INTERNATIONAL ECONOMIC LAW IN A MULTI-POLAR WORLD WITHOUT EFFECTIVE UN AND WTO CONSTITUTIONAL CONSTRAINTS

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ABSTRACT

Section II *describes the "regulatory competition" between (1) Europe's multilevel ordoliberal economic constitutionalism, (2) the neoliberal business regulation dominating the Bretton Woods and GATT/WTO agreements, and (3) the power monopolies distorting competition and suppressing human and democratic rights in authoritarian countries like China and Russia.* Section III *explains how the related geopolitical rivalries and market distortions are undermining worldwide United Nations and World Trade Organization agreements and their sustainable development goals.* Section IV *illustrates how the realities of "constitutional pluralism" increasingly prompt like-minded governments to conclude plurilateral alliances (e.g., for free trade agreements, environmental clubs, security alliances) prioritizing diverse values (like normative and methodological individualism in Europe, business-driven neoliberalism in Anglo-Saxon democracies, power monopolies in authoritarian states) with mutually conflicting industrial policies. Democratic constitutionalism explains why citizens must insist on "public-private partnerships" for collectively protecting the*

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sustainable development goals with due respect for human rights (e.g., access to food, protection of public health and the environment); yet, the ordoliberal goal of promoting democratic input-legitimacy and republican output-legitimacy of multilevel governance of public goods by constitutional constraints on governance failures (e.g., to prevent the "Anthropocene") remains opposed by authoritarian rulers and neoliberal societies.

KEYWORDS: *constitutionalism, human rights, sustainable development, UN, WTO*

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I. INTRODUCTION

Many international lawyers—like some of the editors and contributors to this Journal—combine academic teaching with practical careers as diplomats and international judges, confronting them with the task of finding the right balance between the human rights ideals of United Nations (hereinafter "UN") law, the political realities constraining legal practices, and the impartiality and independence of judicial administration of justice. This contribution begins with a brief discussion of the normative ideals underlying the post-1945 international economic law (hereinafter "IEL") and today's realities of three diverse conceptions of IEL based on mutually incoherent value priorities (see below Section II). Section III describes the geopolitical rivalries increasingly undermining the post-1945 multilateral treaty systems and confronting legal practitioners with value and policy choices, for example in "de-risking" economic interdependence and

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protecting "economic security". Section IV explains why—the more globalization is perceived as creating vulnerabilities justifying national security restrictions (e.g., against the spread of viruses, weaponization of food and energy supplies)—the more important become *plurilateral* second-best responses like trade, investment and environmental agreements conditioning market access on respect for human rights and greenhouse gas reductions. Global health, environmental and rule-of-law reforms require private-public partnerships supported by civil societies, businesses and science-based expert governance protecting public health, climate change mitigation and other sustainable development goals (hereinafter "SDGs"). Such "multi-stakeholder" strategies can become more effective by extending democratic constitutionalism to transnational public goods (hereinafter "PGs"), as prescribed in European Union (hereinafter "EU") law (e.g., Articles 3, 21 of the 2009 Lisbon Treaty on European Union (hereinafter "TEU")) and recommended also in the 2015 UN Sustainable Development Agenda. Constructing peaceful coexistence among states with diverse authoritarian, neoliberal and ordoliberal policies requires "social market economies" supporting citizens and governments in adjusting to economic competition and geopolitical rivalries. In view of the geopolitical disagreements on human rights, UN and WTO reforms should prioritize "sustainable development" and impartial third-party adjudication of international disputes aimed at maintaining the transnational rule of law. Democracies, social media and lawyers must defend "speaking truth to power" by challenging public disinformation, censorship of freedom of expression, and suppression of human rights.

II. INTERNATIONAL ECONOMIC LAW IN A MULTI-POLAR WORLD

The 20th century can be characterized as an "American century": the decisive US support for ending colonial empires[1] and for elaborating and globalizing the UN Charter, the UN Specialized Agencies, the General Agreement on Tariffs and Trade (hereinafter "GATT 1947") and the 1994 Agreement establishing the WTO promoted decolonization and "constitutionalization" of IEL based on respect for individual and democratic self-determination in a rules-based, neo-liberal economic order. Yet, in contrast to premature hopes that the fall of the Berlin Wall (1989) and the dissolution of the Soviet Union (1991) would lead to a uni-polar world dominated by democracies, China and Russia used their WTO memberships

[1] For instance, through World Wars I and II (ending e.g., the Austrian-Hungarian, German, Japanese and Turkish empires), US support for post-1945 decolonization, US opposition against the British-French occupation of the Suez Canal in 1956, US support for ending of the cold war by the dissolution of the Soviet Union, and for the transformation of former Soviet Republics into North Atlantic Treaty Organization allies and democratic European Union member states.

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to successfully reform their economies without introducing democratic governance. The resurgence of China and India as the most populous national economies opposing the US domination of the post-1945 monetary, financial and trading systems increasingly challenges IEL. If the non-transparent "Belt & Road" cooperation among authoritarian countries (like China and Russia) continues to increase and the Shanghai Cooperation Organization—the world's largest regional economic and security organization in terms of territory and population (consisting of China, India, Kazakhstan, Kyrgyzstan, Pakistan, Russia, Tajikistan, Uzbekistan and Iran)—becomes the dominant force in Asia for realizing China's and Russia's common goal of an authoritarian international order, authoritarian rulers will confront humanity, once again, with the "paradox of freedom" as discussed by the ancient Greek philosopher Plato in his book "*The Laws*": Human freedoms risk destroying themselves unless abuses of public and private power are constitutionally restrained by laws and institutions.

Just as every human being has a genetically and socially unique worldview, so have the 193 UN member states historically evolved with diverse traditions and social, economic, political and legal orders interacting inside and among jurisdictions in diverse ways, ushering in internationally incoherent political and economic systems. At the 1938 Walter Lippmann conference in Paris, the economist Walter Rüstow used the term "neoliberalism" to explore the normative foundations of a humane, liberal economic order avoiding the past governance failures of *laissez-faire* liberalism, the "social dis-embedding" and impoverishment (e.g., due to hyper-inflation) in Germany's "Weimar Republic" during the 1920s, mutually harmful protectionism (like the 1930 US Smoot-Hawley Tariff Act reinforcing the great depression of the 1930s), and totalitarian central planning in communist and socialist countries. During the 1940s, the "Freiburg School of ordoliberalism" inspired the institutionalization of Germany's post-1945 "social market economy" and the progressive "constitutionalization" of the EU's "competitive social market economy" (as prescribed in Article 3 TEU). Yet, the legal practices of the Bretton Woods institutions, the 8 GATT Rounds of multilateral trade negotiations and the WTO Agreement were dominated by Anglo-Saxon business pressures to liberalize, privatize, deregulate and "financialize" international economic relations without adequate regard to the social adjustment problems caused by international economic and political competition. Today, Europe's economic ordoliberalism, Anglo-Saxon neoliberalism and totalitarian state-capitalism (e.g., in China and Russia) prioritize different values and different decision-making procedures distorting economic competition and rekindling geopolitical rivalries. Understanding the value conflicts driving this "regulatory competition" is a prerequisite for designing effective policy responses. The Bretton Woods agreements aimed at enhancing peace through

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mutually beneficial trade and cooperation; the new geopolitical conflicts undermining the UN and WTO legal systems confirm that the UN ideals of universal protection of human rights and sustainable development remain deeply contested in authoritarian and neoliberal societies.

A. Europe's Economic Constitutionalism Based on Normative Individualism

World Wars I and II provoked social, economic and political crises prompting most people in Western Europe to progressively adopt new national Constitutions limiting their feudal and colonial traditions by prioritizing the tasks of protecting democratic self-government (e.g., by constitutional, democratic and human rights enhancing democratic input-legitimacy of law) and PGs demanded by people. The term "ordoliberalism" was developed by the founders of the "Freiburg School" of law and economics in response to the regulatory challenges of Germany's Weimar Republic (1918-1933), the Nazi dictatorship (1933-1945) and the Federal Republic (since 1949). They explored—from a reasonable citizen perspective—the legal-institutional framework for market economies reconciling the individual pursuit of self-interests with the common citizen interests in PGs (like respect for human rights and social justice limiting "capitalist commodification" of persons, natural and financial resources).[2] Ordoliberalism and its focus on market failures (like restraints of competition, harmful externalities, social injustices, information asymmetries), related governance failures (e.g., to protect PGs like monetary and price stability, judicial remedies, rule-of-law) and constitutional failures (e.g., to limit abuses of public and private power by human and democratic rights) influenced also the design of the European economic communities since the 1950s. European economic integration law progressively incorporated the main five "constitutive" and "regulative ordoliberal principles" into Europe's micro-economic "common market constitution" and "macro-economic monetary constitution"[3]:

1. European law acknowledges (e.g., in Article 2 TEU) the sociological fact of the *interdependence of social, economic, political and legal, national and international orders*; it emphasizes the need for regulating market failures, governance failures and constitutional failures, and rejects *laissez faire* liberalism (perceiving markets as natural or spontaneous orders), neoliberal trust in social and economic self-regulation, and Marxist perceptions of the economic sub-structure of societies as

[2] For details, see ERNST-ULRICH PETERSMANN, TRANSFORMING WORLD TRADE AND INVESTMENT LAW FOR SUSTAINABLE DEVELOPMENT 127-63 (2022).

[3] For details, see Ernst-Ulrich Petersmann, *Neoliberalism, Ordoliberalism and the Future of Economic Governance*, 26(4) J. INT'L ECON. L. 836, 838-40 (2023).

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determining all what happens in their superstructure. This "interdependence of orders" requires recognizing the legal primacy of the democratically adopted legal Constitution and reconciling the different economic, political and legal rationalities (like economic utility-maximization, political power to protect PGs, rule-of-law). Non-discriminatory market competition necessitates legal protection not only of common citizen interests (like equal freedoms and property rights, "consumer sovereignty" in economic markets, "citizen sovereignty" in democratic markets); also special interests may require legal protection, for instance by reconciling labor rights with employer interests, and shareholder with stakeholder interests, through democratic legislation and judicial remedies.

2. *Respect for human rights* requires normative individualism (using individual welfare as relevant normative standards) and methodological individualism (explaining social phenomena in terms of the interplay of individual actions) recognizing voluntary, informed individual consent and mutually beneficial agreements among citizens (like democratic consent and voting) as ultimate sources of values. EU law prescribes a "*competitive social market economy*" (Article 3 TEU) with active social policies, for instance by assisting market participants (like workers, consumers, producers, and citizens) to adjust to disruptive changes imposed by economic and democratic competition. As competition creates winners and losers, a "social market economy" must protect citizens with human and constitutional rights and social assistance policies in order to maintain democratic support for non-discriminatory conditions of competition.
3. The interdependence of orders requires democratic constitutions to also construct an "*economic constitution*" with "market-conforming ordering policies" (like monetary, competition, trade, environmental, health and social policies) protecting the systemic importance of price mechanisms (as citizen-driven information-, coordination- and sanctioning mechanisms) and non-discriminatory competition (as a "discovery procedure" and restraint on abuses of power). Legal responses to economic challenges must "constitutionalize market failures" (e.g., by limiting restraints of competition, harmful externalities, information asymmetries, and social injustices) and related "governance failures" (like insufficient protection of PGs demanded by citizens) in all dimensions of societies (e.g., by recognizing and protecting civil, political, economic, social and cultural rights of citizens at national and transnational levels of governance). Democratic, legal and judicial accountability requires justiciable legal criteria (like the "polluter pays principle") and legal "balancing" of rights of citizens (like private property rights and worker rights). The multilevel institutionalization of

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"public reason" must maintain an "overlapping consensus" (e.g., among citizens, governments and courts of justice) respecting "national identities" (cf. Article 4 TEU).

4. National markets need to be embedded into *transnational, rules-based liberal orders* (e.g., as prescribed in Arts 3 and 21 TEU) based on transnational rule-of-law, multilevel democratic and judicial institutions, and independent regulatory agencies (like the European Central Bank) protecting human and constitutional rights of the almost 450 million "EU citizens", as codified in the EU Charter of Fundamental Rights (hereinafter "EUCFR").
5. Like national democratic Constitutions, the effectiveness and legitimacy also of the EU's multilevel constitutionalism depends on coherent "*constitutional politics"* and *"constitutional economics*" inside and beyond democracies and their market economies, as promoted by the "democratic principles" (e.g., as prescribed in Articles 9-12 TEU) for multilevel constitutional, parliamentary, participatory and deliberative "democratic governance" of the EU, as well as by the EU's multilevel monetary, competition, trade, investment, environmental and social policies and their legislative, administrative and judicial implementation with due respect for rights and remedies of citizens. The EU commitments (e.g., in Article 21 TEU) to protecting the rule of law also at international levels of governance distinguish EU foreign policies most clearly from the foreign policies of hegemonic states like China, Russia, and the USA.

B. Neoliberal Business Regulation Dominating the Post-1945 International Economic Law

The US Constitution protects a common market without comprehensive, legal limitations of "market failures" and related "governance failures". Economic, environmental, social and cultural rights and judicial remedies are much less protected in US constitutional law and judicial practices compared with EU law. The private financing of democratic elections entails that US congressmen are often influenced more by business sponsors and vested interests than members of parliaments in Europe, whose election campaigns tend to be financed publicly by member states. Due to the money- and business-driven financing of US federal elections and prevailing trust in self-regulation of markets and business, many areas of US economic and trade laws and policies (e.g., on tax evasion, producer subsidies, trade remedies, only selective enforcement of US antitrust and environmental laws) are dominated by business interests justified on grounds of "Kaldor-Hicks efficiencies" (like producer and consumer gains larger than related environmental pollution and social costs). For instance,

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1. the US Congress no longer supports free trade agreements (hereinafter "FTAs") and protection of many PGs (like effective gun controls, protection of public health against abuses of tobacco and drugs, the social rights dimensions and rule-of-law principles of the UN Sustainable Development Agenda);
2. the US Chamber of Commerce successfully lobbies against US ratification of UN agreements protecting public goods (like the World Health Organization Framework Convention on Tobacco Control, UN human rights conventions e.g., on protecting rights of children, labor rights conventions of the International Labor Organization);
3. nor does Congress effectively control the hundreds of "executive trade deals", discriminatory trade remedies (like anti-dumping, countervailing, safeguard duties and trade restrictions on grounds of "national security" authorized by US Presidents) and related violations of WTO rules and dispute settlement procedures.[4]

The US and British leadership in negotiating the 1944 Bretton Woods Agreements and GATT 1947, and the US rejection of the 1948 Havana Charter for an International Trade Organization, led to multilateral monetary, financial and trade agreements dominated by Anglo-Saxon financial interests (e.g., due to the convertibility of the US dollar and British pound, their control over the International Monetary Fund and World Bank Group) and business interests (e.g., lobbying for systemic import restrictions for agricultural, cotton, textiles and steel products based on GATT exceptions and "voluntary export" restrictions, discriminatory "trade remedies"). The absence of effective international competition, environmental and social legal disciplines and related judicial remedies reflected "neoliberal biases" favoring business-driven "market solutions" and macro-economic "Kaldor-Hicks efficiencies" (e.g., justifying environmental pollution). Until today, regulatory capture by rent-seeking lobbies (e.g., of financial, banking, steel, aluminum, internet and health regulation), and power politics disregarding international agreements ratified by the US Congress[5] are much stronger in the USA than inside the EU. President Trump's appointment of other business leaders (like Secretary of Commerce Ross, US Trade Representative Lighthizer and his deputy Shea) promoting US protectionism in manifest violation of WTO legal obligations of the USA illustrated prioritization of neoliberal nationalism (like discriminatory import

[4] For detailed references to the US practices briefly summarized in this section, and to relevant literature, see PETERSMANN, *supra* note 2, 90-126.

[5] Examples include US President Trump's populist withdrawal of the USA from UN Agreements like the 2015 Paris Agreement on climate change mitigation and the World Health Organization, the 2022 Inflation Reduction Act's disregard for WTO law, and the illegal US blocking of the appointment of WTO Appellate Body judges leading to the disruption of the WTO dispute settlement system.

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protection for US producers in the 2022 Inflation Reduction Act), in contrast with the EU commitments to protect rule-of-law inside and outside the EU.

Leading US trade lawyers seeking to prevent the US destruction of, or US withdrawal from the WTO system criticize the opportunistic disinformation on WTO practices;[6] they appeal to foreign governments to accept that the US Congress no longer supports many WTO rules limiting US trade policies (e.g., on trade remedies, security exceptions, compulsory appellate review);[7] but they also admit that US challenges of Chinese market distortions through WTO dispute settlement practices could have been more effective than President Trump's WTO-inconsistent trade deal with China and unilateral US power politics.[8] Similarly, US environmental experts regret the fact that the US Congress remains unwilling to use first-best environmental policy instruments like carbon taxes, and to protect human and constitutional rights to protection of the environment.[9] Neoliberal biases against impartial, judicial accountability contributed also to the fact that regional economic and human rights courts (like those in Europe) have never been accepted by Anglo-Saxon countries outside Europe. US industrial policies (as reflected in the 2022 US Chips Act and Inflation Reduction Act) differ from the EU's industrial policies by relying more on discriminatory protection for US producers without regard to WTO legal disciplines. Britain's "Brexit" from the EU emulated American neoliberalism, for instance by economic, environmental and social deregulation aimed at creating a "Singapore at Thames".

C. Power Monopolies and Abuses of State-Capitalism

Human societies approach legal ideas and political institutions from "paradigms of thought" shaped by their diverse political and legal cultures. The ancient democratic and republican constitutionalism in city republics around the Mediterranean Sea some 2500 years ago had no equivalent in the political and legal cultures in Africa, the Americas and Asia. Likewise, the French and US revolutionary "enlightenment Constitutions" of the 18th

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[6] James Bacchus, *The World Trade Organization: Myths Versus Reality*, CATO INST. (Sept. 26, 2023), https://www.cato.org/publications/world-trade-organization-myths-versus-reality.

[7] ALAN WM. WOLFF, REVITALIZING THE WORLD TRADING SYSTEM 484, 498-99, 509 (2023).

[8] Jennifer A. Hillman, *What Role for the WTO in Disciplining China's State-Dominated Economy?*, 26(3) J. INT'L ECON. L. 614, 614-18 (2023).

[9] For case studies, see generally Christina Eckes, *Constitutionalising Climate Mitigation Norms in Europe*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, 107 (Ernst-Ulrich Petersmann & Armin Steinbach eds., 2024), https://brill.com/display/title/69434; James Flett, *The EU Carbon Border Adjustment Mechanism a Transnational Governance Instrument Whose Time Has Come*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *id*; Erin Daly et al., *Common but Differentiated Constitutionalisms* Does 'Environmental Constitutionalism' Offer Realistic Policy Options for Improving UN Environmental Law and Governance? US and Latin American Perspectives, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *id*.

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century inspired similar democratic Constitutions only in a few countries outside Europe during the 19th century, mainly in Latin America. As long as relations between communities, states and rulers in Africa and Asia remained governed by unruly power politics, concentration of power—rather than separation of powers protecting individual rights and remedies—remained the primary objective of "authoritarian Leviathans" in order to protect "rule by law" rather than decentralized "rule of law". Modern democratic constitutionalism was embraced by only a limited number of African and Asian states after the end of imperial and colonial power politics following World War II. The ancient insights that democratic constitutional self-restraints of people—aimed at empowering citizens and limiting abuses of public and private power—can limit the "bounded rationality" of human beings as a kind of "political psychology", are rejected by authoritarian rulers (e.g., in China and Russia) seeking concentration and maximization of their powers in order to distribute privileges to their supporters (like Russian oligarchs, Chinese communist party members, state-trading enterprises) and suppress human and democratic rights (like freedom of information and expression, freedom of assembly and political opposition).

The 1944 Bretton Woods agreements and GATT 1947 were elaborated by—and for—democratic market economies; they included only a few rules addressing the specific regulatory challenges of state-trading enterprises and systemic discrimination in state-capitalist countries. Dysfunctional, communist state capitalism was one of the major drivers for the dissolution of the Soviet Union (1991). China and Russia used their WTO memberships to successfully reform their economies without effective liberalization of their political dictatorships; the resulting "authoritarian capitalism" undermines the legitimacy of power monopolies and corrupt oligarchic rulers, for instance whenever rulers prioritize collectivist state values without regard to human rights (e.g., in Russian aggression against neighboring states like Georgia and Ukraine), and in restoring China's ancient rule over more than 80% of the South China sea in violation of the UN Convention on the Law of the Sea (hereinafter "UNCLOS"). In contrast to human rights law (hereinafter "HRL") prioritizing respect for human dignity (like human reason and conscience) and subjecting all state powers to legal limitations by "inalienable" individual and democratic rights, authoritarian rulers reject such legal, democratic and judicial accountability challenging their power monopolies. How long will people tolerate communist "strongmen" ideologies based on utopian Marxist dreams (like the "withering of states" in communist "worker paradises" governed by "dictatorships of the working class") as justifications for denying human, constitutional and workers' rights and deliberative democracy? Can corrupt power monopolies improve the often poor quality and insufficient accountability of their governance (like famines caused by communist collectivization of agricultural

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production, and wasteful investments)? Will cooperation among communist China, Iranian ayatollahs, North Korean and Russian dictators last longer than previous, short-lived "alliances of evil"? The future of these countries is likely to be just as tumultuous as their past.

D. Regulatory Competition as Discovery Procedure and Institutional Restraint

The diverse justifications of ordoliberalism (prioritizing human and democratic rights), business-driven neoliberalism (prioritizing business-driven "Kaldor-Hicks-efficiencies") and totalitarian state-capitalism (prioritizing power monopolies) resemble dialectic "Hegelian struggles" of antagonistic, philosophical ideas with few prospects for a peaceful "synthesis'; they entail "regulatory competition" and diverse regulatory responses to "market failures", "governance failures" and "constitutional failures" based on mutually incoherent governing principles. For example, in internet regulation and digital trade,

1. European regulations prioritize fundamental privacy rights, judicial remedies of citizens and the need for EU regulations (e.g., of digital services and platform businesses);
2. authoritarian regulations (e.g., in China and Russia) prioritize state control (e.g., by state censorship, local data storage requirements, duties of tech companies to reveal their algorithms to state authorities);
3. neoliberal US regulations protect market freedoms and self-regulation of private data by US tech companies; key aspects of Internet regulation are left to private self-regulation by the Internet Corporation for Assigned Names and Numbers, a nonprofit organization incorporated under Californian law.[10]

The information, coordination and sanctioning functions of market competition influence "regulatory competition" among governments without ensuring universal progress. For example, the collapse of the Soviet economy resulting in the dissolution of the Soviet Union (1991) seemed like a victory for open market competition over state planning; the successful reforms of the Chinese and Russian economies following the accessions of China (2001) and Russia (2012) to the WTO confirmed the comparative advantages of a rules-based, competitive trading system; the authoritarian market distortions in China and Russia, and their political disregard for human rights and criminal justice,[11] prompt increasing countermeasures by

[10] For detailed comparisons, see generally ANU BRADFORD, DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY (2023).

[11] For example, in 2023 the Russian government declared that any attempt at implementing the arrest warrant issued by the International Criminal Court against President Putin would be considered a "declaration of war" against Russia. Max Du Plessis & Andreas Coutsoudis, *The Putin-South Africa*

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the market-based Organisation for Economic Cooperation and Development (hereinafter "OECD") countries and their multinational corporations (e.g., replacing Chinese and Russian suppliers in response to political "weaponization" of supply chains). The politicization of regulatory competition undermines the collective supply of global PGs like legal security (see SDG 16).

The emphasis—in the 2030 UN Sustainable Development Agenda—on the importance of human rights, democratic governance and rule-of-law for multilevel governance of transnational PGs (like the universally agreed seventeen SDGs) reflects the "constitutional approach" advocated in UN and European HRL and democratic constitutionalism.[12] But these normative ideals tend to be disregarded in the legal practices of authoritarian states suppressing human and democratic rights. The successful WTO memberships of China and Russia did not prevent their oligarchic rulers from denying political "governance failures" (e.g., in terms of market distortions, violations of rule-of-law, suppression of human and democratic rights and related PGs). The more they oppose rules-based constraints making governments responsive to citizens' interests (such as human rights), the more "regulatory competition" and geopolitical rivalries risk blocking UN and WTO reforms (e.g., by additional competition, environmental and social rules).[13] The current regulatory challenge of "de-risking" authoritarian weaponization of economic interdependence requires distinguishing areas of mutually beneficial cooperation (e.g., in collectively providing global PGs) from areas of mutually harmful rivalries (like state-sponsored cyber-attacks, military technologies). Past problem-solving approaches (like the "cold war" among communist and democratic countries, insufficient WTO rules on state-capitalism) cannot secure global cooperation for realizing agreed SDGs like climate change mitigation. Are China's authoritarian "Belt and Road alliances" and "partnership without limits" with Russia—based on trade and investment agreements without legal guarantees of human rights, protection of the environment and rule-of-law—forerunners of a new "authoritarian international law"?

Arrest Warrant Saga: A Tale of the Shrinking World of an Accused War Criminal, EJIL:TALK! (Aug. 18, 2023), https://www.ejiltalk.org/the-putin-south-africa-arrest-warrant-saga-a-tale-of-the-shrinking-world-of-an-accused-war-criminal/.

[12] PETERSMANN, *supra* note 2, at 127-63; *see generally* Giuliana Zicardi Capaldo, *Global Constitutionalism and Global Governance: Towards a UN-Driven Global Constitutional Governance Model*, *in* GLOBALIZATION AND ITS IMPACT ON THE FUTURE OF HUMAN RIGHTS AND INTERNATIONAL CRIMINAL JUSTICE 629 (M. Cherif Bassiouni ed., 2015).

[13] On proposals for WTO competition rules, see Ernst-Urich Petersmann, *Competition-Oriented Reforms of the WTO World Trade System – Proposals and Policy Options*, *in* TOWARDS WTO COMPETITION RULES, KEY ISSUES AND COMMENTS ON THE WTO REPORT (1998) ON TRADE AND COMPETITION 44, 43-71 (Roger Zäch ed., 1999).

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III. GEOPOLITICAL RIVALRIES UNDERMINING UN AND WTO LAW

The past problems in producing and supplying Covid-19 vaccines, "green technologies" (like batteries dependent on rare earth materials controlled by China), or sufficient assistance for Ukraine's self-defense against Russian military aggression, and in responding to politically motivated trade restrictions by China (e.g., vis-à-vis Australia and Lithuania) and Russia (e.g., on energy and food exports), have prompted many democracies (e.g., in the EU, Japan and the USA) to review and invoke "essential security interests" beyond the traditional scope of "security exceptions" (e.g., in Article XXI GATT 1994), which focus on "time(s) of war or other emergency in international relations" (Article XXI, para. b, iii). Notably, the US administration invoked Article XXI GATT for industrial policy reasons; it rejects the WTO jurisprudence that the text of GATT Article XXI justifies partial judicial review of whether its objective conditions (like "taken in time of war or other emergency in international relations") are applicable.[14] While most trade restrictions on security grounds (e.g., to address short supply insecurities for vaccines and arms) can be justified within the existing rules, some long-term "domestic economic security strategies" aimed at changing supply chains and market structures (like China's exportation of excess production of steel) may be challenged under WTO rules and dispute settlement procedures (like the US import restrictions on steel and aluminum). Contrary to the politically driven US preference for disregarding WTO rules, the EU commitment to complying with international law prevented the EU-US summit meeting on 20 November 2023 from agreeing on common trade restrictions on steel imports from China. Clarifying democratic security strategies for "de-risking" the vulnerabilities generated by an interdependent world, preventing "economic security threats" destabilizing societies, and responding to proposals for changing the UN and WTO "security exceptions" so as to limit unjustified economic coercion, depend on an evaluation of whether UN and WTO law can still protect essential democratic interests in the current multipolar world with geopolitical rivalries (e.g., among authoritarian dictatorships and their neighboring states). Section III summarizes increasing failures of UN and WTO governance undermining the UN Sustainable Development Agenda. Hence, as explained in Section IV, UN and WTO governance of PGs must be supplemented by democratic leadership for "plurilateral agreements" responding to UN and WTO governance failures.

[14] For a discussion of this GATT/WTO jurisprudence, the US concerns and policy responses, see BERNARD HOEKMAN ET AL., NON-ECONOMIC OBJECTIVES, GLOBALISATION AND MULTILATERAL TRADE COOPERATION 43-60 (2023).

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A. Increasing Challenges to the "UN Constitutional Governance Model"

All UN member states adopted national Constitutions (written or unwritten) constituting, regulating, and justifying national governance of PGs; they joined multilateral treaties of a higher legal rank for protecting transnational PGs like human rights and the rule of law. National constitutionalism and UN HRL induced some UN institutions to recommend "constitutional governance models" (including protection of human rights, democracy, separation of powers, checks and balances, judicial remedies, and rule of law) also for multilevel governance of the SDGs. Yet, the proposed constitutional reforms remained limited to a few policy areas (like compulsory adjudication in WTO law, investment law, international criminal law, and the UNCLOS). The "embedded liberalism" and rule-of-law systems underlying the UN and WTO sustainable development obligations are increasingly disregarded by authoritarian rulers, as illustrated by

1. China's refusal to comply with the 2016 UNCLOS arbitral award on China's illegal extension of sovereign rights in the South China Sea, and China's disregard for human rights inside China;
2. the illegal US blocking of the WTO Appellate Body (hereinafter "AB") system since 2017, which has rendered the AB dysfunctional since December 2019 and is increasingly undermining the WTO dispute settlement system;[15] and
3. Russia's refusal to comply with the 2022 judicial orders by the International Court of Justice and the European Court of Human Rights to suspend its illegal suppression of human rights in Ukraine and inside Russia.[16]

Without compulsory judicial remedies, UN HRL cannot be effectively enforced. Only in exceptional situations did the UN Security Council (hereinafter "SC") assert "legislative powers", for example, to establish international criminal courts and respond to international health pandemics by adopting UN SC Resolutions 2532 and 2565 (2020) acknowledging that "the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security"[17] and calling "upon all parties to armed conflicts to engage immediately in a durable humanitarian pause" to provide humanitarian assistance to the world's most vulnerable in conflict zones.[18] The disagreements on the scope of UN HRL persist:

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[15] Peter Van den Bossche, *Can the WTO Dispute Settlement System Be Revived? Options for Addressing a Major Governance Failure of the World Trade Organization*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *supra* note 9, at 308, 312.

[16] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. V. Russ.), Provisional Measures, 2022 I.C.J. 211, ¶ 86 (Mar. 16, 2022).

[17] S.C. Res. 2532, pmbl. para. 11 (July 1, 2020); S.C. Res. 2565, pmbl. para. 17 (Feb. 26, 2021).

[18] S.C. Res. 2532, *supra* note 17, ¶ 2.

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1. China, which ratified the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") but not the UN Covenant on Civil and Political Rights (hereinafter "ICCPR") in order to shield its communist party's political monopoly, does not legally and judicially protect human rights;
2. the USA has ratified the ICCPR but not the ICESCR in view of US political preferences for business-driven, economic regulation and prioritization of civil and political over economic, social and cultural rights;
3. most European countries have ratified both the ICCPR and the ICESCR; in contrast to the rejection by China and the USA of individual UN complaint mechanisms and regional human rights conventions and human rights courts, they protect civil, political, economic, social and cultural rights also through individual UN complaint procedures and regional HRL (like the European Convention on Human Rights (hereinafter "ECHR") and the EUCFR) with individual judicial remedies in national and European courts;
4. Russia does not effectively implement human rights conventions; its oligarchic rulers suppress human rights (e.g., of political dissidents, freedom of information) and democratic self-determination at home and abroad.

Disregarding human and democratic rights is the main reason for unprovoked and unjustified wars of aggression and related war crimes (as currently in Ukraine). The "constitutional implementation deficits" in UN and WTO legal practices (like disregard for human rights in the numerous civil wars in Africa and Asia) reinforce governance failures to prevent unnecessary poverty (SDG 1) and protect food security (SDG 2), public health (SDG 3) and public education for all (SDG 4), gender equality (SDG 5), access to water and sanitation for all (SDG 6), and many other SDGs like "access to justice" (SDG 16). Transforming national into multilevel constitutionalism remains resisted by authoritarian and nationalist rulers (e.g., in China and Russia) defending their self-interests in discretionary powers avoiding democratic and legal accountability. For example,

1. the UN Security Council system is rendered ineffective by authoritarian abuses of veto-powers and illegal aggression and threats of military force;
2. the UN human rights system fails to prevent violations of human and democratic rights in many UN member states;
3. the 1992 UN Framework Convention on Climate Change (hereinafter UNFCCC) failed to prevent climate change;
4. UN environmental law and institutions also failed to prevent ocean pollution, over-fishing and biodiversity losses;

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5. the World Health Organization (WHO) failed to prevent and effectively respond to global health pandemics like Covid-19;
6. the Food and Agriculture Organization failed to protect food security for currently more than 200 million people;
7. the Bretton-Woods Agreements failed to prevent the 2008 financial crises and remain one-sidedly dominated by the industrialized G7 countries; and
8. China, Russia and the USA increasingly reject UN and WTO adjudication if judicial rulings limit their foreign policy decisions (e.g., to violate UN or WTO law).

Even if democratic constitutionalism promoted "democratic peace" inside and among democracies (e.g., in the Americas and Europe), the UN "constitutional governance model" failed to prevent increasing power politics among authoritarian and democratic countries. The US trade war against China since 2018, Russia's war against Ukraine since 2014, and the collective economic sanctions against Russia also disrupt the rules-based world trading system and promote "de-risking" of supply chain vulnerabilities in "strategic sectors".

B. Disruption of the WTO Legal and Dispute Settlement System

The 1944 Bretton Woods Agreements and GATT 1947 were designed by and for democracies based on their liberal assumptions that the proper functioning of non-discriminatory market competition requires legal guarantees of stable and convertible currencies, freedom of contract, private property rights, liberalization of tariffs, prohibition of non-tariff trade barriers, rule-of-law and judicial remedies. The agreements include only a few and insufficient legal restraints on state capitalism, state-trading enterprises, subsidies and related distortions of competition (e.g., by discriminatory tax and currency privileges, suppression of labor rights and equal competitive opportunities). Authoritarian states (like China and Russia) do not protect effective constitutional and judicial remedies of their citizens against executive suppression of freedoms and democratic rights (like freedoms of information and of political opposition). Nor do their power monopolies and state capitalism protect non-discriminatory conditions of competition. Even though the Protocols for the accession of China, Russia and other state-trading countries include "WTO plus disciplines", WTO law lacks sufficient competition rules for state-trading companies, subsidies and other distortions of trade (like discriminatory tax privileges). Hence, market economies increasingly introduce countermeasures in their trade relations with China and Russia aimed at limiting competitive distortions and perceived violations of the "embedded

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liberalism"[19] underlying WTO law. China's "partnership without limits" with Russia, and its network of bilateral "Belt and Road Agreements" with over 80 countries, lay the foundations for an alternative trade regime dominated by bilateral power-politics without multilateral rules, independent judicial remedies and guarantees of human and democratic rights of citizens.

Abuses of executive powers by populist demagogues (e.g., disregarding international obligations like the EU-UK Brexit Agreement and the Paris Agreement on Climate Change) are an increasing challenge also inside democratic countries. US President Trump (2017-2021) interpreted his executive powers under Article II of the US Constitution very broadly as allowing him to do whatever he wanted in the foreign policy area (e.g., withdrawing the US from multilateral treaties like the WHO Constitution and the 2015 Paris Agreement without approval by the US Congress). The "tribal support" from Republican party majorities in the US Congress for President Trump undermined parliamentary control of executive politics (like President Trump's "putsch attempt" on 6 January 2021), including congressional control of US trade policies which, since the US-Mexico-Canada Free Trade Agreement of 2020, are based on hundreds of "executive deals" rather than on free trade agreements (hereinafter "FTAs") approved by Congress. Since the 1980s, US President Reagan's neo-liberal policies promoted business-driven economic regulation, money-driven democratic elections, "rent-seeking" limitations of trade and competition (e.g., by protecting domestic producers through discriminatory "trade remedies", subsidies, regulatory standards, tax reductions, intellectual property rights, only selective enforcement of US antitrust laws), and increasing social inequalities. Unilateral US trade sanctions (e.g., against foreign violations of US intellectual property rights) and US interest group politics in the "GATT Rounds" of multilateral trade negotiations reinforced selective US import protection (e.g., for domestic agricultural, cotton, textiles and steel producers) and export opportunities for dominant US suppliers (notably for services trade and US "tech empires" protected by intellectual property rights and systemic tax avoidance).

Under the US Trump administration, the "regulatory capture" of US trade policies (e.g., for import protection for steel and aluminum industries), the US withdrawal from various multilateral treaties by executive orders of President Trump, and the illegal US blocking of WTO AB appointments revealed some of the systemic conflicts between US neoliberalism and

[19] Arguably, the "embedded liberalism" underlying WTO law has evolved beyond its limited meaning under GATT 1947, for instance by including new UN and WTO legal obligations (like human rights) and recognition of four Chinese customs territories as subjects of WTO law with limited trade policy autonomy of Hong Kong, Macao and Taiwan (the legal status of the latter remains contested both inside and outside Taiwan, which was never governed by the People's Republic of China and is not covered by the "one China, two systems" guarantee in China's Constitution).

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Europe's ordoliberal, economic constitutionalism. US Trade Representative (hereinafter "USTR") Lighthizer, his deputy ambassador Shea, and US Secretary of Commerce Ross had all been long-standing business lobbyists who, like President Trump himself, identified US business interests (e.g., in rejecting WTO judicial findings limiting US discretion to use discriminatory "trade remedies") with the national US interest. President Trump's decisions to withdraw the USA from regional FTAs (like the 2016 trans-Pacific and transatlantic FTAs) were taken unilaterally without requesting approval by the US Congress. The 2020 USTR Report criticizing the AB jurisprudence[20] perceived WTO law as an instrument of US power politics; it ignored the (quasi)judicial mandates of WTO dispute settlement bodies and their (quasi)judicial methodologies by insisting on controversial US interpretations of WTO rules, yet without identifying violations by the AB of the customary law rules of treaty interpretation. The USTR Report—notwithstanding its valid criticism of some WTO rules and dispute settlement practices (e.g., that the AB no longer consulted with the parties when deciding to disregard the Article 17.5 deadline)—suffered from legal biases and false claims characteristic of Trump's "big lies" (e.g., about having won the 2020 US federal elections). Since December 2019, the US blocking of AB appointments rendered the AB dysfunctional; most WTO dispute settlement reports are now "appealed into the void" of a dysfunctional AB without adoption of their legal findings, thereby also undermining the WTO rule-of-law system. The active industrial policies introduced by the US Biden administration (e.g., for protecting workers, decarbonization of the economy, technological innovation) prompted the EU and USA to establish a transatlantic Trade and Technology Council for preventing competitive distortions and coordinating their diverse trade, environmental and industrial policies; yet, the power-oriented US trade policies and the EU commitment to WTO-consistent trade policies prevented this Trade and Technology Council from promoting rules-based WTO reforms.[21] The 2022 WTO Ministerial Conference surprised everyone by concluding a series of WTO agreements (e.g., on limiting fisheries subsidies and facilitating global supply of Covid-19 vaccines).[22] Yet, the China-US trade war, military aggression (e.g., by Russia) and military threats (e.g., by China) against

[20] *See* U.S. TRADE REPRESENTATIVE [hereinafter USTR], REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body. For a detailed refutation of the false USTR legal claims, see generally JENS LEHNE, CRISIS AT THE WTO: IS THE BLOCKING OF APPOINTMENTS TO THE WTO APPELLATE BODY BY THE UNITED STATES LEGALLY JUSTIFIED? (2019); PETERSMANN, *supra* note 2, at 90-126.

[21] *See* Elaine Fahey, *Democratic Leadership through Transatlantic Cooperation for Trade and Environmental Reforms?*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *supra* note 9, at 279, 281.

[22] For details, see WOLFF, *supra* note 7, at 174.

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WTO members (like Israel, Taiwan and Ukraine) risk complicating additional WTO agreements at the 2024 WTO Ministerial Conference at Abu Dhabi.

C. Geopolitical Transformations Endangering the SDGs

The "2030 Agenda for Sustainable Development", adopted in 2015 by a UN summit meeting, links economic, environmental and social rules with commitments to "realize the human rights of all" and seventeen agreed SDGs over the next 15 years with "the participation of all countries, all stakeholders and all people".[23] Its recognition (in para 9) that "democracy, good governance and the rule of law . . . are essential for sustainable development", and its "inclusive public-private stakeholder approach" go far beyond the "member-driven governance" ideologies of the Bretton Woods institutions and the WTO. Yet, Russia's wars of aggression, China's threats of aggression (e.g., in the South-China Sea and against Taiwan as an autonomous WTO member), China's insufficient cooperation with the WHO in preventing the Covid-19 health pandemic, and suppression of human rights in authoritarian states increasingly undermine prevention of unnecessary poverty (SDG 1), protection of food security (SDG 2), public health (SDG 3), and other SDGs like protection of the environment (SDGs 13-15), "access to justice" and rule-of-law (SDG 16). The UN Sustainable Development Agenda not only acknowledges the instrumental importance of peace, security and of the WTO trading system for realizing the SDGs;[24] the UN Secretary-General also continues to warn how much the ongoing geopolitical conflicts have reversed past progress made in realizing many SDGs like protecting food security, public health, access to justice and related human rights.[25] The "Global Stocktake Decision", adopted by the Conference of the Parties (hereinafter "COP 28") of the UNFCCC on 13 December 2023 at Dubai, recognizes the need for "transitioning away from fossil fuels in energy systems in a just, orderly and equitable manner . . . so as to achieve net zero by 2050 in keeping with the science".[26] Yet, the

[23] G.A. Res. 70/1, pmbl. (Oct. 21, 2015).

[24] The SDA acknowledges (*e.g.,* in paras. 17.10-12) that realizing most SDGs – like ending poverty for everybody, securing access to food, water and medicines, and de-carbonizing economies – requires a "rules-based, open, non-discriminatory and equitable multilateral trading system under the WTO".

[25] The annual UN reports on progress towards the SDGs document how "decades of development progress have been halted or reversed" as a result of Russia's military aggression against Ukraine (*e.g.,* forcing more than 15 million people inside Ukraine to flee from their homes), global health pandemics, related food and economic crises and violent conflicts elsewhere. *See generally* UN Economic and Social Council, *Progress towards the Sustainable Development Goals*, U.N. Doc. E/2022/xxx (2022).

[26] U.N. Framework Convention on Climate Change, *Outcome of the First Global Stocktake*, ¶ 28, U.N. Doc. FCCC/PA/CMA/2023/L.17 (Dec. 13, 2023).

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international commitments for reducing production and consumption of fossil fuels and related greenhouse gas (hereinafter "GHG") emissions, and for financial and technical assistance for a "just, orderly and equitable" energy transition, remain insufficient for realizing the universally agreed goal of keeping temperature rise below 2°C and ideally at 1.5°C above preindustrial levels.

Without trust and an effective WTO dispute settlement system, the successful realization of climate change mitigation and inducing market-oriented reforms in China's totalitarian state-capitalism are unlikely to succeed. President Trump's arbitrary destruction of the WTO AB—and the lack of majority support in the US Congress for restoring the WTO AB system, for concluding FTAs, and for introducing carbon taxes as the most efficient policy instrument for carbon reductions aimed at climate change mitigation—illustrate some of the continuing differences between business-driven US neoliberalism (e.g., US preferences for power-oriented trade protectionism unrestrained by impartial adjudication), compared with EU ordoliberalism (like leadership for introducing Multi-Party Interim WTO arbitration in 2020, for adopting the European climate law in June 2021, and for implementing fourteen legislative EU Commission proposals aimed at making Europe the first carbon-neutral continent by 2050). While EU industrial, trade and environmental policies are explicitly committed to protecting human rights and the international rule of law,[27] US industrial, trade and environmental policies increasingly discriminate in favor of US producers (e.g., of steel, aluminum, electric vehicles, batteries) without regard to WTO law.

The realities of power politics blocking UN and WTO reforms (e.g., by abuses of veto powers) do not exclude cooperation among "willing countries", for instance at WTO Ministerial Conferences. Yet, conflicting regulations (e.g., tax evasion by digital services companies), systemic rivalries (e.g., over control of internet services and protection of privacy rights), and the collective countermeasures by democracies against suppression of human and democratic rights by China, Russia and other authoritarian regimes (like Iran, North Korea, Myanmar) increasingly undermine UN law, WTO law and related regulatory regimes (like HRL, UNCLOS as the legal "constitution of the oceans", the UNFCCC as legal "constitution of the atmosphere") for realizing the SDGs (e.g., their environmental objectives in SDGs 13-15). State-capitalism, business-driven neo-liberalism and related industrial policies rely more on "management approaches" aimed at "Kaldor-Hicks efficiency gains" and "welfare economics" within the diverse frameworks of national constitutionalism;

[27] EUROPEAN COMMISSION, 70 YEARS OF EU LAW: A UNION FOR ITS CITIZENS 30-53, 268-90 (2022).

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they neglect the search by constitutional economics[28] for welfare-enhancing changes in constitutional rules (like EU common market freedoms, constitutional and human rights of access to food, public health and environmental protection), as illustrated by the very diverse climate change mitigation policies in the BRICS countries (Brazil, Russia, India, China, South-Africa), Europe and the USA.

IV. HOW TO RESPOND TO UN AND WTO GOVERNANCE FAILURES?

Why is it that "constitutional politics" successfully transformed European integration law but, so far, failed to realize the declared UN goal of "transforming our world" in order to realize the universally agreed SDGs? The American philosopher Rawls described the "constitutional politics" necessary for transforming agreed constitutional principles into democratic constitutionalism as a "four-stage sequence" as reflected in the history of the US Constitution: reasonable citizens, after having agreed (1) on their constitutional "principles of justice" (e.g., in the 1776 US Declaration of Independence and Virginia Bill of Rights), (2) elaborate national Constitutions (e.g., the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of citizens; and (4) the agreed constitutional and legislative rules need to be applied and enforced by administrations and courts of justice in particular cases so as to protect equal rights and rule of law.[29] The more globalization transforms national into transnational PGs (like human rights, rule of law, the SDGs) which—in a globally interdependent world composed of more than 200 sovereign states—no state can unilaterally protect without international law and multilevel governance institutions, the more national "constitutionalism 1.0" has become an incomplete system for governing transnational "aggregate PGs". Violations of the multilateral UN and WTO treaty obligations and arbitrary disregard for the universally agreed SDGs can be described as "governance failures" to respect the democratic mandates given by citizens when they ratified UN and WTO treaties. Such governance failures also reflect failures of "constitutional politics" to respect universally agreed UN

[28] *See* Ernst-Ulrich Petersmann, *Constitutional Pluralism, Regulatory Competition and Transnational Governance Failures*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *supra* note 9, at 31, 52-55. Europe's "constitutional economics" derives values from voluntary, informed consent of citizens by embedding the common market, monetary, competition and environmental EU policies into multilevel constitutional rules and institutions promoting human and constitutional rights and non-discriminatory conditions of competition in a "competitive social market economy" (Art. 3 TEU) enhancing the welfare of all citizens.

[29] JOHN RAWLS, A THEORY OF JUSTICE 171-76 (rev. ed. 1999).

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and WTO legal principles in legislative, administrative and judicial implementing measures.

A. Constitutional Responses to Transnational Governance Failures?

In European integration among constitutional democracies based on the European Economic Communities established since the 1950s, the demands by EU citizens for regional and global PGs transformed national into multilevel constitutionalism extending the national "four-stage sequence" to (5) international law, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU law (like legal primacy, direct effects and direct applicability by citizens of precise, unconditional EU rules) and (8) domestic implementation of EU law inside member states protecting PGs across national borders.[30] Following the fall of the "Berlin wall" (1989) and the dissolution of the Soviet Union (1991), democratic constitutionalism also contributed to the worldwide recognition of multilevel judicial protection of rule of law in UN law (e.g., in the UNCLOS, the International Criminal Court), WTO law and international investment law. Yet, transforming national into multilevel constitutionalism remains resisted by authoritarian and nationalist rulers defending their self-interests in discretionary powers avoiding democratic and legal accountability.

UN member states tend to define—and respond to—transnational governance failures in diverse ways depending on which UN law values their governments prioritize:

1. process-based, representative democracies (e.g., in Anglo-Saxon countries) prioritize constitutional nationalism, majoritarian institutions, their democratic accountability, civil and political liberties over economic, social and cultural rights of citizens, and discretionary foreign policy powers;[31]
2. rights-based, multilevel democratic constitutionalism is practiced notably in the 27 EU member states interpreting their Treaties on

[30] *See* EUROPEAN COMMISSION, *supra* note 27, at 30-65; GIULIANO AMATO ET AL., THE HISTORY OF THE EUROPEAN UNION: CONSTRUCTING UTOPIA, 57-58 (Giuliano Amato et al. eds., 2019); ERNST-ULRICH PETERSMANN, MULTILEVEL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS, 151ff, 270ff (2016).

[31] MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 124-35 (2022), claims that the people and their elected representatives, rather than citizens and courts of justice invoking human and constitutional rights for social change, should define the nation's political identity and make its most important policy decisions. He disregards transnational constitutional, parliamentary, participatory and deliberative democracy as prescribed in EU law (e.g., Arts 9-12 TEU), and also protection of transnational PGs as a task of "living democratic constitutionalism". The focus in US courts on "negative freedoms" from coercion by government—and on judicial deference to "political questions" to be decided by the US Congress (like the regulatory powers of the US Environmental Protection Agency) – impedes judicial recognition of "positive constitutional rights" (e.g., to health and environmental protection) if they have not been explicitly recognized in legislation.

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European Union and the EUCFR as functionally limited "treaty constitutions" restraining market failures (e.g., by competition, environmental and social rules protecting individual and common market freedoms, social rights and judicial remedies), constitutional failures (e.g., by constituting democratic, judicial and regulatory EU institutions protecting human and constitutional rights of EU citizens, transnational PGs and "national identities"), and governance failures (e.g., by rule-of-law requirements, institutional "checks and balances");[32]

3. authoritarian states (like China and Russia) have adopted "fake constitutions" that neither effectively constrain power monopolies (e.g., of China's communist party, the oligarchic rulers in the Kremlin) nor protect independent, democratic and judicial remedies and human rights. They increasingly denounce UN HRL as being based on "Western values" rather than on human "reason and conscience" as universally recognized in Article 1 of the UN Universal Declaration of Human Rights.

This reality of constitutional pluralism suggests that diverse preferences, regulatory competition, geopolitical rivalries and authoritarian opposition against "constitutional UN and WTO reforms" (like strengthening judicial protection of human rights) will remain permanent facts. Yet, China's participation in the Multi-Party Interim Arbitration arrangements among currently (2023) fifty three WTO members (contrasting with the non-participation by the United Kingdom and the USA), and China's implementation of most WTO dispute settlement rulings against China (contrasting with frequent non-implementation of WTO dispute settlement rulings against the USA), illustrate China's strong self-interest in maintaining the multilateral WTO trading system, as well as the "regulatory capture" of US trade policies by rent-seeking US lobbies (notably the US steel industry and "trade remedy lobbies"). Russia's wars of aggression, war crimes and "weaponization" of energy and food supplies further illustrate how—the more the UN and WTO systems are undermined by abuses of veto powers, wars and collective countermeasures—UN and WTO law and governance, and the "regulatory competition" among authoritarian and democratic countries, risk failing to protect the universally agreed SDGs. The successful, albeit modest results of the WTO Ministerial Conference in June 2022 and of the "COP 28" conference in December 2023 confirm the

[32] European courts perceive their judicial mandates as "constitutional guardians" more broadly in view of the multilevel guarantees of human and constitutional rights and related PGs in Europe's multilevel, democratic constitutionalism and "European" democratic cultures. On the need for more "progressive constitutionalism" also in the USA challenging "originalist interpretations" of the US Constitution, see JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 185-250 (2022); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 91-99, 129-30 (2022).

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need for continuing global cooperation in protecting the SDGs. Yet, the realities of power politics in UN and WTO governance call for second-best, plurilateral reforms among "willing countries" (e.g., through democratic defense alliances like NATO, "climate protection clubs" conditioning market access on the protection of the SDGs). The failure of the US to persuade the EU to join a "clean steel club" discriminating against "dirty" (i.e., more carbon-intensive) Chinese steel production was due to the EU's commitment to WTO-consistent trade policies (without prejudice of future use of more EU antidumping- and countervailing duties on imports of Chinese steel).

The realities of intergovernmental power politics do not justify disregard for transnational constitutionalism in "realist responses" to the collective action problems in protecting global PGs even if—in state practices—pragmatic focus on "what works", and on whether successful arrangements in one field can be replicated in others, prevails. Interdisciplinary analysis of the interests, incentives, power, "bounded rationality", costs and benefits of the actors involved must admit the continuing importance of constitutionalism (like human rights, democratic governance, rule-of-law) for democratic self-government and protection of PGs. Similarly, constitutional economics explains why welfare economics (e.g., examining costs and benefits of alternative policy instruments within the limits of national Constitutions) and power-oriented, intergovernmental pursuit of national self-interests remain incomplete paradigms for analyzing the collective action problems of multilevel governance of transnational PGs. European integration law confirms how multilevel constitutionalism can construct "democratic peace" inside and among states by limiting political abuses of human passions (like greed) and rational egoism of power-maximizing autocrats (e.g., using and threatening military force at home and abroad). As discussed below, constitutional economics (e.g., underlying EU common market law and GATT/WTO law) and transnational "constitutional politics" (like EU environmental constitutionalism) offer realistic policy tools for promoting economic and social welfare, efficient rule-of-law principles, democratic civil society support and successful "PGs litigation" reinforcing democratic accountability of governments.

B. Respect for Constitutional Pluralism

The policy question underlying democratic constitutionalism—how to constitute, limit, regulate and justify governance institutions and rules of a higher legal rank protecting informed, individual consent to the collective supply of PGs?—remains of existential importance for reasonable citizens in all states. Yet, national Constitutions in authoritarian states prioritize different values (like China's Constitution referring to "dictatorship of the working class"); they offer insufficient remedies for their frequent

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"implementation deficits" (e.g., regarding the human rights commitments in China's Constitution), thereby facilitating power politics (like President Putin's initiation of Russia's war against Ukraine, his withdrawal of Russia from European institutions). Constitutional pluralism also characterizes the diverse "treaty constitutions" establishing the fifteen UN Specialized Agencies governing special PGs (like the "constitution" establishing the International Labor Organization providing for rights of governments, employer representatives and workers). These realities of "constitutional pluralism" are limited by the UN Charter and general principles of UN law, just as the various EU institutions remain embedded into general EU constitutional law principles (e.g., as codified in the ECHR and the EUCFR); hence, political denial of human rights and other violations of international law may not prevent international institutions from holding state- and non-state-actors legally and judicially accountable.

The limited jurisdiction and resources of intergovernmental organizations necessitate "private-public partnerships" for collective provision of PGs (like the "Global Alliance for Vaccination and Immunization"). Arguably, constitutionalism is also of crucial importance for preventing that "de-globalisation" between authoritarian countries (like China, Iran and Russia) and democracies provokes devastating conflicts similar to those caused by the "first de-globalisation" (1914-1945) ushering in World Wars I and II, the inter-war economic depression and the rise in dictatorships responsible for the killing of millions of people. Just as democracies promote peaceful foreign policies by commitments to respect human rights and rule of law (e.g., as prescribed in Article 21 TEU and UN law), so must WTO members (like China and Taiwan) settle their disputes peacefully and protect the rule of law also vis-à-vis non-state actors (like criminal organizations disrupting peaceful cooperation among states).

C. Containing Power Politics by Plurilateral Protection of SDGs

As democracies cannot trust totalitarian power politics, they increasingly resort to pluri- or unilateral policy responses and collective countermeasures. The EU's multilevel constitutionalism, UN HRL and the recognition of affirmative constitutional duties to protect PGs (like protection of the environment) promote multilevel, participatory and deliberative democracy as protected in Articles 9-12 TEU and illustrated also by the participation of more than 80,000 civil society representatives in the COP 28 conference at Dubai in December 2023. The defense of democracy in Ukraine against Russia's illegal aggression illustrates how rule-of-law and the survival of democracies may require "democratic wars of independence"

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based on active citizenship [33] and defense alliances among "militant democracies". As the current health, environmental, economic, food, migration and security crises were provoked by governance failures, democracies and the EU have good reasons to base their foreign policies on defending democratic constitutionalism, as prescribed in Article 3 and 21 Lisbon Treaty. For instance, in order to protect EU citizens against perceived market failures and governance failures, the EU has introduced new regulations for:

1. screening foreign investments inside the EU;
2. limiting access of non-EU companies to government procurement inside the EU unless reciprocal access of EU companies is secured;
3. avoiding "carbon leakage" through unilateral EU carbon border adjustment measures;
4. EU "anti-coercion measures" providing for unilateral EU countermeasures against economic sanctions by third countries (like China);
5. EU "sustainability sanctions" in response to foreign violations of labor rights, human rights and sustainable development commitments, including also an EU corporate sustainability due diligence directive requiring large companies to protect human rights, worker rights and environmental standards in their supply chains;
6. EU emergency powers for responding to supply chain problems (as they emerged during the Covid-19 and energy crises); and
7. stronger EU anti-subsidy and emergency export control regimes.[34]

Similarly, the failures of the WTO "single undertaking' and consensus-practices prompt ever more WTO members to conclude plurilateral "club agreements" like:

1. FTAs and similar preferential trade agreements (e.g., under Article XXIV GATT);
2. "critical mass agreements" like the 1996 WTO Information Technology Agreement, which was initially negotiated among twenty-nine WTO members and progressively extended on a most-favored nation basis covering now 97% of world trade in information technology products among eighty-three countries; and
3. other "open plurilateral agreements" like the WTO Government Procurement and Aircraft Agreements and "joint statement initiatives" (e.g., for regulating e-commerce).[35]

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[33] *See generally* JON ALEXANDER & ARIANE CONRAD BRIAN ENO, CITIZENS: WHY THE KEY TO FIXING EVERYTHING IS ALL OF US (2022).

[34] These various EU Regulations and Directives are published in the EU Official Journal and explained on the EU website on EU trade policies. *Making Trade Policy*, EUROPEAN COMMISSION, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/making-trade-policy_en.

[35] WOLFF, *supra* note 7, at 308, 390.

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The EU intends to embed its carbon-emissions-trading system (hereinafter "ETS") and related carbon-border-adjustment measures (hereinafter "CBAMs") into broader "GHG reduction clubs" making market access conditional on, inter alia, agreed "green product standards", agreed procedures for calculating "embedded carbon" in products and equivalence of diverse GHG reduction policies, reductions of fossil fuel subsidies, agreed rules for renewable fuel subsidies, and the elimination of tariffs on environmental goods and services, with due respect for the WTO principles of special and differential treatment of less-developed countries and the environmental law principle of common but differentiated responsibilities.[36] Just as the multilaterally agreed trade restrictions in the UN Convention on Trade in Endangered Species and in the Montreal Protocol on Transboundary Movement of Hazardous Wastes were never challenged in WTO dispute settlement proceedings, multilaterally agreed GHG reduction clubs, "environmental goods agreements", newly agreed subsidy rules and fossil fuel disciplines should set incentives for plurilateral cooperation with "critical mass membership" promoting non-discriminatory treatment without free-riding. Consensus on a "package deal" and "grand bargain" might require a broader "WTO sustainability agenda" on how to promote the policy objectives of a "circular economy" (e.g., reducing waste and plastic pollution by re-cycling), sustainable agriculture (e.g., addressing bio-diversity, water and food security issues), greening of transport services, the "blue economy" (like over-fishing, ocean pollution), and on a "just transition" assisting less-developed countries through financial and technical assistance.[37]

Public-private partnerships (like government cooperation with vaccine producers in public health protection, strengthening supply chains for a low-carbon transition, participation of the International Chamber of Commerce (hereinafter "ICC") in protecting food security through organizing food exports from Ukraine) have proven to be of crucial importance for protecting global PGs.[38] The diversity of governmental and private company pledges of GHG reductions calls for promoting civil society incentives for active participation in decentralized monitoring of market failures (like pollution

[36] On the problems of linking diverse CBAM systems, see Timothy Meyer, *Taxing, Regulating, and Trading Carbon: An Introduction to the Symposium*, 116 AJIL UNBOUND 191, 193 (2022). Following a G7 initiative for promoting "carbon clubs" in June 2022, trade ministers representing more than 50 WTO members launched an initiative for promoting trade-related climate mitigation rules in January 2023.

[37] For comprehensive proposals, see generally DAN ESTY ET AL., VILLARS FRAMEWORK FOR A SUSTAINABLE GLOBAL TRADE SYSTEM (2023).

[38] *See* Pascal Lamy, *Reforming UN and WTO Governance: Multilateralism and Polylateralism*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *supra* note 9, at 238, 241-242; John W.H. Denton AO, *Business Views on Transnational "Governance Failures" and "Corporate Responsibilities", in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *supra* note 9, at 243, 248.

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harms) and governance failures (like non-implementation of GHG pledges). Enhancing synergies between human and legal rights to protection of the environment can strengthen democratic and judicial remedies and citizen participation in environmental governance, as illustrated by environmental rights, climate litigation and company-driven emission trading and CBAM systems discussed in section IV. D. As prices of internationally traded goods often do not reflect their environmental and social costs, the UN and WTO sustainable development goals must be construed in mutually coherent ways, for instance by preventing pollution costs and protecting human and labor rights and the "planetary boundaries" of economic growth, just as neo-liberal "shareholder conceptions" of company goals must be replaced by more inclusive "stakeholder conceptions" and "social corporate responsibilities". This requires not only stronger reporting requirements of companies on their environmental, social and governance performance. The "constitutional politics"—and "constitutional economics"—methodologies argue more broadly that constitutional democracies can remain effective only if the human and constitutional rights of citizens are protected by democratic legislation, administration and adjudication protecting rule-of-law and empowering citizens. Even if Europe's multilevel constitutionalism has no equivalent outside Europe, the transformation of national into transnational "aggregate PGs" (like the SDGs) can be promoted by extending national constitutionalism to transnational governance of PGs. History suggests that such constitutional reforms require perennial struggles of citizens for the collective protection of human rights and rule-of-law limiting abuses of power. In a globalized "world on fire", reasonable citizens must recognize themselves as human beings with cosmopolitan responsibilities rather than only as national citizens of this or that state. Without such a cosmopolitan "Sisyphus morality" and stronger leadership from constitutional democracies, realizing the SDGs will become a utopia.

Even if preference heterogeneity requires second-best strategies for protecting the SDGs, democracies must continue challenging protectionist discriminations as those applied by authoritarian WTO members and in the 2022 US Inflation Reduction Act. Continued EU leadership for reforming WTO third-party adjudication and investor-state arbitration remains necessary for protecting the SDGs, human rights and non-discriminatory conditions of competition. If plurilateral cooperation among like-minded countries—rather than global economic integration also among geopolitical rivals—should become the new security policy paradigm, UN and WTO governance will become even less capable of protecting the SDGs. The entry into force, on 1 January 2022, of the Regional Comprehensive Economic Partnership (hereinafter "RCEP") between China and fourteen Asia-Pacific countries, and its regulatory competition with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter

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"CPTPP")[39], illustrate how Asian countries—similar to African countries participating in the Pan-African FTA, American countries participating in regional FTAs in Southern-, Central and North-America, and European countries participating in the EU, European Free Trade Area, European Economic Area and external FTAs with third countries—remain determined to protect the advantages of rules-based, liberal trading systems, notwithstanding increasing challenges of the WTO system. The lack of provisions on labor rights and environmental protection in the RCEP agreement, as in most bilateral "Belt & Road" agreements concluded by China, illustrates China's lack of legal leadership for the human rights and environmental dimensions of the SDGs, notwithstanding China's technological leadership for certain "green technologies" (like electric vehicles, lithium batteries, solar and wind energy production). By involving domestic democratic institutions, non-governmental actors (like businesses and "green cities"), science-based regulatory agencies and epistemic communities can enhance democratic support and "checks and balances". The UN's "constitutional governance model" and Europe's multilevel constitutionalism are reminders that—without empowering citizens through human and democratic rights, parliamentary and judicial protection of transnational rule-of-law, and transnational democratic cultures—transnational PGs are unlikely to be effectively protected for the benefit of all citizens. Similarly, voluntary citizen support renders peaceful cooperation among WTO Members (including China's four WTO customs territories) much more stable than authoritarian power politics.

D. European Constitutionalism as Driver for UN and WTO Sustainable Development Reforms

Europe's economic constitutionalism has been a driver for various "constitutional reforms" of IEL such as EU membership in the WTO and in some UN institutions; the compulsory WTO dispute settlement system; the EU's initiation, since 2020, of multi-party interim arbitration (based on Article 25 WTO Dispute Settlement Understanding) as a substitute for the dysfunctional AB; human rights- and sustainable development-clauses in many FTAs; the leading role of EU member states in promoting compulsory investor-state arbitration in international investment treaties, and the EU initiatives for transforming investment arbitration into more transparent and

[39] The Comprehensive and Progressive Trans-Pacific Partnership is a free trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam, which entered into force in 2018 after US President Trump withdrew the USA in spite of the earlier signing of the agreement by the Obama administration.

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impartial adjudication. [40] Similarly, the EU's environmental constitutionalism increasingly responds to the fact that intergovernmental climate politics since the 1992 UNFCCC failed to prevent climate change. In contrast to the 2015 Paris Agreement's prioritization of national sovereignty over "nationally determined contributions" (hereinafter "NDCs"), EU member states included more ambitious environmental rules and GHG reduction commitments into EU law and legislation of a higher legal rank (see below 1.); EU law empowers citizens and non-governmental organization to hold governments and companies legally accountable through judicial remedies for complying with EU environmental law (see below 2.); and the EU adopted the first multilateral carbon-ETS with complementary CBAMs as incentives for third countries to either join the ETS (e.g., as part of FTAs) or increase their own carbon taxes on carbon-emitting industries (see below 3.).

1. EU environmental constitutionalism — The UN climate law regime—based essentially on the 1992 UNFCCC, the 1997 Kyoto Protocol, the 2015 Paris Agreement, and the numerous decisions of the parties to these instruments—aims at "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change" (Article 2.a Paris Agreement). The regular "COP meetings", and their science-based and political review mechanisms, exert pressures for additional GHG reduction commitments in view of the fact that the current GHG reduction commitments are insufficient for realizing the 2021 Glasgow climate policy goal of "zero-carbon-emission economies" by 2050 (e.g., by transforming fossil fuel electricity into "green electricity"). In contrast to many national Constitutions outside Europe without provisions on the protection of the environment, EU states recognized environmental rights or constitutional duties to protect the environment in EU constitutional law and often also in their national Constitutions (as in Article 20a German Basic Law). According to Article 37 EUCFR, a "high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". Combatting climate change, promoting sustainable development in cooperation with third states, and principles of "environmental constitutionalism" (like the principles of precaution, prevention and rectifying pollution at source, the "polluter pays" principle) are included in the EU Treaty provisions on EU environmental

[40] For details, see VAN DEN BOSSCHE, *supra* note 15, at 308-35; *see generally* Laura Marceddu, *EU and UN Proposals for Reforming Investor-State Arbitration*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *supra* note 9, at 336.

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policies (e.g., Arts 11, 191-193 of the Treaty on the Functioning of the European Union). It was in response to democratic and parliamentary pressures that the EU's comprehensive climate legislation—notably the European climate law approved in June 2021 and the 13 legislative EU Commission proposals published on 14 July 2021 aimed at making Europe the first carbon-neutral continent by 2050—offered leadership for implementing the Paris Agreement on climate change mitigation, for instance by making the goals of "at least" 55% GHG reductions by 2030 and a climate-neutral European economy by 2050 legally binding for EU and member state policies. The multiple policy tools and mandatory standards aim at a socially "just transition" with active industrial policies to secure continuing economic growth. As part of their NDCs and in conformity with both WTO law and the Paris Agreement, the EU member states adopted the ETS as a "cap and trade" scheme intended to lower GHG emissions in the most cost-effective ways without significant government intervention.[41] The EU's ETS will be complemented by CBAMs aimed at preventing "carbon leakage" and distortions of international competition disadvantaging countries with more ambitious climate change policies. The EU climate mitigation objectives, principles and legal obligations are more precise, more uniform, more democratically controlled and judicially enforceable than the respective objectives, principles and legal obligations in UN climate law.

2. EU environmental litigation — In Europe, Articles 2 and 8 of the ECHR prompted ever more courts to protect human rights to life and family life against harmful environmental pollution and climate change. Climate litigation is driven by complaints from non-state actors invoking environmental rights and GHG reduction obligations of governments as recognized in EU law and UN law.[42] Rights to the protection of the environment are now recognized in the laws of more than 150 states, regional treaties, and by the UN Human Rights Council (hereinafter "HRC")[43]; environmental rights have been invoked by litigants all over the world in hundreds of judicial proceedings on protection of environmental interests. In national and European environmental litigation, courts holding governments legally accountable for climate mitigation measures increasingly refer to human rights and constitutional principles. For example, the ruling of the Dutch Supreme Court on 20 December 2019 in State of the Netherlands v. Urgenda confirmed that Articles 2 (right to life) and 8 ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG

[41] For an explanation of the ETS and its legislative framework, see European Commission, *EU Emissions Trading System (EU ETS)*, https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en (last visited Jan. 20, 2024).
[42] Eckes, *supra* note 9, at 107, 109.
[43] *See* Human Rights Council Res. 48/13, ¶ 1 (Oct. 18, 2021) (recognizing that having a clean, healthy and sustainable environment is a human right).

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emissions by at least 25% (compared to 1990 levels) by the end of 2020. The judgment clarified that human rights and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens to enforce positive obligations to take appropriate measures mitigating climate change.[44] The ruling of the District Court of The Hague on 26 May 2021 in Milieudefensie v. Royal Dutch Shell was the first judgment in which a multinational corporation was held responsible for its contribution to climate change based on national and international law.[45] The case was brought as a public interest class action by a Dutch non-governmental organization; it does not focus on compensation for past damages but on corporate obligations to reduce emissions and invest more in cleaner fuels to protect the common interest of current and future generations in preventing dangerous climate change. Similar litigation against energy companies focusing on corporate responsibilities for climate change is pending in many countries. Even though the judgment is based on corporate duties of care under Dutch tort law, the Court's references to international law and to the shared responsibilities of corporate actors may influence the reasoning in future judgments by other courts. The Court found that the total CO_2 emissions of the Shell group exceeded the emissions of many states, including the Netherlands. The group's global CO_2 emissions contributed to global warming and climate change in the Netherlands; they entailed significant risks for residents of that country. The court agreed with the complainants that Shell had an obligation to reduce CO_2 emissions of the Shell group's entire energy portfolio, holding that:

1. Shell is obliged to reduce the CO_2 emissions of the Shell group's activities by net 45% by the end of 2030 relative to 2019 through the Shell group's corporate policy;
2. the policy, policy intentions, and ambitions of the Shell group imply an imminent violation of this obligation;
3. the Court, therefore, allowed the claimed order for compliance with this legal obligation.

The judgment took into account human rights and the Paris Agreement in its interpretation of the unwritten standard of care. The Court also referred to the UN Guiding Principles on Business and Human Rights (hereinafter "UNGP"), which it found to constitute an authoritative, internationally endorsed soft law instrument setting out the responsibilities of states and businesses in relation to human rights; the UNGP "are suitable as a guideline in the interpretation of the unwritten standard of care." According to the

[44] HR 20 december 2019, NJ 2019, 2006 m.nt. J. Spier (De Staat der Nederlanden/Stichting Urgenda) (Neth.).
[45] Hof Den Haag 26 mei 2021, NJ 2021, 5339 m.nt. G.A. van der Veen (Milieudefensie et al./Shell) (Neth.).

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Court, the responsibility to respect human rights encompasses the company's entire value chain including the end-users of the products produced and traded by the Shell group. The Court concluded that the human rights standards, the UNGP, and the Paris Agreement all support the conclusion that Shell should be ordered to reduce the CO_2 emissions of the Shell group's activities by net 45% at the end of 2030 relative to 2019 through the group's corporate policy.

3. EU carbon border adjustment measures — The EU's ETS is complemented by a CBAM requiring that, for all products subject to the relevant legislation (iron and steel, cement, fertiliser, aluminium, hydrogen and electricity)—whether domestic or imported—a carbon price is paid commensurate with the carbon emissions generated during production. Payments under CBAM will be phased in over a decade until 2035 in parallel with the phasing-out of the free allowances which are currently available under the ETS, ensuring equal treatment between EU and non-EU producers. If, for an imported product, a carbon price has been paid in the non-EU country, no adjustment is required upon importation into the EU; if not, an adjustment tariff must be paid equivalent to the carbon price that would have been paid if the product had been made in the EU. As effective decarbonisation is likely to reduce ETS/CBAM payments, ETS/CBAM systems promote "internalization" of the environmental costs of carbon emissions by giving effect to the "polluter pays" principle. Apart from the EU ETS, national or sub-national emission trading systems are operating or under development also in Canada, China, Japan, New Zealand, South Korea, Switzerland and the United States. The EU ETS legislation provides for the possibility to link the EU ETS—as the world's first and biggest, international carbon market—with other compatible emissions trading systems (e.g., as agreed with EFTA countries). The EU's bilateral and multilateral consultations with exporting countries—e.g., in the OECD, the G7's Climate Club, the WTO and the UNFCCC—are assisting exporting countries and industries to find WTO-consistent agreements (e.g., on participation in ETS) promoting decarbonization of industries. As the voluntary NDCs under the Paris Agreement fall short of preventing climate change and the few emission trading systems outside Europe apply only at national or sub-national levels of governance, the EU's multilateral ETS/CBAM system enables bottom-up EU leadership for additional ETS/CBAM systems and GHG reductions in third countries.[46]

In order to avoid "carbon leakage"[47] shifting emissions outside the EU and thereby undermining EU and global GHG reduction efforts, the EU

[46] *See* EUROPEAN COMMISSION, *supra* note 27, at 154, 268.

[47] The more the EU raises its climate ambitions, and less stringent environmental and climate policies prevail in non-EU countries, the stronger becomes the risk of "carbon leakage", for example if companies based in the EU move carbon-intensive production abroad to take advantage of lower

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CBAM Regulation requires EU importers in emissions-intensive sectors to report, during the transitional phase as of 1 October 2023, the carbon content and carbon emission prices paid for the imported goods from all third countries (except those participating in the EU's ETS) and, as of 1 January 2026, to purchase certificates equivalent to the weekly EU carbon price.[48] As importers will be able to claim a reduction in the number of CBAM certificates to be surrendered based on the carbon price paid in the country of export, the gradual introduction of CBAMs incentivises third-country governments to put in place greener policies and encourages third-country producers to reduce their emissions, particularly if alternative low-carbon technologies are available and affordable. The EU is committed to regulating and implementing its CBAM in conformity with both UN law and WTO law. Even if collecting carbon tariffs at the border as an integral part of the EU ETS could violate GATT Articles II or III, Article XX GATT justifies the EU's ETS/CBAM system to the extent it is non-discriminatory and necessary for protecting the human right to protection of the environment (Article XX, para. a), human, animal and plant life or health (para. b), non-discriminatory internal product and production standards like ETS systems (para. d), or is related to the conservation of exhaustible natural resources "in conjunction with restrictions on domestic production or consumption" (para. g).[49] In order to comply with the "common but differentiated responsibility'-principle (Article 4) of the Paris Agreement in the context of CBAMs, the EU Commission initiated bilateral negotiations with third countries (like India, African countries, the USA) on, inter alia, how to define agreed production standards (e.g., for carbon-intensive "dirty steel"), agreed procedures for calculating the carbon content of traded products and services, mutual recognition of diverse climate change mitigation policies in import and export countries (e.g., environmental taxes and subsidies), exemptions of least developed countries and of small and medium enterprises from less-developed countries. By concluding FTAs providing for participation in the EU ETS, third countries can promote the first-best trade and environmental policy instruments avoiding second-best CBAMs.

V. CONCLUSIONS

Sections II and III explained how the regulatory competition among ordoliberal economic regulation (e.g., prioritizing human rights in European constitutionalism), neoliberal economic regulation (e.g., prioritizing

emission standards, or if EU products subject to the ETS are replaced by more carbon-intensive imports.

[48] The CBAM and its legislative framework are explained on the EU Commission website. European Commission, *supra* note 41.

[49] For a detailed legal explanation, see Flett, *supra* note 9, at 145, 166.

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business interests) and authoritarian economic regulation (e.g., prioritizing power monopolies) increasingly undermines UN and WTO legal and dispute settlement systems due to conflicting value priorities. Section IV concluded that this political reality of "constitutional pluralism" is likely to increasingly disintegrate IEL and intensify geopolitical rivalries among democracies and authoritarian governments suppressing human and democratic rights. The more the UN ideals of universal protection of human rights and "democratic peace" are rejected by authoritarian power politics, the more important become plurilateral, second-best reforms and democratic leadership for realizing the universally agreed SDGs. The "Anthropocene" (like irreversible climate change caused by human GHG emissions) risks causing more than 100 million climate refugees (e.g., due to rising sea levels, scarce water, food and energy supplies, insufficient public health protection) and further undermining collective protection of the SDGs.

Section IV illustrated how the EU's economic and environmental constitutionalism sets incentives for "sustainable development reforms" in UN and WTO legal practices. Yet, neoliberal and authoritarian governments increasingly reject "constitutional restraints" (like compulsory UN and WTO adjudication) on "transnational governance failures" (like arbitrary violations of UN and WTO rules). For instance, constitutional and human rights to the protection of the environment tend to be denied in authoritarian countries and also by US courts (e.g., on grounds of judicial deference towards "political questions" left open in the US Constitution and not (yet) decided by the US Congress). This reality of "constitutional pluralism" reflects diverse social traditions like American trust in market- and business-driven solutions enhancing "Kaldor-Hicks-efficiencies" (justifying also polluting industries) rather than in legal and judicial enforcement of the "polluter pays principle" (aimed at enhancing "total welfare" by protecting all citizens against environmental harms). Similarly, the transnational rule-of-law principles prioritized in European law are increasingly challenged in authoritarian and neoliberal state practices, as illustrated by the use—in the US Inflation Reduction Act (hereinafter "IRA") of August 2022—of discriminatory, WTO-inconsistent tax credits, domestic content requirements and trade discrimination for promoting de-carbonization of the US economy. It remains an open question of whether Europe's rules-based decarbonization approach will be as effective as the financial incentives (totaling more than $ 369 billion) offered by the industrial and environmental policies enacted in the IRA. Similarly, it remains doubtful whether China's Covid-19-lockdown policies and fossil fuel policies justify the claim that

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authoritarian top-down governance may enable more efficient "survival governance" than democratic "emergency governance".[50]

Constitutional courts in a few developing countries (like Brazil and Colombia) protect environmental rights. Yet, multilevel legislative, administrative and judicial protection of human and democratic rights and social justice remain less protected in most countries in Africa, the Americas and Asia than inside the EU. Similarly, even though the "rational ignorance" of most citizens towards complex foreign policies (like abuses of discriminatory tariffs for taxing and redistributing domestic income) justifies constitutional restraints on foreign policy discretion (e.g., as prescribed in the EU's "foreign policy constitution" set out in Arts 3, 21 TEU), the ubiquity of transnational governance failures (e.g., in terms of violations of UN and WTO law, disregard for the universally agreed SDGs) has not prompted most citizens and states outside Europe to adjust their national Constitutions to the challenges of multilevel governance of global PGs. Britain's "Brexit" and the US refusal to exercise rules-based trade and environmental policy leadership (e.g., through transatlantic and transpacific FTAs, multilateral CBAMs, reforms of multilateral trade and investment adjudication protecting rule-of-law) reveal domestic interest group politics undermining multilevel protection of the SDGs. IEL in a multi-polar world is bound to become more contested by geopolitical rivalries and conflicting value priorities of authoritarian, neoliberal and ordoliberal government policies.

[50] *See generally* PETER DRAHOS, SURVIVAL GOVERNANCE: ENERGY AND CLIMATE IN THE CHINESE CENTURY (2021); *see generally* Henry Gao & Weihuan Zhou, *Constitutional Failures or Market Failures? China, Climate Change and Energy Transition*, *in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE FAILURES, *supra* note 9, at 206.

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