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# *Global Public Goods amidst a Plurality of Legal Orders: A Symposium*

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A public good (an example is a lighthouse) can be produced by private parties. However, they rarely are. Rather, such goods are generally thought of in economics as a type of commodity that government often provides and maintains because government can overcome the otherwise strong incentive to free ride on the efforts of others. This symposium issue is concerned with the global analogies to municipal public goods. As in the domestic context, global public goods are viewed as essential goods. But globally there is not a government. Instead, we observe a plurality of legal orders arrayed both horizontally and vertically, both publicly and privately. It is this mix of significance and complexity that is the subject of this symposium.

Together, the American and European Societies of International Law (ASIL and ESIL) devised a research forum to explore whether and how the co-existence, interaction, and antagonisms of a plurality of legal orders (international law, domestic law, European Union law, regimes established by private actors) and their driving agents (regulators, contract-makers, and courts and tribunals) contribute to creating and maintaining global public goods. With additional support from and sponsorship by the *European Journal of International Law* (EJIL) and the HiiL Project on Transnational Private Regulation, a symposium with participants from Europe and the United States was held at the European University Institute in October of 2011. That two-day conference is the basis for the articles collected in this symposium issue.

Foundational issues discussed in the symposium included:

- the conceptual and analytical frameworks for understanding global public goods;
- the modes and technologies of production of global public goods and the related governance and legitimacy issues that such techniques raise;

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- the value that the concept of global public goods adds to discourse within international law; and, vice versa, the value that an international law perspective adds to our understanding of global public goods.

The symposium also included discussions on more focused issues such as an understanding of specific global public goods including:

- international cultural goods as a global public good and the role of a plurality of legal orders in their protection and enforcement mechanisms;
- the place of free trade as a global public good and the degree to which the World Trade Organization (WTO) constitutes or contributes to this global public good;
- the enforcement of environment protection and biodiversity conservation as a global public good; and
- the complex interaction of substantive and procedural law in transnational adjudication of disputes involving global public goods.

This article introduces first the idea of public goods as seen through a plurality of legal orders, and then the various articles that make up this symposium.

## 1 The Concept of Global Public Goods against the Backdrop of a Plurality of Legal Orders

Economic theory describes a public good, in contrast to a private good, as one that is characterized by non-rivalry (anyone can use a good without diminishing its availability to others) and non-excludability (no one can be excluded from using the good). Clean air is an example because it is not depleted by the act of an individual breathing it, nor can it be appropriated by a few. Accordingly, public goods present values in which everyone has an interest. But economic theory postulates that in the domestic context individuals have insufficient incentives to act to create or maintain them, relying instead on the efforts of others (free riding). Global public goods are an expanded version of this concept of public goods where both individuals and individual states have insufficient incentives. This situation generates undersupply of these goods and calls for new forms of global governance.

In fact, it is asserted that there is no perfect instance of non-excludability or non-rivalry. However, some global public goods are essentially, even if not perfectly, non-rival and non-excludable, the benefits of which are ‘indivisibly spread among the entire community’. Moreover, a good may be non-rivalrous but excludable – these are called ‘club goods’. Likewise, a good may be non-excludable but rivalrous – for example, high seas fisheries. Goods that feature only one attribute are called impure public goods and require different responses from pure public ones.

For public international legal scholars, there can be scepticism as to whether the economic concept of global public goods is, in terms of international law, merely an old wine in a new bottle. Even as the concept is grounded in the discipline of economics, international law addresses similar questions. Issues such as ‘common interest’, international co-operation as a production mechanism, impact of externalities

– good and bad – upon the production – are familiar to international legal scholars. Less familiarity exists among private law scholars who are familiar with international commercial law and arbitration, but are much less so with forms of transnational private regulation that are emerging to favour the production and protection of global public goods. What this symposium evidences, however, is that much is gained from each of these perspectives. Law and economics come together in creating a framework for the understanding of global public goods, as well as an understanding of the governance and legitimacy issues involved in their pursuit and their distribution. Global public goods represent more than a concept, in that policies aimed at them present choices that need to rest on good governance and to possess legitimacy. The challenge for, and potential contribution of, international law is the design of institutions and processes by which there will be both legitimacy and efficiency in the making of these choices. The legal perspective suggests that processes of production influence outcomes, e.g., the different types of public goods and the problems associated with them are not limited to undersupply but also extend to modes of production which often exclude or limit the voice of the affected interests. Further, it sheds light on the existence and resolution of conflicts among global public goods that may be enshrined in autonomous yet interconnected legal orders.

Thus even as the concept of global public goods is utilized as a useful frame to probe international co-operation, it also raises significant international governance issues in respect of their provision and legitimacy. The concept forces an examination of the incentives and processes necessary to realize global achievements in the absence of a supranational authority capable of compelling states to behave differently. But not only is there not a supranational authority, there exist instead horizontal, as well as vertical, pluralities in legal orders. Plurality of legal orders points to the development of law ‘within, outside and above the State’, as well as the increasing interactions and reciprocal influences between different regimes of international regulation, and creative patterns of interplay between national and international regulation. While a plurality of legal orders complements the diversity of the world, it also increases complexities in co-ordination and results in legitimacy and implementation challenges. Potential conflicts among global legal orders often reflect conflicts among global public goods or between them and private goods calling for innovative forms of global governance.

The articles in this symposium move between this reality of a plurality of legal orders and the challenge of effective global public goods that need also be viewed as legitimate.

## 2 Summary of Articles

Contributors to the symposium discussed transatlantic perspectives on how different legal orders may contribute to the production and management of public goods. The articles deal with the interaction between global public goods and international law, how they influence each other, and with what consequences and implications.

Daniel Bodansky presents a framework for legal scholars to understand and approach the concept of global public goods. The article posits that while global public

goods *per se* are a relatively new concept to international law scholarship, some of the features of the concept are familiar. These include, for example, the recognition in international law of obligations owed to the community of states as a whole; or that certain resources are of ‘common concern’.

Bodansky starts with identifying the underprovision and free-riding effects which accompany the non-exclusion and non-rivalry characteristics of global public goods. He particularly argues that economic theory and public goods literature helps in understanding the different modes of production (‘production technologies’) of global public goods – ‘aggregate effort’, ‘single best effort’, or ‘weakest link’ – and argues that these different modes of production raise different governance issues, and hence different challenges for international law. Some of the governance issues include which global public goods are to be produced, in what quantities, and who should pay – and, ultimately, how these questions should be decided. Thus, global public goods raise legitimacy issues.

Gregory Shaffer places his contribution in the context of how three different frameworks of global governance advanced within international law scholarship – global constitutionalism, global administrative law, and legal pluralism – apply to global public goods. Recognizing the rise of the legal pluralist vision, he examines variation in the properties of global public goods, their distributive implications, and the challenge of production due to conflict in free-riding and collective action. Shaffer presents a comparative classification of global public goods with different production technologies. In this comparative tabulation, he lists also the relevant influencing institutions in a pluralist world and the varying role of international institutions in production and governance of the relevant global public good.

As he traverses through his analysis, Shaffer identifies several critical challenges in distribution of global public goods: information and resource asymmetries, biased participation, representation challenges, and the possibility of ascertaining preferences through a global *demos*, accountability and legitimacy challenges, and enforcement and implementation challenges. In addition, Shaffer makes the acute observation that all global public goods are ultimately rivalrous *inter se*. There often exist conflict and competition between pursuit of various global public goods – between human rights and environment; or between public health and knowledge and technology patents, for instance. Different global public goods also sometimes create cross-purposes.

Shaffer proposes that there is a greater role for international institutions in the production of aggregate effort and weakest link goods, and a relatively lesser role in the production of best effort goods. Shaffer follows on this observation by examining comparative trade-offs and complementarities among alternative institutional choices for varying challenges in the production of global public goods.

Fabrizio Cafaggi introduces the theme of private production of global public goods and makes three claims: (1) private actors have incentives to produce and protect global public goods, thereby challenging the conventional partition between markets, producing private goods, and states, producing public goods; (2) the production and protection of global public goods has to combine procedural and substantive features, making private governance a determinant of the club or public nature of the global

good; and (3) ownership, both individual and collective, and contracting can be used to produce and protect global public goods. He develops the second claim by analysing the preconditions for considering transnational private regulation a form of public good, and concludes that even forms of partial excludability are compatible with public goods when contestation is allowed in the production process. He then examines ownership and contracting as means to govern the production and protection of global public goods, suggesting that private law instruments complement the public international law toolbox. The conclusions are that private production of global public goods deploying alternative or combined ownership and contractual arrangements may complement the new forms of global governance emerging within public international law but require mutual adaptation.

Contributions by Francesco Francioni, Petros Mavroidis, and Elisa Morgera examine various characteristics and issues with respect to *specific* global public goods, namely, internal cultural goods, free trade, and enforcement of biodiversity conservation, respectively, in the context of the plurality of legal orders and international law.

Francioni identifies the conservation and management of international cultural goods as a global public good. Pluralism and diversity are the distinguishing features of cultural expression. Francioni thus argues that art and culture reflect the collective inclination and social organization of the societies that produced and maintained them. The article examines various international conventions that have resulted from interaction between public international law and private law. For Francioni, the common goal of these conventions is preventing and suppressing illicit practices and the destruction of cultural property, as well as the protection of such cultural property generally. He advocates that these conventions reflect an awareness of a conflicting relationship between a plurality of domestic legal orders and a progressive accommodation between them in support of a policy of international legal cooperation. The conventions are successful to the extent that they carefully combine national legal orders, based on the principle of territorial sovereignty, with the international law concept of 'world heritage' attached to the cultural properties to entail the international community's interest in their conservation and management.

Francioni analyses the interactions of the plurality of legal orders and different sets of norms – public and private, domestic and international, wartime and peacetime – that came together to preserve and protect cultural heritage. He laments the absence of specialized *ad hoc* mechanisms of enforcement and dispute settlement in international cultural heritage law, but notes that such absence is somewhat compensated for by borrowed *fora*. These include human rights courts, international criminal jurisdictions, and also arbitration, and they progressively balance individual rights and public interest in cultural property. He points out how cultural heritage norms influence the interpretation of treaty norms in investment arbitration.

Mavroidis examines the cause of free trade and WTO as a global public good. He argues that the WTO provides, at least for its members, a forum for negotiations, and contributes in stabilizing unilateral tariff-setting. He further argues that the WTO also produces the legal framework to support liberalization by addressing negative externalities from a unilateral definition of trade policies. Mavroidis argues that there

would be a risk of spiralling retaliatory tariffs without the negotiated mutually beneficial tariff concessions facilitated by the WTO. Without the WTO, no nation would have the incentive to offer this good.

Mavroidis adds the caveat that although the benefits extend to members of and signatories to preferential trade agreements between members and non-members, non-members are excluded from the benefits of this global public good. Mavroidis further cautions that bargaining externalities might threaten the WTO's relevance and its very existence, but notes that the forum has worked well so far. Given the number of open issues in such a complex multilateral agreement, the unique dispute-settlement function of the WTO itself is also a global public good, in that the WTO thus 'completes' the originally 'incomplete' contract.

Morgera analyses the global public good of enforcement of global environment protection through a plurality of legal mechanisms relying on a plurality of legal orders. She argues that the free-riding phenomenon in the context of global public goods implies that international treaties need not only to create controls but also to incentivize participation and compliance. In her view, the production technologies are potentially synergetic and inter-influencing. Morgera positions 'common but differentiated responsibility' as the by-product of aggregate-efforts global public goods as well as a potential justification for single-best-effort global public goods. The latter in turn, can catalyse a coordinated multilateral response.

The article deploys current (Convention on International Trade in Endangered Species) and future (Nagoya Protocol on Access and Benefit-sharing) scenarios to challenge the traditional understanding of bilateralism. This view sees bilateralism as the relationships whereby each municipal state protects its own rights and third states have no possibility to object to such a course of action, and as a 'severe obstacle standing in the way of stronger solidarity in international relations'. She thus presents US and EU (sanction- and incentive-based respectively) bilateral agreements in a whole new light and purpose, using the framework of global public goods. Morgera advocates that bilateral agreements can serve as a complementary tool to facilitate the enforcement of multilateral agreements for the enforcement of biodiversity conservation. The article examines the interaction caused by synergies between multilateral and mini-lateral action – on aggregate action in the context of single supply and vice versa. She hypothesizes that implementation of multilateral environment protection treaties is a problem and mini-lateral agreements might offer a solution. Obligations in multilateral agreements may be delivered as unmonitored voluntary single-best-effort delivery. She argues that such deployment of bilateralism will take away their moral deficiencies in not being inclusive. Thus Morgera positions the new wave of bilateralism in a complementary rather than a competitive context to multilateralism, to facilitate the enforcement of the global public good of environment protection.

Morgera does recognize that bilateralism can have a private agenda, but concludes that, realistically, such an inevitably mixed agenda should be evaluated on the basis of the *balance* achieved between the protection of the interests of the international community and the interests of individual states. Such a balance has to be evaluated

in light of implications not only at the multilateral level but also at the national and local levels.

Finally, Nollkaemper analyses the interaction of procedural law with substantive law in the transnational adjudication of global public goods. The article examines how procedural law can help or hinder the application of substantive law that protects public goods, and how this relationship reflects normative choices. Some rules of procedure like standing, jurisdiction, admissibility of claims, directly impact on and sometimes even limit the application of substantive law in the context of global public goods.

André Nollkaemper argues that while substantive law in the global public goods context has seen a great deal of development, especially with a focus on multilateral and common interests, rules of procedure have not necessarily kept up and have remained bilaterally focused. This creates a conflict and sometimes limits the substantive law and its adjudication. This issue is made more complex because of legitimacy concerns, since international adjudication in and of itself is also a global public good that competes with other (substantive) public goods. The article contends that the maintenance of an international court as a trusted institution by relevant actors sits uneasily with an assertive approach that may be necessary to protect global public goods. Articulation of reasoning and transparency of proceedings have key implications for legitimacy concerns that may arise in the case of perceived judicial activism or where judicial power is exercised to develop procedural law to address its limitations. However, protection and enforcement of global public goods may be restricted, challenged, and certainly made more complex because of these issues.

### 3 Conclusion

The contributions to this symposium provide new and insightful analyses to the debate on global governance showing that interdisciplinarity within the law and between law and other social sciences can contribute to moving our understanding further. Drawing from different branches of economics, game theory, and international relations, they provide a wide array of examples where emerging new forms of governance are responses to collective actions problems that include not only states, but also powerful private actors. The increasing interdependence of choices and outcomes makes external and spillover effects a central preoccupation which forces decision makers and courts to approach conflicts among global public goods differently from in the past. The influence of human rights is pervasive. It shapes the criteria to define insiders/outside, rule-makers, and rule-takers, empower new players, and transfer rule-making power, wealth, and capabilities from old to new actors. As is often the case, complex architectures trigger more questions than they are able to answer. But this alone is a meritorious achievement.