GLOBAL PUBLIC GOODS – SOME CONSIDERATIONS ON ACTORS, STRUCTURES AND INSTITUTIONS

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Abstract: There is a growing demand to provision of public goods at global level. In part this is a result of globalization, which renders it increasingly difficult to make such goods available within a national framework. The availability of public goods is put further into question by tendencies of privatization and by sovereign claims over certain resources. The growing global demand for public goods can hardly be met by traditional means of international cooperation, including international organizations. Instead, it requires making use of commerce and the world trading system as well as of the potential contributions of private actors. While a number of examples show, that the provision of public goods may be achieved in this way, doubts arise in view of governance, e.g. the ability of the international system to properly appreciate demand and react to it accordingly. It is put forward, that the current system of international organizations and regimes is one of sectoral divide, whereas most issues concerning global public goods require a cross sectoral approach. While states, rather than advocating the common interest, are likely to act as some sort of stakeholders at global level, the involvement of individual beneficiaries and potential contributors of public goods and NGOs is crucial.

Introduction

The global public goods approach is based on and strongly appeals to economic thought. Its foundations and merits in this regard are dealt with elsewhere. Importantly, it addresses institutional, political and legal aspects by highlighting that the poor supply of public goods at international level results from a lack of adequate structures for their production and governance.

From a traditional internationalist and international law perspective, the idea of global public goods sounds quite familiar. Many issues discussed under this new approach have formed part of the international agenda for years, not to say – decades. Furthermore, diplomacy and academia have created a rich variety of concepts and formulas, which appear to be quite close to the public goods approach. The concept of the common heritage of mankind as discussed in relation to deep-seabed minerals, technology, the geo-stationary orbit and a number of other

1 Kaul et al. (eds.) 1999 passim., Kaul et al. (eds.), 2001.
2 See Kaul / Conceição / Le Goulven / Mendoza (2003a).
3 The same holds true, of course, for the national level. See, for a German perspective: Engel (1997) passim.
issues can be used to illustrate this point, as can the “common concern”, which has been voiced in regard to many international environmental issues. From the point of view of international law, the issue of *ius cogens, erga omnes* and the concept of public interest norms may also be mentioned, which rely on the idea of communality in order to justify binding effects on states, irrespective of whether they are bound by explicit consent.

The global public goods approach, however, goes further than these concepts taking on board economic implications and the political economy in the issue areas addressed. Thus, it highlights, that in addressing today’s international challenges, the economic dimension is key, including the regulatory system of the world economy and the underlying political structures.

I. The Demand for Global Public Goods

The global public goods approach has been well received in academia. Research in a number of areas of international relations has made use of this concept. Furthermore, some governments and international institutions have also heavily supported the elaboration and further development of this approach. As this may indicate, the notion of global public goods appears to address relevant questions both from an academic perspective as well as from the point of view of international policy-making. It seems to appropriately reflect a deficit that so far has been described in different ways and from different perspectives. Indeed, as is often stated, there is a demand for the production and / or provision of public goods at global level, which is not properly reflected by the existing political structures. In order to get a better understanding of the notion of global public goods, it seems essential to have a closer look at its causes.

A. Providing Public Goods beyond National Frontiers – an Imperative of Globalization

Obviously, as is often stated, the demand for the provision and production of public goods at global level results from the decline in the role, that states play in this regard. Traditionally, states provided public goods however, the intensification of transboundary economic activity,

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5 *Brunnée* (1998), *passim*.
6 See *Brunnée* (1998) at 800 et seq.
7 See *Kaul et. al.* (1999) and *Kaul et. al.* (2003).
trade, communication, travel and migration increasingly renders it difficult to define and effectively provide public goods in the confines of national boundaries.

For example, established national structures for the production and distribution of public goods, such as rules on access and the structure of finance may be put into question by globalization and the resulting problem of free-riding. Also, established national regulatory policies in the area of health and consumer protection now face the need to comply with international developments and the requirement of international compatibility. In view of international trade and transboundary economic activities, such compatibility of national policies is an imperative. Accordingly, maintaining such compatibility is a high priority in policy-making.

In addition to these effects, globalization may also confront states with new demands concerning public goods: clearly, the facilitation and intensification of communication, travel, trade and social interaction may cause a spread of diseases and encourage criminal activities and international terrorism.

B. Reducing the Publicness of Goods by Privatization and Sovereign Resource Claims

However, the recent demand for global public goods is not only due to the decreasing role that states play. Much to the contrary, the availability of such goods has been put into question by a number of policy measures, both at the national and international levels, which have significantly affected the access to and production of such goods. Such measures include the assignment and strengthening of intellectual property rights, the creation sovereign rights over certain resources and the privatization of the production and distribution of certain public goods or services.

1. The Privatization of Knowledge, Technology and Intellectual Works

This is especially true for knowledge, technology and other intellectual property goods. Under the Agreement on Trade-related Aspects of Intellectual Property Rights of the World Trade Organization (TRIPs), the protection of intellectual property rights has become comprehensive and very effective over the last few years. The free use of patented technology and copyrighted materials, which so far has been a reality in many countries on the basis of legal exemptions or poor enforcement, will be much more severely restricted in the coming years. Furthermore, new developments in patent law and copyrights will reduce the so-called *domaine public* which is considered an important global public good. For instance, the patentability of computer software may restrict the use of software elements by third-party

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9 See infra II. B.

10 See infra II. A. 1.
programmers and limit the activities of the open source community.\textsuperscript{11} An extensive patent protection for genes and gene sequences may hamper third party technology developments.\textsuperscript{12} In the issue-area of biotechnology, a further restriction applies, as countries of origin claim sovereign resource rights on genetic material situated within their jurisdiction.\textsuperscript{13}

2. An Example: Plant Genetic Resources and the Decline of the Public Domain

The impact of intensified protection of intellectual property and the creation of additional entitlements can be exemplified by the case of plant genetic resources. As will be shown below, efforts to bring resources in this issue-area under the guise of a common-heritage can be quickly undermined when conflicting interests seek property rights and entitlements.

Advances in plant breeding in recent decades have considerably changed patterns of agriculture and land use. New and promising plant varieties have been developed by commercial breeding companies and distributed around the world with considerable support from development assistance programs. In many areas, such varieties replaced the cultivation of regional and local breeds and were even grown in places, which, so far, have not been cultivated at all. The resulting decline in diversity in many regions, including those, which can be considered “centers of origin” or “centers of crop diversity” has given rise to some concerns such as the loss of species as an input for future agricultural research and breeding as well as general environmental considerations.\textsuperscript{14} Apart from these considerations, the spread of new and commercially developed crops also had an impact on traditional forms of agriculture.

What followed was a series of impacts, negotiations and agreements that exemplify conflicting claims and interests. Legal claims put into question an exchange of seeds in the local community and the use of some portion of the harvest as propagating material.\textsuperscript{15} Those concerns led to discussions in the FAO, which resulted in the adoption of a legally non-binding Undertaking on PGRFA in 1983.\textsuperscript{16} Most significantly, that undertaking proclaimed that PGRFA are the “common heritage” of mankind.\textsuperscript{17} The common heritage principle,


\textsuperscript{12} Wolfrum / Stoll / Franck (2002).

\textsuperscript{13} See II. C. 1.

\textsuperscript{14} Cf. Perrings / Gadgil (2003).


\textsuperscript{17} Art. 1 of the Undertaking reads: "The objective of this Undertaking is to ensure that plant genetic resources of economic and/or social interest, particularly for agriculture, will be explored, preserved, evaluated and made available for plant breeding and scientific purposes. This Undertaking is based on the universally accepted principle that plant genetic resources are a heritage of mankind and consequently should be available without restriction."

developed through UN negotiations concerning the uses of the deep seabed and its resources contains little more than an idea of free access and an air of distributional justice.\(^{18}\) Today, it looks quite strange, that the undertaking proclaimed such a principle to be applicable to any germ plasm with relevance for food and agriculture, including wild species, landraces as well as highly developed commercial varieties.\(^{19}\) Indeed, the undertaking was soon modified. In 1989 the FAO Conference made it clear, that plant breeder’s rights under the UPOV Convention should not be affected by the undertaking.\(^{20}\) Also, it was stated, that "... the term ‘free access’ does not mean ‘free of charge’."\(^{21}\) In turn, developing countries successfully asked for a recognition of the rights of farmers.\(^{22}\) Two years later, the FAO conference again modified the system of the undertaking. At the FAO conference it was decided, that "breeders’ lines and farmers’ breeding material should only be available at the discretion of their developers during the period of development ..."\(^{23}\) and thereby acknowledged the proprietary character of such lines. However, in turn, the Conference decided that "nations have sovereign rights over their plant genetic resources..."\(^{24}\) Thus within just a few years, the former “common heritage” has been divided up into various proprietary claims.\(^{25}\) It cannot be overlooked, that the different claims made in this case clearly represent the conflicting interests involved. The recognition of plant breeder’s rights and the proprietary character of breeding lines were of comfort to the breeding industry – which in those days was mainly situated in the North. The so called “farmers’ rights” and the concept of a sovereign right on genetic resources can be roughly considered a counterclaim of the South. In sum, the example amply shows, that plant genetic resources, which can be considered a public good have become the subject of claims of different stakeholders. This is likely to cause conflicts in demand, intensive negotiation and result in inefficiencies. Meanwhile, a Treaty on Plant Genetic Resources for Food and Agriculture has been concluded to enable facilitated access to resources while accommodating the various different entitlements.\(^{26}\)

\(^{18}\) See Schrijver (1988).

\(^{19}\) Art 2.1 of the Undertaking reads: "In this Undertaking: (a) "plant genetic resources“ means the reproductive or vegetative propagating material of the following categories of plants: (i) cultivated varieties (cultivars) in current use and newly developed varieties; (ii) obsolete cultivars; (iii) primitive cultivars (land races); (iv) wild and weed species, near relatives of cultivated varieties; (v) special genetic stocks (including elite and current breeders’ lines and mutants); ...”


\(^{21}\) FAO Res. 4/89 supra, Art. 5 (a).


\(^{24}\) See supra.


\(^{26}\) See infra II. C. 2.
3. **The Privatization of Public Services**

A similar development has taken place in view of public services, an area which includes communications, energy, water supply and waste disposal. Whereas the provision of such services has traditionally been taken care of by public authorities, (which had to take into account a number of public policy objectives), there is now a strong tendency to transfer such service provision to the private sector. National developments in this regard are often seconded or even initiated by international efforts to liberalize the trade in services. For example, under the WTO Agreement on Trade in Services, negotiations have been initiated on a number of services, including, for energy, water supply and even secondary education.

**C. Summary**

As has been seen, the demand for the provision of public goods at the global level is not merely caused by globalization but also results from the assignment of exclusionary rights and the privatization of public services. It has to be highlighted, that not only the latter developments but also the process of globalization are subject to policy choices and thus cannot be considered inevitable in an inescapable process of globalization. Also, it has to be emphasized, that choices concerning globalization, liberalization and privatization often have a sound basis. The liberalization and subsequent intensification of trade may importantly contribute to world economic growth. The assignment and strengthening of intellectual property rights may foster research and development and technological advancements around the world. Lastly, the privatization of public services may be an imperative of limited budgets and may result in a better quality and a lower price. Despite these advantages, it cannot be overlooked, that such policy decisions apparently have been made without fully taking into account the resulting impact on the need for and availability of public goods.

II. **The Supply of Global Public Goods**

In order to provide a public good a number of activities may be required, depending on the nature of the good at hand. Goods may need to be produced – as is the case with telecommunications, health services or food; or need to be preserved, as is the case with the environment. In many cases, the supply of a good may require some system of distribution at different levels in order to be supplied to potential beneficiaries at local level. Of course, the supply of a public good also often requires considerable resources, both in terms of funding, technical, and organizational capacities and contributions by different actors.

States, which so far have been the major supplier of public goods, have developed different and often highly sophisticated structures to achieve successful supply. They can rely on existing administrative institutions and system of public finance and goods are processed within a well-established system of economic, social, health and environmental policies and
related preferences. If such goods are to be made available to beneficiaries around the world and/or requires action taken in different countries, supply is considerably more complex.

A. Changing Rather than Decreasing: A New Role for States

The increasing necessity to produce and/or provide public goods at global level will most likely considerably change rather than reduce the role of states. While, according to the reasons outlined above, the provision of public goods within a national framework will become less relevant, there will be an increasing demand for states to commit themselves to contribute to and participate in the global production of public goods.

1. Commitment and Sovereignty: Lessons from International Terrorism

Such demand may quickly arise and even touch upon the status of states in the international system, as the case of international terrorism laid out below amply shows.

During the second part of the Twentieth Century, international security issues have been dominated by two hegemonic powers. After the fall of the Berlin Wall, the U.S., for obvious reasons, was not willing and probably not capable, to take on the burden of acting as a sole power providing international security on its own. Without much success, a participation and contribution of other states was discussed. The attacks of 11 September 2001 made it clear that international terrorist organizations had come into a position to carry out strikes, which in terms of impact come close to state military actions. Also, obviously such terrorist organizations had benefited from the inability or unwillingness of states to exercise control and to effectively prevent terrorist activities.

All of the sudden, it became clear that international security is a public good, which has to be provided for globally.\(^\text{27}\) Within a short period of time spanning from the international operations in Afghanistan to the Report of the Secretary General on 21 March 2005\(^\text{28}\) and including the war in Iraq and related discussions, the role of both international institutions and the states changed considerably, both in practice as well as in terms of general concepts about statehood.

In practice, the Security Council assumed a central role in the fight against international terrorism. It only set up an impressive institutional machinery for the coordination and cooperation of action against international terrorism\(^\text{29}\) but also acted as a quasi-legislator by

\(^{27}\) See Mendez (1999).

\(^{28}\) In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, A/59/2005.

\(^{29}\) Under Resolution 1373 a Counter-Terrorism Committee has been established under the UN Security Council.
making mandatory obligations contained in relevant international terrorism conventions, which hitherto had not been ratified by a number of states concerned.\textsuperscript{30}

In terms of general concepts, the notion of sovereignty became the subject of considerable change. The International Commission on Intervention and State Sovereignty, which has been set up by the Canadian government in response to an initiative by the Secretary General of the United Nations, voiced the idea of a “responsibility to protect”. It based such concept on a “re-characterization”, where sovereignty is no longer exclusively a device of control, but is to be understood as “sovereignty as responsibility”.\textsuperscript{31} In view of the particular importance of international security and the clear-cut and far-reaching authority of the UN Security Council, such developments cannot be generalized. However, it can hardly be overlooked, that the idea of a responsibility as inherent in the concept of sovereignty has also gained relevance in view of other global public goods.\textsuperscript{32}

2. \textbf{Common but Differentiated Responsibilities}

Of course, a stronger commitment of states in view of the provision of public goods at international level has to take into account the different potential and responsibility of particular states.

The protection of the global environmental components is a good example. In order to allow for the participation of all states and in order to foreclose free-riding, means have been developed to allow for just and fair sharing of goods between states with different resources at hand. The principle of common but differentiated responsibilities of states has become well established in international policy-making on sustainable development and also forms part of a number of international environmental instruments.\textsuperscript{33} Furthermore, a system was developed to grant developing countries additional funding for measures fulfilling national environmental objectives while at the same time contributing to global environmental objectives. In this case, the international environmental funding institutions, and primarily the global environmental facility, may fund the incremental costs, which reflect the contribution of the national measure at hand to global environmental objectives.

As this example may shows means and mechanisms can, and have to, be developed to accommodate the different responsibilities and the potential of states in order to enable and to persuade them to participate in the provisions of public goods at global level.

\textsuperscript{30} Talmon (2005).

\textsuperscript{31} The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, Ottawa 2001. Para 2.14 reads in part: “… there is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties.”

\textsuperscript{32} Kaul / Conceição / Le Goulven / Mendoza (2003a), at 12.

\textsuperscript{33} Cf. Stone (2004); Kellersmann (2000)
B. The Limited Relevance of Classical International Co-operation and Intergovernmental Organizations

Of course, the issue of providing public goods at international level is not entirely new. International co-operation is well established in a number of sectors and can rely on long-standing institutions, in particular international organizations. Multilateral and bilateral development assistance often relates to the provision of public goods, e.g. health services or the maintenance of food security. Also, a number of international institutions are engaged in the production of normative public goods, such as technical standards, health regulations and liberalization of international trade.

However, it is highly questionable, whether intergovernmental structures can meet the increasing demand for the supply of public goods at global level. Such structures have become quite specific and efficient, but generally still have limited means, tools and financial resources.

This may be demonstrated by the case of protecting human health against threats like HIV/AIDS and other infectious diseases. The activities of existing international institutions, such as, the World Health Organization (WHO) cannot be underestimated as a resource in terms of provision of the global public good human health. It has for example invaluable scientific expertise as a resource and is well equipped to design and execute programs and campaigns. However, the enormous demand for efficient medicines clearly exceeds its resources and mandate. To provide more financial resources, a “Global Fund to Fight AIDS, Tuberculosis and Malaria” had to be established. States also considered it necessary to fund alternative avenues to be able to produce medicines under favorable conditions more and reduce the negative effects of production under patent protection. In the end, the necessary changes were made by relevant WTO bodies and the international law of intellectual property was at stake. As these examples show, the provision of public goods at international level often requires a combination of resources, skills, authority, regulatory policies and institutional machinery, which exceeds the limits of most individual international organizations.

C. Supply of Public Goods and the Role of Privates

These and many other instances of attempts at new solutions for global problems has shown that states and international organizations can hardly cope with the demand for global public goods by means of traditional forms of intergovernmental co-operation. In view of the supply

35 For details see Matthews (2004).
36 Abbott (2002).
37 See Shaffer (2004), at 463 et seq.
of public goods at global level, it is essential to explore and develop the potential of contributions by individuals, civic groups, society and business.

Within the issue area of environmental protection, this idea was developed long ago embodied in the principle of sustainable development. The 1992 United Nations Conference on Environment and Development endorsed this principle, an insight which is that the protection of the environment cannot be sufficiently achieved by governmental intervention, but needs to become an integral part of economic and social structures.

From a similar but much more limited and instrumental perspective, new concepts such as the public-private-partnership highlight the potential to link public objectives with business activity.

1. Linking Public Goods to Private Benefit – Biodiversity Resources

A number of new approaches for the supply of public goods have been developed in view of environmental goods, especially biodiversity.\(^38\) According to the Convention on Biological Diversity, the conservation of such diversity is a common concern of mankind. There is no doubt that biodiversity has important eco-system functions and can also serve as an input for the development of agriculture and biotechnology and thus qualifies as a global public good. A number of approaches have been developed within the context of the convention in order to link the conservation of biodiversity to potential private benefits. The most important issue in this regard relates to the fact that biodiversity represents a wealth of genetic information which may be used for the development of new materials, medicines and crops. In order to provide incentives for the conservation of biodiversity, the convention endorses a sovereign right of states to determine access to the genetic material and its uses, and links this right to entitlement to receiving a share of potential benefits from such uses. Thus, potential private users of such genetic or biological material, mainly including chemical and pharmaceutical companies, would have to share some of the benefits they receive with the respective country of origin.

Another mechanism envisaged by the Convention on Biological Diversity relates to traditional forms of living and agriculture which may be considered to be supportive to the conservation of biological diversity. The convention calls for the development of mechanisms to ensure that local indigenous communities practicing traditional lifestyle and agriculture may profit from offering their innovations and knowledge to third parties for commercial use. Furthermore, a number of initiatives developed means and ways to explore the full benefits of the conservation of biodiversity for tourism.

\(^{38}\) Perrings / Gadgil (2003).
The supply of public goods is to be achieved by allowing certain private actors to collect the benefits of commercial uses of such public good. It has to be stressed that it is still too early to see whether those approaches are successful in practice.

2. **A Mixed Structure of Public and Private Contributions – the Case of PGRFAs**

Privates also play an important role in the conservation and use of plant genetic resources for food and agriculture. As outlined above, the interests of business, public institutions and of states have made it difficult in the past to organize the conservation and availability of those resources, which represent a global public good which is highly relevant for food and agriculture at international level.\(^{39}\) In order to bring the different actors and interests together, the International Treaty on Plant Genetic Resources for Food and Agriculture envisages a so-called “multilateral system”, which facilitates access and exchanges of such resources between international and national public institutions, mainly seed banks, and private agencies: private seed banks and private plant breeders.\(^{40}\) The system links two international programs of action to conserve and develop plant genetic resources through public funding. Furthermore, a mechanism is envisaged to allow for a sharing of benefits, including those resulting from commercialization.

3. **Public Private Partnerships for Infrastructure Projects and the Provision of Public Services**

It should be noted that there is a strong tendency both at international and international level to enable the supply of public through such public-private partnerships. Such projects are fairly common in the field of infrastructure and the provision of public services, including energy supply, waste disposal and telecommunication. They are also fairly well established in international development co-operation and finance. The projects all have different underlying concepts regarding access and funding. However, in most cases, they envisage that the beneficiaries of certain public good or services have to contribute to its funding. One thus has to be reminded that this form of the supply of public goods has important distributional consequences, as most of them imply that the good or service at stake is not entirely financed by public sources and made available free of charge.

4. **Privatization in the Communications Sector – Satellite Communication and the Internet**

In some areas, the supply of public goods at global level has been fairly well-developed. International satellite communication, including INTELSAT and the INMARSAT system,

\(^{39}\) See *supra*, I. B. 2.

which is specifically designed to meet the need for maritime communication, were developed by adding an international governmental structure to existing US initiatives and organizations. It has to be highlighted, that from the very beginning, this structure included a private element because the leading US agency was organized as a private company. Because of the fact that telecommunication providers in many countries around the world were privatized in recent years, the structure of both systems has been undergoing important changes. Today, both systems mainly rely on a co-operation between providers based on private forms.41

There are striking similarities to this in the development of the Internet. The Internet has been developed with the support of US governmental institutions which have transferred their responsibilities step by step to commercial entities. In addition, a non-governmental international governance structure has been established.42

In sum, these examples from the telecommunications sector show, that public goods may be provided for by private actors at the global level. The subsequent withdrawal of governmental resources and control obviously results from technological advances and developments around the world, which renders those services stable and affordable and reduces the need for intervention.

5. Public Goods and Social Responsibility – Multinational Enterprises

A completely different aspect of the provision of public goods by private actors relates to the so-called social responsibility of multinational enterprises. There is a long history of initiatives aimed at requiring multinational enterprises to take into account social, environmental and political objectives in their overseas business operations and especially when doing business in developing countries. Currently, the OECD, the International Chamber of Commerce and a number of UN bodies have discussed and adopted standards and codes of conduct in this respect. Furthermore, some attempts have been made to link the provision of certain social services to investment projects. In some cases, private partnerships have been set up to provide certain public services like energy and water supply, schools and hospitals along with investment projects.

6. The Role of NGOs

Last but not least, non-governmental organizations can also play an important role in the supply of public goods at global level. Today, the role of NGOs is no longer confined to giving public information and lobbying national and international institutions. NGOs widely engage in international development co-operation by providing education; running public awareness campaigns, providing technical expertise, education and medical services. In some

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41 Polley (2002); Einhorn (1998).
areas, their know-how and capacities are indispensable for fulfilling functions which are important for the provision of public goods.

7. **The Business Community: A Regulating Agency?**

Recently, it has been emphasized, that private actors may also engage in rule-making and standard setting and thus can contribute to the further development of the international body of regulation, which is needed to cope with the effects of globalization. International merchant law and the commercial arbitration often are discussed in this regard. Indeed, international commercial rules and structures and procedures provide for important public good and services, mainly regulation and dispute settlement. It may be added, that private entities also play an important role in the definition of commercial and industrial standards. In many states, the elaboration of technical, industrial and commercial standards has been the task of private institutions. Regional and international standard setting bodies that build on such private structures are also to be considered private entities.

A closer look to the body of law of many states may shows that such law often refers to commercial practices and customs. This involvement and contribution of private actors to rulemaking and standard setting in the field of commerce, industry and technology has been to some extent overlooked in the past.

As regards its future potential, however, caution is to be applied. Private standard setting and rule making, as well as dispute settlement, hitherto has been confined to issues and areas where the potential actors should be able to act on an equal footing regarding their interests and strengths. However, such private standard-setting can hardly be considered appropriate in instances where the interest of individuals and groups, who cannot fully participate in such rule making exercises appropriately, are concerned. In view of the new enthusiasm for private rulemaking within some parts of academia, it should be noted, that proper stakeholder involvement is an essential precondition for private activity in this regard. Also, it should be kept in mind, that many of the “private” activities to be mentioned in this regard can be attributed to informal but effective coercion from public institutions.

8. **Summing up: Multiplicity of Forms**

The increasing need to produce and/or distribute public goods at global level is likely to change the role of states and international organizations and will require the establishment of new forms of organization including private actors. A number of rather different structures have been established for the supply of public goods at global level. They all reflect the particular nature of the good at hand and the related interests of actors concerned. This variety

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43 *Cf. Teubner* (1997 a) and (1997 b).
of forms and structures amply shows that adequate elements and tools are available to arrange
for the supply of public goods at the global level.

III. Global Governance for Global Public Goods

The urgent demand for and the various and complex patterns of supply of public goods at
global level require adequate structures of governance.

A. Managing Public Goods – a Challenging Task

Providing public goods is quite demanding in terms of governance. It requires complex
political decisions, which include the determination of the goods to be made available to the
public in terms of quality, quantity and conditions and necessitates allocating means and
resources for its production and availability. Furthermore, the implementation of such
decisions may be complex and involve regulatory action, institution-building, and the
establishment of an adequate administrative structure for the production and distribution and
funding.

Most importantly, however, decision-making on the provision of public goods requires
difficult choices. In a world of scarce resources, we cannot expect public goods to be
available free and without limitations. Moreover, public goods may be conflicting by their
very nature, as is the case, for instance, with intellectual property protection and public
health. Ways and means have to be in place, to reconcile such conflicting priorities or to
offer compensation.

Decision-making on public goods requires to taking account the positions, interests and views
of various stakeholders, including potential beneficiaries as well as potential private
providers. At the national level, formal political institutions and many informal network
structures exist, which are competent and experienced in this regard. The provision of public
goods beyond the national framework cannot rely on similar structures.

B. European Integration – No Blueprint for the Global Level

In the European context, a regional structure of governance emerged, which can, by and large,
be considered to meet such requirements. Parallel to the progress made in economic
integration, the mandate and authority of the European Union was broadened in order to cover

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44 See Shaffer (2004), at 461.
issues such as consumer protection, health, the environment, infrastructure, science and technology. Nowadays, the provision of those public goods is widely governed by the European institutions. They have the competency to implement their decisions by means of legislation and administration. Furthermore, the European Parliament, (although still in a limited way), represents the Union citizens as potential beneficiaries or providers of public goods. Individuals enjoy a set of rights, which they may enforce in the courts, including the European Court.

C. The International System in Perspective

The international system certainly lacks the homogeneity, which is required to develop adequate structures of governance. In terms of membership, mandate and coverage, the United Nations system might appear to come close to the idea of an international governance structure. However, with a few important exceptions, most notably in the field of collective security, the system lacks the authority to implement its decisions effectively. The United Nations thus may play an important role as a political forum but is poorly equipped to exercise all of the functions, which are required to govern the provision of public goods at global level.

Indeed, the international system to date is mainly built on states, who have retained their right to exclusively create obligations through issue-specific, separate agreements and to design separate institutional structures for particular issues as they deem fit to respond to their particular interest.

1. The System of International Regimes: A Problem of a Sectoral Divide

Thus, in the international system, a whole number of regimes exist, which deal with particular issues. This includes regimes as powerful as the WTO or as specific as the International Plant Protection Convention. Their interrelationship is based on equality. The existence of these different regimes is due to the peculiarities of the processes of development of the international system.

Their creation and structure each reflects a particular consensus on a certain issue, agreed upon by a coalition of states within a specific setting and through specific procedures. Most regimes mirror exactly the circumstances of their creation in terms of a specific combination of subject matter, objectives, rules, decision-making procedures, mechanisms and measures. A good example here is the WTO, which is built on a quite peculiar set of issues, and reflects the different interests of states involved.

However, this sectoral structure of the international order does not easily match with the challenging task to govern the provision of public goods at international level. Global public goods as discussed here, by their very nature, their means of production and availability and
the potential choices to be made between conflicting other public goods and policy objectives often concern more than one international regime.

a. The WTO and Cross-cutting Issues

The numerous difficult debates around the WTO are a particularly good example which deserves elaboration. Most of the issues debated in the WTO concern some public good, e.g. human rights, human health, food security or the environment. In almost all of these debates, reference is made to other international regimes, which are established to provide for those public goods.

For example the environmental cases brought to WTO dispute settlement highlight this point. In the Shrimp-Turtle case, the Convention on International Trade in Endangered Species was at stake, because sea turtles are among those species listed in Annex I to the Convention as being under threat of extinction. The Swordfish case, (which was eventually settled otherwise), should have referred to the United Nations Convention on the Law of the Sea and its implementing provisions for highly migratory species and straddling stocks. In both of these cases, there were obviously strong links to other international regimes. However, they could not be fully explored and taken into account within the confines of the WTO dispute settlement system. Rather than explicitly referring to rules and activities of the other regimes, the dispute settlement institutions of the WTO had to stick to the laws of the WTO as a basis for their considerations. Thus, rather than referring to rules and decisions of other international bodies, the Panels and the Appellate Body had to base their decisions on Article XX of the GATT 1994. This article is a national exception type of provision, which was originally meant to allow for sovereign policy measures in certain policy areas. Thus, the international context of the measures taken hardly could be appropriately reflected.

The divide between international regimes which becomes clear at this point may be particularly significant in dispute settlement procedures. However, it is also present in other fields of activity of the organization. The previously mentioned medicines controversy can be considered a good example in this regard. The problem of providing a cure against HIV/AIDS and other infectious diseases has been discussed in a number of international regimes. In particular, the Committee of the Covenant on Social, Economic and Cultural Rights adopted a General Comment on Article 12 of the Covenant, which deals with the right to health. In this comment, the threat of infectious diseases in general and of HIV/AIDS in particular was highlighted and it was maintained that the availability and supply of effective medicines had a high priority. The comment also indicated that this high priority had to be

47 Stoll / Vöneky (2002).
48 See supra, II.B .
taken into account when applying rules of patent law and non-voluntary licenses in particular. This issue was later adopted by the Human Rights Commission of the United Nations and discussed in greater detail in a special session of the General Assembly, devoted to the problem of HIV/AIDS and other infectious diseases. These two institutions also made the more precise point that the TRIPS Agreement, which envisaged granting licenses for the local production of medicines for local markets, was ineffective because many developing countries have no domestic industrial capacities available which might allow for the local production of highly sophisticated pharmaceuticals. Instead these institutions propagated, a solution which allows for the production of pharmaceuticals under a non-voluntary license in one country and from where they are later imported by states where supply is needed. The problem was later addressed in a 2001 Doha WTO Ministerial Declaration and an implementing decision by The General Council prior to the Cancun Ministerial Conference in 2003. However, the discussion in the WTO on the one hand and in the UN institutions on the other took place separately, and the final WTO decision refers neither to the discussions and decisions in those UN bodies nor to Article 12 of the Covenant. As this may indicate, this kind of a sectoral divide between international regimes is a divide both of institutions and processes as well the underlying substantial legal considerations. It shows that international regimes largely stick to their own mandate and take limited account of discussions, decisions or rules of other quarters of the international system.

b. A Sectoral Divide between Environmental Regimes

It should be noted, that the problem of a divide of international regimes also in many areas. For instance, many of the numerous environmental regimes address subjects which are closely interrelated. The conflict between the protection of biodiversity and climate-change policies may serve as an example in this respect.

c. The Need for Coherence

This divide between regimes renders it difficult to effectively govern the provision of public goods in the very likely case that an issue at hand is related to more than one regime. This is especially the case in view of the need to set priorities and to arrange for some sort of compensation in order to accommodate conflicting interests.

A closer look at the structures and basic documents of the WTO reveals that a link to other international organizations or their activities is only envisaged in a small number of cases. For instance, the decisions and activities of the International Monetary System have to be taken into account.

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50 „Access to medication in the context of pandemics such as HIV/AIDS, Resolution 2001/33 of 23 April 2001.
52 Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/W/2, 14 November 2001.
54 See Matz (2005).
Furthermore, the WTO Agreement on Sanitary and Phyto-Sanitary Measures extensively refers to relevant international standards as adopted by other international institutions. In addition, the SPS Agreement as well as the WTO Agreement on Technical Barriers to Trade urgently call upon other international institutions to elaborate and develop those standards. Moreover, the WTO has taken the initiative to cooperate with those other international regimes in order to foster the development and adoption of further international standards in this regard. This is certainly an encouraging attempt to overcome the sectoral divide.

On the other hand, even in these examples the magnitude of the problem of regime divide becomes clear at the point of the final adoption of the decisions were taken autonomously by the competent bodies of the other regimes. The patterns and structures of such decision-making are independent, thus, there is no international body which can discuss and finally decide on a problem in its entirety. When elaborating and adoption standards, decision-making bodies are bound by the mandate of the respective international regime and therefore cannot openly discuss nor consider external effects such as potentially enormous trade implications. Nor can they devise any kind of political compensation in order to accommodate potential trade interests of members.

At this point, coming back to the development of the European Union can be highly instructive. The international trade system heavily relies on external and other independent international regimes for guidance relating to the increasing number of public policy issues which result from the progressing liberalization of trade. In contrast, the mandate, the institutional structure and the resources of the European institutions were broadened to enable it to cope with the growing demand for coherent policy-making.

In some cases, attempts to achieve such coherence within the WTO can be seen: For instance, the global environmental facility which serves as the funding mechanism of several more recent environmental agreements exercises some overall coordination. However, it needs to be stressed that a number of tendencies are likely to result in a deepening of the structural divide rather than bridging the gap. The proposal for establishing a world environmental organization,\textsuperscript{55} for instance, while certainly possessing the potential to coordinate and harmonize existing environmental regimes, is clearly understood as an institution to counter the activities of the WTO rather than facilitate coordination. As mentioned above, governance for global public goods probably likely requires the adoption of a cross-sectoral approach, which implies that different aspects taken into account which have so far been taken care of by different international regimes.

Thus, international organizations may contribute to the governance of global public goods by contribution each in the confines of a mandate. However, such institutions seem hardly fit for serving as a comprehensive forum to explore, discuss and decide on such issues.

\textsuperscript{55} See Peterson (2000) at 360 \textit{et seq.}
2. States – Common Interest Actors or Stakeholders?

Within the confines of a sectoral divide, the ability of international organizations to cope with new developments and the need for cross-cutting approaches is declining. States are likely to play a more important role, as they have the power to direct international bodies to liaise and establish linkages as they deem fit and to allocate funds according to their proper priorities. This important role also entails a responsibility to devise a structure of the international system, which is coherent and effective.

However, it seems all but clear that states are aware of this responsibility. At national level, as has been shown, states have an important role to play in the provision of public goods and perform related functions of governance. Notwithstanding the many biases and intricacies of the proper reflection and representation of interests in a political system, national political institutions fulfill the task of determining the common national interest and act accordingly.

However, at international level, the conduct of states is likely to be much more oriented towards their national interests. While their activities at national level are driven by some idea of a common national interest, in international discussions, negotiations and decision-making, they are likely to end up as stakeholders. This aspect is likely to be of critical importance for the governance of global public goods because, as explained above, there is a general tendency of shifting the supply for public goods from the national to the global level.

D. Including the perspective of individuals as beneficiaries and potential providers for public goods at global level

As has been shown, public goods are supposed to serve individual beneficiaries. The proper supply of such goods requires that the specific situations and the preferences of such individual beneficiaries are taken into account. Furthermore, such supply has to rely importantly on private contributions – be it by individuals or private business actors. They can provide important input to the governance related to the supply of such public goods. While a number of formal and informal political and administrative structures exist at national level in order to take care of this need, the provision of public goods at global level cannot rely on such favorable structures. Traditionally, states and their governments were entrusted with the task to properly reflect the preferences, needs and the potential of individuals at international level. However, they can hardly be deemed fit to adequately exercise this function in view of the growing complexities of international politics and the challenging demand to govern the provision of global public goods.

Obviously, a more comprehensive and inclusive structure of international policy-making is required, which enables potential beneficiaries and providers of public goods to be more adequately involved.

This need becomes even more apparent when considering, that recent developments highlight the relevance of the individual and its rights. The right to food, the right to water, the farmers’ rights and the right to health may serve as examples in this regard. This coincides with a
renaisance of the more classical social human rights, witnessed by the recent activities of the Committee on the Convention on Economic, Social and Cultural Rights.

However, in view of the fact, that a public good may be relevant for a potentially vast number of beneficiaries all over the world, any direct involvement of those individuals in decision-making seems to be impossible. More likely, will be a need to develop some political structures which represent the preferences, needs and the potential of the various possible stakeholders. Importantly, it has to be taken into account that the supply of a public good relies on local, national and regional activities and structures even if that public good is to be considered a global one.

E. Civil Society as a Necessary Complementary Component of Governance for Public Goods at Global Level

The challenge of building up a structure of governance for global public goods is therefore one of establishing the necessary linkage between very different types of actors all acting upon their own proper roles. As shown, the different international organizations to be involved can hardly communicate and coordinate on their own. The preparedness and ability of states to act as actors in the common interest is fairly limited. Furthermore, the provision of global public goods has to take into account the needs, preferences and the potential of individuals around the world. Non-governmental organizations already play an important role in order to foster awareness and to exercise political influence to bring the view, the potential and the preferences of those different actors together. They are very likely to need to play an even bigger role in the future. To this end, however, it would be necessary that their role be more adequately defined.

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