

REFORMING MULTILEVEL GOVERNANCE OF TRANSNATIONAL PUBLIC GOODS THROUGH REPUBLICAN CONSTITUTIONALISM?— LEGAL METHODOLOGY PROBLEMS IN INTERNATIONAL LAW

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ABSTRACT

Globalization transforms most national into transnational public goods (PGs), which no state can protect unilaterally without international law and multilevel governance institutions.

Democratic, republican and cosmopolitan constitutionalism have proven to be the most effective “legal methods” for protecting transnational “aggregate PGs” like open, rules-based markets and public health (I). They require challenging the “chessboard paradigm” of “disconnected UN/WTO governance” by promoting “republican network governance” empowering citizens to invoke and enforce international “PGs treaties”—like UN, WHO and WTO agreements protecting equal rights, rule of law, public health and mutually beneficial markets across national frontiers—inside domestic legal systems. Even if “global democracy” and “global justice” are likely to remain utopias for a long time, stronger republican and cosmopolitan rights and judicial remedies can empower and motivate citizens—as “republican owners” of PGs

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(res publica) and “democratic principals” of governments—to challenge and limit “market failures” and “governance failures” through “countervailing rights” (II). “Connecting” interdependent local, national, regional and global governance of “aggregate PGs” through cosmopolitan rights and “multilevel constitutionalism” can strengthen “republican governance” of PGs, whose effectiveness is empirically confirmed by rights-based commercial, trade, investment, intellectual property, labour, environmental, criminal, health and human rights law promoting accountable “bottom-up governance” of PGs beyond national borders (III-IV).

KEYWORDS: *constitutionalism, cosmopolitanism, international law, legal methodology, multilevel governance, public goods, WHO, WTO*

I. “GLOBALIZATION” AS A “LEGAL METHODOLOGY CHALLENGE” FOR INTERNATIONAL LAW AND GOVERNANCE

The transformation of most *national* into *transnational public goods* (hereinafter “PGs”) due to globalization challenges state-centred “chessboard conceptions” of “international law among sovereign states” by “global network governance” linking citizens, governments and non-governmental organizations all over the world through global communications, division of labour, universal recognition of human rights and other areas of newly emerging “global law”. This contribution discusses methodological, legal problems of multilevel governance of transnational PGs, as illustrated by the focus of the 2015 Paris Agreement on Climate Change Prevention on transnational cooperation not only among governments representing more than 180 states, but also among non-governmental actors (like business), sub-state actors (like cities) and supra-national actors (like the European Union, hereinafter “EU”). The term “*legal methodology*” is used here as the “best way” for identifying law, the methods of legal interpretation, the “primary rules of conduct” and “secondary rules of recognition, change and adjudication”, the relationship between “legal positivism”, “natural law” and “social theories of law”, and the “dual nature” of modern legal systems. The etymological origins of the word methodology—*i.e.*, the Greek word “*meta-hodos*”, referring to “following the road”—suggest that globalization and multilevel governance of “*transnational PGs*”¹ (like human rights, rule of law, democratic peace, mutually beneficial monetary, trading, development, environmental, communication and legal systems promoting “sustainable development”) require reviewing legal methodologies in order to find “better ways” enabling citizens and peoples to increase their social welfare through global cooperation. All three major functions of law need to be reviewed from the perspective of legal methodologies:

1. The instrumental function of law for normative ordering of social cooperation (*e.g.*, the need for reforming the inadequate limitation of power politics in GATT/WTO governance and the failures to successfully conclude the Doha Round negotiations since 2001);

¹ Economists tend to define pure “PGs” (like sunshine, clean air, inalienable human rights) by their non-rival and non-excludable use that prevents their production in private markets. Most PGs are “impure” in the sense of being either non-rival (*e.g.*, “club goods”) or non-excludable (like common pool resources). Political and legal “republican theories” tend to focus on whether republican “common goods” for everyone (in contrast to the diverse private interests of citizens) are defined and implemented through participatory procedures and democratic conceptions of public interests (*e.g.*, in protecting the republican values of “freedom as non-domination”, political equality, self-government and “civic virtues” of citizens). On the different kinds and “collective action problems” of PGs, see ERNST-ULRICH PETERSMANN, MULTILEVEL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS: METHODOLOGY PROBLEMS IN INTERNATIONAL LAW (2017).

2. The systemic function of law for justifying the reasonable coherence of legal “primary rules of conduct” and “secondary rules” of recognition, change and adjudication (*e.g.*, the controversies over rule of law and the legitimate “judicial functions” in the “dispute settlement system” of the WTO, and over how to reconcile the economic WTO objectives with non-economic PGs like public health); and
3. The cultural function of transforming the “law in the books” into social facts (“living law”) through “legal socialization” and “institutionalization of public reason” inducing legal subjects to voluntarily comply with legal rules and principles (*e.g.*, the often inadequate implementation of UN/WTO legal obligations in domestic jurisdictions undermining a “compliance culture” enabling transnational rule of law and protection of PGs).

A. From State-centred to Citizen-centred Conceptions of International Law

The universal recognition of “inalienable” human rights and of permanent self-determination of peoples as integral parts not only of UN law, but also of national and regional legal systems (*e.g.*, in regional human rights conventions in Europe, Africa and in the Americas) increasingly limits the “sovereign equality of states” by constitutional responsibilities to respect, protect and fulfil human rights, democratic self-determination and other PGs demanded by citizens. This structural shift from “state-centred” to “person-centred” conceptions of international law is reinforced through “globalization” and the increasing recourse to “private-public partnerships” in collective provision of “aggregate PGs” like food security, public health and the global division of labour based on multilevel, private and public market regulations (*e.g.*, by transnational corporations, governments and regulatory agencies cooperating with private economic actors in the elaboration of product standards, production standards, environmental standards and risk-assessments). In order to limit related “collective action problems” (like “free-riding” and harmful “externalities” in efforts at preventing climate change through limitations of carbon emissions), the 193 UN member states continue to establish ever more international “PGs regimes” and “courts of justice” aimed at promoting transnational rule-of-law and legal accountability of multilevel governance institutions. The continuing transformations of the state-centred “international law of coexistence” and “international law of cooperation” into multilevel “PGs governance” have changed how the international community makes, interprets and enforces international law. For instance:

1. The “Westphalian international law among states” (*e.g.*, from 1648 to 1945) emerged from the consent of states and considered states as principal subjects of international law. Today’s treaties and customary law rules are increasingly shaped by international organizations, non-governmental organizations (*e.g.*, NGOs participating in the elaboration of UN conventions, worker and employer representatives in the International Labour Organization) and by constitutional rights of citizens (like the fundamental right to health as a constitutional principle of the law of the World Health Organization, hereinafter “WHO”), especially if rights of citizens are legally and judicially protected in the law of international organizations (*e.g.*, fundamental rights and citizenship rights protected in the EU Charter of Fundamental Rights, “EUCFR”).
2. The codification of the sources of international law (*e.g.*, in Article 38 International Court of Justice Statute, hereinafter “ICJ Statute”) does not specify to what extent the “acceptance” of custom and “recognition” of general principles of law may be influenced by non-state actors. The “determination” of international law rules by lawyers and judges increasingly refers to the legal practices not only of government representatives, but also of international and non-governmental organizations and to the legal consent by citizens as “democratic principals” of multilevel governance institutions. Even though Article 38 ICJ Statute does not establish hierarchies between treaties, customary law and general principles of law, the universal recognition of the legal primacy of UN legal obligations (*cf.* Article 103 UN Charter), *jus cogens*, *erga omnes* obligations and of other “constitutional principles” (*e.g.*, in the “primary law” of international organizations limiting the “secondary law-making powers” of their institutions) progressively “constitutionalize” international law and governance institutions.
3. National and international courts of justice recognize that international treaties among states may be construed as creating rights also for citizens affected by the treaties², and that “[r]espect

² *Cf.* Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano, SpA.*, 2000 E.C.R. I-4161:

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

for human rights is a condition of the lawfulness of Community acts”.³ Hence treaty interpretation and related dispute settlement procedures may be influenced by rights and interests of affected citizens rather than only by rights claimed by governance agents.

4. The institutionalization, judicialization and constitutionalization of multilevel governance of international PGs entail that multilateral treaty rules focus increasingly on dynamically evolving community interests rather than only on bilateral bargaining over national “state interests”. This prompts UN institutions (like the UN Security Council) and international courts to engage in “evolutionary” and “constitutional interpretations” of treaty powers (e.g., UN Security Council powers to create international criminal courts) and of common treaty obligations so as to protect international PGs in the most effective ways.
5. Similar to the recognition of the “trinity” of human rights, rule of law and democratic governance inside constitutional democracies and in an increasing number of regional institutions (like the EU and the Council of Europe), so recognize UN institutions “that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations”.⁴ From the point of view of legal methodology, it remains contested whether democratic governance and rule of law can be deduced—as principles of positive international law—from the government obligations to respect, protect and fulfil human rights; or whether—in order to become positive international law—they must be inductively proven to have also been specifically endorsed by states, for instance in the numerous UN and regional human rights conventions and related resolutions of UN and regional institutions recognizing legal duties to democratic exercise of governance powers. Arguably, both the inductive as well as the deductive methodology justify the same conclusion that—since the Universal Declaration of Human Rights (hereinafter “UDHR”) of 1948—all UN member states have consented to UN and regional treaties and resolutions recognizing legal duties to protect democratic governance and related human rights (like freedom of opinion,

³ Case C-2/94, Opinion Pursuant to Article 228 of the EC Treaty, 1996 E.C.R. I-1759, ¶ 34. On the “*Kadi*-jurisprudence” annulling—on grounds of human rights violations—the EU implementation of “smart sanctions” ordered by the UN Security Council against alleged terrorists, see KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI TRIAL (Matej Avbelj et al. eds., 2014).

⁴ G.A. Res. 64/116, at 1 (Jan. 15, 2010).

freedom of assembly, freedoms to participate in representative governments and in regular elections of democratic institutions).⁵

6. In his regular reports on “the rule of law”, the UN Secretary-General defined the rule of law comprehensively as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”⁶ Such a “constitutional definition” restraining all states and non-state subjects is justifiable from the perspective of human rights; it reveals rule-of-law deficits of the international legal system, for instance in terms of inadequate legal and judicial accountability of multilevel governance agents towards citizens for their frequent non-compliance with multilevel governance duties to respect, protect and fulfil human rights and related PGs (*e.g.*, a public health system protecting the human rights to health by restricting toxic products like cigarettes, alcohol and drugs).

B. From Utilitarian Towards Constitutional Conceptions of International Economic Law?

The “Westphalian international law among states” prioritized utilitarian pursuit of national interests (*e.g.*, through reciprocal bargaining). Modern UN law prioritizes universal recognition of “inalienable” and “indivisible” civil, political, economic, social and cultural rights of citizens and multilateral protection of corresponding PGs (like a public health system protecting the human right to health, judicial remedies protecting rule of law). Depending on their respective value preferences, economic actors conceptualize international economic law (hereinafter “IEL”) from different perspectives:

1. Governments insisting on “state sovereignty” and prioritizing “national interests” tend to perceive IEL as public international law regulating the international economy (*e.g.*, the 1944 Bretton Woods Agreements, GATT 1947, the 1994 WTO Agreement).
2. Private economic actors using their private legal and economic autonomy in the global division of labour perceive IEL primarily as private international transaction law, commercial, corporate and “conflicts law”.

⁵ Cf. FRITHJOF EHM, *DAS VÖLKERRECHTLICHE DEMOKRATIEGEBOT* (2013).

⁶ U.N. Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

3. Citizens, democratic institutions and courts of justice in constitutional democracies tend to perceive IEL from a republican perspective as multilevel democratic protection of PGs through limitation of “market failures” and “governance failures”, for instance by means of national competition, trade, environmental, labour and social legislation as preconditions for the proper functioning of a “social market economy” that must remain consistent also with principles of economic efficiency.
4. EU citizens and their twenty-eight EU member states and representative EU institutions view European economic law as a multilevel constitutional regulation of their common market and of multilevel governance of other European PGs (like transnational rule of law and multilevel protection of human and constitutional rights of EU citizens), even if third European countries insist on maintaining their diverse constitutional traditions in designing IEL among EU members and third countries (*e.g.*, in free trade and customs union agreements).
5. UN Specialized Agencies, the WTO and ever more regional economic organizations recognize that their primary and “secondary” treaty law is increasingly limited by “global administrative law” principles protecting transparency, legal accountability and rule of law in multilevel governance of international monetary stability, the world trading system, world food security, global health protection and other transnational PGs.⁷

The conceptions of IEL differ because public and private, national and international agents often prioritize different values and interests. Republicanism teaches that the rational self-interests of individuals and their “reasonable republican virtues” to support collective protection of PGs depend on their individual rights, civic virtues and “republican ownership” of PGs. By linking PGs (*e.g.*, EU common market and competition rules) to equal rights of citizens, citizens and utility maximizing, economic actors can be “nudged” to use their rational self-interests and individual knowledge for defending PGs against private and public governance failures (such as arbitrary domination, anti-competitive “market distortions”).⁸ The customary rules of treaty interpretation

⁷ For a discussion of these competing conceptions of IEL, see ERNST-ULRICH PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS* ch. I (2012).

⁸ On the advantages of “responsive”, “smart regulation” of economic and “political markets” promoting interactions and cooperation among regulators and regulated actors, see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992). On the prevailing “crime-tort model” of enforcing the “criminal law dimension” of competition rules through independent regulatory agencies—and the “tort law dimension” of

prescribe that—if treaty interpretation based on the text, context, object and purpose remains contested—“disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law”, as recalled in the Preamble of the Vienna Convention on the Law of Treaties (hereinafter “VCLT”) in conformity with its “integration principle” set out in Article 31(3)(c). The Preamble of the VCLT refers to state-centred, peoples-centred and individual, rights-based principles of justice without specifying their mutual interrelationships:

1. “Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained”;
2. “Having in mind the principles of international law embodied in the Charter of the United Nations such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat of use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all”.

The more “principles of justice” and “inalienable human rights” are recognized as integral parts of national and international legal systems, the more does this “dual nature” of modern positive law—*e.g.*, as legal facts and normative objectives that are inadequately realized in the non-ideal reality of national and international legal systems—challenge traditional distinctions between legal positivism, natural law theories and sociological conceptions of law focusing on the “law in action” as a “reality check” for the “law in the books”. The universal recognition of the “inalienable” and “indivisible nature” of civil, political, economic, social and cultural human rights deriving from respect for the human dignity and reasonableness of human beings has incorporated natural law theory into positive national and international legal systems using ever more indeterminate, often under-theorized legal principles and corresponding commitments (*e.g.*, to “sustainable development”). The “inalienable core” of human rights and democratic self-governance limits power-oriented conceptions of “rule by law”. The universal recognition by all UN member states of a human right to democratic self-governance reflects the concern of social theories of law that mere authoritative issuance of legal rules may not create “positive law” unless the rules and governmental authority are also legitimized by democratic consent and voluntary rule-compliance by free and equal citizens. As long as UN and WTO law and practices are dominated by

competition rules through private complainants in domestic courts—see DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* (2011).

governments that prioritize their own rights over those of citizens, civil societies are rightly challenging state-centred interpretations of IEL excluding rights of citizens to invoke international “PGs treaties” in domestic courts of justice, as illustrated by the criticism from European citizens and parliaments of the exclusion of rights and remedies of citizens in Article 30.6 of the Comprehensive Economic and Trade Agreement (hereinafter “CETA”) signed by Canada and the EU in October 2016.⁹

C. Limiting Theoretical Disagreements Through “Constitutional Justice”?

The UDHR recognizes “the inherent dignity” and “inalienable rights of all members of the human family” as foundational principles of “freedom, justice and peace in the world” (Preamble). The universal recognition of human and constitutional rights to judicial remedies, the post-war establishment of now more than twenty-five international courts of justice, and their increasing “judicial dialogues” and “judicial cooperation” with domestic courts continue to promote impartial and independent procedures for the peaceful settlement of disputes over the relevant interpretation of the often indeterminate text, context, object and purpose of international rules and “incomplete treaties”. National and international courts proceed from legal positivism and—due to the increasing number of legal subjects and of new regulatory challenges of international law—often disagree over the sources, interpretation and “rules of recognition” of modern international law. R. Dworkin’s criticism of legal positivism’s neglect of the importance of “principles” of law for legal interpretations of incomplete, often under-theorized rules has led to “inclusive, normative legal positivism” and its acknowledgment that the “integrity” of legal interpretations depends on how to construe rules and other legal practices in conformity with their underlying principles and other “grounds of law” in the most coherent way. In order to clarify the legal interrelationships among different value premises and develop coherent legal theories and inter-subjective agreements on practical interpretations, Dworkin proposed the following “four stages of legal theory”:

1. At the semantic stage of law, many legal terms (like “IEL”, human rights, trade and investment law standards like non-discrimination and “fair and equitable treatment”) remain indeterminate “interpretive concepts” that may be used by different actors with different meanings.

⁹ Cf. Ernst-Ulrich Petersmann, *The EU’s “Cosmopolitan Foreign Policy Constitution” and Its Disregard in Transatlantic Free Trade Agreements*, 21(4) EUR. FOREIGN AFF. REV. 449 (2016).

2. At the jurisprudential stage, law requires justification in terms of “principles of justice” (*e.g.*, state-centered vs cosmopolitan, constitutional and global administrative law conceptions of IEL) and elaboration of a convincing theory of “rule of law” that citizens can accept as legitimate.
3. At the doctrinal stage, the “truth conditions” have to be constructed of how particular fields of law-making and administration can best realize their values and justify their practices and ideals (*e.g.*, insisting on competition, environmental and social law limiting “market failures” as pre-condition of a well-functioning “social market economy”).
4. Judicial administration of justice must apply, clarify and enforce the law in concrete disputes by independent and impartial rule-clarification that institutionalizes “public reason” and protects equal rights and social peace.¹⁰

Since Aristotle, procedural, distributive, corrective, commutative justice and equity continue to be recognized as diverse “spheres of justice” in the design and justification of dispute settlement systems (*e.g.*, for “violation complaints”, “non-violation complaints” and “situation complaints” pursuant to GATT Article XXIII). Post-colonial IEL also includes “principles of transitional justice” based on preferential treatment of less-developed countries (*e.g.*, in Part IV of GATT and in the dispute settlement system of the WTO). “Cosmopolitan principles of justice” are recognized, *inter alia*, in the universal human rights obligations of all UN member states. In contrast to the “freedoms of the ancient” (B. Constant) which protected only limited freedoms of a privileged class of male property owners (*e.g.*, in the republican constitutions of Athens and Rome 2500 years ago), modern constitutional democracies proceed from equal human rights and constitutional rights of citizens as preconditions for “constitutional justice”.¹¹ Rawls’ *Law of Peoples* focused on the limited question of what kind of principles of justice should guide liberal peoples in their international relations (*e.g.*, with non-liberal societies and “outlaw regimes” living in separate states neglecting the mainly domestic causes of the welfare of peoples); the universal recognition of human rights and globalization entail more comprehensive legal obligations to promote “constitutional justice” at home and abroad (*e.g.*, by setting up institutions that protect an equal legal status of all persons) and respect, protect and fulfil human rights and related “aggregate PGs”.¹²

¹⁰ RONALD DWORKIN, *JUSTICE IN ROBES 9 et seq.* (2006).

¹¹ Cf. Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and “Constitutional Justice”*, 19(4) EUR. J. INT’L L. 769 (2008).

¹² On human rights as PGs and the different kinds of PGs, see PETERSMANN, *supra* note 1.

D. Democratic, Republican and Cosmopolitan Constitutionalism as Complementary Legal Methods for Protecting PGs

The term “constitutionalism” is used here for both:

1. The normative proposition that law and governance—in order to be accepted by citizens as legitimate and voluntarily complied with—need to be justified vis-à-vis citizens through agreed principles, rules and institutions of a higher legal rank that must be transformed into constitutional and democratic legislation, administration, adjudication, international “PGs treaties” and “public reason” so as to induce citizens to peacefully cooperate in collective supply of PGs; as well as for
2. The historical “dynamic processes” of constituting, limiting, regulating and justifying legislative, administrative and judicial governance powers based on constitutionally agreed principles of justice and fair procedures for the collective supply of PGs demanded by citizens, for instance by transformation of (a) agreed “principles of justice” (*e.g.*, in the US Declaration of Independence of 1776, the Universal Declaration of Human Rights of 1948) into (b) constitutional, (c) legislative, (d) administrative, (e) judicial and (f) international rules and institutions that protect equal rights of citizens and promote “constitutional mind-sets” limiting rational egoism and “constitutionalizing” law and governance.

Historically, “constitutionalisation” may start with exceptional “constitutional conventions” elaborating constitutional documents codifying “constitutional contracts” among citizens and elaborating national (big C) Constitutions in the name of “We the people”. Related exercises of “constitutive power” may, however, also be initiated *ex post*, for instance by national jurisprudence and international judicial interpretations of rules that are subsequently accepted as higher constitutional law (*e.g.*, by EU member states, their national peoples and citizens accepting the “constitutional jurisprudence” of the Court of Justice of the European Union (hereinafter “CJEU”) and its “judicial constitutionalisation” of EU law). The modern “*six-stage constitutionalisation processes*” (as illustrated above in 2, a to f) derive their democratic legitimacy from the today universal “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”¹³ (Preamble UDHR). “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and

¹³ G.A. Res. 217 (III) A, pmbll., Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

should act towards one another in a spirit of brotherhood.”¹⁴ (Article 1 UDHR) Yet, such legal assumptions of *human reasonableness* may conflict with economic models of a selfish *homo economicus* maximizing individual preferences through cost-benefit calculations. Also “public choice analyses” of rational behaviour in “political markets” acknowledge the psychological, social and cultural influences on decision-making and human behaviour, such as the “three principles” of

1. “thinking automatically” (*e.g.*, “fast” and “spontaneous” rather than “deliberative” and “reasonable slow thinking”);
2. “thinking socially” (*e.g.*, adjusting to social contexts of corruption); and
3. “thinking with mental models” that depend on the situation and the culture (*e.g.*, in under-regulated financial industries profiting from tax-avoidance and circumvention of the law).¹⁵

In order to limit “rational egoism” (*e.g.*, of the utility-maximizing *homo economicus*) and the potentially aggressive animal nature of human beings, constitutionalism calls on reasonable citizens to commit themselves to agreed “principles of justice” (*e.g.*, respect for human dignity) and equal rights (*e.g.*, to pursue one’s own conceptions of a “good life” and of “social justice”) that are granted a higher legal rank over post-constitutional law-making. Yet, national Constitutions legitimately differ among jurisdictions depending on the democratic preferences of citizens and on the historical contexts in which peoples convene their constitutional conventions and elaborate their “constitutional contract” behind a “veil of ignorance”.¹⁶ The constitutional process of transforming the “law in the books” into socially effective “legal cultures” requires “republican virtues” of citizens to exercise their constitutional rights and promote constitutional, representative, participatory and deliberative democracy and legislative,

¹⁴ *Id.* art. 1.

¹⁵ *Cf.* WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2015: MIND, SOCIETY AND BEHAVIOR (2015).

¹⁶ For as discussion of which principles of justice a group of individuals would choose to regulate their society if they were deprived of any information about themselves that could bias their choices, see THE ORIGINAL POSITION (Timothy Hinton ed., 2015). “Constitutional justice” aims at limiting partiality and arbitrariness (*e.g.*, based on utilitarianism and “historical entitlements”) by insisting on equal, inviolable freedoms and “human dignity” of each person, fair “Socratic reasoning procedures”, justice as the most important virtue of social institutions, and the importance of publicity in choosing a social conception of justice, as explained in Kantian and Rawlsian theories of justice for constitutional democracies. Whether the “principles of justice” justified by J. Rawls for national societies (notably the equal basic liberty principle, the fair equality of opportunity principle, and the “difference principle”) should be applied also to “international constitutional contracts” (*e.g.*, among representatives of whole peoples rather than only individuals) for an “international law of peoples” (as advocated by cosmopolitan theories of justice challenging Rawls’ emphasis on respect for non-liberal, yet “decent peoples”) remains contested among citizens, peoples and UN member states insisting on “reasonable pluralism” respecting the diverse human capacities to choose a conception of the “good life” and to act on one’s social conception of basic justice.

administrative and judicial clarification of indeterminate and incomplete constitutional law and legislation so as to institutionalize “public reason” and democratic support of “republican governance” of PGs (*res publica*). Internationally agreed “PGs treaties” aim at coordinating national PGs regimes through agreed international “principles of justice”, implementing rules and institutions, as illustrated by ever more multilateral agreements agreed upon—and implemented in the context of—regional and worldwide organizations like multilateral monetary, trade and investment agreements, environmental treaties or the WHO Framework Convention on Tobacco Control (hereinafter “FCTC”). Arguably, more than 2,500 years of historical experience with *national republicanism* in Europe offer important political and legal lessons for rendering also international PGs treaties more effective through transnational “republican constitutionalism”.

E. From Feudalism to Republican Constitutionalism: Lessons from Europe?

Law and politics in ancient times were dominated by rulers justifying their powers and feudal governance structures by “mandates from heaven” and by the “natural order” of the *cosmos*. According to the Chinese philosopher Xunzi (298-220 BC), “the heavens create the people and appoint the ruler. The ruler is like a boat, the people are like the water. The water may support the boat, and it may also capsize it.” Whereas most states practised national “constitutionalism” only since the 20th century, democratic constitutionalism in ancient Greece and republican constitutionalism in ancient Rome emerged already during the 5th century BC and were discussed in Europe during more than 2,000 years. The ancient Greek philosopher Plato—in his book on *The Republic*—used the metaphor of the “state ship” in a significantly different way: the people were inside the boat and responsible for the democratic election of governments with limited mandates. One common objective of democratic and republican constitutionalism was to constitute, limit, regulate and justify governance powers through collective long-term commitments of a higher legal rank. Democratic elections of rulers, legal protection of citizen rights (“*cives Romanus sum*”), constitutional “checks and balances” (*e.g.*, among the Roman consuls, the Roman senate and popular assemblies), jury trials (*e.g.*, of Socrates in ancient Athens), citizen-driven governance (*e.g.*, based on popular votes) and protection of other PGs (*e.g.*, through decentralized governance mechanisms like the Roman *lex mercatoria* and arbitration) enabled Greek democracies and Italian city republics to evolve into regional powers controlling large parts of the Mediterranean and beyond. The Roman legal system laid the basis for the emergence of a European private law system that continued to develop throughout Europe

until modern times—even after political power politics had overthrown democratic constitutionalism in ancient Greece and constitutionalism in Italian and Northern European city republics (*e.g.*, cooperating in the commercial and military “Hanseatic League” of cities bordering the North and Baltic Seas).

The historical evolution of democratic and republican constitutionalism and of its challenges in Europe differed significantly from political traditions outside Europe. The use of religious monotheism for justifying the concentration of legislative, executive and judicial powers (*e.g.*, in the Pope as prescribed till today in Article 1 of the Constitution of the Vatican State) led to protestant counter-revolutions and religious wars. Following the “enlightenment challenges” of dogmatic claims to know meta-physical truths, the American and French “human rights revolutions” of the 18th century emphasized the need for protecting human autonomy through “inalienable” human rights and democratic self-determination. The failures of these human rights revolutions (*e.g.*, to prevent governmental terror and return to monarchical power in France, to end racial and gender discrimination in the U.S.A., to terminate colonialism and imperialism) were progressively overcome after World War II due to ever more constitutional democracies and UN member states submitting to multilevel legal rules and institutions protecting human rights and other PGs. Yet, UN, GATT and WTO governance of transnational PGs remain dominated by intergovernmental power politics and “disconnected governance” preventing citizens from invoking and enforcing UN, GATT and WTO legal obligations in domestic jurisdictions so as to hold governments accountable for protecting PGs. While the regional agreements establishing the EU, the European Economic Area (hereinafter “EEA”) and the European Convention on Human Rights (hereinafter “ECHR”) provide for multilevel governance institutions protecting republican rights and regional PGs for the benefit of citizens, the different political context in Asia has so far prevented similar regional agreements, parliamentary and judicial institutions based on multilevel constitutionalism. The lack of a general Asian organization including all regional states—similar to the African Union, the Organization of American States, the League of Arab States and the Council of Europe—confirms the comparatively less inclusive, legal cooperation among Asian countries.

F. From Democratic to Multilevel Cosmopolitan Constitutionalism: Lessons from Europe?

Democratic constitutionalism protects (*e.g.*, in national Constitutions and Articles 2, 9-12 Treaty on European Union (hereinafter “TEU”) constitutional, representative, participatory and deliberative governance of

national peoples and their citizens based on fundamental rights, rule of law, regular popular elections and multiple, competing political parties. The democracy requirement of modern UN law—as universally recognized in numerous UN conventions, UN resolutions and related state practices—focuses on (1) participatory and deliberative self-government of peoples through regular, free and competitive elections and votes; (2) a multi-party system reflecting the diverse democratic preferences; (3) guarantees of basic human rights and (4) and the limitation of public and private power by the rule of law.¹⁷ The 2009 Lisbon Treaty remains the only regional treaty that prescribes, defines and effectively enforces constitutional, parliamentary, participatory and deliberative democracy also for the multilevel governance powers of an international organization and its “EU citizens”.¹⁸ Even though many UN member states call themselves *republics*, the heritage of European *republican constitutionalism* (e.g., since the city republics in ancient Rome, Florence, Venice and northern Europe)—such as constitutional protection of citizen rights against arbitrary domination, promotion of participatory governance and “republican virtues” of citizens, institutional “checks and balances” protecting rule of law and other PGs)—remains underdeveloped in many modern “peoples republics”.¹⁹

Cosmopolitan constitutionalism recognizing transnational rights and duties of “citizens of the world” is increasingly becoming a regulatory paradigm not only in human rights law, but also in other fields of international law like international criminal law, Internet law, sports law, regional market integration law, commercial, trade, investment and intellectual property law. The idea of dual citizenship—in local communities as well as “citizens of the world” in a “cosmopolitan community” based on a shared morality of mutual respect for strangers—is

¹⁷ Cf. EHM, *supra* note 5.

¹⁸ Cf. Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations*, 23(2) EUR. J. INT'L L. 315 (2012). On democratic nation states, EU citizenship, cosmopolitan rights and civil society actors as complementary bases for the democratization of multilevel governance, see Anne Peters, *Dual Democracy*, in THE CONSTITUTIONALISATION OF INTERNATIONAL LAW 263 (Jan Klabbers et al. eds., 2009).

¹⁹ Cf. REPUBLICANISM: A SHARED EUROPEAN HERITAGE: VOLUME I (Martin van Gelderen & Quentin Skinner eds., 2002); REPUBLICANISM: A SHARED EUROPEAN HERITAGE: VOLUME II. (Martin van Gelderen & Quentin Skinner eds., 2005). On the diverse legal traditions of republicanism and the disagreement on whether the core values of republicanism should be defined in terms of liberty (non-domination), republican virtues of active citizenry finding self-realization in political participation and collective supply of PGs, communitarianism, social and political equality, or deliberative democracy, see LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES (Samantha Besson & José Luis Martí eds., 2009) and PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 275 (1997) (Pettit argues for a “communitarian character of freedom as non-domination” recognizing that “the freedom of a community is as basic a notion as the freedom of individuals . . .”).

traced back to Diogenes (ca 412 BC), the founder of the Cynic movement in ancient Greece.²⁰ Ancient and modern cosmopolitanism (*e.g.*, based on Kantian moral theory) emphasize that human beings—as they “are born free and equal in dignity and rights” and are endowed with “reason and conscience” (*cf.* Article 1 UDHR)—must justify their conduct by “universalizable” principles that respect human dignity (*e.g.*, in the sense of equal autonomy rights) and reconcile individual, legitimate self-interests with those of all others.²¹ Peaceful cooperation for protecting PGs demanded by citizens across national borders must be based on “cosmopolitan rights” of individuals and peoples as proclaimed in the 1776 U.S. Declaration of Independence, the 1789 French Declaration of the Rights of Man and the Citizen, and in the UDHR of 1948. Just as individuals must reasonably limit the exercise of their individual freedoms by respecting the equal freedoms of all others, so must democracies, states and international organizations respect the equal democratic rights of foreign peoples and jurisdictions as emphasized in UN human rights conventions, for instance in the UN legal guarantees of the rights of all *peoples* to self-determination (*cf.* the common Article 1:1 of the 1966 UN Covenants on Civil, Political, Economic, Social and Cultural Rights). In Asia, however, regional human rights law (hereinafter “HRL”) and regional parliamentary and judicial institutions remain less developed than in the Americas, Africa and Europe.

II. REPUBLICAN “NETWORK GOVERNANCE” OF PUBLIC GOODS REQUIRES COSMOPOLITAN RIGHTS

If “equal freedoms” are recognized as “first principle of justice” (*e.g.*, as explained by Kantian and Rawlsian legal theories) and law and governance must be justified *vis-à-vis* citizens also in terms of protecting PGs demanded by free and equal persons, how does one induce citizens to participate in democratic governance and support collective protection of transnational PGs like open markets based on rules protecting undistorted competition and mutually beneficial division of labour?

Inside democracies, national markets are legally constructed and protected by private and public laws based on:

1. individual rights (like freedom of contract, freedom of profession and business, property rights, workers rights, judicial remedies);

²⁰ When asked where he came from, Diogenes answered: “I am a citizen of the world” (*kosmopolitês*); *cf.* DIOGENES LAERTIUS, *LIVES OF THE EMINENT PHILOSOPHERS: VOLUME 2*, at 63 (Robert Drew Hicks trans., 1925).

²¹ *Cf.* PAULINE KLEINGELD, *KANT AND COSMOPOLITANISM: THE PHILOSOPHICAL IDEAL OF WORLD CITIZENSHIP* (2012); *PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL* (James Bohman & Matthias Lutz-Bachmann eds., 1997).

2. individual accountability and social responsibilities (*e.g.*, based on torts law, corporate law, consumer protection law, labour law, tax legislation); and
3. regulatory powers and institutions (*e.g.*, monetary authorities protecting stable money, competition authorities limiting restraints of competition, health authorities protecting public health, national constitutions limiting public restrictions of trade).

Commercial law has evolved since ancient times. Modern legal and economic “constructivism” and “*ordo-liberalism*” explain why personal savings, investments, creativity, industrial innovation and welfare-enhancing market competition often depend on incentives based on legal security and individual rights (*e.g.*, economic freedoms, property rights, copyrights, patent rights, competition rules) that must be limited by “countervailing rights”, judicial remedies and regulatory supervision (*e.g.*, risk-assessment procedures) so as to limit particular abuses of rights with “harmful externalities”. This mutual interdependence of market regulation and market competition is true not only for *economic markets* inside and beyond states; it is true also for “*political markets*” coordinating and controlling competition for political powers and of their democratic exercise in national and international politics. “*Constitutional economics*” emphasizes that citizens can enhance their welfare not only through mutually beneficial contracts and rule-making in private markets within the constraints of existing laws, but also through “constitutional contracts” regulating “political markets” and changing the law through democratic legislation and institution-building. At the request of civil society, “horizontal” conceptions of international law focusing on “sovereign equality of states” and on “balance of power” between sovereign states are increasingly challenged by citizens and complemented by “constitutional checks and balances” (*e.g.*, in human rights law, consular law, international criminal law and the law of the sea) protecting legal and judicial accountability of governments and cosmopolitan rights of citizens vis-à-vis the ubiquity of abuses of public and private powers.

The inadequacy of the state-centred “chessboard conception” of international diplomacy (*e.g.*, as an “endless competition of contending kingdoms”) is rendered obvious by the modern “web views” of economic and civil society actors in global communications, the global division of labour and in protection of the environment.²² International trade, for instance, is ever more dependent on commercial regulations among and within transnational corporations and “global supply chains” for “global

²² Cf. Anne-Marie Slaughter, *How to Succeed in the Networked World: A Grand Strategy for the Digital Age*, 95(6) FOREIGN AFF. 76 (2016) (emphasizing the need for protecting “digital rights” of Internet users as incentives for empowering citizens to cooperate globally and better follow and control the “chess games among diplomats”).

production” (e.g., of smartphones incorporating hundreds of components and patents produced in dozens of countries). The lifting out of poverty of hundreds of millions of poor citizens in China following its market-liberalization since 1978—as well as in India following its market liberalization since 1991—was made possible by promoting citizen-driven division of labour through multilevel trade liberalization and regulation. It dramatically illustrated the interdependencies of market regulation and economic welfare, just as the previous periods of economic poverty in communist China—and of economic stagnation in India during colonial times and post-colonial “socialization” of the Indian economy—demonstrated the impoverishing effects of governmental restrictions of private freedoms, property rights, corporations, investments and open markets.

A. Rights-based Market Regulation as Incentive for Promoting Legal and Political Cooperation Inside and Beyond Federal States

Comparative research of the creation of common markets in federal states and of their dynamic legal evolution often uses diverse legal methodologies, such as comparative legal and constitutional law analyses of “integration through law” (e.g., including also natural law conceptions emphasizing publicity, clarity, consistency and historically agreed moral principles as preconditions of legitimate “law”) and functional “law and economics” analyses of private market ordering and of (inter)governmental limitations of “market failures”, “governance failures” and related “collective action problems”. The diverse, comparative analyses suggest that decentralized, legal rights and judicial accountability have been of crucial importance for limiting “market failures” as well as “governance failures” in creating national and regional common markets not only in Europe, but similarly in economic and legal integration in the Americas, Africa and Asia.²³ For instance, during the 19th century, the common markets inside the U.S.A., the Swiss federation and in the German Customs Union (*Deutscher Zollverein*, 1815-1866) became effective thanks to ever stronger legal and judicial protection of economic freedoms and corresponding restraints on discriminatory trade barriers by the federated component states.²⁴ Similarly, the common market among the twenty-eight

²³ Cf. INTERNAL MARKETS AND MULTILEVEL GOVERNANCE: THE EXPERIENCE OF THE EU, AUSTRALIA, CANADA, SWITZERLAND AND THE US (George Anderson ed., 2012).

²⁴ Cf. ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAW AND FOREIGN TRADE POLICY IN THE UNITED STATES, THE EUROPEAN COMMUNITY AND SWITZERLAND (1991) (This book explained why the constitutional legitimacy of multilevel economic regulation could be enhanced by interpreting the multilevel guarantees of equal

EU member states and the EU free trade agreements with third European countries became effective through the legal and judicial interpretation and protection of the common market freedoms for goods, services, persons, capital and related payments in terms of not only rights of governments, but also of citizens and other self-interested economic actors challenging national and EU market restrictions in domestic and European courts. “Cosmopolitan rights” protecting citizens and other non-governmental, economic actors across national frontiers—like freedom of contract, property rights, human rights, EU citizenship rights, rights of free movement of persons beyond state borders (*e.g.*, due to liberalization of services), multilevel parliamentarianism in regional economic communities, and recognition of transnational rights of migrants (*e.g.*, to take up employment and receive social security benefits while residing in another common market member country)—are no longer “unique European experiments” in rights-based, regional common markets and integration law. Their “enabling”, limiting, regulatory, “legitimizing”, “enforcement” and “republican functions” (*e.g.*, as decentralized means for limiting implementation deficits of PGs regimes), and their often “derivative nature” (*e.g.*, common market freedoms and investor rights derived from constitutional rights and state citizenship) are increasingly recognized also beyond Europe, notably in some African, Latin American and Central American integration regimes.²⁵ Even though many Asian countries cultivated communitarian rather than individualist legal traditions, their modern economic prosperity is based on using, incorporating and adjusting civil, economic, corporate, monetary, banking, trade and arbitration law traditions developed in industrialized countries and on joining international economic organizations like GATT, the WTO and the Bretton Woods institutions.

Also WTO law confirms the advantages of recognizing private and public non-state actors at sub-national and supra-national levels of governance (like Hong Kong, Macau, Taiwan, regional organizations like the EU) as increasingly important legal subjects of multilevel governance of PGs. The “constitutional functions” of such WTO rules for promoting

freedoms, non-discrimination, rule of law and access to justice in national, regional and worldwide economic law in mutually coherent ways for the benefit of citizens and their constitutional rights in domestic legal systems. Such “mutually consistent interpretations” promote the legal and judicial accountability of multilevel governance agents that are often inadequately controlled by citizens, civil society, parliaments and courts of justice and fail to effectively protect PGs demanded by citizens.).

²⁵ On the increasing recognition of transnational economic, labour, social and political citizenship rights (*e.g.*, in the EU, the EEA, the Andean Community, MERCOSUR, the Central American Common Market, the Economic Community of West-African States, the Gulf Cooperation Council) and of regional parliamentary institutions, see Carlos Closa & Daniela Vintila, *Supranational Citizenship Rights in Regional Integration Organizations*, Presented at European University Institute, Florence (May 14, 2015) (unpublished manuscript on file with the author).

economic, legal and political cooperation among local, national and regional levels of governance in separate customs territories—like China, Hong Kong, Macau and Taiwan as separate WTO members using WTO rules and free trade agreements (hereinafter “FTAs”) for progressively recreating a single “Chinese common market”²⁶—explain the emergence of now more than 400 FTAs and more than 3000 bilateral investment treaties (hereinafter “BITs”) as legal frameworks for transnational movements of goods, services, persons, investments and related payments. The *Decision on Advancing the Rule of Law in China*, adopted by the fourth plenary session of the 18th Communist Party of China Central Committee meeting on 23 October 2014, aims at promoting law and independence of judicial review from local political influences (e.g., by central financing of national and local courts), yet without limiting the communist party’s “rule by law” through constitutional “rule of law”. China’s trade minister, in an article on *Strengthening Trade Policy Compliance and Promoting Rule of Law in China* of 31 December 2014, explicitly acknowledged the linkages between China’s compliance with WTO rules and dispute settlement rulings, including systemic checks of the “WTO compliance” of national and local trade regulations, with the broader promotion of rule of law inside China.²⁷ The legal and institutional “checks and balances” among legislative, executive and judicial governance powers prescribed in WTO law enhance the legitimacy of trade politics by promoting “rule of law” in conformity with the parliamentary ratification of WTO agreements by national parliaments in WTO members. Just as BITs are aimed at protecting investor rights, FTAs and also some WTO agreements explicitly protect legal trading rights and judicial remedies for the benefit of private actors, like holders of intellectual property rights (protected by the WTO Agreement on Trade-related Intellectual Property Rights, hereinafter “TRIPS”), pre-shipment inspection companies (protected by the WTO Agreement on Preshipment Inspections), or foreign companies participating in government procurement tendering procedures and protected by the WTO Agreement on Government Procurement. The WTO requirements of legislative and administrative good faith implementation of WTO law and of its judicial protection also inside domestic legal systems serve to “ensure the conformity of laws, regulations and administrative procedures”²⁸ with

²⁶ On the autonomous WTO memberships of the four customs territories of China, Macau, Hong Kong and Taiwan—and on their incentives for peaceful reduction of the economic and legal divisions of China as a single sovereign country, e.g., due to rules-based free trade agreements progressively recreating a common market—see CHIEN HUEI WU, *WTO AND THE GREATER CHINA: ECONOMIC INTEGRATION AND DISPUTE RESOLUTION* (2012).

²⁷ Cf. Guohua Yang, *China in the WTO Dispute Settlement: A Memoir*, 49(1) J. WORLD TRADE 1 (2015).

²⁸ Marrakesh Agreement Establishing the World Trade Organization art. XVI:4, Apr. 15, 1994, 1867 U.N.T.S. 154.

WTO obligations (Article XVI:4 WTO Agreement) and promote—if only in very imperfect ways—“security and predictability to the multilateral trading system”²⁹ (Article 3:2 Understanding on Rules and Procedures Governing the Settlement of Disputes, hereinafter “DSU”). Even though China continues to comply with WTO rules and WTO dispute settlement rulings, China’s Constitution and judiciary do not effectively limit the political powers of the communist party and its “rule by law” (*e.g.*, using police powers and criminal proceedings for sanctioning political dissenters).³⁰ Moreover, while China effectively implements its international trade, investment law and other related legal obligations (*e.g.*, to limit tobacco consumption and other health pandemics in conformity with the WHO FCTC³¹), it does not effectively implement its human rights commitments, labour law and certain other international legal obligations (*e.g.*, under the UN Convention on the Law of the Sea, hereinafter “UNCLOS”).³²

B. Challenging Path-dependent Histories, Theories and Practices of Market Regulation

As explained in section I, the interpretation of indeterminate treaty terms and of incomplete rules of international law is likely to be influenced not only by their object and purpose (*e.g.*, WTO law aimed at promoting “sustainable development”), but also by the jurisprudential and doctrinal “principles” underlying international rules (*e.g.*, principles of corrective justice, commutative justice and equity underlying the vague WTO rules on “violation complaints”, “non-violation complaints” and “situation complaints” in GATT Article XXIII and in Article 26 WTO DSU). Interpretation of such jurisprudential and doctrinal “principles” tends to be guided by theories (*e.g.*, political and legal theories of justice, economic theories underlying trade and other economic rules) that often remain contested in view of their relationships with path-dependent histories (*e.g.*, of GATT 1947-1995) and related legal practices. For instance:

²⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3:2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

³⁰ On the lack of judicial independence, see Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case*, 43(3) SUFFOLK U. L. REV. 669 (2010).

³¹ Cf. Lesley A. Jacobs, *Global Tobacco Control Law and Trade Liberalization: New Policy Spaces?*, in LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES 131, 140-43 (Daniel Drache & Lesley A. Jacobs eds., 2014).

³² Cf. Ljiljana Biuković, *Is There Policy Space for Human Rights Linkages in China’s Trade and Investment Network?*, in LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES, *supra* note 31, at 274; Pitman B. Potter, *Human Rights and Social Justice in China*, in LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES, *supra* note 31, at 299.

1. In Article 3:1 DSU, “[m]embers affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.”³³ Yet the path-dependent GATT 1947 rules and dispute settlement practices were often the result of power politics disregarding equal fundamental rights of citizens and judicial protection of transnational rule of law.³⁴
2. The WTO Agreement on TRIPS was the result of interest-group politics based on the claims that (1) intellectual property rights (hereinafter “IPRs”) should be available in all WTO member countries; (2) the TRIPS standards should ensure minimum standards corresponding to those prevailing in industrialised market economies; (3) WTO members could apply more demanding, national or regional standards; yet (4) less-demanding standards should be permissible only to the extent TRIPS allowed such deviations. Yet, economists and constitutional lawyers convincingly argue that strategies of using trade concessions as a bargaining chip for imposing higher IP standards on other trading countries in order to obtain “protection rents”, promote the technological competitiveness of industrialised countries and reduce trade deficits (*e.g.*, of the U.S.A.) need to be reviewed so as to avoid economically inefficient over-protection of IPRs (*e.g.*, in terms of restricting competition and access to essential goods like pharmaceuticals, food and education) that is not outweighed by the benefits of related trade-concessions, investments or technology transfers.³⁵
3. The “one-size-fits-all” approach underlying the TRIPS Agreement not only disregards the fact that IPRs are likely to promote innovation only under competitive market conditions in countries with a sufficient educational system and science base. It is also based on simplistic economic claims that “more patent protection” equals “more innovation”, and “more copyright protection” equals more “creative human activities”. Hence, the “trade-related approaches” to market regulation in WTO rule-making (*e.g.*, on anti-competitive practices) need to be reviewed from broader economic and legal perspectives (like competition law rather than

³³ DSU, *supra* note 29, art. 3:1.

³⁴ Cf. Ernst-Ulrich Petersmann, *The Establishment of a GATT Office of Legal Affairs and the Limits of “Public Reason” in the GATT/WTO Dispute Settlement System*, in A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 182 (Gabrielle Marceau ed., 2015).

³⁵ Cf. TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES (Hanns Ullrich et al. eds., 2016).

WTO “anti-dumping law”) acknowledging the need for protecting general consumer welfare (which is nowhere mentioned in WTO law) and national innovation markets that risk being stifled by overprotection of IPRs and anti-competitive trade regulations. Apart from this need for bringing “trade economics” and trade regulation into conformity with modern competition, IP and development economics, institutional economics and public choice theories explain why trade policy processes creating IP rules in the context to trade bargaining become easily captured by rent-seeking interests of right-holders benefitting from over-protection of IPRs and related protection rents and anti-competitive practices.³⁶

C. The PG of an Open World Market as a “Republic” of Citizens?

The search for the “sources” of IEL, the best methods of legal interpretation, the “primary rules of conduct” and “secondary rules of recognition, change and adjudication” of IEL is usually approached from the point of view of *legal positivism* as a discovery of legal facts in the sense of authoritative law-making and effective law-enforcement. For example, Article 38 ICJ Statute codifies the sources of international law in terms of “international conventions”, “international custom, as evidence of a general practice accepted as law”, and “general principles of law recognized by civilized nations”. But the same article defines the “rules of recognition” not only in terms of recognition by states; the references to “civilized nations” and to “judicial decisions and the teachings of the most highly qualified publicists . . . as subsidiary means for the determination of rules of law” qualify state consent in conformity with the customary rules of treaty interpretation as codified in the VCLT. The latter customary rules explicitly require interpreting treaties and settling related disputes “in conformity with the principles of justice”, including also “human rights and fundamental freedoms for all” (*cf.* the Preamble and Article 31 VCLT). Such person-oriented “principles of justice” offer new and diverse ways of theorizing fragmented treaty regimes and reforming path-dependent, state-centred interpretations in order to realize and protect human rights of citizens and their democratic demand for PGs more effectively.³⁷

As all UN member states have accepted legal obligations to respect, protect and fulfil “inalienable” human rights as integral parts of modern legal systems, HRL requires “critical legal positivism” reconciling the

³⁶ Cf. Josef Drexl, *The Concept of Trade-relatedness of Intellectual Property Rights in Times of Post-TRIPS Bilateralism*, in *TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES*, *supra* note 35, at 53.

³⁷ On the multiplicity of theories and “schools” of international law, see *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* (Anne Orford & Florian Hoffmann eds., 2016).

“constitutional premises” of HRL (*e.g.*, its recognition of citizens as “agents of justice”, “constituent powers” and “democratic principals who delegate only limited governance powers subject to inalienable human rights and democratic and judicial remedies) with the path-dependent, power-oriented conceptions of international law (*e.g.*, advocating “Hobbesian social contracts” delegating unlimited powers to “states” and “absolute rulers” so as to transform the civil “war of everybody against everybody else” into peace and order). HRL and decolonization have not only prompted most UN member states to adopt national (big C) Constitutions. Globalization also entails that traditional legal distinctions (*e.g.*, in European legal systems) between private law (sub-divided into regulation of persons, things and actions, contract law, property law, family law and inheritance law), national public law (sub-divided into constitutional law and administrative law) and international law are increasingly challenged by the emergence of transnational law and multilevel regulatory systems; the latter are driven no longer only by states but—as normatively suggested and justified by democratic, republican and cosmopolitan constitutionalism—increasingly also by non-governmental and international actors, as illustrated by transnational regulation of global supply chains, of the internet (*lex digitalis*) and of global “sports law”.³⁸ The new “legal pluralism” based on *functional* rather than only *territorial* legal sub-systems (*e.g.*, WTO membership admitting not only states but also sub- and supranational customs territories like Hong Kong and the EU) entails conflicts of jurisdiction that challenge the boundaries and cultures of national, transnational and international legal and judicial systems and related legal pre-conceptions (*Vorverständnis*) of legal actors. The regulatory and “collective action problems” of the diverse kinds of “pure” or “impure” PGs tend to differ depending on their diverse regulatory contexts.³⁹ Understanding worldwide legal regimes (like WTO law) and multilevel governance institutions (like the WTO dispute settlement bodies, regional and national economic courts) requires interdisciplinary studies that often explain the choices of political actors in different ways, for instance depending on whether international relations theories focus on *states* (like realism, institutionalism, functionalism) or on *individual* and *non-governmental actors* in order to disaggregate the “black box” of “states” (like “public choice”, constitutional or other constructivist

³⁸ Cf. TRANSNATIONAL LAW: RETHINKING EUROPEAN LAW AND LEGAL THINKING (Miguel Maduro et al. eds., 2014).

³⁹ For instance, while “best-shot PGs” (like invention of pharmaceuticals against global diseases) may be promoted unilaterally through private-public partnerships in a single country, transnational “aggregate PGs” may require universal participation of states in a worldwide “global administrative law regime” (like the Universal Postal Union) or “constitutional regime” (like enforcement of UN law through the UN Security Council, multilevel legal and judicial protection of transnational rule of law and human rights in the EU).

theories).⁴⁰ Republican, democratic and cosmopolitan constitutionalism suggest that re-interpreting multilevel market regulations as republican and cosmopolitan law for the protection of global PGs—like the transnational division of labour among producers, investors, traders and consumers based on “market rights”, human rights and other cosmopolitan rights protected through multilevel legal and judicial remedies—could supplement and strengthen intergovernmental governance by embedding it into an international “*res publica* of citizens” cooperating across national borders in the collective supply of international PGs.

III. NEED FOR “CONNECTING” MULTILEVEL MARKET REGULATIONS BY DOMESTIC APPLICATION OF INTERNATIONAL “PGS TREATIES”

The impact of the globalization of markets, law, governance and related security risks on the transformation of national Constitutions can be illustrated in terms of Somek’s distinction between:

1. “Constitutionalism 1.0” like the post-revolutionary, emancipatory US and French “Constitutions of liberty” during the 18th century establishing legislative, executive and judicial powers for democratic self-government;
2. “Constitutionalism 2.0” like the post-World War II democratic “human rights Constitutions” (*e.g.*, in most EU member states) committed to protection of human dignity and civil, political, economic and social rights for everybody; and
3. “Constitutionalism 3.0” like the “cosmopolitan Constitutions” of EU member states supporting constitutionalization of multilevel governance of transnational PGs, such as the common market among EU and European Free Trade Area (hereinafter “EFTA”) states based on common market rights, other fundamental rights, non-discrimination of citizens on grounds of nationality, and respect for democratic “constitutional pluralism”.⁴¹

⁴⁰ On “realist challenges” of international law and of the “idealism” associated with inter-war legal and political scholarship, and the emergence of alternative political science conceptions of international law (notably “liberalism”, “institutionalism” and “constructivism”) overcoming realism’s hostility to international law by explaining the mutual advantages of international rules and institutions and “legal constructivism”, see INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2014). The “*status quo* bias” of American international relations theories and their frequent neglect of regional and UN HRL are often criticized by Europeans as “an American crusade” aimed at justifying hegemonic US power politics without offering convincing strategies or leadership for collective supply of many international PGs (like transnational rule of law and protection of human rights, climate change prevention) beyond national US interests driven by domestic interest-group politics.

⁴¹ Cf. ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION (2014).

The constitutional principles of liberty, equality and solidarity have become universally recognized parts of UN HRL and of “sustainable development” commitments. Yet the “law in the books” is often not transformed into socially effective “law in action”, as illustrated by inadequate regulation of “market failures”, “governance failures” and of judicial protection of fundamental rights in national and international jurisdictions. Even though most UN member states have adopted national Constitutions, the constitutional task of transforming the agreed “constitutional principles of justice” into democratic legislation, administration, adjudication, international agreements and “public reason” supported by citizens is impeded by abuses of public and private power in many UN member states. The preceding section II has argued that the increasing limitation of state-centred by person-centred conceptions of international law based on human and other cosmopolitan rights justifies re-interpreting multilevel regulation of global markets as protecting not only rights of governments, but also rights of citizens as “democratic principals” and main economic actors responsible for holding multilevel governance institutions more legally, democratically and judicially accountable for their frequent failures to protect international PGs. This concluding section III explains why the proposed legal transformation of the world trading system and of other citizen-driven, global PGs (like global communication systems) into a “cosmopolitan republic” and public space (*res publica*) protected by stronger citizen rights requires strengthening “participatory democracy” based on domestic application and enforcement of international “PGs treaties”.

Section I explained why—inside democracies—constitutionalism has proven to offer the most effective “legal methodology” for transforming agreed constitutional “principles of justice” into democratic legislation, administration and adjudication protecting rights of citizens. Section II explained why—in citizen-driven areas of international cooperation and PGs—power-oriented “chessboard conceptions” of “international law among states” need to be legally limited by rights-based “network conceptions” empowering citizens to use their individual knowledge and rational self-interests for engaging not only in “deliberative democracy”, but also in “republican” and “cosmopolitan constitutionalism” for protecting transnational PG across national borders. Such functionally limited, multilevel constitutionalism governing transnational PGs can be practised even among countries (*e.g.*, in Africa and Asia) that may lack effective national “constitutional democracies”—yet allow citizen-driven “countervailing rights” to challenge welfare-reducing “market failures” and “governance failures” undermining specific transnational “aggregate PGs” (like transnational rule of law in economic division of labour protected by commercial, investment and environmental law and arbitration). This

concluding section III explains: (A) why the universal recognition of human rights justifies protecting rights of citizens to domestic implementation of international “PGs treaties”; and (B) empirical evidence confirms that “cosmopolitan international law” (like commercial and intellectual property law and arbitration) often regulates social conduct more effectively than state-centred international treaties which governments perceive as “breakable contracts” that citizens and domestic courts should not be allowed to effectively enforce in domestic legal system.

A. Need for Protecting Domestic Application of International “PGs Treaties”

As a legal methodology, democratic constitutionalism argues that the most legitimate and most effective way of transforming constitutionally agreed “principles of justice” into democratic legislation, administration, adjudication and “living law” is to confer equal rights on citizens and mandate democratically elected, yet separate legislative, executive and judicial institutions to protect these rights and corresponding PGs in ways that can be enforced by citizens through constitutional “checks and balances” (like democratic elections, participatory and deliberative democracy, judicial remedies). Sections I and II argued that globalization has not only transformed most *national* into *transnational* PGs that must be legally and judicially protected through international “PGs treaties” (e.g., UN, WTO and regional integration agreements) and “network governance” based on “private-public partnerships” in collective governance of PGs. In order to transform international law into effective rules protecting the rights and reasonable interests of all citizens, “PGs treaties” must also be designed as “democratic law” that citizens can invoke and enforce in domestic legal systems subject to their compliance with the respective constitutional law systems agreed among citizens as “higher law” governing their national communities. The modern reality of “constitutional pluralism” and the “disabling effects” of global integration on state-centred traditions of governing PGs do not necessarily result in what Somek denounces as a “law of the jungle” undermining democratic self-government.⁴² The dynamic evolution of EU law illustrates (e.g., by its legal and institutional creation of a European “banking Union” in response to the financial, debt and economic crises since 2008/2010) that market-failures also offer political opportunities for limiting related “governance failures”, for instance by using “cosmopolitan constitutionalism” (like rights-based common market and competition law) for “bottom-up” and

⁴² Cf. *id.* at 21 *et seq.*

“top-down constitutionalization” of multilevel governance of functionally limited PGs. Globalisation requires supplementing *national* by *multilevel democratic, republican and cosmopolitan constitutionalism* supported by state citizens and “cosmopolitan citizens” alike. This “constitutional challenge”—notably the changing role of international treaties for regulating private lives of citizens (*e.g.*, their rights, working conditions, human security, access to food, health and communication services)—require acknowledging the need for empowering citizens to hold multilevel governance institutions more legally, democratically and judicially accountable for complying with agreed “PGs treaties”. Treaties continue to be drafted by diplomats with limited legal expertise and often include indeterminate rules and principles in order to overcome “reasonable disagreements” among the contracting parties. In view of the limited constitutional mandates of diplomats, the incorporation, validity, rank and “direct applicability” of intergovernmental agreements in domestic legal systems depends primarily on domestic constitutional systems rather than only on whether treaty rules are precise, unconditional, capable of and intended for “direct effects” and “direct application” inside domestic legal systems.

Both “monist” and “dualist” constitutional systems acknowledge that international law needs to be incorporated into domestic legal systems in order to produce “domestic law effects” in the national legal order. While national Constitutions often recognize customary international law and other generally recognized rules of international law as having force of law in domestic law, they tend to regulate the incorporation of treaties in three alternative ways:

1. Under systems of automatic constitutional incorporation (*e.g.*, in EU law, Japanese and U.S. law), international treaties acquire domestic legal force immediately upon their ratification and publication in the domestic law gazette even without additional enabling legislation.
2. Many national Constitutions (*e.g.*, in EU member states) leave the domestic law effects of international treaties to their incorporation through a parliamentary law of approval.
3. Other national legal systems implement treaty obligations and regulate their domestic legal effects through *special implementation acts* (*e.g.*, amending domestic laws) without incorporating the treaty as such into domestic law.⁴³

While the term “self-executing” refers to the first system of constitutional treaty incorporation as having domestic legal force

⁴³ For thorough analyses, see Yuji Iwasawa, *Domestic Application of International Law*, in COLLECTED COURSES OF HAGUE ACADEMY OF INTERNATIONAL LAW—RECUEIL DES COURS: VOLUME 378, at 9 (2016).

(validity) without additional legislation, the terms “direct effect” and “direct applicability” refer to the question arising under all three legal systems of whether precise and unconditional treaty provisions can be invoked and enforced by domestic institutions and citizens (*e.g.*, as conferring rights on citizens). Some human rights conventions (like the International Covenant on Civil and Political Rights (ICCPR), the ECHR) and large parts of EU law have become recognized as being “directly applicable” inside the domestic legal systems and in domestic courts of their respective member states. There is also increasing recognition that treaty provisions requiring “domestic implementation” (*e.g.*, in Article 2:1 International Covenant on Economic, Social and Cultural Rights, Article XVI:4 WTO Agreement) do not exclude the “direct applicability” of precise and unconditional treaty obligations. Yet, many governments and domestic courts remain reluctant to accept a legal presumption that precise and unconditional treaty obligations approved by democratic institutions for the benefit of citizens can be invoked inside domestic legal systems also by citizens, unless the government or parliament can justify why such “direct applicability” is not in the “public interest”. The more international treaties become necessary for protecting rights of citizens and related PGs (like EU common market law, public health law) and assert legal primacy over domestic rules, the more demanding must such legal justifications be of why “PGs treaties” approved for the benefit of citizens should not be enforceable by domestic courts and citizens as “democratic principals” who must hold multilevel governance agents legally, democratically and judicially more accountable for protecting PGs; citizens can discover and challenge “market failures” and “governance failures” more easily than any central institution with inevitably limited knowledge of the preferences and problems of citizens.⁴⁴ As emphasized by the CJEU, “[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and the Member States”;⁴⁵ “[t]he mere

⁴⁴ As the efficacy of treaties depends on their application and enforcement in domestic legal systems, the universal recognition of human rights justifies a presumption that international “PGs treaties” approved by parliaments may be “directly applicable” for the benefit of citizens as “agents of justice” just as other democratic legislation. Executive preferences for avoiding such legal and judicial accountability should not be decisive. For a criticism of the selfish opposition by many government executives against “direct applicability” of UN and WTO agreements and related adjudication, see *id.* and Ernst-Ulrich Petersmann, *Why Do the EU and Its Court of Justice Fail to Protect the “Strict Observance of International Law” (Article 3(5) TEU) in the World Trading System and in Other Areas of Multilevel Governance of International Public Goods?*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW—TRADE POLICY BETWEEN LAW, DIPLOMACY AND SCHOLARSHIP: LIBER AMICORUM IN MEMORIAM HORST G. KRENZLER* 145 (Christoph Herrmann et al. eds., 2015).

⁴⁵ Case 26/62, *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Neth. Inland Revenue Admin.*, 1963 E.C.R. 1, 13.

fact that the contracting parties have established a special institutional framework for consultations and negotiations *inter se* in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of the agreement.”⁴⁶

B. Why “Constitutional Democracies” and “Cosmopolitan International Law” Are More Effective and More Legitimate

Democracy, republicanism and cosmopolitanism argue that constitutional rights and remedies of citizens serve not only as “principles of justice” and constitutional limitations of abuses of power. They also operate as incentives for using the knowledge and “republican virtues” of citizens and their reasonable self-interests in decentralized enforcement of rule of law, thereby contributing to the “constitutionalization” and transformation of legal systems in conformity with the demands of citizens. Cosmopolitan principles, rights and responsibilities continue to dynamically evolve through hundreds of human rights treaties, economic law treaties, environmental, criminal, humanitarian, consular law and other treaties and related jurisprudence. Multilevel judicial protection of such rights and of transnational rule of law promotes “civilizing”, de-politicizing and “constitutionalizing” ever more fields of international law for the benefit of citizens, for instance through:

1. Cooperation between national courts and arbitral tribunals in the recognition, surveillance and enforcement of arbitral awards (*e.g.*, deciding on contractual commercial rights, property rights and judicial remedies) pursuant to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards;
2. Cooperation among national and regional economic and human rights courts that protect individual rights and transnational rule of law for the benefit of citizens in FTAs and customs unions, for instance by protecting individual rights beyond national frontiers through EU law, the law of the EEA, the ECHR and by multilevel judicial protection of such rights in domestic and regional courts;
3. The arbitration, annulment and enforcement procedures of the International Centre for the Settlement of Investment Disputes (hereinafter “ICSID”) in cooperation with national courts that enforce ICSID awards on protection of investor rights and obligations under bilateral and multilateral investment treaties; or
4. The more than half a dozen of international criminal courts complementing national criminal jurisdictions and protecting

⁴⁶ Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a. A.*, 1982 E.C.R. 3641, 3664.

individual rights and legal accountability through multilevel judicial cooperation.

The more globalization transforms *national* into *transnational PGs* that no single state can unilaterally protect without international law and institutions, the more national Constitutions reveal themselves as “partial Constitutions” that increasingly depend on multilevel governance of transnational PGs through international law and institutions protecting human rights across national frontiers, including the cosmopolitan right of “[e]verybody . . . to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”⁴⁷ (Article 28 UDHR). Legal theory argues that—because the democratic legitimacy of legal systems depends on constant interactions among the three regulatory, justificatory and enforcement functions of legal systems—consent by citizens and by democratic institutions to international rules enhances voluntary compliance with and decentralized implementation and enforcement of multilevel regulations of PGs. Sociological evidence confirms the importance of non-governmental “global citizen movements” in mobilizing civil society support for international “PGs treaties” like the Rome Statute for the International Criminal Court, international trade and environmental treaties.⁴⁸ Economics and “public choice” theories explain why—just as economic market competition is enhanced by granting producers, traders, investors and consumers actionable rights and judicial remedies for limiting abuses of power and other “market failures”—also “participatory democracy” and accountability in “political markets” can be enhanced by democratic and cosmopolitan rights of citizens.

Yet, human rights also protect individual and democratic diversity and popular sovereignty to decide which international agreements a country wishes to ratify. The need for limiting abuses of public and private power through “constitutionalizing” multilevel governance of PGs must respect the reality and legitimacy of “constitutional pluralism” at national and international levels. It must learn from “comparative institutionalism” by empirically exploring why certain “PGs regimes” (*e.g.*, the compulsory WTO dispute settlement system) have succeeded in protecting transnational PGs more effectively than other treaty regimes. In view of the “executive dominance” of intergovernmental rule-making, the rational self-interests of diplomats to limit their legal, democratic and judicial accountability towards citizens, and the ineffective parliamentary and judicial control of “disconnected UN/WTO governance”, the necessary constitutional reforms of multilevel governance of PGs are unlikely to be supported by governments and parliaments unless citizens, civil society (notably

⁴⁷ UDHR, *supra* note 13, art. 28.

⁴⁸ *Cf.* COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY (Roland Pierik & Wouter Werner eds., 2010).

business), courts of justice and international organizations insist more on the “democratic functions” of “PGs treaties” to protect the equal rights of citizens. Empirical evidence suggests that “cosmopolitan PGs regimes” (like common market and competition laws in the EU and EEA, regional human rights conventions like the ECHR) and their multilevel, judicial protection—*e.g.*, by national courts cooperating with the CJEU, EFTA Court, and the European Court of Human Rights (hereinafter “ECtHR”)—often protect equal rights of citizens more effectively than “disconnected UN/WTO governance” based on agreements which—even if approved by parliaments in order to protect international PGs for the benefit of citizens—governments treat as “breakable contracts” that do not effectively protect rights and judicial remedies of citizens against harmful rule violations by their own governments.

IV. CONCLUSION: NEED FOR PROMOTING “TRANSNATIONAL REPUBLICANISM” IN MULTILEVEL GOVERNANCE OF PGs

The sovereign freedom of the 193 UN member states to choose which international treaties they wish to ratify makes “legal fragmentation” (*e.g.*, the coexistence of thousands of international treaty regimes) an inevitable feature of modern international law. “Public choices” of whether to ratify and implement international PGs treaties continue to be often driven by power politics (*e.g.*, refusal by hegemonic states to ratify the Rome Convention establishing the International Criminal Court) and by utilitarianism (*e.g.*, China’s domestic implementation of WTO and investment adjudication, but not of arbitration under the UNCLOS). This contribution has explained why globalization entails not only dialectic struggles for limiting power-oriented bilateralism and legal fragmentation through rules-based multilateralism and “constitutionalization” of multilevel governance of transnational PGs (*e.g.*, acceptance of the compulsory jurisdiction of ever more international courts of justice, participation of non-governmental, sub-state and supra-national actors in international PGs treaties like the UNCLOS and the WTO Agreement). Republicanism and legal sociology also explain why multilevel legal and judicial protection of cosmopolitan rights (like human, economic, health rights and judicial remedies of citizens) contributes also to “socializing”, de-centralizing, “de-politicizing” and empowering multilevel governance of functionally limited PGs (*e.g.*, in the context of the WHO Framework Convention on Tobacco Control, the WTO Agreements on TRIPS and Government Procurement, worldwide and regional human rights, commercial and investment agreements). The jurisprudence of the ECtHR, the CJEU and of the EFTA Court, and their close cooperation with national courts in interpreting and developing European law, illustrate how judicial

mandates to interpret treaties “in conformity with the principles of justice”, including “human rights and fundamental freedoms for all” (as recalled in the Preamble to the VCLT), may justify multilevel, judicial protection of transnational rule of law for the benefit of citizens and of their “republican rights”.⁴⁹ “Republican constitutionalism” suggests that multilevel political, legal and judicial governance of transnational PGs needs to be legitimized, limited, regulated and justified by protecting not only equal rights of states, but also of their citizens as “constituent powers”, “democratic principals” and “agents of justice”, whose rational self-interests and decentralized knowledge offer incentives for discovering and limiting “market failures” as well as “governance failures” by using cosmopolitan rights and judicial remedies promoting “responsive regulation”. This contribution focused on promoting a “republican compliance culture” in citizen-driven market regulations and acknowledged the non-ideal reality of intergovernmental power politics in other policy areas with different compliance- and rule-of-law-problems.

Most international “PGs regimes” evolve dynamically, for instance by supplementing and finally replacing GATT 1947 through eight “GATT Rounds” that ushered in the WTO Agreement of 1994 and by progressively developing environmental framework agreements (*e.g.*, on protection of biodiversity and prevention of climate change) through successive protocols specifying the rights and obligations of member states. The ambitious “Doha Round’s” objective of improving the multilateral trading system through a “single undertaking” on about 20 different subjects of trade regulation has not been realized so far. Yet, the multilateral agreements on the accession of 40 new WTO Members (such as China and Russia), the WTO Information Technology Agreements of 1997 and 2015, the entry into force of the WTO Agreement on Basic Telecommunications in 1998, of the WTO Agreement on Financial Services in 1999 and of a revised WTO Government Procurement Agreement in 2015, the 2001 WTO Declaration on the TRIPS Agreement and Public Health, the related 2003 WTO “waiver” and 2005 amendment of the TRIPS rules on compulsory licences for essential medicines, the 2014 Trade Facilitation Agreement and the Undertaking by developed countries of December 2015 to remove export subsidies illustrate that the WTO system continues to evolve as the most successful multilateral trading system in history governing now more than 90% of world trade. The increasing share of developing countries in world trade (now over 53%) confirms an increasing “economic convergence” among trading countries that contrasts with the

⁴⁹ For a comparison of the judicial methodologies of the CJEU, the EFTA Court and the ECtHR, see Ernst-Ulrich Petersmann, *Multilevel Judicial Governance in European and International Economic Law*, in *LE JUGE EN DROIT EUROPÉEN ET INTERNATIONAL* 45 (Samantha Besson & Andreas R. Ziegler eds., 2013).

“diverging development” of industrialized countries during the 19th century, mainly due to modern information and communication technologies.⁵⁰

The more than 520 invocations of the WTO dispute settlement procedures since 1994 have prompted criticism of an “imbalance” between political and judicial rule-clarifications in WTO governance. Views over the legitimate authority and methodologies of the WTO dispute settlement bodies often differ, as illustrated by politically motivated refusals in 2016 to appoint WTO Appellate Body judges and by the inconclusive WTO negotiations about improvements of the WTO’s DSU. The contribution of the WTO dispute settlement jurisprudence to the progressive clarification of indeterminate WTO rules is illustrated by the successful legal challenges of safeguard measures (Article XIX GATT) in about 10 WTO dispute settlement proceedings, which induced WTO Members to resort instead to discriminatory anti-dumping and countervailing duties. As illustrated by the lack of Preambles justifying the vague and incoherent “fair trade principles” underlying these WTO agreements and their use in practice as selective safeguard measures, the economic rationale of the WTO Agreements on Article VI GATT and on subsidies remains contested among WTO members. Similarly, the role of the WTO and of its legal disciplines in implementing the UN agreements on climate change prevention and the 2030 UN Agenda for Sustainable Development remain to be clarified. The more such legal clarification of indeterminate WTO rules and of under-theorized WTO principles (like “sustainable development”, “fair price comparison” in calculating dumping margins, “green subsidies”, “non-violation” and “situation complaints” pursuant to Article XXIII GATT) is left to WTO dispute settlement bodies, the stronger becomes the need for justifying the legal and judicial methodologies used in WTO panel, appellate and arbitration proceedings and in the political control of judicial dispute settlement institutions by the intergovernmental Dispute Settlement Body. This contribution has argued that perhaps the most important “republican lesson” from European integration law is that empowering citizens to invoke and enforce international “PGs treaties” (like the ECHR, EU and EEA common market law, the EU Charter of Fundamental Rights) in domestic jurisdictions offers the most legitimate method for limiting “disconnected intergovernmentalism” by citizen-driven, multilevel governance of transnational PGs, including multilevel “judicial dialogues” and “judicial comity” in clarifying indeterminate rules and protecting transnational rule of law. Also worldwide UN and WTO agreements and regional treaties outside Europe include legal and judicial

⁵⁰ Cf. RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* (2016).

guarantees of individual rights and judicial remedies that could—and should—be construed as empowering citizens and non-governmental actors to invoke “PGs treaties” approved by parliaments for the benefit of citizens in domestic jurisdictions in order to limit the ubiquity of abuses of public and private power in international economic relations.⁵¹ The one-sided, diplomatic focus on “member-driven political governance” and “market-driven economic governance” of international trade neglects the constitutional experience that collective protection of PGs (like a non-discriminatory trading system) depends on individual rights, judicial remedies and accountability obligations limiting “market failures” as well as “governance failures” distorting trade and competition. WTO dispute settlement bodies rightly emphasize their inherent powers for judicial “administration of justice” (*e.g.*, by allowing mutually agreed transparency of panel and appellate proceedings, promoting due process through preliminary rulings, admitting private legal counsels and *amici curiae* submissions, “completing legal analyses” in appellate proceedings); they exercise judicial comity (*e.g.*, vis-à-vis other dispute settlement jurisdictions dealing with the same dispute in *Brazil — tyres*) and judicial deference (*e.g.*, vis-à-vis national sovereignty to decide on the level of protection of non-economic values like “public morals”).⁵² Yet, the often indeterminate WTO provisions and related disputes leave open many contested questions, for instance about how to interpret “the basic principles underlying this multilateral trading system” (Preamble to the WTO Agreement), the economic rationale underlying WTO rules (*e.g.*, on subsidies, “fair price” comparisons in dumping calculations), and judicial interpretation methods if the political WTO institutions fail to reach agreement on clarifications of WTO rules (*e.g.*, by “authoritative interpretations”, treaty amendments or “waivers”).

This contribution has argued that—as national and international HRL recognize citizens as “agents of justice” with “inalienable rights” and judicial remedies—multilevel governance institutions need to be

⁵¹ At the request of trade diplomats, most domestic courts shun “consistent interpretations” of domestic trade rules, “direct applicability” of related WTO legal obligations and “judicial comity” between domestic courts and WTO adjudication, thereby undermining the obligation of “[e]ach Member [to] ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the [WTO] Agreements” (Article XVI:4 WTO Agreement). Arguably, this “disconnect” in multilevel trade governance is inconsistent with the numerous WTO requirements of protecting effective remedies in domestic jurisdictions, for instance in the field of GATT (Article X), the WTO Anti-dumping Agreement (Article 13), the WTO Agreement on Customs Valuation (Article 11), the Agreement on Subsidies and Countervailing Measures (Article 23), the General Agreement on Trade in Services (Article VI GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (*cf.* Articles 41-50, 59 TRIPS), and the Agreement on Government Procurement (Article XX).

⁵² *Cf.* Ernst-Ulrich Petersmann, *20 Years WTO Law and Governance: Some Legal Methodology Problems*, 13(2) MANCHESTER J. INT’L ECON. L. 106 (2016).

constituted, limited, regulated and justified more democratically for the benefit of citizens in order to be held more accountable for their governance failures to protect transnational PGs effectively. The historical lessons from sixty-five years of European integration law (*e.g.*, since the 1950 ECHR, the 1951 Treaty establishing the European Coal and Steel Community) suggest that the needed “constitutional reforms” are unlikely to come about “top-down” from intergovernmental institutions unless citizens, civil society, parliaments and other democratic institutions insist “bottom up” on stronger protection of their rights in multilevel governance of PGs. Cosmopolitan constitutionalism recognizing transnational rights of “citizens of the world” is becoming a regulatory paradigm not only in HRL, but also in other fields of international law (like international criminal law, Internet law, sports law) and of IEL (like regional market integration law, commercial, trade, investment and intellectual property law). More than 2,000 years of political experience with “republican constitutionalism” suggest that the effectiveness of multilevel governance of transnational PGs depends on empowering citizens to hold multilevel governance institutions legally, democratically and judicially accountable so as to promote “public reason” and “democratic capacities” of multilevel governance institutions.

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