Sustainable Development through Regulatory Competition without Effective UN and WTO Legal Restraints?

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Abstract

The current human disasters – like illegal wars of aggression, violent suppression of human and democratic rights, health pandemics, climate change, ocean pollution, overfishing and other biodiversity losses, non-compliance with United Nations (UN) and World Trade Organization (WTO) law – reflect governance failures and insufficient cooperation (section I.) to protect the 'sustainable development goals' (SDGs). Since 1950,

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Europe's multilevel constitutionalism succeeded in progressively limiting transnational governance failures; yet, it is not followed outside Europe (section II.). Geopolitical rivalries (e. g. among authoritarian and democratic states) and competing national and regional regulations (e. g. on decarbonisation, digitalisation, and securitisation of economies) increasingly undermine UN and WTO legal restraints and judicial remedies (see section III.). The more globalisation is perceived as creating vulnerabilities justifying national security restrictions (e. g. against spread of viruses, weaponisation of interdependence), the more democracies resort to plurilateral second-best responses like trade, investment and environmental agreements conditioning market access on respect for human rights and greenhouse gas reductions (section IV.). This contribution explains why regulatory competition, 'authoritarian alliances', and their influence on plurilateral agreements (e. g. in Asia) render 'constitutional UN/WTO reforms' and realisation of the SDGs unlikely.

Keywords

Constitutionalism – EU – human rights – governance failures – market failures – UN – WTO

Introduction

The '2030 Agenda for Sustainable Development', adopted in 2015 by a UN summit meeting, links economic, environmental, and social rules with commitments to 'realise the human rights of all' and 17 agreed sustainable development goals (SDGs) over the next 15 years with 'the participation of all countries, all stakeholders, and all people'.[1] 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 threat of aggression against Taiwan as an autonomous member of the World Trade Organization (WTO), its insufficient cooperation with the World Health Organization (WHO) in preventing the Covid-19 health pandemic, and suppression of human rights in authoritarian states increasingly

1 UNGA Res 70/1 of 25 September 2015, A/RES/70/1, Preamble.

undermine prevention of unnecessary poverty (SDG1), protection of food security (SDG2), public health (SDG3), and other SDGs like protection of the environment (SDGs13-15), 'access to justice' and rule-of-law (SDG16). Can the SDGs be realised in a multi-polar world where China and Russia seek to establish a new 'authoritarian world order' without protection of human rights, democratic self-determination, and non-discriminatory competition? Will the USA return to previous isolationist tendencies (e. g. of rejecting the 1920 League of Nations, the 1948 Havana Charter for an International Trade Organization) by implementing the threats of former US President Trump to withdraw from UN institutions and the WTO, rather than exercise leadership for UN and WTO reforms? This contribution explains why the increasing disregard for UN and WTO law enhances regulatory competition and mutually incoherent, plurilateral agreements and industrial policies (e. g. in the Americas, Asia, and Europe) rendering 'constitutional UN/WTO reforms' and realisation of the SDGs unlikely.

I. How to Respond to UN and WTO Governance Failures?

Modern international law and transnational constitutionalism (e. g. based on regional human rights conventions and courts of justice) evolved by responding to wars and related governance failures through multilateral treaties and institutions for governing public goods (PGs). 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 rule-of-law. Yet, even though the SDGs are of existential importance for citizens all over the world, most citizens and democratic institutions outside Europe fail to adjust their national constitutionalism to obvious transnational governance failures. The 'constitutional politics' necessary for transforming agreed constitutional principles into democratic constitutionalism was described by the American philosopher Rawls 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[2] and Virginia Bill of Rights[3]), (2) elaborate national Constitutions (e. g. the US

2 US Declaration of Independence of 4 July 1776, available at <https://www.archives.gov/founding-docs/declaration-transcript>, last access 26 January 2024.

3 Virginia Bill of Rights of 12 June 1776, available at <https://www.archives.gov/founding-docs/virginia-declaration-of-rights>, last access 26 January 2024.

Federal Constitution of 1787[4]) 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.[5] Globalisation transforms *national* into *transnational PGs* (like human rights, rule of law, most SDGs) which – in a globally interdependent world composed of 193 sovereign UN member states – no state can unilaterally protect without international law and multilevel governance institutions; it renders 'national constitutionalism 1.0' an incomplete system for governing transnational 'aggregate PGs'.[6]

In European integration among constitutional democracies since the 1950s, the demands by European Union (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 rules (like legal primacy, direct effects and direct applicability of precise, unconditional EU rules by citizens) and (8) domestic implementation of EU law inside member states protecting PGs across national borders (see section II.).[7] Following the fall of the 'Berlin wall' (1989) and the dissolution of the Soviet Union (1991), democratic constitutionalism also contributed to worldwide recognition of multilevel judicial protection of rule of law in UN law (e. g. in the UN Convention on the Law of the Sea [UNCLOS])[8], trade law (e. g. in WTO law) and in investor-state arbitration. Yet, 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 without democratic and legal accountability. For example,

4 Constitution of the United States of 21 February 1787 <https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm>, last access 26 January 2024.

5 See John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999), 171 ff.

6 This need for transforming 'nationalist constitutionalism 1.0' (like the US Constitution) into 'cosmopolitan constitutionalism 4.0' for governing global PGs is explained in Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Hart Publishing 2017), 321 ff.; see also below in section II. 2.

7 See Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino and Lucrezia Reichlin (eds), *The History of the European Union: Constructing Utopia* (Hart Publishing 2019).

8 United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 397.

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- the UN Security Council system is rendered ineffective by authoritarian abuses of veto-powers, the failure of the UN Non-Proliferation Treaty[9] to prevent the spread of nuclear arms, illegal aggression, and threats of military force, like Russian threats of using nuclear weapons in its war of aggression against Ukraine;
- the UN human rights system fails to prevent violations of human and democratic rights in many UN member states, for instance due to ineffective judicial remedies;
- the 1992 UN Framework Convention on Climate Change (UNFCCC)[10] failed to prevent climate change;
- UN environmental law and institutions also failed to prevent ocean pollution, over-fishing, and biodiversity losses;
- the World Health Organization (WHO) failed to prevent and effectively respond to global health pandemics;
- the Food and Agriculture Organization (FAO) failed to protect food security for currently more than 200 million people;
- the Bretton-Woods Agreements failed to prevent the 2008 financial crises; they remain one-sidedly dominated by the industrialised G7 countries; and
- 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).

1. How to Explain Transnational Governance Failures?

The constitution, limitation, regulation, and justification of multilevel rules and institutions for protecting PGs remains the biggest regulatory challenge in the 21st century. Constitutionalism proceeds from the insight that constitutional contracts among free and reasonable citizens can limit abuses of public and private power and promote voluntary, mutually beneficial cooperation by institutionalising public reason. The diverse forms of *democratic constitutionalism* (e. g. since the ancient Athenian democracy), *republican constitutionalism* (e. g. since the ancient Italian city republics), and of *common law constitutionalism* (e. g. in Anglo-Saxon democracies) aim at limiting 'governance failures' through commitments to agreed 'principles of justice' (like human rights, democratic self-governance, separation of powers), and institutions of a higher legal rank (like democratic and judicial protection of rule-of-law). Principles of democratic constitutionalism agreed upon since ancient Athens (like citi-

9 United Nations Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, 729 UNTS 161.

10 United Nations Framework Convention on Climate Change of 9 May 1992, 1771 UNTS 107.

zenship, democratic governance, courts of justice, 'mixed government'), of republican constitutionalism since ancient Rome (like separation and limitation of power, rule-of-law, *jus gentium*), and of common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) have become recognised in and beyond national Constitutions as necessary for protecting PGs. The 2030 UN Sustainable Development Agenda (SDA) emphasises the importance of human rights, democratic governance and rule-of-law also for multilevel governance of transnational PGs like the universally agreed 17 SDGs. Yet, as discussed in section III., the 'constitutional principles' underlying UN human rights law (HRL) and the SDA are neither effectively implemented in the legislative, administrative and judicial practices inside and among authoritarian states nor in UN law. The current economic, environmental, food and migration crises, global health pandemics, Russia's unprovoked military aggression and war crimes in Ukraine confirm the constitutional insight (e. g. of Kantian legal theory) that national Constitutions and 'horizontal inter-national law' cannot protect citizens against external human disasters unless abuses of policy discretion are legally limited in external relations for the benefit of all citizens.

From a citizen perspective, the UN and WTO governance crises can be explained in terms of 'constitutional failures' (e. g. to protect human rights, rule-of-law and the SDGs), related 'governance failures' (including both public and private abuses of power), and 'market failures' (like unnecessary poverty, hunger, environmental pollution). Global health, environmental and rule-of-law reforms depend on private-public partnerships with civil societies, business, and epistemic communities supporting public health, climate change mitigation and other SDGs. Such 'multi-stakeholder strategies' can become more effective by embedding them into democratic constitutionalism protecting transnational 'aggregate PGs'. The diverse Asian, European, and American approaches to governing transnational 'aggregate PGs' – as illustrated by the EU's environmental constitutionalism and 'EU climate law' of June 2021 compared with the protectionist, economic and environmental rules and trade discrimination in the 2022 US Inflation Reduction Act (IRA) of August 2022,[11] and by the refusal of China and India to phase out coal-generated electricity by 2050 – illustrate 'regulatory competition' resulting from mutually inconsistent market regulations (e. g. on decarbonisation of economies, internet regulation, fundamental rights) in competing jurisdictions with diverse value priorities (like authoritarian states, EU HRL and common market law prioritising normative individualism, parliamentary supremacy, and business-driven neo-liber-

11 US Inflation Reduction Act of 16 August 2022, available at <https://www.congress.gov/117/bills/hr5376/BILLS-117hr5376enr.pdf>, last access 26 January 2024.

alism in Anglo-Saxon democracies) undermining non-discriminatory conditions of competition and endangering the SDGs (see section III.).

2. Insufficient Responses to Transnational Governance Failures

UN member states tend to define – and respond to – transnational governance failures in diverse ways depending on which UN legal values their governments prioritise:

- process-based, representative democracies (e. g. in Anglo-Saxon countries) tend to prioritise constitutional nationalism, majoritarian institutions, their democratic accountability, civil and political liberties over economic, social and cultural rights of citizens, and discretionary foreign policy powers;[12]
- rights-based, multilevel democratic constitutionalism is practiced notably in the 27 EU member states interpreting their Treaties on European Union (TEU), on the Functioning of the EU (TFEU) and the EU Charter of Fundamental Rights (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');[13]
- 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 human and democratic rights and independent, judicial remedies.

12 Martin Loughlin, *Against Constitutionalism* (Harvard University Press 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 (124-135). He disregards transnational constitutional, parliamentary, participatory, and deliberative democracy as prescribed in EU law (e. g. Arts 9-12 TEU), including its 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 recognised in legislation.

13 As discussed in section 2, 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 see Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (Harvard University Press 2022); Adrian Vermeule, *Common Good Constitutionalism* (Polity 2022).

This 'constitutional pluralism' suggests that diverse preferences, regulations distorting competition, geopolitical rivalries, and authoritarian opposition against 'constitutional UN and WTO reforms' will remain permanent facts. Russia's wars of aggression, war crimes, and 'weaponisation' of energy and food supplies 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 market regulations, risk failing to protect the universally agreed SDGs. The successful, albeit modest results of the WTO Ministerial Conference in June 2022[14] confirm the need for continuing global cooperation in protecting the SDGs. Yet, the realities of power politics in UN and WTO governance call for second- and third-best, plurilateral reforms among 'willing countries' (e. g. through democratic defence alliances like North Atlantic Treaty Organisation (NATO, 'climate protection clubs' conditioning market access on protection of the SDGs, transnational networks of science-based cooperation for decarbonising and digitalising economies and responding to cyber-attacks and health pandemics), as discussed in section IV.

3. Constitutionalism as Analytical Methodology

European history suggests that constitutionalism offers the most convincing responses to the challenges of human passions, rational egoism, and psychopathic autocrats (e. g. using military force at home and abroad) for protecting peaceful cooperation among citizens. Constitutional economics and constitutional politics offer analytical insights for examining – and regulating – the man-made causes of the current economic, environmental, health, food, security, and other transnational governance crises in terms of 'market failures' (like harmful externalities), 'constitutional failures' (like insufficient constitution of democratic governance institutions protecting human rights), and related 'governance failures' (like disregard for rule-of-law).[15] They criticise path-dependent nationalism for neglecting how consti-

14 See WTO, MC12 outcome document, 17 June 2022, WT/MIN(22)/24.

15 On 'constitutional economics' and 'economic constitutionalism' see Ernst-Ulrich Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (Oxford University Press 2022), chapters 4-5; Stefan Voigt, *Constitutional Economics: A Primer* (Cambridge University Press 2020). Multilevel constitutionalism remains neglected by the prevailing methodologies of constitutional nationalism, international realism (e. g. focusing on governmental power politics), welfare economics (e. g. focusing on cost-benefit analyses inside nation states without challenging Constitutions), and conceptions of international organisations as 'international functionalism' (rather than multilevel governance of PGs).

tutional restraints on discretionary foreign policy powers (e. g. in EU common market law, General Agreement on Tariffs and Trade [GATT]/WTO law) and transnational 'constitutional politics' (like regional economic and environmental constitutionalism) have promoted economic and social welfare beyond state borders. Nationalist Anglo-Saxon arguments 'against constitutionalism across national borders' – based 'on the claim that it institutes a system of rule that is unlikely to carry popular support'[16] – disregard the multilevel legal and judicial protection of EU citizenship rights, EU constitutional rights and remedies, and of EU parliamentary, deliberative and participatory 'demoi-cracy', which promoted transnational 'constitutional patriotism' by EU citizens justifying and supporting EU law and limiting past 'constitutional failures' in national governance systems. The diverse value priorities and 'constitutional implementation deficits' in UN member states entail geopolitical rivalries and authoritarian opposition against multilateralism (like President Putin withdrawing Russia from European institutions, suppression of human rights in China and Russia, President Trump withdrawing the USA from certain UN and regional treaties). The 'regulatory competition' among neo-liberal, state-capitalist, and ordo-liberal regulations[17] of markets and PGs is aggravated by the lack of effective UN and WTO legal disciplines on 'market failures' (like restraints of competition,

16 Loughlin (n. 12), 202, whose nationalist conception of 'representative democracy' argues 'against constitutionalism' without offering any strategy for protecting transnational PGs demanded by citizens (like the SDGs), and without recognising how multilevel legal and judicial EU protection of civil, political, economic, social and cultural rights limited market failures, and governance failures by enlarging human freedoms and capabilities. He seems to accept neoliberal interest group politics and constitutionally unrestrained foreign policy discretion, which favour populist and feudal abuses of representative democracies with 'ordinary politics' being typically driven by mere preference and narrow self-interests; see Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991), criticising 'dualist democracy'.

17 At the 1938 Walter Lippmann colloquium in Paris, the term 'neo-liberalism' was coined for expressing the need for a liberal world order rejecting *laissez-faire* liberalism, the national protectionism of the 1930 Smoot-Hawley Tariff Act of the US Congress, and incoherent socialist central planning. The 1944 Bretton Woods Agreements and the General Agreement on Tariffs and Trade (GATT 1947) promoted a neo-liberal world trading system dominated by US business interests in liberalisation, privatisation, deregulation, and 'financialisation' of economies based on 'Chicago School' beliefs in market competition as decentralised information, coordination, and sanctioning mechanisms. European economic integration was influenced more by 'ordo-liberalism' elaborated by the 'Freiburg School' and 'Brussels School' of lawyers and economists emphasising the need for multilevel, legal limitations of 'market failures', 'governance failures', and 'constitutional failures'; on the different national schools of law and economics (like the Freiburg and Cologne schools in Germany, the Chicago and Virginia schools in the USA) and transnational schools of law and economics (like the Brussels and Geneva schools in Europe, the 'Washington consensus' promoted by the Bretton Woods institutions) see Petersmann, *Transforming* (n. 15), chapters 2 and 4.

adverse externalities, information asymmetries, social injustices), 'governance failures' (e. g. to respect rule-of-law and protect PGs), and 'constitutional failures' (e. g. in terms of protecting human rights against authoritarian power politics). Arguably, constitutionalism is also of crucial importance for preventing the 'new de-globalisation' between authoritarian countries and democracies to provoke devastating conflicts similar to those of the first 'imperial de-globalisation' (1914-1945) ushering in World Wars I and II, the great economic depression, and the rise in dictatorships responsible for the killing of millions of people.

II. Europe's Multilevel Constitutionalism Remains without Equivalent outside Europe

Since the 1950s, the successive amendments of the EU treaties and the judicial protection of common market rights, human rights, and environmental rights of EU citizens by European and national courts led to a progressive 'constitutionalisation' of EU common market law, monetary law, environmental law, and HRL;[18] this successful transformation of *national* into *multilevel European constitutionalism* protecting human rights and democratic peace among most European countries has confirmed the historical experience that democratic constitutionalism remains the most important 'political invention' for limiting transnational governance failures like abuses of public and private power caused by 'bounded rationality' of human beings. Citizens often remain dominated by their passions and selfish utility-maximisation (as illustrated by millennia of wars, slavery, and gender discrimination) rather than by their reasonableness and morality. Constitutional self-limitations can limit abuses of public and private power by 'tying one's hand to the mast' (following the ancient wisdom of Ulysses) of agreed principles of justice (like human rights, democratic self-determination, rule-of-law) and inclusive institutions of a higher legal rank. World War II prompted all 193 UN member states to strengthen such 'legal self-commitments' at national and international levels of law and governance. 'Constitutional politics'[19] adjusting na-

18 For details see Amato, Moavero-Milanesi, Pasquino and Reichlin (n. 7); Petersmann, *Multilevel* (n. 6); Guillaume Grégoire and Xavier Miny (eds), *The Idea of Economic Constitution in Europe. Genealogy and Overview* (Brill Nijhoff 2022); Alicja Sikora, *Constitutionalisation of Environmental Protection in EU Law* (Europa Law Publishing 2020).

19 The term 'constitutional politics' is used here for describing dynamic, democratic, and judicial processes of implementing agreed 'constitutional principles of justice' in multilevel governance of PGs and for challenging the 'non-implementation deficits' causing constitutional-, governance-, and market-failures.

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tional Constitutions to global regulatory challenges (like the SDGs) remain, however, neglected by most citizens and governments outside Europe notwithstanding their universal experience that intergovernmental power politics (like colonialism and imperial wars) undermined democratic peace and welfare all over the world. Just as World War I led to communist dictatorships (e. g. following the Bolshevik revolution in 1917) and civil wars (e. g. in the dissolution of the Chinese and European empires), the 'new de-globalisation' provoked by the Russian wars of aggression, current geopolitical rivalries, and trade wars require new forms of plurilateral, economic, and political cooperation preventing political, economic, and environmental disasters through new forms of transnational constitutional restraints on discretionary foreign policy powers.

1. Constitutional Limitations of 'Market Failures' and 'Governance Failures'

Europe's ordo-liberal approach to market regulation differs from Anglo-Saxon neo-liberalism by its more systemic legal limitation of market failures, governance failures, and constitutional failures beyond national frontiers.[20] Europe's multilevel constitutionalism extended national constitutionalism to functionally limited 'treaty constitutions' constituting, limiting, regulating, and justifying European governance of transnational PGs, like the human rights protected in the European Convention on Human Rights

[20] See Ernst-Ulrich Petersmann, 'Neoliberalism, Ordoliberalism and the Future of Economic Governance', JIEL 26 (2023), 836-842. The neglect of these categorical (e. g. rights-based vs utilitarian) value differences prompts frequent 'neo-liberal mis-interpretations' of European economic regulation (e. g. by Emma Luce Scali, *Sovereign Debt and Socio-Economic Rights Beyond Crisis* [Cambridge University Press 2022], who attributes the 'austerity-conditionality' of the EU's financial assistance in response to Greece's sovereign debt crises to 'Hayekian neo-liberalism' [grounded in Friedrich August von Hayek's explanation of market competition as information-, coordination-, and sanctioning-mechanism] rather than to the 'democratic constitutionalism' emphasised in the relevant jurisprudence by the German Constitutional Court). Similarly, Loughlin (n. 12) conflates EU ordo-liberalism with neo-liberalism (e. g. on 186, 195) by overlooking that the multilevel legal and judicial protection of social, labour, and human rights co-constituting Europe's 'social market economy' aims at protecting the autonomy, dignity, and capabilities of all EU citizens by limiting the neo-liberal prioritisation of property rights and of market distortions benefitting the powerful. Cosmopolitan constitutionalism is not inconsistent with Loughlin's claim that 'constitutional democracy remains our best hope of maintaining the conditions of civilized existence' (24); yet, his dismissal of democratic constitutionalism as baseless 'faith' (149) amounts to a neo-liberal recipe for human disaster and continued human failure to protect global PGs demanded by, and of existential importance for citizens.

(ECHR),[21] the common market freedoms and rule-of-law principles of Europe's common market and monetary constitutionalism. The Lisbon Treaty's 'common market constitution' for a 'competitive social market economy' limits national and EU powers through constitutional, competition, environmental, social rules, and institutions of a higher legal rank restricting 'market failures' (like abuses of market power, cartel agreements, environmental pollution, information asymmetries, social injustices) and related 'governance failures' (like governmental neglect of limiting 'market failures'). Inside the EU and in the external relations with European Free Trade Area (EFTA) countries, multilevel constitutionalism induced all EU and EFTA countries to cooperate in their multilevel implementation of European and national competition, environmental, 'social market economy' rules, data protection, and digital services regulations. The institutionalisation of multilevel competition, environmental, monetary, and other EU regulatory agencies and of related democratic and judicial remedies, limited governance failures through multilevel network governance of independent competition, monetary and other regulatory agencies,[22] democratic institutions and courts of justice.

The 'regulatory competition' among EU member states, EFTA states, and third European states remained 'constitutionally restrained', for instance due to the ECHR and related constitutional law principles protected by multilevel cooperation among European courts (like the European Court of Human Rights, the EFTA Court, the European Court of Justice) and national courts. The common GATT membership of European countries, the 1979 Tokyo Round Codes,[23] and the 1994 Agreement establishing the WTO[24] offered additional legal disciplines, political institutions, and judicial remedies for resolving disputes if diverse European regulatory systems and economic and trade policies created conflicts over perceived governance failures. The – relatively few – GATT and WTO disputes initiated by third European

21 European Convention on Human Rights of 4 November 1950, available at <https://www.echr.coe.int/documents/d/echr/convention_ENG>, last access 31 January 2024.

22 The democratically defined mandates of such science-based regulatory agencies, and their limitation of market and governance failures subject to judicial remedies of citizens and democratic oversight, justify such 'ordo-liberal agencies'; they refute neo-liberal criticism (e. g. by Friedrich August von Hayek, *Knowledge, Evolution and Society* [Adam Smith Institute 1983]) of their 'inevitable ignorance' and 'pretence of knowledge'; see Ernst-Ulrich Petersmann, 'Competition-Oriented Reforms of the WTO World Trade System – Proposals and Policy Options', in: Roger Zäch (ed.), Towards WTO Competition Rules (Kluwer Law International 1999), 43-71.

23 See e. g. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 12 April 1979, Document code LT/TR/A/1.

24 Marrakesh Agreement establishing the World Trade Organization of 15 April 1994, 1867 UNTS 154.

countries (like Norway and Turkey) challenging EU regulations empirically confirmed how European integration law promoted 'democratic peace'. Whenever financial, public debt, monetary, migration, public health, and energy crises inside the EU revealed 'constitutional failures' to secure the rule-of-law and protect PGs, EU institutions responded by seeking to reform EU law, for example by monetary and fiscal integration in response to the financial crises since 2008, a 'health union' in response to the Covid-19 health pandemic of 2020, and common migration, energy, foreign and defence policies in response to Russia's military aggression against Ukraine since 2014.

2. Multilevel 'Constitutional Politics' Protecting Transnational PGs

European law responds to the fact that globalisation transforms *national* into *transnational PGs*, thereby rendering national Constitutions incomplete. Globalisation requires complementary, multilevel constitutionalism constituting, limiting, and justifying multilevel governance of transnational PGs. European law illustrates how path-dependent 'constitutionalism 1.0' based on (1) national constitutional contracts (like the 1789 French Declaration of the Rights of Man and the Citizen),[25] (2) national Constitutions, (3) democratic legislation, and (4) administrative and judicial protection of rule-of-law for the benefit of citizens can be extended to international law and institutions for legally constituting *transnational PGs*, which no single state can protect without rules-based international cooperation.[26] Maintaining the input- and output-legitimacy of functionally limited 'treaty constitutions 2.0 among states' (like the European Economic Arean [EEA] and WTO agreements providing for compulsory judicial protection of transnational rule-of-law) constituting and regulating such multilevel governance requires also 'cosmopolitan constitutionalism 3.0' (as codified in the Charter of Fundamental Rights of the European Union [EUCFR] and in the 'foreign policy constitution' of the 2009 Lisbon Treaty) based on multilevel, institutional protection of human and consti-

25 The Declaration of the Rights of Man and of the Citizen of 26 August 1789, available at <https://www.conseil-constitutionnel.fr/en/declaration-of-human-and-civic-rights-of-26-august-1789>, last access 31 January 2024.

26 For explanations of the different kinds of (trans)national PGs (like non-rival and non-excludable 'pure PGs', excludable 'club goods', and exhaustible 'common pool resources'), which require diverse policy responses, see Petersmann, *Multilevel* (n. 6), 190 ff.

tutional rights, transnational rule-of-law and multilevel implementing regulations respecting 'constitutional pluralism'.[27] Europe's citizen-driven transformation of *national 4-stage constitutionalism* into *multilevel 8-stage constitutionalism* through 'constitutionalising' (5) international law, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU rules, and (8) domestic implementation of EU law had no parallel outside Europe, just as the judicial remedies of citizens in the ancient Greek and Italian city republics had innovated a 'legal civilisation' without parallels in Africa, the Americas, and Asia. The emergence of 'illiberal' EU member states (e. g. in Hungary and Poland) illustrated why the 'normative pull' of human rights depends on their 'normative push', i. e. their effective legal implementation through constitutional law, democratic legislation, administration and adjudication, international treaties, multilevel governance institutions, 'secondary law' of international institutions (like the jurisprudence of European economic and human rights courts) and its domestic, legal implementation. The limitation of EU membership to constitutional democracies – and the democratic, regulatory, and judicial EU institutions – promoted citizen-driven enforcement of EU law through multilevel, judicial protection of constitutional guarantees of civil, political, economic and social rights, and common market freedoms (like free movements of goods, services, persons, capital and related payments, freedom of profession) across national borders, which the more than 450 million EU citizens never enjoyed before the creation of the European Union. The EU law commitments (e. g. in Arts 3, 21 TEU) to protecting human rights and rule-of-law also in the EU's external relations contributed to worldwide recognition of multilevel judicial protection of rule-of-law beyond the EU, for instance in trade and investment agreements (e. g. by prompting the EU to insist on compulsory trade adjudication in WTO law and on investment adjudication also in the EU's external investment treaties), in international criminal law (e. g. by constituting transnational criminal courts), and in other multilateral treaties with compulsory adjudication (like the UNCLOS).

3. Europe's Historical and Legal Context Remains Unique

The *millennia* of European experiences with wars and republican reforms, Europe's particular political context of now more than 40 neighbouring

[27] For explanations, and my arguments for a worldwide 'cosmopolitan constitutionalism 4.0, see Petersmann, *Multilevel* (n. 6).

democracies, their common experiences of 'constitutional failures' (like feudalism, dictatorships, the holocaust) ushering in World Wars I and II and the 'cold war', and the positive 'constitutional transformation experiences' of EU citizens were major driving forces for Europe's multilevel constitutionalism. In contrast to the frequent distortion of national politics by authoritarian rulers and their 'populist disinformation' (including also in Britain's Brexit referendum and the USA under former President Trump), the EU's multilevel constitutional, parliamentary, and participatory 'demoi-cracies' succeeded in institutionalising 'public reason' and 'transnational deliberative democracy' beyond national frontiers.

In Asia and North-America, constitutional nationalism continues to prevail in the shadow of regional hegemons. Many less-developed countries prioritise nation-building over multilevel governance of global PGs, just as hegemonic rulers prioritise nationalism over cosmopolitan responses to global governance crises. Among African and Latin-American democracies, regional human rights conventions, and common markets promoted much weaker 'constitutional reforms' compared with European integration. The post-1945 neo-liberal ideologies of Anglo-Saxon democracies, the Bretton Woods institutions and GATT promoted liberalisation, privatisation, deregulation, and 'financialisation' of economies; yet, the 'ordo-liberal counter-movement' of systemic multilevel legal restraints on 'market failures', governance- and 'constitutional-failures' remained essentially limited to European economic, environmental and human rights constitutionalism. Even though European constitutionalism remains imperfect in many ways, and the initial protectionism of the EU's external agricultural, trade and association policies has become progressively liberalised, there are many reasons why Europe's supra-national integration model cannot be transferred to other continents with other political priorities and social traditions.

III. Hegemonic Rivalries and Regulatory Competition Undermine UN and WTO Law

The constitution, limitation, regulation, and justification of legislative, executive, and judicial UN institutions and procedures in the UN Charter[28] and in the 15 UN Specialised Agencies, and the 1948 Universal Declaration

28 Charter of the United Nations of 26 June 1945 XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119.

of Human Rights (UDHR)[29] initiated revolutionary transformations and decolonisation of the international legal system. Yet, during President Xi's visit to Moscow in March 2023, the Chinese and Russian Presidents reaffirmed their 'partnership without limits' aimed at a 'new world order' and 'changes unseen in a century' (President Xi Jinping).[30]

1. A New Authoritarian 'World Order' Undermining 'UN Constitutionalism'

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, rule-of-law) also for multilevel governance of the SDGs.[31] Yet, the proposed constitutional reforms remained limited to a few policy areas (like compulsory adjudication in WTO law, investment law, and in 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

- 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;[32]
- the illegal US blocking of the WTO Appellate Body (AB) system since 2017, which has rendered the AB dysfunctional since December 2019; and

29 UNGA Res 217 (III) of 10 December 1948, A/Res/217 (III).

30 The citations were discussed in all major newspapers and by news agencies like <https://www.atlanticcouncil.org/blogs/new-atlanticist/experts-react/xi-and-putin-just-wrapped-up-talks-in-moscow-what-does-it-mean-for-the-war-in-ukraine-and-chinas-global-standing/>, last access 31 January 2024.

31 See Giuliana Ziccardi Capaldo, 'Global Constitutionalism and Global Governance: Towards a UN-Driven Global Constitutional Governance Model' in: Mahmoud Cherif Bassiouni (ed.), Globalization and Its Impact on the Future of Human Rights and International Criminal Justice (Intersentia 2015), 629-662.

32 See PCA, *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), Case No. 2013-19, award of 12 July 2016.

- Russia's refusal to comply with the 2022 judicial orders by the International Court of Justice[33] and the European Court of Human Rights[34] to suspend its illegal suppression of human rights in Ukraine and inside Russia.[35]

Without compulsory judicial remedies, UN HRL cannot be effectively enforced. Only in exceptional situations did the UN Security Council (SC) assert 'legislative powers', for example to establish international criminal courts; the SC responses to international health pandemics by adopting UN SC Resolutions 2532 and 2565 (2020) only acknowledged that 'the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security',[36] and called '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.[37] The disagreements on the scope of UN HRL persist:

- China, which ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) but not the UN Covenant on Civil and Political Rights (ICCPR) in order to shield its communist party's political monopoly, does not legally and judicially protect human rights;
- the USA has ratified the ICCPR but not the ICESCR in view of US political preferences for business-driven, economic regulation and prioritisation of civil and political over economic, social and cultural rights;
- 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 of 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 ECHR and the EUCFR) with individual access to national and European courts;
- 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.

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33 ICJ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), provisional measures, order of 16 March 2022, ICJ Reports 2022, 211.

34 ECtHR, *Ukraine v. Russia (X)*, App. no. 11055/22, decision on interim measures of 1 March 2022.

35 For details see Ernst-Ulrich Petersmann, 'The UN Sustainable Development Agenda and Rule of Law: Global Governance Failures Require Democratic and Judicial Restraints', Max Planck UNYB 25 (2022), 457-497.

36 UNSC Res 2532 of 1 July 2020, S/RES/2532, preamble, para. 11; UNSC Res 2565 of 26 Feb. 2021. S/RES/2565, preamble, 17.

37 UNSC Res 2532 of 1 July 2020, S/RES/2532 para. 2.

Disregard for human and democratic rights remains 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 numerous civil wars and 'military coups' in African and Asian countries) reinforce governance failures to prevent unnecessary poverty (SDG1) and protect food security (SDG2), public health (SDG3) and public education for all (SDG4), gender equality (SDG5), access to water and sanitation for all (SDG6), and many other SDGs like 'access to justice' (SDG16).[38] European claims that power politics impedes the 'constitutional functions' of UN/WTO law (e.g. by undermining rule of law inside and between states) and PGs demanded by citizens, remain contested by many non-European governments and academics.

2. Disruption of the WTO Legal and Dispute Settlement System

The 1944 Bretton Woods Agreements and GATT 1947[39] were designed by and for democracies based on their liberal assumption that the proper functioning of non-discriminatory market competition requires legal guarantees of stable and convertible currencies, freedom of contract, private property rights, liberalisation of tariffs, prohibition of non-tariff trade barriers, rule-of-law, and judicial remedies. The agreements include only 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 labour rights, and of equal competitive opportunities). Authoritarian states (like China and Russia) do not afford effective constitutional and judicial remedies to 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 ensure non-discriminatory conditions of competition. Also WTO law provides for insufficient legal disciplines on state-trading companies, subsidies and other distortions of trade and competition (like tax exemptions and subsidies). Hence, market economies increasingly intro-

38 The importance of 'good governance' and of 'inclusive institutions' for promoting sustainable development is emphasised in the SDA based on a broad academic consent; see Stefan Dercon, *Gambling on Development: Why Some Countries Win and Others Lose* (Hurst & Co. Publishers 2022); Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Crown Currency 2011).

39 The General Agreement on Tariffs and Trade of 30 October 1947, available at <https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm>, last access 31 January 2024.

duce countermeasures in their trade relations with China and Russia aimed at limiting competitive distortions and perceived violations of the 'embedded liberalism'[40] 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[41] and the Paris Agreement on Climate Change[42]) 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)[43]. 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 (FTA)[44] of 2020, are based on hundreds of 'executive deals' rather than on 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'

40 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 and Macao). 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, remains a special case with a legal status contested both inside and outside Taiwan.

41 Agreement of 12 November 2019 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2019 CI 384/1.

42 Paris Agreement of 12 December 2015, 3156 UNTS 79.

43 For the withdrawal from the WHO see Brandon J. Murrill and Nina M. Hart, Withdrawal from the World Health Organization: Legal Basis and Implications (5 June 2020). Congressional Research Service LSB10489, available at <https://crsreports.congress.gov/product/details?prodcode=LSB10489>, last access 31 January 2024; For the withdrawal from the Paris Agreement see <https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/>, last access 31 January 2024.

44 Agreement between the United States of America, the United Mexican States, and Canada, 1 July 2020, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>, last access 31 January 2024.

limitations of trade and competition (e. g. by protecting domestic producers through ever more 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 aluminium 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 Europe's ordo-liberal, economic constitutionalism. US Trade Representative (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 trade policy discretion) 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 criticising the AB jurisprudence[45] 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 for 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

45 See USTR, Report on the Appellate Body of the WTO, Washington February 2020, available at <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: Jens Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Grossmann 2019); Petersmann, *Transforming* (n. 15), chapter 3.

AB dysfunctional; many WTO dispute settlement reports are now 'appealed into the void'[46] of a dysfunctional AB without adoption of their legal findings, thereby undermining also the WTO rule-of-law system. The active industrial policies introduced by the US Biden administration (e. g. for protecting workers, decarbonisation 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 lack of domestic political support inside the USA for WTO-consistent trade policies creates increasing conflicts with the EU insistence on rule-of-law, as discussed below.

3. The Geopolitical Transformations Endanger the SDGs

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.[47] The SDA explicitly acknowledges (e. g. in paras 17.10-12) that realising most SDGs – like ending poverty for everybody, securing access to food, water, and medicines, and de-carbonising economies – requires a 'rules-based, open, non-discriminatory, and equitable multilateral trading system under the WTO'. Without a multilateral WTO dispute settlement system, successful realisation of climate change mitigation, of future WTO negotiations, and of 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 neo-liberalism (e. g. US preferences for power-oriented trade protectionism unrestrained by impartial adjudication), compared with EU ordo-liberalism (like leadership

46 See e. g. *India – Tariff Treatment on Certain Goods in the Information and Communications Technology Sector*, Notification of an appeal by India under Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS582/16, 14 December 2023.

47 UN Economic and Social Council E/2022/XXX, Report of the Secretary-General.

for introducing Multi-Party Interim WTO arbitration in 2020, for adopting the European climate law in June 2021, and for implementing the currently 14 legislative EU Commission proposals aimed at making Europe the first carbon-neutral continent by 2050). While EU industrial, trade and environmental policies aim at maintaining international rule-of-law, US industrial, trade and environmental policies increasingly discriminate in favour of US producers (e. g. of steel, aluminum, electric vehicles, batteries).

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 the WTO Ministerial Conference in June 2022. Yet, conflicting regulations (e. g. of 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 for the oceans',[48] the UNFCCC as legal 'constitution of the atmosphere') aimed at realising the SDGs (e. g. their environmental objectives in SDGs 13-15). The market failures and governance failures distorting regulatory competition impede protection of PGs. State-capitalism, business-driven neo-liberalism, and industrial policies rely more on 'management approaches' aimed at 'Kaldor-Hicks efficiency gains' and 'welfare economics' within the diverse frameworks of national constitutionalism; they neglect the search by *constitutional economics*[49] for welfare-enhancing changes in constitutional rules (like EU common market freedoms, constitutional and human rights of access to food, public health, education, and

48 Tommy T. B. Koh, 'A Constitution for the Oceans', available at <https://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf>, last access 8 March 2021).

49 See n. 15. 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 mutually beneficial, 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. Institutional and constitutional economics share with neoclassical economics certain fundamental assumptions (such as methodological and normative individualism, pursuit of efficiency gains). Yet, they extend economic analyses to aspects that are typically ignored in neoclassical economics, such as synergies between democratic constitutionalism (e. g. protecting civil and political freedoms, voter preferences, limitation of all government powers, democratic accountability) and transnational, economic constitutionalism (e. g. protecting economic and social rights, consumer preferences, non-discriminatory and more inclusive competition protecting informed consent of all citizens, legal accountability and consumer welfare by limiting protectionism and social inequalities).

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.

4. UN Climate Law Prioritises National Sovereignty

Intergovernmental climate politics since the 1992 UNFCCC failed to prevent climate change. The 2015 Paris Agreement prioritises national sovereignty by focusing on 'nationally determined contributions', which continue to differ enormously among UN member states (e. g. regarding phasing-out of fossil-fuel subsidies and of coal-based energy). The regular 'conferences of the parties' (COP) to the UNFCCC, and their science-based and political review mechanisms, exert pressures for progressive legal clarifications of greenhouse gas (GHG) reduction obligations. Yet, multilevel democratic, parliamentary, executive, and judicial climate mitigation governance in the context of Europe's 'environmental constitutionalism' is more legally developed compared with UN climate mitigation policies and their authoritarian neglect in many UN member states.

In Europe, Articles 2 and 8 ECHR prompted ever more courts to protect human rights to life and family life against harmful environmental pollution and climate change. Some European states adjusted their national Constitutions by recognising environmental rights or constitutional duties to protect the environment (as in Article 20 a 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 into the EU Treaty provisions on EU environmental policies (e. g. Arts 11, 191-193 TFEU). 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 – 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. The EU emissions trading system will be complemented, as of 2023, by carbon border adjustment measures (CBAMs) aimed at preventing 'carbon leakage' and distortions of competition in countries with more ambitious climate change policies. Climate litigation increasingly acknowledges invocation by private and public complainants of GHG reduction obligations of governments as recognised in EU law and UN law.[50] 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 under UN law and inside most countries outside Europe.[51]

Rights to the protection of the environment are increasingly recognised in the laws of now more than 150 states, regional treaties, and in the UN General Assembly Resolution of 28 July 2022 recognising human rights to a clean, healthy, and sustainable development.[52] 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 emissions by at least 25 % (compared to 1990 levels) by the end of 2020.[53] 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

50 See Petersmann, Transforming (n. 15), chapter 9.

51 See the comparative studies of environmental constitutionalism and environmental litigation in Ernst-Ulrich Petersmann and Armin Steinbach (eds), *Constitutionalism and Transnational Governance Failures* (Brill 2024), chapters 4-6.

52 See UNGA Res 76/L.75 of 26 July 2022, A/76/L.75, confirming the previous UNGA Res HRC/48/13 of 8 October 2021, A/HRC/RES/48/13 recognising that having a clean, healthy, and sustainable environment is a human right.

53 Hoge Raad, *Supreme Court, State of the Netherlands v. Stichting Urgenda*, judgment of 20 December 2019, case no. 19/00135, ECLI:NL:HR:2019:2007. 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. For comparative overviews of climate litigation see: César Rodriguez-Garavito (ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action* (Cambridge University Press 2022); Francesco Sindico and Makane Moïse Mbengue, *Comparative Climate Change Litigation* (Springer 2021).

multinational corporation was held responsible for its contribution to climate change based on national and international law.[54] The case was brought as a public interest class action by a Dutch Non-Governmental Organisation (NGO); 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:

- Shell is obliged to reduce the CO2 emissions of the Shell group's activities by net 45 per cent by the end of 2030 relative to 2019 through the Shell group's corporate policy;
- the policy, policy intentions, and ambitions of the Shell group imply an imminent violation of this obligation;
- 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 (UNGP),[55] 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 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

54 Rechtbank Den Haag, *The Hague District Court, Milieudefensie et al. v. Shell*, judgment of 26 May 2021, case no. C/09/571932 / HA ZA 19-379, ECLI:NL: RBDHA:2021:5339.

55 UNGA RES HRC/17/31 of 21 March 2011, A/HRC/17/31.

45 per cent at the end of 2030 relative to 2019 through the group's corporate policy.

In the USA, by contrast, similar constitutional and human rights tend to be denied by US courts, for instance on grounds of judicial deference towards 'political questions' left open in the US Constitution and not (yet) decided by the US Congress. This congressional reluctance to recognise human, constitutional, or environmental rights to climate change mitigation is related to 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). The US Inflation Reduction Act (IRA) of August 2022 uses discriminatory tax credits, domestic content requirements, and trade discrimination for promoting de-carbonisation of the US economy, notwithstanding their legal inconsistencies with WTO law. It remains to be seen whether Europe's rules-based decarbonisation approach will be as effective as the financial incentives (totalling more than $ 369 bn) offered by the industrial- and environmental policies enacted in the IRA. China and Russia do not recognise human rights and independent judicial remedies of their citizens for challenging national climate mitigation policies. Constitutional courts in a few developing countries (like Brazil and Colombia) protect environmental rights; yet, constitutional economics and constitutional politics insisting on multilevel legislative, administrative and judicial protection of human and democratic rights, human capabilities, constitutional rights of citizens (like equal access to education, health protection, satisfaction of basic needs), and social justice remain politically less influential 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 policy challenges (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.[56] Britain's 'Brexit' and the US refusal to exercise

56 See Petersmann, *Transforming* (n. 15), 189 ff. In contrast to neo-liberal conceptions of self-regulatory markets, Europe's ordo-liberalism perceives non-discriminatory conditions of market competition as legal constructs requiring systemic legal restraints of market failures, constitutional failures, and related governance failures.

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) confirm policy shifts from 'first-best constitutional reforms' to second- or third-best reform strategies.

IV. Plurilateral Responses to UN and WTO Governance Failures

Section I. explained why globalisation requires transforming national '4-stage constitutionalism' into multilevel '8-stage governance' of transnational PG. Section II. argued that the successful transformations of *national* into *multilevel, European constitutionalism* limiting transnational governance failures – albeit often in experimental and imperfect ways – has enabled EU leadership also for constitutional reforms of UN and WTO law and governance (e. g. by pushing for compulsory third-party adjudication in the UNCLOS, trade, and investment law). Constitutionalism made EU foreign policies more transparent, reasonable, and predictable. Yet, different political priorities and increasing geopolitical rivalries entail that African, American, and Asian countries often resist Europe's multilevel constitutionalism and related constitutional reforms of UN and WTO law. Section III. explained why Russia's wars against Ukraine and threats of nuclear aggression, the US destruction of the WTO AB adjudication system, and China's suppression of human rights illustrate transnational governance failures undermining global PGs. Constitutional UN reforms (e. g. of the ineffective UN Security Council system) and WTO reforms (like compliance with Article 17 Dispute Settlement Understanding [DSU]) appear ever more unlikely. For instance, Pascal Lamy remained the only WTO Director-General who emphasised synergies between HRL and WTO law, and invited the Inter-Parliamentary Union to convene regular parliamentary meetings inside the WTO in order to promote democratic support and accountability of trade policies; Lamy's call for 'cosmopolitics' aimed at enhancing the legitimacy and coherence of the world trading system, of its global governance, and of its support by civil societies and 'cosmopolitan constituencies'.[57]

57 See Pascal Lamy, *The Geneva Consensus. Making Trade Work for All* (Cambridge University Press 2013); Pascal Lamy, *Towards World Democracy* (Policy Network 2004); Steve Charnovitz, 'The WTO and Cosmopolitics' in: Ernst-Ulrich Petersmann (ed.), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (Oxford University Press 2005), 437-445.

This section IV. concludes that – in a multi-polar world – geopolitical rivalries are likely to intensify (IV. 1.); plurilateral democratic leadership for realising the SDGs remains fragile (IV. 2.); whenever abuses of power impede UN and WTO reforms, democracies must prioritise plurilateral trade, environmental, security, and rule-of-law-reforms in cooperation with civil societies, business, and transnational private-public partnerships (IV. 3.) as second- or third-best policy strategies for protecting the SDGs.

1. Bounded Rationality: Geopolitical Rivalries as Permanent Facts

The authoritarian 'strong man politics' in China, Russia and in the US Republican Party suggest that nationalism and hegemonic power politics will continue undermining UN and WTO law and politics through market failures, governance failures, and related constitutional failures. The 'Beijing consensus' imposed by the power monopoly of China's communist party[58] is not effectively constrained by China's national Constitution (e. g. as citizens cannot invoke and enforce human and constitutional rights through judicial remedies in independent Chinese courts). Similarly, Russia's President Putin and his kleptocratic oligarchs dominate Russia's police state without effective 'constitutional checks and balances'; their executive governance suspended human and democratic rights inside Russia (e. g. of the political opposition and public media) and outside Russia (e. g. ordering illegal invasions into neighbouring countries, annexation and 'Russification' of occupied territories like Crimea and the Donbass in Ukraine). Totalitarian power politics – like China's secretive 'polit-bureau politics', 'surveillance capitalism', health-lockdowns, 'social credit systems', suppression of human and minority rights and threats of military force (e. g. in the South China sea and vis-à-vis Taiwan) – force democracies to respond by forming collective defence alliances and protecting their citizens against foreign 'weaponisation' of economic interdependence.

Russia's political domination of the Eurasian Economic Community, like China's political domination of bilateral 'Belt & Road agreements' on financial, trade, and infrastructure networks, Eurasian agreements on regional

58 At the Communist Party congress in November 2022, President Xi Jinping followed the example of Mao of unifying his personal control over the Party, the state and the military apparatus, and of evading constitutional time limits for his concentration of personal power and his exclusion of political critics in the standing politburo.

Asian institutions like the Shanghai Cooperation Organisation,[59] and 'China-Russia strategic cooperation' are based on power-oriented cooperation among authoritarian governments without multilateral rules and institutions protecting human and democratic rights. This focus on power-monopolies and lack of legal accountability is also characteristic of many governments in former Soviet republics in Eurasia and less-developed countries (like Iran, Myanmar, North Korea, Syria); their opportunistic policies[60] undermine the UN and WTO 'world order treaties' through regulatory competition among power-oriented neo-liberal, state-capitalist or rules-based, ordoliberal regulations (e. g. of collective security measures, internet control). EU efforts at reforming the WTO appellate review system and investor-state arbitration, and of strengthening environmental policies by embedding them into the WTO legal and dispute settlement system, are resisted by hegemonic power politics.[61] Human rights, democratic governance, rule-of-law and 'corporate responsibilities' remain insufficiently protected also in the legal practices of the more than 10,000 transnational corporations participating in the 'UN Global Compact'[62] on business and human rights.[63]

The 'politicisation' of the WTO trading system is likely to continue, for instance if WTO members fail to extend the 'Covid-19 waiver', to let the WTO agreement on unreported fishing subsidies of June 2022 enter into force and to agree on a 'climate waiver' for CBAMs. The more authoritarian governments (e. g. in China and Russia) disregard global rules limiting 'market failures', 'governance failures', and 'constitutional failures', the stronger becomes the risk of economic disintegration, for instance into 'authoritarian alliances' (e. g. among China, Russia, and other Eurasian countries), FTAs

59 Charter of the Shanghai Cooperation Organization of 15 June 2001, available at <file://s-fs1/mlehmann.$/downloads/Declaration%20on%20the%20establishment%20of%20the%20SCO.pdf>, last access 31 January 2024.

60 Like buying oil and gas from Russia undermining countermeasures against illegal aggression by Russia; abstention from UN General Assembly resolutions condemning Russia for illegal invasions and related violations of *erga omnes* UN rules on democratic self-determination.

61 See Petersmann, *Transforming* (n. 15), chapters 3, 7-8. Arguably, the EU's CBAM is justifiable under GATT Article XX, a (EU protection of the human right to climate change mitigation), XX, b (health protection), XX, d (a non-discriminatory EU emission trading system) and XX, g (non-discriminatory conservation of exhaustible natural resources) as well as under the heading of Article XX GATT (EU leadership for reducing GHG emissions through a non-discriminatory emission trading system); it does not violate the Paris Agreement (e. g. on 'common but differentiated responsibilities'), which the EU continues to support and which does not limit sovereign rights under Article XX GATT.

62 See <https://unglobalcompact.org/what-is-gc/participants>, last access 31 January 2024.

63 Petersmann, *Transforming* (n. 15), chapter 2.

among democracies, and the non-aligned 'global south' defining development priorities in often diverse ways. The 'polarisation politics' by populist 'strong-men' (like Presidents Bolsonaro, Erdogan, Putin, Trump, and Xi Jinping) contributed to the rising number of authoritarian governments (e. g. also in 'illiberal' EU member states like Hungary and Poland) and to the declining number of democracies, thereby rendering democratic leadership for protecting the SDGs more difficult.

2. Democratic Leadership Beyond NATO Remains Fragile

Anglo-Saxon neo-liberalism prioritises constitutional nationalism (as illustrated by the 'Brexit') and 'process-based constitutionalism' (as illustrated by the unwritten British Constitution, the lack of references in written Anglo-Saxon Constitutions to the SDGs) rather than rights-based, multilevel constitutionalism requiring all branches of government to protect PGs (like UN HRL, regional common markets, global environmental protection).[64] Europe's multilevel constitutionalism perceives democratic constitutions as expressing dynamically evolving 'living constitutions' responding to changing regulatory challenges and needs of citizens; HRL is interpreted as requiring both democratic legislators and the judiciary as 'constitutional guardians' to interpret and develop laws and policies responding to citizen demand for protecting PGs.[65] Conflicting regulatory and foreign policy conceptions were the main reason for the long-standing failures of the Transatlantic Partnership cooperation since the 1990s. The 'Brexiters' pursue a 'Singapore at Thames' as a deregulated competitor for the EU with more restrained judicial powers; like former US President Trump, they emphasise national sovereignty to disregard international agreements (like the EU-UK Brexit Agreement of 2020) and European

64 See Loughlin (n. 12) and Fishkin and Forbath (n. 13); Vermeule (n. 13) and related text.

65 Fishkin and Forbath (n. 13) similarly argue for 'affirmative constitutional obligations' (at 21 ff.) of both legislative and judicial institutions to prevent oligarchic domination of the US economy resulting in socially unjust inequalities and failures to protect PGs, as they were recognised during most periods of US constitutionalism (like the early Republic, the post-civil war reconstruction, and the New Deal legislation, when 'constitutional economic order hinged on a governmental duty to assure decent work and livelihoods, collective bargaining, social insurance, and other social goods to all Americans', at 254-255). Yet, progressive arguments using 'living constitutionalism' for advocating political reforms as being constitutionally required remain challenged by US conservatives using 'originalist constitutional interpretation' for opposing such reforms. Given the Supreme Court's conservative view of the US Constitution and the difficulties of amending the US Constitution, US advocates of the SDGs often avoid constitutional interpretations and human rights arguments in support of the SDGs.

adjudication. Business-driven economic regulation and related 'regulatory capture' are today more restrained inside the EU (e. g. due to its public financing of political election campaigns) than in the USA, where business-financed presidential and congressional elections often lead to appointment of business leaders (like US President Trump, his Secretary of Commerce W. Ross), business lobbyists (like USTR R. Lighthizer, his deputy USTR D. Shea), and congressmen financed by business interests (like coal, steel, cotton, tobacco, gun, and pharmaceutical lobbies). The Biden administration temporarily settled some of the EU-US trade disputes (e. g. over subsidies for aircraft makers Airbus and Boeing, European digital taxes on US tech groups, the US Section 232 tariffs on EU aluminium and steel). The Transatlantic Trade and Technology Council did, however, not prevent the illegal trade discrimination in the 2022 IRA (e. g. in favour of producing electric vehicles and their batteries in the USA); it may also prove incapable of preventing re-introduction of discriminatory US steel tariffs if the EU should not accept the US proposals for imposing 'carbon tariffs' on 'dirty steel products' produced in China.

NATO cooperation remains strong in implementing countermeasures against Russia's illegal wars of aggression. Yet, it is uncertain whether China's long-standing support for dictatorships (like Iran, Myanmar, North Korea, Russia) and Chinese military aggression against Taiwan will promote common transatlantic countermeasures similar to those introduced against Russia's military aggression. The lack of US trade policy leadership (e. g. through concluding transatlantic and transpacific FTAs updating trade rules among democracies) will increase the relative power of 'authoritarian alliances' like the Shanghai Cooperation Organization as the world's largest, regional economic and security organisation in terms of territory and population. The African Continental Free Trade Area, which came into force in January 2021, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[66] reflect efforts at protecting the advantages of rules-based FTAs at regional levels given the failures of WTO negotiations. The entry into force, on 1 January 2022, of the Region-

66 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) of 30 December 2018, available at <https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf>, last access 9 February 2024.The CPTPP is an FTA 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. Britain is joining the CPTPP in 2023.

al Comprehensive Economic Partnership (RCEP)[67] between China and 14 Asia-Pacific countries confirmed the previous experiences with China's Belt & Road agreements that China's political and economic power has become strong enough to induce many countries to conclude trade and investment agreements without references to human and labour rights and without multilateral judicial safeguards of rule-of-law. The Indo-Pacific Economic Framework (IPEF), which was launched by the USA in 2022, seeks to establish novel regulations pertaining to trade, digital markets, supply chains, and infrastructure initiatives among 14 Indo-Pacific partners representing an estimated 40 % of the global Gross Domestic Product (GDP); yet, as an executive agreement without approval by the US Congress, the IPEF offers no access to the US market and risks being blocked by republican majorities in the US Congress.

3. Embedding Plurilateral Protection of SDGs into Democratic Constitutionalism

As democracies cannot trust totalitarian power politics, they increasingly resort to plurilateral and unilateral policy responses and collective countermeasures within the constraints of UN/WTO law. Following Russia's illegal military invasions of Ukraine since 2014, democracies introduced collective economic sanctions and – in 2022 – excluded Russia from most European institutions. The 40 democracies from Asia, the Americas, and Europe offering Ukraine military assistance in its collective self-defence against Russia's war of aggression, and the 44 European democracies (plus representatives of the EU Commission and EU Council) that condemned Russia's aggression during their first 'European Political Community' conference at Prague in October 2022, may be forerunners of a new 'plurilateral liberal order' defending human and democratic rights and rule-of-law against the 'authoritarian international law' advocated by China, Russia and their authoritarian allies.[68] The current 'sanctions coalition' supporting Ukraine's self-defence against Russian aggression includes also non-European states like Canada, the USA and six democracies from the Asia-Pacific

67 Regional Comprehensive Economic Partnership (RCEP) of 15 November 2020, available at <https://www.mfat.govt.nz/assets/Trade-agreements/RCEP/RCEP-Agreement-Legal-Text.pdf>, last access 9 February 2024.

68 See David L. Sloss and Laura A. Dickinson, 'The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order', AJIL 116 (2022), 798-809; Tom Ginsburg, 'Authoritarian International Law', AJIL 114 (2020), 221-260.

region (Australia, Japan, New Zealand, Singapore, South Korea, and Taiwan). In economic regulation, however, the value-differences between Europe's ordo-liberal, multilevel constitutionalism and business-driven, neoliberal US constitutional nationalism are likely to prevent 'deep economic integration' between Europe and the USA, as it was envisaged in the EU-US draft agreement on a Transatlantic Trade and Investment Partnership rejected by President Trump.

The EU's multilevel constitutionalism, UN HRL and the recognition of affirmative constitutional duties to protect PGs (like protection of the environment) remain driven by multilevel constitutional, participatory, and deliberative democracy as protected in Articles 9-12 TEU. The defence 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' based on active citizenship[69] and defence 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 Arts 3 and 21 TEU. For instance, the EU has introduced new regulations for

- screening foreign investments inside the EU;
- limiting access of non-EU companies to government procurement inside the EU unless reciprocal access of EU companies is secured;
- avoiding 'carbon leakage' through unilateral EU carbon border adjustment measures;
- EU 'anti-coercion measures' providing for unilateral EU countermeasures against economic sanctions by third countries (like China);
- EU 'sustainability sanctions' in response to foreign violations of labour rights, human rights and sustainable development commitments;
- EU emergency powers for responding to supply chain problems (as they emerged during the Covid-19 and energy crises); and
- stronger EU anti-subsidy and emergency export control regimes.[70]

69 See Jon Alexander and Ariane Conrad, *Citizens: Why the Key to Fixing Everything is All of Us* (Canbury Press 2022).

70 See Alan Hervé, 'European Unilateralism as a Tool for Regulating International Trade: a Necessary Evil in a Collapsing Multilateral System', in: Fondation Robert Schuman Policy Paper no. 626, 29 March 2022. The exact titles and dates of adoption of these legislative proposals, regulations and directives are published in the EU Official Journal and on the EU Commission website <https://commission.europa.eu/law_en>, last access 31 January 2024.

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

- FTAs and similar preferential trade agreements (e. g. under Article XXIV GATT);
- 'critical mass agreements' like the 1996 WTO Information Technology Agreement, which was initially negotiated among 29 WTO members and progressively extended on a most-favoured nation basis covering now 97 % of world trade in information technology products among 83 countries; and
- other plurilateral agreements like the WTO Government Procurement and Aircraft Agreements.[71]

Constitutionalism suggests embedding CBAMs into broader 'GHG reduction clubs' making market access conditional on, *inter alia*, non-discriminatory carbon tariffs, agreed procedures for calculating 'embedded carbon' in products and equivalence of diverse GHG reduction policies, agreed 'green product and production standards', 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.[72] Just as the multilaterally agreed trade restrictions in the UN Convention on Trade in Endangered Species[73] and in the Basel Convention on Transboundary Movement of Hazardous Wastes[74] 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 voluntary global cooperation and for 'critical mass membership' promoting non-discriminatory treatment without free-riding. Consensus on a 'package

71 The more than hundred FTAs examined by the WTO Committee on Regional Trade Agreements and other Plurilateral Trade Agreements (PTAs) are listed on the WTO website <https://www.wto.org/>, last access 31 January 2024. For an analysis and lists of PTAs see: James Bacchus, 'The Future of the WTO: Multilateral or Plurilateral?', CATO Policy Analysis No. 947 of 25 May 2023.

72 On the problems of linking diverse CBAM systems see the various contributions to the symposium: Timothy Meyer, 'Taxing, Regulating, and Trading Carbon: An Introduction to the Symposium', AJIL Unbound 116 (2022), 191-195. 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 since January 2023.

73 Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, 993 UNTS 243.

74 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 22 March 1989, 1673 UNTS 57.

deal' and 'grand bargain' might require a broader 'WTO sustainability agenda' on how to promote the broader 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 a 'just transition' assisting less-developed countries through financial assistance.

The diversity of governmental and private company pledges of GHG reductions also calls for stronger civil society incentives for active participation in decentralised monitoring of market failures (like pollution harms) and governance failures (like non-implementation of GHG pledges). This can be promoted by enhancing synergies between human and legal rights to protection of the environment and stronger democratic and judicial remedies. As prices of internationally traded goods often do not reflect their environmental and social costs, the UN and WTO sustainable development goals must factor in the pollution costs, human and labour rights, and the 'planetary boundaries' in order to promote social welfare, 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 (ESG) 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 beyond state borders. Even if Europe's multilevel constitutionalism has no equivalent outside Europe, the transformation of *national* into *transnational 'aggregate PGs'* (like the SDGs) can be supported by extending national constitutionalism, civil society support and private-public partnerships to transnational governance of PGs. History suggests that such constitutional reforms require perennial struggles of citizens for collective protection of human rights limiting abuses of power. In a globalised 'world on fire', reasonable citizens should recognise themselves as human beings with cosmopolitan responsibilities rather than only as national citizens of this or that state. Without a cosmopolitan 'Sisyphus morality' and stronger leadership from constitutional democracies, realising the SDGs remains a *utopia.*

Even if preference heterogeneity requires second- or third-best strategies for protecting the SDGs, the EU countries should continue challenging protectionist discriminations as those in the 2022 US IRA and those applied by state-capitalist countries. 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 regional 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. Similarly, the regulatory competition between RCEP, CPTPP and other FTAs in Asia, Africa, the Americas, and Europe risks becoming increasingly distorted by geopolitical rivalries (e. g. about human rights conditionalities, access to rare earth materials, 'friend-shoring' of supply chains, phasing-out of coal-powered energy). The lack of provisions on labour rights and environmental protection in the RCEP agreement, as in most bilateral 'Belt & Road' agreements concluded by China, illustrates China's lack of leadership for the human rights and environmental dimensions of the SDGs. Involving domestic democratic institutions, non-governmental actors (like business and 'green cities'), science-based regulatory agencies and epistemic communities can enhance democratic support and 'checks and balances'.[75] 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 struggles for private-public partnerships supplying PGs – transnational PGs are unlikely to be effectively protected for the benefit of all. Will today's young 'climate change generation' take up the regulatory challenges of the Anthropocene? Can UN member states maintain social support for de-carbonising their economies and for democratic governance of sustainable development if governments and civil societies in industrialized countries remain unwilling to ensure 'climate justice' (e.g. through more financial and technical assistance, higher greenhouse gas reductions) and protection of human rights in less-developed countries adversely affected by existential environmental problems caused by climate change? How to realise the UN commitments to a 'just transition' if authoritarian governments in UN member countries refuse to protect human rights, democracy and rule of law, and to increase their carbon reduction commitments under the Paris Agreement? Why do EU citizens agree that – contrary to Loughlin's claims – multilevel legal and judicial protection of fundamental rights and of transnational rule-of-law remains indispensable

75 On the problematic relationships between democratic and 'stakeholder governance' see: Harris Gleckman, *Multistakeholder Governance and Democracy. A Global Challenge* (Routledge 2018); Liliana B. Andonova, Moira V. Faul and Dario Piselli (eds), *Partnerships for Sustainability in Contemporary Global Governance* (Routledge 2022).

for limiting transnational governance failures, including also populist neglect for climate change mitigation in authoritarian countries and in business-driven 'representative democracies' (like Australia, Brexit-Britain, and the USA) denying their citizens comprehensive judicial protection of human and constitutional rights?[76]

[76] Loughlin's (n. 12) criticism (e. g. on 150, 162, 186 ff., 194-202) of the 'rights revolution', 'judicial revolution', and of 'invisible constitutions' protecting a new 'constitutional legality' undermining his conception of Anglo-Saxon democracy, neglects that – in multilevel governance of global PGs among diverse 'demoi-cracies' in the 21st century – globalisation renders judicial clarification and enforcement of transnational constitutional restraints on power-oriented inter-governmentalism indispensable for rules-based protection of PGs – provided diverse traditions of 'democratic constitutionalism' based on human rights and democratic governance of free and equal world citizens are respected. This need for rules-based reconciliation of private and democratic autonomy based on agreed constitutional principles (like subsidiarity, proportionality, rule-of-law) requires also strengthening human rights and multilevel, democratic constitutionalism in international economic law (see Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing 2012). Human rights and judicial remedies empowering citizens set incentives for 'participatory' and 'deliberative democracy' limiting the 'rational ignorance' of many citizens towards global PGs and challenging the insufficient parliamentary control of distant, worldwide governance organisations.