DEVELOPMENTS

Conference Report – Europe's Constitutionalization as an Inspiration for Global Governance? Some Viennese Conference Impressions

*By Kathrin Blanck, Angelika Hable and Ulrike Lechner**

"New Foundations for European and Global Governance? The Achievements of Europe's Constitutionalization." This was the title of the two-day conference organized by the European Community Studies Association (ECSA) of Austria and the Europainstitut of the University of Economics and Business Administration. The meeting was set in the beautiful atmosphere of the Banqueting Hall of the Bank of Austria building in the centre of Vienna on 29 and 30 November 2004.

As the title suggests, the theme of the conference was ambitious – and so was the composition of its participants. The participants included predominantly European and International law specialists, as well as economists, political scientists, historians and sociologists representing a range of nations: Austria, Belgium, Finland, Italy, the Netherlands, Portugal, Switzerland and the United Kingdom. The goal was to discuss the role of the European Union in a globalized world. The discussions took into account the potential impact of the Treaty establishing a Constitution for Europe (hereinafter: the Constitutional Treaty or CT), but also drew a general picture of Europe, including its international relations, the interface between European and international law and politics, as well as the suitability of European integration as a role model for global constitutionalization.

In the face of the broad scope of questions, the organizers sought to tackle the theme from several clearly defined perspectives. The six panels each dealt with different cornerstones of constitutionalization and integration: (1) the constitutional foundations, (2) conceptions of international relations, (3) institutional aspects and competencies, (4) and (5) the constitutionalization and globalization of different policy fields, as well as (6) conflicts between EU and international law. Almost all the panels consisted of scholars of different academic disciplines, either as reporters or discussants of the respective contributions. Most of the panels were, moreover, chaired by distinguished practitioners in the field of European and In-

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ternational law from Austrian governmental departments, the Federal Chancellery, the Ministry for Foreign Affairs and the Ministry for Economics and Labor. The conglomeration of the different perspectives regarding the substantive appraisal of the topic, enhanced by the angles of different academic disciplines and cultural traditions and the confrontation of science and political practice, resulted in challenging, sometimes provocative and consistently thought provoking discussions.

The titles of the panels were already thought provoking. Under the heading "Democracy, Legitimacy, Efficiency or Anything Else?" (Panel 1), Stefan Griller (University of Economics and Business Administration, Vienna) looked at the essence of democracy at the European Union and the global level. He inquired whether it was, again and again, the question of legitimacy and democracy, or whether there was a pragmatic way forward, instead? Griller wondered whether the deletion of Thukydides' quotation ("Our Constitution…is called a democracy because power is in the hands not of a minority but of the greatest number?"[1]) from the preamble shortly before the end of the Intergovernmental Conference was justified? Griller stated that, at the level of the European Union, democracy, as a constitutional principle in all Member States and as an integral principle of EU law (Art 6 TEU) was imperative. Europe thus stood under the obligation to essentially assure structural congruency and preserve the basic ideas of democracy, the identity of the governing and the governed and the equality of citizens as carriers of democracy and a source for legitimacy.[2] For Griller, the core of the current democratic deficit within the EU was consequently the remoteness of decision taking from the citizen, as well as the still limited co-decision rights of the European Parliament in the legislative process. Another factor included the fragmented accountability of the members of the Council towards their respective national parliaments, which, moreover, was not working well in practice. And whilst, under this perspective, unanimity might be considered as a guarantor for democracy, in the sense that it mirrored the preferences of all Member States, Griller asserted that, as a rule, it was in practice and for technical reasons detrimental to decision making in the European Union. Instead, absolute majority decisions would be the core feature of democratic decision taking, allowing for decision by the greatest possible number in the process of dynamic law making. Altogether, at the EU level, Griller concluded that Thukydides was right and, what's more, that there was no alternative to democracy and legiti-

[1] Thukydides, II, 37.

[2] The requirements of input democracy may, according to Stefan Griller, be *complemented*, by output-oriented factors, such as openness, participation, accountability, effectiveness and coherence. *See also* Daniel Halberstam, *The Bride of Messina or European Democracy and the Limits of Liberal Intergovernmentalism*, in *Altneuland: The EU Constitution in a Contextual Perspective*, JEAN MONNET WORKING PAPER NO. 5/04.

macy.[3] And whilst, in Griller's view, there were important steps in the proposed new Constitution in optimizing the principle of democracy in the European multi-level system, many additional steps, and particularly enhancing parliamentarism, should still remain desirable.

At the global level, in contrast, Stefan Griller evaluated the situation as categorically different. The fundament of public international law was rather the principle of the equality of states, irrespective of their internal structure, than democracy and human rights. And although recent developments at the WTO level in the context of the Seattle and Cancun negotiation rounds saw some sort of strengthening of input democracy, the perspective of international lawmaking by an international "parliament" was, in Griller's view, utopian.[4] Under these circumstances, he considered it as even more important to promote democracy and human rights by peaceful means at the global level, which was moreover mandatory for the European Union under the EU-Treaty (Art 11) and the Constitutional Treaty (Art III-292). Yet, as a flipside to the lack of common universal democracy standards and because, in contrast to the European Union, a structural congruency at the global level did not exist and was not in sight, Griller suggested that the transferal of powers of the EU to international organizations (IO) should be subject to limitations. Fundamental policy choices had to be taken at the EU level or subject to the consent of the Union. Whereas international treaties fixing policy choices remained possible, he argued that majority decisions, by which the European Union could be outvoted, had to be restricted to more technical issues. And challenged upon his further policy conclusions, linking the levels of Member States, Union and the global world, Griller proposed that the European Union should be a member of IO's in all these cases, where it held sole or shared competence in a given area of Union law. In this regard, it was noteworthy that the new Constitutional Treaty opened the case for sole EU-membership to the WTO, even though joint representation would most probably continue in the light of national political concerns.

A more complementary than direct "criticism" from the political scientist's point of view followed in the intervention of Gerda Falkner (Institute for Advanced Studies, Vienna). She raised the question, to what extent the notion of "governance" might

[3] For a critical and multifaceted interpretation of the quotation from Thukydides, *see* Uwe Walter, *Was Volkes Wille erstrebt,* FRANKFURTER ALLGEMEINE ZEITUNG, (12 DECEMBER 2003).

[4] For a debate on democracy in the field of international law refer to Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization and International Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW NO 5 (2004); Mattias Kumm, *The Legitimacy of International Law in Question: A Constitutionalist Framework of Analysis,* 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW NO 5 (2004). Regarding dispute settlement in WTO law, refer to Claus-Dieter Ehlermann and Nicolas Lockhart, *Standard of Review in WTO law*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW 491-521 (2004).

be helpful in the democracy-debate at the EU level. In essence, her contribution pointed to the fact that there was still a long way from theory to practice, from law making to implementation. And she contended that it was similarly important to derive from the final results of decision making the extent to which these actually reflected the outcome of democratic principles. To this end, she made a number of observations. First, that the development of EU-governance took place beyond the level of constitutional law or law itself. Several dimensions, such as the modes of decision, the binding character of a piece of law, the competence of the European Court of Justice, the legal basis of a measure as well as the margin of maneuver for its implementation needed to be considered. Second, the increased importance that was attached to the involvement of an ever wider group of stakeholders in the decision making since the White Paper on European Governance[5] had resulted in a pay-off between ever more extensive consultations of such groups, albeit in a non-binding way, and the subsequently more narrow scope for "real" decision making. Antagonistic was, in this regard, also the position of the European Parliament which should feed into the debate the views of its electorate, yet lacked a correspondingly strong role in decision making. And looking at the level of enforcement, Falkner observed that there were major implementation failures and that the Commission was, to date, not able to adequately perform its control function for a lack of time and resources. She derived this conclusion from a collaborative research project carried out under her direction at the Max Planck Institute for the Study of Societies.[6] Notwithstanding the common constitutional values characterizing Europe's constitutionalization process, Falkner concluded that there was still a large variance between Member States in the style of reacting to a duty of implementation, even splitting Europe into three worlds – that of law observance, of domestic policies and of neglect.

Moving away from Europe's worlds of compliance to the global sphere, Panel 2 under the heading "Empire or Community" brought together an interesting complement; confronting a lawyer's perspective on the repercussions of Europe's constitutionalization in the world with an historian's and political scientist's view on Europe's conceptions of the future of international relations. Erika de Wet (University of Amsterdam) departed from the premise that there was an emerging international constitutional order, consisting of an international community, an international value system and, albeit rudimentary' structures for its enforcement. This value system was essentially inspired by the UN Charter with its universal membership and the dual role of both a sectoral constitutional regime for peace and security as well as a key connecting factor linking, in both substantive and struc-

[5] COM (2001) 428, July 2001.

[6] For further information refer to http://www.mpifg.de/socialeurope.

tural terms, the different communities into the international community. Otherwise, De Wet associated the international constitutional model with the intensification in the shift of power and control over public decision making away from the nation state towards international actors of a regional and sectoral nature.

On this basis, her object of investigation was the inspiration that was drawn from the process of European constitutionalization for the transfer of specific constitutional concepts to the sectoral constitutional orders, such as the UN and the WTO. The focus of her analysis was thereby the feasibility and implication of the introduction of the principle of institutional balance into the legal order of the United Nations, essentially with a view to the concern, how the ever expanding power of the Security Council could be curtailed in the absence of a centralized judiciary. She thereby observed a categorical difference in the substance of the principle of institutional balance at EU and UN level and emphasized that a rigid transposition of domestic concepts to the post-national level must be avoided. The core of the principle at the post national level was to prevent the extension of power of one organ at the expense of another. Insignificant was thus the exact nature of the Security Council's powers, as either executive or legislature. The core question was, instead, whether these powers were extended at the expense of the constitutional structure foreseen in the UN Charter. In this regard, she pointed out that the extent of control by the other principal organs of the UN for ensuring a an institutional balance, by the ICJ and the General Assembly for example, was and will continue to be limited.

De Wet thus underlined the potential of the national courts to maintaining the vertical balance of power between the UN and Member States, as well as protecting the fundamental values which were inherent in their own constitutional order as well as that of the UN. Similar as in the European Union, the symbolic threat of rejecting binding measures adopted by a supranational, or respectively international, organ could be applied as a mechanism for ensuring the boundaries of the institution's power and the maintenance of a balance of power within and amongst overlapping constitutional orders. Thus, in essence, the "nuanced relationship between EU institutions and national courts" could, according to Erika de Wet, serve as a role model for global constitutionalization. In the absence of any centralized system for judicial review in the UN and in the light of the constantly expanding powers of the Security Council, national courts might provide the last (or even the only) resort for providing a measure of control over *ultra vires* Security Council decisions.[7]

[7] For deeper analysis, refer to Erika de Wet's habilitation thesis, ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004).

Wolfram Kaiser's (University of Portsmouth) point of departure was comparable to Erika de Wet's, yet with a different connotation and objective of analysis. Nicely wrapped in Robert Kagan's well-known statement "Europeans are from Venus and Americans from Mars,"[8] he sought to explain why, *in spite of* continuing broadly compatible norms, values and objectives for the future global order, the EU and the US now diverged so fundamentally on the methods to achieve global constitutionalization, which had resulted in the most serious transatlantic rift since the end of World War II. In conformity with David Calleo, Kaiser described Europe's vision of world order as pluralist; that is, "multipolar, balanced and multilateral,"[9] and shaped in accordance with the Community ideal. By this last point Kaiser emphasized the high degree of institutionalization, legal penetration and developed mechanisms for peaceful interest mediation. Similar to De Wet, Kaiser perceived this vision as also including a control over any imperial ambitions, through an institutionalized system of checks and balances.

Yet, rather than building on the transposition of the Union's constitutional concepts on the international order, Kaiser looked at the roots for the strongly diverging concepts of a global order between the US and the EU and examined to what extent the clash of globalization models limited the Union's aspirations of "global Community building." To a large extent, he traced the preferences for a global order in the twenty-first century back to fundamentally different historical experiences. He located the roots for Europe's vision in the collective experience of internecine war, hegemonic ambitions and community-building, strengthened by the experience of European constitutionalization as a success story[10] and the conviction by many Europeans of the superiority of their societal model. In contrast to Europe, the US lacked the experience of a foreign war on their soil as well as external hegemonic threats, except of the British Empire in its formative years. According to Kaiser, America's social and political fabric was based on a vibrant, religiously underscored narrative of American exceptionalism.

The cleavage between the two concepts was, in Kaiser's view, particularly strong as a result of the unilateralist doctrine pursued by the United States in reaction to the external security threats following September 11, which severely limited the EU's aspirations for effective, multi-polar global constitutionalization. This was particu-

[8] ROBERT KAGAN, PARADISE & POWER (2003), AT 3.

[9] David P. Calleo, *The Broken West*, 46 SURVIVAL NO. 3, 29-38, 30 (2004); This is seen in contrast to the US administration's aim of a unipolar, hegemonic and unilateral international system.

[10] In conformity with Ivo Daalder, Wolfram Kaiser saw Europe's most important success clearly in eliminating "the possibility of a return to internecine conflict through an ever greater commitment of sharing sovereignty." *See* Ivo Daalder, *The End of Atlanticism*, 45 SURVIVAL NO. 2, 147-166, 150 (2003).

larly apparent in the example of the Kyoto Protocol and the International Criminal Court. Equally obstructive to the EU's vision of global constitutionalization was the Bush administration's inclination towards the use of military methods and direct foreign intervention, sharply contrasting with the EU's preference for so-called "soft power."[11]

Kaiser noted, however, a pitfall to Europe's aspirations of global Community building in the danger that might result from applying (and extending) the European constitutionalization experience and model beyond "culturally compatible" societies that were keen on their socialization into the Community culture. In this context, he pointed to the danger that the EU may succeed in transferring constitutional forms, but without sufficient political substance. This risk was, in his view, particularly pertinent at the time of the present ideological void which resulted from the end of the Cold War and the most recent enlargement round.

In conclusion, Kaiser envisaged three potential scenarios resulting from the present cleavage: either a new transatlantic bargain with an American shift towards less Empire and more Community; a less appealing alternative, involving an increasing US unwillingness to remain globally engaged, resulting in American withdrawal and isolation; and the most worrisome, the persistence of US imperial fantasies, long enough to defeat the constitutional dreams of Europe.

Despite of these dismal prospects the ensuing discussions, initiated by Advocate General Miguel Poiares Maduro (European Court of Justice, Luxemburg/University of Lisbon) were lively and went to the heart of the notion of constitutionalism used by both speakers. Following up Wolfram Kaiser's contribution, Poiares Maduro questioned whether a notion of constitutionalism that was based not so much on shared values and loyalty but on the self-perception of the success of Europe's constitutionalization process was not a rather limited vision. He wondered whether transposing Europe's concept of constitutionalism to societies without acceptance by the political community would not create false legitimacy, and eventually come close to transgressing the borderline to imperialism.
And also Erika de Wet's analysis on the principle of institutional balance came to the fore. In Poiares Maduro's view her concept of institutional balance, in fact, united three different constitutional concepts, namely that of implied powers, judicial review and institutional balance. De Wet contended that it was feasible to further shape these concepts, but she emphasized that, in any event, it was possible only to transpose the *essence* of the principles to the global level. And it was this

[11] JOSEPH NYE, SOFT POWER (2004).

core content of international constitutional concepts that the national courts would be called upon to apply.

Panel 3, placed under the mystic heading "Kafka Reloaded?", led away from a value debate to the secrets of economic facts and figures. It contrasted intriguing data based on an in-depth analysis of power indices with regard to the Council voting system with the apparent shift of the constitutional weights from the supranational to the intergovernmental sphere as enacted in the Constitutional Treaty. To this end Mika Widgrén (Turku School of Economics), who opened the panel, embarked on a critical analysis of the Council voting procedure as it works under the current system as well as compared to the Constitutional Treaty. The results presented under the aspect of measuring the power implications, turned out to be a matter of teasing out the devil in the details.[12]

In his view, the June 2004 EU summit failed to solve the enlarged EU's decision-making problems. He particularly criticized the postponed implementation until 2009 of the relevant Constitutional Treaty rules which provided for double-majority voting rules and would radically alter and improve the situation. In his introductory remarks Widgrén emphasized that the EU was both a union of states and a union of people. Choosing one voting rule meant opting exclusively for one side of this coin, which unavoidably nourished the EU's legitimacy dilemma. According to Widgrén, it was only by chance that the existing qualified majority vote-weighting scheme had managed to maneuver between the two extremes. However, the last enlargement round generated the absolute necessity of creating a new and more legitimate voting system. Whereas it was relatively simple to assure union-of-states legitimacy (by attributing equal power to all Member States), ensuring union-of-people fairness would imply, according to Widgrén, a power distribution in the Council that was proportional to the square root of each nation's population (the so-called *Penrose* rule). Practical appliance of the square root rule was likely to be located in a gray area between weighted voting and dual rules.

Against this background, the evaluation conducted by Widgrén together with his colleague Richard Baldwin (Graduate Institute of International Studies, Geneva) of the currently applicable dual-majority schemes, focused on two elements: firstly the decision-making efficiency which was evaluated by means of the concept of passage probability, secondly the scheme's power distribution with regard to the individual Member States which was gauged according to a specific numerical measure of power called the "normalised Banzhaf index" (NBI).

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[12] Widgrén's contribution was based on a paper written by Mika Widrén together with Richard Baldwin, *Council voting in the Constitutional Treaty. Devil in Details*, CEPS Policy Brief nr. 53, July 2004 (2004).

The conclusions drawn by Widgrén emphasized the improved legal situation created by the Constitutional Treaty as compared to the Nice compromise. The former would not only significantly strengthen the EU's capability to act, but also enhance transparency and remain neutral to further enlargement. The huge variations of the EU with regard to the population size profile of its member nations created legitimacy problems for dual majority systems. In summary, the above mentioned observations represented a fascinating economist's view, but as Bruno de Witte (European University Institute, Florence) later also observed, from a more socio-political perspective one should add the different political "weight" and practical capability to exercise influence possessed by each Member State. Thus, it is difficult to fully subscribe to the frequently propagated assumption that the present system does not work properly compared to the still theoretical alternatives, since the continuous progress achieved under the Treaty of Nice belies conclusions that are too one-dimensional.

In his comments, Bruno De Witte demonstrated his respect for the literary theme in the panel's title in a less mathematical but more Viennese sense, by referring to the letters written by Franz Kafka to his unfortunate love in Vienna.[13] He generally agreed that consequences of a particular mode of decision making will engender kafkaesque dilemmas which provided support for the argument that the aspect of a Member State's ability to see a matter passed does count; and this despite several political scientists hinting at the rare proofs which confirm that power-sharing had ever became crucial in the decision making process. In order to avoid poorly conceived compromises comparable to the voting system in the Treaty of Nice, De Witte pleaded to never leaving such decisions to the last minute, given the fact that the idiosyncratic sensation of infallibility inherent to most Head of States would get even stronger when assembled to decide on collective action.

Having clarified his position, De Witte drew the attention of the audience to the issue of competencies. He observed that the Constitution remained rather cautious with regard to internal policies limiting most surprisingly, the majority of legal innovations to the field of the Common Foreign and Security Policy (CFSP). This observation was even more startling given that the Laeken Mandate on the Future of Europe contained four objectives directly affecting EU membership and citizenship and aiming at the creation of a Constitution for the citizens. However, as De Witte pointed out, the objective to better link the EU to its citizens was paid at the price of democracy and full accountability and control. In his view some significant amendments had been reached by the Convention's proposal and then during the

[13] Between the years 1920-22 Franz Kafka was unhappily in love with Milena Jesenská-Pollack who was married and lived in Vienna. An impressive collection of passionate letters documents this sad period in the life of Franz Kafka.

IGC but the prominent role attributed to the foreign relation dimension strongly challenged the inherently inward looking aspect of any substantial process of Constitution-building.

The indeed strong dynamic of the foreign relations dimension was taken up by the members of Panel 4. Piet Eeckhout (King's College, London) and Ernst Ulrich Petersmann (European University Institute, Florence) developed their reports under the broad heading "Constitutionalizing and Globalizing European Policies." Eeckhout elaborated on the aspect of constitutional coherence and consistency in the field of the EU's external action, examining this theme through the lens of the Constitutional Treaty. He observed massive residue from the current pillar structure in the field of CFSP, leaving the CFSP outside any standard legal territory. This was particularly due to the fact that the Constitution failed to envisage a role for the Court of Justice and to conceptualize competencies for conducting the CFSP. The unique character of current CFSP instruments such as common positions or joint actions allowed for decisions on any aspect of foreign and security policy that the Head of Governments may think expedient. However, it was generally acknowledged that the external legal provisions of the EU were not matched by a respective external political role, and any comprehensive concept to bridge the gap between law and policy in this area were still well out of sight.

Against this backdrop, Eeckhout welcomed the creation of an EU foreign minister and one external action service, provided that these innovations would be implemented properly. He strongly pleaded for lifting the veils of intergovernmentalism and supranationalism, judging the current tension between the administrations of the Council and of the Commission to be wholly unproductive and unnecessary. In Eeckhout's view the importance of the entire debate on coherence was partly rooted in the issues of "mixity"[14] and EU membership of international organizations.[15] Strikingly the Constitutional Treaty did not make reference whatsoever to either mixed agreements or the EU joining international organizations, although evidence suggested that at least legally speaking the Member States which were members of the UN Security Council were required to involve the EU in certain UN negotiations and decisions.[16] In order to consolidate coherence in the field of the

[14] „Mixity" means that the European Community and the Member States enter into agreements jointly, in the form of a mixed agreement.

[15] See also, among others, Pascal Gauttier, *Horizontal Coherence and the External Competencies of the European Union*, 10 EUROPEAN LAW JOURNAL 23-41 (2004); Inge Gavaere / Jeroen Capiau / An Vermeersch, *In-Between Seats. The Participation of the European Union in International Organizations*, 9 EUROPEAN FOREIGN AFFAIRS REVIEW 55-187 (2004).

[16] Compare Article III-305 para. 2 CT.

EU's external action, but also with regard to coherence between internal and external policies, there would be a great need for proactive cooperative practice in this area.

Similar to Wolfram Kaiser, but from a legal and political perspective, Petersmann looked at the *sui generis* character of the European approach to international constitution building by contrasting the respective US vision (as illustrated by the US National Security Strategy)[17] and the EU vision (as reflected by the European Security Strategy).[18] The prevailing US foreign policy paradigm was shaped by the so-called "embedded international liberalism," notwithstanding that it contained numerous policy failures. The European view reflected a more multilateral approach focusing on the UN security system and international law.

However, Petersmann argued that, for various reasons, the existing state-centered and power-oriented UN system did not offer an appropriate legal framework for realizing the foreign policy goals prescribed in the Constitution. Moreover, he contended that the EU's legal structure after the merger of the pillars would remain incomplete in many respects. Hence, the Union could not unilaterally "constitutionalize" its external policies according to the principles enacted in Article III-292 of the Constitutional Treaty without having comparable restraints on multi-level governance outside the Union. On the other hand, Petersmann clarified that the EU Constitution's mandate of further "constitutionalizing" multilevel governance in the wider Europe and in international institutions would remain Europe's most important foreign policy challenge.

Based on the EU's own high standards of constitutional protection of human rights this should eventually lead to full-membership of the Union in all UN institutions in areas in which the EU exercised foreign policy power. He illustrated his point by referring to the positive repercussions of the EC membership in the WTO, since the Union achieved sustained success in the transformation of the power-oriented GATT trading system into the more rules-based WTO legal and dispute settlement system. He attached particular weight to the global protection of human rights, a concern which should be primarily promoted by the EU's vast range of instruments for advancing rights-based, democratic and other constitutional reforms of international organizations as well as by a comprehensive EU security strategy focussing on civil security and respect for human rights.

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[17] *National Security Strategy* of 17 September 2002, *see* www.usinfo.state.gov .

[18] *European Security Strategy: A secure Europe in a better world* of 12 December 2003

Mads Andenas (British Institute of International Comparative Law, London) observed in his comments that before exporting the EU legal model to the global stage it should be clarified, whether the available toolbox (the Constitutional Treaty) was appropriate to achieve the pre-defined goals. He drew attention to the fact that even the most fundamental aspects, such as the rule of law, were generally read through a national lens and were assessed from a national perspective, so that, for example, German or American scholars would likely achieve diverging results when reflecting on the same topics, solely based on their respective politico-legal traditions.

This remark immediately sparked off a lively discussion, which led back to the arguments put forward in the preceding Panels, on the question whether a global understanding of the rule of law existed or if one had to contend oneself with a vague and amorphous meaning of that widely propagated concept. To Andenas, it seemed perfectly conceivable to excavate a core meaning of the rule of law, such as the indispensable condition of legal review, after having, however, stripped-off the various restrictions attached to it by different legal systems. Against this backdrop Petersmann referred to the current position of the US Congress, which bluntly refused to be bound by international law since, according to the Congress, it was not a legitimate but a power oriented system. Consequently any global concept of the rule of law was not desirable at least from the perspective of the US American Congress.

In order to meet the above mentioned concerns, Bruno de Witte proposed the exportation of EU principles of good governance *via* international agreements instead of struggling within the WTO in order to influence it. This argument met some resistance since promoting the rule of law, for instance, in China would necessitate a global forum such as the WTO. All together, exporting the regional EU model to the global level must be perceived as a bold venture not at least due to the fact that, on the one hand, a lot of underdeveloped countries were governed by non-democratic regimes and, on the other hand, most international organizations lacked the necessary input legitimacy.

The practical examination of these questions was reserved for the second day, which was dedicated to the role of the EU in international *fora*. Panel 5, under its intriguing heading "Integrating Integration?", analyzed conflicts, incidents, policies and institutional aspects of the EU, the WTO and the UN. Panel 6 took over the international debate from a more specific point examining Europe's role in the world with the theme "Hormones and Democracy." Giacinto della Cananea (University of Urbino) stressed the fact that the originally predominant central role of the states in basic public functions, nowadays, had undergone a change into the "role of intermediaries between regional and global institutions and their internal

articulations." New institutions, such as the EU and the WTO, had not been created with the purpose of replacing the states but rather with the underlying idea of challenging economic and social problems in a globalized world. Della Cananea thus brought forward the question on how the institutional framework of the new *pouvoirs publiques* should be shaped and whether the liberal and democratic principles of polities could survive Europeanization and globalization.

The more basic problem of coherence in global economic policy-making was examined by Bart De Meester (University of Leuven) who focused on the general role and the potential of the EC to (inter-)act in IOs. Whereas it was up to the statute of an IO itself to lay down the basis for any possible EC-involvement, it was Community law that defined the exercise of the EC's specific powers. De Meester recalled that the EC could be involved in IO's, whether as a member or not. He illustrated the first scenario of the EC as a member by mentioning WTO negotiating rounds and actions in the Codex Alimentarius Commission, which provided for both exclusive and non-exclusive EC competence. If an issue fell within exclusive EC competence, Member States were limited in their actions both internally and externally. The major problem herein was drawing the exact line between the EC's and the Member States' competence in a specific case and, thus, defining the respective voting right. According to De Meester, the more delicate situation involving the EC not being a member in IO resided practically only in situations of exclusive EC-competence, when only the Member States were represented inside the IO. In that case Member States must represent the interests of the EC in the IO and act loyally (Article 10 of the EC-Treaty).

In order to demonstrate the practical relevance of those rather theoretical aspects, De Meester referred to the WHO and recalled that the EC was not a member and, thus, had no right to vote. To give an example, De Meester cited current negotiations on the International Health Regulations (IHR), an international instrument covering measures for preventing the transboundary spread of infectious diseases, that went on within the WHO. He recalled the existence of bilateral relations between the EC and the WHO due to common interests of both organizations in health-related issues. However, these examples of rather informal cooperation should not be confused with real involvement of the EC in decision-making in the World Health Assembly. This, De Meester emphasized, did not exist. The most famous example of successful EC-WHO cooperation was the WHO Framework Convention on Tobacco Control, which, according to De Meester, was a very special case since there existed a special WHO-resolution authorizing regional economic integration organizations to negotiate on that specific convention.[19] For the

[19] World Health Assembly, *Towards a WHO Framework Convention on Tobacco Control*, WHA52.18, 24 May 1999.

time being, in the IHR-revision, there did not exist an equivalent provision authorizing the Commission to open negotiations. But even if there was such an authorization, it should be borne in mind that this would not make the EC a member of the WHO and, being a non-member, the EC could not participate in a conclusive manner in decision-making and ratification. As a result, the duty of loyal cooperation committed the Member States to act in the interest of the EC in such contexts, regardless of whether an issue of exclusive or non-exclusive competence was at stake.

De Meester furthermore underlined that policy-making in the EC did not happen in a vacuum but in a globalized world with many linkages to different IOs which could result in conflicts between IO and between IO and Member States. As an example De Meester referred to the WHO, which had been granted observer status on the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee). Since the SPS Agreement did not cover all measures for the protection of public health, not all of the IHR measures automatically also fell into the scope of the SPS Agreement. Currently, no representatives of the WTO were included in the Intergovernmental Working Group on the IHR Revision, apart from technical meetings with the WTO Secretariat. Nevertheless, De Meester observed in the IHR-revision the adoption of WTO-relevant standards. However, he argued that this did not imply recognition and presumed consistency under the SPS Agreement. Still, a Panel or the Appellate Body might consider these measures in a concrete dispute on health measures as a tool of interpretation.[20] It goes without saying that these non-WTO international rules could not modify or add to the existing WTO rules.[21]

To illustrate the diverse modes of interaction between international organizations, more specifically the EC, the WHO, the Codex Alimentarius Commission and the WTO, De Meester referred to the negotiations on the Framework Convention on Tobacco Control and on the IHR-revision, which showed overlaps of rules and conflicts. He drew attention to the emerging risk for incoherence because of the fact that the EC was not a member of the WHO whereas it was an active member of the WTO and of the Codex Alimentarius Commission. Thus, the only way to avoid incoherence in different international fora required the EC to limit possible actions of its Member States in IOs. This example highlighted the lack of real EC-membership in IOs as the cause for coordination problems of Member States' actions and EC competencies resulting in conflicts between rules developed in different international *fora*. Full membership of the EC in IOs dealing with issues that fell into its exclusive competencies could help avoid such conflicts.

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[20] ERNST ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 128 (1997).

[21] *See* Appellate Body Report: India – Patent protection for pharmaceutical and agricultural chemical products, WT/DS50/AB/R, 16 January 1998, para 46.

In return, Della Cananea demonstrated a "relational" analysis of the EU and the WTO. He looked at the EU as a twofold innovation based on both the states and their peoples. Regarding the role of the EU in WTO decision-making procedures, he pointed to the formation of clubs and the increasing use of dispute resolution procedures, which seemed striking to him as the EU usually favored political negotiations. He argued that there was a contrast between the EU and WTO-systems regarding agricultural products, culture and public health, which particularly concerned the different standards of protection applied and as well as the relevance of scientific evidence of risk. In her intervention Lorenza Sebesta (University of Bologna) stressed the existence of a clear difference between *pouvoir publique* in the EU and the WTO. She regarded the WTO as a forum for bargaining on the basis of objective facts. According to her, the main idea behind the WTO was the creation of an organization with the aim of imposing international liberalization of the market. In contrast, she considered the EU as a place where principles actually matter, focusing rather on the well-being of its people than on the economy.

Della Cananea perceived the hormones case as a good example of those different factors. Maria Rosaria Ferrarese (University of Rome) joined his argumentation and referred to the strong decision-making power of the WTO, its dramatic economic effects and to the variety of issues that one single dispute could possibly imply. In the hormones case, economic and trade issues, including non-economic concerns such as health, confidence in science, etc., were at stake. Moreover, Ferrarese stressed the importance of the WTO as a powerful organization concerned with issues of political, social and economic relevance, the territorial aspect and the more or less worldwide membership to WTO.[22]

The hormones case also served as an example with which to examine challenges to governance in detail. Thomas Cottier (University of Berne) provided an overview of the structure and implications of the WTO SPS Agreement. Extensive non-tariff trade barriers based upon national food standards and policy, but also recommendations by the Codex Alimentarius Commission served as a background. In his presentation, Cottier resumed the structure of the SPS Agreement as "food standards to be mandatorily based upon agreed international food standards." However, he pointed to the right to impose stricter domestic standards, for example in the case of positive scientific evidence of risk to human, animal or plant health. As a whole, he explained that the SPS Agreement left a deliberate choice to strengthen the impact of internationally agreed standards, to reverse the burden of proof for stricter domestic standards etc. Concerning the negotiations of the agreement, he recalled that it had been negotiated under the EC ban on import of hormone-treated

[22] For international economic governance played by WTO concerning non-economic concerns, *see also* STEFAN GRILLER, INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS (2003).

meat and that it had been limited to SPS-specialists. Moreover, consumer interests had not really been taken into account.

Cottier put forward the need to review governance against the background of a persisting increase of WTO law and policies and an inextricable link between foreign and domestic policies. Though Cottier already observed a beginning progress in the domestic reform of governance, he still felt the need for continuously fighting fragmentation and specialization within national governments and EC decision-making processes. Regarding the state of domestic governance in Europe, he drew attention to a lack of parliamentary traditions in foreign trade policy formulation in Europe and of foreign economic policy expertise in political parties. Cottier came up with some suggestions for a domestic reform of governance, *i. e.* the creation of interagency task forces for the preparation of negotiating positions, open hearings and debates with all interest groups, thus, a well-structured and transparent process of negotiations and the inclusion of the European Parliament.

Taking into consideration the state of WTO governance, he observed purely intergovernmental structures, operating together with the strict consensus principle in decision-making, a lack of effective procedures to hear other IOs representing public goods, and fragmentation and specialization. For a reform of WTO-governance Cottier perceived some constraints, such as well-established diplomatic traditions in trade rounds. In order to pursue a WTO reform of governance in negotiations, he pointed to the requirement of establishing public hearings of non-trade concerns and of fighting fragmentation. He argued that cross-border coherence (horizontal issues) should be taken into account and that the consensus principle should be given up for the benefit of weighted voting. As possible factors for weighted voting he mentioned the contribution to the WTO, the GDP, market openness and population. In his concluding remarks Cottier pleaded for a short-term reform for coherence in domestic procedures and transparency (hearings, parliamentary involvement and coherence), whereas in the WTO he discerned the need for a long-term reform, which depended upon overcoming the consensus diplomacy.

In her comments, Ferrarese examined the WTO's governance and its challenges to democracy from the political scientist's point of view. The hormones case itself showed the difficulty of drawing a link between international global organizations and democracy. Notwithstanding the inconsistencies between the hormones case and democracy, she identified some signals of democracy in international law. She perceived the hormones case as a good example of international governance and examined its most important aspects, such as the relationship between democracy and international governance. Whereas in terms of globalization, governance had mainly been placed opposite to democracy, she perceived at the same time some "seeds" of international democracy, including: transparency, participation, interna-

tional cooperation of different states, and multilateralism.[23] Moreover, Ferrarese pointed to the importance of responsible political choices whenever science left a certain degree of uncertainty to politics. She recalled the difficulty of transferring the democratic process in the international and global sphere. She concluded that governance affecting our lives must be balanced by more democracy. Issues present in the hormones case, such as health, security and environment, should be articulated coherently taking into account the background of different visions.

In conclusion, it can be derived from the various panels that there are undoubtedly repercussions for Europe's model of constitutionalization in the world. There was obvious agreement among the panelists that the process of European constitutionalization may be an important foundation towards a uniform approach that might, in the long run, shape the development of the global legal order. There was, however, also agreement that there are substantive differences regarding the constitutional concepts operating at the EU and international level, starting from democracy and legitimacy to the balance of powers and the rule of law. Therefore, the prevailing approach among the panelists seemed to be that, that which may be transposed to the global level will be reduced to an *essence* of constitutional principles. Limitations to such transposition are discerned, on the one hand, in the different traditions and perceptions of concepts for a global order, particularly between the US and the EU. On the other hand, the possibilities are reflected in the acceptance of international constitutional law by the political communities and, henceforth, in the enforcement of such principles. In turn, at the international level, it is perceived that the lack of real EC-membership in IOs can cause coordination problems for Member States' actions and EC competencies resulting in conflicts between rules developed in different international *fora*. Full membership of the EC in IOs concerning issues that fall into exclusive EC-competencies could help to avoid such conflicts. Also, the need to enhance formalized cooperation and establish more coherence in the linkages between IOs was expressed. Accordingly, the challenge has been determined to be to review governance against the background of persisting fragmentation and specialization.

The inspirations drawn from the conference may be summarized by the conclusion that new foundations for European, and even more for global governance, where the constitutionalization process is only in the fledgling stages, will have to be built on core constitutional values. Thereby, European constitutionalism and, as its most recent achievement, the Constitutional Treaty, has the potential to serve as an inspiring role model; potentially one that may be difficult to digest but which is irresistible in its core essence, just as the Sacher Torte enjoyed in the after-hour.

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[23] Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 369-377 (2001).