(European) Multilevel Constitutionalism to Govern Transnational Public Goods? A Reply to Petersmann

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Abstract

In the Article hereby commented, Ernst-Ulrich Petersmann further elaborates on his will-known thesis on the constitutionalisation of UN law and WTO law. Petersmann argues, first, that the EU provides a successful example in the governance of transnational public goods; secondly, that such success story is essentially due to the EU's basic institutional arrangements, characterised as 'mulitilevel constitutionalism'. Petersmann thus submits that die EU's multilevel constitutionalism provides a viable template for the international community at large, and that the UN and die WTO should further proceed down the path of 'hard' constitutionalisation following the EU's example.

This Reply takes issue with the second of the Article's assumptions. It thus argues that the notion of multilevel constitutionalism does not provide a descriptively accurate account of the structure of the European legal space. Rather, it is submitted, the literature on constitutional pluralism captures more adequately the reality of competing claims to final authority in structuring the relationship between national and supranational legal system in the context of the EU.

Against this background, Petersmann's claim the the 'European model' ought to be transposed to the globel stage can be nuanced. Rather than aiming at enforcing normative hierarchies through effective dispute resolu-

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tion mechanisms, the 'constitional' value of (quasi-)universal fora such as the UN and the WTO can thus lie in the potential to provide a common 'grammar' to discursively structure the dialogue between competing normative views on globel affairs along lines of mutual intelligibility.

Keywords

Global governance – European Union – Multilevel constitutionalism – Global constitutionalism – Constitutional pluralism

I. Introduction

In his paper,[1] Professor Petersmann provides once again an example of the intellectual vivacity which established him as one of the leading (if controversial)[2] thinkers on matters of international law and governance. Drawing together several threads of his multi-decennial academic journey, in this piece Petersmann builds on several theoretical insights provided, in particular, in his recent publications.[3] This allows him to critically engage once again with the complex challenges currently faced by the international community.

To summarise in few words the Article's main line of argument: Professor Petersmann starts by conceptualising said challenges as failures in the governance of '[transnational public goods] (like human rights, rule of law, most Sustainable Development Goals [SDGs]) which – in a globally interdependent world composed of 193 sovereign United Nations (UN) member states – no state can unilaterally protect without international law and multilevel governance institutions'.[4] He then posits 'multilevel constitutionalism', modelled after the experience of European integration, as the most successful institutional arrangement to promote the governance of such transnational public goods. Through such model, Petersmann submits, 'the challenges of

1 Ernst-Ulrich Petersmann, 'Sustainable Development through Regulatory Competition without Effective UN and WTO Legal Restraints?', HJIL 84 (2024), 103-139.

2 For a particularly well-known critique of Petersmann's general approach, see Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', EJIL 13 (2002), 815-844.

3 See, in particular, Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods: Methodology Problems in International Law* (Hart 2017), as well as Ernst-Ulrich Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (Oxford University Press 2022).

4 Petersmann, Sustainable Development (n. 1), 106.

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human passions, rational egoism and psychopathic autocrats' can be tackled, such that 'constitutional restrains on discretionary foreign policy powers […] and transnational "constitutional politics" […] [can promote] economic and social welfare beyond state borders'.[5] According to Petersmann, while the UN and World Trade Organisation (WTO) frameworks already provide, in principle, a suitable institutional structure for such a multilevel constitutionalism,[6] the effective operation of both fora is curtailed 'by authoritarian and nationalist rulers (e. g. in China and Russia) defending their self-interests in discretionary powers without democratic and legal accountability'.[7] Against this background, Petersmann calls for 'second- and third-best, plurilateral reforms among "willing countries"' to be put in place.[8] Hence, Petersmann defends plurilateral arrangements between countries sticking to the model of 'democratic constitutionalism' in their internal politics (e. g. through 'Free Trade Agreements [FTAs] and similar preferential trade agreements' concluded between constitutional democracies), but also unilateral projections of said countries' preferences onto others (e. g. through carbon border adjustment mechanisms and 'sustainability sanctions in response to foreign violations of labor rights, human rights and sustainable development commitments').[9] According to Petersmann, on the one hand, participants in these transitional arrangements 'should continue challenging protectionist discriminations' with a view to ultimately establishing a multilateral, rule-based order inspired by the canon of global constitutionalism.[10] On the other hand, however, this strategy could, in itself, satisfactorily limit the damages brought about to the governance of transnational public goods by the lack of a universal constitutional framework.

Petersmann's account openly aims at strongly positioning itself in the current geopolitical landscape. He thus chastises both the 'new "authoritarian world order" without protection of human rights, democratic self-determination and non-discriminatory competition' allegedly pursued by China and Russia[11] and the 'isolationist tendencies' of the USA.[12] Against this background, Petersmann essentially sees 'EU countries' as the actors capable of taking the lead in bringing about the governance changes he posits.[13] As hinted at above, the theoretical justification for this move is the

5 Petersmann, Sustainable Development (n. 1), 110-111.
6 Petersmann, Sustainable Development (n. 1), 106.
7 Petersmann, Sustainable Development (n. 1), 106.
8 Petersmann, Sustainable Development (n. 1), 110.
9 Petersmann, Sustainable Development (n. 1), 134-138.
10 Petersmann, Sustainable Development (n. 1), 137.
11 Petersmann, Sustainable Development (n. 1), 105.
12 Petersmann, Sustainable Development (n. 1), 105.
13 Petersmann, Sustainable Development (n. 1), 137.

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stipulation that the EU already provides in its internal constitutional structure an example of the multilevel constitutionalism needed for an effective governance of transnational public goods. On the other hand, both China/Russia and the USA would be characterised by forms of 'constitutional nationalism' structurally incompatible with multilevel constitutionalism – China and Russia actually having put in place 'fake constitutions', and the USA sticking to a purely 'process-based representative democracy' which 'prioritizes constitutional nationalism and discretionary foreign policy powers'.[14]

While thought-provoking, this account is problematic at many a level. To start with, Petersmann seems to take global interdependence and the resulting transnational public goods as a given – that is, as a 'problem' to be given a 'solution' through law (*in casu*, multilevel constitutionalism). Thereby, he apparently resorts to outdated theoretical models on a simple and unidirectional correspondence between 'law' and 'society', whereby the former would provide a tool to be used by social engineers to tackle problems found to prevail in the latter.[15] This ignores recent insights on the role of (international) law in *constituting* (public) *goods* (rather than merely governing them as entities existing outside of the law),[16] as well as in *creating* (rather than

14 Petersmann, Sustainable Development (n. 1), 109-110 and 117.

15 For a brilliant and classic overview of this mode of thinking, understood as a 'globalised legal consciousness' characterising the basic way of thinking about the law for the better part of the 20th century, see Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in: David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006), 19-73 (37-62). A particularly vibrant *locus* for contemporary scholarly debate on this matter is the comparative law literature discussing functionalism. An excellent overview of this debate, showing the extent to which the simplistic understanding discussed above is by now mostly discredited, can be found in Ralf Michaels, 'The Functional Method of Comparative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019), 345-389.

16 An issue recently brought to new prominence by the 'Law and Political Economy' (LPE) movement. For some particularly representative texts, see Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019); Poul F. Kjaer (ed.), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020). For an account focusing, in particular, on the role played by international law, see David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016), particularly Chapter 6. Theorisation on this matter has, however, a much longer intellectual pedigree, and an illustrious antecedent can be found in the critical legal studies movement: see, for instance, Robert W. Gordon, 'Critical Legal Histories', Stanford L. Rev. 36 (1984), 57-125 (102-113). Admittedly, Petersmann himself occasionally hints at the constitutive role of law in respect of the transnational public goods he is concerned about: see Petersmann, Sustainable Development (n. 1), 8-10 and 13-14. However, on the whole, the article severely downplays this aspect.

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solving) '*problems*' for the governance thereof.[17] In defending a correspondence between internal constitutional arrangements and attitudes towards international law and governance, Petersmann also upholds the controversial view that constitutional democracies have a more positive record of compliance with international law than other political regimes – a stance whose soundness seems never to have been conclusively established.[18] Perhaps most conspicuously, in reiterating the controversial constitutionalist interpretation of international law which he himself crucially contributed to advance over the years, Petersmann fails to engage with the views which, to the opposite, point to the imperialistic and hegemonic implications of such an approach.[19]

Entire libraries have been written on each and every of these points, and justice can be done to none of them in the limited space hereby available. In this short reply, I would rather like to problematise another aspect. Whereas the latter is of perhaps narrower import in general debates on the constitutionalisation of international law, it plays a central role in Petersmann's article as a threshold condition for the argument thereby advanced. In the following, I would thus like to discuss the extent to which 'multilevel constitutionalism' can, indeed, be predicated to provide an accurate depiction of the state of affairs in the European Union (EU). This exercise is undertaken in adopting, for the sake of the argument, Petersmann's further assumption that the EU's institutional arrangements can be taken as a 'success story' to be imitated in devising governance mechanisms for transnational public goods.[20] My con-

17 See, notably, Jorge E. Viñuales, *The Organisation of the Anthropocene: In Our Hands?* (Brill 2018).

18 Although see the recent comprehensive research of Tom Ginsburg, *Democracies and International Law* (Cambridge University Press 2021), particularly, for present purposes, Chapters 1 and 2. Also see n. 47 below.

19 See, notably and with further references to the broader debate, Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010), particularly Chapters 2 and 9.

20 An assumption which might indeed be reversed, in my opinion with good reasons, to argue that the EU's legal and political complex is often such as to *undermine*, rather than streamline, the governance of transnational public goods. Obvious reference should be made here to the perspectives developed and refined over the years by Fritz Scharpf. See, seminally, Fritz W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', Pub. Adm. 66 (1988), 239-278 (254-271), and Fritz W. Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in: Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck (eds), *Governance in the European Union* (Sage 1996), 15-39; for a book-length restatement of the earlier arguments, see Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999), particularly, for present purposes, Chapters 2 and 3. For a more recent reiteration of the argument, which on chronological grounds can also take into account what is the current constitutional framework of the EU, see Fritz W. Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"', Socio-Economic Review 8 (2010), 211-250.

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tention is then that, even if such premise is accepted, the extent to which such arrangements can indeed best be captured by the notion of 'multilevel constitutionalism' may be less self-evident than at first sight. In this piece, I will thus try to sketch out an argument which could be briefly summarised as follows: the EU cannot be satisfactorily described through the paradigm of multilevel constitutionalism, but is rather best captured by the notion of constitutional pluralism; such model may rather paradoxically resemble the geopolitically fragmented scenario through which Petersmann sketches out the current international governance landscape; the most apposite response to the current crises may hence actually be less far-reaching than Petersmann argues – even or, rather, precisely, assuming, with him, that the global governance of transnational public goods ought to follow the EU's template.

II. The EU's Constitutional Landscape: Multilevel Constitutionalism or Constitutional Pluralism?

'Multilevel constitutionalism' is a concept strongly associated with the German legal scholar, Ingolf Pernice, who popularised it in a handful of seminal articles at the turn of the last century.[21] In Pernice's account, 'multilevel constitutionalism' aims at capturing the notion that, in the context of European integration, one and the same political subject is part of several, complementary polities established by independent *contrats sociaux* and located at different

[21] See (in chronological order) Ingolf Pernice, 'Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and "Multilevel Constitutionalism"' in: Eibe Riedel (ed.), German Reports on Public Law – Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998 (Nomos 1998), 40-65; perhaps most influentially, Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', CML Rev. 36 (1999), 703-750; Ingolf Pernice, 'Multilevel Constitutionalism in the European Union', ELRev 27 (2002), 511-529. Pernice's effort at disseminating multilevel constitutionalism followed up on his success in establishing the paradigm in the German debate through the notion of *Verfassungsverbund*, seminally undertaken in Ingolf Pernice, 'Bestandssicherung der Verfassungen: verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung' in: Roland Bieber and Pierre Widmer (eds), *L'espace constitutionnel européen – Der europäische Verfassungsraum – The European Constitutional Area* (Schulthess 1995), 225-264. In the article hereby commented, Petersmann does not explicitly refer to Pernice's account as such (nor, however, does he explicitly elucidate the concept of 'multilevel constitutionalism' he uses). However, in other works devoted to the theorisation of multilevel constitutionalism, he points to characteristics which are essentially akin to Pernice's, if not even more far-reaching in referring to the features which will be addressed below. See, e. g. Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart 2012), 160-183.

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territorial levels – national, sub-national, and European.[22] As a consequence of the independence of each *contrat social*, Pernice regards each of the polities so constituted as 'original': the political legitimacy of each level is not derived from any of the other ones, but is rather the independent and self-positing manifestation of the political agency of the citizens acting on the relevant territorial level.[23] The different *contrats sociaux* are thus understood as constitutional arrangements in the tradition of European constitutionalism. All such constitutional arrangements are integrated and coordinated in the broader context of the EU, which thus emerges as a 'divided power system'.[24] Crucially for present purposes, Pernice posits that, as a consequence of the independent and original legitimisation of the supranational polity, such integration comes in the shape of the terms dictated by EU law itself – that is, with the acceptance of the unconditional primacy of EU law over domestic law in the domains of functional competence of the EU itself.[25] This led Pernice to famously maintain that '[w]here conflicts between a European rule and a national rule arise in a given case, it is inherent in this system and a condition of its proper functioning, that one rule prevails'.[26] Despite unconvincing attempts by its proponents at arguing the opposite,[27] therefore, European multilevel *constitutionalism* would be characterised by one of the features traditionally associated with constitutional systems – and one which Petersmann himself repeatedly defended throughout his works on the constitutional approach to international (trade)

22 See Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam' (n. 21), 707.

23 Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam' (n. 21), 709.

24 Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam' (n. 21), 707.

25 See Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam' (n. 21), 711-719.

26 Pernice, 'Multilevel Constitutionalism in the European Union' (n. 21), 514.

27 See Pernice, 'Multilevel Constitutionalism in the European Union' (n. 21), 520-521, as well as Franz C. Mayer and Mattias Wendel, 'Multilevel Constitutionalism and Constitutional Pluralism: *Querelle Allemande* or *Querelle d'Alllemand*?' in: Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 127-151 (130-131 and 138-140). Both pieces insist on the fact that the functional criterion of demarcation between the national and the supranational levels would be such as to eschew conceptualisations resorting to the notion of hierarchy: rather, the question becomes one of non-hierarchical competence by subject-matter. Conceptually elegant as this construction might be, it does not seem to detract from the fact that, as a matter of fact, the end result of primacy's operation, within the functional ambit demarcating its scope of application, is precisely that of preventing the valid operation of incompatible norms created by sources different from that enjoying primacy – which is pretty much what constitutional hierarchies are all about, when stripped of their conceptual apparatus. Leading proponents of the constitutional approach to EU law have, in fact, traditionally underlined the element of normative hierarchy inherent in the principle of supremacy: see e. g. Joseph Weiler, 'The Community System: The Dual Character of Supranationalism', YBEL 1 (1981), 267-306 (272); Giuseppe F. Mancini, 'The Making of a Constitution for Europe', CML Rev. 26 (1989), 595-614 (599-601).

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law:[28] a hierarchy of norms backed by effective enforcement mechanisms.[29] If actors situated on the national or sub-national constitutional levels contradict a European rule, European multilevel constitutionalism is thus taken to unambiguously dictate the pre-eminence of the European normative precept.

There is, of course, much which is true in the above depiction. The interaction between different constitutional levels in the European legal space is mostly informed by primacy, to the extent that not only the European Court of Justice (ECJ), but also the domestic courts of the EU's Member States (MS) accept primacy as a rule. Yet, it is also equally true and well-known that the apex courts of many a MS do not subscribe to the *unconditional* version of primacy championed by the ECJ; rather, they subject it to the famous doctrines variously known as '*controlimiti*' or '*Solange*'. Such doctrines condition acknowledgement of EU law's primacy to 'counter-limits' meant to safeguard core principles of the national constitution, and signal national courts' willingness to refuse upholding primacy in case the limitations are breached.[30] It is mostly due to the widespread introduction of such limitations that a competing, and in my view more descriptively accurate, account of the structure of the European legal space has emerged – that is, constitutional pluralism.[31] Constitutional pluralism emphasises the multiplicity and incommensurability of the claims to final authority by different legal systems in the context of European integration. Taking note of the conditional primacy accorded to EU law in national legal systems *for purposes of those systems*, it refuses to accept EU law's claim to unconditional primacy *for purposes of the EU legal system* as, *a priori*, more well-founded than the former. Constitutional pluralism rather takes as a starting point the fact that several legal systems compete for

28 See e. g. Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (University Press Fribourg Switzerland 1991), 218-219; Ernst-Ulrich Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U. N. Dispute Settlement System', N. Y. U. J. Int' l L. & Pol. 31 (1999), 753-790 (768-770 and 774 ff.); Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights', JIEL 3 (2000), 19-25 (20-21).

29 On this aspect in constitutional theory see, with further specification and elaboration, also in historical perspective, Dieter Grimm, 'The Origins and Transformation of the Concept of the Constitution' in: Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016), 3-37.

30 For an overview, see Monica Claes, 'The Primacy of EU Law in European and National Law' in: Damian Chalmers and Anthony Arnull (eds), *Oxford Handbook of European Union Law* (Oxford University Press 2015), 178-211 (193-199).

31 See, seminally, Neil MacCormick, 'Beyond the Sovereign State', M. L. R. 56 (1993), 1-18; Neil MacCormick, 'The Maastricht-Urteil: Sovereignty Now', ELJ 1 (1995), 259-266. For a (critical) overview of the debate, see Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', ELJ 14 (2008), 389-422 (412-414).

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final authority in the European legal space, and aims at conceptualising the implications this has on the interaction between different legal layers. A key consequence thereby drawn is the emphasis on the 'dialogue' between different systems. When (potential) conflicts between the different layers arise, emphasis is placed not so much on the application of formal rules of conflict to determine which system is to prevail over the other. Rather, constitutional pluralism underlines the extent to which the different actors involved strive to mutually accommodate the different concerns underlying the conflicting stances, and accepts the principled legitimacy of all such attempts.[32]

Whereas some argue that the dichotomy between multilevel constitutionalism and constitutional pluralism in EU law might be overstated,[33] I contend that the acceptance of hierarchical subordination entailed by the former clearly demarcates it from the latter. Against the background of this distinction, I would then submit that constitutional pluralism offers a more accurate depiction of the current state of affairs in EU law. This is not to say that such model should work as an all-explanatory grand theory. For instance, counter-limits are rarely invoked in practice, and (while the topic remains empirically under-researched) it can be safely assumed that much of the implementation of EU law before national courts does indeed benefit from the operation of primacy.[34] However, this does not detract from the fact that counter-limits have, indeed, been invoked in prominent cases by domestic courts.[35]

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32 See e. g. Kaarlo Tuori, 'From Pluralism to Perspectivism' in: Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018), 39-56.

33 See e. g. Matej Avbelj and Jan Komárek, 'Introduction' in: Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 1-15 (6).

34 Also in light of the fact that lower courts, to which the everyday application of EU law in individual cases is entrusted, are reportedly much keener on accepting EU law's doctrines as they are proposed by the ECJ than apex and constitutional courts. The classic study in this respect (providing both empirical evidence for the claim and theoretical elaboration on the underlying reasons) is Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001).

35 Perhaps most 'shockingly', on the part of the German Constitutional Court in the by now infamous *PSPP* judgement: see Bundesverfassungsgericht, judgement of 5 May 2020, cases 2BvR 859/15, 2 BvR 1651/15, 2BvR 2006/15, and 2 BvR980/16. From the rich literature on this landmark case, see the different takes in: Ana Bobić and Mark Dawson, 'Making Sense of the Incomprehensible: The *PSPP* Judgment of the German Federal Constitutional Court', CML Rev. 57 (2020), 1953-1998; Federico Fabbrini, 'Suing the BVerfG', Verfassungsblog, 13 May 2020; Marco Dani and others, '"It's the Political Economy …!" A Moment of Truth for the Eurozone and the EU', I CON 19 (2021), 309-327. For an overview of other counter-limits cases, including the prominent examples of the Czech Republic and Denmark, see Niels Petersen and Konstantin Chatziathanasiou, Primacy's Twilight? On the Legal Consequences of the Ruling of the Federal Constitutional Court of 5 May 2020 for the Primacy of EU Law (2021). Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs (PE 692.276), available at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/692276/IPOL_STU(2021)692276_EN.pdf>, last access 7 March 2024, 27-45.

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Even more significantly, the dialogue triggered by national actors' explicit or implicit 'threat' to apply counter-limits has reportedly engendered developments in EU law even without having to formally apply counter-limits themselves. In the fundamental rights domain particularly, the ECJ showed itself eager to revisit its interpretive stances, with a view to accommodating the concerns expressed by its national counterparts.[36] This suggests that a static view of the relationship between legal orders pivoting on the formal principle of primacy conceals a more dynamic reality. In the European pluralist order, contestation on the substantive principles stuck to by different legal systems shapes the terms on which the relationship governed by primacy plays out in practice. In other words, the supranational law which comes to enjoy primacy is not created in a vacuum; rather, it amounts to the outcome of a process of (if need be, purely potential) dialogue and conflict. It is such process which contributes to imbuing the formally prevailing supranational law with a meaning substantively shaped by the competing concerns expressed by national legal systems.[37]

III. The European Model and Global Governance: Pluralism and Contestation

What does this tell us about the questions tackled by Petersmann's article? In my view, if the EU is regarded as a success story in governing transnational public goods, reading its institutional complex through the lens of constitutional pluralism undermines Petersmann's plea for a multilevel constitutionalisation of the global governance landscape. This point is, of course, nothing new in itself. In the heyday of the debate on the constitutionalisation of international law, (constitutional) pluralism did, indeed, emerge as the most appealing intellectual alternative to 'hardcore' constitutionalism in providing the overarching framework for the post-Cold

36 Two prominent and chronologically spaced-out examples being the sagas which revolved around case C-11/70 – *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECLI:EU:C:1970:114), on the one hand, and case C-105/14 – *Taricco and Others* (ECLI:EU:C:2015:555), on the other hand. On *Internationale Handelsgesellschaft*, see Gráinne De Búrca, 'The Evolution of EU Human Rights Law' in: Paul Craig and Gráinne De Búrca (eds), The Evolution of EU Law (3rd edn, Oxford University Press 2021), 480-505 (488-489). On *Taricco*, see Alessandro Marciano, 'The Dialogue between Courts in the So-Called *Taricco* Saga' in: Koen Lenaerts and others (eds), *Building the European Union: The Jurist's View of the Union's Evolution* (Hart 2021), 237-244.

37 For a similar argument, see Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in: Neil Walker (ed.), *Sovereignty in Transition: Essays in European Law* (Hart 2003), 501-537 (513-517 and 520-524).

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War international order.[38] Traditionally, however, proponents of pluralism as an alternative to constitutionalism focused on the latter's hegemonic implications (as alluded to above), and posited pluralism as a model more respectful of the axiological diversity to be found in the international community.[39] By contrast, I would hereby like to develop a slightly different angle. This remains normative in orientation, but takes Petersmann's call for effectiveness in the governance of transnational public goods on its own terms. The question I would thus like to sketch out is the following: Can the EU experience be taken to show that a pluralist model is more viable than hardcore constitutionalism in structuring the international community's efforts in coping with global challenges?

Subject to the following caveats, my cautious and tentative reply would be 'yes'. If it can plausibly be argued that it is precisely because of constitutional pluralism that EU law and governance tend to be effective, then the case for maintaining a pluralist structure also outside of the European context gains decisive weight. If, for instance, compliance with EU fundamental rights law benefits from the system's openness to accommodate axiological differences in national legal systems, can one not reasonably posit that such openness and accommodation should also prevail in the even more diverse context of global governance?[40] It is important to note that this feature does not prevail exclusively in the domain of judge-driven dialogue on core constitutional features such as fundamental rights. For instance, in the seemingly much more mundane domain of administrative execution and regulation in EU law, similar considerations on the anticipatory internalisation of conflicts in law- and policy-making through 'comitology' have a long record of being re-

38 For influential illustrations of this approach, see Neil Walker, 'The Idea of Constitutional Pluralism', M. L. R. 65 (2002), 317-359; Krisch (n. 19). Note, however, that Walker, while being one of the most prominent theorists of constitutional pluralism, argues in favour of the enduring relevance of constitutionalism (not *à la Petersmann*, i. e. as a concrete template for the organisation of the global legal order based on the effective enforcement of normative hierarchies, but) understood as 'metaconstitutional discourse', i.e. as a source of politico-legal imaginary through which to shape the interaction between the components of global constitutional pluralism: see Walker (n. 38), 356-359, and, more recently, Neil Walker, 'Constitutionalism and Pluralism in Global Context' in: Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012), 18-37 (32-37). Furthermore, one should not be misled into thinking that a blunt dichotomy between constitutionalism and pluralism ever was the only intellectual alternative available for thinking of the structure of world affairs in the age of globalisation. See, for instance, Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', M. L. R. 70 (2007), 1-30, famously developing, in particular, at 15-24, a critique of *both* constitutionalism and pluralism as 'generalising doctrines with an ambivalent political significance' (24).

39 See n. 19 above and surrounding text.

40 See n. 36 above.

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garded as a key factor explaining the success of EU administrative law.[41] In other words, when (constitutional) pluralism takes the centre stage in accounting for EU law's structural features, the constitutional quality of EU law can only be properly understood against the background of the fundamentally pluralist structure of its overall institutional environment.

In my view, it is hence precisely if one, *arguendo*, accepts that the EU system can provide a blueprint for global governance, that one should then renounce excessively far-reaching constitutionalist aspirations. Rather, it is precisely in drawing such (dubious) parallel that one should accept the positive value of pluralism in structuring global governance. This is subject, however, to an important disclaimer. As shown, again, by the European example, a system conceiving of itself as overarching (*in casu*, the European/supranational one) and participating from this perspective in the contest over final authority, thus providing an umbrella for the dialogue posited by pluralism, does, indeed, have a positive role to play. In European law, the integrative role played by the supranational system provides a common 'grammar' for the dialogue within and between national legal systems, as well as between the latter and the supranational one. In other words, framing conflicts between different constitutional layers as conflicts within and on EU law 'Europeanises' them. At least as far as some general principles are concerned, this common framing provides a shared platform for engagement which, rather than strictly dictating the substantive outcome of the conflict, helps in structuring it along lines of mutual intelligibility.[42] Of course, this does not always hold true. As the debate on 'overconstitutionalisation' has convincingly shown, EU law does actually, in way too many instances, predetermine the outcome of conflicts.[43] In other words, EU law constitutional-

41 See e. g. Herwig C. H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011), 282; Paul Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018), 115. While the argument is ultimately brought several steps further, similar considerations also provide the starting point for Joerges and Neyer's famous characterisation of comitology as 'deliberative supranationalism': see Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', ELJ 3 (1997), 273-299 (292-298), and Christian Joerges and Jürgen Neyer, 'Deliberative Supranationalism' Revisited (2006). EUI Working Papers LAW No. 2006/20, available at: <https://cadmus.eui.eu/bitstream/handle/1814/6251/LAW-2006-20.pdf?sequence=1&isAllowed=>, last access 7 March 2024, 21-27.

42 See Armin von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp 2022), 19-20.

43 See, notably, Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', ELJ 21 (2015), 460-473; Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', ELJ 21 (2015), 2-22; Marco Dani, 'Openness, Purposiveness, and the Realignment of the EU and the Democratic and Social Constitutional State', GLJ 24 (2023), 1099-1126.

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ises certain policy preferences and thereby delegitimises competing visions as possible participants in the (European as well as national) political process – also leading, however, to intractable legal conflicts when opposing visions (or the acceptability thereof) are, themselves, constitutionalised by other systems in Europe's pluralist landscape. This point seems, however, to lend further support to the claim hereby made. It is when, in hardcore constitutionalist fashion, the claim to ultimate authority of the supranational legal system is brought too far, and takes too staunchly a side in favour of one of the conflicting views, that constitutional crisis and 'destructive conflicts' are engendered.[44] When open-endedness prevails, however, the Europeanisation of the terms of confrontation allows for the concerns enshrined on the national level to be expressed in a language which can be internalised in EU law itself. This, in turn, makes it possible for the latter to accommodate the diverging views expressed by national actors. In other words, the dialogue between systems underlined by pluralism is fostered through, and perhaps even made possible at all by, the existence of the EU's legal system as an overarching and putatively 'supreme' system – provided that the supranational norms, principles, and concepts remain indeterminate enough to mediate conflicts in a mostly procedural way, leaving the substance of the matter open to contestation. Such a mediating role played by EU law is key in unleashing the generative potential of normative conflicts.

This might provide a further, important insight for the debate on global governance. That is, also in this context, an overarching framework providing a platform to engage the relevant actors in a process of structured dialogue within and over international law may be key in cabining pluralism into openness to mutual accommodation of diverging views. In this sense, I think it is perfectly justified to conceive of (quasi-)universal fora such as the UN and (although, in my view, less justifiably) the WTO as 'constitutional' in orientation. Their constitutional value would, however, lie not so much in the 'hard', hierarchical mechanisms for the enforcement of allegedly shared fundamental values traditionally posited by constitutionalist approaches to international law. Rather, it would derive from the 'soft' or 'thin' fact of providing some amongst many normative complexes aiming at providing an answer to challenges identified as 'common' by the international community, while laying claim to universality and comprehensiveness in geographical and normative scope. On the one hand, such an approach would be more reflec-

44 I take the concept of 'destructive conflict' from Ana Bobić, 'Constructive versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU', Cambridge Yearbook of European Legal Studies 22 (2020), 60-84, who, however, admittedly uses it to refer mostly to conflicts triggered by the insistence on the part of *national* courts on the values and claim to ultimate authority of domestic constitutional systems.

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tive of legitimate diversity in the international community. On the other hand, when looked at from Petersmann's chosen angle of effective governance, such an approach would comport with modern theories of compliance in international law, which emphasise the role of dialogue, discursive engagement, and contestation in inducing compliance with international obligations.[45] From this perspective, buttressing the health of the UN complex and the WTO would remain a worthwhile exercise, as posited by Petersmann; however, the ultimate aspiration would be less to have a strong institutional and normative constellation settling conflicts through formal hierarchical means, and more to have a forum capable of turning conflict into cooperation.

To be clear, by the above I am by no means arguing against resort to 'hard' means of enforcement of international obligations in general, and even less so in respect of obligations flowing from (quasi-)universal regimes.[46] Rather, what I aim to suggest is that such an approach should be placed in a broader context – one where normative contestation is, in principle, allowed and accommodated, rather than curtailed through insistence on the enforcement of views which may be less shared than assumed. This should particularly be the case where reasonable contestation and strongly-held normative views exist. An exaggerated insistence on constitutionalist approaches seems to run counter to this approach, in the European context no less than on the global stage. The value of constitutionalist aspirations thus rather lies, in my view, in providing the overarching conceptual framework within which such normative contestation is to play out, before value choices come to be enforced through law's coercive power.

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45 See, seminally, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995). Of relevance for Petersmann's argument, such theories are often invoked in explaining the effectiveness of the WTO system in particular: see e. g. Joost Pauwelyn, 'The Calculation and Design of Trade Retaliation in Context: What Is the Goal of Suspending WTO Obligations?' in: Chad P. Bown and Joost Pauwelyn (eds), The Law, Economics and Politics of Retaliation in WTO Dispute Settlement (Cambridge University Press 2010), 34-65 (59-60).

46 Rather, in previous work I have modestly tried to argue the opposite view: see Paolo Mazzotti, Stepping Up the Enforcement of Trade and Sustainable Development Chapters in the European Union's Free Trade Agreements: Reconsidering the Debate on Sanctions (2021). European Law Institute Young Lawyers Award 2021 Winning Paper, available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/YLA_Award/Submission_ELI_Young_Lawyers_Award_Paolo_Mazzotti_2021.pdf>, last access 7 March 2024; Paolo Mazzotti, 'Comfortably Numb? The Implementation of Sustainability Commitments in the EU-China CAI' in: Suranjali Tandon (ed.), A Green Deal for the Globe: European Union External Action and the International Just Transition, College of Europe in Natolin-Natolin Nests Series, forthcoming 2024 – pre-print available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4238594>, last access 7 March 2024.

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IV. Conclusion

At least since the Maastricht Treaty sped up the pace of the EU's unfinished process of constitutionalisation, proposals to extend an ill-defined 'European model' to the global governance landscape have blossomed. As already pointed out in a 2002 seminal article by Nicolaïdis and Howse, however, such proposals have mostly been advanced by offering a misrepresentation of the EU's reality – building an 'EUtopian' narrative on what the EU aspired to be, projecting onto other actors demands that they become what the EU itself actually never was.[47]

Arguing in favour of a deepened constitutionalisation of international law based on a conceptualisation of the EU through the lens of multilevel constitutionalism seems, to me, to take a further step in the direction of EUtopianism. The literature on constitutional pluralism in the EU has, in my view, convincingly shown that the emphasis on constitutional hierarchies underlying multilevel constitutionalism does not accurately reflect the EU's current state of affairs. If a pluralist description is accepted as better fitting the EU's institutional complex, then arguing that global governance should follow the EU's template seems to suggest that the current pluralism of the global landscape deserves being safeguarded and cherished in turn. I would thus provokingly argue that Petersmann's positive assessment of the EU's record of governance transnational public goods, if accepted despite being

47 Kalypso Nicolaïdis and Robert Howse, '"This Is My Eutopia …": Narrative as Power', J. Common Mkt. Stud. 40 (2002), 767-792. Of relevance for the present discussion (see the point raised at n. 18 above), the literature has repeatedly underlined that, in particular, the EU's self-portrayal as an actor committed to 'the strict observance and the development of international law' (Art. 3(5) TEU) does not seem to match the EU's actual behaviour as an actor on the international stage. See, making this point in respect of different bodies of international obligations, Gracia Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues', CML Rev. 57 (2020), 1031-1068; Päivi Leino-Sandberg, 'Environmental Information and "External Pressure": Assessing EU Compliance with Its International Obligations under the Aarhus Convention' in: Kenneth Armstrong, Joanne Scott and Anne Thies (eds), EU External Relations and the Power of Law: Essays in Honour of Marise Cremona (Hart, forthcoming 2024). Petersmann himself acknowledged that this translates into a dubious compliance record on the part of the EU, inter alia, with the WTO obligations which amount to a core concern of his: see Ernst-Ulrich Petersmann, 'Can the EU's Disregard for "Strict Observance of International Law" (Article 3 TEU) Be Constitutionally Justified?' in: Inge Govaere, Reinhard Quick and Marco Bronckers (eds), Trade and Competition Law in the EU and Beyond (Edward Elgar 2011), 214-225 (214-221). I take this acknowledgement to further undermine, albeit from a different vantage point, Petersmann's argument that the EU can provide a viable template for a 'multilevel constitutionalism' which, in Petersmann's submission, would ultimately envisage, at the top of the pyramid of constitutional levels, the very same international law towards which the EU shows, at best, an ambivalent attitude.

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questionable in itself, can be turned into a plea against the import of (radical) multilevel constitutionalism on the global stage. What we can take from the EU's experience is, rather, the inherently positive value of conflict, even fierce, within a common horizon of understanding.

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