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The UN sustainable development agenda and rule of law: how to limit global governance failures and geopolitical rivalries?

Ernst-Ulrich Petersmann



European University Institute  
**Department of Law**

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LAW: HOW TO LIMIT GLOBAL GOVERNANCE FAILURES AND  
GEOPOLITICAL RIVALRIES?**

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## **Abstract**

The 2030 UN Sustainable Development Agenda defines its 17 Sustainable Development Goals (SDGs) in terms of human rights, rule of law and multilevel governance of related public goods. Global governance failures challenge the ‘embedded liberalism’ and rule-of-law principles underlying UN and WTO law. WTO rules promoting non-discriminatory ‘regulatory competition’ among neo-liberal Anglo-Saxon countries, China’s totalitarian state capitalism, Europe’s multilevel constitutionalism and ‘third world conceptions’ of international law are disrupted by geopolitical rivalries. This contribution explains why the SDGs cannot be realized without multilevel legal and judicial restraints on ‘market failures’ (like environmental pollution) and ‘governance failures’ (like hegemonic trade wars, US disruption of the WTO dispute settlement system). As long as international law is conceived as power politics privileging domestic interest groups, the cosmopolitan SDGs risk being undermined. Protecting human rights and de-carbonizing economies require democratic struggles for holding governments more accountable, as illustrated by citizen-driven environmental litigation in Europe and by disregard for SDGs by authoritarian and populist governments.

## **Keywords**

Climate change; constitutionalism; embedded liberalism; GATT; human rights; rule of law; sustainable development; UN; WTO.

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## I. The UN Sustainable Development Agenda and Global Governance Crises

At the 70th anniversary of the UN in 2015, a summit meeting with the heads of government of some 150 UN member states adopted the ‘2030 Agenda for Sustainable Development’ aimed at ‘Transforming our World’ in order to ‘realize the human rights of all’, ‘to end poverty and hunger everywhere’, and to implement 17 agreed sustainable development goals (SDGs) over the next 15 years with ‘the participation of all countries, all stakeholders and all people’.<sup>1</sup> The Resolution explicitly recognized (in para. 9) that ‘democracy, good governance and the rule of law ... are essential for sustainable development’. Universal agreement on this ambitious program for a ‘Global Partnership for Sustainable Development’ was rendered possible by the fact that - notwithstanding agreement on SDGs and on 169 more specific policy targets - the legally non-binding UN General Assembly Resolution neither prescribes precise rights and obligations nor specifies the legal instruments, their legal ranking, sequencing and other legal changes necessary for implementing the SDGs. Similarly, the 2015 Paris Agreement on climate change mitigation, ratified by 190 countries (2021), relies on ‘nationally determined contributions’ (NDCs) and science-based governance indicators without prescribing the precise content of NDCs and policy instruments (like carbon taxes, phasing out of coal subsidies), which need to be progressively clarified.

Since 2015, the realities of climate change, the information and communication technology (ICT) revolution, global health pandemics and the task of providing vaccines to all people increased the regulatory challenges and the need for more precise legal implementation commitments. For example, the European Union (EU) proposals of 14 July 2021 for introducing carbon taxes aimed at reducing greenhouse gas (GHG) emissions, international calls for concluding a World Health Organization (WHO) pandemic treaty on reducing the risk of disease outbreaks (eg by pathogens jumping from animals to humans) and disease spread, the World Trade Organization (WTO) negotiations on limiting harmful fishery subsidies, and proposals (eg from India and South Africa) to temporarily waive intellectual property protections related to Covid-19 health technologies aim at additional UN and WTO agreements at a time when both UN and WTO governance remain confronted with geopolitical conflicts. The 25th Conference of the Parties (COP 25) to the UN Framework Convention on Climate Change (UNFCCC) in November 2019 acknowledged that the world was not on track to meeting the Paris Agreement’s long-term goal of holding the increase in global average temperature to well below 2°Celsius compared to pre-industrial levels, preferably to about 1.5°Celsius. In 2020/21, the Covid-19 health pandemic killed more than 3 million people; it made realizing the SDGs more difficult by, inter alia, increasing the number of people living in extreme poverty by more than 120 million, reducing economic growth in many countries by ‘lockdowns’ and slow rollouts of vaccination, enhancing foreign debt and further limiting policy space. On 12 May 2021, the Independent Panel for Pandemic Preparedness & Response published its highly critical findings that a swift, collaborative response to the 2019 Covid-19 outbreak in China could have prevented it becoming a global catastrophe in 2020; the Panel’s recommendations include setting up a Global Health Threats Council, additional powers of the WHO to investigate and publish information about disease outbreaks without government approval, and new funding for an International Pandemic Financing Facility.<sup>2</sup> As the SDGs and the goals of the Paris Agreement cannot be achieved without more precise international regulation, additional environmental protection commitments (like limitations of GHG emissions, fossil fuel subsidies, fishery subsidies) and leadership by the G20 countries become ever more urgent. For instance, similar to the establishment of the Financial Stability Board by the G20 countries in response to the 2008 financial crisis and to proposals for a G20 Global Health Threats Council for coordinating global health pandemic responses,

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<sup>1</sup> *Transforming Our World: The 2030 Agenda for Sustainable Development* (UN 2015); the citations are from the Preamble of the Declaration (UN General Assembly Resolution A/RES/70/1) adopted on 25 September.

<sup>2</sup> *Covid-19: Make it the Last Pandemic*, The Independent Panel for Pandemic Preparedness and Response, May 2021. The Panel criticizes the International Health Regulations of the WHO and proposes numerous reforms.

the climate, biodiversity and other environmental crises could justify additional G20 institutions coordinating multilevel governance of global public goods (PGs). Yet, political and legal views on how to implement the SDGs in conformity with UN and WTO law differ enormously. In preparation of the 26th Conference of the Parties to the UNFCCC at Glasgow in November 2021, UN Secretary-General Guterres called on all UN member states to abolish fossil fuel subsidies, phase-out coal power plants, and enforce the polluter-pays principle with the aim of decarbonizing economies by 2050 (ie shifting from fossil fuels like coal, oil and natural gas to zero-carbon energy systems based on solar, wind, hydro, geothermal, biomass and nuclear power). As more than 80% of the increase in carbon dioxide emissions up to 2050 are likely to come from less-developed countries (notably China and India), leadership and assistance by developed countries (notably the biggest carbon emitters like Australia, Canada, the EU, Japan, Russia, UK and USA) for less-developed countries in the coming years will be crucial. Will the necessary adjustments of UN and WTO law to the global climate, health and governance crises be possible in spite of the geopolitical rivalries and increasing number of natural, political and human disasters revealing a breakdown of the ‘social contract’ (eg in countries like Afghanistan, Haiti, Lebanon and Venezuela) and the limits of international solidarity?

This contribution proceeds from the fact that global integration transforms ever more national into transnational ‘aggregate PGs’ (like public health, security, climate change mitigation, transnational rule of law) which no state can protect without international law and institutions. Yet, the ‘embedded liberalism’ underlying UN and WTO law - and its evolution from a neo-liberal ‘Washington consensus’ to a more human rights-based ‘Geneva consensus’ as expressed in the SDGs - fail to effectively protect transnational rule of law as a restraint on geopolitical and regulatory competition among WTO members with diverse legal, political and economic systems and policies (section II). Europe’s constitutional approaches to human rights law (HRL), common market law, monetary integration and common foreign and security policies suggest that - without ‘constitutionalism’ as a reasonable self-commitment to rules, institutions and principles of justice of a higher legal rank aimed at limiting ‘bounded rationality’ and social conflicts in governance of PGs - human rights, rule of law and the SDGs cannot be effectively protected (section III).<sup>3</sup> Reforming world trade and investment law and their compulsory dispute settlement systems is of crucial importance for ‘transforming our world’, decarbonizing economies and limiting environmental pollution and other abuses of public and private power (section IV).<sup>4</sup> By emphasizing the value differences between neo-liberal Anglo-Saxon, totalitarian Chinese, ordo-liberal European and ‘third world’ conceptions of international economic law (IEL), this article contributes to the literature on divergent national and regional approaches to international law and the need for embedding multilevel governance of PGs in theories of ‘constitutional pluralism’.<sup>5</sup> Its main conclusion

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<sup>3</sup> Notwithstanding the diversity of national constitutional systems, constitutional principles are increasingly extended to the law of international organizations and invoked in multilevel governance and adjudication - such as human and constitutional rights; democratic self-determination by the people as constituent power; national sovereignty; limited delegation of power; proportionality of their exercise; rule of law; separation of - and ‘checks and balances’ among - legislative, executive and judicial powers; access to justice and judicial remedies; multilevel judicial cooperation based on principles of ‘judicial comity’; constitutional restraints on executive emergency powers; legal accountability of independent regulatory agencies; multilevel governance through international organizations; principles of subsidiarity and federalism; cf E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems of International Law* (Hart 2017).

<sup>4</sup> Just as UN, WTO and EU law introduced transformative legal and institutional changes, so does realizing the SDGs require new multilevel governance rules, institutions and ‘systemic interpretations’ limiting path-dependent neo-liberalism and authoritarian state-capitalism; cf E.U.Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022).

<sup>5</sup> On how international lawyers in different states often pursue different conceptions of international law see: A.Roberts, *Is International Law International?* (OUP 2017). On the need for extending constitutionalism to the ‘primary’ and ‘secondary law’ of international organizations constituting, limiting, regulating and justifying multilevel governance of functionally limited public goods see E.U.Petersmann, *Constitutionalism and international Organizations*, in: *Northwestern Journal of International Law and Business* 17 (1996), 398-469. The need for functionally limited ‘treaty constitutions’ for multilevel

is that the human rights- and rule of law-objectives of the UN Development Agenda require rules-based, democratic ‘network governance’, judicial safeguards of rule of law and democratic resistance against authoritarian power politics advocating an ‘international law among states’ without protecting human and democratic rights (section V).

## **II. UN/WTO Law and State-centered ‘Embedded Liberalism’ Fail to Protect the SDGs**

The term ‘embedded liberalism’ was first used for describing the dual objectives of the General Agreement on Tariffs and Trade (GATT 1947) to liberalize international trade and protect domestic political autonomy (eg national sovereignty to choose legal and political systems and regulate markets and their social adjustment problems by non-discriminatory regulations).<sup>6</sup> It can be used also for the ‘sovereign equality of states’ and human rights guarantees of UN law protecting individual and democratic autonomy inside and among UN member states. UN HRL reflects the historical insights that peaceful cooperation in and among societies requires moral, legal, democratic and economic order based on mutually coherent principles of justice supported by citizens, human rights and respect for human dignity. Both UN and WTO law provide for limited delegation and separation of legislative, executive and judicial powers subject to legal and judicial restraints of the ‘sovereign equality’ of UN and WTO member states aimed at protecting non-discriminatory competition inside and among national polities and economies, for instance by

- legal harmonization and ranking of economic policy instruments according to their economic efficiency (eg in the law of the International Monetary Fund, GATT and WTO law);
- non-discrimination and proportionality requirements limiting governmental restrictions of human rights and economic freedoms (eg prohibitions of gender, racial and economic discrimination); and
- multilevel legal and judicial remedies at national and international levels of governance (like private property rights, access to justice).

From constitutional citizen perspectives like that adopted by some of the founding fathers of GATT 1947 (notably US Secretary of State and Nobel Peace Prize laureate Cordell Hull) and of the post-1950 European integration treaties, the self-imposed UN and GATT legal constraints responded to the ‘bounded rationality’ and past ‘governance failures’ to limit welfare-reducing abuses of policy powers (like the trade protectionism enacted in the 1930 US Smoot-Hawley Tariff Act triggering worldwide economic crises) and protect equal freedoms of economic actors beyond national borders.<sup>7</sup> The multilevel legal and judicial GATT/WTO safeguards of non-discriminatory trade competition based on transnational rule-of-law complement the ‘cosmopolitan constitutionalism’ underlying HRL by ‘institutionalizing public reason’ for designing and interpreting domestic legal systems, UN and GATT/WTO rules in mutually beneficial, legally consistent ways.

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governance of transnational PGs continues to be neglected; cf A.Peters, Constitutional Theories of International Organizations: Beyond the West, in *MPIL Research Paper Series* 2021-19.

<sup>6</sup> Cf J.G.Ruggie, International regimes, transactions and change: Embedded liberalism in the postwar economic order, in: *International Organization* 36 (1982), 379-415.

<sup>7</sup> Cf K.Dam, Cordell Hull, the Reciprocal Trade Agreements Act and the WTO, in: E.U.Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (OUP 2005), 83-98. On constitutionalism as a response to human preferences for ‘monocausal algorithms’ (like monotheism, monarchies, market fundamentalism) see Petersmann (n 4), chapter 5.

## 1. *Prioritization of state sovereignty over human rights in legal practices*

All legal systems are characterized by dialectic interactions among normative legal rules, principles and institutions and legal practices influenced by power politics and self-interests of legal actors. The UN Charter had been adopted in the name of ‘We the Peoples of the United Nations’ so as, inter alia, ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and from other sources of international law can be maintained’ (Preamble). Yet, UN membership remains limited to states. State-centered definitions of UN ‘principles’ - eg in Article 2 focusing on ‘sovereign equality of all its Members’, prohibition of the use or threat of force, peaceful settlement of disputes, international cooperation, non-intervention into domestic jurisdictions - dominate UN legal practices. The 1945 UN Charter included seven references to human rights. The Universal Declaration of Human Rights (UDHR), approved in the 3rd UN General Assembly by 48 UN member states without opposition (albeit subject to 8 abstentions), listed civil and political liberties, democratic participatory rights, economic, social and cultural rights with due respect for the diversity of views on how to justify the universal recognition that

‘(a)ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’ (Article 1 UDHR).

The ‘inherent dignity’ and ‘equal and inalienable rights of all members of the human family’ proclaimed as ‘the foundation of freedom, justice and peace in the world’ (Preamble UDHR) continue being construed in different ways as

- 1) ‘inherent moral birth rights’ and ‘justice claims’ (eg to have rights) of every human person derived from human conscience, other common humanity values (like responsibility, moral powers for conceptions of a good life and social justice) and universally shared responses to what the Preamble describes as ‘disregard and contempt for human rights’ (eg during the preceding World Wars, Nazi dictatorship and holocaust) that resulted ‘in barbarous acts which have outraged the conscience of mankind’;
- 2) deriving from ‘reasonable free good will’ respecting human dignity (eg in the Kantian sense of a ‘categorical imperative’) and acknowledging the moral need for human rights, ‘cosmopolitan international law’ and an international federation of liberal republics protecting equal freedoms and ‘democratic peace’;
- 3) moral rules deriving from the ‘golden rule’, reciprocity and agreed prohibitions of discrimination (eg in Article 2 UDHR protecting human rights ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’);
- 4) moral ‘natural rights’ deriving from respect for human dignity in the sense of ‘free’ and ‘full development of his personality’ (Articles 22, 26, 29 UDHR) and human capabilities (such as life, health, reason, conscience, etc) and basic human needs;
- 5) legal human rights universally recognized by all 193 UN member states in, inter alia, the UN Charter, UN and regional human rights agreements, national Constitutions and other legal acts implementing the moral human rights recognized in the UDHR; or as
- 6) political, participatory human rights recognized in UN member states, notably by democratic institutions in constitutionally restrained ‘deliberative democracies’ acknowledging the ‘co-originality’ (J. Habermas) of individual and democratic autonomy.<sup>8</sup>

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<sup>8</sup> For a discussion of diverse human rights conceptions and philosophies see J.Morsink, *Inherent Human Rights. Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press 2009); A.Follesdal *et al.* (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (OUP 2014).

The disagreements underlying UN HRL (eg among China, the EU, Islamic countries, the USA) and the hegemonic self-interests of the veto-powers in the UN Security Council entailed that the legal relationships between state sovereignty, democratic self-determination and human rights remain contested among UN member states. Like previous UN resolutions (eg on a ‘New International Economic Order’: NIEO), also the UN Sustainable Development Agenda fails to provide for effective democratic, legal and judicial remedies of citizens. Recent power politics (like Russia’s annexation of parts of Ukraine) confirms that neither the UN Charter nor general international law offer ‘constitutional rules’ effectively limiting abuses of power and protecting human rights. Moreover, human rights are ‘not enough’ for protecting the SDGs, for example because HRL protects legal ‘status equality’ of human beings without guaranteeing the rules, democratic institutions, resources, goods and services necessary for satisfying popular demand and essential needs of citizens, which depend on constitutional, economic, social and other legal rules and institutions (like economic markets supplying consumers with needed private goods, democratic ‘political markets’ and governments providing PGs).<sup>9</sup> In contrast to the EU Charter of Fundamental Rights (EUCFR) as incorporated into the 2009 Lisbon Treaty on European Union (TEU), the 1966 UN human rights conventions on civil and political rights (ICCPR) and economic, social and cultural rights (ICESCR) do not include legal guarantees of market freedoms (like freedom of contract, freedom of profession, freedom of trade), private property and other legal guarantees (like monetary stability) for mutually beneficial division of labor, private trade, competition and innovation. As each UN member state remains sovereign to decide which UN human rights conventions it wants to ratify and implement in its domestic legal system, many UN member states have not ratified - or not effectively implemented - UN and regional human rights conventions. The current geopolitical, environmental and public health crises and social inequality reveal systemic failures of UN and WTO power politics. UN law - even though it promoted decolonization, ‘human rights revolutions’, ‘international economic law revolutions’ and development assistance all over the world - has not effectively empowered citizens by protecting human rights, rule of law and other SDGs against abuses of public and private power in most UN member states. UN legal practices prioritize state sovereignty and intergovernmental power politics over effective protection of human and democratic rights, the SDGs and related PGs like public health and protection of the environment. Hegemonic governments (eg in China, Russia, the USA under President Trump) abuse international rules for intergovernmental power politics promoting domestic self-interests (like protecting their power, policy discretion and interest groups); they avoid ‘constitutional constraints’ like parliamentary and judicial ‘checks and balances’ limiting executive discretion. UN HRL fails to effectively protect human rights in most authoritarian states.

## **2. *State-centered ‘embedded liberalism’ fails to protect the SDGs***

The drafters of the UDHR were driven by a shared vision for ‘cosmopolitan justice’ perceiving all human beings as members of the same family of mankind - rather than by national state interests and negotiations based on reciprocity. UN HRL promoted universal recognition of moral, political and legal human rights and related struggles for justice (like decolonization, racial and gender equality). UN law was less successful in institutionalizing multilevel, legislative and judicial protection of human rights inside many UN member states, where governments claim priority of government power over ‘inalienable human rights’, democracy and judicial protection of rule of law; governmental consent to international law and adjudication continues to be often construed narrowly. The drafting of the 1944 Bretton Woods agreements and of GATT 1947 had been dominated by US hegemonic interests (eg in access to foreign markets, use of the US dollar as universal reserve currency, containment of communist countries, neo-liberalism driven by US corporate interests). The post-1945 ideological differences among UN member states and the money-driven, neo-liberal ‘Washington consensus’ entailed that GATT and the WTO were never formally incorporated into the UN legal system.

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<sup>9</sup> Cf S.Moyn, *Not Enough. Human Rights in an Unequal World* (Harvard UP 2018).

Trade liberalization before World War I reflected ‘dis-embedded liberalism’ based on protection of ‘negative freedoms’ and laissez faire-attitudes in most countries vis-à-vis the social adjustment problems created by colonialism, the first industrial revolution (based on machines driven by steam power) and by the first globalization during 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 during the 1930s. The ‘embedded liberalism’ underlying GATT 1947 enabled and promoted welfare states protecting also ‘positive, personal freedoms’ 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 ‘ICT revolution’ 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 jurisdictions 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 Agreements on Anti-dumping and Trade-Related Intellectual Property Rights: TRIPS)<sup>10</sup>, Europe’s ordoliberal insistence on rule compliance (eg as protected by the WTO dispute settlement system and ‘necessity’ requirements in numerous WTO Agreements), and ‘third world’ insistence on phasing-out of the Agreement on Textiles and Clothing and protecting ‘sustainable development’. 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 of WTO dispute settlement rulings. WTO law prompted domestic trade law reforms also in less-developed countries enabling the BRICS (Brazil, Russia, India, China, South-Africa) to become major stakeholders and beneficiaries in the world trading system.

The progressive adjustment of the ‘embedded liberalism’ underlying GATT/WTO law - eg to the emergence of social welfare states<sup>11</sup>, decolonization<sup>12</sup> and to regional economic integration<sup>13</sup> - needs to be continued in order to render WTO law consistent with the regulatory challenges of globalization, climate change and with SDGs like public health, food security and protection of human rights. WTO law acknowledges ‘sustainable development’ as a WTO objective and includes provisions permitting national measures ‘necessary to protect human, animal or plant life or health’ (eg Articles XX GATT, XIV GATS), ‘the protection of the environment’ (eg Preamble TBT Agreement), and ‘to avoid serious prejudice to the environment’ (eg Article 27 TRIPS Agreement). The 1994 ‘Decision on Trade and Environment’ recognizes ‘that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment and the promotion of sustainable development on the other’. The WTO Committee on ‘Trade and Environment’ has a broad mandate ‘to enhance positive interaction between trade and environmental measures, for the promotion of

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<sup>10</sup> The inconsistencies of anti-dumping laws and practices with non-discriminatory competition rules are widely recognized. Many competition lawyers express concerns that some anti-dumping and TRIPS rules – whose drafting was dominated by domestic industry lobbyists – offer too much protection stifling competition and innovation.

<sup>11</sup> Eg by providing for GATT-consistency of social policies under Articles III, XVI, XIX, XX GATT and related WTO agreements.

<sup>12</sup> 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’, and ‘special and differential treatment’ in many WTO provisions.

<sup>13</sup> Eg by recognizing sovereign rights to form customs unions and admitting EU membership in the WTO.

sustainable development’ and of positive synergies between trade and environmental agreements and their respective dispute settlement mechanisms.<sup>14</sup> If the WTO ‘sustainable development’ objectives and the WTO provisions (eg in Article V WTO agreement) for cooperation with other international organizations are construed in conformity with the UN Sustainable Development Agenda, the WTO legal and institutional mandates are sufficient for responding to the fact that - in contrast to the initial focus of ‘sustainable development’ on converging economic development and environmental protection<sup>15</sup> - the 2030 UN Development Agenda pursues SDGs also in the field of social inclusion and human and labor rights with a view to eradicating poverty in all its forms.<sup>16</sup> By describing the SDGs as realizing ‘the human rights of all’, the universal endorsement of the UN Sustainable Development Agenda reflects the paradigm shift from the neo-liberal, money-driven ‘Washington consensus’ to an ordo-liberal, citizen-driven ‘Geneva consensus’ on an international order explicitly committed to human rights, good governance and rule of law as defined in numerous multilateral agreements and institutions in Europe (like labor rights protected by the ILO, health rights protected by the WHO, rights to food protected by the FAO, rights to education protected by UNESCO, human rights and rights of refugees protected by the UN High Commissioners for Human Rights and for Refugees and other UN institutions, rights of citizens to receive environmental information and access to environmental justice under the 1998 Aarhus Convention).<sup>17</sup> The regulatory challenges of climate change, pollution, health pandemics and of the ‘digital ICT revolution’ illustrate the ongoing need for adjusting UN and WTO law to new regulatory challenges requiring new agreements, for instance on specifying the ‘NDCs’ for reducing GHG emissions under the 2015 Paris Agreement, introducing WTO-consistent carbon taxes and carbon border adjustment mechanisms (CBAMs), complying with the WTO dispute settlement system as a limitation on illegal power politics, providing Covid-19 vaccines to all people in all countries, and protecting privacy of information and cyber security on the internet. Can the human rights-based ‘embedded liberalism compromise’ reflected in the cosmopolitan, citizen-oriented SDGs and related PGs (like transnational rule of law) be protected more effectively?

### **III. Human Rights Law Cannot Protect the SDGs without Democratic Constitutionalism**

Legal and political history demonstrate that - notwithstanding the universal recognition of human rights, democratic governance and rule of law by all UN member states - the failures of many governments to protect human and democratic rights and rule of law require people to continue their democratic struggles for constitutional restraints on abuses of public and private power. It was due to the post-war, democratic struggles of citizens that EU law and its EUCFR include constitutional guarantees of civil, political, economic and social rights, multilevel judicial remedies and explicit guarantees of a ‘competitive social market economy’ (Article 3 TEU) with common market freedoms (like free movements of goods, services, persons, capital and related payments, freedom of profession), protection of private property and social rights across national borders, which the more than 450 million EU citizens never enjoyed before the creation of the EU. The ‘Brussels consensus’ embeds European economic law into multilevel human and constitutional rights of EU citizens protected by multilevel constitutional, democratic and judicial institutions and treaty systems like the EUCFR, the European Convention on Human Rights (ECHR), the EU’s common market constitution and its partial extension to the European Economic Area (EEA), the EU’s incomplete monetary constitution and functionally

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<sup>14</sup> The 1994 ‘Decision on Trade and Environment’ is reproduced in *The Result of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts* (WTO 1995), at 469f.

<sup>15</sup> Cf UN General Assembly, Rio Declaration on Environment and Development (1992) A/ CONF.151/26.

<sup>16</sup> Cf the Preamble of the UN 2030 Agenda (n 1), 3rd recital; UN 2030 Agenda paras 2 and 9.

<sup>17</sup> On the increasing contestation of the neo-liberal, interest-group-driven ‘Washington consensus’ by the more human rights-centered ‘Geneva consensus’ and ‘Brussels consensus’ see Petersmann (n 4), chapter 2; P.Lamy, *The Geneva Consensus. Making Trade Work For All* (CUP 2013).

limited ‘foreign policy constitution’.<sup>18</sup> 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 like the jurisprudence of European economic and human rights courts; their effectiveness can dramatically increase if (9) citizens can invoke and enforce precise and unconditional, international rules inside states and thereby constrain power politics (eg by judicial remedies of citizens in national and European courts). Yet, almost half of the individual complaints under the ECHR come from Russia and other Eastern European countries (like Ukraine) which - even if the complaints are supported by the European Court of Human Rights (ECtHR) - often fail to offer effective remedies. This ‘legal implementation deficit’ - also in the context of the ECHR - confirms how international rules (like the 2015 Paris Agreement) risk remaining ineffective if they are not implemented in domestic laws and supported by independent institutions protecting rights of citizens against abuses of power. It is no coincidence that the EU’s comprehensive climate legislation - such as the European climate law approved in June 2021 and the 13 legislative proposals published on 14 July 2021 aimed at making Europe the first carbon-neutral continent by 2050 - remain, so far, unique in the implementation of the Paris Agreement on climate change mitigation.

UN HRL, the ‘Geneva consensus’ and the SDGs have much weaker, legal and institutional foundations than the effective protection of individual and democratic autonomy in European constitutional law. In his *Theory of Justice* (1971), the American philosopher J. Rawls described constitutionalism as a ‘four-stage sequence’ as reflected in the history of the US Constitution: reasonable citizens, after having agreed (1) on their constitutional ‘principles of justice’ (eg in the 1776 US Declaration of Independence and Virginia Bill of Rights), (2) elaborate national Constitutions (eg the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of citizens; and (4) the agreed constitutional and legislative rules need to be applied and enforced by administrations and courts of justice in particular cases so as to protect equal rights and promote rule of law and rule-compliance by citizens.<sup>19</sup> Globalization transforms ever more national into transnational PGs (like human rights, rule of law, sustainable development) requiring multilevel governance and multilevel constitutional restraints on abuses of public and private powers beyond such national ‘four-stage sequences’. Hence, the legitimate demands by citizens for regional and global PGs require transforming national constitutionalism into a multilevel ‘six-stage sequence’ taking into account the need for (5) international law and (6) multilevel governance institutions for protecting ever more PGs in a globalizing and dynamically changing world.<sup>20</sup> The new forms of multilevel governance of transnational, often interdependent and ‘overlapping, aggregate PGs’ (like mutually beneficial world trade and investment systems, rule of law, human rights and other SDGs) enabled functionally limited ‘treaty constitutions’ and compulsory, worldwide trade and investment adjudication systems as discussed in section IV. Protecting the SDGs requires taking into account two additional ‘constitutional challenges’ in order to institutionalize ‘public reason’ and rule-of-law:

### **1. *Multilevel constitutional perspectivism***

The ‘four-stage sequence is a device for applying the principles of justice and for constraining legal systems from different perspectives of justice’, from which the different problems of justice are to be

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<sup>18</sup> Cf Petersmann (n 4), chapter 5; K. Tuori, *European Constitutionalism* (CUP 2015).

<sup>19</sup> Cf. Rawls, *A Theory of Justice* (Harvard UP revised ed. 1999), at 171ff.

<sup>20</sup> This need was explained in Petersmann (n 3), at 112f, 126ff, 174ff.



settled, ‘each point of view inheriting the constraints adopted at the preceding stage.’<sup>21</sup> Hence, the legal design of democratic legislation protecting SDGs must take into account - and remain constitutionally and institutionally restrained by - international law respecting the constitutional principles and institutional restraints democratically agreed upon at the six different levels of multilevel governance from six legitimately diverse, but complementary ‘constitutional perspectives’; only functionally integrated ‘multilevel constitutionalism’ can effectively protect human rights and transnational PGs in a globally integrated world. For example, European courts acknowledging GHG reduction obligations of governments rightly base their judgments on the international GHG reduction commitments recognized in EU law and the Paris Agreement.<sup>22</sup> Investor-state arbitration (ISA) awards based on the more than 3’200 bilateral or multilateral investment agreements tend to be legally enforceable in national courts. Yet, as illustrated by the US\$ 15 billion compensation claim filed in 2021 by Canadian company TC Energy challenging President Biden’s cancellation of the Keystone XL oil pipeline, international arbitration can undermine climate change mitigation and other SDGs if the arbitrators disregard international environmental law. Even if the ‘embedded liberalism’ underlying GATT/WTO law protects national political autonomy of states, the SDGs and WTO commitments to ‘sustainable development’ should prompt governments and judges to construe multilevel trade, investment and environmental regulation in conformity with the SDGs and HRL. Such multilevel constitutional and judicial cooperation remains rare outside Europe. Most UN ‘treaty constitutions’ fail to effectively protect human rights against abuses of power. The US disruption of the compulsory WTO dispute settlement system illustrates how ‘constitutional constructivism’, judicial review standards and judicial interpretations of rule-of-law may become contested ushering in power-oriented de-judicialization and value-based identity politics (‘America first’).

## **2. *Multilevel constitutional pluralism***

As human rights protect individual and democratic diversity, the permanent fact of diverse religious, philosophical, moral and political doctrines endorsed by citizens entails the need for respecting ‘constitutional pluralism’ institutionalizing an ‘overlapping consensus’ supporting ‘public reason’ by free and equal citizens in spite of their diverse moral beliefs.<sup>23</sup> For example, in contrast to the social contract theories proposed by T.Hobbes (eg interpreting social contracts as submission to the absolute powers of British monarchs protecting social peace) and by J.J.Rousseau (eg interpreting social contracts as submitting free and equal citizens to the ‘general will’ of democratic legislators), the US founding fathers were inspired by J.Locke’s conception of social contracts among citizens delegating only limited governance powers restrained by human and constitutional rights retained by citizens, as specified in the US Bill of Rights added to the US Constitution in 1791. Multilevel constitutionalism for limiting abuses of power and for protecting human rights in multilevel governance of PGs must respect legitimate ‘constitutional pluralism’ such as reflected in Anglo-Saxon neo-liberal democracies and European ordo-liberal constitutionalism. Yet, are China’s totalitarian conceptions of ‘embedded liberalism’ (like China’s lack of constitutional restraints on its ‘communist party state’ and military power) consistent with WTO law, for instance if Chinese forced-labor practices violate UN HRL? Will ‘failed states’, WTO-inconsistent trade wars and climate change undermine the SDGs? Can ‘constitutional contestation’ (eg driven by ‘democratic alliances’ and ‘climate protection clubs’) limit global governance crises?

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<sup>21</sup> Rawls (n 19), at 176. Arguably, individual and social perspectivism creates regulatory problems 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 perspectives may justify diverse regulatory understandings and responses; their overall consistency must be maintained by multilevel constitutionalism like compulsory adjudication systems.

<sup>22</sup> See the case-law discussed in Petersmann (n 4), chapter 8.

<sup>23</sup> Cf E.U.Petersmann, ‘Constitutional Constructivism’ for a Common Law of Humanity? Multilevel Constitutionalism as a ‘Gentle Civilizer of Nations’ in: MPIL Research Paper Series No. 2017-24.

Many authoritarian UN member states invoke UN principles (like ‘sovereign equality of states’, ‘non-intervention’ into domestic affairs) as ‘shields’ against external criticism (eg of domestic suppression of human and minority rights of Uighur and Tibetan minorities and people in Hong Kong). The disagreements - also among the five veto-powers in the UN Security Council - on the scope of UN HRL are reflected by the incomplete ratification of UN human rights conventions: China ratified the ICESCR but not the ICCPR in order to shield its communist party’s political monopoly; the USA ratified the ICCPR but not the ICESCR in view of US’ political preferences for business-driven, neo-liberalism dominated by US companies and prioritizing civil and political over economic, social and cultural rights; most European countries ratified both the ICCPR and the ICESCR and - in contrast to China and the USA, which reject regional human rights conventions and human rights courts - protect civil, political, economic, social and cultural rights also through European and national HRL. Europe’s multilevel constitutionalism has facilitated worldwide legal reforms like the compulsory WTO dispute settlement system accepted by all 164 WTO members. Yet, the domestic ‘implementation deficits’ of UN and WTO law - notably in hegemonic countries - entail that citizen-driven human rights and environmental litigation holding governments accountable for implementing the SDGs remain more developed in Europe than in Asia, Africa or the Americas, as illustrated by the constitutional, human rights and environmental litigation discussed in section V.

#### IV. Reforming Trade and Investment Law and Adjudication for Protecting the SDGs

In contrast to earlier UN resolution on a ‘NIEO’, the SDGs ‘seek to realize the human rights of all’ and explicitly recognize the need for ‘democracy, good governance and the rule of law’. Most UN member states also recognized compulsory international jurisdiction for rules-based third-party adjudication of disputes in world trade and investment law. As international trade and investment rules and adjudication remain crucial for realizing most SDGs and related PGs (like supplying food and vaccines, decarbonizing and digitalizing economies, transforming the ‘plastics economy’), President Trump’s neo-liberal disruption of the WTO dispute settlement system has, so far, not been supported by other WTO members. Can the SDGs be realized in and beyond countries without effective safeguards of rule of law and human rights as constitutional restraints on abuses of public and private power? Or 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 that the authoritarian Chinese government might be better capable of ‘survival governance’ and of decarbonizing national economies?<sup>24</sup> Do Europe’s ‘cosmopolitan democracies’ protect PGs more effectively than neo-liberal and authoritarian countries? As private patent rights for pharmaceutical products - as incentive and compensation for private research and inventions of medicines - 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<sup>25</sup>: What kind of amendments of trade and investment law do the SDGs require?

The EU and other countries resort to plurilateral trade, investment and environmental reforms like agreed WTO ‘interim appeal arbitration’ since 2020, CBAMs as of 2023, new free trade agreements (FTAs) transforming voluntary NDCs under the Paris Agreement into legally enforceable obligations for climate change mitigation, and investment court systems protecting SDGs more specifically.<sup>26</sup>

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<sup>24</sup> Cf P.Drahos, *Survival Governance: Energy and Climate Change in the Chinese Century* (OUP 2021).

<sup>25</sup> Cf P.Drahos, Public lies and public goods: ten lessons from when patents and pandemics meet, in *EUI Law Working Paper* 2021-5.

<sup>26</sup> Cf M.Bronckers/G.Gruni, Retooling the Sustainability Standards in EU Free Trade Agreements, in *JIEL* 24 (2021), 25-51. The EU is reviewing the ‘trade and sustainable development’ chapters in its FTAs and wants to insert more environmental conditions also into the EU’s [Generalised Scheme of Preferences](#) (GSP), which makes lower tariffs for certain developing countries conditional on compliance with 15 international agreements on labour standards and human rights (the 8 countries presently eligible for ‘GSP+’

Arguably, legal reforms of world trade and investment law for realizing many SDGs - like climate change mitigation, freedom from hunger, access to water, protection of biodiversity, universal health care, access to 'green electricity' and education for all - cannot afford ignoring the historical lessons of constitutionalism for constituting, limiting, regulating and justifying participatory, rules-based and accountable forms of governance. The needed reforms (like limitation of fossil fuel subsidies, fishing subsidies, patent rights impeding universal access to vaccines, carbon emissions) require democratic support from citizens and parliaments, rule of law constraints on populist opposition (eg from republican members of the US Congress denying climate change and democratic election results), judicial protection of human rights and legal sanctions for rule violations. The frequent abuses of executive emergency powers during health pandemics, environmental and geopolitical crises - eg for circumventing parliamentary control of executive limitations of individual freedoms and democratically approved treaty obligations - threaten democratic governance and science-based governance indicators (eg for climate change, over-fishing). Section 1 explains why multilevel judicial remedies in world trade, investment and European integration law remain of crucial importance for protecting SDGs, the rule of law and regulatory competition between neo-liberal, state-capitalist, ordo-liberal and 'third world' conceptions of economic regulation. Yet, world trade and investment adjudication require reforms (section 2).

### ***1. Sustainable development requires rule of law in world trade and investments***

The 2030 UN Agenda emphasizes the need for a 'global partnership' with 'the participation of all countries, all stakeholders and all people' based on 'universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination'.<sup>27</sup> The Agenda's explicit commitment to 'the rule of law at the national and international levels' and ensuring 'equal access to justice for all'<sup>28</sup> recalls earlier UN definitions of 'rule of law at national and international levels' as 'a principle of governance in which all persons, institutions and entities, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with internationally recognized human rights'.<sup>29</sup> At the worldwide level of governance, it is only since the 1990s that the compulsory WTO dispute settlement system - and the worldwide web of now more than 3'200 bilateral and multilateral investment agreements - have provided for multilevel, judicial remedies promoting 'rule of law at national and international levels' through comprehensive jurisprudence.

#### **1.1 The GATT/WTO dispute settlement system**

The 316 dispute settlement proceedings under GATT 1947 and the 1979 Tokyo Round Agreements<sup>30</sup>, and the more than 600 formal dispute settlement proceedings under the WTO Agreement (1996-2020), protected – for the first time in world history - transnational rule of law in trade relations among now

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preferences have to ratify 27 international conventions on human rights, labour standards, the environment and good governance, and submit to **close monitoring** of their implementation by the European Commission). The EU's 'Taxonomy Regulation' of June 2020 entered into force on 12 July 2020 and requires companies to conduct 'human rights due diligence' for designating any good or service as 'sustainable'.

<sup>27</sup> *Transforming our World* (n 1), eg paras. 3-9.

<sup>28</sup> *Transforming Our World* (n 1), at Preamble and paras 8, 9 and 'goal 16'.

<sup>29</sup> Cf Report of the Secretary-General, *Delivering Justice: programme of action to strengthen the rule-of-law at the national and international levels*, A/66/49 of 16 March 2012, para. 2. This definition of rule of law remains contested, for instance by 'interactional' and 'constitutional conceptions of law' focusing on whether the agreed rules of law are supported by consistent legal practices not only of governments, but also of citizens and other non-governmental actors; cf H.Krieger/G.Nolte (eds), *The International Rule of Law - Rise or Decline? - Approaching Current Foundational Challenges* (OUP 2019).

<sup>30</sup> Cf the list and analyses of cases in: *GATT Disputes 1948-1995*, 2 vols. (WTO Geneva 2018).

164 WTO members.<sup>31</sup> The jurisprudence approved by GATT/WTO members clarified the rights and duties under international trade law with due regard to general international law and the more than 400 FTAs concluded among GATT/WTO members (often providing for additional judicial remedies). As more than 85% of the more than 500 GATT/WTO dispute settlement findings were approved and implemented, the GATT/WTO dispute settlement system is the most frequently used, worldwide dispute settlement system in the history of international law. Article X:3 GATT and equivalent provisions in GATT/WTO agreements on specific trade subjects (like anti-dumping duties, subsidies, technical barriers to trade, services trade, trade-related intellectual property rights) and on the accession of specific countries (like China) provide for access also to domestic legal or judicial remedies. Most GATT/WTO members did not allow ‘direct application’ and judicial enforcement of GATT/WTO obligations by citizens in domestic jurisdictions; yet, many GATT/WTO disputes were preceded or followed by domestic court proceedings (eg challenging illegal trade remedies). The global ‘interpretive community’ of trade lawyers, academics and judges scrutinizing and developing GATT/WTO jurisprudence strengthened this ‘trade law culture’ promoting ‘public reason’ (eg in the sense of shared systems of public justification of multilevel trade rules and of their decentralized enforcement), providing ‘security and predictability to the multilateral trading system’ (Article 3 DSU) and reducing transaction costs in the global division of labor.

‘Diplomatic conceptions’ reducing rule of law among states to the availability and relative effectiveness of international dispute settlement procedures are criticized by citizen-oriented conceptions of ‘interactional law’ exploring whether international law rules are supported by citizens in a common practice of legality (eg rooted in Fuller’s eight criteria of legality) in day-to-day decision-making.<sup>32</sup> The legitimate authority of modern legal systems depends on the consent of free and equal citizens and of their democratic institutions; as the WTO Agreement has been voluntarily approved in 163 WTO member states and by the EU and continues to promote their economic welfare through rules-based, market-driven division of labor, the WTO legal and dispute settlement systems can be assert ‘input-’ and ‘output-legitimacy’. The economic, social and ‘sustainable development’ objectives of the WTO, the WTO legal rules and judicial remedies, and each WTO member’s legal obligations to ‘ensure the conformity of its laws, regulations and administrative procedures with its obligations under the annexed Agreements’ (Article XVI.4 WTO Agreement) created a global trading, legal and compulsory dispute settlement system that has enabled member states to enhance economic welfare and peaceful legal, economic and political cooperation as never before in human history. In Article 3.2 DSU, WTO members recognize that the dispute settlement system ‘serves to preserve the rights and obligations of Members under the covered Agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’. The codification of these customary rules in Articles 31-33 VCLT prescribes interpretation of treaties based not only on their text, context, object and purpose; interpretation must also take into account, inter alia, ‘any relevant rules of international law applicable in the relations between the parties’ (Article 31.3.c), including also ‘principles of justice’ and ‘human rights and fundamental freedoms for all’, as recalled in the Preamble of the VCLT.

## 1.2 WTO jurisprudence protects human rights values

The SDGs and the UN resolutions on rule of law emphasize the need for respecting human rights.

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<sup>31</sup> Cf G.Marceau (ed), *A History of Law and Lawyers in the GATT/WTO. The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015).

<sup>32</sup> On Fuller’s ‘inner morality of law’ based on eight principles of legality (ie generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, congruence) see: LL Fuller, *The Morality of Law* (Yale UP revised edition 1969), 197-200. On constitutional conceptions of rule of law see the comparative law contributions to: M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (Kluwer 1993). On ‘interactional law’ focusing on consent by citizens to the enactment and application of legal rules see J.Brunnée/S.J.Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).

Does the fact that human rights are nowhere mentioned in WTO law - and hardly ever invoked and discussed in WTO bodies and referred to in WTO dispute settlement reports - undermine the legitimacy of the WTO legal and dispute settlement system? The less WTO members remain capable of amending WTO rules or agreeing on new WTO agreements and on authoritative interpretations of WTO law, the more important becomes the 'judicial function' of the WTO Dispute Settlement Body (DSB) to clarify the often vaguely drafted WTO provisions for the settlement of disputes in conformity with the DSU and the 'systemic treaty interpretation' requirements of customary law. As WTO law does not provide for individual access to WTO dispute settlement bodies, WTO complainants and defendants hardly ever invoke human rights in WTO dispute settlement proceedings. The intergovernmental WTO procedures justify the judicial WTO practice of focusing on the 'objective PGs values' underlying human rights (like public health protection underlying the human right to health) rather than on individual human rights. GATT/WTO jurisprudence suggests that judicial protection of human rights values in WTO dispute settlement proceedings can be as effective as if the judges had referred to individual human rights in interpreting and 'balancing' state-centered WTO rights, obligations and exceptions.

The WTO objectives and 'general exceptions' protect human rights values like 'public morals', 'public order', 'human, animal or plant life or health', 'protection of national treasures of artistic, historic or archaeological value', 'conservation of exhaustible natural resources', protection of the environment, 'essential security interests', 'raising standards of living' and 'sustainable development'. WTO jurisprudence has interpreted these WTO provisions broadly. For instance:

- The 2018 WTO panel and 2020 appellate reports on complaints by tobacco exporting countries against Australia's legislation on tobacco plain-packaging (TPP) confirmed that these health regulations restricting intellectual property rights and sales of tobacco products were consistent with WTO law (eg on technical barriers to trade and intellectual property rights). The reports refrained from referring to human rights, which had neither been invoked by the complainants nor by the defendant. But the interpretation of WTO rules in conformity with the 2001 WTO Declaration on the 'TRIPS Agreement and Public Health' and the 2003 WHO Framework Convention on Tobacco Control (FCTC) avoided conflicts with health rights, thereby illustrating the importance of 'systemic treaty interpretation' for maintaining the consistency of WTO rights and obligations with other international treaty commitments.<sup>33</sup>
- The 2014 WTO panel and appellate reports on EU import restrictions on seal products acknowledged, inter alia, that the EU exceptions for products from indigenous people in Greenland were justifiable under the 'public morals' exception in GATT Article XX(a) provided they did not discriminate against seal products imported from Canada and Norway.<sup>34</sup>
- The 2011 panel and 2012 appellate reports on US restrictions on tuna based on the 'Dolphin Protection Consumer Information Act' confirmed that US 'dolphin-safe' labelling measures would be consistent with WTO law provided they were applied in non-discriminatory ways.<sup>35</sup>

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<sup>33</sup> Cf E.U.Petersmann, How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law? WTO Dispute Settlement Panel Upholds Australia's Plain Packaging Regulations of Tobacco Products, in: *The Global Community Yearbook of International Law and Jurisprudence* 2018, 69-102. The AB reports confirming the panel findings were published on 9 June 2020: WT/DS435/AB/R and WT/DS441/AB/R.

<sup>34</sup> Cf. WT/DS400,401/R/AB adopted on 18 June 2014.

<sup>35</sup> Cf. WT/DS/381/R/AB adopted 13 June 2012.

- The 2007 WTO panel and appellate reports on Brazil's import restrictions on retreaded tyres implied that the restrictions could be justified as being necessary for health protection reasons if applied in non-discriminatory ways.<sup>36</sup>
- The 2004 panel and 2005 appellate reports on US restrictions of cross-border gambling and betting services implied that such restrictions can be justified as being necessary for protecting 'public morals' (Article XIV(a) GATS) if applied in non-discriminatory ways.<sup>37</sup>
- The 2003 panel and 2004 appellate reports on EC tariff preferences for combatting drug production and trafficking in less-developed countries implied that such preferences can be consistent with WTO law if applied in non-discriminatory ways.<sup>38</sup>
- The 2001 appellate report on EC import restrictions on asbestos confirmed the justifiability of these health protection measures; as health risks can affect the competitive relationship of asbestos and substitute products, non-discriminatory health protection measures may neither violate GATT Article III nor need justification under GATT law.<sup>39</sup>
- The 1998 and 2001 appellate reports on US import restrictions on shrimps confirmed that non-discriminatory animal protection conditioning imports of shrimp on the use of certain fishing nets protecting turtles is justifiable under GATT Article XX(g).<sup>40</sup>

All these WTO dispute settlement findings affected the regulation of business activities with potentially harmful or discriminatory, economic, health or environmental effects. The findings influenced also global application of WTO rules beyond the specific disputes. They confirm the sovereign rights under WTO law to adopt non-discriminatory regulations protecting non-economic PGs like 'public morals' (including also human rights), public health and the environment. There is no evidence, so far, that any of the more than 600 GATT/WTO dispute settlement findings since 1948 has violated human rights.

### 1.3 'Systemic WTO interpretation' limits 'legal fragmentation'

The Covid-19 health pandemic is a reminder of the close interrelationships between economic and health systems. During the 20th century, tobacco consumption killed more than 100 million people, ie more than World Wars I and II and the holocaust together. Yet, it was only in 2003 that the FCTC - the first multilateral treaty negotiated under Article 19 of the WHO Constitution - was signed and subsequently accepted by more than 180 countries. The co-existence of 15 separate UN Specialized Agencies (like the WHO) with functionally separate mandates and legal systems responds to the fact that, in a world composed of more than 200 states, the 'sovereign equality of states' (Article 2 UN Charter) makes legal and institutional 'fragmentation' inevitable: different states and governments have different priorities as to which bilateral and multilateral treaties each of the 193 UN member states is willing to conclude, subject to which judicial remedies, and how to implement treaty obligations inside diverse national legal and political systems. The WTO jurisprudence on TPP and other health protection measures confirms that the customary rules of treaty interpretation - and judicial mandates of administering justice - offer national and international dispute settlement bodies sufficient legal flexibility for interpreting fragmented treaty rights and obligations of WTO members in mutually coherent ways.

The WTO complaints initiated in 2012 by Ukraine, Honduras, and the Dominican Republic, and in 2014 by Cuba and Indonesia, challenged the consistency with WTO law of Australia's TPP measures. Yet,

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<sup>36</sup> Cf. WT/DS/332/R/AB adopted on 12 December 2007.

<sup>37</sup> Cf. WT/DS/285/R/AB adopted on 20 April 2005.

<sup>38</sup> Cf. WT/DS246/R/AB adopted on 20 April 2004.

<sup>39</sup> Cf. WT/DS135/R/AB adopted on 5 April 2001.

<sup>40</sup> Cf. WT/DS58/R/AB adopted on 6 November 1998 and 21 November 2001 (Article 21.5 DSU).

the complaints and defenses also involved HRL, intellectual property law, investment law, health law and Australia's constitutional law and adjudication. As tobacco use is classified as a global epidemic responsible for the deaths of nearly 6,000,000 people annually, including 600,000 non smokers exposed to second hand smoke, the WTO disputes affected people and health regulations all over the world. After separate complaints by tobacco industries in the national courts of Australia<sup>41</sup> and in investor-state arbitration (under an investment treaty between Hong Kong and Australia) had already been rejected<sup>42</sup>, two of the four separate, yet largely identical WTO panel findings were adopted by the DSB in August 2018.<sup>43</sup> The two other WTO panel reports were appealed; both appeals were rejected in two WTO AB reports adopted in June 2020.<sup>44</sup> The four Panel and two AB reports dismissed all claims of violations of GATT and WTO rules (notably under the TBT and TRIPS Agreements); as neither the complainants nor defendant had referred to human rights (eg to health protection), the judicial balancing of economic rights (eg market access rights and intellectual property rights protected by WTO law) and public health protection focused on governmental rights to protect public health rather than on corresponding human rights. The dozens of separately negotiated agreements included into the WTO Agreement and WTO treaty practices (like the 2001 WTO Declaration on the TRIPS Agreement and Public Health) were construed by the WTO dispute settlement bodies as a mutually coherent legal system. Multilateral treaties on tobacco control negotiated in the WHO (notably the FCTC of 2003), WIPO conventions and related treaty practices were duly taken into account in the legal findings on the consistency of Australia's TPP regulations with WTO law. The judicial interpretations of WTO rules in conformity with HRL and health law set an example for future WTO disputes relating to environmental measures like CBAMs.

#### 1.4 Judicial limitation of 'security exceptions' promotes rule-of-law

The geopolitical rivalries and environmental and health emergencies have given rise to increasing invocations of WTO exceptions (including also 'national security exceptions') and the use of emergency powers of governments for imposing discriminatory trade restrictions. So far, the invocations by Russia, the US Trump administration and some US allies (like Saudi Arabia) of WTO 'security exceptions' for justifying discriminatory trade restrictions - and for denying WTO jurisdiction to review related decisions - remain contested by most other WTO members. In the WTO dispute initiated by Ukraine in 2016 against Russia's discriminatory restrictions on traffic in transit, Ukraine claimed that these transit restrictions were inconsistent with Russia's obligations under GATT Article V (freedom of transit), Article X (publication and administration of trade regulations) and with related commitments in Russia's Accession Protocol. Russia asserted that the measures were necessary for the protection of its essential security interests and had been taken in response to the emergency in international relations that occurred in 2014 (ie Russia's annexation of Crimea). Russia invoked the national security exceptions in GATT Article XXI(b)(iii) and claimed that the WTO panel lacked jurisdiction to further address this dispute. The WTO panel report, adopted on 26 April 2019, found, inter alia, that

- WTO panels have jurisdiction to review some of the aspects of a WTO member's invocation of Article XXI(b)(iii);
- Russia had met the objective requirements for invoking this Article XXI(b)(iii) in relation to the transit restrictions at issue, and

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<sup>41</sup> For an overview of tobacco litigation in national, European and investment courts see Petersmann (n 3), 241ff, 256ff.

<sup>42</sup> The tribunal's award of December 2015 was published on the website of the Permanent Court of Arbitration in May 2016.

<sup>43</sup> WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R of 28 June 2018 on Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging. For detailed legal analyses see Petersmann (n 33).

<sup>44</sup> The AB reports confirming the panel findings were published on 9 June 2020 (WT/DS435/AB/R and WT/DS441/AB/R) and adopted on 29 June 2020.

- Russia's restrictions were covered by Article XXI(b)(iii).<sup>45</sup>

Since 2017, there is an increasing number of WTO panel proceedings in which complainants challenged discriminatory trade restrictions that were justified by the respondent WTO members (like Saudi Arabia, United Arab Emirates, Bahrain, the USA) by invoking national security exceptions in WTO law. For instance, the US justification of its 2018 import tariffs on aluminium and steel on grounds of national security prompted China, India, the EU, Canada, Mexico, Norway, Russia, Switzerland and Turkey to request the establishment of WTO dispute settlement panels against the US.<sup>46</sup> The Panel report on Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights of June 2020<sup>47</sup> concerned discriminatory trade sanctions against Qatar and one of its companies (called 'beIN') in Saudi Arabia because of Qatar's alleged support of terrorist activities. The Panel established that the requirements of Article 73(b)(iii) of the TRIPS Agreement for justifying Saudi Arabia's violations of Articles 42 and 41 of the TRIPS Agreement on national security grounds were met. Yet, Saudi Arabia's additional violation of Article 61 TRIPS Agreement had not been justified by Saudi Arabia under the 'security exception' of Article 73(b)(iii). In examining the security exception in Article 73 TRIPS Agreement, the Panel noted (in para. 7.230) that

'Article XXI(b)(iii) of the GATT 1994, which is identical to Article 73(b)(iii) of the TRIPS Agreement, was recently addressed by the panel in *Russia – Traffic in Transit*. It held that a panel must determine for itself whether the invoking Member's actions were "taken in time of war or other emergency in international relations" in subparagraph (iii) of Article XXI(b) of the GATT 1994. It further found that a panel's review of whether the invoking Member's actions are ones "which it considers necessary for the protection of its essential security interests" under the chapeau of Article XXI(b) of the GATT 1994 requires an assessment of whether the invoking Member has articulated the "essential security interests" that it considers the measures at issue are necessary to protect, along with a further assessment of whether the measures are so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member implemented the measures for the protection of its "essential security interests" arising out of the emergency. According to the panel in *Russia – Traffic in Transit*, the obligation of a Member to interpret and apply Article XXI(b)(iii) of the GATT 1994 in "good faith" requires "that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests".

7.231. In this dispute, both parties interpreted Article 73(b)(iii) of the TRIPS Agreement by reference to, and consistently with, the interpretation of Article XXI(b)(iii) of the GATT 1994 developed by the panel in *Russia – Traffic in Transit*. However, the parties' arguments reveal divergent views on three fundamental issues pertaining to the applicability of the security exception in Article 73(b)(iii) to the facts and measures at issue: (a) whether there is an "emergency in international relations" in the sense of subparagraph (iii) of Article 73(b); (b) whether Saudi Arabia has articulated its "essential security interests" with sufficient clarity and precision; and (c) whether—and, if so, how—the measures that Saudi Arabia characterizes as the "action which it considers necessary for the protection of its essential security interests" under the chapeau of Article 73(b) relate to any of the specific measures challenged by Qatar in this dispute.'

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<sup>45</sup> WT/DS512/R, *Russia – Measures Concerning Traffic in Transit* (WTO-Panel) (5 April 2019).

<sup>46</sup> See WTO documents DS 544, 547, 548, 550, 551, 552, 554, 556 and 564, respectively. Some of these WTO members adopted trade restrictions against the US as countermeasures under Article 8 of the Safeguards Agreement (arguing that the US measures are in reality disguised safeguards). The US challenged these countermeasures as unjustified (eg requesting WTO dispute settlement proceedings against Canada, China, the EU, Mexico and Turkey; cf WTO documents DS 557, 558, 559, 560 and 561 respectively).

<sup>47</sup> WT/DS567/R, *Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights* (16 June 2020); adoption of this panel report was prevented by Saudi Arabia's 'appeal into the void'. In the following quotations from this Panel report, the footnotes are omitted.



The Panel further noted that the ‘parties in this dispute and multiple third parties each express agreement with the general interpretation and analytical framework enunciated by the panel in Russia – Traffic in Transit. These parties and third parties therefore considered that both can be transposed to Article 73(b)(iii) of the TRIPS Agreement.’<sup>48</sup> Following detailed examinations of these contested issues, the Panel concluded:

‘With respect to Saudi Arabia's invocation of the security exception in Article 73(b)(iii) of the TRIPS Agreement:

- i. the requirements for invoking Article 73(b)(iii) are met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the measures that, directly or indirectly, have had the result of preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and
- ii. the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ.’

‘8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with the TRIPS Agreement, they have nullified or impaired benefits accruing to Qatar under that Agreement.’

‘8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that Saudi Arabia bring its measures into conformity with its obligations under the TRIPS Agreement.’

It remains to be seen whether the legal reasoning in the two panel reports reviewing the ‘good faith’ invocation of WTO ‘security exceptions’ - and confirming the partial ‘justiciability’ of such unilateral invocations of ‘security exceptions’ - will be followed also in future WTO jurisprudence on other invocations of ‘security exceptions.’ It is likely that the pending WTO panel proceedings on US invocations of the ‘security exception’ in GATT Article XXI for justifying other trade sanctions (eg on steel and aluminum) will follow the reasoning of the above-mentioned panel reports and confirm the WTO-inconsistency of these US invocations of Article XXI GATT. At the DSB meeting on 22 February 2021, the US invoked Article XXI GATT in response to Hong Kong’s complaint against US requirements that goods produced in Hong Kong must be marked to indicate that their origin is ‘China’<sup>49</sup>; the US objected to the establishment of a panel on the following grounds:

- ‘The clear and unequivocal U.S. position, for over 70 years, is that issues of national security are not matters appropriate for adjudication in the WTO dispute settlement system. We therefore do not understand the purpose of this request for panel establishment, seeking WTO findings that the United States has breached certain WTO provisions. The WTO cannot, consistent with Article XXI of the General Agreement on Tariffs and Trade 1994, consider those claims or make the requested findings.’
- ‘No WTO Member can be surprised by this view. For decades, the United States has consistently held the position that actions taken pursuant to Article XXI are not subject to review in GATT or WTO dispute settlement. Each sovereign has the power to decide, for itself, what actions are essential to its security, as is reflected in the text of GATT 1994 Article XXI.’<sup>50</sup>

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<sup>48</sup> Panel report (n 47), para. 7.243.

<sup>49</sup> U.S. - Origin Marking Requirement (WTO document DS597/5 of 15 January 2021).

<sup>50</sup> US Statements at the DSB meeting on 22 February 2021, USTR website. The panel was established as requested by Hong Kong.

China's WTO complaint of 6 December 2018 leading to the WTO Panel report of 15 September 2020 on United States - Tariff Measures on Certain Goods from China<sup>51</sup> illustrated how 'systemic incoherencies' among state-capitalist and liberal economic systems may provoke 'systemic WTO disputes'. The US invoked the findings in the USTR's Section 301 report on China's unfair trade practices as demonstrating violations of the 'public morals' and 'standards of right and wrong' enshrined in US legislation (like norms against theft and misappropriation of intellectual property and unfair competition) as justification of the additional tariff sanctions imposed by the US government. Both China and the WTO Panel rejected the US request not to examine China's request for findings under GATT Articles I and II with respect to the US tariff measures and, instead, to issue a report with a 'brief description' of the pertinent facts of the dispute and 'reporting that a solution has been reached' by the parties, as prescribed by Article 12.7 of the DSU. The Panel report confirmed that the US tariff increases were inconsistent with the US obligations under GATT Articles I and II. As regards the US invocation of the 'public morals' exception in GATT Article XX(a) as justification of discriminatory US tariff sanctions, the Panel concluded that the 'standards of right and wrong' invoked by the United States could be covered by the term 'public morals' within the meaning of Article XX(a) of the GATT 1994. In its assessment of whether the USA had demonstrated the 'necessity' of the import tariffs at issue, the Panel examined the existence of a genuine relationship of ends and means between the public morals objective as invoked by the United States and the measures at issue. After lengthy examinations of the nexus between the measures the United States had chosen (ie additional duties on a wide range of products) and the US public morals concerns, the Panel concluded 'that the United States has not provided an explanation that demonstrates how the imposition of additional duties on the selected imported products contributes to the achievement of the public morals objective as invoked by the United States. It follows that the United States has not adequately explained how the measures the United States has chosen are necessary to protect such public morals'.<sup>52</sup> As the USA had not met its burden of demonstrating that the measures were justified under Article XX(a) of the GATT 1994, the Panel upheld its previous findings that the US measures at issue were inconsistent with Articles I:1, II:1(a) and II:1(b) of the GATT 1994. The US appealed the Panel report, once again, 'into the void' of a dysfunctional WTO AB. Even though the panel report could not be adopted so far, the WTO jurisprudence on 'good faith review' of the application of WTO exceptions - and its acceptance by almost all WTO members (including China and Russia) - defends transnational rule of law in a world of increasing power politics.

## **2. *Need for reforming trade and investment law and adjudication***

The adoption of more than 420 WTO panel, appellate and arbitration reports in the context of more than 600 formal WTO dispute settlement procedures since 1995 suggests that the compulsory WTO dispute settlement system has made a unique contribution to protecting rule of law in international trade from 1995 up to December 2019, when the illegal US 'blocking' of the filling of vacant AB positions left only 1 AB member without the 'quorum' of 3 AB members needed for accepting new appeals.<sup>53</sup> Between December 2019 and June 2021, all but one WTO panel reports were 'appealed into the void' of a dysfunctional AB, thereby preventing the adoption of the panel reports and the conclusion of the ever larger number of - in June 2021 19 - pending appeals. Compared to 39 requests for WTO dispute settlement consultations in 2018 and 19 in 2019, only 5 requests for consultations were made in 2020 and only 3 during the first half of 2021; this resulted in 30 pending WTO panel proceedings with little

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<sup>51</sup> The Panel report is published in WT/DS543/R.

<sup>52</sup> WT/DS543/R, para. 7.238.

<sup>53</sup> For detailed analyses of the US disruption of the WTO AB see: E.U.Petersmann, Neo-liberal, State-Capitalist and Ordo-liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System, in: *EUI Law Working Paper 2020-16 and Chinese (Taiwan) Yearbook of International Law and Affairs 2021*.

prospect for adoption of the dispute settlement findings by the DSB. Like the US Trump administration from January 2017 to January 2021, also the US Biden administration continued to

- block DSB consensus on the regular requests from more than 120 WTO members at each DSB meeting to proceed to the prompt filling of AB vacancies as prescribed in Article 17.2 DSU;
- block adoption of the mediation proposals elaborated by ambassador David Walker for agreed reforms of the DSU in exchange for US approval of filling the AB vacancies, without submitting US proposals on how the AB crisis could be resolved;
- refuse participation of the USA in the Multiparty Interim Appeal Arbitration Arrangement based on Article 25 DSU and accepted by 25 WTO members (plus the 27 EU member states) by June 2021; and
- reject the widely held legal interpretation that Article IX.1 WTO Agreement authorizes and requires majority voting in order to overcome illegal blocking of consensus decisions and comply with WTO law as prescribed by democratic institutions when they approved the WTO Agreement and - in many jurisdictions - incorporated it into domestic legal systems.<sup>54</sup>

The US disruption of the WTO dispute settlement system was part of the mercantilist trade policies imposed by US President Trump since 2017 by

- withdrawing from FTAs (like the Trans-Pacific Partnership) or
- insisting on protectionist amendments of FTAs (like the Korea-US FTA, NAFTA) and limitations of third-party adjudication (eg investor-state arbitration among NAFTA countries);
- introducing discriminatory tariffs on imports of China worth up to \$360 bn and
- restricting also imports from other countries in order to reduce bilateral US trade deficits;
- protecting US aluminum and steel producers by imposing illegal tariffs on aluminum and steel imports (eg also from NATO allies like Canada and EU countries); and
- invoking the ‘national security exceptions’ in US and WTO law (eg GATT Article XXI) for justifying additional, discriminatory import restrictions and sanctioning Chinese technology companies.

The US import restrictions were based on the broad executive trade policy powers of the US President without asking for approval from the US Congress, thereby circumventing parliamentary control. Due to the limited standards of judicial review (like the ‘rational basis test’) in US trade law, it remained rare that – as in the judgment of 14 July 2020 by the US Court of International Trade – US courts annulled discriminatory trade sanctions imposed by executive orders on the basis of alleged ‘security interests’ (Section 232).<sup>55</sup>

Since 2020, the lockdowns, export restrictions, massive subsidies in support of domestic industries, advocacy for self-sufficiency and for re-location of global value chains in the context of the Covid-19 health pandemic resulted in additional executive restrictions disrupting world trade. In contrast to ‘vaccine nationalism’ initially practiced by some countries, the ordo-liberal constitutionalism underlying EU law prompted EU institutions to assume global leadership for

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<sup>54</sup> For details see Petersmann (n 53).

<sup>55</sup> US Court of International Trade, *Transpacific Steel LLP v US et al.*, Court No 19-00009, judgment of 14 July 2020; cf. S.Charnovitz/G.Hufbauer, Landmark court decision limits presidential trade restrictions, in: <https://voxeu.org/content/landmark-court-decision-limits-presidential-trade-restrictions>.

- supplying vaccines also to third countries;
- responding to the global environmental crises by adopting the European climate law in June 2021 and 13 legislative proposals for decarbonizing the European economy by 2050;
- and initiating multilateral reforms of international trade and investment law and adjudication in order to better protect transnational rule of law in trade and investment disputes.

Arguably, the increasing resort to ‘executive emergency governance’ in the context of the global health, environmental and other governance crises enhances the need for judicial remedies against abuses of public and private power. The illegal US disruption of the WTO appellate review system was mainly due to neo-liberal US industry pressures to reject the AB jurisprudence limiting the use of trade remedies (safeguards, anti-dumping and countervailing duties); President Trump’s appointment of long-standing US industry lobbyists to the positions of US Trade Representative (USTR R.Lighthizer) and US representative to the WTO (ambassador D.Shea) enabled this rent-seeking protectionism to become official US trade policy. The 2020 USTR Report on the AB jurisprudence perceived WTO law as an instrument of US power politics; it disregarded the (quasi)judicial mandates of WTO dispute settlement bodies and their (quasi)judicial methodologies by insisting on controversial US interpretations of WTO rules without identifying clear violations by the AB of the customary law rules of treaty interpretation.<sup>56</sup>

In the context of the bilateral and multilateral negotiations on reforming international investment rules and arbitration, the EU proposals for transforming ISA into multilateral investment court systems remain, likewise, resisted by US governments due to their strategic preference for using international economic agreements for intergovernmental bargaining rather than for impartial third-party adjudication limiting US power politics. Just as the EU’s cosmopolitan conception of European common market and community law is due to Europe’s post-1950 traditions of multilevel constitutionalism, the US traditions of perceiving international economic agreements as bargaining tools are strongly influenced by US hegemonic policies and neo-liberalism (eg the influence of business lobbying on US elections and US law-making). Paradoxically, even though the US has used past ISA and WTO dispute settlement proceedings more successfully than other countries (eg in terms of ‘winning’ US complaints and defending the USA against complaints)<sup>57</sup>, the geopolitical rivalries and neo-liberal industry pressures reinforced US skepticism vis-à-vis impartial third-party adjudication. Cosmopolitan and constitutional arguments - eg that defining ‘state interests’ in terms of citizen-oriented SDGs (like human rights and related PGs) can de-politicize conflicts among states and facilitate rules-based third-party adjudication, as illustrated by more than 60 years of multilevel cooperation among national and European economic, constitutional and human rights courts since the 1950s - remain unconvincing for hegemonic and autocratic rulers viewing international relations as ‘zero-sum games’ and intergovernmental power politics.

The increasingly diverse conceptions of IEL - like neo-liberal prioritization of interest group politics in the USA (eg rent-seeking industries benefitting from discriminatory trade and investment protection and corresponding limitations of impartial trade and investment adjudication), authoritarian government regulation in totalitarian countries (like China and Russia), and cosmopolitan and constitutional conceptions of EU law - prompt governments and industries to adopt diverse positions also on reforms of trade and investment adjudication. Civil societies criticize the - often secretive - ad hoc ISA

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<sup>56</sup> See USTR, *Report on the Appellate Body of the WTO*, Washington February 2020, 177 pages (<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: J Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (Berlin: Grossmann 2019); Petersmann (n 53).

<sup>57</sup> For statistical evidence see: R. Basedow, Why de-judicialize? Explaining state preferences on judicialization in World Trade Organization Dispute Settlement Body and Investor-to-State Dispute Settlement reforms, in: *Regulation & Governance* (2021), 1-20.

procedures and now more than 1'100 publicly known ISA awards as being based on one-sided protection standards privileging foreign investors in ways that risk being inconsistent with inclusive and transparent, legal and judicial protection of the SDGs. The path-dependent trade and investor-biases of international investment law are perceived as potential threats to the necessary decarbonization, humanization and digitalization of economies. From the point of view of the citizen- and human rights-oriented SDGs, international trade and investment agreements should no longer be viewed only as public international law agreements among governments aimed at regulating transnational trade and investment transactions of private traders and investors. UN HRL and the SDGs also recognize constitutional dimensions of individual and democratic rights of private and public economic actors and corresponding legal obligations of government agents with limited, delegated powers, which justify global administrative law conceptions of IEL and stronger judicial remedies for holding multilevel governance institutions legally and judicially accountable for protecting PGs. The strong influence of economic principles on the design of economic regulation further requires interpreting IEL with due regard to the economic efficiency, property and competition principles underlying modern trade, competition, investment, environmental regulation and adjudication in IEL. The constitutional, administrative and international public law dimensions of IEL and of 'corporate social responsibilities' for SDGs risk being neglected if WTO panels are composed of economists and investment arbitrators come from private law firms dependent on corporate clients.<sup>58</sup>

## **V. Conclusion: Need for Strengthening the SDG Commitments to Human Rights, Democratic Governance and Rule of Law**

The current health, environmental, trade and global governance crises provide 'stress tests' for the UN and WTO legal systems. They reveal systemic 'governance failures' - for instance to provide vaccines to all and effectively protect human rights, rule of law and many SDGs (like protection of ecosystems as provided for in SDGs 13 to 15). Constitutional theory helps to identify 'original sins' in the 'social contracts' not only of countries (like incomplete representation of citizen interests, communist power monopolies in China, racial discrimination and money-driven 'market fundamentalism' in US constitutionalism), but also in multilateral treaties constituting international organizations (like discriminatory GATT rules on agricultural, cotton and textiles trade). Due to 'media capture' distorting information, the true scale of human suffering remains unknown.<sup>59</sup> In European democracies, constitutional, human rights and environmental complaints and successful civil society litigation increasingly hold governments accountable for protecting SDGs. For example:

- The ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda*<sup>60</sup> (a Dutch NGO suing the state on behalf of around 900 citizens) confirmed the 2018 Court of Appeals judgment 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. The judgment clarified that HRL (eg the ECHR) and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens in order to enforce positive obligations to take appropriate measures mitigating climate change. Even if the respondent state is only a minor contributor to climate change, a court can determine the legal responsibilities to reduce emissions of an individual state that shares responsibility with other actors for climate change ('partial causation justifies

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<sup>58</sup> On competing conceptions of trade and investment law, and the proposals for reforming WTO and investment adjudication, see Petersmann (n 4), chapters 6 to 8, and Basedow (n 57).

<sup>59</sup> Cf A.Schiffirin (ed), *Media Capture. How Money, Digital Platforms and Governments Control the News* (Columbia UP 2021).

<sup>60</sup> *De Staat der Nederlanden (Ministerie van Economische Zaken en Klimaat) tegen Stichting Urgenda*, Hoge Raad der Nederlanden, Civiele Kamer, Nummer 19/00135, 20 December 2019.

partial responsibility'; the failure of other states to meet their responsibilities does not justify nonperformance). As the disputing parties agreed that climate change presents serious risks, the court did not need to decide on these facts; it relied on the precautionary principle and the internationally agreed need for reducing emissions by at least 25% by 2020, leaving it to the political government branches to determine how to implement this legal obligation.

- In November 2020, the Conseil d'Etat - France's highest administrative court - delivered a climate-related ruling in *Commune de Grande Synthe I* by acknowledging France's obligation to reduce GHG emissions.<sup>61</sup> The Conseil d'Etat accepted that the municipality of Grande Synthe had *locus standi* resulting from its 'direct and certain exposure' to climate change (notably sea rise); its request relating to GHG emissions reductions had been based on international, European and French legal obligations for emissions reduction, notably the EU's second Energy-climate package of 2018 and its implementation in French law, which made the objective of GHG emissions reductions enforceable against the government.
- The Order of the German Constitutional Court of 24 March 2021 protected constitutional complaints by German climate activists challenging Germany's Federal Climate Change Act of 2019.<sup>62</sup> The Federal Climate Change Act makes it obligatory to reduce greenhouse gas emissions by at least 55% by 2030 relative to 1990 levels. The complainants claimed that the legislation failed to introduce a legal framework sufficient for swiftly reducing greenhouse gases, especially carbon dioxide (CO<sub>2</sub>). The Court found that the legislative emission reduction targets respond to the constitutional duty (Article 20a Basic Law) to protect the claimants from harm against climate change at present. Yet, the challenged provisions were found to violate the freedoms of young complainants by irreversibly offloading major emission reduction burdens onto periods after 2030. The Court defined the constitutional climate goal arising from Article 20a Basic Law, which protects the natural foundations of life like the environment, in accordance with the Paris target as being to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. The statutory provisions on adjusting the reduction pathway for greenhouse gas emissions from 2031 onwards were found to be insufficient to ensure that the necessary transition to climate neutrality is achieved in time. The Court ordered the legislator to enact provisions by 31 December 2022 that specify in greater detail how the reduction targets for greenhouse gas emissions are to be adjusted for periods after 2030. The provisions of the Federal Climate Change Act governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights insofar as they lacked sufficient specifications for further emission reductions from 2031 onwards.

It was due to civil society initiatives in Europe that - on 28 November 2019 - the European Parliament declared a global climate emergency and requested the EU Commission to cut emissions by 55% to ensure a carbon-neutral 'circular economy' with net-zero GHG emissions in the EU by 2050. The EU's 2019 'Green Deal' promoted legislative reforms and global leadership for transforming Europe into the first carbon-neutral continent by 2050. The 'European climate law', adopted by the European Parliament and European Council in June 2021<sup>63</sup>, makes the EU's goals of cutting GHG emissions 55% by 2030 (compared with 1990 levels) and reaching climate neutrality by 2050 legally binding; it establishes a

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<sup>61</sup> Cf N. de Arriba-Sellier, [verfassungsblog.de/another-urgenda-in-the-making](https://verfassungsblog.de/another-urgenda-in-the-making) of November 25, 2020.

<sup>62</sup> The Constitutional Court decision can be found on the website of the German Constitutional Court (BVerfG, decision of the First Senate of March 24, 2021 - 1 BvR 2656/18 -, Rn. 1-270, [http://www.bverfg.de/e/rs20210324\\_1bvr265618.html](http://www.bverfg.de/e/rs20210324_1bvr265618.html)).

<sup>63</sup> Regulation (EU) 2021/... of the European Parliament and of the Council establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), adopted 30 June 2021.

governance framework for climate mainstreaming and progress control, extending the EU's emission trading system (eg to automobiles and housing), tightening EU reduction requirements for car emissions, and providing for carbon taxes on polluting imports.

The leadership by civil society litigation and democratic institutions for designing climate legislation for decarbonizing the European economy has, so far, no equivalent in Africa, the Americas or Asia.<sup>64</sup> It offers empirical evidence for the proposition that 'transforming our world' through legislative, administrative and judicial protection of the SDGs will be politically easier to realize with the support of democratic societies and judicial protection of 'access to justice' and rule of law, as universally agreed in the 2015 UN Sustainable Development Agenda. The high mortality rates in 'populist democracies' (like Brazil, India, the UK and USA) led by nationalist governments during the 2020 Covid-19 health pandemic suggest that competent, multilevel governance respecting UN and WTO law may prove more important for protecting SDGs than national political systems. Plurilateral agreements establishing 'climate protection clubs' must include all 'willing countries'.<sup>65</sup> Also 'civil society struggles' may no longer suffice to prevent climate change and protect climate refugees forced by rising sea levels to leave inundated home territories.

As explained in section IV, respect for UN and WTO law and for third-party adjudication of trade and investment disputes - which will inevitably multiply in the decarbonization, digitalization and humanization of economies, global health pandemics and related governance failures - will become ever more important for rules-based, multilevel realization of the SDGs. Strengthening transnational rule of law requires adjusting national constitutionalism to rules-based, multilevel governance of transnational PGs. Human civilization needed millennia for separating religious from political loyalties, for limiting monarchical powers by national Constitutions, and for institutionalizing global UN/WTO law and multilevel HRL. Will people have the political wisdom and leadership for preventing environmental and human disasters through multilevel 'constitutionalization' of power politics and realization of the SDGs by 2030? Does legal positivism offer a sufficient methodology for protecting democratic constitutionalism in multilevel governance of PGs? Can constitutional contract- and democratic discourse-theories be integrated into legal positivism by 'dynamic' and 'systemic interpretation' of UN law in conformity with the SDGs? How to reconcile cosmopolitan HRL with the realities of cultural pluralism, power politics, 'failed states' and 'Islamic terrorism'?

Reforms of world trade and investment adjudication would be an important signal that the people - as the legitimate source of legal authority - understand the need for holding multilevel governance powers democratically, legally and judicially accountable for promoting human rights and the SDGs. Proposals for 'environmental constitutionalism' as a reasonable self-restraint on the 'anthropocene'<sup>66</sup> caused by environmental pollution disregarding the 'laws of nature' (eg on climate change) postulate a degree of 'political enlightenment' that seems unrealistic in times of hegemonic power politics dominated by unreasonable autocrats and violent extremists (even inside the US Congress) denying climate change and democratic elections. The 'implementation, identity and sanctioning deficits' undermining the SDGs (like health protection though global distribution of vaccines, GHG reductions, termination of fossil fuel subsidies, more humane migration and refugee practices, stronger protection of UN HRL) require 'democratic struggles' for adjusting social and 'constitutional contracts' (eg on what we owe each other) to climate change and other global governance challenges. Can 'democratic enlightenment' succeed in containing human and environmental disasters and antagonistic power rivalries? Many citizens and governments lack the courage (eg of Sisyphos), 'Kantian morality' and 'constitutional mind-set' to treat all strangers with human dignity as part of 'cosmopolitan law' and of 'constitutional

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<sup>64</sup> Cf 'Special Issue: Climate Litigation in Africa', in *Carbon & Climate Law Review* 15 (2021), issue 2.

<sup>65</sup> Cf. R.Leal-Arcas, *Climate Clubs for a Sustainable Future: The role of international trade and investment law* (Kluwer 2021).

<sup>66</sup> L.J.Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016).

patriotism' (Habermas) defending human rights as 'human identity core' for multilevel constitutionalism enabling and limiting 'survival governance'. Defending judicial remedies offers benchmarks for criticizing and remedying governance failures and for engaging civil societies in struggles for justice and for democratic constitutionalism against authoritarian and populist attacks undermining the SDGs. EU law and the economic, social and environmental reforms introduced by the US Biden administration justify hopes that democracies might live up to their responsibilities to protect the cosmopolitan SDGs as agreed bases for the social welfare tasks and human rights duties of states.







