Globalisability of Universalisability?
How to apply the Generality Principle
and Constitutionalism internationally

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1. Introduction 1
2. Hayek on international order 3
3. The reason of universalisable rules 7
   3.1 The Kantian question 7
   3.2 The “test of universalisability” 8
   3.3 The universal reach of abstract rules 10
4. Generality Principle and International Constitutionalism 12
5. The present international economic order 15
   5.1 WTO: implementing the generality principle and direct effect -
       a mixed record 15
   5.2 EU: universalisable core with expanding discretionary periphery 19
6. Outlook: Towards a universalisable governance of international interactions 24
References 30
1. Introduction

The growth of the extended order of international trade and the decline of centrally planned national economies have been major “Hayekian” events. The former demonstrates capitalism’s ability to create spontaneous orders of mutually beneficial interactions of much greater complexity than could ever be produced by deliberate arrangement. The latter evidences socialism’s inability to provide institutions and incentives that allow for the social use of the local knowledge, personal skills, and individual talents of economic actors.

Following Hayek and classical liberals as ancient as Kant or Hume, abstract rules of just conduct form the institutional basis for spontaneous co-ordination in a free society. Such rules are abstract in the sense of being applicable to unknown and unspecified peoples and cases; and they are mostly proscriptive – thus “negatively” defining the liberty of using one’s personal knowledge and skills in the pursuit of individually chosen aims. The rules of just behaviour being “purpose neutral” (Gray 1986: 67), their applicability is not confined to specific groups of peoples that share common specific purposes. Already for semantic reasons, but also due to the fact that universalisable rules know no demarcations of specific peoples, it seems only natural to assume universal applicability, i.e. globalisability of abstract rules of just conduct.

If social interactions now span the globe, the argument would go, if global interactions ought to be guided by rules, and if one wants such rules to reflect ideals of procedural justice and individual liberty, the issue of global “governance” should be a most natural concern for classical liberals. And a Hayekian answer to that challenge may at first sight seem straightforward. The “game of catallaxy” as a wealth-creating game of voluntary and mutually beneficent exchange is played according to common rules of the game.\(^1\) With the removal of barriers to international trade and foreign direct investment, “catallaxy” has become the biggest game on our planet. Consequently it may seem, general rules of the game should also apply world-wide in order to create the beneficial effects of a global market economy.

\(^1\) See Hayek (1966/67: 165): “liberalism presupposes the enforcement of rules of just conduct and expects a desirable spontaneous order to form itself only if appropriate rules of just conduct are in fact observed”.
But things become ambivalent as one imagines law and legislation beyond the realm of established political communities such as nation states. Most of our laws still refer to given territorial entities (nation states); most legislation originates from national parliaments; most property rights and the liberties as legally defined and constitutionally safeguarded are rights and liberties of citizens (as members of a nation state). The largely unyielding congruence of the limits of laws and legislation with borders among (and within) nation states, however, is no deplorable heritage of nationalism or isolationism; it is a most natural consequence of constitutional and democratic liberalism. Only within nation states’ (and, to a lesser degree, among some interstate federations’) constitutions and political practice does one find fully developed combinations of legitimising procedures (representation, public debate), third party enforcement mechanisms (executive and police powers) and effective controlling devices (judicial review, public opinion, migration).

In order to create a harmonious triad of law, legislation and liberty, all these dimensions of collective action have to be balanced according to the political ideal of the rule of law. This ideal reflects the desire of a people to be under the same government and share the same rules of just behaviour which express common values of citizens as members of grown political communities based on common history, common language and some sense of empathy and mutual understanding. To be sure, not all nation states at all times trace back to a “demos” (e.g. Zürn 1998), or a “people” (Rawls 1999: 23ff) thus defined. But they certainly do so to a larger extent than most multi-national political bodies, or presumed representations of a “world community”.

Still, one does finds organisations and institutions that provide rules and procedures for economic and political co-ordination and control on a trans-national scale. This observation can meet with two converse classical liberal or, say, Hayekian responses: (a) such rules are desirable – since (and as long as) they satisfy the need for an order of rules to create and channel a global order of actions; (b) such rules are of dubious legitimacy – since (and as long as) they cannot satisfy the need of adequate procedural and cultural conditions that reflect a grown understanding of common values, norms and opinions.

Our aim is to address some elementary aspects of this innate trade-off between both classical liberal requirements for an adequate order of rules: (a) effectiveness in the sense of the rules’ congruence with a given order of (economic) actions and (b) legitimacy in the
sense of the rules’ congruence with the given social-cultural conditions of (political) consent. In the following part 2, we review Hayek’s own account of the requirements of a liberal international order of rules, finding several arguments that help to further illustrate the above-mentioned trade-off. But we will hardly find Hayek relate his legal and political philosophy of “universalisability” to assessments of international governance. Therefore, we have to go back to Hayek’s accounts of universalisable rules of just conduct in part 3 in order to prepare our account of such rules’ globalisability. In part 4 we address the generality norm as a constitutional principle for the governance structure of an international order. Both general, proscriptive rules and specific, prescriptive regulations of the international order are contrasted in part 5, as we find them today both on the level of WTO and of EU rules and regulations. Part 6 offers a summary conclusion of our empirical and normative-theoretical observations.

We cannot endeavour here to discuss all major elements of existing international law or of an ideal global “constitution of liberty”. In fact, we will only occasionally be more explicit about material contents of the rules of the game. This is not only because such a task would be beyond the scope of a single paper. It is also because we like to focus our attention on formal principles that should, in our view, inform any (re-) construction of international governance.

2. Hayek on International Order

It has been observed, e.g. by Razeen Sally (2000: 97), that Hayek “wrote very little on questions of international order … his oeuvre was cast in a model of national political economy that rarely ventured ‘beyond the border’ to take account of international transactions. In the Hayekian scheme, economic order, the rules that underpin it, and the allotted role for the state and public policy all operate ‘behind the border’”. This is quite true for Hayek’s work on law, legislation and liberty after the 1950s. But before that, one finds two writings in which Hayek explicitly addresses the problem of international (economic) order: A paper on “The Economic Conditions of Interstate Federalism” (1939) and chapter XV (“Prospects of International Order”) in his “Road to Serfdom” (1944).²

² In Hayek’s Constitution of Liberty, international aspects are virtually absent. The exception is one paragraph, where Hayek (1960: 47f) argues that even major inequalities among nations may be of great assistance to the progress of all with technological (and institutional) knowledge that took the West hundreds of years to achieve now presenting a free gift for underdeveloped countries. In his trilogy on Law, Legislation and Liberty Hayek only once addresses the issue of supra-national order and legislation. He
In his 1939 paper on interstate federalism, Hayek makes several points that are relevant for the following discussion:

- Interstate federalism faces the difficulty of subjecting numerous states characterised by diverse social and economic conditions and prospects to common rules. Compared to legislation within a single nation state, it is much less likely to command popular support for discriminatory rules and regulations that only benefit specific groups or determine specific social standards (Hayek 1939/80: 257ff). Hayek here implies that in a regime of voluntary interstate federalism the diversity of social conditions and of citizens’ values and interests would favour agreement on (more) general abstract rules of conduct on the level of joint legislation.3

- Interstate federalism could also frustrate individual (member-) states’ endeavour to enact interventionist legislation (ibid.: 258). With free movements of men and capital, discriminatory burdens placed on particular industries could “drive capital and labour elsewhere” (ibid.: 260). Competitive interstate federalism also means that national organisations such as trade-unions, cartels, or professional associations lose their monopoly power to control the supply of their services or products (ibid.: 261). Hayek here implies that interstate federalism, by inducing the “exit” of dissatisfied owners of mobile resources, would force governments at home to reconsider discriminatory regulations and resort to more “exit-resistant” general and abstract rules.

- In order to avoid disintegration of the federation, it would not be sufficient to only prohibit interstate tariffs or quota. Member states’ administrative regulations often (are intended to) have the very same protectionist effects. In order to prevent non-tariff barriers from obstructing a common market, Hayek argues “that the

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3 The flip-side of this argument is, of course, that, with a constant level of (now centralised) interventionism, the amount of coercion or, in the terminology of Buchan/Tullock (1962) “external costs” increases with the size and heterogeneity of the political unit: “as the scale [of interventionist planning] increases, the amount of agreement on the order of ends decreases and the necessity to rely on force and compulsion grows” (Hayek 1944: 221f).
federation will have to possess the negative powers of preventing individual states from interfering with economic activity, although it may not have the positive power of acting in their stead” (ibid.: 267). Such negative rules of just government behaviour, Hayek argues, should also protect interstate competition in its ability to “form a salutary check …” on local governments’ activities “… while leaving the door open for desirable experimentation” (ibid.: 268). Hayek here argues in favour of proscriptive rules of just conduct of member states, enforced by a central agency as “third party” – another claim in favour of internationalised universalisable rules of administrative behaviour.

In his “Road to Serfdom” Hayek (1944, ch. XV) discusses the “prospects of international order” in very much the same spirit, but with a somewhat broader perspective. And he is now more explicit about the role that an “international authority” would have to play in order to enforce the rules agreed upon by “a community of nations of free men” (ibid.: 236).

- Again, Hayek expects that interventionist planning can find support only within rather small nation states. But these states “will never submit to the direction which international economic planning involves … while they may agree on the rules of the game, they will never agree on the order of preference in which the rank of their own needs and the rate at which they are allowed to advance is fixed by majority vote” (ibid.: 230). And again Hayek expects that the powers of an international authority would be “mainly of a negative kind; it must, above all, be able to say ‘No’ to all sorts of restrictive measures” (ibid.: 232). Consequently, the rules of the game would have to be mostly proscriptive, defining only the kinds of actions that the players (above all: governments) may not undertake. To Hayek it seems at least plausible that governments can agree on a list of such measures as they do not want to see applied against themselves and which, therefore, they could commit themselves not to apply against others – provided that such prohibitions restrain the behaviour of every government that joins the international “disarmament club”. Here, Hayek does implicitly apply his “test of universalisability” (see 3.2.) to the interaction among “nations”, or rather, among political representatives of citizens of different states.
• On the specifics of the procedural rules defining the empowerment of a supervising authority, Hayek remains rather evasive. The major powers that must devolve on an international authority are “to preserve peaceful relationships, i.e., essentially the powers of the ultra-liberal ‘laissez faire’ state. And even more than in the national sphere, it is essential that these powers … should be strictly circumscribed by the Rule of Law” (ibid.: 232). The problem, not directly addressed by Hayek is however that, even less than in the national sphere, the necessary or at least favourable conditions for the Rule of Law to be effective are mostly absent in international relations: a common legal tradition and political culture, a grown legal practice, a habitual sense of justice, and the willingness to accept third party enforcement of the rules also in cases where defection or free-riding would be a dominant unilateral strategy.

• Instead of such “soft” or informal conditions, Hayek relies on international treaties in which “strictly defined powers are transferred to an international authority, while in all other respects the individual countries remain responsible for their internal affairs” (ibid.: 233). Later, Hayek alludes to a second condition for the stability and effectiveness of an international Rule of Law: not only should its tasks be limited to those that can be clearly defined and unanimously adopted; also its applicability and jurisdiction should be limited to those nations that are ready to co-operate under a common set of rules. Hayek here seems to suggest that his ideal of a community of nations of free men is best organised as a “club”: an association of nations that share elementary common values and are thus in a more credible position to commit themselves to adhering to a Rule of Law enforced by an international third party.

4 Hayek (ibid.: 237) attributes the demise of the League of Nations to having been over-ambitious on both accounts: (a) “charged with all the tasks it seems desirable to place in the hands of an international organisation, they will not in fact be adequately performed” and (b) “in the (unsuccessful) attempt to make it world-wide it had to be made weak”.

5 The qualification that only states that already domestically subscribe to elementary principles of the rule of law can be accepted or expected to be members of an international community under the law of peoples is also prominent in Kant’s “Eternal Peace” (1785/1991) and Rawls’ “Law of Peoples” (1999). In Wohlgemuth (2004), I argue in favour of club solutions for the development of European integration as a way to combine flexible enlargement with increased legitimacy (voluntariness) and decreased decision making costs. See also Ahrens/Hoen (2002).
In sum, one finds in Hayek’s early writings on international order both arguments that still today characterise discussions on globalisation and international political governance: (a) a need for rules of the game in order to preserve peace and facilitate international economic and political interaction; and (b) a need to limit the purpose of international rules and authorities to fields where true agreement can be reached. And, what is most relevant for our discussion, Hayek at least implicitly seems to suggest that it is above all the universalisable nature of international rules of the game that would serve both needs and should therefore also help to reduce innate tensions between them.

3. The reason of universalisable rules

3.1 The Kantian question

In appendix I to his “philosophical sketch” on “eternal peace” Kant (1795/1991: 121f), after distinguishing the “moral politician” (“who so chooses political principles that they are consistent with those of morality”) from the “political moralist” (“who forges a morality in such a way that it conforms to the statesman’s advantage”) urges the practical philosopher

“first, to decide the question: In problems of practical reason, must we begin from its material principles, i.e., the end as the object of choice? Or should we begin from the formal principles of pure reason, i.e., from the principle which is concerned solely with freedom in outer relations and which reads, “So act that you can will that your maxim could become a universal law, regardless of the end”?

Not surprisingly, for Kant the latter has precedence – and for reasons that to a Hayekian sound very familiar. The first option would be that of Kant’s “political moralist” who very much resembles Hayek’s constructivist rationalist who holds that we “should so re-design society and its institutions that all our actions will be wholly guided by known purposes” (Hayek 1973: 9). The second option is chosen by Kant’s “moral politician” who would assent to universal maxims of conduct and follow what Gray (1986: 7) describes as the main point in Hayek’s procedural theory of justice: that “we discover the demands of justice by applying to the permanent conditions of human life a Kantian test of universalisability”.

3.2 The “test of universalisability”

The “test of universalisability” (Hayek 1976: 27ff) is a procedural “test of the appropriateness of a rule” with the main criterion for appropriateness being whether we “can ‘want’ or ‘will’ that such a rule be generally applied” (ibid.: 28). Applying this Kantian test to the principles of a legal order, Hayek (1966/67:166) distinguishes 3 essential and interrelated aspects of rules of just conduct. Universalisability:

(1) Relates to individual conduct (not social states): “justice can be meaningfully attributed only to human action and not to a state of affairs without reference to the question whether it has been, or could have been, deliberately brought about by somebody”.

(2) Leads mostly to rules that ban unjust behaviour (not prescribe specific actions): “the rules of justice have essentially the nature of prohibitions … the aim of rules of just conduct is to prevent unjust action”.

(3) Creates protected domains of individual responsibility: “the injustice to be prevented is the infringement of the protected domain of one’s fellow men, a domain which is to be ascertained by means of the rules of justice”.

As Hayek never tired to insist, states of affairs that – such as the unplanned diffusion of incomes in a market economy – are unintended results of human interaction, but not of anyone’s design or volition, can not be regarded “just” nor “unjust”.6 Justice is about individual conduct; it is about the choice of actions to achieve self-chosen ends. If justice is to be the maxim of rules that guide the social interaction of free man, these rules can not be predominantly prescriptive. If men are to be able to freely interact, using their own knowledge for self-chosen purposes, just behaviour cannot be enforced by means of rules which tell everyone what to do in any given circumstance. Rather, rules of just behaviour would in most cases7 be negative proscriptions of certain kinds of behaviour that are generally deemed unjust (behaviour that no individual would want himself be the victim of). By prohibiting certain kinds of action, these rules negatively define and equally protect

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6 See (ibid.: 171): “Nobody distributes income in a market order (as would have to be done in an organization) and to speak, with respect to the former, of a just or unjust distribution is therefore simple nonsense”.

7 Hayek (1966/67: 167) acknowledges rare cases where positive duties to certain actions may be considered „just“, such as a duty to come to the help of others whose life in imminent danger.
a private domain, a sphere of individual responsibility, or, in Lockeian terms: the rights to property, life and liberty.

This basic rationale of universalisability in the definition of unjust behaviour and the ensuing demarcation of protected domains only applies to the extended order of spontaneous co-ordination among large groups of unknown individuals who are and should be free to carry on self-chosen purposes. This point will be most relevant for our further discussion:

“as rules which have originally been developed in small purpose-connected groups (‘organizations’) are progressively extended to larger and larger groups and finally universalized to apply to the relations between any members of an Open Society who have no concrete purposes in common and merely submit to the same abstract rules, they will in this process have to shed all references to particular purposes … [this] made it possible to extend these rules to ever wider circles of undetermined persons and eventually might make possible a universal peaceful order of the world.” (Hayek 1966/67: 168)

Hence, Hayek (ibid.) argues that – given an ever extending order of interactions among unknown individuals – “only purpose-independent (‘formal’) rules pass this test” of universalisability. However, as Gray (1986: 60ff) points out, neither Kant nor Hayek aim at merely formal and purpose-free criteria of law and legislation. Rules of just behaviour are “purpose-free” in the sense that (in most cases) they do not prescribe or even refer to the pursuit of specific common purposes that individual action, in order to be legal or just, has to follow. But exactly because of their purpose-free formulation, they do support a “social” purpose in the sense of the extended order of successful voluntary co-ordination that the rules help create. This order “extends the possibility of peaceful co-existence of men for their mutual benefit beyond the small group whose members have concrete common purposes” (Hayek 1966/67: 163). And as this order of actions provides “the best chance for any member selected at random successfully to use his knowledge for his purpose” (ibid.) and at the same time the best available means for the use of knowledge and skills in society, abstract rules of a spontaneous market order finally increase “the chances of any member of society taken at random of having a high income” (ibid.: 173).

There is only an apparent paradox in Hayek’s claim that purpose-free rules serve the purpose of creating an abstract order, which supports the individuals’ attainment of their

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8 In focussing on procedural criteria of justice and in taking the chances of a randomly chosen individual as point of comparison, Hayek’s conception parallels the Theory of Justice of another modern Kantian: John Rawls (s.a. Gray 1986: 60; Hayek 1976: 100).
unknown, often diverse, particular purposes.\textsuperscript{9} The point is that purpose-free (formulations of) rules, under conditions of lacking common (understandings of) specific purposes, are best at achieving the purpose of extending the order of voluntary interaction. And this order, exactly because of the purpose-neutrality of its basic rules and of its (market) co-ordination mechanism, leads to the best possible attainment of the purpose to maximise anyone’s chances to pursue his self-chosen aims and have a high income.

3.3. The universal reach of abstract norms

The rationale of universalisable rules of just conduct applies with even greater force to the very extended order of global capitalism. The creation and preservation of an international market order within a “community of nations of free men” (Hayek 1944: 236) does not need “agreement on the concrete results it will produce in order to agree on the desirability of such an order” (Hayek 1966/67: 163). In fact, such an order based on universal rules of just conduct, “being independent of any particular purpose … can be used for, and will assist in the pursuit of, a great many different, divergent and even conflicting purposes” – as we should expect to find them the more the order extends to (groups of) individuals with different social values and cultural backgrounds. The three aspects of the test of universalisability can easily be translated into principles of international law, legislation and liberty:

(1) International justice refers to concrete individual (and political) behaviour, not to states of affairs that no one could intentionally have brought about.

(2) Internationally universalisable rules of just behaviour will in most cases be prohibitions aimed at the prevention of unjust action\textsuperscript{10}.

(3) Prohibition of non-generalisable, discriminatory acts creates protected domains also in international relations. It defines the equal sovereignty of citizens (and their political

\textsuperscript{9} See Hayek (1976: 17): “Only if applied universally, without regard to particular effects, will [the abstract rules] serve the permanent preservation of the abstract order, a timeless purpose which will continue to assist the individuals in the pursuit of their temporary and still unknown aims”. See also Buchanan/Congleton (1998: 9f): “The law, as such, is presumed to have as its primary purpose the facilitation of personal interaction. In this conception, there is no social purpose to the law. … the generality norm … is not drawn from some externally ordered list of social purposes (or external standards of fairness) – a list that is presumed to exit independently of the preferences of the players or participants in the game itself”.

\textsuperscript{10} The same is true for Kant’s famous articles on perpetual peace. All, Kant observes, “are prohibitive laws” requiring the abolishment of the stated abuses, often even “being valid irrespective of differing circumstances and they require that the abuses they prohibit should be abolished immediately” (Kant 1795/1991: 97)
representatives) of all nations to pursue self-chosen ends by choosing among an open set of actions that are not prohibited.

Referring to the present discussion of “global governance”, these aspects can yield some guidance. Concerning the first statement, it turns out to be rather pointless to discuss “global justice” in terms of the distribution of incomes among countries or regions, or with reference to “terms of trade” as long as they are the unintended results of spontaneous interactions among millions of individuals, which no one could ever have produced (or prevented) by deliberate action. Instead, one would have to look for concrete behaviour of economic or political actors that can be argued to be unjust, because it does not pass the test of universalisability, since no one (including those who carry out these acts) would want this kind of behaviour to be generally applied. Protectionism provides the perfect example. Tariffs, quota, as well as cases of deliberately erected non-tariffs barriers to trade will be ruled out by the generality test as prejudicial to the myopic interests of a few.\footnote{See Buchanan/Congleton (1998: 78ff) and Vanberg (1992) illustrating the domestic prisoners’ dilemma structure of protectionism. In fact, there is no prisoners’ dilemma among states, since free trade enhances the welfare of a nation even if practised unilaterally (Sally 2000: 102ff). In a rational actor environment, protectionism can only be explained as “an intra-national prisoners’ dilemma problem” (Vanberg 1992: 379) based on the rationale that seeking protection is the dominant strategy for any particular industry acting separately, although all would be better off if nobody were protected compared to the situation where all or most industries are protected. It could be argued that the constitutional choice of a purely formal generalisation norm would not prevent politicians to engage in protectionism, e.g. by imposing uniform tariffs on all imported goods. But, assuming a constant overall level of protection (say, of tariff receipts), this would already create a (Pareto-) improvement compared to a situation of discriminatory tariffs which create stronger distortions of resource allocation. However, even uniform tariffs would not pass the universalisability test since they would obviously discriminate against domestic consumers of imported producer goods or final goods (Buchanan/Congleton 1998: 80). Finally, with non-discriminatory tariffs, more industries would be affected in dual roles as producers and consumers. Hence even for current beneficiaries of discriminatory protection, no tariffs could be preferable to uniform tariffs (see Buchanan/Lee 1991).}

The most important rules of just behaviour in an international community of free nations would have to bind political agents. They would above all consist of prohibitions of certain political actions that obstruct citizens’ freedom to engage in mutually beneficial trade with foreigners. They would, thus, confer a protected domain of freedom to trade on individuals. To be sure, the removal of barriers to the free movement of goods, services, capital and persons across borders need not be the only task of an international economic order. But it is the foremost task, since without negative guarantees of free trade the market order is not going to develop into an extended abstract order that allows individuals across borders to pursue their self-chosen aims in a regime of mutually beneficial exchange. Other political rules that could facilitate international trade – such as the legal enforcement of
border-crossing contracts, or the introduction of international standards and norms – are clearly secondary to the establishment of free trade. In addition, it is far from obvious that these elements of international private law would necessarily have to be laid down and fixed once and for all by an international political authority.

In fact, border-crossing transactions within the “international private law society” (Sally 2000: 111) do quite comfortably rely on “a web of private property rights and the enforcement of contracts according to private law within a multitude of separate national jurisdictions” (ibid.). International trade flourished well in the absence of unitary private law and of a central enforcer of international contracts. In addition to the choice of national formal private law and jurisdiction, also informal, privately established and enforced norms and conventions governing international transactions have for centuries spontaneously evolved and supported the extending order of capitalism. Obviously, this unplanned evolution of an order of rules establishing “stability of possession, of its transference by consent and of the performance of promises” (Hume 1739/1978: 126), originating in the mercantile community and spreading across borders of provinces and states by imitation rather than deliberate design is a major vindication of Hayek’s trust in social self-organisation.\(^\text{12}\)

Having thus established reasons for our emphasis on universalisable rules of just government behaviour aimed at protecting private spheres of freedom to engage in transnational interactions, we will now take a closer look at the internationalisation and constitutionalisation of the relationship between “state” and “citizen” and ways to enforce universalisable rules of just behaviour on an international level.

4. Generality Principle and International Constitutionalism

Although we make ample use of ideas of classical liberalism, our guiding concept is not a material definition of minimal state action. Constitutional liberalism recognises the need of active legislation for the establishment of a legal framework that guides collective action on the sub-constitutional level of decision-making.\(^\text{13}\) More specifically, the focus is on the

\(^{12}\) See e.g. Hayek (1988: 94ff); Benson (1988); Milgrom/North/Weignast (1990); Curzon-Prize (1997).

\(^{13}\) See about the Constitutional Political Economy approach Brennan/Hamlin (1998) and Vanberg (1998). See there also about the distinction between decisions carried out at the constitutional and the sub-constitutional level, and about the Principle of Constitutional Equivalence Sideras (2001).
relationship between citizens as the ultimate sovereigns of democracies, understood as “territorial enterprises” (Vanberg 2000) – with citizens’ sovereignty providing the ultimate yardstick for politics to be carried out in their name.

The relationship between citizens and their rule-setting agents is fundamentally characterised by the extent to which citizens’ personal freedom is protected against government encroachment. Arguably, on a national level, one key facet of this individual safeguard is the definition and enforcement of citizens’ rights which critically depend upon the relative importance of proscriptive private versus prescriptive public (administrative) law within the legal system established by the respective constitution. Citizens are protected from discretionary government action to the extent that the rules composing the governing institutional fabric are general and proscriptive in nature, thus ensuring procedural justice and enforceable private rights. Individual freedom requires effective constitutional embedding. A constitution typically defines the locus of (domestic) political power. It is a formal or informal meta-level institution establishing and regulating subordinate institutions with specified competencies in the form of bundles of legal powers (Føllesdahl 2002). From a classical liberal perspective, the main task performed by a constitution is to define the limits of governmental powers vis-à-vis the individual constituent.14

A controversial issue is whether the concept of constitutionalism is of relevance for the international realm. Regarding constitutionalism and transnational governance, Joerges/Sand (2002) use a traditional and rather narrow concept of constitutionalism claiming that it presupposes a state and that, until very recently, the very idea of a “constitution without a state” sounded rather odd. Grimm (1997: 245), discussing the need of a constitution for Europe, points out that, although the Maastricht treaty does contain provisions of constitutional nature, “when it comes down to it constitutions are still something to do with states”. The task that is attributed to constitutions by this approach solely refers to the formation of a legal basis for the state, to the creation of a legal meta-

14 Hayek concedes that constitutions have served an important task in the United States in fending off discretionary governmental powers and securing independence. But he argues that constitutions as such are not necessarily the safest safeguard for constituents against arbitrary, coercive governmental powers. Rather, it is the rule of law that effectively constitutes a limitation on the powers of all government: “… the conception of the rule of law is sometimes confused with the requirement of mere legality in all government action. … The rule of law … is more than constitutionalism: it requires that all laws conform to certain principles.” (Hayek 1960: 205).
level needed to set up a well functioning *democratic state* (Grimm 1997: 239, 250). Petersmann (1997, 1998, 2000), in turn, calls for a human rights approach to international law, arguing “that the universal recognition of ‘inalienable’ human rights as part of general international law calls into question the democratic legitimacy of the ‘state-centred’ approach of classical international law which has persistently failed to protect human rights and ‘democratic peace’ in international relations” (Petersmann 2000: 3). His conception of constitutionalism comprises different levels, national as well as international, of constitutional systems, thus extending Hayek’s notion of a hierarchy of rules or laws (Hayek 1960: 176) beyond the boundaries of the nation state.

Our idea(1) of constitutionalism is less concerned with traditional notions of constitutionalism as a form to organise state activity. Instead, we regard all rules that govern fundamental aspects of relationships between individual constituents and political agents as constitutional. In principle, there seems no reason to conceptually separate the rules of the game of national politics from the rules of international political conduct. Just as national constitutional rules perform the task of containing the coercive capacities of governments, so do international rules which typically assume the form of mutual governmental self-restrictions: they limit the government’s range of discretionary activities. This applies with even greater force to those areas of international relations where governments explicitly commit themselves to maintain freedom of, and non-discrimination in, legitimate international transactions of their citizens, thus warranting important additional protection of private property rights (Tumlir 1983: 83). Thus Tumlir’s (1983: 80) notion of the international economic order “as the second line of national constitutional entrenchment”.

The generality principle is a rule of law that lays down basic requirements of constitutional and sub-constitutional legislation. As a constitutional principle that is to guide sub-constitutional decisions and acts of legislation, it demands the “limitation of the coercive powers of government to the enforcement of general rules of just conduct” (Hayek 1978: 138). This guiding principle is applicable not only to national governments and their constitutions. It can equally apply to coercive powers established among states, no matter if exercised in joint decision committees or by a centralised third party enforcer of

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15 On free trade as a private right, and as a matter of private law, see also Sally (2002: 31).
international rules of conduct. In the domestic sphere of politics, the state constitution establishing and regulating subordinate institutions is the relevant meta-level institution needed for the implementation of the generality principle. In the international political realm, however, it is not easy to identify a specific type of meta-institution essential for the operation of universalisable rules, such as the state constitution in the context of the nation state. Rather, one can discern a meta-institutional void in international affairs.

International political conduct takes place bilaterally or among small groups of nations, regionally, or multilaterally. And it concerns interactions among diverse groups of players such as individual constituents, enterprises or states. Accordingly, existing regimes governing international relations – for example world organisations such as the UN, WTO, the IMF or the World Bank, and other authorities such as the EU, the OECD or International Development Banks – differ significantly in the extent of their assigned tasks. The transformation of the GATT into the WTO, for example, involved a shift from an organisation exposed to power politics to an authority reliant more on law and due process. We argue that the international meta-institutional void needs to be filled with proscriptive, quasi-constitutional provisions, particularly if individuals’ rights are at stake and need to be safeguarded against governments’ discretionary interference. Particularly the WTO and the European Union show rudimentary traits of abstract rules, constitutionalism and the rule of law. In the following section we will hence look into the main characteristics of these two organisations focusing on the prospects of the realisation of an international economic order that is arranged according to the generality principle and that allows for just government behaviour protecting private spheres of freedom to trans-national interaction.

5. The present international economic order

5.1 WTO: implementing the generality principle and direct effect - a mixed record

For the most part of the second half of the previous century, the world trading system was driven by the GATT regime (General Agreement on Tariffs and Trade). On the whole, GATT rules were built in order to promote market access according to Most Favoured Nation and National Treatment clauses that are of proscriptive and non-discriminatory
nature. Following the Uruguay round, the WTO (World Trade Organisation) succeeded the GATT regime in 1994. With WTO, the political-institutional agenda was significantly broadened to include rules for market access in agriculture, textiles and clothing, services and intellectual property. TRIPS (the Agreement on Trade-Related Intellectual Property Rights), as opposed to the proscriptive Most Favoured Nation and National Treatment clauses of the GATT, is of prescriptive make-up. It consists of harmonised legal standards on the protection of patents, trademarks and copyrights to be applied across the WTO membership and takes the “WTO rules in a new direction – not farther in the direction of market access, but elsewhere, towards a complex, regulation-heavy standards harmonisation” (Sally 2002: 26). Thus, the exercise of the generality principle in the international realm, in spite of its longstanding use in the GATT agreements, cannot be taken for granted. Quite the opposite seems to be the case: at present, result-oriented rather than process-oriented politics seem to be the name of the game.

The WTO constitutes a community of nations aspiring to form a governance structure for foreign economic policy affairs through law (Petersmann 2000). The WTO, being a club of members with the mandate to warrant the gradual liberalisation of international trade, modified its agenda and corpus of law in consecutive negotiation rounds. With the considerable strengthening of the Dispute Settlement Mechanism, jurisprudence of the WTO has gained significance. The new Dispute Settlement Procedures are legalistic and quasi-automatic, as opposed to the much weaker modus operandi under the GATT regime that more heavily relied upon diplomacy and, as could frequently be observed, was repeatedly exposed to blunt power politics. The constitutional function of free trade has gained importance. It reduces the politicised discrimination inherent in protectionist policies that favours powerful vested interests, and thereby helps to bring about greater transparency and equality of treatment before the law.

Yet, the observation that the WTO is a “contract organization” laying down and progressively extending its multinational commitments raises structural and procedural issues. The role of the Dispute Settlement Body, having the sole authority to establish

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16 The GATT had “a relatively clear mandate – to negotiate and enforce non-discriminatory rules on international trade” though “it is instructive to note that only 11 of the 25 founding articles of the GATT contain negative, proscriptive rules” (Sally 2002: 14, 18).

17 On the constitutional function of the international economic order and of free trade, also understood as an additional line of constitutional entrenchment, see Tumlir (1983: 80), and Sally (2002: 16).
panels of experts to consider the case, and the Appellate Body is contentious. Some observers are concerned about a creeping legislation of the WTO that fills in gaps and ambiguities contained in many Uruguay Agreements, such as the General Agreement on Trade in Services (GATS), Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT) and Trade-Related Aspects of Intellectual Property Rights (TRIPS). This could create an “always-brittle political consensus” (Sally 2000: 27) within the large, diverse group of members trying to sustain “creative” judicial interpretations of legal texts, driven by litigation.

To be sure, a governance system consisting of a set of legal provisions to some degree requires, within its own confines, competency of judicial adjustments and interpretations. Legal-constitutional procedures must allow for legal interpretation in the light of changing circumstances. Just as contracts cannot possibly be complete, so do legal and constitutional systems. Leaders of government like to celebrate agreement committing themselves to certain policy principles only to subsequently exhaust themselves in endless bickering over phrasing the obligations in the most ambiguous and least compulsory manner. Therefore, a legal mechanism needs to be in place that is apt to detect and mend “structural fractures” of the legal system, prompting the relevant legal bodies to strive for consistency of legal interpretation over time and between contiguous areas of law (Tumlir 1983: 82).

The justified call for simple, transparent and negative rules does not principally discard the prospects of endowing the WTO with a quantity of competencies of judicial interpretation, first and foremost located at the Appellate Body. In view of the complicated relationship between the WTO Secretariat and the WTO members it may well be a sensible proposal to demand a reversal of the current trend of developing the WTO rules in contradictory directions, namely in the direction of proscriptive rules in the MFN and National Treatment fashion and simultaneously in the direction of prescriptive rules as seen in the case of TRIPS. The opportunity to revive the initial purpose of the GATT (to remove trade barriers by employing proscriptive, i.e. simple, transparent and non-discriminatory rules), may even be bolstered by strengthening the interpretative vigour of the relevant WTO bodies. After all, it was the GATT’s “inability to provide an authoritative interpretation of its rules” (Tumlir 1983: 81) that can be regarded as its crucial weakness.
It was this structural flaw of the GATT, along with the insight that the GATT, for decades, had not been delivering the desired results of a truly open world trading system, that inspired Tumlir to offer a proposal that was intended to make the underlying principles of the GATT more effective: “One can imagine the international economic policy commitments of a government to be undertaken in the form of self-executing or directly effective treaty provisions, creating immediate private rights enforceable against one’s own government to the order established or contemplated by the treaty” (ibid.: 83). And he goes on suggesting that “national courts, rather than diplomacy, can and should provide the necessary authoritative interpretation of the international commitments governments undertake in matters of economic policy” (ibid.).

The reading of international trade policy commitments, in the form of WTO rules, as private rights held by individual constituents principally allows national legislators to translate their international economic policy commitments into national law. It deploys national court systems to deal with cases brought in by individual constituents, now empowered to defend their private rights at home (Vanberg 1992). In the light of this reinforcement of the protection of property rights, the international economic order can, as mentioned above, be seen as the “second line of national constitutional entrenchment”. Directly effective agreement provisions would relieve WTO litigation bodies of the strain of the workload, thus turning the governance structure of international trade into a multi-level system serving the individual citizen. The resulting reduction of transaction costs of taking action against violations of international trade rules permits a broader enforcement and a more consequent implementation of the WTO rules. Consequently, directly effective provisions reinforce citizens’ sovereignty.

Another variant of the empowerment of individuals to guard their rights is conceivable and has partly already been put into effect. In principle, individuals could be given standing before WTO Dispute Panels, a possibility that is currently not put into practice. The North American Free Trade Agreement (NAFTA), however, has introduced this option for constituents of its member states to defend their rights against governments in front of a NAFTA Tribunal. A number of cases have been filed, for example *The Loewen Group, Inc. (Canada) v. The United States* or *Ethyl Corp. (United States) v. Canada*. The Loewen Group claimed that the legal system of the United States, represented by the Mississippi State Court System, had violated its rights established under the “investor-to-
state” provisions of Chapter 11 of NAFTA and requested compensation from the U.S. government for the value of the settlement it had been forced into and for the subsequent plunge in the value of its stock and other business setbacks. The *Ethyl Corp. (United States) v. Canada* case was settled. Initially, Ethyl Corp. had challenged the Canadian government with a $251 million lawsuit, charging “regulatory takings” that effectively seized its Canadian assets. The Canadian government agreed to pay Ethyl $13 million in damages and to cover the company’s legal costs rather than risk a politically embarrassing defeat in a NAFTA Tribunal.

These examples show that, even if no national court will ever rule on whether a case under consideration violated rights granted by specific NAFTA or WTO provisions, individuals or corporations can enforce their rights by employing quasi-legal procedures instead of diplomacy. The right to call upon an international conflict settlement panel or tribunal also reinforces citizens’ sovereignty, just as directly effective international rules concerned with international policy conduct do. Additionally, both, the right to call upon an international conflict settlement panel or tribunal as well as directly effective international rules governing the international policy conduct de-politicise conflicts over economic policies and place the responsibility of the treatment of such cases in the hands of some international quasi-judiciary body, for example a WTO Settlement Panel, and the national judiciary respectively.

5.2 EU: universalisable “core” with expanding discretionary periphery

The European Union is more than an inter-governmental treaty constituting conditions of free-trade (such as the WTO). At the same time, it remains less than a federal state involving potential omni-competence or competence-competence on the federal level (such as the USA). The EU has sovereign rights conveyed to it by the member states that it exercises in place of them and with direct effect on the member states. So far, however, community institutions have no power to alter the law they are subject to; they are “given a constitution by third parties” (Grimm 1997: 248) – if the European treaties are regarded a “constitution” and member states’ governments as represented in the European Council are regarded “third parties”.

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18 See Grimm (1997: 245ff) on the constitutional nature of the treaties. He argues that to the extent that constitutions are concerned with legalising political rule, the treaties leave nothing to be desired. Hence, from a legal scholar’s perspective fundamental requirements of modern constitutionalism are met. However,
This ambivalent character of EU governance will remain largely unchanged even if national parliaments (and in some cases: populations via referenda) will ratify a “Treaty establishing a Constitution for Europe” as has been drafted by the European Convention in July 2003. The Convention was given an ambitious mandate: to consolidate the enormously complex body of European law separating primary from secondary rules and thus, making its basic structure of competencies, rights and procedures more transparent for the public and more binding for the contracting parties. In tidying up the complex network of treaties forming a three-column Union, the Convention somewhat succeeded. But still, it produced one of the most verbose constitutional texts to be found in history: some 263 pages text (depending on what language is used) filled with over 400 articles plus 37 pages protocols.\textsuperscript{19} The American Constitution comprises 4,500 words, the proposed EU document some 70,000. The brevity, simplicity and transparency which ought to help EU citizens to know of and rely on lasting fundamentals of the polity and distinguish them from the lower-ranking details seemed impossible to achieve in a Convention of representatives of member states engaged in an ongoing log-rolling procedure.\textsuperscript{20}

However, the basic universalisable provisions of the common market that already were established by the 1958 treaties creating the European Economic Community, should remain at the core of a new European constitution.\textsuperscript{21} Here, we do find crucial elements of a universalisable order similar to Hayek’s (1939/80) vision of interstate federalism. Artt. 3 (a), 3 (c), 3 (g)\textsuperscript{22} provide the crucial rules governing the conduct of member state governments: the “prohibition” of tariff and non-tariff barriers to trade between member states and the “abolition of obstacles to freedom of movement for persons, services and

Grimm also identifies serious deficiencies: “In so far as constitutions are concerned with the legitmation of rule by those subject to it, the treaties … fall short” since European public power “is not one that derives from the people, but one mediated through states” (ibid.: 249). Considering the absence of a “European people” in the sense of a political community speaking the same language, discussing the same issues in sufficiently overlapping communication networks and sharing similar values, it is above all the legitimacy basis that will for some longer time be lacking for a European Constitution that would have more weight and richness than the present treaties.

\textsuperscript{19} See http://european-convention.eu.int for the full text.
\textsuperscript{21} For more comprehensive accounts of the development of EU constitutionalism with universalisability as a major reference point, see Streit/Mussler (1994); Mussler/Wohlgemuth (1995).
\textsuperscript{22} We use the numbering according to the consolidated version of the Amsterdam Treaty of 1999. Within the draft treaty establishing a constitution for Europe, the core elements can be found as Artt. III-14ff.
capital”. Prohibitions also include member states’ granting of privileges in the form of aides, subsidies, discriminatory taxation and regulation (Artt. 87 ff.). In addition, private restraints to trade are “prohibited as incompatible with the common market” (Artt. 81 and 82). Hence, the freedom to act and to compete within the common market is protected by universalisable rules of just conduct against interference of national governments and of private actors. Thus, protected domains of individual freedom are created that underpin an extended order of voluntary interaction across (member) state borders. Finally, the rules have been “constitutionalised” with Art. 230 transforming member states’ obligations to abstain from obstructing the basic liberties into subjective rights of EU citizens which are enforceable by court action (Streit/Mussler 1994: 332).

It is above all through setting non-discriminatory, universalisable rules of just conduct of member states and citizens of the European Union that economic integration is achieved “from below” with individual economic agents exploiting the extended order’s enlarged opportunities which serve their individual purposes. At the same time, individual member states, as long as their actions are not prohibited as incompatible with the common market, are free to develop institutional systems that reflect their own social and economic conditions, cultural traditions and public opinions. The freedom of citizens to choose between member states’ institutional arrangements that involve different costs and benefits according to different needs, tastes and interests, together with the freedom of governments to change and differentiate their institutional supply, creates institutional competition among European member states. This inter-jurisdictional competition can in fact serve, as Hayek (1939/80: 268) expected, as a “salutary check” on the states’ interventionist endeavours while still allowing or even stimulating “desirable experimentation” – thus also providing some equivalent to a Hayekian “discovery procedure” of such political preferences and problem solutions as, “without resort to it, would not be known to anyone, or at least would not be utilized.”

On the other side, European integration also clearly frustrates Hayek’s expectation that interstate federalism would discourage discriminatory regulations and purpose-oriented

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23 See already Wilhelm Röpke (1959) for an account of a liberal international order that should grow from below instead of being imposed from above.
24 The quote is taken from Hayek’s (1968/78: 179) famous definition of (market) competition. Applications of this “Austrian” market process theory approach to the realm of political competition can be found in Wohlgemuth (1999; 2002) or Vanberg (2000).
legislation. Spectacular cases of discriminatory laws and policy prescriptions can be found right at the beginning of European integration – e.g. with the common agricultural policy or the European Coal and Steel Community. And they have grown ever since, e.g. with demanding a “high level of protection” in health, safety, environmental and consumer protection policies (Art. 95 (3)) or the establishment of various redistributive funds (Artt. 158ff) introduced by the Single European Act; with ambitious industrial policy targets (Art. 157) added by the Maastricht treaty; or with a verbose declaration of aims and purposes in the fields of “social policy, education, vocational training and youth” (Artt. 136 ff.) further amended by a charter of social rights with the Amsterdam treaty.

In the Amsterdam Treaty’s 367 articles, rules stating that member states or European institutions “shall contribute to the achievements of the objectives referred to in article …”, that they “shall work towards the development of a co-ordinated strategy for …”, or “shall have as a task …” abound not only in rules dealing with procedural detail, but also in material law defining policies aimed at securing specific results for specific sectors or fixing specific standards favouring specific groups. In fact, the whole enterprise of European politics is put under a teleological constitutional obligation as expressed in the preambles to both treaties (on European Union and European Community): creating an “ever closer union” (see also Art. 1). Such a commitment of the Union and its members not only to specific actions following prescribed purposes, but also to a (meta-) purpose of never-ending political integration regardless of citizens’ preferences would clearly contradict Hayek’s understanding of a “community of nations of free men”.25

The 2003 draft of a “European Constitution” would make this purpose-specific and programmatic character only more obvious. Although organisational provisions to strengthen a more effective respect of subsidiarity have been proposed, the collection of common purposes, goals and competencies has been extended even more. It reads much more like a party platform and statist wish-list granting licence and organising political activity than like a “Constitution of Liberty” that would above all have to define limits of

25 Vibert (2001: 172) identifies an attitude of “Jurists’ Europe” that triggers a “misleading chain of logic: European law is viewed as an instrument of integration all integration is good since all integration should be integration under the law, the more that law pervades all activities, the more the union’s good is secured”. Such reasoning, Vibert (ibid.) argues, “undermines the respect for the law since European law comes to be seen as serving a political agenda”.

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political power and grant individual citizens remedies against state interference (s.a. European Constitutional Group 2004).

There are many reasons that might explain the emergence and persistence of such rules as are clearly not universalisable and could even be obviously damaging the interests of large (but latent) groups within the EU.\textsuperscript{26} European rules result from haggling over package-deals. Just as on a national level, discriminatory rules that benefit some and harm others can, particularly in combination with privileged access of special interest groups, be brought into a bargaining equilibrium via extensive log-rolling. European Union decision making procedures provide most favourable conditions for non-generalisable rent-seeking deals to be europeanised as “law”. European legislation is often not visible to the public (and domestic parliaments) before decisions are taken; and conflicting positions are often “solved” (mostly in the Council of ministers) without identifying who was advocating what. Political deliberation often starts only at the very end of long technocratic drafting process; and political decisions often appear as \textit{faits accomplis} after some days and nights of haggling behind closed doors. And perhaps worst of all, since there is no European public sphere or europeanised public opinion that could inform and control European politics, legislation cannot recur to an (informed) consent of a European people (Grimm 1997; Schlesinger 1999).

Overall, European integration at the same time asserts and disproves Hayek’s ideas of interstate federalism based on universalisable rules of just conduct. With its common market based on fundamental liberties, the europeanisation of universalisable rules of just behaviour has produced an extended order of economic and inter-jurisdictional competition that should definitely have increased the chances of a European citizen taken at random of using his knowledge for his purposes and having a high income. However, with its growing periphery of interventionist and harmonised regulations stifling economic and inter-jurisdictional competition, Europe has also shown that policies that would definitely fail a universalisability test can just as easily be europeanised if adequately bundled and obscured.

\textsuperscript{26} For a more comprehensive public choice account of European politics, see, e.g. Vaubel (1994; 2004).
6. Outlook: Towards a universalisable governance of globalisation

Was Hayek, writing at a time when the world was plagued by war and the breakdown of a fairly well established order of international trade27, as Sally (2000) argues, naïve to expect an international economic order based on classical liberal principles to result from intergovernmental constitutionalisation? A careful reading of Hayek’s early statements on this matter in the context of his later writings on universalisability, confronted with a preliminary evaluation of interstate federalism in the EU and of the WTO’s trade regime partly vindicate, partly vitiate this claim.

In fact, the post-war international agreements preceding today’s EU and WTO started out with basic rules proscribing certain kinds of government behaviour that were rightly identified as damaging mutual interests in an extended order of peace and prosperity. As Hayek (1939/80: 264) expected, central planning remained largely “limited to the extent to which agreement on … a common scale of values can be attained or enforced” and thus limited to small societies, homogenous populations or (federations of) states dominated by a totalitarian hegemon (the former USSR). The “free world” never looked like that and globalisation probably never will.

Constitutional democracies have learned to live with a “reasonable pluralism of comprehensive doctrines” (Rawls 1999: 40) at home and were thus well prepared to face even more diversity abroad.28 And they have learned that the best way to cope with diversity is to rely on generality embodied in proscriptive rules instead of uniformity enforced by prescriptive rules. As a consequence, “negative integration” based on rules that remove barriers to citizens’ interaction between states rightly took precedence over “positive integration” based on rules that decree the pursuit of specific (or unspecific)

27 See Henderson (1992) who refers to empirical evidence that suggests that, viewed in historical perspective, closer economic integration is no dramatic novelty. As a well-established long-run tendency it was only interrupted by the Great War. In fact, “the world economy in May 1992 is further away from full integration than it was in May 1892” (ibid.: 646).

28 What is already true for a constitutional democratic society: that “political and social unity does not require that is citizens be unified by one comprehensive doctrine” (Rawls 1999: 124) is all the more true in international relations. Rawls (ibid.: 40) argues very much like Hayek: “we may assume that there is an even greater diversity in the comprehensive doctrines affirmed among the members of the Society of Peoples with its many different cultures and traditions. Hence a classical, or average, utilitarian principle would not be accepted by peoples, since no people organized by its government is prepared to count, as a first principle, the benefits for other people as outweighing the hardships imposed on itself.”
However, as our short discussions of EU and WTO politics suggested, integration has not stopped there. Positive, purpose-lead integration “from above” with – sometimes reasonable, sometimes questionable – statements of common duties and purposes more and more shapes present agendas and intergovernmental bargaining rounds. Not only empirical, but also normative-theoretical reasons make us somewhat cautious when defending a claim of “globalisability of universalisability”. The most important qualifications can be illustrated if we restate our claim with four qualifying parentheses: we argue in favour of the

(1) (near) globalisability of
(2) (elementary) universalisable rules of
(3) (un) just
(4) (government) behaviour.

We will conclude this (already sufficiently complex) paper by a short discussion of these four issues – partly summarising our argument so far, partly pointing at some additional complications of the matter of international governance that we started out to address with one simple constitutional principle: universalisability. For dramaturgic reasons we proceed in the order (3), (4), (2) and, finally, (1).

Our third qualification refers to the already sufficiently stressed reliance on predominantly proscriptive rules. This proposition is not unchallenged in the literature. Streit/Voigt (1993) also discuss “desirable rules for an international society of private law” (ibid.: 59) in Hayekian terms of universalisability, distinguishing three defining criteria: generality, openness and clarity. These elements are deemed adequate for a national private law society. But with application to international trade, Streit and Voigt argue, the property of “openness”, i.e. the predominant reliance on proscriptive rules, would be “most undesirable in the case of a trade order” (ibid.: 60). It would amount to “an invitation to member states to invent practices which would allow the circumvention of these rules” (ibid.). We consider this a justified warning – well founded in experiences with, e.g., voluntary export restraints or regulatory non-tariff barriers. But we fail to see the workability of the alternative, namely “to opt for closure by declaring all actions forbidden which are not explicitly allowed” (ibid.). We lack the imagination to conceive of a definite and conclusive list of actions that governments would to be allowed or perhaps prescribed.

See Scharpf (1999) on the distinction between positive and negative integration. Streit/Mussler’s (1994) concepts “integration from above” and “integration from below” create similar distinctions.
to take which would be conducive to the extension and protection of either an international spontaneous order of private trade or of inter-jurisdictional competition. Free markets, at home and internationally, depend on (a definite, but alterable list of) prohibitions rather than of governments’ prerogatives.

The fourth reservation points at the peculiar structure of the international order: although “human individuals and not states or nations must be the ultimate concern even of international organizations” (Popper 1945/66: 288, note 7), it is state representatives that would have to convene and submit to constitutional self-restrictions on their behaviour, in order to create protected private spheres of the citizens represented. It is this reliance on inter-governmental self-restriction that turns the model of a constitutional contract among free citizens into a more indirect and demanding concept. There is one major reason why international governance (certainly in the EU, but also in the WTO) increasingly relies on purpose-lead declarations of the desirability of alleged common political aims instead of rules proscribing certain political actions: politicians. As soon as the most self-destructive government activities that most obviously threaten world peace and world trade are effectively banned, politicians following their common self-interest as a classe politique have other things in mind than further self-restrictions. For self-interested politicians it should be more rewarding in terms of demonstrated good intentions to sign declarations of common purposes referring to social (economic, environmental etc.) states of affairs that need to be changed. Also in terms of political power, international agreements providing mutual encouragement and authorisation to pursue activist agendas (at home or on the level of common policies far removed from domestic parliamentary or public control) must seem more attractive to politicians than a mutual abrogation of discriminatory policies.30

Our second qualification deserves some further clarification. Not all universalisable rules of just conduct can be and need be globalised. Globalisation does not afford the international legal order to become more and more “general” in the sense of plainly emulating the range of legislation as commonly performed in nation states. Nor does it afford delegation of the requisite authorities to enact and enhance such “generalised” law to a super-national authority. Globalisation, however, should profit from the international

30 The observation of Vibert (2001: 22) not only relates to “constitution building” in the EU, but also to new agendas for WTO and IMF conferences: “When governments try to justify to public opinion what they have agreed in the treaties, the stress is always on the good policy outcomes they hope and promise to achieve – never on the underlying principles of political association”.
availability of such rules as are more likely to be agreed upon by governments and citizens of those nation states willing to engage in the global game of catallaxy. Again, such rules would mostly be “general” in the sense of being independent of specific purposes, largely proscriptive towards governments and protective towards individual spheres of self-determination. Thus global governance should have at its core rules of conduct which are general in the sense of being universalisable across borders, not in the sense of being merely effectively enforced across borders.

One of our main arguments is that a territorially more universal applicability of such rules is greatly facilitated by their abstract nature of universalisability. The argument can also be formulated as a trade-off between rules’ “reach” and their “richness” (see Vibert 2001: ch.4) with universalisability supporting reach — and richness reducing universalisability.

General rules of just conduct have, as we argued throughout this paper, systematic advantages when one wants rules to reach out to ever larger groups and establish an extended order that allows peaceful interactions among individuals that need not have concrete purposes, value systems or interests in common.31 Rules with more richness in material content and regulatory detail afford more agreement on concrete common purposes. They are best provided on lower levels of constitutional hierarchies (see part 4). For (near) global governance as well as for the division of powers within the European Union this means that those rules that are universalisable and provide the basic protected spheres of voluntary interactions among citizens should be at the heart of the respective constitution. Both WTO and EU (and their constitutional texts) should concentrate on their core activity of providing and enforcing general, proscriptive rules with reach. WTO trade rules should have the qualities of both governmental commitments, enforceable at the WTO level, and at the same time of private rights, enforceable at the level of national judicial level to discipline national governments. Authoritative judicial interpretation at WTO level may serve as an auxiliary to achieve consistency of legal interpretation over time and between contiguous areas of law. The same rationale applies, as argued above, to the “constitutionalisation” (Mestmäcker 1994: 6) of European citizens’ basic freedoms to act on the European single market.

31 Rawls, although his principles are “richer” in material content and even include (more or less) modest global redistribution duties, claims that his “Law of Peoples” has the advantage that its applicability “depends not on its time, place, or culture of origin … it asks of other societies only what they can reasonably grant without submitting to a position of inferiority or domination … This enabled that law to be universal in its reach. It is so because it asks of other societies only what they can reasonably endorse once they are prepared to stand in a relation of fair equality with all other societies.” (ibid.: 121f).
With their tasks limited to the provision and enforcement of rules with reach, international agencies would be “a source of generally applicable rules that coexist alongside the rules of other regulatory regimes of the localities, regions, and states. What needs to be set up is a framework for coexisting regulatory regimes where rules with reach, provided by the union, coexist alongside rules with richness, provided by member states and their regions” (Vibert 2001: 99). As a consequence, people will not only, as consumers, have a choice between goods and services produced under different regulatory systems by competing businesses. They will, as “jurisdiction users”\(^{32}\) also engage in choices between the regulatory systems themselves (as locations for direct investment, capital allocation or individual residence) – thus creating competition among jurisdictions. International agencies would still have an important role to play. We argue that their importance and strength not necessarily increases with the multitude and richness or their competencies. To the contrary, by trying too much, (European or near global) international authorities will only disappoint and disaffect. Hence, interstate federalism and the (near) global order of international trade is more stable and able to grow through enlargement if it relies on strong rules in limited areas. Violations of common rules of just conduct are easier to observe and compliance is easier to enforce, if the rules are mostly defined as proscriptions of certain kinds of conduct, rather than prescriptive rules commanding the pursuit of specific purposes.

International agencies would, therefore, find their most natural and strong role in the position of a neutral umpire, determining and sanctioning violations of common rules. With limited tasks and mostly negative formulations of the rules “significant room for the idea of a people’s self-determination” (Rawls 1999: 111) would be preserved. At the same time, the central international authority would not be under unsupportable burdens on its (necessarily weak) direct democratic legitimacy. Hence a necessary condition of a workable international Rule of Law is the restriction of the international agency’s competence to a final list of strictly defined competencies, serving a two-fold purpose: “The international Rule of Law must become a safeguard as much against the tyranny of

\[^{32}\text{See Vanberg (2000) on competition among jurisdictions and its capacity to create additional options for (immobile) citizens as well as for mobile “jurisdiction users” with the effect of enhancing “citizen sovereignty”.}\]
the state over the individual as against the tyranny of the new superstate over the national communities” (ibid.: 236).

This leads us, finally, to our first qualifying parenthesis. Although an international constitution’s concentration on rules with “reach” should be applicable to societies based on quite different cultural norms, national traditions or political ideologies, some political agents and perhaps even their constituents may still find the limitations on their behaviour created by universal rules of just conduct “too rich”. The opening of markets and societies to foreign goods, services, capital, ideas and people and the capitalistic spirit of competition that comes with it may be regarded threatening or even incompatible with (e.g. Buddhist or Hinduist) fundamental values. Hence, the international division of labour and knowledge under common universalisable rules is limited by the extent to which these rules are found compatible with a society’s fundamental values. If even abstract rules of just conduct are found too burdensome and interfering with politicians’ or citizens assumed sovereignty, they should neither be forced to join the international order of free nations, nor should they be given special status or the power to force other nations to adopt (even) weaker constraints. Although it can rightly be argued that network externalities exist to the effect that rules increase in value the greater the number of people who observe them, this scale advantage only holds if the rules’ content does not change in the process. A softening of the rules or of their enforcement in order to reach the widest possible (European or global) agreement on a minimal common denominator should be resisted.33

Our ideal of a “globalisable” constitutional order based on universalisable rules of just conduct is old hat. In fact, it is as old as economics as a science, since all we offered here was a somewhat updated reformulation of Adam Smith’s “obvious and simple system of natural liberty”:

"Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man or order of men. The sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient.” (The Wealth of Nations, vol. II, bk. IV, ch. 9., § 51)

33 Instead, it seems preferable to give room for voluntary multi-speed (and multi-direction) integration. This means that those jurisdictions that want to pursue common purposes in specific areas of positive integration as well as those that favour stronger rules protecting their citizens’ self-co-ordination through international trade in a model of negative integration should both be allowed to go ahead on their own responsibility. See Wohlgemuth (2004).
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