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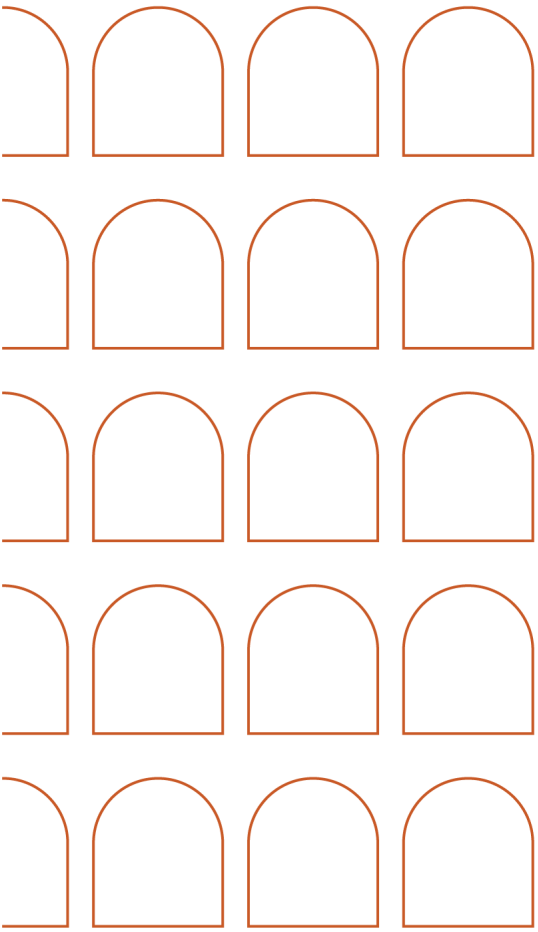

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Transforming Trade, Investment and Environmental Law for Sustainable Development?

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Abstract

The 2030 UN Sustainable Development Agenda aims at 'transforming our world' to protect universally agreed sustainable development goals (SDGs) that – due to globalization – can no longer be secured by any state without international law and multilevel governance of global public goods (PGs). Democratic and republican constitutionalism historically emerged as the most effective methods for protecting local and national PGs demanded by citizens; they need to be complemented by functionally limited, multilevel constitutionalism securing transnational 'aggregate PGs' like mutually beneficial trade and investment systems. This contribution explains why commitments to human rights, democratic governance and rule-of-law have become incomplete safeguards of the SDGs without complementary, constitutional reforms of international trade law (II), investment law (III) and environmental law (IV). Human rights require embedding national 'constitutionalism 1.0' and functionally limited 'treaty constitutions 2.0' into 'cosmopolitan constitutionalism 3.0' empowering and protecting citizens and representative, multilevel governance institution (V). Constitutional, participatory and deliberative democracy, private-public partnerships (eg for inventing vaccines) and citizen-driven network governance (eg for decarbonizing economies) remain crucial for providing PGs and for protecting humanity against authoritarian power politics (VI). Are the necessary constitutional reforms politically feasible at a time of Russian wars of aggression aimed at suppressing human rights and democratic governance?

Keywords

Appellate Body; constitutionalism; EU; investment law; public goods; sustainable development; trade law; UN; WTO.

I. 'TRANSFORMING OUR WORLD': THE 2030 UN SUSTAINABLE DEVELOPMENT AGENDA

At the 70th anniversary of the United Nations (UN) in 2015, a UN 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'.[1] The Resolution 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 17 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 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 'governance by science-based indicators' without prescribing the precise content of NDCs; also the policy instruments (like carbon taxes, phasing out of coal subsidies) need to be progressively clarified. Since 2015, the realities of climate change, the digital communication and information revolution, unforeseen global health pandemics and the need for providing vaccines to all people further complicated the regulatory challenges. For example, European Union (EU) proposals for introducing carbon taxes aimed at reducing greenhouse gas (GHG) emissions and 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, like proposals (eg from India and South Africa) to temporarily waive intellectual property protections related to Covid-19 health technologies, aim at additional UN agreements and World Trade Organization (WTO) decisions at a time when both UN and WTO governance are impaired by geopolitical conflicts. The 26th Conference of the Parties (COP 26) to the UN Framework Convention on Climate Change (UNFCCC) in November 2021 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 5 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, confronting many less-developed countries with slow rollouts of vaccination, enhancing foreign debt and economic crises, 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.[2] Russia's 2022 invasion into Ukraine further illustrates how authoritarian power politics can easily undermine UN law and peaceful cooperation.

At the 'Leaders summit' of 40 countries organized by US President Biden in April 2021 on climate change mitigation, the US pledged to cut GHG emissions by at least 50% by the end of this decade (similar to the earlier EU commitment to reduce emissions by 55% during this

[1] *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.
[2] *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.

decade) and to realize a carbon-neutral power sector by 2035 (eg by using commercial solar- and wind-power). As the SDGs and the goals of the Paris Agreement cannot be achieved without more precise international regulation, multilateral negotiations on additional environmental protection commitments (like limitations of GHG emissions, fossil fuel and 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, the climate, biodiversity and other environmental crises could justify more targeted G20 institutions coordinating multilevel governance of global public goods (PGs). In April 2021, carbon-intensive European industries (eg producing steel, cement, power-generation, chemicals) called for introducing carbon border taxes aimed at compensating their increasing production costs and competitive disadvantages caused by the EU's Emissions Trading System (ETS) and its record prices for CO^2 allowances; they warned of 'carbon leakage' if manufacturing should move abroad to areas with less stringent environmental restrictions. Yet, political and legal views on how to implement the SDGs in conformity with UN and WTO law differ enormously; for example, American 'techno-optimism' relies more on private development of new 'green technologies' (like carbon capture and storage, use of 'green hydrogen power' and batteries) than on adopting the EU's 'systemic climate legislation approach', ETS, carbon taxes and border carbon adjustment proposals. At the UNFCCC conference at Glasgow in November 2021, UN Secretary-General Guterres' call 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) did not lead to legally binding commitments. As more than 80% of the increase in carbon dioxide emissions up to 2050 is likely to come from less-developed countries (notably China and India), the insufficient financial adjustment assistance by developed countries (notably the biggest carbon emitters like Australia, Canada, the EU, Japan, Russia, UK and USA) for less-developed countries – and Russia's continuing wars of aggression - further impede the necessary adjustments of trade, investment and environmental laws to the global climate, health and governance crises.

II. TRANSFORMING WORLD TRADE LAW – WITHOUT A FUNCTIONING WTO LEGAL AND DISPUTE SETTLEMENT SYSTEM?

The replacement of the General Agreement on Tariffs and Trade (GATT 1947) and of the 1979 Tokyo Round Agreements by the 1994 Agreement establishing the WTO - and its acceptance by now 164 WTO members, including state-capitalist economies like China (since 2001) and Russia (since 2012) – transformed the world trading system into a global treaty system regulating more than 90% of world trade, with compulsory WTO jurisdiction for the peaceful settlement of trade disputes. The few multilateral agreements resulting from the Doha Round negotiations since 2001 (like the 2013 Trade Facilitation Agreement) created an imbalance between the 'negotiation-' and 'legislative functions' of the political WTO institutions and the adoption of more than 380 dispute settlement reports (1995-2021) by the WTO Dispute Settlement Body (DSB), whose third-party adjudication dynamically clarified the disputed meaning of WTO rules and principles. This collective 'judicial function' of WTO panels, the Appellate Body (AB), WTO arbitration and the DSB became increasingly contested by the USA, when the US Trump administration – since 2017 - began blocking DSB consensus decisions on the filling of AB vacancies on alleged 'systemic reasons' and – in 2018 - introduced discriminatory import restrictions and politically motivated trade wars (notably with China) in blatant disregard for WTO rules. Since 11 December 2019, the AB lacked the 'quorum' prescribed for accepting and examining new appeals; only two new WTO panel reports could be adopted because all other panel reports were appealed by the losing party 'into the void' of a dysfunctional AB. WTO members other than the USA sought to prevent this breakdown of the WTO dispute settlement system by

- requesting at each DSB meeting to proceed to the filling of the 7 AB vacancies as legally prescribed in Art 17.2 WTO Dispute Settlement Understanding (DSU);
- elaborating a WTO General Council Draft Decision in 2018 on reforms of the DSU (notably Article 17 on the AB) conditional on the willingness of the USA to comply with the legal obligation of filling AB vacancies 'as they arise' (Article 17.2 DSU);
- and initiating Multi-Party-Interim-Appeal Arbitration (MPIA) procedures based on Article 25 DSU, which have been accepted so far by more than 50 WTO members.[3]

The US Biden administration - in view of the US trade war and geopolitical rivalries with China, the 2022 mid-term elections, and the lack of congressional support for WTO AB reforms - continued blocking the filling of AB vacancies without indicating under which conditions the US would be willing to restore the AB or reform the DSU. The progressive disruption of the WTO legal and dispute settlement system had adverse incentives also for WTO negotiations on new trade rules and for realizing SDGs like enhancing economic welfare, food, health, energy and environmental security through trade.

1. Neo-liberal, State-capitalist and Ordo-liberal Disagreements on WTO Law

The design of the 1944 Bretton Woods Agreements and of GATT 1947, the rejection by the US Congress of the 1948 Havana Charter for an International Trade Organization, and the 1979 Tokyo Round Agreements had been dominated by US interests (eg in using the US dollar as global reserve currency, liberalizing market access for US exports) and the 'Quad' of most powerful market economies (USA, Canada, EU and Japan). It was only in the Uruguay Round negotiations (1986-1994) that the money-driven traditions of Anglo-Saxon neo-liberalism (eg prioritizing liberalization, privatization and financialization of markets, business-driven agricultural and steel subsidies, import protection through safeguards, anti-dumping and countervailing duties, orderly marketing agreements for cotton, textiles, steel and other products) were increasingly challenged by less-developed countries (eg interested in limiting trade distortions caused by subsidies, trade remedies, discriminatory textiles agreements) and by European economic ordo-liberalism (eg interested in limiting power-oriented US unilateralism by third-party adjudication of trade disputes). The accession of China (2001) and Russia (2012) to the WTO, and the dissatisfaction of the BRICS countries (Brazil, Russia, India, China, South-Africa) with the WTO Doha Round negotiations, rendered reforms of international trade, investment, and environmental law and institutions increasingly difficult due to conflicting neo-liberal, state capitalist, and ordo- liberal conceptions of multilevel trade regulation. For example, utilitarian Anglo-Saxon neo-liberalism (eg promoting tax cuts and self-regulatory market forces privileging the *homo economicus*), constitutional European ordo-liberalism (eg protecting common market freedoms through multilevel constitutional rights and judicial remedies of EU citizens), and authoritarian state capitalism (eg protecting authoritarian power monopolies in formerly communist countries) pursue different legal and institutional designs of trade, investment, and Internet agreements, as illustrated by the Brexit agreement (eg its avoidance of supra-national institutions and European courts) and by China's refusal (eg in its EU–China investment agreement of December 2020) to accept investment adjudication and human rights commitments.[4] The transformation of China into the largest

[3] For details see: P. Van den Bossche, The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication? in: World Trade Institute Working Paper 02/2021; 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: *China (Taiwan) Yearbook of International Relations* 38 (2020), 1-41 (Brill 2021).

4 The recent support by the IMF and World Bank of activist fiscal, economic, health, and environmental policies in response to the global health pandemic and climate change, illustrates how distinctions between 'neo-liberalism', 'state-capitalism', and 'ordo-liberalism' refer to policy trends that elude precise definitions and continue to evolve. Even in the USA, government spending, budget deficits, central bank interventions, welfare payments and corporate bailouts have increased over the past decades. The neo-liberal focus on business efficiency in terms of consumer prices is now challenged by focusing also on the welfare of workers, farmers, house owners, and citizens adversely affected by media concentration, rising health and housing costs, and environmental harm. The lack of majority

trading nation and second-largest national economy, the increasing political authoritarianism inside China (eg vis-à-vis minorities in Tibet and Xinjiang, political autonomy in Hong Kong and Taiwan) and beyond China (eg its territorial expansion in the South China Sea), and the geopolitical rivalries and trade war with the USA prompted increasing disregard for WTO law in the relations among the two largest trading nations. At the COP26 Glasgow conference in November 2021, the BRICS countries also failed to support various EU and US initiatives aimed at phasing-out coal subsidies and reducing greenhouse gas (GHG) emissions, which are likely to provoke additional future trade conflicts.

The 'regulatory capture' of US trade policies (eg on import protection for steel and aluminum industries) under the Trump administration, the US withdrawal from various multilateral treaties by executive orders of President Trump, and the illegal US destruction of the WTO AB system illustrate systemic conflicts between US neo-liberalism and Europe's ordo-liberal, economic constitutionalism. USTR Lighthizer, his deputy ambassador Shea, and US secretary of commerce Ross had all been long-standing business lobbyists who, like President Trump himself, identified US business interests (eg in rejecting judicial findings limiting US executive policy discretion) with the national US interest.[5] President Trump's decisions to withdraw the USA from UN agreements (eg on the World Health Organization, the 2015 Paris Agreement on climate change mitigation) and regional trade agreements (like the 2016 Trans-Pacific Partnership) were taken unilaterally without requesting approval by the US Congress. The 2020 USTR Report criticizing the AB jurisprudence perceived WTO law as an instrument of US power politics; it ignored the (quasi)judicial mandates of WTO dispute settlement bodies and their (quasi)judicial methodologies by insisting on controversial US interpretations of WTO rules without identifying violations by the AB of the customary law rules of treaty interpretation.[6] The lack of majority support in the US Congress for restoring the WTO AB system - or for introducing carbon taxes as the most efficient policy instrument for carbon reductions aimed at climate change mitigation – differ from the EU leadership for introducing MPIA WTO arbitration in 2020, for adopting the European climate law in June 2021 and publishing on 14 July 2021 thirteen legislative EU Commission proposals aimed at making Europe the first carbon-neutral continent by 2050, thereby exercising EU leadership inside and beyond Europe for implementing the Paris Agreement on climate change mitigation.[7]

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support in the US Congress for restoring the WTO Appellate Body system - and for introducing carbon taxes as the most efficient policy instrument for carbon reductions aimed at climate change mitigation – illustrate some of the remaining differences between neo-liberal US priorities - compared with ordo-liberal EU leadership for introducing Multi-Party Interim WTO arbitration in 2020, for adopting the European climate law in June 2021, and publishing on 14 July 2021 thirteen legislative EU Commission proposals aimed at making Europe the first carbon-neutral continent by 2050. Anglo-Saxon neo-liberalism prioritizes constitutional nationalism (as illustrated by the 'Brexit') compared to the EU's multilevel constitutional protection of the common market and of multilevel democratic and judicial institutions embedded into regional human rights law and multilevel constitutional law. Europe's regional economic and human rights constitutionalism has no equivalent in North America; it remains alien to Anglo-Saxon neo-liberalism, as illustrated by the English dream of creating a 'Singapore at Thames' as a deregulated competitor for the EU's economic constitutionalism. Business-driven economic regulation and related 'regulatory capture' are today more restrained inside the EU (with its more public financing of political election campaigns) than in the USA, where money-driven Presidential and congressional elections often lead to political appointments of business leaders (like US President Trump, his Secretary of Commerce W.Ross), business lobbyists (like US Trade Representative R.Lighthizer, his deputy USTR D.Shea) and congressmen financed by business interests (like coal and steel industries).

[5] Cf Q.Slobodian, The Backlash Against Neoliberal Globalization from Above: Elite Origins of the Crisis of the New Constitutionalism in *Theory, Culture & Society* (2022 forthcoming).

[6] 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 3).

[7] Cf Regulation (EU) 2021/1119 of the European Parliament and of the Council establishing the Framework for Achieving Climate Neutrality ('European Climate Law' adopted 30 June 2021) and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

2. Sustainable Development without Rule-of-Law?

UN human rights law (HRL), the 2030 Sustainable Development Agenda and WTO law acknowledge that their common goal of sustainable development requires rule-of-law protecting rules-based legal and economic order. The UN has defined the 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'.[8] This focus on (1) legal accountability, (2) public promulgation of law, (3) equality before the law, (4) independent judicial remedies, and (5) compliance with human rights is – albeit only indirectly – recognized also in the WTO provisions on access to judicial remedies at national and international levels of governance and interpretation of WTO rules in conformity with the customary rules of treaty interpretation (Article 3 DSU). There is no empirical evidence, so far, that any of the past WTO dispute settlement findings violated UN HRL and could not be justified by what the Vienna Convention on the Law of Treaties calls 'principles of justice' (cf the Preamble VCLT).[9] Yet, WTO legal practices do not effectively prevent or remedy violations of rule-of-law, as illustrated by the continuing unwillingness of WTO members to fill WTO AB vacancies (as required by Article 17.2 DSU), if necessary by majority voting (as prescribed in Article IX.1 WTO Agreement) overcoming illegal vetoing of consensus decisions in the DSB.[10]

The rise and fall of the WTO dispute settlement system - from its revolutionary beginnings since 1995 up to its illegal disruption in December 2019 - illustrates one of the existential problems of multilevel governance of PGs: Even if the non-excludable and non-exhaustive character of 'pure PGs' (like a rules-based, mutually beneficial world trading system) induces states to prevent 'free-riding' by creation of excludable 'club goods' (like the WTO) in order to make membership conditional on reciprocal cooperation, hegemonic member states (like China, Russia and the USA) often abuse their asymmetric power for promoting nationalist goals. Arguably, the increasing disregard for rule-of-law by hegemonic power politics – for instance, by China regarding its territorial claims in the South China Sea, by Russia regarding its military invasions of Ukraine, and by the USA in its discriminatory trade war against China and illegal disruption of the WTO dispute settlement system – impedes UN/WTO governance of global PG; it also entails 'regulatory competition' among regional systems based on competing authoritarian and democratic value systems (like the Eurasian Economic Community among formerly Soviet republics dominated by Russian power politics, China's bilateral agreements with more than 80 'Belt and Road' partner governments, North and Central American economic integration dominated by neo-liberal US politics, Europe's multilevel economic constitutionalism). In order to protect global PGs, adversely affected third states must cooperate (eg in regional free trade agreements, the plurilateral MPIA, majority voting as prescribed in Article IX.1 WTO Agreement) in order to contain the disruptive effects of illegal power politics. Without independent third-party adjudication in the WTO protecting transnational rule-of-law, the WTO trading and legal systems risk disintegrating. For example, the EU's commitment to unilateral introduction of carbon border adjustment mechanisms (CBAMs) as of 2023 – provided multilateral negotiations on carbon taxes and related CBAMs fail - is bound to provoke WTO disputes over the inevitably complex methods for calculating the 'carbon content' of imported goods (like steel, aluminum, cars) and services (like shipping

[8] 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.

[9] 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 (GCYILY)* 2018 (2019), 69-102.

[10] Cf Petersmann (note 3) and H.Gao, Finding a Rules-Based Solution to the Appellate Body Crisis: Looking Beyond the Multiparty Interim Appeal Arbitration Arrangement, in: *JIEL* 14 (2021), 534-550.

and air transports). Without impartial third-party adjudication and coordination of WTO rules with relevant UN environmental agreements (like the UNFCCC and the 2015 Paris Agreement), such WTO disputes – and the adjustments of WTO rules and practices to the need for climate change mitigation - are likely to remain contested and to trigger trade retaliation further disrupting trade and climate change policies. Similar collective action problems exist in the ongoing efforts at adjusting investment law and environmental governance to the ever more urgent needs of climate change mitigation, as discussed below.

III. TRANSFORMING INTERNATIONAL INVESTMENT LAW BEYOND THE EU?

In the context of the bilateral and multilateral negotiations on reforming international investment rules and arbitration, the EU proposals for transforming investor-state arbitration (ISA) into multilateral investment court systems remain resisted by hegemonic governments (eg in China, Russia, the USA) due to their preference for power-oriented bargaining rather than for impartial third-party adjudication. Just as the EU's rights- and citizen-based conceptions of European common market and community law are due to Europe's post-1950 traditions of multilevel constitutionalism, the US traditions of using international economic agreements for power-oriented bargaining are influenced by US hegemonic traditions and neo-liberalism (eg the influence of business lobbying on US elections and US law-making). The US 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);[11] yet, the geopolitical rivalries and neo-liberal industry pressures reinforced US skepticism (notably under the Trump administration) 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 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' power conflicts, requiring hegemons to maximize their relative power.

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 competition law enforcement and impartial adjudication), authoritarian government regulation in totalitarian countries (like China and Russia), and constitutional conceptions of EU law protecting individual and judicial remedies and cosmopolitan rights - prompt governments and industries to adopt diverse positions on reforms of trade and investment adjudication. Civil societies criticize the - often secretive - *ad hoc* ISA procedures and more than 1'100 publicly known ISA awards as being based on one-sided protection standards and procedures privileging foreign investors in ways that risk being inconsistent with inclusive, transparent, legal and judicial protection of the SDGs. Path-dependent trade and investor-biases (eg in the Energy Charter Treaty) are perceived as potential threats to the necessary decarbonization of economies.[12] The inconsistency of ISA with EU constitutional law was confirmed in the *Achmea* judgment of the EU Court of Justice (CJEU);[13] according to the EU Commission, this judgment implies 'that all investor–State arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a

[11] 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.

[12] The *Financial Times* of 21 February 2022 reports that five energy groups are suing four European governments for ca 4 billion Euros over restrictions of coal, oil and gas projects as climate change concerns rise, using the secretive ISA procedures under the Energy Charter Treaty.

13 Case C-284 / 16 *The Slovak Republic v Achmea BV* [2018] ECLI:EU:C:2018:158.

valid arbitration agreement'.[14] In democracies, the ongoing negotiations on reforming ICSID, UNCITRAL, and other ISA procedures— and on strengthening corporate social responsibilities— are driven by social and democratic claims that justice and HRL - even if they may not prescribe specific economic policies - entail duties for governments, courts of justice, and corporate actors that require constitutionalizing the path-dependent investor privileges in bilateral investment treaties (BITs) and ISA so that citizens are legally and judicially protected in non-discriminatory ways. Without independent, impartial trade and investment adjudication and an effective WTO appellate review system, the inevitable trade disputes (eg about CBAMs) and investment disputes (eg about decarbonizing investments and energy markets) risk disrupting rule-of-law and human rights-oriented SDGs. The constitutional, administrative law and international public law dimensions of modern trade and investment disputes require judicial administration of justice, which path-dependent WTO panels composed by trade diplomats - or investment arbitrators from private law firms dependent on corporate clients - may not ensure.[15]

IV. TRANSFORMING INTERNATIONAL ENVIRONMENTAL LAW?

Climate change, biodiversity losses, over-fishing, plastic pollution and other environmental crises require private-public partnerships for decarbonization and de-plastification of economies, inventing new 'green technologies', and for reforming international environmental, trade and investment law and adjudication. Rights to the protection of the environment are now recognized in the laws of more than 150 states, regional treaties, and by the UN Human Rights Council (HRC).[16] Environmental and human rights have been invoked by litigants all over the world in hundreds of judicial proceedings on protection of environmental interests over the past years.[17] Democratic and judicial control (eg of emergency restrictions of fundamental rights) and science-based governance helped to limit abusive 'executive emergency measures' also during the Covid-19 health pandemic; they reinforced calls for 'environmental constitutionalism' limiting the human destruction of eco-systems ('anthropocene') and disregard for 'planetary boundaries'. Similarly, civil society challenges of 'social media capture' reinforced calls for 'digital constitutionalism' aimed at entrenching rights and constitutional principles into the multilevel regulation and governance of digital technologies, digital transformations and working conditions (eg for workers on electronic Internet platforms) so as to limit dis-information and protect digital, privacy and social rights.[18] The need for stronger constitutional 'checks and balances' preventing systemic dangers of 'unbound executive governance' (eg disrupting multilateral treaty systems ratified by parliaments, abusing artificial intelligence) and of private self-regulation was further illustrated when anti-democratic protesters stormed the US Congress on 6 January 2021 in response to Trump's 'big lie' that the 2020 congressional election was 'stolen' from the Republicans: US politicians and military officials warned of a 'Weimar moment' of US democracy with the risk of a 'Hitler-like political coup'.[19] The protectionist US disruption of the WTO dispute settlement system illustrated the need for

14 Cf *Protection of Intra- EU Investment, Communication from the Commission to the European Parliament and the Council*, COM (2018) 547 (19 July 2018), at 26. The case-law of national and EU courts following the Achmea judgment is discussed in L.Mistelis/N.Lavranos (eds), *European Investment Law and Arbitration Review* 6 (2021), 154ff, 241ff, 270ff, 310ff.

15 On proposals for reforming WTO and investment adjudication see E.U.Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022), chapters 6 to 8; Basedow (n 11); Mistelis/Lavranos (n 14), 104ff, 339ff.

16 See Resolution 48/13 adopted by the HRC on 8 October 2021, recognizing that having a clean, healthy and sustainable environment is a human right.

17 Cf P.de Vilchez Moragues/A.Savaresi, The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation? (April 18, 2021 http://dx.doi.org/10.2139/ssrn.3829114).

18 Cf A.Schiffrin (ed), *Media Capture. How Money, Digital Platforms and Governments Control the News* (Columbia UP 2021). Digital constitutionalism has been discussed with respect to the recent EU proposals on a Directive on platform workers' working conditions, digital and social rights (COM 2021/762).

19 *Financial Times* of 16 July 2021 ('Donald Trump lashes out at top US military officer: I'm not into coups').

constitutional safeguards limiting executive powers to disrupt, or withdraw from, multilateral PGs treaties ratified by parliaments without granting executives powers to destroy 'PGs treaties'.

1. European Democratic and Judicial Reform Strategies

Hegemonic power politics risk undermining transnational rule-of-law as illustrated by the US destruction of the WTO AB, Russia's military aggressions against formerly Soviet republics like Ukraine, and the difficulties of European courts in protecting human rights against authoritarian governments inside member states like Turkey.[20] Europe's multilevel constitutionalism has enabled civil societies to enhance democratic and judicial accountability of governments in Europe for climate mitigation and other SDGs. In European democracies, constitutional, human rights and environmental complaints and 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*[21] (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 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 international commitments to reduce 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.[22] 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.[23] 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

[20] Cf D.Kurban, *Limits of Supranational Justice* (CUP 2020).
[21] 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.
[22] Cf N. de Arriba-Sellier, verfassungsblog.de/another-urgenda-in-the-making of November 25, 2020.
[23] 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).

> for swiftly reducing greenhouse gases, especially carbon dioxide (CO^2). 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 that - on 28 November 2019 - the European Parliament declared a global climate emergency; it 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 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[24], 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 governance framework for climate mainstreaming, extending the EU's emission trading system (eg to automobiles and housing), tightening EU reduction requirements for car emissions, and providing for CBAMs for imports from countries without equivalent carbon taxes and GHG emission reductions. In view of the EU's Green Deal, the EU Commission is determined to design its CBAMs in WTO-consistent, non-discriminatory ways aimed at preventing 'carbon leakage' on the import and export sides to achieve the environmental objectives (like linking competing CBAM and ETS systems by giving credit to trading partners who adopt regulations ensuring that a carbon price is paid for CO^2 emissions).

2. A Global UN Pact for the Environment (GPE)?

Proposals for rendering the dozens of functionally limited UN environmental agreements more coherent through a GPE were postponed in 2019 in favour of another UN Declaration to be adopted in 2022 on the 50th anniversary of the UN Stockholm Conference on the Human Environment. Civil society initiatives and climate litigation in Europe have relied more on international law than environmental litigation outside Europe (eg in the USA), where political opposition against judicial protection of human and environmental rights derived from UN law remains widespread.[25] The high mortality rates in 'populist democracies' (like Brazil, India, the United Kingdom and USA) led by nationalist governments during the 2020/21 Covid-19 health pandemic suggest that competent, multilevel governance respecting UN and WTO law - and democratic, judicial and independent scientific 'checks and balances' - may be more important for protecting SDGs than national political systems.[26] Trade agreements are increasingly

[24] See note 7 above.
[25] Cf note 17 above.
[26] On the crises of democracies manipulated by populist demagogues increasing social inequalities by 'regulatory capture', polarizing societies through tribal identity politics, distorting deliberative democracy by disinformation and corrupt governance, undermining constitutional democracy by manipulating election results, judicial appointments

recognized as necessary instruments for resolving the current health, environmental, economic and geopolitical crises. Plurilateral agreements establishing 'environmental protection clubs' can put pressure on 'free-riders'; but such agreements must be based on non-discriminatory standards and remain open for all 'willing countries'.[27] The WTO negotiations on limiting plastic pollution, fisheries subsidies, vaccine nationalism, and on access to 'green' and health technologies respond to systemic governance failures; promoting GHG reductions and 'environmental compliance mechanisms' raise dispute settlement problems different from trade agreements limiting trade distortions rather than environmental harms. Trade and investment disputes will inevitably multiply in the needed decarbonization, digitalization, de-plastification and humanization of economies. Can constitutional nationalism be adjusted to the needed multilevel protection of SDGs? Human civilization needed millennia for separating religious from political loyalties, for limiting monarchical powers by national Constitutions, and for institutionalizing global law protecting human rights. Convincing people - as the legitimate source of legal authority - of the need for holding multilevel governance powers democratically, legally and judicially more accountable for protecting the SDGs remains confronted with realities of power politics (eg in China and Russia) that risk preventing constitutional reforms of UN and WTO law and adjudication protecting the SDGs.

Proposals for 'environmental constitutionalism' - as a reasonable self-restraint on the 'anthropocene'[28] caused by environmental pollution disregarding 'laws of nature' - postulate a degree of 'political enlightenment' that seems unrealistic in times of hegemonic power politics dominated by autocrats and extremists (even inside the US Congress) denying climate change and democratic self-determination. The legal 'implementation deficits' undermining the SDGs (like insufficient legal and judicial protection of public health, the environment, economic welfare and of migrants in many countries) require more 'democratic struggles' for adjusting social and 'constitutional contracts' (eg on what we owe each other) to global governance challenges. Anglo-Saxon advocates (like P.Allot) of 'evolutionary self-constitution of humanity' transforming international law into a communitarian *Eunomia* now admit the 'legal wasteland' of current power politics.[29] Rather than lamenting that the indeterminacy and opportunistic interpretations of legal rules render 'law incapable of providing convincing justifications to the solution of normative problems'[30], international lawyers should embrace the democratic task of 'institutionalizing public reason' for empowering citizens and their democratic institutions to challenge intergovernmental power politics. Citizens and politicians often 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 patriotism' (Habermas) defending human rights as 'human identity core' for multilevel constitutionalism and 'survival governance'.

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and democratic checks and balances, abusing executive powers and promising simple solutions to complex global governance problems see: M.Naim, The Dictator's New Playbook: Why Democracy is Losing the Fight, in *Foreign Affairs* March/April 2022.

[27] Cf. R.Leal-Arcas, *Climate Clubs for a Sustainable Future: The role of international trade and investment law* (Kluwer 2021).

[28] L.J.Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016).

[29] Cf E.U.Petersmann, Self-Constitution of Mankind without Constitutional Constructivism? in *EJIL Talk* of 4 January 2022. P.Allot avoids talking about actual institutions based on his observation 'that all institutions take over ideals and take them in, corrupt them, and they would do it again' (cf the Symposium on P.Allott's books on *Eunomia* and *The Health of Nations*, in: *EJIL* 16 (2005), 255 ff, at 284; during the same symposium, Allot said: 'I am not concerned about how we get from here to there because that will happen anyway' (269)). Yet, in his *EJIL Talk* of 14 October 2021 on 'Responding to the Collapse of Global Government', Allot admits the 'unprecedented global disorder' of current power politics privileging the self-interests of authoritarian governments. In view of the centuries of 'evolutionary common law constitutionalism' inside and among Anglo-Saxon countries, Allot distrusts constitutional constructivism among governments, *i.e.* among the very people whose abuses and excesses constitutionalism and human rights should constrain.

[30] M.Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005), at 69. For my criticism of Koskenniemi's prioritization of 'legal deconstruction' over the 'constructive task' and 'socializing potential' of constitutionalism for institutionalizing public reason and 'constitutional mind-sets' (eg in courts of justice, independent, science-based regulatory agencies) see Petersmann (note 15), chapter 2.

Deliberative democracy and judicial remedies offer venues for criticizing and remedying governance failures and for engaging civil societies in struggles for justice and for the SDGs. Do EU law and the domestic reforms introduced by the US Biden administration justify hopes that democracies might live up to their responsibilities to protect the cosmopolitan SDGs at least inside Europe and North America? Unfortunately, the money-driven 'neo-liberal capture' of US economic and democratic regulation (eg due to business financing of political election campaigns) has, so far, excluded US leadership for returning to rule-of-law in the WTO dispute settlement system and for carbon taxes and CBAMs mitigating climate change. Without institutionalizing 'public reason' and multilevel remedies protecting human rights and rule-of-law in international trade, investment and environmental policies, the UN and WTO legal systems risk disintegrating into competing, regional blocs. The Russian 'wars of aggression' of the 21st century illustrate how geopolitical rivalries risk further weakening the 'constitutional infrastructures' needed for protecting the SDGs.

V. TRANSFORMING NATIONAL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS?

Human self-ordering (eg through sociality, morality, reasonableness, religiosity, legality) has failed to suppress human animal instincts (like violence) and rational egoism (eg in anti-competitive agreements). Democratic constitutionalism aims at protecting citizens through constitutional rules and institutions of a higher legal rank aimed at coherent limitations of 'market failures', 'governance failures' and 'constitutional failures' in the private and public ordering of societies, economies and polities aimed at collective supply of PGs demanded by citizens. While most EU member states have incorporated into their national Constitutions specific provisions on European integration, adjustments of national Constitutions (as in Article 20a German Basic Law) to the multilevel governance challenges of the 17 SDGs are less frequent.

1. From National to Multilevel Constitutionalism for Multilevel Governance of PGs?

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, rule-of-law and rule-compliance by citizens.[31] Globalization transforms ever more *national* into *transnational PGs* (like human rights, rule-of-law, most SDGs) requiring multilevel governance and multilevel constitutional restraints on abuses of power beyond such national 'four-stage sequences'. Globalization has rendered national 'constitutionalism 1.0' an incomplete system for governing PGs. The universal recognition of human rights, democratic governance and rule-of-law by UN member states has not prevented failures of many governments to protect human and democratic rights and rule-of-law in legal practices. Constitutionalism can effectively protect human and constitutional rights and related PGs only through dynamic struggles of citizens (*démocratie de tous les jours*) holding public and private powers accountable for protecting PGs at both national, international and transnational levels of governance.[32]

[31] Cf J.Rawls, *A Theory of Justice* (Harvard UP revised ed. 1999), at 171ff.

[32] Cf E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Hart 2017); G.Ziccardi Capaldo, Facing the Crisis of Global Governance - GCYILJ's Twentieth Anniversary at the Intersection of Continuity and Dynamic Progress, *GCYILJ* 2020 (2021), 5-16. Ziccardi Capaldo defines the global community

In European integration law among constitutional democracies, the demands by EU citizens for regional and global PGs transformed *national* into *multilevel constitutionalism* extending the national 'four-stage sequence' to (5) international law, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU rules (like legal primacy, direct effects and direct applicability by citizens) and (8) domestic implementation of EU law inside member states protecting PGs across national borders.[33] The EU's commitment (eg in Arts 3, 21 TEU) to protecting human rights and rule-of-law also in external relations contributed to worldwide recognition of multilevel judicial protection of rule-of-law in trade and investment agreements through compulsory trade and investment adjudication. Yet, transforming *national* into *multilevel constitutionalism* remains resisted by authoritarian and nationalist rulers (eg in China and Russia) defending their self-interests in discretionary powers without legal accountability. This 'disconnect' of UN/WTO governance institutions from citizens and from effective parliamentary and judicial accountability mechanisms facilitates intergovernmental power politics and interest group politics undermining the legitimacy and effectiveness of multilevel governance of PGs. The less citizens control their 'principal-agent mandates' for limited, multilevel governance of PGs, the more *legal constitutions* and their underlying *constitutional ideals* (eg as reflected in the SDGs) risk becoming replaced by power-based *real constitutions* and *law in action* (like the *de facto* incapacitation of the AB) inconsistent with the *law in the books* (like Art 17 DSU).

European law illustrates why the 'normative pull' of human rights depends on their 'normative push': their effectiveness depends on legal implementation through (1) constitutional law, (2) democratic legislation, (3) administration and (4) adjudication supporting 'public reason', (5) international treaties, (6) multilevel governance institutions and (7) 'secondary law' of international institutions (like the jurisprudence of European economic and human rights courts) and (8) its domestic, legal implementation. The limitation of EU membership to constitutional democracies, parliamentary and representative EU institutions, and citizen-driven enforcement of EU law promoted recognition and judicial protection in EU law of constitutional guarantees of civil, political, economic and social rights, multilevel judicial remedies, 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. European economic law became embedded and restrained by multilevel human and constitutional rights of EU citizens protected by multilevel constitutional, democratic and judicial institutions and treaty systems, like the EU Charter of Fundamental Rights (EUCFR), the European Convention on Human Rights (ECHR), the EU's common market constitution, its partial extension to the European Economic Area (EEA), the EU's incomplete monetary constitution and functionally limited 'foreign policy constitution'.[34] The democratic, judicial and other institutional 'checks and balances' constraining 'executive

as a 'universal human society' based on 'global constitutional principles'. Her view of a 'unified/integrated' world system under global principles and procedures developed by the UN global governance model (including the rule of law, protection of human rights, democracy, separation of powers, checks and balances, judicial review) postulates that the UN governance model provides the basic constitutional framework for an integrated system of global governance that unifies the different legal systems under constitutional principles and procedures respecting pluralism and overall diversity. The 20 volumes of the GCYILJ edited by Ziccardi Capaldo since 2001 document the empirical evolution of UN law-making, law-enforcement and law-adjudication for an 'integrated global governance system' based on *'*co-management*'* and *'*shared governance*'* aimed at guaranteeing global PGs. My own research emphasizes more the need for 'bottom-up struggles' for constitutional reforms (as successfully realized in European constitutional law), the need for mutual coherence of national, international and transnational constitutional principles and practices (as opposed by authoritarian governments prioritizing their oligarchic self-interests), and the 'implementation deficits' in UN, WTO, regional and national legal practices (eg in China and Russia).

[33] Cf G.Amato *et alii* (eds), *The History of the European Union. Constructing Utopia* (Hart 2019).

[34] Cf Petersmann (note 15), chapter 5; K.Tuori, *European Constitutionalism* (CUP 2015).

emergency governance' inside the EU during economic, financial, public health and environmental crises empirically confirmed how HRL can become more effective if citizens can invoke and enforce precise, unconditional, international rules inside states and challenge power politics (eg using judicial remedies of citizens in national and European courts). It was in response to democratic and parliamentary pressures that the EU's comprehensive climate legislation – notably the European climate law approved in June 2021 and the 13 legislative EU Commission proposals published on 14 July 2021 aimed at making Europe the first carbon-neutral continent by 2050 – offered leadership inside and beyond Europe for implementing the Paris Agreement on climate change mitigation.[35] After the illegal US blocking of the appointment of the WTO AB judges rendered the AB incapable in December 2019 to accept new appeals, the EU law requirement of promoting the EU's constitutional principles (like rule-of-law) also in the EU's external relations prompted the EU initiative for a plurilateral WTO appeal arbitration system based on Article 25 DSU, accepted by now more than 50 WTO members. Multilevel constitutionalism in internal and external EU relations remains a major driving force for strengthening international rule-of-law and human rights in multilevel governance of the SDGs.

2. Constitutional pluralism does not exclude multilevel constitutionalism

The above-mentioned four- and eight-stage sequences of constitutionalism are devices for applying agreed constitutional principles of justice for constraining legal systems from different perspectives of justice, 'each point of view inheriting the constraints adopted at the preceding stage.'[36] Hence, the legal design of democratic legislation protecting SDGs must respect - and remain constitutionally and institutionally restrained by – the diverse constitutional and international legal principles and institutional restraints democratically agreed upon at the eight different levels of multilevel governance. Just as multilevel governance of transnational PGs is based on hundreds of separate, multilateral agreements, so must the task of 'constitutionalizing' related treaty provisions (eg on dispute settlement, rule-of-law safeguards) be examined separately for each treaty regime. For example, European courts - and increasingly also climate litigation outside Europe - acknowledge GHG reduction obligations of governments by invoking multilevel GHG reduction commitments recognized in UN law and domestic politics.[37] 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 - and by potential conflicts between fossil fuel-based energy investments invoking the protection standards of the Energy Charter Treaty against climate mitigation measures -, ISA can undermine climate change mitigation and other SDGs if the arbitrators disregard international environmental law.[38] According to the CJEU, ISA is no longer consistent with the multilevel, judicial remedies under EU constitutional law in relations among EU member states.[39] Arguably, the systemic treaty interpretation requirements codified in Article 31:3 VCLT require governments and judges to construe multilevel trade, investment and environmental regulation in conformity with the WTO and SDG commitments to 'sustainable development' and HRL for the benefit of citizens. The diversity and rational egoism of citizens and people may exclude 'global democracy', 'global justice' and uniform 'global constitutionalism'. Yet, the path-dependent realities of intergovernmental 'chessboard governance' (eg in the UN Security Council) and

[35] See above note 7.
[36] Cf Rawls (n 31), at 176.
[37] Cf section IV above and I.Alogna/C.Bakker/J.P.Gauci (eds), *Climate Change Litigation. Global Perspectives* (Brill 2021).
[38] Cf note 12 and C.Müller-Hoff/L.Duarte, Don't Stick to a Fossil Treaty – Pull the Plug on the Energy Charter Treaty, *newsletter@völkerrechtsblog* of 1 February 2022.
[39] Cf notes 13-15 above and related text.

citizen-driven 'network governance' (eg in the context of multinational corporations, market competition and communication systems) must be coordinated through rules, multilevel governance institutions and mutually coherent interpretations with due respect for the universal recognition of human rights, the legitimate diversity of national and regional legal systems, and of individual and democratic autonomy as sources of legal legitimacy.

From the perspective of the 'eight-stage constitutionalism' underlying European integration law, most UN and WTO agreements are insufficiently 'constitutionalized' in terms of parliamentary implementing legislation, administrative and judicial protection of rule-of-law and constitutional rights of citizens. For instance, labor and health rights based on the 'constitutions' (*sic*) establishing the ILO and WHO, and UN human rights conventions cannot be effectively enforced by citizens in many UN member states. The US disruption of the compulsory WTO dispute settlement system, and totalitarian autocrats disregarding human rights in China and Russia illustrate how insufficient institutional 'checks and balances' facilitate abuses of executive powers undermining UN and WTO law. As already explained by Kantian legal philosophy, 'democratic peace' among national legal and political systems cannot be secured by 'international law' as long as discretionary foreign policy powers are not constitutionally constrained by cosmopolitan human and constitutional rights and judicial remedies protecting citizens.[40] The 'telecommunications revolution' – by enabling 'weaponization' of social media, politics and undeclared civil wars (eg through abuses of artificial intelligence, China's data-driven 'surveillance/social credit systems' for individuals and corporations, systemic disinformation, computer hacking and subversion) - multiplies the constitutional reasons for limiting social conflicts and related abuses of power through multilevel constitutionalism civilizing, stabilizing and legitimizing multilevel governance of PGs.[41]

As human rights protect individual and democratic diversity, the permanent fact of diverse moral, religious and political 'worldviews' of citizens entails the need for respecting 'constitutional pluralism'. Institutionalization of 'public reason' (eg in democratic institutions, science-based regulatory agencies, courts of justice) helps citizens to understand and support multilevel governance of PGs (like climate change mitigation) in spite of their diverse moral beliefs and 'rational ignorance' towards most scientific research. Multilevel constitutionalism must build on an 'overlapping consensus' respecting legitimate diversity of cultures. For example, in contrast to the social contract theories proposed by T.Hobbes (eg interpreting social contracts as submission to the absolute powers of 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. UN HRL and compulsory WTO adjudication illustrate that the diversity of national 'constitutional contracts' does not exclude functionally limited, multilevel constitutionalism. Yet, the 'Brexit' suggests that 'island states' may be less willing to accept multilevel constitutionalism than states (like Germany) sharing national borders with numerous third states.

3. Limits of Multilevel Constitutionalism

The European history chapter opened by the fall of the Berlin Wall, bringing hopes of 'democratic peace' among the 47 member states of the Council of Europe, ended on 24 February 2022 with Russia's renewed invasion of Ukraine and Russia's suspension from

[40] Cf Petersmann (note 32), 135ff, 169ff.
[41] Cf M.Galeotti, *The Weaponisation of Everything: A Field Guide to the New Way of War* (Yale UP 2022); B.F.Walter, *How Civil Wars Start – and How to Stop Them* (Viking 2022).

representation in the Council of Europe on 25 February 2022. Many authoritarian governments invoke UN principles (like 'sovereign equality of states', 'non-intervention' into domestic affairs) as 'shields' against external criticism (eg of suppressing human and minority rights in China and Russia). The disagreements - also among the five veto-powers in the UN Security Council - on the scope of UN HRL reflect the incomplete ratification, domestic implementation and 'constitutionalization' of UN human rights conventions:

- China ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) but not the UN Covenant on Civil and Political Rights (ICCPR) in order to shield its communist party's political monopoly;
- the USA ratified the ICCPR but not the ICESCR in view of US political preferences for business-driven, neo-liberalism and prioritization of civil and political over economic, social and cultural rights;
- most European countries ratified both the ICCPR and the ICESCR; in contrast to the rejection by China and the USA of regional human rights conventions and human rights courts, they protect civil, political, economic, social and cultural rights also through regional HRL (like the ECHR and the EUCFR);
- Russia does not effectively implement human rights conventions; its oligarchic rulers suppress human rights (eg of political dissidents, freedom of information) and democratic self-determination at home and abroad.

Multilevel constitutionalism for limiting abuses of power and protecting human rights in multilevel governance of PGs must respect legitimate 'constitutional pluralism' within multilaterally agreed limits. If Chinese forced-labor practices violate UN HRL and Russia's invasions of Ukraine undermine the sovereignty principles underlying UN/WTO law, UN and WTO members must defend the international rule-of-law. For instance, the collective economic sanctions responding to Russia's repeated violations of the *erga omnes* prohibition of the use of force (Article 2.4 UN Charter) may promote agreed reforms of the UN collective security system. Successful, rights-based climate litigation in Europe and conditional membership in 'climate protection clubs' offer examples for how 'environmental constitutionalism' can pressure governments to reduce GHG emissions and phase-out coal subsidies.[42] The reality of constitutional pluralism has not prevented Europe's multilevel constitutionalism from promoting international rule-of-law, for instance through EU initiatives for the compulsory WTO dispute settlement system and for ISA based on now more than 3'200 investment protection treaties. Disagreements on human and constitutional rights limit constitutionalization of international law; but judicial remedies for protecting transnational rule of law and impartial third-party adjudication of economic and environmental disputes remain of existential importance for sustainable development.

VI. CONCLUSION: 'TRANSFORMING OUR WORLD' REQUIRES MULTILEVEL CONSTITUTIONAL REFORMS

The legal transformation of the world into networks of interdependent nation states resulted from millennia of cultural evolution of societies. The human desire for legal legitimacy (justice), economic efficiency (welfare) and social acceptability of governments entails that – even if globalization and the universally agreed SDGs require *multilevel* governance institutions – nation states will remain foundations of economic, political and legal cultures. The global health, environmental and security disasters confirm the insufficient problem-solving capacities of the existing UN/WTO governance institutions. Will the new Russian wars of aggression – similar to the universal acceptance of the UN Charter, decolonization and of national Constitutions (written or unwritten) following World War II –usher in a stronger European peace system? The transformation of *national* into *transnational* and *global PGs* requires citizens to

[42] Cf section IV and *Climate Change and Human Rights in the European Context* (European Network of National Human Rights Institutions 2021).

limit their 'rational ignorance' towards the global nature of multilevel governance of most PGs and to struggle for constitutional reforms. This contribution has explained why national constitutionalism must be extended to international treaties and institutions limiting intergovernmental power politics and embedding multilevel governance of transnational PGs in national democratic, republican and cosmopolitan systems protecting the input- and output-legitimacy of international law and participatory governance institutions.

1. Need for Targeting Collective Action Problems

Regulating private goods, PGs, 'club goods' with limited membership, exhaustible common pool resources and 'global commons' (like outer space, the High Seas, Antarctica, the atmosphere, cyberspace, biodiversity, cultural heritage) must respond to diverse collective action problems. The 15 UN Specialized Agencies provide for diverse 'treaty constitutions' for multilevel governance of specific PGs; constitutional restraints on intergovernmentalism (like the tri-partite ILO governance structures, the compulsory WTO dispute settlement system) improved the legitimacy and effectiveness of governance institutions, for instance by linking their respective treaty objectives of protecting PGs (like public health, decent work conditions, public education, food security) to labor rights and human rights universally recognized in UN law. 'Open access regimes' for the 'global commons' share common principles (like non-appropriation, common management, peaceful use, openness to scientific research, benefit- and burden-sharing, protection of the environment); their regulation necessitates also particular treaty rules, institutions, restraints, safeguards of human rights, related principles of justice and judicial remedies protecting 'systemic interpretation' and rule-of-law. Certain collective action problems (like inventing vaccines in response to new epidemics) may be resolved through private-public partnerships led by a single state ('one-shot PGs' like invention of polio vaccine); other collective action problems may require focusing on a few 'weak states' ('weakest link PGs' like nuclear non-proliferation); most national PGs have been transformed by globalization into 'aggregate PGs' requiring treaty-based, multilevel governance institutions, whose rules must respond to the specific collective action problems (eg by including worker and employer representatives into the 'tripartite' ILO institutions). European integration law illustrates how evolutionary constitutionalism (eg as confirmed in the jurisprudence of European courts) and functionally limited 'treaty constitutions' constituting, limiting, regulating and justifying multilevel governance of PGs interact in complex ways. Their success depends on institutionalizing 'public reason' and mobilizing civil society support (eg for decarbonizing economies, supplying vaccines, defending rule-of-law) for transforming 'ideal' into 'real constitutions'.

2. Need for 'Constitutional Embedding' of International Organizations

Comparative studies of regional integration systems suggest that regional economic organizations and common markets function more effectively if they are embedded into regional 'human rights constitutions' (like the ECHR and EUCFR) and protect 'common market freedoms' through common constitutional and competition rules and judicial remedies. Ordo-liberal conceptions of economic organizations, free trade areas and customs unions aimed at protecting 'social market economies' (like the EEA and EU) are democratically and socially better capable of promoting structural changes (like decarbonization and digitalization of economies, provision of vaccines to everybody in health pandemics) and of resisting 'regulatory capture' than money- and business-driven, neo-liberal free trade agreements (eg in North America). EU common market freedoms and related fundamental rights remain strongly supported by most EU citizens. The experimental EU monetary, fiscal and debt disciplines and social rights (eg for economic migrants, political refugees) remain more contested. The currently 280 million migrants, 80 million forcibly displaced people, and the

prospect of 150 million climate refugees by 2050 require 'constitutional constructivism' for humanizing and civilizing legal systems.[43]

Human rights require constituting governmental legitimacy 'bottom up' through citizen-driven national Constitutions, democratic legislation, administrative and judicial protection of rule-of-law. EU law and EEA law demonstrate how path-dependent 'constitutionalism 1.0' and functionally limited 'treaty constitutions 2.0' among states require multilevel protection of human and constitutional rights ('cosmopolitan constitutionalism 3.0') for limiting abuses of national and intergovernmental power politics. Rendering world trade, investment, and environmental law consistent with transnational rule-of-law requires democracies to defend functionally limited, multilevel constitutionalism (like compulsory trade and investment adjudication) against power politics (like President Trump's illegal destruction of the WTO AB system based on false claims about alleged 'judicial over-reach').

3. Constitutionalism as Reasonable Limitation of 'Bounded Rationality'

Just as citizenship in ancient city republics was the driving force for limiting monarchical and oligarchic powers through democratic and republican constitutionalism (eg in ancient Athens and Rome), the universal recognition of human rights requires cosmopolitan constitutionalism protecting 'citizens of the world' against abuses of policy powers: unless citizens – also inside authoritarian countries - assume democratic responsibilities for 'cosmopolitics', multilevel governance of transnational PGs cannot remain legitimate and effective.[44] Citizens remain 'rationally ignorant' of most global governance problems due to their prioritization of their individual life and family plans. Cosmopolitan rights (like human rights, common market rights) can limit this 'bounded rationality' by protecting citizens against abuses of power; they offer citizens incentives for engaging with 'cosmopolitics' responding to global challenges like health pandemics and climate change.

Resisting authoritarian governments and their disregard of human rights at home and abroad remains the biggest challenge. Executive withdrawal (eg by President Trump) from multilateral PGs treaties ratified by parliaments – and illegal, executive disruption of judicial accountability (eg in the WTO) - reflect insufficient democratic control over foreign policy powers also inside democracies. Additional accountability mechanisms (like parliamentary and judicial remedies, science-based health and environmental institutions) are needed for protecting transnational PGs (like rule-of-law, protection of the environment) and overcoming 'bounded rationality' and interest group politics. Promoting PGs requires democracies to defend - as prescribed in the Lisbon Treaty (Arts 3, 21) and acknowledged also in the UN Sustainable Development Agenda - human rights, democratic governance, rule-of-law and the SDGs for the benefit of humanity. Resisting power politics remains a permanent struggle aimed at de-politicizing conflicts over alleged 'state interests' by focusing on common, cosmopolitan interests of citizens. The ubiquity of market failures, governance failures and 'constitutional failures' requires a more humane self-constitution of humanity based on more active civil society struggles for extending democratic constitutionalism (like human, constitutional and democratic rights of citizens, judicial remedies, 'mixed government'), republican constitutionalism (like separation of power, rule-of-law, science-based regulatory agencies), and common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) to regional and UN/WTO governance of PGs. National 'constitutionalism 1.0' is neither adequately extended to international law and institutions; nor are 'PGs treaty constitutions 2.0' sufficiently implemented in domestic legislation, administration and judicial remedies protecting citizens.

[43] 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.
[44] Cf C.Foroni Consani/J.T.Klein/S.Nour Sckell (eds), *Cosmopolitanism. From the Kantian Legacy to Contemporary Approaches* (Duncker & Humblot Berlin 2021).

Section II.2 explained why coherent multilevel governance of PGs requires defining rule-of-law at national and international levels in coherent ways. Multilevel constitutionalism transforms path-dependent 'four-stage sequences' of constitutionalism by integrating 'PGs treaties', multilevel governance institutions, their implementing regulations and cosmopolitan rights into more coherent 'multilevel governance'. Integrating the successive national, international and cosmopolitan constitutional rules must remain embedded into 'demoi-cratic' governance respecting constitutional pluralism and cultural diversities. The reciprocity principles underlying international law promote progressive learning processes, for example by justifying collective countermeasures against authoritarian violations of *erga omnes* rights and duties aimed at limiting abuses of power. The more geopolitical rivalries among authoritarian and democratic governments prevent consensus-based reforms of UN/WTO law, the more necessary become plurilateral reforms of multilevel governance of PGs among like-minded countries. Just as the social and political 'animal nature' of human beings necessitated perennial 'struggles for justice' in national polities, the same social and political antagonisms require democratic states to defend their constitutionally agreed principles of justice also in their external relations with other states, as universally acknowledged in the UN commitments to protecting human rights, democratic governance, rule-of-law and PGs for the benefit of all humanity. As explained by Albert Camus in his *Myth of Sisyphus* and currently demonstrated by the brave resistance in Ukraine against Russian invaders, human beings have reasons to enjoy struggles for justice like Sisyphus, whom ancient Greek vases depicted as smiling even if the stone he pushed uphill ultimately rolled back downhill.