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Teaching international economic law in the 21st century

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European University Institute
Department of Law

**TEACHING INTERNATIONAL ECONOMIC LAW IN THE 21ST
CENTURY**

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Abstract

This book contribution explains why international economic law (IEL) is increasingly taught from diverse, national and regional perspectives and value premises (I). IEL courses should give an overview of the common regulatory objectives, instruments and legal methodology challenges of IEL (II) and of how the ‘embedded liberalism’ underlying UN and WTO law promotes non-discriminatory ‘regulatory competition’ and diversity of national and regional IEL systems (III). They should explain why the post-1945 ‘embedded liberalism compromise’ needs to be adjusted to the global environmental, health and sustainable development challenges and to the need for stronger protection of transnational rule-of-law in world trade, investment and environmental law and governance. Without maintaining the compulsory WTO dispute settlement system and investment and human rights adjudication, the 2030 UN Sustainable Development Agenda and its citizen-oriented ‘sustainable development goals’ cannot realize their human rights objectives (IV).

Keywords

Climate change; constitutionalism; health pandemics; human rights; international economic law; law and economics; WTO.

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Introduction

Climate change, health pandemics and their impact on the global economy, on its legal regulation and on individual 'life chances' (eg of poor people in less-developed island states that risk being submerged by rising sea levels) illustrate how economic, political, legal, social, biological, chemical and physical systems interact in complex ways. Different people are likely to perceive the legal regulation of these interactions differently depending on their 'human condition' and existential perspective, for example as a healthy citizen of the European Union (EU) compared with a poor citizen in Africa or in dictatorships like Belarus, North Korea and Cuba. Just as individuals (like Sisyphus) draw diverse conclusions from their 'human condition', so do human societies organize themselves - and regulate their economies - through law and politics in response to diverse, social conditions and democratic preferences. For instance, neo-liberal interest group politics in industrialized Anglo-Saxon countries, totalitarian control of the economy in China and other authoritarian states, multilevel constitutional protection of the EU's common market freedoms and common trade and investment policies, and insistence by less-developed countries on 'special and different treatment' often give rise to conflicting conceptions of international economic law (IEL).

I. Perspectivism and Existentialism in International Economic Law

Perspectivism is an existential problem of all legal systems: Similar to religions proceeding from 'original sin' (eg requiring the expulsion of Adam and Eve from paradise and justifying God's punishment of Cain for having murdered his brother Abel by condemning Cain to become a 'restless wanderer on earth'), legal philosophers perceive the unruly nature of human beings (T.Hobbes: '*homo homini lupus est*') and their 'unsocial sociability' (I.Kant) as the main justification of law and of the need for 'justice' (eg in the sense of reasonable justification of law), 'social contracts' and for 'institutionalizing public reason' (J.Rawls). For instance, from the perspective of industrialized countries, protecting patent rights for pharmaceutical products as incentive and compensation for private research and inventions of medicines may appear reasonable – even if it may be viewed as a 'death sentence' from the perspective of poor countries that cannot afford paying monopoly prices for newly developed vaccines offered and sold initially in developed country markets.¹ The examples of 'climate refugees', patent protection for medicines, or of unnecessary famines (eg in dictatorships like North Korea) illustrate how economic regulation may involve existential questions that may be answered differently from different perspectives: What kind of limitations of intellectual property rights do human rights of individual access to public health protection require? Are human rights to education and to freedom of opinion compatible with governmental instructions (eg in authoritarian countries like China) to avoid discussing the importance of human and constitutional rights for designing IEL? Authoritarian and democratic governments offer different answers to many 'existential questions' like whether, and how, the 'human condition' of 'social conflicts' (eg due to different conceptions of the good) can be overcome by reasonable political conceptions of justice in non-homogeneous societies where unreasonable people risk preventing social peace and justice by transforming politics into fights against 'political enemies'. Similar to the 'Heisenberg principle' in quantum physics, the mere fact of observation from different perspectives risks changing realities; individual, communitarian, national, international or cosmopolitan social perspectives may call for diverse regulatory understandings and responses.

The diversity of textbooks on IEL - defined as the private and public, national and international law regulating transnational economic relations - illustrates how IEL is taught in different ways. Textbooks

¹ Cf P Drahos, Public lies and public goods: ten lessons from when patents and pandemics meet, in *European University Institute Law Working Paper* 2021-5.

on IEL written from ‘third world perspectives’ often discuss past constitutional failures of economic regulation (eg during centuries of colonial exploitation, slave trade and opium trade)², which IEL textbooks written from neo-liberal United States (US) perspectives (eg focusing on the post-1945, US-led neo-liberal economic order based on the 1944 Bretton Woods Agreements and the 1947 General Agreement on Tariffs and Trade: GATT) or from ordo-liberal European perspectives (eg focusing on Europe’s common market and the external relations law of the EU) often neglect. Commercially oriented business and law schools prefer using IEL textbooks prioritizing professional training and an interdisciplinary understanding of the complex interactions between economic, political and legal orders - rather than textbooks criticizing the positively existing IEL for failing to protect human rights and other ‘principles of justice’. Teaching IEL must acknowledge such ‘perspectivism’, diverse needs and demands of IEL students. This contribution proceeds from the normative premise that human right law (HRL) and the 2030 UN Sustainable Development Agenda require placing individual human beings and their human rights, basic needs, democratic and cosmopolitan responsibilities at the center of IEL teaching, research and regulation. This normative premise remains ignored by many authoritarian governments in many UN member states as well as in many intergovernmental institutions like the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO). From normative citizen perspectives, challenging socially unjust government and business practices (like the fact that so many US billionaires pay hardly any taxes) must be a central part of teaching IEL. The human rights and environmental litigation for holding governments and business accountable for abuses of public and private power (like pollution) confirms the practical relevance of IEL approaches focusing on civil societies as democratic principal of government agents with limited, delegated powers. Without empowerment of civil societies and of democratic and judicial institutions, the central regulatory challenge of IEL and sustainable development - ie the ubiquity of market failures and governance failures - cannot be effectively addressed.

The regulatory challenges of IEL constantly change in response to technological, environmental and political changes and global governance crises (like financial and migration crises, geopolitical rivalries, ‘green’ and ‘digital revolutions’). Hence, no textbook of IEL can offer a ‘complete overview’ of all areas of IEL. Their selection of IEL subjects is influenced by their often diverse, methodological premises such as

- intergovernmentalism (eg enhancing national interests through intergovernmental negotiations);
- functionalism (eg promoting national interests through multilevel governance in international organizations protecting transnational public goods);
- constitutionalism (eg democratic self-limitation of policy discretion by rights, rules and institutions of a higher legal rank); and
- ‘law and economics’ (eg promoting economic efficiency of law and governance).

The methodological choices often entail prioritization of diverse values and regulatory approaches like using ‘intergovernmental alliances’ and ‘functional spill-overs’ (eg in China’s bilateral ‘Belt and Road networks’) rather than markets as citizen-driven information, coordination and sanctioning mechanisms. In order to avoid getting lost in the jungle of multilevel economic regulation and economic transactions at national, regional and worldwide levels of governance, teaching IEL should focus on both (II) regulatory challenges common to all countries in order to realize their universally agreed ‘sustainable development goals’ (SDGs); (III) the regulatory diversity among national and regional IEL traditions; and (IV) on policy lessons from the historical evolution of IEL and from the close interrelationships between economic, political, legal and social orders.

² Cf L Choukroune/JJ Nedumpara, *International Economic Law: Text, Cases and Materials* (CUP 2021), at 3f.

II. What is International Economic Law? What are its Objectives and Regulatory Challenges?

Textbooks and classes on IEL should clarify (1) how to define IEL, (2) the goals and instruments of economic regulation, and (3) the main regulatory and methodological challenges. Access to - and processing of - all relevant information (eg on tax evasion, cyber crimes, global warming) turns out to remain a major frontier of IEL and of its democratic regulation, notwithstanding information and communication technology (ICT) 'revolutions' and artificial intelligence. A human rights-approach to IEL requires encouraging students to challenge the existing, power-oriented UN and WTO legal practices from the perspectives of their individual conceptions of justice and democratic responsibilities - notwithstanding the fact that the existing 'positive IEL' tends to be construed by most governments as justifying intergovernmental power politics. If law depends on the legal opinions of people and 'justice is the first virtue of social institutions'³, legal education should be based on theories of justice - also in IEL. Yet, teachers should also inform their IEL students about the professional risks which 'human rights advocacy' may entail for professional careers in power-oriented governance and money-driven business institutions. As discussed below, legal systems - including IEL - remain highly imperfect constructs dominated by social, political and economic struggles for power that are too often won by profit-seeking interest groups rather than by advocates for justice and human rights protection.

1. *Diverse Conceptions of International Economic Law*

Since ancient times, the human desire for more, better and a larger variety of goods and services has given rise to trade, division of labor and regulation of markets.⁴ This human desire for increasing individual welfare through trade interacts - as illustrated by millennia of feudalism and colonial and imperial conquests - with the human hunger to possess land and natural resources: 'if goods can't cross borders, soldiers will'.⁵ International trade and investment agreements (eg among city republics around the Mediterranean Sea) and regulation of currencies, property and commercial contracts have been recorded since ancient times (eg in the Code of Hammurabi ca 1772 BCE). IEL courses should explain the economic logic underlying IEL. For instance, as market-driven trade and investments depend on stable currencies and responsive market prices, the post-WWII efforts at recreating a multilateral international economic order began with the 1944 Bretton Woods Agreements establishing

- the IMF for promoting stability and convertibility of national currencies, liberalization of international payments and balance-of-payments assistance; as well as
- the World Bank Group for providing financial assistance for the reconstruction of war-torn countries and development assistance for less-developed countries.

Following the US Congress' refusal to ratify the 1948 Havana Charter for an International Trade Organization, GATT 1947 provided the legal basis for the progressive liberalization of tariffs, regulation of non-tariff trade barriers, multilateral dispute settlement procedures and eight 'GATT Rounds' of multilateral trade negotiations extending trade liberalization and trade regulation to additional barriers for trade in goods, services, trade-related investments and intellectual property rights. The international monetary, financial and trade agreements were supplemented by the UN legal system based on the 1945 UN Charter and 15 UN Specialized Agencies, eg for liberalization of international air transports, maritime transports, postal services, telecommunications services, health and tourism services, educational, scientific and cultural cooperation, agricultural and industrial cooperation, and intellectual property rights. The UN also provided institutional frameworks for negotiating hundreds of additional

³ J.Rawls, *A Theory of Justice* (OUP revised edition 1999), at 3.

⁴ Cf. P Coggan, *More: The 10,000 Year Rise of the World Economy* (Profile Books 2020).

⁵ The quotation reflects the trade and investment agreements and colonial policies since ancient time (eg the practice of the republic of Venice to protect its foreign trading posts by military force, if necessary).

multilateral agreements (like the 1982 UN Convention on the Law of the Sea: UNCLOS, international commodity agreements) and institutions (like the 1964 UN Conference on Trade and Development: UNCTAD) for regulating and monitoring particular areas of international economic relations.

The two path-dependent fields of IEL - ie (1) private commercial law (eg based on national private law and conflict-of-law rules, international agreements coordinating contract law principles and providing for mutual recognition and enforcement of commercial arbitration) and (2) international public law (eg based on treaties, customary law and generally recognized principles of law) - were progressively supplemented by (3) multilevel economic regulation (eg multilevel cooperation among national and international monetary and competition authorities inside the EU, the International Competition Policy Network) coordinating and implementing agreed economic policies; (4) global administrative law conceptions emphasizing the legal constraints of international economic organizations by constitutional law principles like transparent policy-making, conferral of limited powers, legal and judicial accountability; and (5) regional constitutional approaches to economic regulation based on common market freedoms, fundamental rights, multilevel parliamentary control and multilevel judicial protection of transnational rule-of-law, national and regional constitutional rights, human rights and economic courts.⁶ New regulatory challenges (like the 'green' and 'digital revolutions' aimed at decarbonizing and digitalizing the global economy) give rise to the emergence of new fields of IEL (like electronic commerce, governance of the internet and of the use artificial intelligence, commercial use of outer space). Different textbooks draw different borderlines of IEL, for instance regarding labor and business law, HRL, environmental law, air and space law.

Many regulatory challenges of IEL (such as protection of human and intellectual property rights in IEL, WTO appellate review, investment arbitration, social inequalities) remain contested. Teaching IEL should enable students to understand why the regulatory approaches to IEL continue to differ and to coexist. One explanation relates to the diversity of values pursued by private and public economic actors like:

- *private autonomy* advocated by private traders, producers and investors, as illustrated by the pursuit of utility- and profit-maximization strategies of commercial companies and rent-seeking industries;
- *public autonomy* ('sovereignty', power, policy discretion) advocated by governments representing states;
- *economic efficiency* and consumer welfare emphasized by consumers;
- *democratic input-legitimacy* emphasized by citizens and their democratic institutions (eg challenging the legitimacy of allowing military rulers to represent states like Myanmar);
- *republican output-legitimacy* emphasized by counter-majoritarian, republican institutions (like central banks, competition, health, environmental and other regulatory agencies, international organizations); or
- *transnational rule of law* and equal individual rights protected by national and international courts of justice.

This fact of legal pluralism underlying IEL reflects the reality of political disagreements on whether law and governance need to be justified vis-à-vis citizens by prioritizing private autonomy (eg human rights), public autonomy (eg democratic governance, representative and deliberative democracy) or authoritarian power politics (eg prioritizing 'law and order'). For instance, the UN Charter prioritizes 'sovereign equality' of member states and veto powers of the five victorious powers in WWII; UN HRL

⁶ On these five competing conceptions of IEL and the need for their integration see E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart 2012), 78ff.

prioritizes individual and democratic self-determination as ‘inalienable’ rights; and the 2015 UN Sustainable Development Agenda aims at reconciling protection of private and public autonomy of individuals (human rights) and of peoples (democracy) with sovereign equality of states and human rights-oriented SDGs, including also democratic governance, access to justice and rule-of-law.

2. *Changing Functions, Structures and Regulatory Paradigms of IEL*

If ‘justice is the first virtue of social institutions’ and of social sciences (like law, economics and politics) as distinguished from the search for objective truth in the natural sciences studying physical, chemical or biological facts: What kind of ‘basic structures’ of IEL, of law-making, and of procedural and substantive ‘principles of justice’ does justice require? How to reconcile justice for states, people, and for all men, women and children? Does the ‘anthropocene’ require also ‘justice for animals and other natural organisms’ in view of the fact that human ‘rule of law’ interacts inevitably with ‘the rule of nature’ like climate change, and the interactions between law and nature require duties of care?

Procedural, constitutional, distributive, corrective, commutative principles of justice and equity for justifying ‘basic structures’ of legal systems are much older than the post-1945 universal recognition of ‘inalienable’ human and democratic rights and modern conceptions of ‘justice as economic efficiency’ in a world of scarce resources. The ‘embedded liberalism compromise’ underlying UN law (eg UN HRL) and WTO law protects national sovereignty and legitimate diversity of national legal, political and economic systems.⁷ The EU’s multilevel democratic constitutionalism extends nationally agreed ‘constitutional principles of justice’ to the EU’s common market and to multilevel governance of transnational public goods (PGs). In September 2015, 170 heads of governments adopted the UN 2030 Agenda for Sustainable Development specifying 17 SDGs and 169 policy targets as an integrated framework for guiding national and global development actions up to 2030. In contrast to the Millennium Development Goals adopted by the UN in 2000, the 2030 Agenda is grounded more in HRL as a means for ‘localizing’ sustainable development. Almost all of the 17 SDGs relate to human rights values like ending poverty in all its forms everywhere (SDG 1); ending hunger and achieving food security (SDG 2); ensuring healthy lives (SDG 3) and inclusive, equitable quality education (SDG 4); achieving gender equality (SDG 5); availability of water and sanitation for all (SDG 6); access to affordable and sustainable energy for all (SDG 7); promoting economic growth and decent work for all (SDG 8); sustainable industrialization (SDG 9); reducing inequality within and among countries (SDG 10) and promoting sustainable development (SDGs 11-17), including combatting climate change (SDG 13) and promoting peaceful societies with access to justice and accountable, inclusive institutions for all (SDG 16). The SDGs ‘seek to realize the human rights of all’ and ‘balance the three dimensions of sustainable development: the economic, social and environmental’.⁸ The Agenda describes itself as being

‘guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, in international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome.’⁹

Arguably, the universal endorsement of the 2030 Agenda is relevant legal context also for interpreting and implementing the WTO ‘sustainable development’ commitments. Teaching IEL should prompt

⁷ For a discussion of the historical evolution of ‘embedded liberalism’ and the need for its ‘greening’ see E.U.Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022), chapters III.A and VIII.B.

⁸ United Nations, *Transforming our World: the 2030 Sustainable Development Agenda*, UN General Assembly Resolution A/RES/70/1 of 25 September 2015.

⁹ UN Resolution A/RES/70/1 (n 8), para. 10. On interpreting ‘sustainable development’ commitments in conformity with HRL in the sense of A Sen’s ‘development as freedom’ protecting basic needs and human capacities for individual and social self-development see Petersmann (2012), at 190, 340, 374ff.

students to discuss the impact of the UN human and labor rights systems and of the SDGs on interpreting and developing IEL. The UN Guiding Principles for Business and Human Rights, as endorsed by the UN Human Rights Council on 16 June 2011 and increasingly invoked in litigation on ‘corporate responsibilities’ (eg to reduce the carbon emissions of oil companies like Shell), confirm

- *state duties* to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
- *corporate responsibilities* to respect human rights, which means to avoid infringing on the rights of others and to address adverse impacts with which a business is involved; and the need for
- *access to effective remedies for rights-holders* when abuse has occurred, through both judicial and non-judicial grievance mechanisms.¹⁰

IEL students must be taught why financial and debt crises, climate change, global health pandemics and geopolitical rivalries focusing on ‘friends or enemies’ are undermining the neo-liberal economic order. Likewise, ‘executive emergency governance’ without effective parliamentary and judicial controls threatens democracy, rule of law, human rights and the realization of the SDGs, as illustrated by US President Trump’s abuses of executive powers and ‘national security exceptions’ (like Section 301 of the US trade legislation) for starting discriminatory trade wars against China and NATO allies, disrupting multilateral treaty systems, rejecting democratic election results and fighting political critics as enemies of his ‘republican creed’.¹¹ It is often only by incorporating the non-binding UN Resolutions on SDGs into domestic legal systems and treaty obligations like the 2015 Paris Agreement on Climate Change Mitigation and free trade agreements (eg FTAs of the EU), that the SDGs can actually change the dialectic tensions between normative orders (eg based on agreed rules, principles and institutions recognized as law and social facts) and subjective legal claims, practices and politics dominating legal practices. Can - and should - this ‘politics of legal systems’ be limited by ‘constitutional restraints’ based on ‘pre-commitments’ to constitutional rules, ‘principles of justice’ and institutions of a higher legal rank constraining abuses of legislative, executive, judicial, non-governmental and private powers (eg in IEL), as it has been successfully realized in European economic integration law since the 1950s?¹² Why is it that the post-1945 ‘Washington consensus’ for a neo-liberal design of the international economic order has become progressively challenged by a more human rights-based ‘Geneva consensus’¹³, as it is confirmed in the universally agreed 2015 UN Sustainable Development Agenda? Will the ‘new nationalism’ (as illustrated by the ‘Brexit’ and the disruption of multilateral treaties by former US President Trump) and the rise in authoritarian governments undermine democracies and lead to a new ‘geopolitical economic order’ characterized by bilateral power politics (eg in the trade wars initiated by former US President Trump and by China)?

¹⁰ Cf. *Guiding Principles on Business and Human Rights. Implementing the UN ‘Respect, Protect and Remedy’ Framework* (UN 2011).

¹¹ IEL courses should also discuss the obvious similarities between the politics of former US President D.Trump and Carl Schmitt’s justification, in the 1930s, of ‘charismatic legitimacy’ of authoritarian leaders abusing ‘emergency powers’ and anti-liberal, ethnic ‘identity politics’, perceiving politics as existential struggles between ‘friends and foes’, contesting the legitimacy of their ‘political enemies’, rejecting courts as ‘defenders of the Constitution’, defending illiberal cultures and undermining democratic constitutionalism by ‘political religions’ justifying ‘big lies’ (eg about democratic election results); cf E.Kennedy, *Constitutional Failure. Carl Schmitt in Weimar* (Duke University Press 2004); E.U.Petersmann, *The 2018 Trade Wars as a Threat to the World Trading System and to Constitutional Democracies*, in: *Trade, Law and Development X* (2018), 179-225.

¹² Cf E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law* (Hart 2017).

¹³ Cf P Lamy, *The Geneva Consensus. Making Trade Work For All* (CUP 2013).

3. Regulatory and Methodological Challenges

Constitutional and institutional economics and public choice theories explain the failures of IEL (eg to protect human rights and related SDGs) in terms of ‘market failures’, ‘governance failures’ and ‘constitutional failures’ of multilevel governance of PGs.¹⁴ The predominance of intergovernmental power politics and of insufficient democratic and judicial remedies inside worldwide and many regional organizations reflects prioritization of ‘state sovereignty’ and disregard for human rights inside many UN member states. Since the 1950s, European integration law demonstrated how ‘constitutional approaches’ to IEL can transform intergovernmental power politics and periodic wars - as they devastated the welfare of European citizens during centuries - into mutually beneficial economic, political, social and legal cooperation promoting more than 70 years of ‘democratic peace’ among EU member states. The interactions between economic, political, social and legal orders - and the need for ‘constitutionalizing’ foreign policies in order to better protect the SDGs - should be a central part of teaching IEL. For example, students of IEL should understand why democratic struggles for input-legitimacy and republican output-legitimacy of IEL are driven by ‘constitutional insights’ that ‘state duties’ must be legally defined in terms of equal rights and judicial remedies of all citizens rather than in terms of policy discretion of rulers; by focusing on reasonable self-interests and common rights of citizens rather than on conflicting ‘state interests’, the SDGs can promote cooperation and ‘democratic peace’.

The 2019 ‘Sustainable Development Goals Report’ identified climate change (eg cutting ‘record-high greenhouse gas emissions now’ so as to prevent displacement of up to 140 million people by 2050) and ‘increasing inequality among and within countries’ as the two most challenging issues of our time.¹⁵ Intensifying climate-, health-, migration- and social crises are prompting ever more governments to resort to executive ‘emergency governance’ for imposing, eg, ‘lockdowns’ aimed at reducing Covid-19 infections. Did the collapse of the health infrastructures in India’s capital New Delhi in response to India’s more than 400’000 daily Covid-19 infections in May 2021 confirm the prediction by Peter Drahos¹⁶ that the authoritarian Chinese government might be better capable of ‘survival governance’ and of decarbonizing national economies than democratic countries? Can ‘survival governance’ justify empowering totalitarian rulers to disregard human rights (eg by abusing facial recognition technologies for ‘smart cities’ in China) and democratic governance (eg by prohibiting democratic freedoms)? Does the US destruction of the WTO dispute settlement system undermine the rule-of-law objectives of the SDGs? What are the lessons from the historical experiences that empowerment of dictatorial regimes has led to economic misery and famines (eg in communist China under Chairman Mao), genocides (eg in Nazi Germany), military aggressions (eg by Nazi Germany, the Soviet Union, Russia) and disregard for human rights time and again?

Law as a democratic self-restraint on human freedom reflects the psychological insight that human beings act like social animals - in their private as well as public lives - out of a mix of unconscious instincts, senses, passions, rational self-interests, morality and reasonableness. Hence, understanding legal, economic, political and social interactions requires combining (1) *rules-based legal* with (2) *utilitarian economic*, (3) *power-oriented political*, (4) *ethical communitarian* and (5) *natural science* methodologies in addition to (6) philosophical and psychological theories of justice.¹⁷ All human societies use ‘rule by law’ for ordering civil, political, economic, social and cultural cooperation;

¹⁴ Cf Petersmann (n 7), chapter III.

¹⁵ *The Sustainable Development Goals Report 2019* (UN 2019), 3, 42, 48.

¹⁶ Cf. P Drahos, *Survival Governance: Energy and Climate Change in the Chinese Century* (OUP 2021).

¹⁷ The distinction of four basic forms of human regulatory systems - ie legal (hierarchical), social (self-regulatory), economic (market) and technological (architectural) modalities that engage with the practical and moral senses of the regulated human beings - by L. Lessig, *Code: Version 2.0* (Basic Books 2006) has been criticized (eg as neglecting genetic, geo- and climate-engineering technologies that are closer to natural regulatory systems than to intentional human regulation).

constitutional limitations of rulers by ‘rule of law’ depend on ‘struggles for justice’ and remain contested in the ‘politics of law’. The interactions among local and national societies, economies, politics and legal systems vary among countries depending on their democratic preferences and political and legal cultures. The history of colonialism, slave trade and imperial conquests illustrates how the evolution also of IEL was shaped by power politics. It is thanks to democratic and anti-colonial struggles that, today, ‘positive law’ tends to be defined not only by (1) ‘primary rules of conduct’ and (2) ‘secondary rules of recognition, change and adjudication’; it also includes (3) ever larger numbers of constitutional and human rights protecting ‘principles of justice’ and SDGs as integral parts of legislation and ‘secondary law’ adopted by administrative, regulatory or judicial institutions.¹⁸ Path-dependent legal positivism continues being challenged by human rights and democratic revolutions resulting in social challenges of power-oriented international law practices and of social injustices (eg regarding the unequal distribution of power, money and social welfare inside and among states). IEL students should be taught not only why normative *legal orders* reflecting the ‘public reason’ and rationality of their legal subjects and governments dynamically evolve through politicized *legal practices* and ‘dynamic interpretations’ of indeterminate rules and principles, for instance if citizens, governments or courts of justice invoke - as in the case of the SDGs - human rights and climate change for justifying ‘new interpretations’ or citizen-oriented rules in order to respond to abuses of public and private power. Regional economic integration law also confirms the empirical fact that democratic constitutionalism has been comparatively more successful in ‘institutionalizing public reason’ and maintaining ‘democratic, peaceful cooperation’ than authoritarian power politics (eg prior to World Wars I and II, in post-war politics among Eurasian countries).

‘Critical legal positivism’ acknowledges this ‘dual nature’ of modern legal systems, which include also ‘inalienable’ human rights and ‘principles of justice’ empowering citizens to resist unjust legal practices and path-dependent rules of positive law.¹⁹ Due to the constant tensions between reason and will (power), and the interactions between the surface level of positive law and the sub-surface level of legal and political cultures and social psychologies (or pathologies) influencing law-making and adjudication of legal rules and principles, positive IEL constantly interacts with institutionally framed *legal practices* shaped by political cultures, politics, self-interests and the will (power) of legal actors; together, the *legal orders* and the *legal practices* constitute *legal systems* developing in response to dialectic interactions between law (reason, rationality) and practices (political choices, psychology).²⁰ Conceptions of today’s ‘IEL system’ remain highly contested. Teaching IEL cannot be ‘neutral’ in a world of vast social inequalities and injustices (like tax evasion by multinational companies) vis-à-vis billions of poor people. If the young generation of today does not succeed in changing IEL, environmental, health and governance crises risk destroying the human welfare of billions of people.

III. Diversity of National and Regional Approaches to IEL

The emergence of world order treaties depends on either hegemonic leadership (eg by the USA for the UN and Bretton Woods legal systems) or on treaty provisions reconciling the diverse national and regional interests of countries with their common global interests (eg the WTO provisions protecting national sovereignty, regional free trade areas and customs unions, special and differential treatment of less-developed countries). In the 21st century, the co-existence of Anglo-Saxon neo-liberalism (as illustrated by the ‘Brexit’ and US disregard for multilateral treaties under President Trump), authoritarian state-capitalism (eg in China and many formerly communist countries), ordo-liberal European economic constitutionalism (notably in the EU and the European Economic Area: EEA) and

¹⁸ For details see Petersmann (n 12), 59ff.

¹⁹ Cf R Alexy, *The Argument from Injustice: Reply to Legal Positivism* (Clarendon Press 2002); K Tuori, *Critical Legal Positivism* (Routledge 2016).

²⁰ For this dialectic conception of legal systems and IEL see Petersmann (n 7), chapters I.A and II.

diverse ‘third world conceptions’ of economic regulation transforms the post-1945 neo-liberal Bretton Woods system into a new ‘geo-economic security order’ with politically motivated economic sanctions disrupting multilateral treaty systems (eg the WTO dispute settlement system).²¹ The political domination of ‘GATT politics’ (1948-1994) by what was called the ‘Quad’ (ie the USA, the EU, Japan and Canada) has become replaced by geopolitical power rivalries among WTO members prioritizing diverse values like hegemonic neo-liberalism (eg dominating the money- and market-driven ‘Washington consensus’ on interest-group driven trade policies), authoritarianism (eg prioritizing power monopolies in ‘one political party states’ like China), multilevel economic constitutionalism (eg in the EU prioritizing human and constitutional rights of EU citizens) or ‘UN political idealism’ without effective implementation inside many UN member states (eg disregard for UN HRL in many non-democratic countries in Africa, Asia and Latin America).

The ‘UN politics’ was reflected also in the joint statement of the heads of the IMF, the World Bank, the World Health Organization (WHO) and the WTO of 1 June 2021 on ‘A new commitment for vaccine equity and defeating the pandemic’, which called for a ‘coordinated strategy ... to vaccinate the world’ based on (1) financing the COVAX global vaccine access programme; (2) investments into vaccine production capacity; and (3) calling for accelerated negotiations for a ‘pragmatic solution around intellectual property’ - without reference to human rights, other international legal obligations and the anti-competitive distortions of business-driven, pharmaceutical patent protection.²² The regional and functionally limited ‘human rights constitution’, ‘common market constitution’, incomplete monetary constitution and ‘foreign policy constitution’ of the EU and its member countries have embedded national, democratic constitutionalism and intergovernmental cooperation into multilevel constitutionalism offering unique protection of civil, political, economic, social and cultural rights, which EU citizens never enjoyed before on this European scale.²³ The EU’s ‘New Green Deal’ (December 2019) and European climate legislation (2021), the EU’s leadership in the Covid-19 health pandemic for securing access to vaccines inside and outside the EU, the EU’s ‘Recovery and Resilience Facility’ and ‘Next Generation EU investment program’ financed through EU loans/bonds of up to 750 billion Euros (2020/21), and the EU’s digital economy regulation, digital common market legislation and global reach of regulatory standards (eg for chemical industry standards) illustrate how European economic constitutionalism has enabled the EU countries to respond more effectively to global environmental, health and governance crises and regulatory challenges (like climate change, the ‘digital revolution’) than other regional economic communities in Africa, Asia and the Americas.

Comparing national and regional economic integration systems should be an integral part of teaching IEL in order to explain why some legal and economic systems have promoted famines and economic poverty (eg in communist China before its progressive economic liberalization since 1978) and fail to protect human rights and the SDGs. The constitutional values underlying national and regional systems often explain their choice of economic policy instruments. For instance, industrialized democracies protect patent systems also for pharmaceutical products because it sets incentives for decentralized research, protects private property rights and protects national health and industrial interests in rich countries with populations capable of paying the often high prices for patented pharmaceutical products. But patent protection for pharmaceuticals may be less appropriate for less-developed, low-income countries, notably in global health pandemics where public health requires providing vaccines to everybody everywhere. Globalization (eg of health pandemics and climate change) requires multilevel governance of PGs responding to the diverse ‘collective action problems’ of diverse kinds of PGs, for

²¹ Cf. Petersmann (n 7), chapter II.

²² Cf the criticism by D Desierto, The IMF, WTO, World Bank, and WHO all come around? Multilateral Unity Against Inequitable Global COVID Vaccine Distribution, but still sans Human Rights, in *EJIL Talk* of 3 June 2021. On the distortions of health governance by business-driven interest group politics and the shortcomings of the patent system for responding to global health pandemics see: Drahos (n 1), at 7: ‘the patent system itself has become a source of pandemic risk’.

²³ Cf K Tuori, *European Constitutionalism* (CUP 2015); Petersmann (n 7), chapter IV.E.

instance by international stock-piling of scarce resources and emergency aid and national promotion of manufacturing know-how for generic medicines (eg in Brazil and India).²⁴ IEL courses should compare and explain the law, regulatory instruments and practices of the 15 UN Specialized Agencies in order to help students understand why, eg, only some of them (like the WHO, ILO, FAO, UNESCO) are based on ‘constitutions’ (*sic*) committing member states to protection of human rights (like health rights, labour rights, rights to food and education) and providing for inclusive forms of multilevel governance (like the ‘tripartite’ composition of ILO bodies by government, worker and employer representatives). IEL students should know why the GATT/WTO legal system continues being deliberately kept out of the more politicized UN legal system.

Contrary to the post-1945 ‘cold war’ between the economically dysfunctional Soviet Union and Western democracies, the cultural value differences underlying Anglo-Saxon neo-liberalism (eg prioritizing market mechanisms driven by the *homo economicus*), authoritarian state-capitalism (eg prioritizing power monopolies of authoritarian governments) and of Europe’s ordo-liberal, economic constitutionalism (eg protecting common market rights and constitutional rights of EU citizens) are likely to persist for a long time. In the coming decades, China and India are expected to resume their centuries-old status as the two largest national economies. Hence, the future international economic order is likely to become shaped by ‘competing regionalism’ (eg between African, Asian and North-American FTAs, the state-centered bilateralism of China’s ‘Belt and Road’ infrastructure and communication networks, the EU and EEA). The likely decentralization of IEL may require more flexible re-interpretations of the WTO provisions for trade remedies, general and security exceptions, regional and plurilateral agreements, and special and differential treatment for less-developed WTO member countries. IEL courses should invite students to reflect on the impact of the increasing geopolitical rivalries among business-driven Anglo-Saxon neo-liberalism, China’s totalitarian state-capitalism and Europe’s ordo-liberal, economic constitutionalism on worldwide economic treaties and institutions. For instance, why does the US Biden administration find it politically so difficult to re-commit to the WTO Appellate Body system after its arbitrary destruction by the US Trump administration? The ‘green revolution’ necessitating de-carbonization of the global economy, the ‘digital revolution’ requiring new regulations of ICT services (eg regarding ‘cyber security’, data privacy, use of artificial intelligence), global health pandemics requiring global supply of vaccines, and the realization of other SDGs and related PGs illustrate the need for IEL courses to explore new fields of IEL and their impact on the existing UN and WTO legal systems.

IV. The Historical Evolution of IEL: Policy Lessons?

IEL textbooks and seminars should explore also ‘foundational problems’ of IEL like (1) the changing paradigms of ‘embedded liberalism’ underlying IEL, (2) ‘law and economics’ and (3) human rights dimensions of IEL. What are their policy lessons for the 2030 UN Agenda for ‘transforming our world’ in order to realize the citizen-oriented SDGs and related PGs like ‘digitalization’, ‘de-carbonization’ and ‘humanization’ of the global economy?

1. Need for Adjusting ‘Embedded Liberalism’?

Trade liberalization before World War I reflected ‘dis-embedded liberalism’ based on *laissez faire*-attitudes in most countries vis-à-vis the social adjustment problems created by colonialism (like exploitation, famines, illiteracy and high mortality in colonial territories like British India), the first industrial revolution (based on machines driven by steam power) and by the first globalization during

²⁴ See Petersmann (n 12); Drahos (n 1) at 17f: ‘Under the current global patent regime developing countries cannot expect to be given any priority in the times of pandemics’.... ‘developing countries should continue to build networks of collaboration among themselves’... ‘Without a manufacturing knowledge base, developing countries will find it hard to escape the deadly consequences of a patent-mediated response to pandemics.’

the second half of the 19th century. The post-war second industrial revolution (based on mass assembly line production driven by electricity) was embedded into domestic economic regulation, competition and social policies in most industrialized countries, notwithstanding the ‘social dis-embedding’ resulting from the global financial crises and economic disintegration since 1929. The ‘embedded liberalism’²⁵ underlying GATT 1947 not only *acknowledged* sovereign rights to regulate ‘market failures’, related ‘governance failures’ and constitutional problems; it also *enabled* and *promoted* welfare states through reciprocal trade liberalization enhancing mutually beneficial division of labour and economic and legal cooperation in producing private and public goods.

WTO law responded to the third industrial revolution of computers and telecommunications by additional, multilateral harmonization of product and production standards, competition and trade remedy rules, liberalization and regulation of services trade, protection of intellectual property rights, and of transnational rule of law through compulsory jurisdiction for settlement of trade disputes through domestic judicial remedies and WTO dispute settlement procedures. WTO law changed the embedded liberalism underlying GATT 1947 in ways reflecting both neo-liberal Anglo-Saxon interest-group politics (eg resulting in the WTO Anti-dumping and TRIPS Agreements)²⁶ and ordo-liberal insistence on rule compliance (eg through the compulsory jurisdiction of the WTO dispute settlement system and the (quasi)automatic adoption of more than 420 WTO panel, appellate and arbitration reports), non-discriminatory conditions of competition (eg as reflected by the non-discrimination and ‘necessity’ requirements in the WTO Agreements on technical barriers to trade and (phyto)sanitary standards, the phasing-out of the Agreement on Textiles and Clothing) and ‘sustainable development’ commitments. Compared with the ‘provisional application’, lack of parliamentary ratification and ‘grandfather exceptions’ of the intergovernmental GATT 1947, the WTO Agreement strengthened the ‘constitutional dimensions’ of WTO law, as illustrated by parliamentary approvals of the WTO Agreement, its incorporation into the domestic legal systems of many WTO members, the separation of legislative, administrative and judicial powers of WTO institutions (cf Article III WTO Agreement), provisions for majority voting (cf Article IX) and for domestic implementation of WTO rules (Article XVI.4), and the compulsory WTO dispute settlement system.

The progressive adjustment of the ‘embedded liberalism’ underlying GATT/WTO law - eg to the emergence of social welfare states²⁷, decolonization²⁸, European economic integration²⁹ and to China’s WTO membership subject to additional commitments incorporated into WTO law through China’s Accession Protocol - needs to be continued in order to render WTO law consistent with the regulatory challenges of globalization, climate change and other SDGs. WTO law does not explicitly refer to climate change. Decisions on greenhouse gas (GHG) emission reductions have to be coordinated in the specialized UN bodies (like the UN Framework Convention on Climate Change: UNFCCC, the International Maritime Organization, the International Civil Aviation Organization), regional and national institutions outside the WTO. Yet, trade and climate rules inevitably interact and must remain consistent and mutually supportive.

²⁵ Cf JG Ruggie, International regimes, transactions and change: Embedded liberalism in the postwar economic order, in: *International Organization* 36 (1982), 379-415.

²⁶ The inconsistencies of anti-dumping laws and practices with non-discriminatory competition rules are widely recognized; they prevented WTO negotiators from agreeing on a Preamble text explaining the economic rationale of the WTO Anti-dumping Agreement. Many competition lawyers express concerns (eg in H Ullrich *et alii*, eds, *TRIPS Plus 20. From Trade Rules to Market Principles*, Springer, 2016) that some anti-dumping and TRIPS rules – whose drafting was dominated by industry lobbyists – offer too much protection stifling competition and innovation.

²⁷ Eg by providing for GATT-consistency of social policies under Articles III, XVI, XIX, XX GATT.

²⁸ Eg by providing in GATT Article XXVI:5,c for easy transition from ‘dependent’ to ‘independent’ GATT membership, Part IV GATT on ‘Trade and Development’, ‘special and differential treatment’ provided for in many WTO provisions.

²⁹ Eg by recognizing sovereign rights to form customs unions and admitting EU membership in the WTO.

The 2015 Paris Agreement on climate change mitigation entered into force in November 2016; it was ratified by 190 Parties (2021). 182 countries plus the EU notified their ‘nationally determined contributions’ (NDCs) by 2019. These voluntary contributions to reduce GHGs differ enormously and remain insufficient. President Trump’s withdrawal of the USA – as the largest economy and second-largest emitter of GHGs – from the Agreement entailed that - during the UN climate conference in Madrid in December 2019 focusing on ‘carbon market systems’ - other major emitters of GHGs (like China, India, Australia) avoided committing to ambitious limitations of GHGs. In January 2021, US President Biden recommitted the USA to join the Paris Agreement and to transform the US into a carbon-neutral economy by 2050. Yet, the lack of effective legal disciplines for NDCs, for the WTO-consistent application of ‘climate change mitigation measures’ or - in case of inconsistencies with WTO law - for WTO exemptions (eg ‘waivers’ granted by the WTO Ministerial Conference), WTO surveillance measures (eg by the WTO Trade Policy Review Mechanism) and for mutually consistent dispute settlement procedures (eg in the context of the UNFCCC and the WTO) risk provoking legal conflicts between WTO rules and climate mitigation policies - unless WTO members can agree on a ‘peace clause’ for climate actions, or on how to determine the ‘likeness’ of competing products based on the amount of carbons used in producing them, and on standards for calculating ‘carbon border adjustments measures’ (CBAMs like border tax adjustments) on the basis of carbon use, carbon emissions, agreed carbon prices and an agreed framework for emissions trading. The current WTO negotiations on limitation of fishery subsidies will have to be followed by, *inter alia*, WTO negotiations on limiting fossil fuel subsidies, non-discriminatory CBAMs and emission trading systems aimed at reducing GHG emissions.³⁰ IEL courses should teach students the regulatory challenges of decarbonizing the global economy by 2050, for instance why CBAMs will be necessary so as to (1) increase carbon prices, (2) reduce carbon emissions, (3) prevent ‘carbon leakage’, (4) induce polluting industries (like steel, aluminium, cement, plastics, aviation, maritime and road transports) and ‘free-riding countries’ to participate in climate mitigation (eg by waiving CBAMs among members of the same ‘carbon club’), and (5) maintain non-discriminatory conditions of competition (‘trade neutrality’).

The needed adaptations of WTO rules are facilitated by the ‘systemic interpretation requirement’ of customary international law (as codified in Article 31.3(c) VCLT) and by the compulsory WTO dispute settlement system; both call for clarification of the WTO’s sustainable development objectives in conformity with the 17 SDGs accepted by UN member states. The 2030 Agenda for Sustainable Development aims at implementing its 17 SDGs (like overcoming poverty, hunger and global warming, protecting health, education, gender equality, access to water, sanitation and clean energy, urbanization, the environment, human rights and social justice) by ‘localizing the SDGs’ so as to empower local institutions, actors and civil society support. As the SDGs aim at reconciling ‘climate mitigation measures’ with other sustainable development objectives (like poverty reduction, sustainable agriculture, sustainable use of marine resources and terrestrial ecosystems) and with trade rules, they may offer ‘relevant context’ for interpreting WTO rules, for ‘balancing’ competing policy measures, for evaluating NDCs under the Paris Agreement, and for citizen-oriented WTO governance reforms. This is confirmed by the recent climate litigation against governments and oil companies (like the Anglo-Dutch Shell company) prompting national courts (eg in Germany, France and the Netherlands) to hold governments and corporations accountable for reducing carbon dioxide emissions and recognizing human and constitutional rights to protection of the environment.³¹ The SDGs and related ‘social corporate responsibilities’ are likely to influence also investor-state arbitration and related constitutional concerns that the ‘outsourcing’ of investor-states disputes to commercial arbitrators risks undermining the public law dimensions of such investment disputes. The US disruption of the WTO dispute settlement system continues to disrupt also compliance with WTO law; it enhances the risks of future ‘trade wars’ caused by unilateral introduction of CBAMs and related disputes.

³⁰ For details see: J Munro, *Emission Trading Schemes under International Economic Law* (OUP 2018); Petersmann (n 7), chapter VIII.C.

³¹ Cf Petersmann (n 7), chapter VIII.C.

2. IEL and Economics: 'Enlightenment Now'?

Many areas of IEL (like trade and competition laws) are strongly influenced by economics like the 'theory of optimal intervention' justifying GATT's legal ranking of alternative trade policy instruments and subsidies in terms of their economic efficiency so as to promote mutually welfare-enhancing, legal harmonization reducing transaction costs and political conflicts – without limiting national sovereignty over non-discriminatory, domestic regulation of the economy and polity. IEL cannot be understood without good knowledge of economics. Yet, many politicians (like former US President Trump) and 'critical legal theorists' refuse to engage with economic theories (eg on why trade has been instrumental for lifting billions of people out of poverty over the past decades), for instance based on their mercantilist beliefs, self-interests or claims that the correctness of economists' models always 'depends on a number of assumptions not directly addressed in them'.³² The claim of 'critical legal theories' (eg as represented by Koskenniemi) 'that law is incapable of providing convincing justifications to the solution of normative problems'³³, cannot be derived from descriptions of 'the politics of indeterminate international law' transforming lawyers into moralists, nor from Koskenniemi's critique of liberalism, human rights and economics³⁴:

- The ethical commitment (eg underlying UN HRL, the 17 SDGs and their 169 agreed policy targets) to inclusive reasoning, humanism and emancipation requires refining (eg 'falsifying') our understanding of the world through evidence-based science (eg open debates with 'conjectures and refutations' as explained by K. Popper) accepting our cosmopolitan responsibilities for 'transforming our world' in order to realize the agreed SDGs. The past technological, economic and 'human rights revolutions' enabled progressive realization of the American revolutionary ideals of 'life, liberty and pursuit of happiness' and the French revolutionary ideals of '*liberté, égalité et fraternité*', even if the remaining social injustices (like unequal distribution of power and wealth) are reminders of the imperfections of all political and legal struggles.
- Empirical evidence demonstrates that democratic constitutionalism, deliberative democracy and 'institutionalization of public reason' (eg in independent regulatory agencies like central banks, competition, public health and environmental agencies) not only enable, but also require going beyond Koskenniemi's semantic and interpretative 'argumentative games' with indeterminate legal rules. Competing legal and social science doctrines are likely to remain controversial; yet, such controversies can be reduced by democratic, legislative, administrative, judicial and other agreed procedures providing for authoritative decision-making, including multilevel

³² M Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (Asser Institute 2020), at 17. According to Koskenniemi, 'the cynicism of the "system" lies in its insufficient scepticism' (at 31); yet Koskenniemi's radical skepticism about values and reform proposals - apart from pleading for 'truthfulness' and emancipation - can also be seen as a refusal to clarify public reason and change harmful practices by engaging with the social and natural sciences underlying the SDGs.

³³ Cf M Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005), at 69. Koskenniemi's focus on discretionary political decision-making - and his contempt for liberal theories of justice ('the liberals are my enemies') justifying the need for democratic 'institutionalization of public reason' (J Rawls) and of human rights - resemble the reasoning of Carl Schmitt for political decision-makers in 'exceptional situations'. For a criticism see: JL Dunoff, *From Interdisciplinarity to Counterdisciplinarity: Is there Madness in Marti's Method?* in *Temple International & Comparative Law Journal* 27 (2013), 309-338.

³⁴ Koskenniemi's emphasis on the open-ended nature of international legal discourse and of the purposes and meaning of legal rules, and his endless criticism of 'false universalism' (like human rights and the fight against impunity which he describes as 'hegemonic maneuvers') present themselves as 'Socratic dialogues' - without an academic theory of justice, doctrinal or institutional reform proposals, or practical proposals for improving social justice, in view of his emphasis on the inescapably situated, contextual and contested nature and politics of legal claims, arguments and related structural biases favouring certain actors and outcomes. His proposed 'culture of legal formalism' is less about finding 'correct answers' in legal doctrine and professional practices than about protecting adversarial processes of legal argumentation among juridical equals.

constitutionalism protecting human rights, multilevel governance and third-party adjudication of disputes among member states. If ‘entropy, evolution and information’ can be identified as the ‘enlightenment challenges’ of our modern human condition³⁵, the SDG of a ‘global partnership for sustainable development... with the participation of all countries, all stakeholders and all people’ deserves support as a humanitarian ‘enlightenment strategy’ aimed at reducing social injustices, intergovernmental abuses of power and non-inclusive bad faith governance in authoritarian UN member states.

- Like other social sciences, the history of economic thought has evolved enormously, eg from mercantilist focus on the welfare of rulers and of merchants to welfare economics aimed at maximizing general consumer welfare, and to constitutional economics aimed at protecting ‘development as freedom’ and empowerment of human capacities. In order to promote the SDGs, lawyers should accept moral responsibilities for criticizing the hegemonic purposes of US neo-liberalism and totalitarian state-capitalism and the status quo bias of intergovernmental power politics. European economic integration law offers empirical evidence for how ‘multilevel economic constitutionalism’ can promote human rights, social welfare and ‘democratic peace’ and serve as a model for realizing SDGs also beyond Europe. The acceptance of the compulsory WTO dispute settlement system by China and Russia confirms that ‘constitutional reforms’ (like independent third-party adjudication of economic disputes) can successfully constrain intergovernmental power politics.

IEL classes should encourage students to explore whether the UN SDGs offer more coherent benchmarks for evaluating economic and environmental measures than neo-liberal focus on ‘Kaldor-Hicks efficiency’. For instance, should the WTO ‘sustainable development’ objectives and related WTO exceptions (eg for national health and environmental protection measures) be interpreted in conformity with the universally accepted SDGs for evaluating whether national human rights protection, climate change mitigation measures, ‘green subsidies’, regulatory restrictions of GHG emissions and other ‘NDCs’ under the 2015 Paris Agreement are consistent with world trade rules and with the ‘proportionality balancing’ of competing policy objectives required under Article XX GATT?

3. *Are Human Rights Part of IEL?*

As the reality of ‘regulatory competition’ is driven by conflicting value preferences, IEL researchers should discuss which values can justify IEL. Adam Smith’s invention of liberal economics in his *Inquiry into the Nature and the Causes of the Wealth of Nations* (1776) was preceded by his *Theory of Moral Sentiments* (1759), in which Smith explored the human nature of seeking mutually beneficial exchanges in social interactions. Smith’s justification of mutually beneficial trade by the advantages of specialization and division of labour has been supplemented by numerous additional theories (eg focusing on ‘comparative’ rather than ‘absolute advantages’, accumulation of financial and human capital, scientific inventions, legal preconditions for social welfare states, market competition as decentralized information, coordination and sanctioning mechanisms). The social inequalities inside and among states demonstrate that macro-economic ‘Kaldor-Hicks efficiencies’ do not ensure social justice. As globalization also promotes interdependencies, governments increasingly emphasize the need for diversifying or ‘de-coupling’ global supply chains and for balancing efficiency gains against national vulnerabilities enhanced by globalization.

³⁵ Cf S Pinker, *Enlightenment Now. The Case for Science, Reason, Humanism and Progress* (Penguin 2018), at 14ff. Entropy (eg disorder in closed systems) can be transformed into more orderly, open systems through evolution and better information; ‘for all the flaws in human nature, it contains the seeds of its own improvement, as long as it comes up with norms and institutions that channel parochial interests into universal benefits’ (at 28).

European economic law recognizes common market freedoms and civil, political, economic, social and cultural rights as constitutional foundations of (inter)national economies. Arguably, HRL and the SDGs prioritize respect for human dignity by satisfying basic human needs so as to enable ‘development as freedom’ (A Sen) and self-realization of one’s human capacities.³⁶ The ordo-liberal arguments for limiting ‘market failures’³⁷, ‘governance failures’³⁸ and ‘constitutional failures’³⁹ are likewise grounded in human rights arguments for protecting equal liberties, social justice and transnational rule of law as ‘principles of justice’ justifying the ‘basic structures’ of legal systems.⁴⁰ Democratic self-limitation of abuses of public and private power by means of constitutional rules of a higher legal rank and institutional ‘checks and balances’ respond to the insights of behavioural economics: bounded rationality can be reduced by changing the legal incentives for decision-making and encouraging (‘nudging’) individual economic and social actors to autonomously do things that are good for them and for society without governments compelling them to do so.

IEL confirms the methodological insight that social sciences exploring autonomous, social behaviour motivated by ideas, beliefs and passions are confronted with much more uncertainty than natural sciences studying physical, chemical and biological facts. The democratic objective of institutionalizing inclusive ‘public reason’ in order to protect the human rights of all is different from natural science conceptions of ‘truth’ open to ‘falsification’. Ordo-liberalism explains why economic systems cannot be understood without the humanities explaining the close interactions between social, economic, political and legal orders. The perennial human struggles for procedural and substantive ‘justice principles’ - as illustrated by statues of *justitia*, the blindfolded Roman goddess of law and justice (armed with a sword symbolizing power and will, and with a balance symbolizing reason and justice for peaceful settlement of disputes) in courthouses all over the world - offer empirical evidence that utility maximization based on cost-benefit analyses is only one among other motivations for social conduct. The 2030 UN Sustainable Development Agenda reflects universal rejection of a money-driven, neo-liberal ‘Washington consensus’ in favour of a human rights-centered ‘Geneva consensus’, even if it does not openly embrace the ordo-liberal ‘Brussels consensus’ on embedding economic markets into multilevel democratic constitutionalism as in European economic law. Most UN and WTO diplomats prioritize state-centered intergovernmentalism, just as economists (like D Rodrik’s claims concerning a ‘globalization paradox’⁴¹) and politicians outside Europe disregard the ‘constitutional failures’ necessitating multilevel constitutionalism.

The future relationships between the bilateral management approaches characteristic for China’s Belt and Road networks, the neo-liberal economic multilateralism dominating many US trade agreements concluded by republican US Presidents (like the US-Mexico-Canada FTA), Europe’s regional economic constitutionalism, and regional FTAs in Africa, Asia and Latin-America are bound to evolve dynamically through ‘regulatory competition’, ‘trial and error’ (eg in coping with climate change and global health pandemics) and power politics (like hegemonic ‘trade wars’ between China and the USA, military aggression by Russia). Teaching IEL should enable researchers to better understand why non-discriminatory ‘regulatory competition’ is consistent with the ‘embedded liberalism compromise’

³⁶ Cf Petersmann (n 6), chapter III.

³⁷ Like abuses of power, cartel agreements, adverse external effects, social injustices and information asymmetries.

³⁸ Like wasteful and discriminatory trade protectionism and inflationary money policies leading to unjust redistribution of domestic revenue.

³⁹ Like totalitarian disregard for human rights in China and Russia and US President Trump’s initiation of illegal trade wars and executive ‘emergency governance’ without effective parliamentary and judicial review.

⁴⁰ Cf Petersmann (n 7), chapter III; Petersmann (n 6), chapters II and III.

⁴¹ Cf D Rodrik, *The Globalization Paradox. Democracy and the Future of the World Economy* (WW Norton & Company 2011) and his unconvincing ‘incompatibility proposition’ that we cannot have national sovereignty, democratic politics and global economic integration at once (cf pp 200-201); the EU’s multilevel democratic constitutionalism does protect national sovereignty (eg in terms of democratic capacity to protect national and international PGs), democratic politics and rules-based, global economic integration at once, as discussed in Petersmann (n 7), chapter IV.E.

underlying UN and WTO law as long as UN and WTO legal obligations are respected. As both China's disregard for arbitration under the UNCLOS⁴² and the US destruction of the WTO Appellate Body were legally arbitrary: explaining the systemic importance of 'access to justice', independent third-party adjudication of economic disputes and multilevel judicial protection of transnational rule of law for realizing the SDGs must remain a central task of teaching IEL and of preventing further 'governance failures' and 'constitutional failures'.

Explaining the need for developing IEL and HRL in mutually supportive and legally consistent ways can also contribute to educating non-lawyers about the systemic importance of IEL for realizing the universally agreed SDGs in a world of scarce resources, of short-sighted power struggles and the 'anthropocene' – ie our new global context of humans having become a geophysical force provoking climate change, massive biodiversity losses and other geological changes that risk running out of human control. Arguably, the global climate change, health pandemics and related governance crises confirm the need for global constitutional approaches limiting 'governance failures' so as to prevent the human destruction of our environmental system.⁴³ European law illustrates why the 'normative pull' of human rights depends on their 'normative push', ie their effective legal implementation through (1) constitutional law, (2) legislation, (3) administration, (4) adjudication, (5) democratic support and 'public reason', (6) international treaties, (7) international institutions and (8) 'secondary law' of international institutions. In multilevel governance of PGs, domestic governance failures (eg in protecting human rights and rule-of-law, 'moral hazards' prompting opportunistic rulers to default on international debt obligations) can often more easily be overcome if adversely affected citizens can invoke and enforce precise, international rules inside states and thereby constrain power politics (eg by judicial remedies of citizens in national and European courts). Such multilevel legal, democratic and judicial remedies have no equivalent in many authoritarian UN member states (like China and Russia) invoking UN principles (like 'sovereign equality of states', 'non-intervention' into domestic affairs) as 'shields' against external criticism of their domestic suppression of human rights (eg of political critics in Russia) and minority rights (eg of Uighur and Tibetan minorities in China, people in Hong Kong).

The decrease in the number of constitutional democracies suggests that 'constitutionalizing' the UN system may remain a political utopia. Yet, 'democratic alliances' of countries should continue their 'normative push' for constitutional reforms, eg following the successful introduction of worldwide compulsory settlement of disputes through the 1994 WTO Agreement and its Dispute Settlement Understanding for multilevel third-party adjudication. IEL courses should explain why 'interdisciplinary agnosticism' of 'critical legal theories' impedes legal responses to the technological transformations of the international economy and to the perennial tasks of legally limiting 'market failures' (eg through competition, social and environmental rules) and 'governance failures' (eg through tax reforms, protection of PGs and related human rights).

⁴² China's rejection of the arbitration award of 12 July 2016 under UNCLOS Annex VII was driven by China's maritime expansion disregarding its legal and judicial obligations under the UNCLOS; see the Permanent Court of Arbitration Case No 2013-19 in the matter of the South China Sea Arbitration (*The Republic of the Philippines v The Peoples Republic of China*). The award is published on the PCA website at www.pccases.com/web/view/7.

⁴³ Cf LJ Kotzé LJ, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016). While transition to a net-zero carbon emissions economy by 2050 appears technologically possible, it requires far-reaching changes also in agricultural, food, environmental, political and social policies; cf. *Making Mission Possible: Delivering a Net-Zero Economy* (Energy Transition Commission September 2020). In contrast to the preceding 'Holocene epoch', which was characterized by relative stability in ecological conditions, the Anthropocene risks disrupting the 'Earth system' and international legal regulation of socio-ecological issues. Do the interactions between human 'rule of law' and 'rule of nature' (eg through natural catastrophes) require not only 'duties of care', but also more inclusive decision-making procedures, as proposed by advocates for 'constitutionalizing the anthropocene'? Should legal duties to protect human rights have priority over legal duties to protect non-human parts of nature, especially in legal systems (like UN law) which fail to protect human rights effectively?

4. 'Transforming our World' through IEL?

Since 1950, European law was progressively transformed through regional HRL and economic integration law creating ever more 'spill-overs' for additional cooperation among the now 47 member states of the Council of Europe. The 2030 UN Agenda for Sustainable Development aims at 'transforming our world' through multilevel protection of human rights and the SDGs. Realizing the SDGs requires 'transforming' also the UN and WTO legal systems and strengthening trade, investment and human rights adjudication as preconditions for maintaining transnational rule of law in the transformative processes that are bound to provoke economic, humanitarian, legal and governance conflicts (eg over protecting future 'climate refugees' and endangered environmental resources). Without empowerment and participation of civil societies, implementation of the SDGs through legislative, administrative, judicial, economic, democratic and technological reforms in the 193 UN member states risks lacking 'political drivers', democratic support, vigilant guardians and self-interested defenders of rule of law and of 'enlightenment now'. Citizen-driven 'struggles for justice' and their protection by democratic and judicial institutions remain the most powerful driver for democratic reforms.

Yet, will rules-based UN, WTO and other IEL reforms be possible in the 'Chinese century' with an increasingly authoritarian government in China resisting protection of human rights, suppressing transparent information (eg on the outbreak of the Covid-19 health pandemic in the city of Wuhan in 2019), supporting authoritarian dictatorships also outside China (like Iran, North Korea and Myanmar), and with China's aggressive sanctions in response to human rights criticism (eg prompting the European Parliament to 'freeze' ratification of the 2020 EU-China Agreement on Investments)? Will neo-liberal interest group politics push Anglo-Saxon countries to pursue more nationalist foreign policy agendas disregarding multilateral treaties protecting PGs? Will the African FTA among 54 African countries succeed in expanding mutually beneficial trade and rule of law inside Africa? Can the necessary decarbonization and digitalization of the global economy succeed without disrupting multilateral treaty systems if multilateral dispute settlement systems are increasingly disregarded? Can public health systems continue relying on private pharmaceutical companies without stricter controls of abuses of patent rights and without better protection of public health as a global PG also in poor countries without proper infrastructures (like local capacities to produce pharmaceuticals for tropical diseases)?

Future textbooks and university classes on IEL will be faced with many new regulatory challenges that cannot be exhaustively discussed in one single textbook or seminar. In order to show students the 'woods behind the trees' and explain the 'constitutional problems' undermining UN and WTO governance, teaching IEL should focus on the 'basic legal structures' of IEL and of multilevel governance aimed at protecting the SDGs, including the universal recognition in the 2030 UN Sustainable Development Agenda (eg para. 9) that 'democracy, good governance and the rule of law ... are essential for sustainable development'. Yet, is cosmopolitan democracy a politically realistic strategy beyond Europe? Is it undermined by the 'rational ignorance' of local citizens rejecting - also inside democracies like Britain and Switzerland - multilevel governance in European institutions? Does artificial intelligence reduce the information problems of economic markets and democracies by enabling 'global internet governance' based not only on 'public reason' of local citizens, but incorporating also additional information flows (eg from global biological and environmental systems)? Which communities are relevant and legitimated for answering such 'IEL challenges'? Teaching IEL should conclude with 'Socratic questions' rather than with 'pretence of knowledge'; it should emphasize the need for protecting human rights and 'open societies' designing IEL in humane and cosmopolitan ways without justifying dictatorial regimes for 'survival governance'.

