

Introduction and Overview: The Crisis of International Economic Law

GLOBALIZATION, IE, ‘THE closer integration of the countries and the peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders’, affects not only the daily lives of ever more people everywhere – ‘their jobs, their food, their health, their education, their leisure time’¹ – it also leads to far-reaching structural changes of the world economy. For instance, increasing numbers of goods, including not only high-technology products (such as mobile phones) but also shoes and clothing, are manufactured in global networks of suppliers of raw materials and intermediate goods and producers of final goods located in many countries. The failure to conclude the Doha Round negotiations in the World Trade Organization (WTO) since 2001, like the failure to conclude a new ‘Kyoto II Climate Change Agreement’, illustrate that waiting for global consensus on new worldwide agreements risks being an unreasonable strategy; unilateral safeguard measures (like border tax adjustments), bilateral agreements (like the thousands of bilateral double taxation and investment agreements), regional agreements (like the hundreds of free trade agreements) and ‘experimental governance’ (eg, in constructing regional monetary unions and ‘carbon emission trading systems’) may be necessary ‘building blocks’ for consensus-building on reforms of worldwide trade, financial and environmental rules. Although tariff preferences matter less and less, the international production networks and the failures of worldwide economic negotiations foster ever more preferential ‘deep economic integration’ agreements regulating markets and government interventions far beyond existing worldwide rules, with the risk of increasing regulatory and market segmentation. Whereas national and regional legal systems dynamically change, the international economic law (IEL) system established since the Second World War faces an unprecedented crisis requiring ‘new thinking’. Regulatory and legal responses to the transatlantic banking crisis, ‘sovereign debt’ crisis, economic growth, governance and social crises are hampered by the simultaneous legitimacy and rule of law crises in IEL and by ‘democratic disagreement’ on appropriate reforms, for example, of the ‘moral hazards’, lack of competitiveness and ineffective fiscal disciplines in some southern European member states of the European Monetary Union. Arguably, the options of ‘exit, voice and loyalty’² explain the

¹ J Stiglitz, *Globalization and its Discontents* (London: Penguin, 2002) 9.

² On the dependence of constitutional and economic law reforms, and of their legitimacy, on a political equilibrium between ‘voice, exit and loyalty’ see: AOHirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations and States* (Cambridge: Harvard University Press, 1970); J Weiler, ‘The Transformation of Europe’ (1990) 100 *Yale Law Journal* 2403 ff. On older, *ordo*-liberal conceptions of ‘interdependence of

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decreasing loyalty to the postwar IEL system, the recourse to ‘legal pluralism’ as a means of decentralized legal reforms in order to ‘move from the world of Hobbes to the world of Kant’³ and the need to analyze IEL in an interdisciplinary context.

As illustrated by the picture on the book cover, this book analyzes the vast and dynamically changing field of IEL from the perspective of citizens, their human and constitutional rights and the increasing number of national and international court decisions reviewing multilevel economic governance with due regard to human rights. It argues that the regulatory challenges of the twenty-first century require a ‘paradigm shift’⁴ in IEL: the ‘Westphalian conceptions’ of ‘international law among sovereign states’ – which continue to prevail in worldwide agreements and diplomatic practices mainly on grounds of ‘path-dependence’, in spite of the obvious failures of diplomatic ‘business as usual’ – need to be limited in IEL through more cosmopolitan regulation of the global division of labour at regional, transnational and national levels to protect more effectively human rights, consumer welfare, the environment, democratic support of IEL by citizens and ‘constitutional coherence’ among diverse, national and international legal orders. Underlying this proposition is the claim – based on both empirical, comparative institutional analyses as well as on constitutional and economic theories – that legal limitations of market failures and governance failures can be rendered more effective – in the economy no less than in the polity – by judicially enforceable, cosmopolitan rights of citizens to equal market freedoms, non-discriminatory conditions of competition and judicial protection of constitutional rights and transnational rule of law for the benefit of citizens. Rights-based approaches to IEL are not only a requirement of morality and justice, but even more so of political ‘realism’ and democracy: IEL must take into account the need for limiting the ubiquity of abuses of public and private power by ‘countervailing powers’ of citizens as self-interested guardians of their constitutional rights and of their mutually beneficial, economic cooperation across frontiers; individual rights and judicial remedies require justification of all government restrictions and enhance participatory, deliberative and ‘constitutionally accountable democracy’. The rights-based approach offers not only citizen-oriented and comparative law perspectives on the increasingly complex and existentially important field of IEL, which state-centred textbooks describing IEL often neglect; it also offers different perspectives on the ‘principles of justice’ underlying IEL and illustrates the diverse traditions of translating human rights into practical economic regulation for the benefit of citizens. Proceeding from the basic premise of modern economics and of Rawls’ theory of justice that human welfare depends on institutionalizing reasonable rules and institutions protecting open markets, the book emphasizes the importance of ‘cosmopolitan liberties’ and of moral duties of citizens to ‘struggle for justice’ and for a more cosmopolitan IEL. As illustrated by Mohammed Bouazizi, the young Tunisian street vendor whose protests against arbitrary market restrictions triggered Tunisia’s human rights revolution in 2011, the freedom to sell in the market place (as pictured by Diego Rivera on the book cover) may

legal, economic and political orders’ see ch VII. On the risk of ‘social dis-embedding’ by globalization, and the need for ‘democratic re-embedding of IEL’ through stronger protection of human rights and ‘struggles for individual rights’, see ch IV.

³ cf P Lamy, who – in his speech of 6 October 2011 on ‘What Multilateral Trading System for the Future?’ (accessible on the WTO website) – stated: ‘we need to do for international monetary relations what we already did for trade: move from the world of Hobbes towards the world of Kant’.

⁴ cf TS Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

trigger and justify a human rights revolution against welfare-reducing, economic and political oppression.

According to Mohammed's younger brother, the identification of millions of disempowered Arab people during the 'Arab Revolutionary Spring 2011' with the self-immolation of Bouazizi reflected a common suffering: 'that the poor also have the right to buy and sell'.⁵ Modern economics and theories of justice confirm that social welfare depends on reasonable rules and institutions protecting economic freedoms, property rights and non-discriminatory conditions of competition of citizens to engage in mutually beneficial division of labour, subject to legal constraints of 'market failures' as well as 'governance failures'. Just as the arbitrary confiscation of the merchandise and other means of trade owned by Bouazizi destroyed his private business and prospects of autonomous self-development, millions of protesters in the 'Arab Spring' are challenging authoritarian, welfare-reducing government restrictions impeding individual and democratic self-development and emancipation of the poor. This book discusses more than a hundred case studies of legal and judicial disputes regarding fundamental economic freedoms, property rights, labour and social rights, access to justice, judicial 'balancing' of economic and human rights, multilevel 'judicial governance' and transnational 'rule of law' in the broader context of regional and worldwide IEL and its legal implementation in domestic jurisdictions; it emphasizes the need for assessing the diverse comparative law experiences with due respect for legitimate 'legal pluralism' (eg, acknowledging that similar legal concepts may be differently interpreted due to diverse constitutional traditions and social contexts in different jurisdictions). Even though written by a law professor and practitioner – during more than 35 years – of IEL, the main research interest underlying this book is to contribute to clarifying the impact of 'constitutional pluralism' and of diverse 'theories of justice' on the interpretation and design of IEL by the 'legal actors' and on their under-supply of interdependent 'public goods'.⁶ One major lesson from this multilevel, comparative law and practice-oriented perspective is to challenge the apparent 'universalism' of worldwide human rights and IEL treaties: their universal, open-ended legal terms and underlying principles are often construed and implemented in legitimately diverse ways based on different theories of justice and of human rights informing the interpretations. As legal and judicial cooperation among constitutional, human rights and IEL institutions is more developed in European law than in other international legal systems, many case studies are taken from economic and human rights adjudication in the European Union (EU), the European Economic Area (EEA), the European Convention on Human Rights (ECHR) and national jurisdictions across Europe. The fact that cases decided by European courts and their often innovative, legal methodologies (like 'balancing' of economic and human rights) are increasingly cited also in investor–state arbitration and regional human rights and economic

⁵ Quoted from H de Soto, 'The free-market secret of the Arab revolutions' *Financial Times* (9 November 2011) 9.

⁶ On the defining characteristics of 'public goods' (like their non-excludable and non-rival use benefiting all citizens) which, in contrast to private goods, must be collectively supplied by governments, see I Kaul, I Grunberg and MA Stern (eds) (1999). On the 'constitutional functions' of the Bretton Woods Agreements and GATT for empowering citizens to engage in mutually beneficial trade transactions and for regulating trade in conformity with constitutional principles like freedom, non-discrimination and rule of law across frontiers see EU Petersmann (1991). On comparative constitutional, legislative, administrative and judicial regulation of trade and the economy see M Hilf and EU Petersmann (eds) (1993); this book's comparative, legal and institutional case studies of trade regulation across Europe, North America and Asia illustrate the diversity of regulatory options and 'laboratory' of regulatory approaches applied by lawmakers.

courts outside Europe, confirms that ‘experimental, multilevel governance’ in Europe may be relevant across jurisdictions: not only in less-developed countries (LDCs) and Anglo-Saxon ‘majoritarian democracies’ reassessing their nationalist legal traditions but, as I have argued long since, also in other fields of IEL. One major thesis of this study is that, as inside the EU, ‘constitutional tolerance’ (Weiler), respect for constitutional pluralism, the ‘centrality of conflict’ resulting from competing constitutional claims and legitimate ‘constitutional heterarchy’⁷ are also constitutive of the legitimacy of IEL and limit the necessary, yet functionally limited ‘constitutionalization’ of IEL.

THE LACK OF A THEORY OF JUSTICE FOR IEL

The successful outcome of complex games (like chess) depends on understanding the logic of the rules of the game as well as the strategic options of the players. Similarly, individual and democratic self-governance in the world economy and ‘globally integrated production’ require understanding the rules, institutions and underlying principles governing the global division of labour. These rules are becoming increasingly complex and contested in view of their failures to prevent unnecessary international poverty, banking crises, financial and environmental crises. As explained in chapter I, the prevailing ‘Westphalian conception’ of IEL as an instrument for promoting national interests lacks a coherent theory for protecting international public goods in conformity with the human rights obligations of all UN member states. Most governments and participants in the global division of labour take economic decisions with only limited knowledge of the international ‘rules of the game’ and their systemic implications, eg, their incentives for abuses of economic power due to inadequate competition rules, consumer protection and surveillance (eg, of the persistent violations of the EU Treaty’s fiscal and debt disciplines in some eurozone member states). For instance, as individual member countries of the Eurozone Monetary Union can no longer control by national policy instruments (like devaluation of the exchange rate, monetary expansion by interest rate changes) the currency in which their debt is issued, they are confronted with new regulatory challenges to protect monetary stability and economic growth without succumbing to ‘moral hazards’. The less the interactions between national, bilateral, regional and worldwide government interventions are transparent and justifiable in terms of principles of justice and human rights, the more citizens contest the legitimacy of the often opaque redistribution of income through economic regulation (eg, of public bailouts of insolvent industries, banks and foreign sovereign debts).

This book is about the joint responsibility of citizens and governments to institutionalize a more legitimate ‘public reason’ for a more cosmopolitan IEL which citizens – as ‘primary subjects’ of the global division of labour and ‘democratic owners’ of all governance institutions – have reason to support. Just as private life has to be lived morally in respect of other people and ethically with regard to ourselves, so must law, governance and individual conduct – also in the global division of labour – remain justifiable on grounds of political morality and justice rather than only in terms of utilitarian

⁷ cf D Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in JL Dunoff and JP Trachtman (eds) (2009) 326–55.

output.⁸ The less people understand IEL and international economic institutions, the greater are the risks for democratic contestation of the rules (eg, by nationalist ‘Tea Party protestations’) and for their abuses (eg, by states joining international economic institutions like the eurozone without ever complying with the relevant rules). For instance, the worldwide and European banking, financial and ‘sovereign debt’ crises which have occurred since 2008 have destroyed private savings worth billions of dollars. Most of the adversely affected citizens lacked effective remedies (eg, against losses of jobs and pension funds) and feel exploited by systemic ‘problems of high debt, corruption and clientelism’⁹ cultivated even inside European constitutional democracies like Greece. As the EU Treaty’s fiscal and debt disciplines continue to be violated by more than 20 out of the 27 EU member states and EU law prohibits ‘monetary financing’ of ‘sovereign debts’ (Articles 123–125 TFEU), the former chief economist of the ECB concluded: ‘(a)lmost all treaties promising European fiscal discipline have been broken time and again’, and ‘(a)ny attempt to “save” monetary union via agreements which transfer sovereignty to a European level, where violations of fundamental treaties have become a regular event, lacks any logic’.¹⁰ Just as EU law considers fiscal, debt and economic policies as primarily national responsibilities in conformity with the ‘principle of subsidiarity’ (Article 5 TEU), this study argues in favour of ‘bottom-up reforms’ of IEL in order to better protect rights of citizens and transnational rule of law based on the classical ‘constitutional methods’ of empowering citizens to challenge market failures as well as governance failures by stronger legal and judicial remedies promoting ‘public reason’ and decentralized ‘piecemeal social engineering’ (Popper). By showing that IEL rules (like the transparency disciplines and judicial remedies required by Article X GATT) can support human rights objectives, and that democratic resistance to ‘top-down governance’ has to be taken seriously, this study should also be of interest to interdisciplinary scholars working on human rights and multilevel economic governance.

The ‘Westphalian international law among sovereign states’ up to the First World War did not provide for permanent worldwide institutions. The institutions established after the First World War (like the League of Nations) and after the Second World War (like the UN) were inspired by ideals of worldwide ‘social engineering’ that failed to realize many

⁸ cf R Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011) (explaining why what people achieve – the ‘product value’ of a human life – is less important than the manner in which they live their lives and treat other people – their ‘performance value’. The diverse value dimensions of social life – eg, what truth is, life means, morality requires and justice demands – are interrelated).

⁹ G Rachman, ‘How to tame the Greek beast?’ *Financial Times* (26 July 2011) 7. An increasing number of comments in the *Financial Times* during 2011 described the euro crisis measures as a ‘Ponzi scheme’ violating the ‘bailout’ prohibition, fiscal and debt disciplines prescribed in the EU Treaty and transferring taxpayers’ money without adequate involvement of national parliaments – ‘a clear violation of the fundamental democratic principle of “no taxation without representation”’ (cf O Issing, ‘Slithering to the wrong kind of union’ *Financial Times* (9 August 2011) 9).

¹⁰ Issing (n 9): ‘In the end, it will only further alienate the people from Europe itself’, ‘the fact that a member country of the euro – even in the case of permanent violations of the rules – will be saved at any price causes moral hazard and creates an obvious potential for blackmail’. Proposals for a European common bond would ‘relieve some countries of their burden of a record of fiscal irresponsibility’ at the expense of those EU member countries which respected the fiscal disciplines. Most economists proposing transformation of the European Monetary Union into a fiscal union with permanent financial transfers to over-indebted EU member countries disregard the limited legal powers, democratic legitimacy and political capacity of EU institutions to impose top-down comprehensive local governance reforms: ‘The solutions to these problems in every case can only be found locally’ (J Kay, ‘As Europe’s elite is fighting reality and will lose’ *Financial Times* (26 October 2011) 7), even though EU financial adjustment assistance for inducing the necessary reforms of domestic labour markets, unproductive public sectors and weak banking systems remains indispensable.

of the ‘grand strategies’. Prior to the entry into force of the ‘Bretton Woods Agreements’ in 1945 and the ‘provisional application’ of the General Agreement on Tariffs and Trade (GATT 1947) as of 1 January 1948, there existed no coherent system of IEL helping citizens and governments to increase their welfare through mutually beneficial rules limiting governance failures at national levels (such as protectionism and colonialism with ‘harmful externalities’) and promoting collective supply of private and ‘public goods’ across frontiers. The non-ratification of the 1948 Havana Charter for an International Trade Organization and the only ‘provisional application’ of many GATT provisions until 1995, illustrated the limited willingness of states to adjust their national legal systems to the requirements of a mutually beneficial world trading system. The absence of a Legal Office in the GATT Secretariat until 1983 reflected the predominant conception of GATT rules as a power-oriented framework for trade policymaking; for instance, the ‘GATT Rounds’ of trade liberalization focused on the export interests of industrialized countries, and mutually agreed ‘voluntary export restrictions’ were used for circumventing GATT’s legal disciplines and discriminating notably against imports of cotton and textiles from LDCs. Since 1995, more than 450 dispute settlement proceedings in the WTO over alleged violations of WTO rules, like the current judicial proceedings in national courts (such as the German Constitutional Court) as well as in the European Court of Justice (ECJ) over violations of the Lisbon Treaty’s prohibitions of ‘bailouts’ (Articles 123-125 TFEU) and of ‘excessive government deficits’ (Article 126 TFEU), illustrate the increasing difficulties in constitutional democracies to comply with IEL disciplines ratified by national parliaments for the benefit of citizens. Why do citizens, governments and courts fail so often to protect transnational rule of law for the benefit of citizens and social justice in IEL? Why are some international public goods effectively protected (like postal services, telecommunications, air and shipping transports), whereas the collective supply of others remains impeded by ‘market failures’ as well as ‘governance failures’? The main thesis of this book is that – in IEL – the ‘animal spirits’ and rational egoism of individuals need to be restrained by stronger constitutional and institutional protection of ‘public reason’ based on cosmopolitan freedoms and other ‘principles of justice’. The national ‘rights revolutions’ since the seventeenth century often focused one-sidedly on particular national constitutional traditions and prevailing political conceptions for instance in England on parliamentary sovereignty and utilitarian ‘sentiments’ (eg, in the works of Smith and Hume), in the French Revolution on popular sovereignty and rationality (eg, in replacing the ‘*ancien régime*’ by a ‘revolutionary democracy’ that degenerated quickly into terrorism) and in the American Revolution on institutionalizing a national ‘public reason’ prioritizing civil and political over economic and social rights (thereby privileging powerful producer interests in exploiting market power, slaves and indigenous people);¹¹ as illustrated by multilevel constitutional and judicial protection of the

¹¹ On the diverse ‘constitutional foundations’ of the British, American and French ‘democratic revolutions’ see, eg, Petersmann (1991 133 f) and the ‘Introduction’ by C Porset in G Gusdorf, *Les Révolutions de France et d’Amérique: La violence et la sagesse* (Paris: La Table Ronde, 2005). Conceptions of majoritarian, parliamentary democracy and of representative ‘rational representation by political élites’ often assume people to act as rational agents rather than as sensible maximizers of their self-interests and ‘slaves of their passions’ (cf DHume, *A Treatise of Human Nature*, 1740). Constitutional and cosmopolitan conceptions of democracy emphasize the limited reasonableness and bounded rationality and control of individuals over oneself; the conscious, human reasoning is often distorted by unconscious biases, passions and limited understanding of the social ‘rules of the game’, as illustrated by the financial crises since 2008. The ‘multilevel constitutionalism’ endorsed in this study criticizes the authoritarian ‘Westphalian conception’ of human beings and of their human nature as illegitimate and a ‘pretence of knowledge’ (cf FA Hayek, *New Studies in Philosophy, Politics,*

individual rights of 500 million EU citizens, multilevel regulation of IEL in the twenty-first century requires a new ‘reflective equilibrium’¹² with due regard to the human rights obligations and constitutional restraints adopted by all UN member states. This book argues that more effective supply of interdependent public goods in the twenty-first century requires ‘constitutionalizing IEL’, notably by stronger legal and judicial protection of cosmopolitan rights in multilevel, economic governance in order to better protect human rights, democratic governance, transnational rule of law and consumer welfare. Human rights and economic cosmopolitan rights set incentives for reconciling the often selfish struggles characterizing the ‘human condition’ and global competition by institutionalizing ‘public cosmopolitan reason’ as defined by democratic legislation, participatory democracy and judicial review of governmental restrictions of individual rights at the request of citizens. Can the prevailing, mercantilist ‘*government/producer partnership model*’ dominating multilevel trade, investment, financial and environmental governance be transformed into a constitutionally more limited, more decentralized and more legitimate ‘*cosmopolitan democracy model*’ providing for more effective legal and judicial protection of all general citizen interests?

THE LEGITIMACY CRISIS OF IEL

UN human rights treaties and worldwide IEL treaties continue to evolve as separate legal regimes without explicit coordination, as illustrated by the lack of any references to human rights in the IMF, World Bank, GATT and WTO Agreements. The ‘intuitive, unconscious fast thinking’¹³ of most human rights lawyers, economic lawyers and diplomats remains that the complexity of IEL should not be further complicated by linking IEL to the complexities and different legal culture of human rights law (HRL). This book emphasizes the need for ‘slow constitutional thinking’ challenging ‘legal fragmentation’: market economies, democratic politics and IEL as ever more important instruments for reducing unnecessary poverty need to be justified and ‘constitutionalized’ in terms of human rights and other ‘principles of justice’. The apparent ‘governance crises’ in international monetary, financial, trade and environmental relations are increasingly perceived by citizens as a ‘legitimacy crisis’ challenging the ‘Westphalian conceptions’ of IEL. Instead of responding to citizen demand for more jobs, higher salaries and prevention of climate change, international economic institutions increasingly alienate citizens by imposing economic austerity programmes and failing to protect international public goods demanded by citizens. Worse, due to the delegation of vast foreign policy powers to executive institutions and the inadequate transparency and parliamentary control of multilevel governance, parliamentary, participatory and deliberative democracy at local and national levels are increasingly undermined without ‘compensatory citizens’ rights’ to transnational democratic participation (as provided for in Articles 9–12 TEU)

Economics and the History of Ideas (London: Routledge, 1978) chapter 2) and of ‘social engineering’ capacities that are politically naïve.

¹² Cf J Rawls (2001) 29–32.

¹³ On the distinction – as two dialectic thinking processes characteristic of human rationality – of ‘unconscious, intuitive fast thinking’ from ‘conscious slow thinking’ based on deductive reasoning double-checking the cognitive biases of expert intuition, see D Kahneman, *Thinking, Fast and Slow* (New York: Allen Lane, 2011).

and to transnational ‘cosmopolitan self-governance’ (as protected in the EU Charter of Fundamental Rights). As discriminatory trade restrictions and subsidies tend to redistribute income among domestic groups, discretionary trade and financial policies are increasingly shaped by rent-seeking interest groups at the expense of general consumer welfare. In contrast to the ‘community vision’ of EU law protecting both national and ‘EU citizenship’ (Article 9 TEU) as well as democratic representation by national parliaments and by the European Parliament (*cf* Articles 10, 12 TEU), the ‘intergovernmentalism’ of worldwide institutions does not even aim at complementing individual and democratic self-governance of citizens. Government representatives and specialized interest groups often collude in functionally specialized, international organizations without adequate democratic accountability of diplomats *vis-à-vis* general citizen interests (eg, in terms of general consumer welfare and human rights) and members of national parliaments. From the perspective of most citizens focusing their democratic participation and attention on local and national politics, the social legitimacy of distant, intergovernmental organizations tends to be perceived as even weaker than their limited, *normative* democratic credentials (eg, based on parliamentary ratification of international treaties establishing international organizations).

Lawyers, economists and political scientists disagree on the appropriate legal, economic and political methodologies for interpreting, applying, developing and evaluating rules of IEL. The ‘dual nature’ of modern national and international law – as legal systems composed not only of positive legal rules and practices, but also of moral ‘principles of justice’ as explicitly recognized in human rights law, national constitutions, the UN Charter and general international law – is often neglected in multilevel economic governance and in the dispute settlement practices of international economic courts and arbitral tribunals. For instance, in Europe’s current ‘sovereign debt’ crisis, many politicians and economists call for ‘financial solidarity’ without regard to the prohibition of ‘bailouts’ in Article 125 TFEU and the ‘moral hazards’ that contributed to the banking, financial and sovereign debt crises. Many ‘constitutional problems’ of IEL – such as the relations between ‘rules’ and ‘principles’, or between producer-driven economic regulation and ‘courts of justice’ reviewing the ‘rules of recognition’ of IEL and the legal consistency and ‘proportionality’ of regulation – remain ‘under-theorized’. The more government representatives and ‘rent-seeking’ interest groups perceive IEL as a power-oriented instrument for income distribution by means of regulation, the more civil society challenges the democratic legitimacy and ‘principles of justice’ of economic regulation for the benefit of powerful industries, for example in case of subsidies for, and ‘bailouts’ of banks, automobile and aircraft industries.

Human rights and democracy require public justification of legal rules and governance institutions and their support by the ‘public reason’ of citizens. The competing legal, economic and political conceptions of IEL reflect diverse approaches to justifying economic rules and governance practices. The rules of the 1994 Agreement establishing the WTO affect the individual lives and welfare of billions of producers, workers, investors, traders and consumers all over the world. Yet, most government representatives, international civil servants, economists, lawyers and political scientists interpreting, applying and negotiating WTO rules inside the WTO headquarters at Geneva have never read the 30,000 pages of WTO treaty rules and more than 50,000 pages of WTO dispute settlement reports. Their views on what the WTO Preamble calls ‘the basic principles and objectives underlying this multilateral trading system’ tend to be diffuse and

contested. For example, the main entrance to the WTO's Centre William Rappard at the Lake of Geneva is flanked by two statues representing 'peace' and 'justice', the two central objectives and justifications of legal systems since ancient times. Even though the sculptor positioned the statues on either side of the entrance door in order to remind all people entering the building of the human ideals of justice and peace,¹⁴ I met only a few people – during my 30 years as legal advisor inside the Secretariat of the GATT 1947 and the WTO – interested in exploring the relationships between world trade law, peace and justice, a perennial problem already identified in the publications by Ambassador William Rappard during the 1930s as one of the major causes of the breakdown of the world trading system ushering in the Second World War.¹⁵ Outside the WTO, for instance in the 2005 World Summit Outcome, world leaders 'acknowledge that peace and security, development and human rights are the pillars of the UN system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing'.¹⁶ European citizens likewise acknowledge the achievements of the 1957 Treaty establishing the European Economic Community (EEC) not only in terms of historically unprecedented economic welfare and multilevel constitutional protection of fundamental rights of citizens. They value the Treaty also for having evolved into the most effective 'peace treaty' of all times protecting rule of law and 'democratic peace' far beyond the 27 member states of the EU, thereby putting an end to the periodic wars in Europe up to the Second World War. EU law illustrates the systemic importance of mutually beneficial IEL for the collective supply also of *non-economic* 'public goods' like transnational rule of law and peaceful cooperation for the benefit of citizens and their human rights.

By committing itself to a 'competitive social market economy' based on respect for human rights, rule of law and democratic constitutionalism (*cf* Articles 2–3 TEU), European economic integration law contributed to empowering the now 500 million EU citizens as legal subjects of human rights, constitutional rights, cosmopolitan economic rights and 'democratic principals' of multilevel economic governance inside the EU. The right of citizens to justification of governmental restrictions of individual freedoms can

¹⁴ *cf* the explanations of the statues by their sculptor: L Jaggi in *Centre William Rappard. Home of the World Trade Organization* (WTO: Geneva, 2011) 34. Instead of representing 'justice' in the traditional way as a blind-folded woman holding a scale and a sword, the artist sculptured 'justitia' holding a dove (representing truth) and checking a serpent (symbolizing lying and deceitfulness) with her feet. On the history of the iconography of justice see J Resnik and D Curtis (eds), *Representing Justice. Invention, Controversy and Rights in City-States and Democratic Courtrooms* (New Haven: Yale University Press, 2011).

¹⁵ The International Chamber of Commerce (ICC) was founded in the wake of the First World War with the explicit task of promoting 'world peace through world trade', economic growth, job creation, prosperity and peaceful international economic cooperation, *cf* F Lehmann and JP Lehmann (eds), *Peace and Prosperity through World Trade* (Cambridge: CUP, 2010). Also the WTO publication '10 Benefits of the WTO Trading System' mentions as the first benefit: 'The system helps to keep the peace'. 'The WTO trading system plays a vital role in creating and reinforcing . . . confidence. Particularly important are negotiations that lead to agreement by consensus, and a focus on abiding by the rules' (WTO, 2009) 2. The conference book edited by P Ala'li, T Broude and C Picker, *Trade as Guarantor of Peace, Liberty and Security?* (ASIL, 2006) focuses on the effects of trade and economic integration on the emergence of wars and armed conflict and the development of international economic law as a positive tool in promoting peace. The role of commerce as a driver not only of 'sociability' and norm-structured interactions, but of colonialism and imperialism was already discussed by the founding fathers of the Westphalian system of 'international law among states' like Grotius, Hobbes and Pufendorf, *cf* B Kingsbury and B Straumann, 'State of Nature versus Commercial Sociability as the Basis of International Law' in S Besson and J Tasioulas (eds) (2010) 33–52. For interdisciplinary analyses of the historical, economic, political and legal foundations of modern IEL see Petersmann (1991).

¹⁶ UN General Assembly Resolution A/Res/60/1, 2005 World Summit Outcome, para 9.

be seen as one of the most basic human rights of crucial importance for effective enjoyment of other human rights such as access to justice and democratic participation.¹⁷ Many IEL treaties – also beyond EU law – offer more legal and judicial guarantees for transnational freedom and non-discriminatory treatment in international cooperation among citizens than non-economic agreements, including UN human rights conventions focusing on protection of human rights *inside* domestic jurisdictions without offering effective judicial remedies at international levels. Yet, in the Bretton Woods and WTO Agreements, rule of law, ‘justice’ and human rights are nowhere mentioned. The prevailing paradigms of ‘member-driven governance’ and economic ‘utilitarianism’ (ie, focusing on economic ‘efficiency’ and welfare-maximization) prompt WTO diplomats and economic lawyers to shun questions of justice and human rights in international economic regulation. Also, philosophy books rarely explore the ‘justice dimensions’ of IEL and the legal justifiability of moral claims that international law violates ‘the human rights of the poor’.¹⁸ Freedoms from hunger and from unnecessary poverty are recognized as human rights in ever more constitutional democracies and in a few international conventions (eg, on human rights and food aid). Yet, their effective protection in IEL and in many LDCs remains a cosmopolitan dream.¹⁹ UN human rights law offers inadequate remedies for overcoming power-oriented ‘Westphalian conceptions’ of ‘international law among sovereign states’ in order to protect basic human needs more effectively. Do the legal impediments to enforcing obligations of justice at the global level justify the conclusion that there can be no such legal obligations?²⁰ Can IEL be an effective instrument of governance without offering convincing answers to the increasing challenges of its input and output-legitimacy?

Diplomats and lawyers involved in intergovernmental economic regulation often justify their pragmatic neglect for the ‘justice dimensions’ of IEL by the need to avoid complicating the negotiation, interpretation and application of economic rules by perennial controversies about justice. Can such ‘rational ignorance’ be justified by ‘realist’ claims that international economic relations remain in an anarchical ‘Hobbesian state of nature’ where morality and legal restraints of ‘state sovereignty’ risk endangering national interests in foreign policy discretion and maximizing national power?²¹ Does the often arbitrary income redistribution by means of illegal trade protectionism, subsidies, restrictive business practices and selfish financial practices²² refute pragmatic propositions that questions of morality should be left to individuals? Can international economic regula-

¹⁷ cf R Forst (2007); J Neyer, ‘Justice or Democracy? Power and Justification in the EU and other International Organizations’ in R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond* (Antwerp: Intersentia, 2010) 33–47.

¹⁸ cf T Pogge, ‘Recognized and Violated by International Law: the Human Rights of the Poor’ (2005) 4 *Leiden Journal of International Law* 717–45. On Pogge’s neglect of basic principles of international law in his morally justified criticism of IEL see: R Howse and R Teitel, ‘Global Justice, Poverty and the International Economic Order’ in Besson and Tasioulas (eds) (2010) 437–49; P Emerton, ‘International Economic Justice: Is a Principled Liberalism Possible?’ in S Joseph, D Kinley and J Waingymer (eds) (2009) 133 ff.

¹⁹ cf T Pogge, *Freedom from Poverty as a Human Right: Who Owes What to Whom?* (New York: OUP, 2007); C Häberli and B Karapinar (eds), *Food Crisis and the WTO: World Trade Forum* (Cambridge: CUP, 2010).

²⁰ cf T Nagel, ‘The Problem of Global Justice’ (2005) 33 *Philosophy and Public Affairs* 113–47.

²¹ For a description and convincing rejection of allegedly ‘realist state of nature arguments’ see A Buchanan (2004) 29–37.

²² Examples of such practices include sales of complex financial derivatives with unjustified ‘triple A ratings’, fraudulent investment funds based on ‘Ponzi/Madoff schemes’, privatization of profits (eg, by means of excessive bonuses for excessive risk-taking) and ‘socialization of losses’ (eg, by means of public bailouts) by ‘banks that are too big to fail’ and elude effective regulation.

tion be justified in terms of human rights and democratic self-government?²³ Does the right to popular self-determination include responsibilities limiting cosmopolitan duties of international assistance, as suggested by Rawls' refusal to extend the 'principles of justice' inside constitutional democracies to international law and non-liberal people that do not struggle for defending their human rights against authoritarian traditions and abuses of power? Does international law adequately protect citizens against illegitimate rulers abusing the 'borrowing privilege' and 'resource privilege' of states by borrowing on behalf of the country and wasting its natural resources at the expense of the domestic population? Answering such questions about the legitimacy of IEL raises deeper questions concerning international law and its relationships to domestic legal systems, especially concerning the role of citizens as subjects of international law, their human, constitutional and cosmopolitan rights in IEL, and the role of 'peoples' (rather than only states) and individuals as subjects of 'international justice'.

This study argues that the human rights obligations of all UN member states require reinterpreting and redesigning IEL for the benefit of citizens and their reasonable self-interests in more effective protection of human rights and other, national and international public goods. The classical international law principle of 'sovereign equality of states' (Article 2 UN Charter) must be interpreted in conformity with the rights to 'popular sovereignty' and 'individual sovereignty' (eg, as defined by human rights) in order to empower citizens to assume their individual and democratic responsibilities to respect, protect and fulfil human rights more effectively in the worldwide division of labour among producers, workers, investors, traders and consumers. Yet, in contrast to Rawls' *Theory of Justice* for an international *Law of Peoples*,²⁴ the individual and democratic responsibilities of citizens for their individual and social welfare do not justify neglecting cosmopolitan rights and obligations in IEL. As illustrated by the unnecessary poverty of so many people in LDCs, the prevailing 'Westphalian conceptions' of 'international law among sovereign states' fail to protect citizens against widespread abuses of foreign policy powers and under-supply of international public goods. The increases in consumer welfare and transnational rule of law made possible by regional and worldwide trade rules – as illustrated by the peaceful creation of common markets among the 30 member states of the European Economic Area (EEA) and among the four Chinese customs territories (the People's Republic of China, Hong Kong, Macau and Taiwan) – illustrate the 'interdependence' of national and international public goods: had China, rather than withdrawing from its GATT membership in 1949, complied with GATT rules since 1948, the impoverishment of hundreds of millions of Chinese citizens could have been avoided. Similarly, stronger protection of the economic welfare and human rights of billions of citizens in today's globally integrated world economy depends on whether IEL will succeed in regulating the 'collective action problems' of a mutually beneficial world trading, financial, environment and development system more effectively. This introduction gives an overview of the main normative assumptions and conclusions of chapters I to VIII of this study.

²³ cf P Lamy, 'Crisis is opportunity to restore coherence in global economic governance', lecture at the UN Office in Geneva (8 December 2010) (<http://www.wto.org>) 3: 'The global governance that the world needs cannot be severed from local governance roots. There is no shortcut to global coherence via our international institutions, all too often perceived by citizens as remote or obscure, even if it is their governments that are running them'.

²⁴ cf J Rawls, *Law of Peoples* (1999).

METHODOLOGY AND NORMATIVE FOCUS ON THE DUAL NATURE
OF LEGAL SYSTEMS

The term *legal methodology* is used here as referring to the respective conceptions of the sources and ‘rules of recognition’ of law, the methods of interpretation, the functions and systemic nature of legal systems like IEL, and of their relationships to other areas of law and politics. This study analyzes both the *normative dimensions* of IEL (eg, as an ‘overlapping plurality’ of diverse, national and international legal orders based on common principles) as well as the *social-political dimensions* of IEL as being based on law-creating practices of social and political institutions.²⁵ The normative dimensions are being discussed not only from *constitutional perspectives* (eg, of ‘courts of justice’) and *functional-instrumental perspectives* (eg, of political regulators) based on legal positivism and related ‘theories of justice’; the economic objectives and social dimensions of IEL also require analyzing ‘law in context’, notably from *economic perspectives* (eg, focusing on economic efficiency and ‘optimal policy instruments’) and *social-political perspectives* (eg, focusing on ‘public choices’ and ‘public reason’). As no single author can cover all the fields of IEL, modern textbooks of IEL tend to be co-authored by several lawyers who often avoid clarifying their diverse legal methodologies and conceptions of the normative legitimacy of international economic rules. Most textbooks of IEL focus on *describing* the increasingly complex transnational economic rules and institutions, *interpreting* these rules and *explaining* specific regulatory problems. For instance, as competition, trade and most other IEL rules aim at promoting economic efficiency, most textbooks of IEL focus on the consistency of IEL with the underlying theories of economics, state sovereignty and public international law. Even if justice is recognized as a central problem of IEL – for instance, in discussions on whether international arbitration should be legally conceived as (i) a component of a single national legal order (assimilating the arbitrator to a national judge exercising the judicial function within the national legal order of the seat of the arbitration), as (ii) being anchored in a plurality of national legal orders (eg, of those states recognizing and enforcing international arbitral awards) or (iii) as an autonomous ‘transnational law merchant’ and ‘arbitral legal order’ offering legal services and ‘international justice’ to the business community – legal problems should not be seen as a question of ‘truth’, but rather in terms of which legal conception helps to resolve the regulatory problems most efficiently, effectively and legitimately.²⁶ One major hypothesis of this study is that rights-based ‘cosmopolitan conceptions’ of IEL have proven – empirically as well as normatively – to protect human rights, consumer welfare and other ‘public goods’ more effectively and more legitimately than state-centred ‘Westphalian conceptions’ of IEL.

This study suggests that the obvious failures of UN law and of large parts of IEL to realize their agreed treaty objectives require more *normative, conceptual* and *context-*

²⁵ This constant interaction between ‘law as a legal order’ and ‘law as legal practices’ is emphasized by ‘critical legal positivism’, according to which law and its legal changes should be examined on (1) the surface level of positive law, (2) the legal culture, and (3) the deep structures of law; cf K Tuori, *Critical Legal Positivism* (Aldershot, 2002).

²⁶ cf E Gaillard, *Legal Theory of International Arbitration* (Leiden: Nijhoff Publishers, 2010). As explained by R Alexy, ‘The Reasonableness of Law’, in G Bongiovanni, G Sartor and C Valentini (2009), 5–15, reasonable judgments and justice (eg, in the sense of reasonable justification) can be perceived as the equivalent in normative legal sciences to truth in the natural sciences.

tual analysis of IEL rather than mere *description*, *formalistic interpretation* and *economic* analysis of IEL rules. For instance, there is a need for reviewing the often implicit ‘Westphalian preconceptions’ of IEL, for example, of judges and courts as – in the famous words of Montesquieu – mere ‘*bouche de la loi*’ limited by the consent and ‘sovereignty’ of states even if the latter are represented by non-democratic rulers and use their regulatory discretion in welfare-reducing, arbitrary ways. Many fields of IEL are perceived from competing *private* and *public law perspectives*, for instance either as ‘dialectical Hegelian progress’ from power-oriented nationalism and bilateral agreements (eg, on trade, investments and related payments) towards multilateral safeguards of common interests (eg, in WTO law and investment arbitration) or, alternatively, as ongoing ‘Marxian struggles’ of conflicting interests (eg, if bilateral trade and investment agreements are perceived as reciprocal concessions in order to seek competitive advantages vis-à-vis third countries). Depending on such often unstated preconceptions, the interpretation of IEL rules – for instance, of ‘fair and equitable treatment’ (FET) obligations in bilateral investment agreements (BITs) – may differ depending on whether BITs are perceived as emerging multilateral standards of customary international law or as reciprocal concessions deviating from customary international law standards.²⁷ The *private law* and *public law dimensions* of IEL and human rights law are often inseparable. For instance:

- human rights protect both private and public autonomy;
- most economic transactions among citizens take place from a *private law perspective* of traders, producers, investors and consumers and derive their value from respect for ‘normative individualism’;
- also investment law and investor–state arbitration have both *public* and *private law* dimensions, whose dialectic evolution may be viewed positively (eg, as provision of ‘international justice’ through private arbitration services based on progressive ‘multilateralization’ of bilaterally agreed standards) or negatively (eg, as power struggles for imposing conflicting interests by avoiding national and international public law courts as well as ‘publicness’, *amicus curiae* briefs, precedents, systemic consistency and appellate review in arbitrating particular investment disputes).²⁸

Hence, in investor–state arbitration, the legal distinction between ‘treaty breaches’ (eg, of ‘fair and equitable treatment’ obligations) and ‘contract breaches’ (eg, of ‘corporate social responsibilities’ as recognized in the 2006 ‘Equator Principles’ applied by the World Bank and IFC), or between ‘public interests’ (eg, as defined by human rights) and private ‘legitimate expectations’ of investors (eg, in case of privatization of essential water, health and electricity services), must go beyond dogmatic ‘public-private law divides’. In commercial arbitration, for instance, the constitutional limits of private

²⁷ On the interrelationships between conceptions of IEL and legal methodology see, eg, A Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’ (2011) 14 *JIEL* 469–03, citing (at 483) the NAFTA/UNCITRAL arbitration award of 8 June 2009 in *Glamis Gold Ltd v USA*: ‘those treaties with fair and equitable treaty clauses that expand upon, or move beyond, customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the Vienna Convention’; ‘those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom’ (para 606).

²⁸ cf S Wilske and M Raible, ‘The Arbitrator as Guardian of International Public Policy? Should Arbitrators go beyond Solving Legal Issues?’ in CA Rogers and RP Alford (eds), *The Future of Investment Arbitration* (Oxford: OUP, 2009) 249–72.

party autonomy and of the freedom of arbitrators must be determined in conformity with human rights and public order.

This study describes the *historical evolution* and ever more complex ‘positive law thicket’ of multilevel regulation of international movements of goods, services, persons, capital and payments often only by means of short surveys (eg, in the 25 tables). All eight chapters of this book focus on methodological, normative and regulatory problems of multilevel economic governance, for instance by analyzing the input-legitimacy and output-legitimacy of IEL in terms of human rights and other ‘principles of justice’. IEL is conceptualized and justified primarily from a cosmopolitan citizen perspective as a system of norms and legal practices in order to promote not only economic efficiency and ‘sustainable development’, but also the fulfilment of the human rights obligations of UN member states and democratic self-government. The study aims at combining rights-based, communitarian and utilitarian conceptions of economic law and of *practical reason* in view of the ‘reasonable disagreement’ and only limited ‘overlapping consensus’ on the normative foundations of modern international economic regulation.

The methodological starting point of this study is legal positivism and a concept of IEL as being composed of private and public, national and international *systems* of legal norms, including ‘primary rules of conduct’ and ‘secondary rules’ of recognition, change and dispute settlement. This broad conception of IEL excludes the traditional, state-centric view of states as the only subjects of international law – an authoritarian view which often neglects the human rights of citizens, the dominant role of non-state actors in the worldwide division of labour and the role of civil society and courts in the ‘recognition’ and interpretation of rules of IEL. As explained by Hart, a conception of valid law is to be identified, inter alia, by the criteria provided in the rules of recognition and their interpretation by citizens, governments and courts demonstrating that a legal system is accepted as such. The recognition by social actors – and notably by dispute settlement bodies – of valid ‘law’ may also depend on conceptions of justice and other moral values justifying human rights.²⁹ Hence, IEL cannot be limited to treaties, customary and other general international law rules to which states have agreed. As discussed in chapter V, transnational commercial and investment law, and the modern content of the initially vaguely defined investor rights and investment protection standards, dynamically evolve in response to hundreds of national and international arbitral and other dispute settlement decisions ‘recognizing’, interpreting, clarifying and progressively developing rules and principles of IEL based on a de facto practice of judicial precedents.³⁰ The interpretation of WTO rules and of regional economic integration law is likewise often more determined by judicial jurisprudence than by guidance provided by the contracting states. The frequently systemic effect of economic adjudication is confirmed by the fact that states respond to arbitral jurisprudence by means of inter-

²⁹ cf HLA Hart (1994) 105–10, 128, 247, 250, 259.

³⁰ cf JP Commission, ‘Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence’ (2007) 24 *Journal of International Arbitration* 129, 148. The following finding in the ICSID Award of 30 April 2004 in *Waste Management v Mexico* (Case No ARB/00/3) para 98, is illustrative of arbitral interpretations focusing on previous arbitral precedents rather than on the customary methods of treaty interpretation: ‘Taken together, the *SD Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process’.

governmental interpretations (eg, legally binding ‘Notes of Interpretation’ pursuant to Article 1131 NAFTA) or by amendments of international investment agreements (eg, by including footnotes into the recent US investment treaties with Columbia and Peru clarifying that the most-favoured-nation clause shall *not* apply to dispute resolution mechanisms). The fact that arbitral awards may be annulled by ICSID ad hoc Committees or – in the case of commercial arbitration (unlike ICSID arbitration)³¹ – may *not* be enforced by national courts on grounds of ‘public order’, is another illustration of the complex nature and frequent ‘dialectics’ (in Hegelian terms of thesis, anti-thesis and synthesis) of law-making and ‘system-building’ in modern IEL. In spite of the absence of a worldwide investment treaty coordinating the thousands of bilateral trade, investment and double taxation agreements, the bilaterally agreed most-favoured-nation and national treatment requirements, judicial clarifications and dispute settlements promote legal certainty and progressive systemic uniformity.³²

Due to the legitimate diversity of private and public, national and international legal systems, conceptions of IEL and the interpretation and delimitation of economic rules may legitimately differ depending on the particular legal and social context and social practices (eg, of ‘rule-following’ rather than judicial contestation). The UN Charter, UN human rights instruments and the customary law requirement of interpreting international treaties and settling international disputes ‘in conformity with the principles of justice’ and human rights obligations of all UN member states justify a normative conception of law as a social pursuit of ‘justice’ on the basis of principles and rules whose ‘right interpretation and application’ often remain deeply contested.³³ This dual nature of modern legal systems – ie, their legal distinction between factual dimensions of law (as represented by authoritative issuance and social efficacy of rules) and its ideal claims to justice and moral correctness which, in cases of extreme injustice, may affect the validity of positive rules – are of crucial importance for legal interpretation and dispute settlement, not only inside constitutional democracies,³⁴ but also in IEL regulating the transnational cooperation among citizens and their constitutionally limited governments and other agents. For instance, the transformation of human rights as moral rights (eg, as tacitly accepted in discourse and reasoning among human beings accepting one another as autonomous and equal ‘discursive creatures’) into positive rules of constitutional law, human rights law and IEL never obviates normative questions of how such positively agreed rules should be interpreted in order to actually realize and ‘optimize’ their objectives and agreed principles of administrating justice and protecting human

³¹ According to Arts 54 and 55 of the ICSID Convention, the only exception to enforceability of ICSID awards is state immunity. For non-ICSID arbitral awards, Art V(2)(b) of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’) allows the enforcement state to invoke its public policy against recognition and enforcement of arbitral awards.

³² cf SW Schill, ‘System-Building in Investment Treaty Arbitration and Lawmaking’ (2011) 12 *German Law Journal* 1083–110.

³³ cf EU Petersmann, ‘International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation’ in Joseph, Kinley and Waincymmer (eds) (2009) 69–90. On the distinction between the existence of a legal rule (ie, its autonomous norm-meaning as a sentence) and its interpretation and ‘right application’ see HG Gadamer, *Wahrheit und Methode* (Tübingen: Mohr, 1986) 314 (‘understanding always is applying’).

³⁴ cf R Alexy, ‘The Dual Nature of Law’ (2010) 23 *Ratio Juris* 167–82, who concludes that ‘legal positivism is an inadequate theory of the nature of law’ (at 180). Arguably, the inclusion of human rights and principles of justice into modern international and constitutional law also permits accommodating the dual nature of law within a broader concept of positive law.

rights.³⁵ Modern constitutional theory explains why protection of justice, human rights and legal security requires institutionalizing respect for reasonable ‘constitutional pluralism’, deliberative democracy and legal and judicial ‘balancing’ of competing rights supported by ‘public reason’.

The universal recognition of inalienable human rights, of collective rights to popular self-determination and the legitimate diversity of individual and democratic preferences (as reflected in the diversity of democratic constitutions) require mutual respect for legitimate ‘legal pluralism’ in private and public, national and international economic regulation. Both national constitutions as well as international law proceed from the presumption of ‘good faith’ implementation of international legal obligations in conformity with human rights and other principles of justice common to national and international law. Hence, respect for human rights and for self-determination of peoples requires also respect for the legitimate diversity of ‘constitutional pluralism’. Non-hierarchical legal relationships between diverse national and international legal sub-systems must be coordinated and clarified on the basis of ‘universalizable’ principles of justice, human rights, deliberative democracy, transnational rule of law and other common constitutional principles like judicial comity.³⁶ The borderlines between legal and non-legal rules of conduct dynamically evolve in response to legal and dispute settlement practices and struggles for human rights. Hence, international and ‘transnational’ legal practices – such as *lex mercatoria*, internet regulation, commercial and investor–state arbitration, elaboration of product and production standards by non-governmental organizations, UN and company codes of conduct for ‘social corporate responsibility’ and guidelines by international organizations (such as ILO core labour standards, IMF guidelines for ‘floating exchange rates’, for ‘sovereign debt restructuring’ and ‘sovereign wealth funds’, OECD guidelines for transnational corporations) – may be relevant context for interpreting IEL even if they remain ‘soft law rules’ challenging traditional interpretations of national and international rules without having ‘hardened’ yet into new positive law.³⁷

From a historical perspective, private and public, national, transnational and international economic regulation and ‘legal pluralism’ have existed in Europe for more than two thousand years, as illustrated by market and banking regulations in ancient Greece, the trade agreements among ancient city republics in the Mediterranean, the transnational law merchant (*lex mercatoria*) under Roman law, the ‘reception’ of the Roman *jus commune* by more and more European states and city republics since the Middle Ages and the legal and judicial cooperation in transnational organizations like the ‘Holy Roman Empire of the German Nation’ and its Imperial Court (*Reichskammergericht*) which rendered thousands of judicial decisions during the seventeenth and eighteenth centuries.³⁸ Ever since the English, American and French revolutions, the democratic challenges of the ‘Hobbesian paradigm’ of the absolute state and of its Westphalian paradigm of ‘international law among sovereign states’ have continued to lead to ever more new forms of international cooperation, international organizations, transnational

³⁵ On such ‘discourse justification’ and ‘existential recognition’ of human rights as moral rights, and on disagreement of whether human rights are correctly transformed into positive law, see Alexy, *ibid.*

³⁶ On ‘constitutional pluralism’ see, eg, M Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N Walker (ed) (2003) 501–37.

³⁷ On the controversial demarcation of ‘law’ and ‘non-law’ see, eg, GP Callies and M Renner, ‘Between Law and Social Norms: The Evolution of Global Governance’ (2009) 22 *Ratio Juris* 260–80.

³⁸ cf R Zimmermann, ‘Savigny’s Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science’ (1996) 112 *Law Quarterly Review* 576–605.

private regulation, arbitration and collaborative ‘private–public partnerships’ aimed at regulating market failures as well as governance failures.³⁹ The ‘fragmentation’ of private and public, national and international legal regimes is an inevitable consequence of respect for legitimate ‘legal pluralism’ rather than proof of irreconcilable, perennial conflicts as claimed by some lawyers. For instance:

- Kelsen’s conception of national law (including ‘private international law’ based on national choice-of-law rules) and international law as hierarchical legal orders commanding obedience on the basis of different ‘basic norms’ (*Grundnormen*) prompts many international lawyers to perceive competition among sovereign states as inherently power-oriented conflicts of legal authority and of conflicting conceptions of national and international law.⁴⁰
- Similarly, advocates of ‘critical legal studies’ (like Koskenniemi) and ‘radical pluralists’ justifying authoritarian decision-making in antagonistic relations among ‘friends and foes’ (like Schmitt) often focus on ‘strategic conflicts’ among competing legal regimes rather than on their legal commonalities.⁴¹
- Disciples of Luhmann’s ‘autopoietic systems theory’ perceive transnational regulation outside international treaty systems – like the *lex mercatoria* governing international trade transactions, the *lex sportiva* regulating international sports, transnational internet regulation or the emerging *lex culturalis* in transnational adjudication of restitution claims concerning stolen art and other illicit transfers of cultural heritage – as autonomously operating, de-nationalized social sub-systems with separate legal rationalities and law-creating institutions that are bound to clash with state-centred, national and international principles and rules.⁴²

Up until the First World War, the classical ‘Westphalian conceptions’ (eg, by Grotius) of international law among sovereign states did not envisage permanent international institutions. In response to the First and Second World Wars and the world economic and political crises during the inter-war period, UN law, IEL and regional human rights and economic agreements continue to provide for ever more international institutions and multilevel governance mechanisms aimed at limiting abuses of public and private power. Chapters II to IV emphasize that the more different actors – like free citizens, democratic institutions, national or international courts of justice, regulatory agencies, authoritarian rulers and their diplomats – pursue different interests and diverse interpretations of national and international economic rules, the stronger becomes the need for protecting inclusive decision-making and ‘public reason’ by means of constitutional rights and restraints. Rather than perceiving the ‘fragmentation’ of international legal regimes and the emergence of new, transnational regulatory regimes as a ‘paradise lost’, legal fragmentation often reflects inevitable, dialectic adjustments of the Westphalian system of ‘international law among states’ to the human rights obligations of all UN member states and the needs of their citizens. Chapters II and III use Kantian legal

³⁹ cf F Cafaggi, ‘New Foundations of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 20–49.

⁴⁰ cf H Kelsen, *The Pure Theory of Law* (Berkeley: California University Press, 1989). Even though Kelsen derives legal hierarchies from the basic norm of international law, the national lawmaker remains sovereign to decide on the normative content of national law.

⁴¹ cf M Koskenniemi, *La politique de droit international* (Paris: Pedone, 2007).

⁴² cf A Fischer-Lescano and G Teubner, ‘Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999–1046.

theory for explaining why the antagonistic nature of social relations calls for multilevel constitutional protection of equal freedoms in all human interactions at national, transnational and international levels, as acknowledged in UN human rights law. Also, the antagonistic evolution of national and international legal systems in the context of the Westphalian ‘international law among sovereign states’ – as illustrated by colonialism, the First World War, the breakdown of international economic, social, political and legal cooperation during the 1930s, the Second World War and decolonization – can be interpreted in conformity with Kantian legal and historical theory as having contributed to today’s universal acceptance by all UN member states of obligations to protect human rights and democratic self-government. ‘Legal fragmentation’ and ‘legal pluralism’ can provide building blocks for constructing needed ‘syntheses’ through ‘trial and error’ in order to reconcile diverse interests of citizens, non-governmental organizations, states and international organizations through adjustments of private and public, national, international and transnational legal systems. Chapters II to IV plead for citizen-oriented ‘cosmopolitan conceptions’ of IEL to strengthen legal and judicial protection of economic and social rights (eg, in human rights law, international trade law, investment, labour and economic integration law) on grounds of ‘principles of justice’, human rights, constitutional theory and the customary rules of international treaty interpretation.

HUMAN RIGHTS AND ‘CONSTITUTIONAL JUSTICE’ REQUIRE STRONGER
PROTECTION IN IEL OF EQUAL RIGHTS OF CITIZENS AND
TRANSNATIONAL RULE OF LAW

Law as an instrument of governance needs justification. In Europe and North America, there are longstanding traditions of justifying law not only in terms of ‘output legitimacy’ (such as peace and consumer welfare), but also in terms of ‘input legitimacy’ as defined by principles of justice, human rights and democratic self-governance. Investor–state arbitral awards recognize, for example, that investment protection ‘should not be granted to investments made in violation of the most fundamental rules of protection of human rights’.⁴³ In the EU and the EEA, the empowerment of citizens by individual rights and judicial remedies contributed to the decentralized enforcement of the common market rules on the basis of equal guarantees of fundamental rights against welfare-reducing, private and public, national and international restraints of competition and trade. Beyond EU and EEA law, however, international trade, financial, investment and environmental regulation remain dominated by government bureaucracies and their business advisors without adequate representation and legal protection of general citizen interests in consumer welfare and protection of fundamental rights. Diplomats in the International Monetary Fund (IMF) and the World Bank Group often justify their neglect for human rights and constitutional rights in intergovernmental economic regulation by the claim that the Bretton Woods Agreements focus on regulation of economic policy issues (such as monetary sovereignty over the issuance of money, the international regulation of exchange rates, conditional balance-of-payments and development assistance) that do not directly interfere with the private rights of citizens. The intergovernmental regulation of international movements of goods, services, persons, capital,

⁴³ *Phoenix Action Ltd v Czech Republic*, ICSID Arbitration Award of 15 April 2009 (Case No ARB/06/5), para 78. All investment arbitral awards cited are electronically available (eg, at: ita.law.uvic.ca/).

related payments and property rights, by contrast, often operates by imposing tariffs and other discriminatory taxes on transnational economic transactions and restricting liberty rights, private contracts and national regulations in more direct ways that may be legitimately challenged by citizens in domestic courts, regional economic courts or investor–state arbitration. This book argues that the universal human rights obligations of all UN member states call for stronger constitutional and judicial protection of individual rights of citizens in IEL whenever governments restrict or distort mutually beneficial cooperation among citizens across frontiers. Yet, just as equal civil, political, economic and social rights need to be mutually balanced and entail obligations also for individuals, the rights-based approach to IEL is not only aimed at promoting individual and democratic self-government; it is also perceived as the most effective constitutional restraint on abuses of public and private power and as an incentive for institutionalizing ‘public reason’ through ‘participatory’ and ‘deliberative democracy’ and legal and judicial clarification of ‘public reason’

The more than 50 years of GATT/WTO rules discriminating against competitive imports of cotton, textiles, agricultural products and other allegedly ‘unfair competition’ from LDCs – like the absence of GATT/WTO competition rules protecting consumer welfare and the inadequate regulation of international finance, investments and environmental pollution – reflect systemic ‘producer biases’ in intergovernmental economic regulation. As explained by ‘public choice’ theory, organized industries and government bureaucracies often collude in granting ‘protection rents’ in exchange for business support by elaborating trade and investment rules that – de jure or de facto – prevent citizens from holding governments legally, judicially and democratically accountable for welfare-reducing protectionism and violations of international economic agreements ratified by parliaments for the benefit of citizens. Diplomats from adversely affected LDCs often criticize such ‘protection biases’ of power-oriented, intergovernmental trade and investment agreements. Yet, they often also collude in opposing stronger legal protection of general citizen interests, for instance by opposing WTO competition and environmental rules, more transparent decision-making in the WTO, more effective involvement of parliaments and civil society in intergovernmental rulemaking, ‘human rights impact assessments’ and judicial protection in domestic courts of compliance with WTO law for the benefit of citizens. Beyond the WTO, the failures of the self-appointed ‘G20’ (composed of the EU and 19 countries with ‘systemic importance’ for the world economy) – which French President Sarkozy has presented as ‘the planetary governance of the 21st century’⁴⁴ – to predict, prevent and effectively regulate the world financial crisis since 2008, the crisis in the WTO’s Doha Round negotiations and the climate change crisis, likewise elude effective democratic, legal and judicial accountability with regard to citizens.

In the Uruguay Round of multilateral trade negotiations (from 1986 to 1994) ushering in the WTO Agreement, diplomats deliberately avoided any reference in WTO law to ‘rule of law’, ‘courts of justice’, democratic governance and human rights. During my work as secretary, member or chairman of numerous GATT and WTO dispute settlement bodies, I likewise observed the eagerness of diplomats and GATT/WTO lawyers to avoid referring to the customary law requirement of settling disputes and interpreting treaties ‘in conformity with principles of justice’ and the human rights obligations of states

⁴⁴ *Financial Times* (9 November 2010) 11.

(*cf* the Preamble and Article 31 VCLT). Reasonable people – even if they agree on the need for defending ‘justice’ and human rights – often disagree on how to define ‘principles of justice’, the human rights dimensions of international disputes, the legitimate functions of international ‘courts of justice’ and the legitimacy of IEL. Yet, respect for such ‘reasonable disagreement’ justifies neither treating citizens as mere objects of ‘international law among states’ nor the lack of effective legal and judicial remedies of citizens against arbitrary violations of intergovernmental rules. International economic transactions take place mainly among citizens in order to satisfy consumer demand for more, cheaper and a better quality of goods and services by enhancing division of labour, competition and productivity among producers. In the economic relations among the 30 EEA member states, IEL has been successfully transformed into a cosmopolitan ‘integration law’ protecting rule of law and equal rights for private economic actors rather than only rights and obligation for governments. European economic law suggests not only that legal and judicial consistency of economic rules with fundamental rights and judicial remedies of citizens is often a precondition for transnational rule of law and its democratic legitimacy; empowering citizens to actively participate in the decentralized enforcement of European economic and human rights law has also enhanced non-economic values like ‘access to justice’, ‘participatory democracy’ and civilian responsibility.⁴⁵ Hence, this book argues for a ‘cosmopolitan paradigm change’ in IEL: in the twenty-first century, international law must recognize citizens not only as legal subjects of human rights, but also of cosmopolitan rights to mutually beneficial economic cooperation across frontiers protecting citizens against arbitrary violation of transnational rule of law and other governance failures. Yet, politicians and diplomats have self-interests in limiting their legal and judicial accountability for their frequent violations of international rules and object to transforming intergovernmental economic rulemaking and adjudication (eg, in the WTO) into ‘cosmopolitan economic integration law’⁴⁶ protecting also rights of citizens that are enforceable in domestic courts. Civil society rightly criticizes secretive WTO negotiations, dispute settlement rulings and investment arbitration that disregard consumer welfare and privilege powerful producer interests. As intergovernmental ‘litigation strategies’ shaping the progressive development of IEL remain one-sidedly dominated by political and producer interests, protecting civil society by broader cosmopolitan rights could enable citizens and courts of justice to engage in ‘lawyering for social change’ and protect transnational rule of law for the benefit of citizens.⁴⁷

All eight chapters of this book discuss IEL with due regard to the human rights obligations of states and the customary law requirement of interpreting international treaties

⁴⁵ On the ‘emancipatory potential’ of ‘judicial activism’ for the benefit of citizen rights in the EU, the EEA and the ECHR and its impact on democracy in Europe see: TA Börzel, ‘Participation through Law Enforcement. The Case of the EU’ (2010) 39 *Comparative Political Studies* 128 ff; RA Cichowski, *The European Court and Civil Society. Litigation, Mobilization and Governance* (Cambridge: CUP, 2007).

⁴⁶ My publications have characterized IEL long since as ‘integration law’ in view of its ‘constitutional functions’ to go beyond reciprocal rights and obligations of states by protecting ‘trading rights’, investor rights, property rights, labour and human rights, consumer welfare and judicial remedies for the benefit of citizens engaged in the worldwide division of labour, as most visible in European economic law, *cf* EU Petersmann, ‘From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System’ (1998) 2 *JIEL* 175–98.

⁴⁷ On ‘lawyering for social change’ in the US – by developing litigation strategies with the aim of changing the legal order by generating precedents with systemic legal importance beyond the particular dispute – see M Galanter, ‘Why the Haves Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95 ff. Galanter also mentions the risk that organized ‘repeat players’ in the legal system have considerable strategic advantages over individuals who only occasionally appear before courts.

and settling related disputes 'in conformity with principles of justice' and human rights, as explicitly recalled in Article 1 of the UN Charter as well as in the Vienna Convention on the Law of Treaties (Preamble and Article 31 VCLT). The main 'thesis' of this study is that human rights require stronger legal and judicial protection of cosmopolitan rights against the abuses of public and private power in IEL. Yet, 'cosmopolitan conceptions' of IEL must respect the legitimate diversity of theories of justice as reflected in the reality of 'constitutional pluralism'. All comprehensive theories of justice are likely to remain contested among citizens and governments in view of their often conflicting self-interests and value preferences – in international relations no less than inside states. Hence, whenever citizens and governments invoke 'principles of justice' as relevant context for interpreting economic freedoms, property rights, preferential treatment of LDCs, 'public interest exceptions' in international economic treaties or the jurisdiction of economic courts, reasonable disagreement over 'principles of justice' must be respected. For instance:

- Regional 'market freedoms' (eg, in EU law), 'trading rights' (eg, in WTO law) and worldwide liberalization of market access may be justified not only on utilitarian grounds⁴⁸ but – as in this study – as imperfect, cosmopolitan extensions of Rawls' 'first principle of justice', defined in terms of equal rights of citizens to 'the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'.⁴⁹
- The worldwide and regional rules on preferential treatment of LDCs (eg, by means of non-reciprocal tariff preferences, financial and technical assistance, 'trade facilitation' and capacity-building) may be justified not only on grounds of morality, but as an international extension of Rawls' 'second principle of justice' calling for differential treatment of the poor.
- International labour and social rights (eg, of access to water and other essential goods and services) may be justified as human rights rather than only as legislative or administrative rights.
- The 'general exceptions' and numerous safeguard clauses in worldwide and regional economic agreements can be construed as reflecting the Rawlsian claim that – as national welfare depends more on a country's social institutions than on its natural resources – each people can and should agree on social and constitutional arrangements that provide its citizens with the natural and social goods essential for satisfying basic needs.⁵⁰ Arguably, this 'democratic responsibility principle' also supports the cosmopolitan claim made in this study that respect for human dignity (eg, in the sense of individual autonomy and responsibility) requires empowering citizens by rights-based regulation of international economic cooperation at national and international levels.
- The increasingly comprehensive compulsory jurisdiction of national and international courts for protecting rule of law in international economic cooperation, and the customary law requirement of interpreting international treaties and settling related disputes 'in conformity with principles of justice' and the human rights obligations of

⁴⁸ On utilitarian Anglo-Saxon theories of 'justice as efficiency' see R Posner, *Economic Analysis of Law*, 2nd edn (Boston: Little Brown, 1977) 10: 'Efficiency means exploiting resources in such a way that "value" – human satisfaction as measured by aggregate consumer willingness to pay – is maximized'.

⁴⁹ cf J Rawls (1971) 250 and ch VI, section 4.

⁵⁰ cf Rawls (1999) 37–38, 106–20 ('the crucial element in how a country fares is its political culture – its members' political and civic virtues – and not the level of its resources') 117) and ch VI, section 4.

states, can be seen as protecting ‘constitutional justice’ (eg, in the sense of access to independent ‘courts of justice’) as one of the oldest paradigms of legal systems.⁵¹

The International Court of Justice (ICJ) and the ECJ often refer to their judicial functions of ‘administering justice’ and justify judgments in conformity with ‘principles of justice’ as reflected, eg, in the guarantees of UN and European human rights law. Also domestic parliaments and civil society – for instance, during their democratic debates on whether intergovernmental economic agreements deserve parliamentary ratification – increasingly insist that intergovernmental rules must be legitimated through ‘deliberative democracy’. Yet, Habermas’ ‘ideal speech paradigm’ – according to which ‘just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses’⁵² – differs fundamentally from the frequent ‘protectionist collusion’ among parliamentarians and organized interest groups in parliamentary decision-making on economic rules and policies. Rather than deriving values from ‘deliberative democracy ideals’ or from realities of intergovernmental power politics, this study analyses and evaluates IEL – as explained in chapters II to IV – in the light of multilevel human rights law, Kant’s justification of multilevel constitutional protection of cosmopolitan rights, and Rawls’ explanation of the need for institutionalizing ‘public reason’ by constitutional, legislative, administrative and judicial protection of ‘principles of justice’.

IEL MUST REMAIN JUSTIFIABLE IN TERMS OF JUSTICE AND ‘PUBLIC REASON’ (RAWLS)

Citizens trying to understand the modern thicket of worldwide IEL find it increasingly difficult to evaluate its legitimacy, even if governments invoke ‘principles of justice’ for justifying claims to distribution, compensation and legal reciprocity. One purpose of this monograph is to explore ‘the wood hidden behind the trees’ by contributing to a more critical discussion of the basic economic, legal, political and philosophical principles governing the thousands of economic rules and regulations. Chapters II to VI discuss modern ‘theories of justice’ for IEL based on the insight of Rawls that the constitutional legitimacy and ‘public reason’ of democratic legal systems depend on constitutional, legislative, administrative and judicial rules and institutions protecting an ‘overlapping consensus’ on ‘principles of justice’ and rule of law among citizens and governments with often conflicting value preferences and self-interests.⁵³ Yet, in contrast to Rawls’ *Law of Peoples* (1999), this study argues in favour of a cosmopolitan conception of IEL focusing on multilevel protection of cosmopolitan rights. This normative claim – based on the incorporation of human rights into *positive law* – reflects the dual nature of the positive and ideal dimensions of modern legal systems and of the dialectic tensions between intergovernmental rulemaking in IEL and the human rights of citizens in UN member states.

The human rights obligations of all UN member states are based on universally recognized ‘principles of justice’ that require respecting, protecting and promoting indi-

⁵¹ cf EU Petersmann, ‘Human Rights, International Economic Law and “Constitutional Justice”’ (2008) 19 *EJIL* 769–98.

⁵² J Habermas (1996) 107.

⁵³ On the ‘four-stage sequence’ of legitimate rulemaking inside constitutional democracies like the US, see Rawls (1971) 195 ff.

vidual and democratic autonomy and legitimate diversity of citizens and people all over the world. Arguably, 'human rights is an account of what is right, not an account of what is good';⁵⁴ the legal empowerment of individuals by universal, inalienable, indivisible and interdependent human rights as constitutional safeguards against the historical experiences of abuses of political power reflects the same values that underlie common market and competition rules limiting abuses of public and private economic power so as to enable individuals to protect themselves against welfare-reducing market restrictions and injustice in the economy no less than in the polity. Multilevel human rights constitute equal rights of citizens as 'democratic principals', limit the power of all governments as 'agents', coordinate national and international legal regimes and promote 'principled' conflict resolution, legal coherence and synergies among national and international government policies for the benefit of citizens. American theories of justice and of the organization of the basic structure of national and international societies – like Nozick's theory of historical entitlement and Rawls' two basic principles of justice as fairness – tend to prioritize civil and political over economic and social rights like those acknowledged in the 1948 Universal Declaration of Human Rights (eg, Articles 23–26 UDHR) and in the 1966 International Covenant on Economic, Social and Cultural Rights (eg, Articles 9–13 ICESCR), which has not been ratified by the United States. European constitutional law, by contrast, protects the 'indivisibility' of human rights based on the insight that economic and social rights may be of no less existential importance for people and for interpreting and designing IEL than civil and political human rights.

Legal theories of justice legitimately vary depending on the individual and democratic preferences of people and their nationally and internationally agreed legal systems. This study uses Hart's concept of legal systems as a union of 'primary rules of conduct' and 'secondary rules' of recognition, change and adjudication; but it rejects Hart's outdated claim that international law 'resembles, (...) in form though not at all in content, a simple regime of primary or customary law' and, due to its incomplete 'secondary rules', a 'primitive legal order'.⁵⁵ In contrast to areas of international law where third-party adjudication remains an exception to the rule of 'auto-interpretation', modern IEL is characterized by an ever stronger role of national and international courts in clarifying, progressively developing and enforcing IEL and transnational rule of law in international economic cooperation among citizens, thereby transforming IEL into a more developed legal system than many other areas of international law. This is especially true for the diverse 'European conceptions' of IEL inside the EU and in the EEA, whose multilevel constitutional protection of fundamental rights and of transnational rule of law is, arguably, more developed than the 'constitutional nationalism' practised by most states outside Europe. The state-centred specificities of international law – in comparison with national legal systems – can be accommodated by respect for 'constitutional pluralism' with due regard to new forms of multilevel economic governance. The relationships between theories of justice and IEL must be clarified by interpreting IEL in the light of the human rights obligations and diverse constitutional obligations of governments and states with due regard to economic and social rights of the poor. As competition and conflicts among rights are a central constitutional problem in a world of limited resources, chapters V and VIII emphasize the need for constitutional and judicial protection of transnational rule of law

⁵⁴ M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2000) 48.

⁵⁵ Hart (1994) 214.

in the international division of labour among citizens based on ‘proportionality balancing’ of competing human, constitutional, economic and social rights.

As protection of human rights calls for a cosmopolitan conception of IEL, this study supports the ‘New Haven Approach’ advocating leadership by constitutional democracies and ‘courts of justice’ for a post-Westphalian conception of international law. The continued validity of much of the criticism of the legitimacy of international law in recent research – for instance, in Franck’s treatise on *Fairness in International Law and Institutions* (1995), Garcia’s research on *Trade, Inequality and Justice: Toward a Liberal Theory of Just Trade* (2003) and Buchanan’s study of *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004) – has been illustrated by the international financial and banking crisis that started in 2008. My focus on Kantian legal and constitutional theory, as well as on European experiences with multilevel judicial protection of constitutional rights and other constitutional restraints on multilevel economic governance, distinguishes this study from Anglo-American legal philosophies and practices. The ‘human rights approach’ to IEL advocated in this book aims at contributing to autonomous self-limitation of the ‘internal freedom’ of reasonable individuals as well as to the ‘constitutionalization’ of their ‘external, legal freedom’ by ‘principles of justice’ and other constitutional restraints promoting ‘public reason’. Arguably, the lack of such restraints during the financial crisis – as illustrated by perverse incentives for risk-taking and outrageous financial bonuses of bankers at the expense of taxpayers, private investors and consumers – was largely due to inadequate regulation of ‘market failures’ and of legal accountability of bankers and regulators ‘socializing losses’, for instance because banks were ‘too big to fail’ and regulators neglected ‘systemic risks’. Strengthening ‘countervailing rights’ for adversely affected citizens and other ‘constitutional restraints’ on abuses of public and private power is not only justifiable on grounds of justice. It offers also the most ‘realistic’ means for enhancing transparency and limiting governance failures by promoting legal, judicial and democratic accountability for selfish abuses of power. A major task of a cosmopolitan theory of IEL is to go beyond regulating ‘national self-interests’ and relations among state agents by extending constitutional safeguards to citizens for their transnational economic cooperation. Rather than remaining a matter of ‘natural law’ or of discovering ‘natural morons’⁵⁶ in an ideal ‘third world’ (beyond the physical ‘outside world’ and the psychological ‘inside world’ of human beings), clarifying cosmopolitan ‘principles of justice’ has become a task of interpreting positive law in conformity with the existing legal guarantees of human rights, popular self-determination and other constitutional restraints of governments.

⁵⁶ cf R Dworkin, ‘Objectivity and Truth: You’d Better Believe It’ (1996) 25 *Philosophy and Public Affairs* 87, 104: Objective moral reasoning need not embrace Platonic claims that moral values exist independently of subjective minds like ‘some special particles – morons – whose energy and momentum establish fields that at once constitute the morality or immorality, or virtue or vice, of particular human acts and institutions and also interact in some way with human nervous systems to make people aware of the morality or immorality or the virtue or vice’. Dworkin’s constitutional theory aims at explaining the implications for American law and politics of an essentially contractarian theory of constitutional rights that precede and stand above all government institutions and require them to protect these rights, apart from realizing other, more utilitarian tasks of promoting welfare and happiness.

GLOBAL PUBLIC GOODS THEORY AND THE UNDER-SUPPLY OF
'INTERDEPENDENT PUBLIC GOODS'

This book, as emphasized in its sub-title, differs from other books on IEL by its focus on constitutional and 'public goods' theories proceeding from the methodological premise that economic regulation needs to be justified also in terms of moral, political, constitutional and economic theories. Economists define 'public goods' by their 'non-excludable' and 'non-rival' use benefiting all citizens and preventing their commercial supply in private markets. As rules and institutions for public goods shape the infrastructure and welfare of states, the production, design, enforcement and justification of international public goods cannot be left to intergovernmental power politics and piecemeal engineering. The US proposals after the Second World War for a coherent set of Bretton Woods Agreements and the UN Charter focused on 'hegemonic leadership' and rights and obligations of state actors. This book claims that – as multilevel governance of interdependent international public goods has become the most challenging policy task in the twenty-first century – the current under-supply of international public goods requires embedding IEL into stronger constitutional, cosmopolitan and democratically justifiable foundations.

Economists and political scientists tend to distinguish three major varieties of public goods with different regulatory problems and 'production strategies'⁵⁷:

- (i) 'Single best efforts public goods' may be supplied unilaterally or 'minilaterally', for instance by investing in the development of medicines (such as polio vaccine) for preventing pandemics and by engineering technology for avoiding other potential catastrophes (such as 'geoengineering' as an option for preventing climate change).
- (ii) 'Weakest link public goods' may be undermined if one or a few state(s) (for example poor or 'failed states') do not cooperate, for instance in polio eradication as a global public good or in nuclear non-proliferation and control of other weapons of mass destruction.
- (iii) 'Aggregate efforts public goods' can be supplied only through collective action, which may not come about without incentives for cooperation and sanctions of non-cooperation. As discussed in chapter I, their collective supply tends to be confronted not only with numerous 'collective action problems' like 'free-riding' and other 'prisoner-dilemmas'. Global aggregate public goods also tend to be composed of numerous national and regional public goods and to interact with functionally related, other public goods. For instance, an efficient world trading system – which may be conceptualized as a non-rival and non-excludable public good beneficial for all consumers and trading countries (in contrast to the WTO or free trade agreements as 'club goods') – cannot properly function without a liberal (ie, liberty-based) legal and dispute settlement and international payments system (as 'intermediate public goods').

Distinguishing the different kinds of public goods and related regulatory problems may assist in designing the rules and institutions necessary for overcoming 'collective action problems'. For instance:

⁵⁷ cf S Barrett (2007) 22 ff.

- ‘Best shot public goods’ may be provided by private or public, national institutions (eg, research foundations for combating tropical diseases and promoting geoengineering) with little resort to international law and institutions (eg, for protection of patent rights, financial support, regulation of non-discriminatory access).
- ‘Weakest link public goods’ may require multilateral action (eg, authorization by the UN Security Council of humanitarian interventions into ‘failed states’) and multilateral regulation (eg, of non-proliferation of nuclear products) even if remedial interventions may be carried out by one single ‘hegemonic power’ (eg, US military intervention in Iraq in order to destroy alleged weapons of mass destruction). The financial and ‘sovereign debt’ crisis in the EU likewise illustrates how the regional public good of financial stability may be undermined by persistent violations of the EU fiscal and debt disciplines by a few irresponsible governments.
- ‘Aggregate efforts public goods’ tend to require multilateral treaties and institutions like the UN Charter for the protection of international peace, the IMF and WTO Agreements for the protection of a mutually coherent world trade and payments system, or multilateral agreements on limitation and supervision of environmental pollution. Why is it that some global public goods – postal services by the Universal Postal Union, telephone communications by the International Telecommunications Union – have in fact been protected long since?

This study focuses on ‘aggregate international public goods’ such as efficient monetary, trading, financial, investment, environmental and rule of law systems that tend to be composed of national and regional public goods and overlap each other in ever more complex ways. Chapters II to VI emphasize that ‘principles of justice’, cosmopolitan rights, constitutional law, democratic governance and other institutions protecting ‘public reason’ can be perceived as ‘intermediate public legal goods’ that are necessary for regulating and legitimizing global economic public goods, especially regarding:

- the constitution of international institutions with limited, delegated powers and ‘checks and balances’ protecting citizens;
- the distribution of rights, obligations, advantages and costs among cooperating states, non-governmental institutions, third states (eg, ‘free riders’) and individuals;
- the necessary cooperation among international institutions and coordination of their legal regimes (*cf.*, eg, Articles XII–XV, XVIII GATT on cooperation among the IMF and GATT in controlling balance-of-payments restrictions);
- their inevitable ‘prioritization’ (eg, in Article 103 UN Charter) and conflict prevention mechanisms in order to use scarce resources most efficiently;
- the design of decision-making procedures that reduce the collective action problems (eg, of voluntary rulemaking based on state consent, consensus or ‘single undertakings’), and promote ‘constitutional principles’ like transparency, accountability and rule of law;
- the peaceful settlement of disputes and sanctioning of non-compliance; and
- the coordination of interacting national and international legal regimes, for instance by legal harmonization and respect for national ‘margins of appreciation’.

Human rights and constitutional ‘principles of justice’ say little about the optimal legal design of national and international institutions. As reasonable people may never agree on any comprehensive theory of justice, this study engages extensively in com-

parative assessments of the relative merits of ‘constitutional’ and ‘institutional choices’, alternative procedures for revealing democratic and cosmopolitan preferences and legal and judicial safeguards and ‘balancing methods’. Chapters V and VIII emphasize the ‘constitutional functions’ of international courts for the peaceful settlement of disputes, judicial clarification of contested rules, protection of cosmopolitan rights and ‘institutionalization of public reason’. The analysis of more than a hundred national and international court judgments interpreting, clarifying and developing economic rules in the light of relevant constitutional principles and cosmopolitan rights illustrates that judicial decisions may be conceived also as a ‘single best effort public good’ which – for instance, through cooperation or non-cooperation among competing jurisdictions and ‘multilevel judicial governance’ in the context of regional economic and human rights conventions and investor–state arbitration systems – remains closely related to ‘aggregate effort public goods’. This book emphasizes that cosmopolitan rights and judicial remedies are necessary for ‘contestation’ and ‘countervailing restraints’ challenging the vast shift of additional, regulatory powers – as a result of globalization and of its transnational and global regulation – to the executive branches of states, multiple international institutions as well as to private actors with mobile economic resources.

Yet, the institutional safeguards for holding public and private international regulation legally and democratically accountable remain underdeveloped. This study argues that the various ‘enabling’, ‘limiting’, ‘distributive’ and ‘corrective’ functions of the law of international economic organizations raise corresponding questions of ‘constitutional justice’, ‘distributive justice’, ‘corrective justice’ and ‘transitional justice’ requiring coherent justifications and institutionalization of ‘cosmopolitan public reason’ (as discussed in chapters II to VI), notwithstanding the preferences of authoritarian rulers and their diplomats for utilitarian rather than constitutional justifications of IEL.⁵⁸ This study makes numerous propositions to reform the ‘constitutional’ and ‘cosmopolitan deficiencies’ in international trade and investment regulation, for instance by renegotiating the World Bank Convention establishing the International Center for the Settlement of Investment Disputes (ICSID) in order to make investor–state arbitration procedures more transparent and more coherent (eg, in case of multiple, simultaneous complaints in response to systemic economic crises like Argentina’s financial and sovereign debt crises in 2001). In most worldwide economic organizations, international economic regulation continues to be designed in close cooperation among governments and business without effective control by national parliaments, courts and civil society. In contrast to rulemaking inside constitutional democracies, intergovernmental rulemaking often lacks effective constitutional restraints, for instance by human rights, parliamentary and ‘deliberative democracy’ and judicial remedies of adversely affected citizens. The eight ‘GATT Rounds’ of multilateral trade negotiations from 1950 to 1994 were characterized by protectionist pressures on trade negotiators and regulators by ‘special interests’ from

⁵⁸ Even though my long-standing arguments for ‘cosmopolitan’ and ‘constitutional reforms’ of the GATT and WTO legal and dispute settlement systems (eg, in Hilf and Petersmann (eds) (1993) ch 1; Petersmann (1997), ch 1) have been criticized by GATT/WTO diplomats and by protectionist interest groups as too much constraining ‘state sovereignty’ and ‘realist state interests’, this book continues to be based on the ‘constitutional premises’ developed in my earlier books (notably in Petersmann (1991)), including my long-standing proposition to conceive of international institutions for the collective supply of interdependent, international public goods as a ‘fourth branch of governance’ which – like the legislative, administrative and judicial branches – require constitutional restraints and democratic legitimation to protect citizens against abuses of power.

agricultural, cotton, textiles, steel, pharmaceutical and other industries in developed countries. In view of the progressive ‘regulatory capture’ of national and intergovernmental lawmakers by powerful interest groups and their professional lobbies, a ‘package deal’ replacing GATT 1947 and the 1979 Tokyo Round Agreements by the 1994 WTO Agreement turned out to be the only political option for fundamental legal reforms of the world trading system. The failure of the 153 WTO members to reach consensus on new ‘Doha Development Round agreements’ during the Doha Round negotiations from 2001 has led to increasing criticism from environmental groups, human rights groups, public health organizations, labour unions and LDCs challenging ‘injustices’ and ‘imbalances’ of the world trading system.⁵⁹ In spite of worldwide criticism of the gap between the declared objectives of IEL and the realities on the ground, governments fail to agree on the needed economic, political, legal and institutional reforms. For instance, can the reality of ‘interest group politics’ in intergovernmental negotiations be overcome without using the ‘constitutional techniques’ that succeeded in limiting abuses of power and ‘regulatory capture’ by vested self-interests inside constitutional democracies, such as constitutional, institutional and competition safeguards of ‘general citizen interests’, ‘checks and balances’ and judicial protection of constitutional rights? How can national parliaments control more effectively global rulemaking? Should deficits in ‘democratic input legitimacy’ in the law of worldwide organizations be compensated by stronger judicial remedies for protection of human rights and rule of law by ‘courts of justice’? Are the traditional legal theories of ‘monism’ and ‘dualism’, or political ‘principal-agent’ conceptions of international organizations, appropriate for protecting human rights in multilevel economic governance? If the legitimacy of international law no longer depends only on state consent, but also on consistency with the multilevel human rights obligations of governments and respect for democratic self-determination, how should judges clarify the procedural and substantive ‘principles of justice’ underlying IEL, especially in intergovernmental disputes where governments often prevent adversely affected private parties from submitting *amicus curiae* briefs complaining of violations of human rights?

The 1944 Bretton Woods institutions and the 1948 Havana Charter for an International Trade Organization were negotiated on the basis of drafts provided by the US government. The failure of the US Congress to adopt legislation empowering the US government to conclude the Doha Development Round negotiations in the WTO and the UN negotiations on climate change prevention illustrate today’s lack of leadership by the United States for collective protection of ‘global public goods’. As discussed in chapter I, the globalization of markets, of the environment, of international law and communications requires not only new kinds of multilevel regulation of transnational ‘market failures’ and ‘governance failures’. The necessary delegation of limited legislative, administrative and judicial powers to intergovernmental organizations risks undermining democratic and judicial protection of rule of law and individual rights unless intergovernmental decision-making is constitutionally restrained by parliamentary control and judicial protection of individual rights. This requires multilevel constitutional theories recognizing the need for compensating the deficiencies of ‘constitutional nationalism’ by stronger

⁵⁹ cf D Zang, ‘Divided by Common Language: “Capture” Theories in GATT/WTO and the Communicative Impasse’ (2010) 32 *Hastings International & Comparative Law Review* 423–76; R Rosa Cedro and B Furtado Vieira, ‘John Rawls’ Justice as Fairness and the WTO: A Critical Analysis on the Initial Position of the Multilateral Agricultural Negotiations’ (2010) 3(2) *The Law and Development Review*.

‘constitutionalization’ of foreign policies and of multilevel governance of interdependent public goods.⁶⁰

THE NEED FOR RIGHTS-BASED REGULATION LIMITING THE
‘COLLECTIVE ACTION PROBLEMS’ IN IEL

Globalization continues to weaken the traditional forms of ‘constitutional checks and balances’ by national parliaments, limited delegation of powers to national governments and ‘courts of justice’ protecting the rights of citizens against abuses of public and private power. The ever greater impact of international relations on the domestic welfare of citizens requires new forms of multilevel governance of interdependent public goods and multilevel judicial protection of rule of law in the worldwide division of labour among more than 6 billion citizens. The worldwide crises of the international trading, financial and environmental systems confirm that neither the Bretton Woods Agreements nor the WTO Agreement (as a substitute for the stillborn 1948 Havana Charter for an International Trade Organization) effectively protect consumer welfare, ‘sustainable development’, human rights and democratic self-governance. The progressive liberalization and regulation of international trade and investments continues to evolve on the basis of bilateral, regional and worldwide agreements which – like the Bretton Woods and WTO agreements – usually refrain from referring to human rights. How should WTO bodies respond to the increasing criticism that WTO law and other areas of IEL are inconsistent with ‘principles of justice’ and the human rights of the more than one billion poor people living in WTO member countries without adequate access to food, water, sanitation and essential medicines? Does the worldwide recognition of ‘inalienable’ and ‘indivisible’ human rights constitute a new ‘cosmopolitan’ rather than ‘state-centred’ foundation of IEL? What are the legal consequences of the repeated recognition by all UN member states, since the Universal Declaration on Human Rights (UDHR) of 1948, ‘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’ (Preamble UDHR) for the worldwide regulation and governance of markets, competition, private property (as a precondition for private freedom), freedom of profession, freedom of association (including the right to strike), freedom of commercial opinion and the necessary legal limitations of economic freedoms to protect social justice and the environment?

This study analyzes ‘constitutional problems’ of IEL from the perspective of rational and reasonable citizens and their constitutional rights rather than from the perspective of governments. It challenges – from the perspective of human rights, constitutional democracies, economics and political ‘public choice’ theories – the normative legitimacy of the often non-transparent, inefficient and arbitrary ways of modern international

⁶⁰ On the need for protecting the collective human rights obligations of UN member states not only at national, but also at international levels see ch IV and ME Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: OUP, 2007). On the dependence of multilevel protection of human rights and of democratic self-governance on multilevel protection of transnational rule of law, see chs V and VIII as well as G Palombella and N Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009). On the ‘globalization of constitutional law’ and functionally limited ‘multilevel constitutionalism’, see chs II to V and F Venter, *Global Features of Constitutional Law* (Nijmegen: Wolf Legal Publishers, 2010).

economic regulation. Yet, it also takes into account that rational citizens in the 193 UN member states are unlikely to ever agree on any comprehensive theory of justice or of ‘global constitutionalism’ in international relations. IEL will continue to be driven primarily by economic rationality. Yet, it requires constitutional reforms protecting human rights, ‘democratic constitutionalism’ and peaceful resolution of the ubiquity of conflicts of interests ‘in conformity with principles of justice’, with due respect for legitimately diverse views of citizens and governments on how civil, political, economic, social and cultural rights should be mutually reconciled at national and international levels of governance. Chapters I to IV argue that – from the perspective of reasonable citizens – the ‘constitutional legitimacy’ of IEL depends primarily on its consistency with human rights and constitutional democracy rather than on utilitarian welfare arguments. The book’s normative claim – ie, that the ‘collective action problems’ in the supply of global ‘aggregate public goods’ can be overcome only on the basis of multilevel protection of cosmopolitan rights, transnational rule of law and respect for ‘constitutional pluralism’ at national and international levels – is strongly influenced by the revolutionary reforms of European economic law since the Second World War, not only within the EU and among the 30 member states of the EEA, but increasingly also in the more than 25 free trade agreements of the EU with ever more third countries in Europe and beyond (eg, Chile, Mexico and Korea).⁶¹ The rights-based, multilevel constitutional protection of a ‘social market economy’ in European law is bound to remain contested by citizens and governments with different preferences and diverse ‘constitutional experiences’, such as Anglo-Saxon democracies without constitutional protection of economic and social rights, Asian countries with Confucian traditions emphasizing social duties rather than individual legal rights and non-liberal countries.

THE NEED FOR COORDINATING LEGAL REGIMES ON THE BASIS OF ‘MULTILEVEL CONSTITUTIONAL PLURALISM’

This study claims that the prevailing conceptions of ‘international law among sovereign states’ and of international economics neither ensure collective supply of global public goods nor effectively coordinate the ever larger plurality of national, regional and worldwide legal systems in conformity with human rights and democratic constitutionalism. Contrary to the authoritarian beliefs of some human rights advocates, international market competition – as a citizen-driven, decentralized information and adjustment-mechanism for coordinating the autonomous actions of billions of producers, investors, traders and consumers participating in the worldwide division of labour – is an indispensable complement of human rights. Yet, contrary to the beliefs of Anglo-Saxon ‘market fundamentalists’, neither economic markets nor ‘political markets’ (democracy) can function efficiently and legitimately without

- ‘*enabling constitutions*’ empowering citizens and governments to collectively supply interdependent public goods;
- ‘*limiting constitutions*’ limiting the ubiquity of ‘governance failures’ and ‘market failures’ by rights-based regulation empowering adversely affected citizens and courts of justice to protect equal rights of citizens; as well as

⁶¹ cf European Commission, ‘Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU’s 2020 Strategy’ COM (2010) 612 (Brussels, 9 November 2010).

- functionally limited, *multilevel constitutional safeguards* for the collective supply of supplementary, international public goods and for reconciling competing, increasingly overlapping ‘partial constitutional regimes’ with due respect for ‘constitutional pluralism’. Some Anglo-Saxon common law theories argue that human progress is best achieved in private ‘common law societies’ by imposing as few restrictions as possible on ‘natural liberties’, rational utility maximization and self-regulating markets. This study proceeds, by contrast, from Kant’s assumption of the antagonistic nature and conflicts of interests dominating human competition, which call for multilevel constitutional protection of equal liberties and transnational rule of law in all human interactions at national, transnational and international levels. Protection of consumer welfare in the global division of labour depends on multilevel legal restraints of ‘market failures’, ‘governance failures’, ‘discourse failures’ and other conflicts of interests.

As inside constitutional democracies, a modern theory of IEL must analyze questions of rulemaking, administration, adjudication and compliance not only from the standpoint of governments, but from the perspective of citizens, their constitutional rights and the need for multilevel judicial protection of transnational rule of law. Just as democracies can remain stable over time only as a ‘constitutional democracy’ whose constitution, legislation, administration, adjudication and ‘deliberative democracy’ must be ‘anchored’ in an ‘overlapping consensus’ (Rawls) on ‘principles of justice’, so must citizen-oriented conception of IEL in the twenty-first century be ‘constitutionally anchored’ and justified by ‘principles of justice’ as defined by human rights, democratic constitutionalism and legitimate ‘constitutional pluralism’. Economic analyses of ‘market failures’ and ‘public choice’ analyses of ‘governance failures’ must be supplemented by ‘constitutional choice’ analyses of ‘constitutional failures’ and by ‘comparative institutional economics’ evaluating alternative decision-making processes, like citizen-driven market processes, political processes and judicial procedures.⁶²

IEL regulates transnational economic cooperation in incomplete ways in response to ‘demand for regulation’ by citizens, governments and non-governmental organizations adversely affected by ‘market failures’ or ‘governance failures’. Due to ‘rule-following’ and ‘Westphalian path-dependence’, intergovernmental regulation all too often continues focusing on reciprocal rights and obligations of governments without providing for legal, democratic and judicial accountability of governments vis-à-vis citizens. In the modern age of human rights and constitutional rights, authoritarian ‘law-as-command’ theories are no longer sufficient for justifying the validity of, and compliance with, international economic rules. Westphalian conceptions of ‘international law among states’ often fail to offer efficient and effective instruments for the collective supply of international public goods, as explained in chapter I. As the relevant ‘rules of recognition’ should be applied in conformity with human rights and other constitutional restraints of power, the interpretation and development of IEL may legitimately differ – as discussed in chapters II to IV – depending on the constitutional rules and conceptions of ‘justice’ prevailing in different jurisdictions. Chapters V and VIII discuss numerous case studies

⁶² cf the interdisciplinary constitutional, economic and ‘public choice’ analyses of multilevel economic regulation in Hilf and Petersmann (eds) (1993). On participation-oriented ‘comparative institutional analysis’ of alternative decision-making processes like markets, political processes and judicial procedures, see NK Komesar (1994).

where ‘courts of justice’ clarifying incomplete, often vaguely drafted and contested rules of IEL justified their decisions also in terms of human rights and other ‘constitutional principles’ like non-discriminatory treatment of citizens and ‘proportionality’ of government restrictions aimed at protecting and ‘balancing’ competing individual rights. Economic analysis of law, cost-benefit analyses and comparative ‘institutional choices’ (eg, between markets, political government interventions and alternative rules and institutions) risk offering an incomplete analysis of regulatory problems. Reviewing multilevel ‘constitutional choices’ for constituting, limiting and supplementing legislative, administrative and judicial powers and participatory rights of citizens has proven to be of crucial importance for the success of economic integration in Europe, for instance compared with the failures of many regional trade agreements in Africa and in the Americas to create non-discriminatory conditions of market competition. Justice – as the oldest paradigm of law – requires not only that IEL must remain justifiable in terms of principles of human rights, constitutional democracies and other ‘principles of justice’. Constitutional principles of justice will remain effective only to the extent they are supported by legislatures, administrations, courts and citizens as shared ‘public reason’. Respect for the legitimate diversity of moral, legal, economic and political theories of justice suggests that the legitimacy and appropriate design of IEL in the twenty-first century have become more complex than most theories (eg, on ‘global administrative law’ and ‘conflicts law’ conceptions of IEL) admit. ‘Constitutional pluralism’ emphasizes the need for respecting this legal complexity without indulging in any utopia of a ‘common philosophy’ on ‘global constitutionalism’.

THE STRUCTURE OF THIS BOOK

The book begins by discussing *normative questions* which tend to be neglected by legal practitioners, diplomats and civil servants working in national ministries of foreign affairs and worldwide economic organizations like the Bretton Woods institutions, the UN Conference on Trade and Development (UNCTAD) and the WTO.

Chapter I explores how IEL should be designed in order to protect more effectively ‘global aggregate public goods’ (like a mutually beneficial trading, financial and environmental system preventing climate change) that are beneficial for all citizens but can neither be supplied by individual states nor through private markets because their benefits are ‘non-excludable’ (eg, they cannot be withheld practicably from one individual without withholding them from others) and ‘non-rival’ (eg, their consumption by one individual does not diminish their availability for others). Chapter I claims that the current lack of coherent legal and political strategies for transforming national and regional into global public goods requires ‘integrating’ the different private and public, national and international conceptions of multilevel economic regulation to improve the problem-solving capacity of IEL and its ‘constitutional functions’ for empowering citizens to increase their individual and social welfare through mutually beneficial, rules-based cooperation. Chapter I makes the empirical and normative claim that – as substantiated by numerous case studies, notably in chapters V and VIII – the multilevel judicial protection of the EU common market rules, the EEA common market rules, of the human rights guarantees in the European Convention on Human Rights (ECHR) as well as of transnational commercial, investment and arbitration law offers four diverse exam-

ples of ‘cosmopolitan legal orders’ that have proven empirically and normatively more successful in protecting transnational rule of law for the benefit of citizens than the state-centred ‘Westphalian conceptions’ of IEL underlying the Bretton Woods Agreements, GATT and WTO law.

Chapter II discusses the emergence of ‘multilevel constitutional restraints’ and ‘global administrative rules’ in regional and worldwide ‘economic integration law’ in order to limit the disintegrating effects of ‘legal fragmentation’ and transform ‘legal pluralism’ into a mutually coherent rule of law system on the basis of ‘common constitutional principles’ governing national and international law. Rights-based conceptions of international economic regulation call for stronger constitutional restraints of multilevel economic governance aimed at correcting ‘market failures’ and subjecting ‘governance failures’ to multilevel ‘constitutional checks and balances’ in order to protect human rights and democratic constitutionalism more effectively. The terms ‘constitutionalism’, ‘constitutionalization’, constitutional pluralism and ‘human rights coherence’ of IEL are explained.

Chapter III uses Kant’s theory of multilevel constitutional protection of equal liberties and Rawls’ theory of constitutional protection of ‘public reason’ for explaining why – contrary to power-oriented, allegedly ‘realist’ claims that political morality and justice do not reach beyond the boundaries of states – the legitimacy of international law and transnational ‘rule of law’ no longer depend only on state consent, but on multilevel protection of constitutional rights and democratic self-government. The human rights jurisprudence of the ECJ, the EFTA Court and the European Court of Human Rights (ECtHR) illustrate why human rights are essential not only for empowering individuals, but for promoting horizontal and vertical coherence of interdependent, national and international legal systems and jurisdictions. The current financial and environmental crises illustrate the need for limiting the ubiquitous ‘moral hazards’ in economic relations by multilevel constitutional protection of ‘public reason’ and ‘countervailing rights’ of citizens. As explained by Kant and by other modern theories of cosmopolitanism, rights-based ‘multilevel constitutionalism’ is not only morally required; it offers also the politically most ‘realist’ strategy for limiting abuses of public and private power for the benefit of citizens by promoting ‘participatory’ and ‘deliberative democracy’ as necessary complements of parliamentary and representative democracy.

Chapter IV examines the diverse strategies for making multilevel economic regulation (for example of market competition and property rights) consistent with the human rights obligations of governments at national, regional and worldwide levels with due respect for legitimately diverse conceptions of human rights, constitutional democracies and ‘corporate social responsibilities’. The legitimacy and effectiveness of IEL depend on its ‘human rights coherence’ and on support by an ‘overlapping consensus’ on principles of justice and ‘public reason’ justifying international economic rules. Hence, economic liberties must be interpreted in conformity with all other constitutional rights. Contrary to authoritarian conceptions (eg, by Schmitt) of human nature and politics as endless power struggles between friends and foes, constitutional and cosmopolitan conceptions of modern IEL aim at reducing antagonistic conflicts on the basis of ‘universalizable’ principles of justice and fair procedures justifying and clarifying contested rules by means of legislation, administrative and judicial clarification, ‘deliberative democracy’ and ‘proportionality balancing’ of the civil, political, economic, social and cultural dimensions of fundamental rights.

Chapters I to IV criticize the prevailing ‘Westphalian view’ – ie, that IEL must be conceived and further developed as ‘international law among states’ – not only for unduly neglecting the customary law requirement of interpreting international treaties and settling international disputes ‘in conformity with principles of justice’ and the human rights obligations of all UN member states. IEL also fails to protect ‘sustainable development’, human rights and other ‘global public goods’ by means of an international ‘social market economy’ protecting equal, or at least fair opportunities for citizens in rich and poor countries to live the life they have reason to value. Chapter V explains why human rights, the ‘overlapping nature’ of most international ‘aggregate public goods’ and the ‘collective action problems’ require citizen-driven ‘struggles for rights’ (Jhering) and for multilevel protection of transnational ‘rule of law’, with due respect for the reality and normative legitimacy of ‘constitutional pluralism’ and for legitimately diverse conceptions of justice as an explicit objective of national and international legal systems. The judicial functions of courts of justice and human rights require respect (‘judicial comity’) for the interdependence and mutually coherent interpretation of legal systems for the benefit of citizens.

Chapter VI claims that human rights and justice also require that IEL rules must remain justifiable in terms of formal as well as substantive principles of justice governing national, transnational and international economic regulation; the ‘human rights coherence’ and democratic legitimacy of multilevel legal and judicial protection of transnational ‘rule of law’ must be justified by an ‘overlapping consensus’ on principles of justice, respecting ‘reasonable disagreement’ among countries and citizens with diverse preferences and often conflicting self-interests; as the intergovernmental structures of UN law have failed to protect and fulfil the promise of UN human rights (as proclaimed in Article 28 UDHR) to a just international economic and constitutional order, the decision of WTO members to keep the WTO outside the system of UN Specialized Agencies remains justifiable, for instance in view of the fact that WTO membership is open to non-state entities (like Hong Kong and the EU) which have not been admitted to UN institutions.

Chapter VII argues that – notwithstanding the need for respecting legitimate ‘constitutional pluralism’ at national and international levels of governance – multilevel protection of interdependent public goods requires far-reaching changes also in the law of international organizations outside the UN system, like the WTO. For instance, the WTO practices of ‘member-driven governance’ and decision-making on the basis of consensus and ‘single undertakings’ has led to institutional paralysis blocking initiatives for protecting international public goods. The universal duties to protect human rights entail constitutional and cosmopolitan duties to reform IEL by adjusting the ‘Bretton Woods system’ of the 1940s and the WTO to the citizen-driven structures of modern globalization, human rights law and constitutional democracies. All three Bretton Woods institutions – the IMF, the World Bank and the WTO (as the late step-child of the still-born International Trade Organization as envisaged by the 1948 Havana Charter) – face legitimacy and accountability crises due to their inadequate rules, decision-making procedures and ‘governance failures’ in protecting efficient trading, financial, development and human rights systems. The necessary constitutional reforms are unlikely to come about ‘top-down’ by ‘G20 recommendations’ and intergovernmental agreements unless citizens, civil society, parliaments and courts insist more strongly on challenging intergovernmental power politics from the perspective of human rights, ‘deliberative

democracy' and other constitutional 'checks and balances'. Chapter VIII concludes that the past focus on 'constitutional nationalism' – as illustrated by the refusal of some Supreme Court justices (eg, in the United States) to refer to international and 'foreign law', as well as by the one-sidedly inward-looking focus of members of national parliaments (eg, US congressmen) on their political dependence on local constituencies and 'election campaign financing' by organized interest groups – must be limited by multilevel 'constitutional conceptions' of international guarantees of freedom, non-discrimination and rule of law for the benefit of citizens and their cosmopolitan rights. National and international courts should cooperate in interpreting IEL in conformity with modern human rights and in strengthening 'multilevel constitutional restraints' protecting international public goods like transnational rule of law in the global division of labour.

MULTILEVEL CONSTITUTIONALISM AND COSMOPOLITAN CONCEPTIONS OF IEL DEPEND ON 'STRUGGLES FOR RIGHTS'

Since the beginnings of written history (eg, in the books of the Hebrew bible and the Greek *Iliad*), rivalry among individuals, groups and people is described as the major driving force of social, economic and political relations.⁶³ The human rights declarations of 1776 and 1789 resulted from revolutions of citizens claiming inalienable human rights vis-à-vis oppressive governments. In the UN human rights declarations of 1948, 1993 and 2008, governments universally acknowledged that 'human rights are the first responsibility of governments'.⁶⁴ European history and the jurisprudence of European courts illustrate how transforming moral and legal human rights into constitutional democracies protecting common markets and civil, political, economic and social human rights across frontiers requires 'struggles for justice'. The main conclusion of this study is that the twenty-first century must be used by citizens, parliaments, governments and 'courts of justice' for transforming IEL into a more legitimate and more effective instrument for protecting cosmopolitan rights and interdependent public goods. IEL must be conceptualized no longer only in the 'Westphalian tradition' of 'international law among states', but as 'law of peoples' (Rawls) and cosmopolitan 'international law among citizens' entitled to stronger legal and judicial protection of their human rights and other constitutional rights in international economic regulation. The 'regulatory failures' of IEL require legal and judicial limitations of the foreign policy discretion of governments and of private self-regulation by multinational corporations. As many politicians, diplomats, rent-seeking industries and authoritarian governments resist such legal reforms and judicial accountability, civil society and 'courts of justice' must insist on greater respect for 'principles of justice' justifying reinterpretation of existing rules of IEL in conformity with human rights and rule of law for the benefit of citizens.

⁶³ cf E Frankel (ed), *The Illustrated Hebrew Bible* (New York: Stewart, Tabori & Chang, 1999) 23, 29, who identifies family rivalries (eg, since the murder of Abel by his brother Cain) and power politics (like the forced exodus and 'diaspora' of Jews following the repeated conquests of Jerusalem by the Babylonian, Egyptian, Persian and Syrian Empires) as two major themes of human history since antiquity.

⁶⁴ For the texts see: D van Gunsteren and B Fassbender (eds), *Menschenrechterklärung. Universal Declaration of Human Rights* (Munich: European Law Publishers, 2009); the quoted text is from the 1993 Vienna Declaration on Human Rights.

The book aims at contributing to the necessary search for ‘cosmopolitan public reason’ justifying and promoting constitutional reforms of modern IEL. Just as the pervasive conflicts of interests in international economic regulation originate inside the limited reasonableness of individuals, so must legal protection of ‘cosmopolitan public reason’ in IEL focus on legal and judicial protection of the individual’s human rights, constitutional rights, rule of law, general consumer welfare and peaceful settlement of disputes with due respect for ‘reasonable disagreement’. UN law protects ‘sovereign equality of states’ claiming a monopoly for the coercive enforcement of law within their national jurisdictions, including for their ‘primary responsibility’ of protecting the human rights of their citizens. Yet, European human rights and economic law illustrate that multilevel constitutional and judicial protection of human rights and of other principles of justice can operate as the most important driving force for cosmopolitan reforms of IEL limiting domestic ‘governance failures’ and justifying ‘duties to protect’ human rights across national boundaries. The diverse modes of regional economic integration law (eg, inside the EU, the EEA, NAFTA and MERCOSUR) confirm that respect for ‘constitutional pluralism’ offers diverse, albeit imperfect ‘checks and balances’ limiting abuses of public and private power in transnational cooperation among free citizens and democratic governments. The fact that the existing worldwide monetary, trade and environmental agreements are based on legal principles that emerged first at national and bilateral levels (eg, in the US trade agreements based on the US Reciprocal Trade Agreements Act of 1934) suggests that the needed reforms of IEL may be most effective if they evolve ‘bottom-up’ based on ‘best practices’ rather than on the basis of premature claims of global ‘top down regulation’.

The human rights revolutions which have occurred since the eighteenth century, the successful trade liberalization across Europe during the second half of the nineteenth century, the ‘labour law revolution’ following the First World War and the international human rights revolutions, decolonization and worldwide economic integration following the Second World War, illustrate that citizen-driven ‘struggles for rights’ and judicial ‘piecemeal reforms’ of Westphalian ‘treaties among sovereign states’ are often necessary before political agreement on new worldwide rules and institutions may be feasible. This book offers numerous examples why, eg, international dispute settlement systems have become more effective if they were supported and legitimated by involving citizens, non-governmental organizations and civil society rather than only states.⁶⁵

The financial crisis that began in 2008 and its destruction of private savings worth trillions of US dollars are reminders that – wherever economic and social rights of citizens are not effectively protected – abuses of power, selfish egoism and the ‘banality of evil’ (Arendt) risk to prevail. The failure of the IMF to limit the ever larger balance-of-payments imbalances by using the IMF surveillance powers granted in Article IV of the IMF Agreement, the failure of the G20 to agree on new multilateral adjustment disciplines for monetary and exchange rate policies as part of a new ‘Bretton Woods III Agreement’,⁶⁶ or the failure of

⁶⁵ cf GC Shaffer and R Mélenlez-Ortiz (eds), *Dispute Settlement at the WTO. The Developing Country Experience* (Cambridge: CUP, 2010), whose empirical country-studies demonstrate that not only developed countries (like the US and EU member states), but also LDCs have used WTO dispute settlement proceedings most effectively whenever governmental complaints were politically, financially and legally supported by domestic industries, non-governmental organizations and civil society based on domestic legislation granting procedural rights and incentives for private parties to petition for WTO dispute settlement complaints.

⁶⁶ R Zoellick, President of the World Bank Group, proposes that the ‘development of a monetary system to succeed “Bretton Woods II”, launched in 1971, . . . should include possible changes in International Monetary

EU member states and EU institutions to comply with their constitutional obligations to 'avoid excessive government deficits' (Article 126 TFEU) illustrate that reforms of modern IEL cannot be left to politicians alone. Nor can correction of 'market failures' be left to private self-regulation, as illustrated by the fierce opposition from self-interested bankers against increasing the equity requirements of banks in order to reduce banks' systemic risks and 'moral hazards' that contributed to the near collapse of the financial system at the expense of taxpayers.

This study illustrates in numerous case studies that, the less IEL protects 'democratic input legitimacy', the stronger is the need for 'deliberative democracy' and judicial review of the consistency of international economic regulation with constitutional restraints like human rights, transparent rulemaking, due process of law, 'proportionality' of restrictions of individual rights and legal safeguards of 'output legitimacy.' Chapter VIII explains why – in ever more fields of IEL – transparent, independent, impartial and multilevel judicial review and 'balancing' of legislative and administrative restrictions of individual freedoms – based on 'suitability' (efficiency), necessity (rationality) and 'reasonableness tests' (proportionality *stricto sensu*) as constitutional preconditions for lawful governmental restrictions of constitutional rights – is becoming the hallmark of rights-based constitutionalism and the 'ultimate rule of law' (Beatty). Governments and business usually focus their economic rulemaking on reciprocal rights and obligations without justifying economic regulation in terms of principles of justice. In contrast to political institutions and business, the constitutional mandates of 'courts of justice' may require judges to justify their interpretation and application of 'under-theorized' economic rules in terms of 'administration of justice'.⁶⁷

'PUBLIC JUSTICE' (KANT) IN IEL WILL ALWAYS REMAIN CONTESTED

The legal implications of 'principles of justice' for resolving specific disputes often remain contested and require judicial deference towards national 'margins of appreciation', 'reasonable disagreement' and 'constitutional pluralism'. Hence, it is also understandable that – notwithstanding the two statues representing 'peace' and 'justice' at the

Fund rules to review capital as well as current account policies, and connect IMF monetary assessments with WTO obligations not to use currency policies to remove trade concessions. This package approach to economic cooperation reaches beyond the G20 dialogue' and 'supplies a growth and monetary agenda that parallels the G20 financial sector reforms' *Financial Times* (8 November 2010) 13. Zoellick's proposals for considering the use of gold as part of a new monetary 'Bretton Woods III' Agreement provoked widespread public criticism of a return to some gold standard (which JM Keynes chastised as 'a barbarous relic'), for instance because gold's stabilizing properties are 'largely mythical' and 'unrepresentative of the economy': 'any reserve currency needs a supply that can grow as rapidly as global trade. Gold supply falls significantly short of this basic requirement': *Financial Times* (9 November 2010) 2, 10.

⁶⁷ cf G Sartor, *Doing Justice to Rights and Values: Teleological Reasoning and Proportionality in Judicial Review* (Florence: EUI Law Department Working Paper, 2010) 2–3: 'doing justice in interpersonal relationships depends on duly taking into account all the *valuable interests* at stake, both individual and collective, namely all interests that deserve (legal) protection. If justice consists in making choices that best respond to all valuable interests, then doing justice seems to involve two aspects, maximization and balancing: a just choice should maximize the benefit resulting from the aggregation of the choice's impacts on the relevant interests (maximization), taking into account the relative importance of these interests (balancing)'. On the ancient distinctions between case-specific 'particular justice' and abstract principles of 'justice' (eg, in the 'Thomist sense' of understanding 'justice' generically as the sum of all virtues), see already Aquinas, *Summa Theologiae* (Allen: Benzinger Bros, 1947) question 58.

entrance of the WTO headquarters – trade diplomats inside the Centre William Rappard focus on a rules-based trading system and leave it to ‘deliberative democracy’ and ‘courts of justice’ to clarify the perennial controversies over the ‘social justice’ of international economic regulation. According to WTO member governments, there is no need for incorporating human rights into WTO law. Legal and judicial interpretation of WTO rules in conformity with human rights and the 1994 WTO Decision on the mutual coherence of trade and environmental policies, like the 1996 WTO Ministerial Declaration rejecting ‘the use of labour standards for protectionist purposes’ and calling for cooperation with the International Labour Organization as ‘the competent body to set and deal with [labor] standards’, are widely perceived as more appropriate examples for promoting legal coherence among IEL and human rights than incorporating UN human rights obligations into WTO law, eg, following the controversial precedent of incorporating intellectual property treaty obligations into the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS).⁶⁸ Respect for the plurality of justifications of reasonable economic rules in terms of diverse ‘principles of justice’ is more important than the elusive search for worldwide agreement on how to define the formal, procedural and substantive dimensions of ‘social justice’ and legitimacy in IEL. Yet, public discussion and legal clarification of the ‘public reason’ of the dangerously inadequate international economic order at the beginning of the twenty-first century are necessary for transforming IEL into a more effective tool for protecting human rights of citizens all over the world. As illustrated by the progressive transformation of European economic integration law, ‘paradigm shifts’ in favour of cosmopolitan conceptions of IEL must take place first inside the minds of individual citizens, politicians, lawyers and judges before they may eventually become accepted by governments as integral parts of positive IEL.

This book does *not* offer a systematic description of IEL, for instance of its historical evolution, legal subjects and steering mechanisms, the main international economic organizations and dispute settlement systems in IEL, the multilevel regulation of international monetary and trade relations, international competition, transports, communications and other services, investment relations, international government procurement, commodity markets, intellectual property rights and other fields of international economic regulation. The purpose of this book is rather to reconsider basic systemic questions and regulatory problems of international economic regulation in the twenty-first century. For instance:

1. How should IEL, its ‘systemic’ nature, legitimate objectives, ‘primary rules of conduct’ and ‘secondary rules’ of recognition, adjudication and enforcement be conceived in the twenty-first century? Does IEL constitute a ‘legal system’ for multilevel economic governance?
2. Does IEL need to be justified by theories of justice? Is the prevailing conception of ‘public international law among sovereign states’ consistent with the human rights obligations of all UN member states? Do human rights require a cosmopolitan conception of IEL (as, eg, in the common market regulations of the EU and the EEA) in order to protect human rights and consumer welfare more effectively?

⁶⁸ cf C Thomas, ‘The WTO and Labour Rights: Strategies of Linkage’ in Joseph, Kinley and Waincymer (eds) (2009) 257 ff. See also the joint study by the ILO and WTO Secretariats on ‘Trade and Employment: Challenges for Policy Research’ (Geneva, 2007), which emphasized mutual synergies among labour, social and trade policies and acknowledged labour rights as fundamental rights that may be relevant context for interpreting WTO rules.

3. Is the 'constitutionalization' of IEL by means of multilevel regulation and limitation of abuses of economic power the logical continuation of postwar decolonization of international economic relations? Why did governments fail after the First World War, but succeed after the Second World War to reconstruct a liberal international economic order? Why has the transformation of GATT 1947 into the WTO legal system been so much more successful than the attempts at reforming international monetary, financial, investment and environmental law?
4. What are the main causes and origins of the current crises in the international trading, financial, development and environmental systems? Are the related failures of IEL the inevitable fate of humanity in view of the 'rational egoism' of individuals and the ubiquitous 'market failures' and 'governance failures'?
5. Does multilevel governance of interdependent national, regional and worldwide public goods require a multilevel constitutional theory? Are cosmopolitan rights and transnational rule of law necessary for regulating the 'collective action problems' in the decentralized supply of interdependent 'aggregate efforts public goods'?
6. How are the major theoretical approaches in international relations theories and international law related to each other? Do the legitimacy and effectiveness of IEL require an 'overlapping consensus' on principles of justice justifying international economic regulation? Can the 'fragmented' private and public, national and international legal sub-systems of IEL be coordinated without recourse to some coherent theory of 'multilevel constitutional pluralism'?
7. Are the experiences of 'constitutionalism' and 'constitutionalization' relevant for limiting 'market failures' and 'governance failures' in international economic regulation? How should the ambiguous terms 'constitution', 'constitutionalism', 'constitutionalization' and 'constitutional pluralism' be defined in the context of IEL? Have state constitutions become 'partial constitutions' in a globally integrating world where individuals and national communities are increasingly influenced by events originating abroad such as global markets, financial crises, health pandemics, terrorism and environmental pollution?
8. Are the 'principles' underlying international monetary, trade, financial, investment and environmental law mutually coherent? Should economic courts interpret treaty rules by 'balancing' economic principles with human rights principles? Does the universal recognition of human rights influence the interpretation of the 'rules of recognition' of public international law as defined in Article 38 ICJ Statute? Why is it that citizens, NGOs, parliaments, governments, courts of justice and international organizations (like the EU) often have such different views about the appropriate interpretation of IEL rules?
9. What is the legitimate role of 'courts of justice' in interpreting and clarifying IEL rules, principles, individual rights, market access commitments and 'public interest' regulation? Are courts of justice the only branch of government that has to justify its decisions – as independent 'exemplars of public reason' (Rawls) – on the basis of constitutional principles of justice? Is impartial and independent judicial review closer to the ideal dimension of law than political and parliamentary rulemaking based on majority politics? Is judicial discourse based on laws, precedent and legal dogmatics only a special case of general practical discourse open to moral arguments concerning rights and justice, ethical arguments concerning individual and collective identities and pragmatic means-end arguments?

10. Does the potential ‘tyranny of majority politics’ require judicial protection of constitutional citizen rights also in relation to intergovernmental economic regulation? Why are governments so often requesting courts to exercise judicial deference in respect of requests by citizens for judicial review of intergovernmental restrictions of individual economic liberties and property rights (eg, in case of UN ‘smart sanctions’ against individuals without judicial remedies, EU trade restrictions in manifest violation of WTO and EU guarantees of freedom, non-discrimination and rule of law)? Was the EU Regulation of 11 May 2010 on the introduction of a European Financial Stability Facility aimed at stabilizing the European financial system consistent with EU law (eg, Article 122:2 TFEU, the ‘no bailout’ clause in Article 125 TFEU, the ‘principle of conferral’ of limited powers)?⁶⁹
11. Why do many economic courts refer only rarely to the customary law requirement (as codified in the Preamble of the VCLT) of interpreting international law, and settling disputes over the interpretation of treaties, ‘in conformity with the principles of justice’ and human rights? Why is this customary law requirement of ‘constitutional interpretation’ so often ignored by GATT/WTO dispute settlement panels and investor–state arbitrators?
12. What are the legal interrelationships between multilevel human rights law, multilevel ‘constitutional law’ (eg, providing for cooperation among independent ‘courts of justice’) and multilevel economic guarantees of equal freedoms, non-discrimination and judicial protection of rule of law (as in European free trade agreements)? Do multilevel human rights and multilevel economic guarantees of freedom, non-discrimination and rule of law rest on common ‘principles of justice’? How can the ‘functional unity’ of IEL be defined, if it exists at all?
13. What are the constitutive building blocks of a ‘highly competitive social market economy’ (Article 3 TEU)? Can the citizen-oriented approach to European economic law serve as a model for citizen-oriented interpretations of international trade, investment and environmental law beyond Europe? Can the ‘collective action problems’ impeding global public goods be resolved without recourse to the ‘constitutional methods’ used for national and regional public goods? What kinds of WTO reforms would a constitutional approach to IEL require?
14. Can parliamentary democracy remain effective in a globally integrating world without stronger protection of deliberative, participatory and ‘cosmopolitan democracy’ and stronger judicial remedies? Should IEL be evaluated in terms of its contribution to protecting human rights? Is the EU Charter of Fundamental Rights and its distinction between dignity rights, liberty rights, equality rights, solidarity rights, citizen rights and rights to justice consistent with the different distinctions between civil, political, economic, social and cultural human rights in UN law?
15. Do the ‘principles of justice’ underlying UN law enable governments to supply ‘international public goods’ effectively? Which ‘constitutional principles’ are important for limiting the collective action problems in supplying interdependent public goods?

⁶⁹ For the view that this EU Regulation No 407/2010 (OJ L118/1 of 12 May 2010) was inconsistent with Arts 122:2, 125, 127:5 and 352 TFEU see: M Seidel, ‘Aktuelle Probleme der Europäischen Währungsunion’ (2010) 4 *Integration* 334–49.

Lawyers, politicians and economists are likely to answer these questions in diverse ways depending on their normative premises. The conclusions at the end of this study, summarizing my own answers as elaborated in the eight chapters, are kept deliberately brief; for this book – which was drafted during my busy years as head of the Law Department of the European University Institute at Florence, when the dramatic changes in the international financial, trading and environmental systems required ever more revisions of the text – evolved, unfortunately, into a much longer manuscript than originally envisaged. This book differs from other textbooks on IEL by its 'constitutional' and interdisciplinary approaches. Their two methodological and normative premises are based on positive law and should not be misunderstood as 'utopian idealism': First, the human rights obligations of all UN member states require interpreting treaties, and settling related disputes, 'in conformity with principles of justice' and human rights challenging the prevailing 'Westphalian power politics' and its under-supply of public goods demanded by citizens. Secondly, human rights and the collective action problems impeding the supply of international public goods also require regulating the limited reasonableness of human beings, 'majoritarian governance' and intergovernmental power politics by constitutional and cosmopolitan rights and multilevel, judicial protection of transnational rule of law for the benefit of citizens. Westphalian conceptions of government in terms of promoting 'state interests' (as defined by rulers and their diplomats) must be limited by constitutional conceptions of multilevel, democratic self-governance.

Throughout the book, my arguments are illustrated with more than a hundred case examples from diverse fields of economic and human rights adjudication – which may render the reading of some of the text more difficult for those not familiar with adjudication in these often very diverse, national and international jurisdictions. The philosophical and constitutional premises of this study will inevitably remain contested, especially from the perspective of non-democratic countries, Anglo-Saxon 'majoritarian democracies' and 'Washington interest group democracy' with its often 'corrupting influence of money' on economic rulemaking. European 'multilevel constitutionalism' and its underlying 'constitutional economics' differ fundamentally also from the utilitarian 'dollar-sterling diplomacy' dominating the Bretton Woods conferences in the 1940s.⁷⁰ The study refers extensively to relevant legal, political and economics literature in the hope of promoting more public discussion on the methodological problems of IEL and its changing 'rules of recognition'.⁷¹ Each chapter begins with short summaries and overviews of the main arguments so that each chapter can be read as a complementary essay; the disadvantage of this conception of the eight chapters is some repetition of the 'cosmopolitan premises' of each chapter. As the book focuses on legal, political and economic *principles* underlying the historically grown thicket of thousands of IEL *rules*, it avoids getting lost in systematic *descriptions* of many 'technical details' of the ever more complex international monetary, trade, financial, investment, development and environmental regulations. The normative and methodological premises are summarized in 25 tables and illustrated by discussing judgments of international tribunals and domestic courts

⁷⁰ cf the classic analysis by RN Gardner, *Sterling-Dollar Diplomacy: Anglo-American Collaboration in the Reconstruction of Multilateral Trade* (Oxford: OUP, 1956) and the revised 1980 edn: *Sterling-Dollar Diplomacy in Current Perspective: The Origins and Prospects of our International Economic Order* (New York: Columbia University Press, 1980). I wish to thank Richard Gardner for many stimulating discussions at Florence and New York on the issues analyzed in the following chapters.

⁷¹ The books listed in the bibliography are cited in the footnotes in abbreviated form.

in developed and less-developed countries. Thanks are due to my EUI research assistants Johanna Croon and Anna Pitaraki, as well as to the participants in my annual doctoral seminars on *European and International Economic Law – Constitutional Problems of Law and Economics* at the European University Institute in Florence, for frank criticism of some of the texts. All mistakes are my own. Hopefully, the imperfections of this book will prompt other researchers and practitioners of IEL to further debate and clarify the moral and constitutional foundations of multilevel economic regulation as well as the practical relevance of the ‘human rights revolution’ and ‘judicial revolution’ in European economic law for more cosmopolitan conceptions of worldwide IEL.

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