



LAW 2022/11
Department of Law

WORKING PAPER

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Policy Responses in a World without
Effective Global Legal Restraints**

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LAW Working Paper 2022/11

ISSN 1725-6739

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Published in November 2022 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

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With the support of the
Erasmus+ Programme
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Abstract

Modern international law evolved by responding to wars and related governance failures through multilateral treaties and institutions for governing public goods (PGs). The current human disasters – like illegal wars of aggression, violent suppression of human and democratic rights, global health pandemics, climate change, ocean pollution, overfishing and other biodiversity losses, non-compliance with UN and WTO law and dispute settlement systems – reflect multiple governance failures and ‘constitutional failures’ (section I) to protect human and democratic rights and the UN/WTO ‘sustainable development goals’ (SDGs). Since 1950, Europe’s multilevel constitutionalism succeeded in progressively limiting transnational governance failures; yet, it is not followed outside Europe (section II). Geopolitical power politics and nationalism prompted China, Russia and the USA to resist constitutional reforms of UN/WTO governance and ‘environmental constitutionalism’ (section III). Constitutionally unbound ‘totalitarian states’ (like China and Russia) and Anglo-Saxon neo-liberal interest group politics (notably in the USA) disrupt the rules-based world trading system (section IV). Even though the SDGs are of existential importance for citizens all over the world, most citizens and democratic institutions outside the EU fail to adjust their constitutional contracts to obvious transnational governance failures. The more globalization is perceived as creating vulnerabilities justifying national security restrictions (e.g. against spread of viruses, weaponization of interdependence), the more important become plurilateral second-best responses like trade, investment and environmental agreements conditioning market access on respect for human rights and greenhouse gas reductions (section V). Global health, environmental and rule-of-law reforms depend on private-public partnerships with civil societies, business and epistemic communities supporting public health, climate change mitigation and other SDGs. Such ‘multi-stakeholder strategies’ can become more effective by extending democratic constitutionalism to transnational ‘aggregate PGs’. The diverse Asian, European and North-American approaches to governing transnational ‘aggregate PGs’ - as illustrated by the EU’s environmental constitutionalism and ‘EU climate law’ of June 2021 compared with the protectionist, economic and environmental rules and trade discrimination in the 2022 US Inflation Reduction Act of August 2022, and by the refusal of China and India to phase out coal-generated electricity by 2050 – illustrate regulatory competition endangering the SDGs. Can regional leadership, plurilateral reforms and transnational networks of science-based cooperation serve as substitutes for UN and WTO governance failures to protect the SDGs in a multipolar world without hegemonic protection of global PGs?

Keywords

constitutionalism; EU; human rights; governance failures; market failures; UN; WTO.

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

All UN member states adopted national Constitutions (written or unwritten) constituting, regulating and justifying national governance of PGs, and joined multilateral treaties of a higher legal rank for protecting transnational PGs like human rights and rule-of-law. The ‘constitutional politics’ necessary for transforming agreed constitutional principles into democratic constitutionalism was described by the American philosopher Rawls as a ‘four-stage sequence’ as reflected in the history of the US Constitution: reasonable citizens, after having agreed (1) on their constitutional ‘principles of justice’ (e.g. in the 1776 US Declaration of Independence and Virginia Bill of Rights), (2) elaborate national Constitutions (e.g. the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of citizens; and (4) the agreed constitutional and legislative rules need to be applied and enforced by administrations and courts of justice in particular cases so as to protect equal rights and rule of law.¹ The more globalization transforms *national* into *transnational* PGs (like human rights, rule of law, most SDGs) which – in a globally interdependent world composed of 193 sovereign UN member states - no state can unilaterally protect without international law and multilevel governance institutions, the more national ‘constitutionalism 1.0’ has become an incomplete system for governing transnational ‘aggregate PGs’. In European integration among constitutional democracies since the 1950s, the demands by EU citizens for regional and global PGs transformed *national* into *multilevel constitutionalism* extending the national ‘four-stage sequence’ to (5) international law, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU rules (like legal primacy, direct effects and direct applicability of precise, unconditional EU rules by citizens) and (8) domestic implementation of EU law inside member states protecting PGs across national borders (cf section II).² Following the fall of the ‘Berlin wall’ (1989) and the dissolution of the Soviet Union (1991), democratic constitutionalism also contributed to worldwide recognition of multilevel judicial protection of rule of law in UN law (e.g. in the UN Convention on the Law of the Sea (UNCLOS)), trade law (e.g. in WTO law) and in investor-state arbitration. Yet, transforming *national* into *multilevel constitutionalism* remains resisted by authoritarian and nationalist rulers (e.g. in China and Russia) defending their self-interests in discretionary powers without democratic and legal accountability. For example,

- the UN Security Council system is rendered ineffective by authoritarian abuses of veto-powers and illegal aggression and threats of military force;
- the UN human rights system fails to prevent violations of human and democratic rights in many UN member states;
- the 1992 UN Framework Convention on Climate Change (UNFCCC) failed to prevent climate change;
- UN environmental law and institutions also failed to prevent ocean pollution, over-fishing and biodiversity losses;
- the World Health Organization (WHO) failed to prevent and effectively respond to global health pandemics;

¹ Cf. J.Rawls, *A Theory of Justice* (rev edn 1999) at 171ff.

² Cf. Giuliano Amato et al (eds), *The History of the European Union: Constructing Utopia* (2019).

- the Food and Agriculture Organization (FAO) failed to protect food security for currently more than 200 million people; and
- the Bretton-Woods Agreements failed to prevent the 2008 financial crises and remain one-sidedly dominated by the industrialized G7 countries.

How to explain transnational governance failures?

Constitutionalism proceeds from the insight that constitutional contracts among free and reasonable citizens can limit abuses of public and private power and promote voluntary, mutually beneficial cooperation by institutionalizing public reason. The diverse forms of *democratic constitutionalism* (e.g. since the ancient Athenian democracy), republican constitutionalism (e.g. since the ancient Italian city republics), and of *common law constitutionalism* (e.g. in Anglo-Saxon democracies) aim at limiting 'governance failures' through commitments to agreed 'principles of justice' (like human rights, democratic self-governance, separation of powers) and institutions of a higher legal rank (like democratic and judicial protection of rule-of-law). Principles of democratic constitutionalism agreed upon since ancient Athens (like citizenship, democratic governance, courts of justice, 'mixed government'), of republican constitutionalism since ancient Rome (like separation of power, rule-of-law, *jus gentium*), and of common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) have become recognized in national Constitutions as necessary for protecting PGs. The 2030 UN Sustainable Development Agenda (SDA) emphasizes the importance of human rights, democratic governance and rule-of-law also for multilevel governance of transnational PGs like the universally agreed 17 SDGs. Yet, as discussed in section III, the 'constitutional principles' underlying UN human rights law (HRL) and the SDA are neither effectively implemented ('constitutionalized') in the legislative, administrative and judicial practices inside and among authoritarian states (like China, Iran, Myanmar, North Korea, Russia, Syria etc) and neo-liberal democracies nor in UN law. The current economic, environmental, food and migration crises, global health pandemics, Russia's unprovoked military aggression and war crimes in Ukraine confirm the constitutional insight (e.g. of Kantian legal theory) that national Constitutions and 'horizontal inter-national law' cannot protect citizens against external human disasters unless abuses of policy discretion are legally limited in external relations for the benefit of all citizens. From a citizen perspective, the UN and WTO governance crises can be explained in terms of 'constitutional failures' (e.g. to protect human rights, rule-of-law and the SDGs), related 'governance failures' (including both public and private abuses of power) and 'market failures' (like unnecessary poverty, hunger, environmental pollution).

Constitutional responses to transnational governance failures?

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

- process-based, representative democracies (e.g. in Anglo-Saxon countries) tend to prioritize constitutional nationalism, majoritarian institutions, their democratic accountability, civil and political liberties over economic, social and cultural rights of citizens, and discretionary foreign policy powers;³

³ Martin Loughlin, *Against Constitutionalism* (Harvard UP 2022), claims that the people and their elected representatives, rather than citizens and courts of justice invoking human and constitutional rights for social change,

- rights-based, multilevel democratic constitutionalism is practiced notably in the 27 EU member states interpreting their Treaties on European Union (TEU), on the Functioning of the EU (TFEU) and the EU Charter of Fundamental Rights (EUCFR) as functionally limited 'treaty constitutions' restraining market failures (e.g. by competition, environmental and social rules protecting individual and common market freedoms, social rights and judicial remedies), constitutional failures (e.g. by constituting democratic, judicial and regulatory EU institutions protecting human and constitutional rights of EU citizens, transnational PGs and 'national identities'), and governance failures (e.g. by rule-of-law requirements, institutional 'checks and balances');⁴
- authoritarian states (like China and Russia) have adopted 'fake constitutions' that neither effectively constrain power monopolies (e.g. of China's communist party, the oligarchic rulers in the Kremlin) nor protect human and democratic rights and independent, judicial remedies.

This constitutional pluralism suggests that diverse preferences, regulatory competition, geopolitical rivalries and authoritarian opposition against 'constitutional UN and WTO reforms' will remain permanent facts. Russia's wars of aggression, war crimes and 'weaponization' of energy and food supplies illustrate how – the more the UN and WTO systems are undermined by abuses of veto-powers, wars and collective countermeasures - UN and WTO law and governance, and the 'regulatory competition' among authoritarian and democratic countries, risk failing to protect the universally agreed SDGs. The successful, albeit modest results of the WTO Ministerial Conference in June 2022 confirm the need for continuing global cooperation in protecting the SDGs. Yet, the realities of power politics in UN and WTO governance call for second-best, plurilateral reforms among 'willing countries' (e.g. through democratic defense alliances like NATO, 'climate protection clubs' conditioning market access on protection of the SDGs).

Does this reality of intergovernmental power politics justify the frequent disregard of transnational constitutionalism in economic and political science analyses of the collective action problems in protecting global PGs, which pragmatically focus on 'what works', whether successful arrangements in one field can be replicated in others, and on the interests, incentives, power, costs and benefits of the actors involved?⁵ Why is it that welfare economics

should define the nation's political identity and make its most important policy decisions (pp. 124–35). He disregards transnational constitutional, parliamentary, participatory and deliberative democracy as prescribed in EU law (e.g. Arts 9-12 TEU), including protection of *transnational PGs* as a task of 'living democratic constitutionalism'. The focus in US courts on 'negative freedoms' from coercion by government – and on judicial deference to 'political questions' to be decided by the US Congress (like the regulatory powers of the US Environmental Protection Agency) – impedes judicial recognition of 'positive constitutional rights' (e.g. to health and environmental protection) if they have not been explicitly recognized in legislation.

⁴ As discussed in sections II and V, European courts perceive their judicial mandates as 'constitutional guardians' more broadly in view of the multilevel guarantees of human and constitutional rights and related PGs in Europe's multilevel, democratic constitutionalism and 'European' democratic cultures. On the need for more 'progressive constitutionalism' also in the USA see: J.Fishkin/W.E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (Harvard UP 2022).

⁵ Cf G.Papaconstantinou/J.Pisani-Ferry (eds), *New World, New Rules? Final report on the Transformation of Global Governance Project 2018-2021*, EUJ July 2022. The report admits that 'a new world requires new rules' (p. 40), and that 'top-down constitutionalisation through treaties and law' (p. 120) is no realistic template for global governance reforms in a multipolar world (cf. p. 19). Yet it hardly discusses Europe's historical experience that multilevel, bottom-up democratic constitutionalism remains crucial for protecting transnational PGs at regional and worldwide levels of governance.

(e.g. examining costs and benefits of alternative policy instruments within the given constitutional context of states) and power-oriented, intergovernmental pursuit of national self-interests remain the prevailing paradigms for analyzing international politics outside Europe? This contribution proceeds from the constitutional insight that constitutionalism remains the most convincing response to the historical fact that human passions, rational egoism and psychopathic autocrats (e.g. using and threatening military force at home and abroad) remain the biggest challenge to peaceful cooperation among citizens. It criticizes path-dependent nationalism for neglecting how 'constitutional economics' (e.g. underlying EU common market law and GATT/WTO law) and transnational 'constitutional politics' (like EU environmental constitutionalism) have promoted economic and social welfare (e.g. by embedding administrative 'moonshot management' into mutually beneficial constitutional rules, efficient rule-of-law principles, democratic civil society support and successful 'PGs litigation' reinforcing democratic accountability of governments).

The policy question underlying constitutionalism – how to constitute, limit, regulate and justify governance institutions and rules of a higher legal rank protecting informed, individual consent to collective supply of PGs? – remains of existential importance for reasonable citizens in all states. National Constitutions differ among countries according to their histories and preferences; their diverse value priorities and respective 'implementation deficits' (e.g. in democratic and authoritarian states) entail geopolitical rivalries, regulatory competition and authoritarian opposition against multilateralism (like President Putin withdrawing Russia from European institutions, China denying UN HRL, President Trump withdrawing the USA from certain UN and regional treaties). Likewise, the multilateral treaties establishing the 15 UN Specialized Agencies governing special PGs differ among each other in response to their diverse collective action problems. Yet, they remain embedded into the UN Charter and general principles of UN law, just as the various EU institutions remain embedded into general EU constitutional law principles (e.g. as codified in the European Convention on Human Rights (ECHR) and the EUCFR); also national legislatures, executives, judiciaries and independent regulatory bodies remain constrained by constitutional law in their joint governance of PGs. The diverse constitutional structures, principles, rights and duties are important for understanding both *positive aspects* of multilevel governance (like incentives for private-public partnerships, accountability for limiting transnational governance failures) and *normative governance reforms* (e.g. for inventing and producing vaccines, decarbonizing economies, educating and institutionalizing public reason, constraining disinformation by populist demagogues, judicial remedies protecting equal rights and rule-of-law, countermeasures against Russia's war crimes and *jus cogens* violations). Arguably, constitutionalism is also of crucial importance for preventing the 'new deglobalisation' between authoritarian countries (like China and Russia) and democracies to provoke devastating conflicts similar to those which emerged at the end of the 'first deglobalisation' ushering in World Wars I and II, the great economic depression, and the rise in dictatorships responsible for the killing of millions of people.

'*Constitutional economics*' (explaining the welfare effects of constitutional restraints of 'market failures' and 'governance failures') and '*constitutional politics*' (transforming agreed constitutional 'principles of justice' into multilevel legislative, administrative and judicial protection of rule-of-law and PGs) remain neglected also in academic research on multilevel governance of global PGs.⁶ 'Constitutional failures' and 'constitutional implementation deficits'

⁶ For example, the acclaimed book by M. Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Penguin 2020), recommends managerial 'mission-oriented approaches' for realizing the SDGs without acknowledging that most SDGs are 'aggregate PGs' (like ending poverty and hunger for all) requiring international

aggravate market failures, governance failures and the current, worldwide human disasters undermining the SDGs. Constitutional economics suggests examining – and regulating - the man-made causes of the current environmental, health, food, security and rule-of-law crises also beyond states in terms of ‘market failures’ (like harmful externalities), ‘constitutional failures’ (like insufficient constitution of democratic governance institutions protecting human rights) and related ‘governance failures’ (like disregard for rule-of-law).⁷ For example, without taking into account ‘pollution externalities’, economists cannot even know whether the global division of labor increases consumer and citizen welfare. Europe’s multilevel constitutionalism has, however, no equivalent in Africa, the Americas or Asia, where national constitutionalism often fails to effectively constrain abuses of power and to transform ‘collective action problems’ into constitutional reforms – not only in totalitarian states (like China and Russia), but also in other BRICS countries (like Brazil, India, South Africa) and Anglo-Saxon democracies (like ‘Brexit Britain’ and the USA under President Trump, *cf* sections III-V). UN HRL and the SDA emphasize the need for human rights, democratic governance and rule-of-law for protecting the SDGs. Yet, UN HRL and UN/WTO remedies do not effectively constrain (‘constitutionalize’) power politics (sections III-IV). The ‘regulatory competition’ among neo-liberal, state-capitalist and ordo-liberal conceptions of governance is aggravated by the lack of effective UN and WTO legal disciplines on ‘market failures’ (like restraints of competition, adverse externalities, information asymmetries, social injustices), ‘governance failures’ (e.g. to respect rule-of-law and protect PGs), and ‘constitutional failures’ (e.g. in terms of protecting human rights against authoritarian power politics). The needed global cooperation in UN and WTO institutions is further eroded by regional power politics (e.g. in Eurasia) and related countermeasures (e.g. by democratic alliances sanctioning ‘governance failures’ abroad like suppression of human rights in China and Russia). This contribution concludes that the UN SDA risks becoming a *utopia* unless democracies extend their diverse forms of constitutionalism to plurilateral protection of transnational ‘aggregate PGs’ (like public health and climate change mitigation) by empowering private and public, national and international actors to hold multilevel governance of PGs more accountable.

II. Europe’s Multilevel Constitutionalism – why has it no Equivalent outside Europe?

Since the 1950s, the successful transformation of *national* into *multilevel European constitutionalism* protecting human rights and democratic peace among most European countries has confirmed the historical experience that democratic constitutionalism remains the most important ‘political invention’ for limiting transnational governance failures like abuses of public and private power caused by ‘bounded rationality’ of human beings. Citizens often remain dominated by their passions and selfish utility-maximization (as illustrated by millennia of wars, slavery and gender discrimination) rather than by their reasonableness and morality. Constitutional self-limitations can limit abuses of public and private power by ‘tying one’s hand to the mast’ (following the ancient wisdom of Ulysses) of agreed principles of justice (like human rights, democratic self-determination, rule-of-law) and inclusive institutions of a higher

cooperation among UN member states for overcoming collective action problems, which are fundamentally different from ‘single best efforts PGs’ (like inventing vaccines and sending astronauts to the moon, which may be realized by a single state). On the different kinds of PGs and their diverse ‘collective action problems’ see E.U.Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022), chaps 4 and 5.

⁷ On ‘constitutional economics’ and ‘economic constitutionalism’ see Petersmann (n 6); S.Voigt, *Constitutional Economics: A Primer* (CUP 2020).

legal rank. World War II prompted all 193 UN member states to strengthen such 'legal self-commitments' at national and international levels of law and governance. 'Constitutional politics'⁸ adjusting national Constitutions to global regulatory challenges remain, however, neglected by most citizens and governments outside Europe notwithstanding their universal experience that intergovernmental power politics (like colonialism and imperial wars) undermined democratic peace and welfare all over the world. Just as World War I led to communist dictatorships (e.g. following the Bolshevik revolution in 1917) and civil wars (e.g. in the dissolution of the Chinese and European empires), the 'new deglobalisation' provoked by the Russian wars of aggression, current geopolitical rivalries and trade wars require new forms of plurilateral, economic and political cooperation preventing psychopathic autocrats from realizing their threats of nuclear war and environmental disasters through new forms of transnational constitutional restraints on 'bounded human rationality'.

Constitutional limitations of 'market failures' and 'governance failures'

Europe's multilevel constitutionalism extended national constitutionalism to functionally limited 'treaty constitution' constituting, limiting, regulating and justifying European governance of transnational PGs (like the human rights protected in the ECHR, the common market freedoms and rule-of-law principles of Europe's common market and monetary constitutionalism). The Lisbon Treaty's 'common market constitution' for a 'competitive social market economy' limits national and EU powers through constitutional, competition, environmental, social rules and institutions of a higher legal rank restricting 'market failures' (like abuses of market power, cartel agreements, environmental pollution, information asymmetries, social injustices) and related 'governance failures' (like public-private collusion exploiting consumers and taxpayers for the benefit of oligarchs). Inside the EU and in the external relations with European Free Trade Area (EFTA) countries, multilevel constitutionalism induced all EU and EFTA countries to cooperate in their multilevel implementation of European and national competition, environmental, 'social market economy' rules, data protection and digital services regulations. The institutionalization of multilevel competition, environmental, monetary and other EU regulatory agencies, and of related democratic and judicial remedies, limited governance failures through multilevel network governance of independent competition, monetary and other regulatory agencies, democratic institutions and courts of justice.

The 'regulatory competition' among EU member states, EFTA states and third European states remained 'constitutionally restrained', for instance due to the ECHR and related constitutional law principles protected by multilevel cooperation among European courts (like the European Court of Human Rights, the EFTA Court, the European Court of Justice) and national courts. The common membership of European countries in the General Agreement on Tariffs and Trade (GATT 1947), the 1979 Tokyo Round Agreements, and the 1994 Agreement establishing the WTO offered additional legal disciplines, political institutions and judicial remedies for resolving disputes if diverse European regulatory systems and economic and trade policies created conflicts over perceived governance failures. The – relatively few - GATT and WTO disputes initiated by third European countries (like Norway and Turkey) challenging EU regulations empirically confirmed how European integration law promoted 'democratic peace'. Whenever financial, public debt, monetary, migration, public health and energy crises

⁸ The term 'constitutional politics' is used here for describing dynamic, democratic and judicial processes of implementing agreed 'constitutional principles of justice' in multilevel governance of PGs and for challenging the 'non-implementation deficits' causing constitutional-, governance- and market-failures.

inside the EU revealed 'constitutional failures' to secure rule-of-law and protect PGs, EU institutions responded by seeking to reform EU law, for example by monetary and fiscal integration in response to the financial crises since 2008, a 'health union' in response to the Covid-19 health pandemic of 2020, and common migration, energy, foreign and defense policies in response to Russia's military aggression against Ukraine since 2014.

Multilevel 'constitutional politics' protecting transnational PGs

European law responds to the fact that globalization transforms *national* into *transnational* PGs, thereby rendering national Constitutions incomplete. Globalization requires complementary, multilevel constitutionalism constituting, limiting and justifying multilevel governance of transnational PGs. European law illustrates how path-dependent 'constitutionalism 1.0' based on (1) national constitutional contracts (like the 1789 French Declaration of the Rights of Man and the Citizen), (2) national Constitutions, (3) democratic legislation and (4) administrative and judicial protection of rule-of-law for the benefit of citizens can be extended to international law and institutions for legally constituting *transnational* PGs, which no single state can protect without rules-based international cooperation. Maintaining the input- and output-legitimacy of functionally limited 'treaty constitutions 2.0' among states (like the 2009 Lisbon TEU) constituting and regulating such multilevel governance requires also 'cosmopolitan constitutionalism 3.0' (as codified in the EUCFR) based on multilevel, institutional protection of human and constitutional rights, transnational rule-of-law and multilevel implementing regulations respecting 'constitutional pluralism'. In Europe, the demands by EU citizens for regional and global PGs transformed *national 4-stage constitutionalism* into *multilevel constitutionalism* by 'constitutionalizing' (5) international law, (6) multilevel governance institutions, (7) communitarian domestic law effects of EU rules and (8) domestic implementation of EU law inside member states protecting PGs across national borders. The emergence of 'illiberal' EU member states (e.g. in Hungary and Poland) illustrated why the 'normative pull' of human rights depends on their 'normative push', *ie* their effective legal implementation through constitutional law, democratic legislation, administration and adjudication, international treaties, multilevel governance institutions, 'secondary law' of international institutions (like the jurisprudence of European economic and human rights courts) and its domestic, legal implementation. The limitation of EU membership to constitutional democracies – and the democratic, regulatory and judicial EU institutions – promoted citizen-driven enforcement of EU law through multilevel, judicial protection of constitutional guarantees of civil, political, economic and social rights and common market freedoms (like free movements of goods, services, persons, capital and related payments, freedom of profession) across national borders, which the more than 450 million EU citizens never enjoyed before the creation of the European community. The EU law commitments (e.g. in Arts 3, 21 TEU) to protecting human rights and rule-of-law also in the EU's external relations contributed to worldwide recognition of multilevel judicial protection of rule-of-law beyond the EU, for instance in trade and investment agreements (e.g. by prompting the EU to insist on compulsory trade adjudication in WTO law and on investment adjudication also in the EU's external investment treaties), in international criminal law (e.g. by constituting transnational criminal courts), and in other multilateral treaties with compulsory adjudication like the UNCLOS. Europe's historical experiences with centuries of wars, its particular political context of now more than 40 neighboring democracies, their common experiences of 'constitutional failures' (like feudalism, dictatorships, the holocaust) ushering in World Wars I and II and the 'cold war', and the positive 'constitutional transformation experiences' of EU citizens were major driving forces for Europe's multilevel constitutionalism. In Asia and North-America, constitutional nationalism continues to prevail in the shadow of regional hegemons; among

African and Latin-American democracies, regional human rights conventions and common markets promoted much weaker 'constitutional reforms' compared with European integration. Populist politicians prioritize nationalist over cosmopolitan responses to global governance crises, especially in 'island states' (like 'Brexit Britain', Australia, New Zealand) that are less confronted with 'cross-border problems' than EU and EFTA members sharing their borders with many states.

III. Why UN Constitutionalism has become a *Utopia*

The constitution, limitation, regulation and justification of legislative, executive and judicial UN institutions and procedures in the UN Charter and the 1948 Universal Declaration of Human Rights (UDHR) initiated a revolutionary transformation and decolonization of the international legal system. National constitutionalism and UN HRL induced some UN institutions to recommend 'constitutional governance models' (including protection of human rights, democracy, separation of powers, checks and balances, judicial remedies, rule-of-law) also for multilevel governance of the SDGs.⁹ Yet, the proposed constitutional reforms remained limited to a few policy areas (like compulsory adjudication in WTO law, investment law and in the UNCLOS). Without compulsory judicial remedies, UN HRL cannot be effectively enforced. The UN Security Council system continues being blocked by abuses of veto-powers. Only in exceptional situations did the UN Security Council (SC) assert 'legislative powers', for example to establish international criminal courts and respond to international health pandemics by adopting UN SC Resolutions 2532 and 2565 (2020) acknowledging that 'the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security'¹⁰ and calling 'upon all parties to armed conflicts to engage immediately in a durable humanitarian pause' to provide humanitarian assistance to the world's most vulnerable in conflict zones.¹¹ Similar UN Security Council responses to environmental crises remain unlikely, notwithstanding the universal recognition of the need for decarbonizing economies and for protecting the potentially millions of climate refugees against the risks of climate change and rises in sea levels inundating many countries and cities.

Disagreements on human rights

The disagreements – also among the five veto-powers in the UN SC – on the scope of UN HRL reflect the incomplete ratification and implementation of UN human rights conventions:

- China has 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;

⁹ Cf G.Ziccardi Capaldo, Global Constitutionalism and Global Governance: Towards a UN-Driven Global Constitutional Governance Model, in M. Cherif Bassiouni (ed), *Globalization and its Impact on the Future of Human Rights and International Criminal Justice* (OUP 2015), 629-662.

¹⁰ SC Res. 2532 (July 1, 2020) pmbl. para 11; SC Res. 2565 (Feb. 26, 2021) pmbl. 17.

¹¹ SC Resolution 2532 para 2.

- the USA has 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 have ratified both the ICCPR and the ICESCR; in contrast to the rejection by China and the USA of individual UN complaint mechanisms and of regional human rights conventions and human rights courts, they protect civil, political, economic, social and cultural rights also through individual UN complaint procedures and regional HRL (like the ECHR and the EUCFR) with individual access to national and European courts;
- Russia does not effectively implement human rights conventions; its oligarchic rulers suppress human rights (e.g. of political dissidents, freedom of information) and democratic self-determination at home and abroad.

The universal recognition of civil, political, economic and social rights in the UDHR illustrates how human struggles for freedom and peace, and for truth and justice (e.g. in the sense of 'reasonable justification'), are inseparably linked. Democratic self-constitution based on agreed 'principles of justice' (like equal freedoms as 'first principle of justice' as explained by I.Kant and J.Rawls) enables societies to strengthen social peace and mutually beneficial cooperation; public disinformation and suppression of human rights characterize authoritarian governance in unfree societies like the UN veto-powers China and Russia. Hence, constitutional economics perceives informed individual consent to reasonable, mutually beneficial rules – rather than only cost-benefit analyses – as the true source of consumer welfare and citizen welfare (e.g. in the sense of 'development as freedom' to realize one's human capacities).¹² The 'embedded liberalism' and rule-of-law systems underlying the UN and WTO sustainable development obligations are, however, increasingly disregarded by authoritarian rulers, as illustrated by:

- China's refusal to comply with the 2016 UNCLOS arbitral award on China's illegal extension of sovereign rights in the South China Sea, and China's disregard for human rights inside China;
- the illegal US blocking of the WTO Appellate Body (AB) system since 2017, which reflected President Trump's efforts at politicizing and weakening judicial control also inside the USA; and
- Russia's refusal to comply with the 2022 judicial orders by the International Court of Justice and the European Court of Human Rights to suspend its illegal suppression of human rights in Ukraine and inside Russia.

Disregard for human and democratic rights is the main reason for unprovoked and unjustified wars of aggression and related war crimes (as currently in Ukraine) and for 'constitutional implementation deficits' in UN and WTO legal practices ushering in governance failures to prevent unnecessary poverty (SDG1) and protect food security (SDG2), public health (SDG3) and public education for all (SDG4), gender equality (SDG5), access to water and sanitation for all (SDG6), and many other SDGs like 'access to justice' (SDG16).¹³ The annual UN reports

¹² For developing international economic law from such citizen-oriented theories of justice see: E.U.Petermann, *International Economic Law in the 21st Century* (Hart 2012).

¹³ The importance of democratically inclusive 'good governance' and of 'inclusive institutions' for promoting sustainable development in its economic, social, environmental and legal dimensions is empirically proven; see:

on progress towards the SDGs document how ‘decades of development progress have been halted or reversed’ as a result of Russia’s military aggression against Ukraine (e.g. forcing more than 15 million people inside Ukraine to flee from their homes), global health pandemics, related food and economic crises and violent conflicts elsewhere.¹⁴ The realities of power politics blocking constitutional reforms of UN and WTO governance do not exclude cooperation among ‘willing countries’, for instance at the WTO Ministerial Conference in June 2022 and in regional free trade agreements (FTAs). Yet, power politics impedes the ‘constitutional functions’ of UN/WTO law for limiting collective action problems and protecting PGs demanded by citizens by transforming constitutional nationalism into multilevel governance of transnational PGs.

Power politics undermines UN constitutionalism and ‘higher law’ (jus cogens)

National Constitutions differ from each other depending on the democratic preferences and path-dependent histories of people. Constitutional rules and international law - including also peremptory rules of law (like democratic self-determination, prohibition of the use of force and of denial of basic human rights) and prohibitions to recognize as lawful situations that were created by serious breaches of *jus cogens* (like Russia’s aggression, annexation and ‘Russification’ of Ukrainian territories aimed at annihilating the people of Ukraine) - are recognized as ‘higher law’ vis-à-vis post-constitutional legal practices. As the collective action problems inside and among states often differ, also the 15 UN Specialized Agencies provide for diverse ‘treaty constitutions’ for multilevel governance of specific PGs, as illustrated by the ‘constitutions’ (*sic*) establishing:

- the International Labor Organization (e.g. providing for labor rights and tri-partite ILO membership of governments, employer and employee representatives),
- the World Health Organization (WHO, e.g. protecting health rights through international health regulations and conventions),
- the Food and Agriculture Organization (FAO, e.g. protecting food security and related human rights of access to food) and the
- UN Educational, Scientific and Cultural Organization (UNESCO, e.g. protecting rights of access to education).

Likewise, the collective action problems of 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) differ among each other. Democratic support for their multilevel regulation is impeded by the fact that most citizens tend to prioritize their ‘local lives’ (e.g. as members of families, villages, and professional organizations); they often remain ‘rationally ignorant’ toward multilevel global governance problems. The (inter)governmental power politics dominating UN institutions (like abuses of veto-powers in the UN SC, China’s lack of full cooperation in WHO attempts at clarifying the origins of the Covid-19 pandemic in Wuhan) undermines UN protection of human rights and related PGs. ‘Open access regimes’ for the ‘global commons’ (like the High Seas) share common principles (like non-appropriation, common management, peaceful use,

S.Dercon, *Gambling on Development: Why Some Countries Win and Others Lose* (Hurst 2022); D.Acemoglu/J.Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile RBP 2011).

¹⁴ UN Economic and Social Council E/2022/XXX, Report of the Secretary-General (advance un-edited version).

openness to scientific research, benefit- and burden-sharing, protection of the environment). The diverse regulatory regimes (like UNCLOS as the legal ‘constitution of the oceans’, the UN Framework Convention on Climate Change (UNFCCC) as legal ‘constitution of the atmosphere’) remain, however, distorted by market and governance failures (as illustrated by ocean pollution, over-fishing and climate change). Without enforcement of the *jus cogens* limits of ‘higher’ international and constitutional rules of law and of peremptory norms protecting ‘planetary boundaries’, the prevailing power politics will continue undermining the legitimacy and effectiveness of UN and WTO law.¹⁵

Constitutional economics remains neglected in UN legal practices

State-capitalist countries and business-driven, neo-liberal economies rely more on management approaches to economic and environmental regulation than ordo-liberal economies (e.g. inside the EU) restrained by multilevel constitutionalism. Mazzucato’s acclaimed book on ‘Mission Economy: A Moonshot Guide to Changing Capitalism’ (2020) argued for managerial ‘mission approaches’ to organizing economies and realizing the SDGs, for instance following the example of the inclusive ‘Green Deal’ advocated by the EU Commission. Such approaches are appropriate for ‘single best effort PGs’ that can be supplied by a single state (like inventing medicines, exploring the moon) as well as for the pursuit of ‘aggregate PGs’ within regional communities like the EU. Yet, globalization has transformed most PGs into global ‘aggregate PGs’ (like human rights, rule-of-law, most SDGs) dependent on global ‘aggregation’ of local, national and transnational PGs, which no state can secure without cooperation with other states. Overcoming global collective action problems (e.g. in controlling ‘rogue governments’ circumventing nuclear non-proliferation as a PG, preventing ‘wrong GATT panel reports’ by mandating the GATT/WTO Secretariats to ‘assist’ GATT/WTO panel proceedings) requires legal restraints limiting managerial discretion and ‘technological solutions’ proposed for multilevel regulatory challenges (like geo-engineering aimed at mitigating climate change). Europe’s ‘constitutional constructivism’ illustrates how ‘evolutionary constitutionalism’ (e.g. as clarified in European and national jurisprudence on general constitutional principles) and Europe’s functionally limited – and periodically adjusted – ‘treaty constitutions’ interact dynamically. Without multilevel cooperation (as among national and European governments, parliaments, courts, central banks, competition and other regulatory authorities, civil societies), constitutional reforms of UN and WTO law risk being blocked (e.g. by veto powers in UN institutions and WTO consensus practices). Similarly, without more effective protection of human rights and stronger legal restraints on impunity of war crimes (as in Russia’s war of aggression in Ukraine) and on distortions of economic competition (e.g. by state subsidies, state-trading practices, environmental pollution), restraints of competition, ‘pollution externalities’ and utilitarian economic neo-liberalism in UN and WTO member state practices are bound to continue.

Both inside the EU and in the wider European Economic Area (EEA) with EFTA countries, human, constitutional and economic rights were enforced by citizens protected by multilevel democratic, judicial and regulatory institutions and treaty systems like the EUCFR, the ECHR, the EU’s common market constitution, its partial extension to EFTA countries, the EU’s incomplete monetary constitution and functionally limited ‘foreign policy constitution’. The institutional ‘checks and balances’ constraining ‘executive emergency governance’ inside the EU during economic, financial, public health and environmental crises confirmed how human

¹⁵ Cf E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Hart 2017) and the work of the International Law Commission on codification of the international law rules on *jus cogens*.

rights became more effective if citizens could invoke and enforce (e.g. in national and European courts) precise, unconditional, international rules and judicial remedies for challenging power politics. Rather than relying only on result-oriented, macro-economic 'Kaldor-Hicks efficiency gains' and 'welfare economics' within the existing framework of national constitutionalism, Europe's multilevel economic constitutionalism is based on 'constitutional economics' deriving values from voluntary, informed consent of citizens by embedding the common market, monetary, competition and environmental EU policies into multilevel constitutional rules and institutions promoting mutually beneficial, human and constitutional rights and non-discriminatory conditions of competition for a 'competitive social market economy' (Art. 3 TEU) enhancing the welfare of all citizens. In contrast to British, Chinese, US and Russian executives claiming 'sovereign powers' to violate international treaties ratified by parliaments (e.g. for realizing 'Brexit', starting US trade wars against China and NATO allies), EU executive powers are constitutionally more constrained, for example by the common market freedoms, customs union rules and judicial remedies in the EU's common market constitution. *Constitutional economics*¹⁶ explores the welfare-enhancing effects of changes in constitutional rules (like EU common market freedoms, constitutional and social rights of access to food, public health and environmental protection); it explains, *inter alia*,

- why economic and social welfare functions must be defined through democratic constitutionalism (e.g. respecting demand of citizens for equal freedoms, human rights and other PGs) with due respect also for multilateral treaties protecting transnational PGs;
- why mutually complementary economic and democratic constitutionalism tend to avoid human disasters (like famines, abuses of military power) that have been tolerated in dictatorships (e.g. under Stalin, Mao and colonialism); and
- why legal institutions limiting 'moral hazards' (e.g. by 'balanced budget rules', the fiscal and debt disciplines prescribed in the TFEU) and prohibiting gender discrimination are likely to increase economic welfare inside multilevel governance and federal states.

Economic analyses of national and international, legal and political systems can enhance their respective contribution to economic efficiency. For instance, GATT/WTO law and their legal ranking of alternative trade policy instruments according to their economic welfare effects enabled all 164 WTO members to reduce poverty and enhance national welfare for the benefit of their citizens. Out of the 10 most productive countries in 2021/22 (measured by GDP by hour worked), seven were EU members, and two were EEA/EFTA members following most EU common market rules. Constitutional economics insists on citizen-oriented, reasonable 'constitutional choices' respecting human dignity (human and democratic rights), protection of human capabilities, constitutional rights of citizens (like equal access to education, health protection, satisfaction of basic needs), social justice (e.g. promoting 'social market economies' reducing unjust income distribution) and the principal-agent relationships between citizens and governance agents with limited, delegated powers not only on moral, democratic and legal, but also on economic grounds. Yet, rules and institutions must be designed with due regard to diverse political economy environments. For instance, invention, clinical testing and production

¹⁶ Cf n 7. Institutional and constitutional economics share with neoclassical economics certain fundamental assumptions (such as methodological and normative individualism, pursuit of efficiency gains). Yet, they extend economic analyses to aspects that are typically ignored in neoclassical economics, such as the interdependencies between democratic constitutionalism (e.g. protecting civil and political freedoms, voter preferences, limitation of all government powers, democratic accountability) and transnational, economic constitutionalism (e.g. protecting economic and social rights, consumer preferences, non-discriminatory competition, legal accountability and consumer welfare by limiting business-driven neo-liberal politics and social inequalities).

of vaccines by pharmaceutical industries supported by intellectual property rights, subsidies and government procurement may offer efficient health policy strategies for industrialized market economies (provided 'rent-seeking interest group politics' and 'regulatory capture' are limited); less-developed and state-capitalist countries, however, may justify different health policies. The 'rational ignorance' of most citizens towards complex foreign policy challenges (like abuses of discriminatory tariffs for taxing and redistributing domestic income) justifies constitutional restraints on foreign policy discretion (e.g. as prescribed in the EU's 'foreign policy constitution' set out in Arts 3, 21 TEU). The emergence of the 'anthropocene' caused by human transgressions of laws of nature provoking climate change led to successful insistence by EU citizens on 'environmental constitutionalism', as illustrated by the regulation of environmental rights, duties, principles and policy goals in the EUCFR (e.g. Article 37), in the Lisbon Treaty (e.g. Arts 11, 191-193 TFEU) as well as in national Constitutions and HRL empowering citizens to complement the constitutional, parliamentary, participatory and deliberative dimensions of European democracy (cf Articles 9-12 TEU) by engaging in 'strategic climate litigation' as discussed below.

The multilevel rules, institutions and 'principles of justice' governing the EU's 'competitive social market economy' differ fundamentally from business-driven, Anglo-Saxon economic regulation, the 1944 Bretton Woods Agreements and GATT/WTO law justifying health and environmental harm, social injustices and discriminatory protectionism by macro-economic 'Kaldor-Hicks efficiencies'.¹⁷ Britain's 'Brexit' and the unilateral US withdrawal from the draft Transatlantic Trade and Investment Partnership (TTIP) illustrated the conflicts between utilitarian, neo-liberal constitutional nationalism and multilevel, constitutional ordo-liberalism. The lack of rule-of-law and of independent, judicial protection of human rights and of non-discriminatory conditions of competition in many UN member states (like China, Iran, North Korea, Myanmar and Russia) reflect suppression of democratic constitutionalism and constitutional economics. Hence, many UN governance institutions – including the monetary and financial Bretton Woods institutions dominated by hegemonic US policies – remain driven by power politics.

UN climate law prioritizes state sovereignty over environmental constitutionalism

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

¹⁷ Cf Petersmann (n 7), at 189ff. In contrast to neo-liberal conceptions of self-regulatory markets and competition as gifts of nature subject to 'governmental fixes', Europe's ordo-liberalism perceives markets and non-discriminatory conditions of competition as legal constructs requiring systemic legal restraints of market failures, constitutional failures and related governance failures. On the differences between national schools of law and economics (like the Freiburg and Cologne schools in Germany, the Chicago and Virginia schools in the USA) and transnational schools of law and economics (like the Brussels and Geneva schools in Europe, the 'Washington consensus' promoted by the Bretton Woods institutions) see Petersmann (n 7), chapter 2.

more legally developed compared with UN climate mitigation policies and their authoritarian neglect in many UN member states.

In Europe, Articles 2 and 8 ECHR prompted ever more courts to protect human rights to life and family life against harmful environmental pollution and climate change. Some European states adjusted their national Constitutions by recognizing environmental rights or constitutional duties to protect the environment (as in Article 20a German Basic Law). According to Article 37 EUCFR, a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. Combatting climate change, promoting sustainable development in cooperation with third states, and principles of 'environmental constitutionalism' (like the principles of precaution, prevention and rectifying pollution at source, the 'polluter pays' principle) are included into the EU Treaty provisions on EU environmental policies (e.g. Arts 11, 191-193 TFEU). It was in response to democratic and parliamentary pressures that the EU's comprehensive climate legislation – notably the European climate law approved in June 2021 and the 13 legislative EU Commission proposals published on 14 July 2021 aimed at making Europe the first carbon-neutral continent by 2050 – offered leadership for implementing the Paris Agreement on climate change mitigation, for instance by making the goals of 'at least' 55% GHG reductions by 2030 and a climate-neutral European economy by 2050 legally binding for EU and member state policies. The multiple policy tools and mandatory standards aim at a socially 'just transition' with active industrial policies to secure continuing economic growth. The EU emissions trading system (ETS) will be complemented by carbon border adjustment measures (CBAM) aimed at preventing 'carbon leakage' and distortions of international competition in countries with more ambitious climate change policies. Climate litigation increasingly acknowledges invocation by private and public complainants of GHG reduction obligations of governments as recognized in EU law and UN law.¹⁸ The EU climate mitigation objectives, principles and legal obligations are more precise, more uniform, more democratically controlled and judicially enforceable than the respective objectives, principles and legal obligations under UN law.

Rights to the protection of the environment are increasingly recognized in the laws of now more than 150 states, regional treaties, and by the UN Human Rights Council (HRC).¹⁹ Environmental rights have been invoked by litigants all over the world in hundreds of judicial proceedings on protection of environmental interests. In national and European environmental litigation, courts holding governments legally accountable for climate mitigation measures increasingly refer to human rights and constitutional principles. For example, the ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda* confirmed that Articles 2 (right to life) and 8 ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG emissions by at least 25% (compared to 1990 levels) by the end of 2020. The judgment clarified that human rights and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens to enforce positive obligations to take appropriate measures mitigating climate change.²⁰ The ruling of the District Court of The

¹⁸ Cf Petersmann (n 7), chapter 9.

¹⁹ 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.

²⁰ *Supreme Court, State of the Netherlands v Stichting Urgenda* (2019, ECLI:NL:HR:2019:2007, *Urgenda v NL*, 2019). For comparative overviews of climate litigation see: C. Rodriguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action* (CUP 2021);

Hague on 26 May 2021 in *Milieudefensie v Royal Dutch Shell* was the first judgment in which a multinational corporation was held responsible for its contribution to climate change based on national and international law.²¹ The case was brought as a public interest class action by a Dutch NGO; it does not focus on compensation for past damages but on corporate obligations to reduce emissions and invest more in cleaner fuels to protect the common interest of current and future generations in preventing dangerous climate change. Similar litigation against energy companies focusing on corporate responsibilities for climate change is pending in many countries. Even though the judgment is based on corporate duties of care under Dutch tort law, the Court's references to international law and to the shared responsibilities of corporate actors may influence the reasoning in future judgments by other courts. The Court found that the total CO₂ emissions of the Shell group exceeded the emissions of many states, including the Netherlands. The group's global CO₂ emissions contributed to global warming and climate change in the Netherlands; they entailed significant risks for residents of that country. The court agreed with the complainants that Shell had an obligation to reduce CO₂ emissions of the Shell group's entire energy portfolio, holding that:

- Shell is obliged to reduce the CO₂ emissions of the Shell group's activities by net 45 per cent by the end of 2030 relative to 2019 through the Shell group's corporate policy;
- the policy, policy intentions, and ambitions of the Shell group imply an imminent violation of this obligation;
- the Court, therefore, allowed the claimed order for compliance with this legal obligation.

The judgment took into account human rights and the Paris Agreement in its interpretation of the unwritten standard of care. The Court also referred to the UN Guiding Principles on Business and Human Rights (UNGP), which it found to constitute an authoritative, internationally endorsed soft law instrument setting out the responsibilities of states and businesses in relation to human rights; the UNGP 'are suitable as a guideline in the interpretation of the unwritten standard of care'. According to the Court, the responsibility to respect human rights encompasses the company's entire value chain' including the end-users of the products produced and traded by the Shell group. The Court concluded that the human rights standards, the UNGP, and the Paris agreement all support the conclusion that Shell should be ordered to reduce the CO₂ emissions of the Shell group's activities by net 45 per cent at the end of 2030 relative to 2019 through the group's corporate policy. In the USA, by contrast, similar constitutional and human rights tend to be denied by US courts, for instance on grounds of judicial deference towards 'political questions' left open in the US Constitution and not (yet) decided by the US Congress, which remains reluctant to enact legislation recognizing new human, constitutional or environmental rights and prescribing climate change mitigation based on the 'polluter pays principle' (aimed at enhancing 'Pareto efficiency' protecting all citizens against environmental harms) rather than on macro-economic 'Kaldor-Hicks-efficiencies' (justifying also polluting industries). The US Inflation Reduction Act adopted in August 2022 uses discriminatory tax credits, domestic content requirements and trade discrimination for promoting de-carbonization of the US economy, thereby further undermining WTO law and increasing trade conflicts.

F.Sindico/M.Mbengue, *Comparative Climate Change Litigation* (Springer Publishing 2021). For systemic collections of climate cases see: *Fighting Dangerous Climate Change: A Best Practice Guide for Judges and Courts* (World Commission of Environmental Law; <https://www.iucn.org/commissions/world-commissionenvironmental-law/our-work/climate-change-law/judicial-handbook-climate-litigation>).

²¹ *The Hague District Court, Milieudefensie et al. v. Shell* (2021, ECLI:NL: RBDHA:2021:5339).

IV. Disruption of WTO Law by ‘Constitutionally Unbound Executives’

Authoritarian states (like China and Russia) do not protect effective constitutional and judicial remedies of their citizens against executive suppression of human and democratic rights (like freedoms of information and of political opposition). Nor do their power monopolies and state-capitalism protect non-discriminatory conditions of competition. GATT/WTO law provides for insufficient legal disciplines on state-trading companies, subsidies and other distortions of trade and competition (like tax exemptions). Hence, market economies increasingly introduce countermeasures in their trade relations with China and Russia aimed at limiting competitive distortions and perceived violations of the ‘embedded liberalism’²² underlying WTO law. China’s pledge of ‘unlimited support’ for Russia in February 2022, and its network of bilateral ‘Belt and Road Agreements’ with over 80 countries, lay the foundations for an alternative trade regime dominated by bilateral power-politics without multilateral rules, independent judicial remedies and guarantees of human and democratic rights of citizens.

Abuses of executive powers by populist demagogues (e.g. disregarding international obligations like the EU-UK Brexit Agreement and the Paris Agreement on Climate Change) are an increasing challenge also inside democratic countries. US President Trump (2017-2021) interpreted his executive powers under Article II of the US Constitution very broadly as allowing him to do whatever he wanted in the foreign policy area (e.g. withdrawing the US from multilateral treaties like the WHO Constitution and the 2015 Paris Agreement). The ‘tribal support’ from Republican party majorities in the US Congress for President Trump undermined parliamentary control of executive politics (like President Trump’s ‘putsch attempt’ on 6 January 2021), including congressional control of US trade policies as provided for since the 1934 US Reciprocal Trade Agreements Act in successive US trade legislation. Following the refusal by the US Congress to ratify the GATT 1947 and the 1948 Havana Charter for an International Trade Organization, the US Congress did adopt implementing legislation for the 1979 Tokyo Round Agreements and the 1994 Uruguay Round Agreements establishing the WTO. As this implementing legislation does not recognize a power of the US President to unilaterally withdraw the USA from the WTO and change the pertinent US trade laws without involving the US Congress, US constitutional lawyers disagree on whether President Trump’s executive orders blocking the functioning of the WTO AB and ordering discriminatory import restrictions in clear violation of WTO law are justifiable under US constitutional law.²³ Since the 1980s, US President Reagan’s neo-liberal policies promoted business-driven economic regulation, money-driven democratic elections, ‘rent-seeking’ limitations of trade and competition (e.g. by protecting domestic producers through ever more discriminatory ‘trade remedies’, subsidies, regulatory standards, tax reductions, intellectual property rights, only selective enforcement of US antitrust laws) and increasing social inequalities. Unilateral US trade sanctions (e.g. against foreign violations of US intellectual property rights) and US interest group politics in the ‘GATT Rounds’ of multilateral trade negotiations reinforced selective US import protection (e.g. for domestic agricultural, cotton, textiles and steel producers) and export opportunities for dominant US suppliers (notably for services trade and US ‘tech empires’ protected by intellectual property rights and systemic tax avoidance).

²² Arguably, the ‘embedded liberalism’ underlying WTO law has evolved beyond its limited meaning under GATT 1947, for instance by including new UN and WTO legal obligations like the recognition of four Chinese customs territories limiting the ‘One China, two systems principle’ (as recognized in UN law) by the trade policy autonomy of Hong Kong, Macao, and Taiwan.

²³ Cf E.U.Petersmann, The 2018 Trade Wars as a Threat to the World Trading System and to Constitutional Democracies, in: *Trade, Law and Development X* (2018), 179-225.

'Regulatory capture' of US trade policies under President Trump

Under the US Trump administration, the 'regulatory capture' of US trade policies (e.g. for import protection for steel and aluminum industries), the US withdrawal from various multilateral treaties by executive orders of President Trump, and the illegal US disruption of the WTO AB revealed some of the systemic conflicts between US neo-liberalism and Europe's ordo-liberal, economic constitutionalism. US Trade Representative (USTR) Lighthizer, his deputy ambassador Shea, and US secretary of commerce Ross had all been long-standing business lobbyists who, like President Trump himself, identified US business interests (e.g. in rejecting WTO judicial findings limiting US trade policy discretion) with the national US interest. President Trump's decisions to withdraw the USA from UN agreements (e.g. on the WHO, the 2015 Paris Agreement) and from regional trade agreements (like the 2016 Trans-Pacific Partnership, the draft TTIP agreement) were taken unilaterally without requesting approval by the US Congress. The 2020 USTR Report criticizing the AB jurisprudence²⁴ perceived WTO law as an instrument of US power politics; it ignored the (quasi)judicial mandates of WTO dispute settlement bodies and their (quasi)judicial methodologies by insisting on controversial US interpretations of WTO rules, yet without identifying violations by the AB of the customary law rules of treaty interpretation. The USTR Report – notwithstanding its valid criticism of some WTO rules and dispute settlement practices (e.g. that the AB no longer consulted with the parties when deciding to disregard the Article 17.5 deadline) – suffered from legal biases and false claims characteristic for the US Trump presidency and for Trump's 'big lies' (e.g. about having won the 2020 US federal elections):

- US denial of (quasi)judicial functions of WTO third-party adjudication, even though numerous WTO publications and WTO dispute settlement reports over more than 20 years acknowledged the (quasi)judicial mandates of WTO dispute settlement bodies (ie WTO panel and AB reports as adopted by the DSB);
- US disregard for judicial AB arguments in the performance of the Dispute Settlement Understanding (DSU)'s mandate 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3 DSU), for instance whenever the AB found compliance with the time limit of 90 days (Article 17.5 DSU) – which was imposed by US negotiators in 1993 notwithstanding the widespread criticism that no other court seems to be limited by such an unreasonably short time limit – impossible to reconcile with the other AB tasks (eg due to illegal US blocking of the filling of AB vacancies);
- contradictory USTR claims that AB legal findings against the US violated the DSU prohibition to 'add or diminish the rights and obligations in the covered agreements' (Article 3.2 DSU) – even if the AB had justified these legal findings on the basis of the customary rules of treaty interpretation and its (quasi)judicial mandate -, notwithstanding the USTR's regular support of AB reports accepting 'creative WTO interpretations' advocated by the USTR as a legal complainant;
- US description of US 'zeroing practices' as a 'common-sense method of calculating the extent of dumping' even if their biases had been consistently condemned by the AB

²⁴ See USTR, *Report on the Appellate Body of the WTO*, Washington February 2020 (<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body>). For a detailed refutation of the false USTR legal claims see: 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 7), chapter 3.

- and DSB as violations of the WTO obligations of ‘fair price comparisons’ (which are hardly mentioned in the USTR report);
- one-sided focus on WTO texts as interpreted by US negotiators without regard to the customary law and DSU requirements to clarify the meaning of the - often indeterminate - WTO provisions with due regard also to WTO legal texts revealing the ‘context, object and purpose’ of WTO provisions and the explicitly recognized ‘systemic character’ of what the WTO Agreement calls ‘this multilateral trading system’ (Preamble) and its ‘dispute settlement system’ (Article 3 DSU);
 - denigration of AB members as ‘three unelected and unaccountable persons’ whose ‘overreaching violates the basic principles of the United States Government’,²⁵ notwithstanding the election of AB members through consensus decisions of 164 DSB member governments (including the USA), their (quasi)judicial mandate, and the approval of WTO agreements (including the DSU) by the US government and US Congress;
 - insulting claims that the AB Secretariat had weakened the WTO dispute settlement system by not respecting WTO rights and obligations.²⁶

The financial and political influence of protectionist US interest groups on the US Congress prevented the US Trump and Biden administrations to accept compromise solutions for reforming the DSU. Most WTO members continue to reject US propositions for exempting trade remedies and unilateral invocations of WTO ‘security exceptions’ (e.g. for justifying the US trade war against China) from WTO third-party adjudication. The disruption of the WTO dispute settlement system by a dysfunctional AB led to non-adoption of ever more WTO panel reports due to their ‘appeal into the void’ of a no longer functioning AB system. The ‘Economic and Trade Agreement’ signed by the Chinese and US governments on 15 January 2020 provided for discriminatory Chinese commitments to buy US products, discriminatory US import tariffs and US trade restrictions (e.g. targeting Chinese technology companies) without third-party adjudication. This bilateral ‘opt-out’ – by the two largest trading nations – from their WTO legal and dispute settlement obligations was subsequently continued and deepened (e.g. by additional US export restrictions on technology products as of 2022) by the US Biden administration in order to contain China’s rise as a new military and technology threat openly challenging human and democratic rights and other UN legal obligations.

Geopolitical disruption of the rules-based trading system endangers the SDGs

The SDA explicitly acknowledges (e.g. in paras 17.10-12) that realizing most SDGs – like ending poverty for everybody, securing access to food, water and medicines, and decarbonizing economies – requires a ‘rules-based, open, non-discriminatory and equitable multilateral trading system under the WTO’. Without a multilateral WTO dispute settlement system, successful realization of climate change mitigation, of future WTO negotiations, and of inducing market-oriented reforms in China’s totalitarian state-capitalism are unlikely to succeed. President Trump’s arbitrary destruction of the WTO AB – and the lack of majority support in the US Congress for restoring the WTO AB system, for concluding FTAs, and for introducing carbon taxes as the most efficient policy instrument for carbon reductions aimed

²⁵ See the Introduction to the USTR Report (n 24) and pp. 8, 13.

²⁶ USTR Report, at p. 120.

at climate change mitigation – illustrate some of the continuing differences between business-driven US neo-liberalism (e.g. US preferences for power-oriented trade protectionism unrestrained by impartial adjudication), compared with EU ordo-liberalism (like leadership for introducing Multi-Party Interim WTO arbitration in 2020, for adopting the European climate law in June 2021, and for implementing the currently 14 legislative EU Commission proposals aimed at making Europe the first carbon-neutral continent by 2050, thereby exercising EU leadership inside and beyond Europe for implementing the Paris Agreement on climate change mitigation).²⁷

The recent support by the IMF and World Bank of activist fiscal, economic, health, and environmental policies in response to the global health pandemic, climate change, security and food crises illustrates how distinctions between ‘neo-liberalism’, ‘state-capitalism’, and ‘ordo-liberalism’ refer to policy trends that continue to evolve and elude precise definitions. Also 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 focus on more systematic legal limitations of ‘market failures’, ‘governance failures’ and ‘constitutional failures’ through multilevel constitutionalism continues, however, to distinguish European ordo-liberalism from Anglo-Saxon and authoritarian, constitutional nationalism. The money-driven US elections and business-driven US economic legislation (e.g. on import protection, domestic sales of guns and tobacco, discriminatory environmental regulation and tax benefits) undermine US leadership for protecting the SDGs. For example, the US Inflation Reduction Act – as the most important climate change mitigation legislation in US history – could be adopted in August 2022 only in exchange for numerous protectionist discriminations (like tax credits, local content requirements) favoring US industries in violation of WTO law; the Act also failed to respond to the 2022 US Supreme Court ruling limiting the regulatory powers of the US Environmental Protection Agency. Without congressional and judicial recognition of human and constitutional rights to climate change mitigation inside the USA, democratic support and judicial remedies for climate change mitigation rest much weaker inside the USA (as the world’s per capita biggest emitter of GHG) than in Europe.

V. UN and WTO Governance Failures Require Plurilateral Policy Responses

This contribution explained the successful evolution of European integration law since the 1950s as resulting from dialectic transformations of *national* into *multilevel*, *European constitutionalism* limiting transnational governance failures through multilevel protection of European PGs (like the ECHR, the EUCFR, the EU common market, monetary and environmental constitutionalism). The EU’s ‘foreign policy constitution’ (e.g. Arts 3, 21 TEU) extended constitutionalism to foreign policymaking, for instance by requiring the EU to respect and pursue domestic constitutional principles (like human rights, democracy, rule-of-law, sustainable development, compliance with UN law) also in the EU’s common foreign and security policies. This ‘multilevel constitutionalism’ based on multilevel human and constitutional rights and democratic, judicial and regulatory remedies and institutions has enabled the EU to exercise leadership for constitutional reforms of UN and WTO law and

²⁷ Cf Petersmann (n 7), chapter 9; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, 18 February 2021.

governance (e.g. by pushing for compulsory third-party adjudication in the UNCLOS, trade and investment law). Constitutionalism made EU foreign policies more transparent, reasonable and predictable. Yet, different constitutional traditions and increasing geopolitical rivalries entail that African, American and Asian countries continue resisting constitutional reforms of UN and WTO law aimed at better protecting the SDGs. Russia's wars against Ukraine and threats of nuclear aggression, the US destruction of the WTO AB adjudication system, and China's suppression of human rights are examples of transnational governance failures undermining global PGs. Constitutional UN reforms (e.g. of the ineffective UN Security Council system) and WTO reforms (like compliance with Article 17 DSU) appear ever more unlikely. For instance, Pascal Lamy remained the only WTO Director-General who emphasized synergies between HRL and WTO law, and invited the Inter-Parliamentary Union to convene regular parliamentary meetings inside the WTO in order to promote democratic support and accountability of trade policies; Lamy's call for 'cosmopolitics' aimed at enhancing the legitimacy and coherence of the world trading system, of its global governance, and of its support by civil societies and 'cosmopolitan constituencies'.²⁸ Yet, outside Europe, as discussed in sections II-IV, nationalism, the difficulties of amending national Constitutions, process- rather than rights-based constitutional traditions, power politics and neo-liberal 'business capture' of economic legislation (e.g. by the US Congress) impede 'multilevel democracy' and rights-based 'multilevel constitutionalism' as policy strategies for protecting the SDGs.

Bounded rationality: Geopolitical rivalries as permanent facts

The authoritarian 'strongman politics' in China, Russia and in the US Republican Party suggest that nationalism and hegemonic power politics will continue to undermine UN and WTO law and politics by supporting market failures, governance failures and related constitutional failures. The 'Beijing consensus' prioritizes the power monopoly of China's communist party,²⁹ which is not effectively constrained by China's national Constitution (e.g. as citizens cannot invoke and enforce human and constitutional rights through judicial remedies in independent Chinese courts). Similarly, Russia's President Putin and his kleptocratic oligarchs dominate Russia's police state without effective 'constitutional checks and balances'; their executive governance suspended human and democratic rights inside Russia (e.g. of the political opposition and public media) and outside Russia (e.g. ordering illegal invasions into neighboring countries, annexation and 'Russification' of occupied territories like Crimea and the Donbass in Ukraine). Totalitarian power politics – like China's secretive 'polit-bureau politics', 'surveillance capitalism', health-lockdowns, 'social credit systems', suppression of

²⁸ Cf P.Lamy, *The Geneva Consensus. Making Trade Work for All* (CUP 2013); *idem*, *Towards World Democracy* (Policy networks 2005); S.Charnovitz, *The WTO and Cosmopolitics*, in: E.U.Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (OUP 2005), 437-445.

²⁹ At the Communist Party congress in November 2022, President Xi Jinping followed the example of Mao Zedong of unifying his personal control over the Party, the state and the military apparatus and of evading constitutional time limits for his concentration of personal power and his exclusion of political critics in the standing polit-bureau. Like Mao, Xi justified his power grab by creation of a personality cult and writing 'Xi Jinping thought' into the constitution of the Chinese Communist party. This return to imperial 'one man rule', the endless lockdowns of citizens based on Xi's 'zero Covid-policy', the systemic risks of the draconian restrictions on individual freedom, and their economic and social costs are increasingly challenged by civil society inside China. Even if government repression of civil society protests continues to work inside China (as inside Russia) as an alternative to correcting governance failures, the myth of the wisdom of disastrous strongman decisions to suppress human and democratic rights has been made evident for everybody.

human and minority rights and threats of military force (e.g. in the South China sea and vis-à-vis Taiwan) – prompt democracies to respond by forming collective defense alliances and protecting their citizens against foreign ‘weaponization’ of economic interdependence. State-capitalism undermines citizen-driven market-competition, for instance by means of non-transparent business privileges, subsidies, state-owned enterprises (SOEs) and manipulation of non-convertible currencies. Russia’s political domination of the Eurasian Economic Community, like China’s political domination of bilateral ‘Belt & Road agreements’ on financial, trade and infrastructure networks, and related Eurasian agreements on regional Asian institutions and on ‘China-Russia strategic cooperation’ are based on power-oriented cooperation among authoritarian governments without multilateral rules and institutions protecting human, environmental and democratic rights. This focus on self-interests of rulers and power-monopolies is also characteristic of many governments in former Soviet republics in Eurasia and less-developed countries (like Iran, Myanmar, North Korea, Syria) and their opportunistic conduct (eg in buying oil and gas from Russia undermining NATO’s countermeasures against illegal aggression by Russia, abstention from UN General Assembly resolutions condemning Russia for its illegal invasion of Ukraine and related violations of *erga omnes* UN legal obligations like respect for democratic self-determination). The regulatory competition among neo-liberal, state-capitalist, ordo-liberal constitutional and authoritarian paradigms of economic regulation undermines the UN and WTO ‘world order treaties’. EU efforts at reforming the WTO appellate review system and investor-state arbitration, and of strengthening environmental policies by embedding them into the WTO legal and dispute settlement system, are resisted by hegemonic power politics.³⁰ Human rights, democratic governance, rule-of-law and ‘corporate responsibilities’ remain insufficiently protected also in the legal practices of the more than 10’000 transnational corporations participating in the ‘UN Global Compact’ on business and human rights.³¹ The ‘politicization’ of the WTO trading system is likely to continue, for instance if WTO members fail to extend the ‘Covid-19 waiver’ and the WTO agreement on unreported fishing subsidies of June 2022 and to agree on a ‘climate waiver’ for CBAMs. The more authoritarian governments (e.g. in China and Russia) disregard global rules limiting ‘market failures’, ‘governance failures’ and ‘constitutional failures’, the stronger becomes the risk of economic disintegration, for instance between ‘authoritarian alliances’ (e.g. among China, Russia and other Eurasian countries), FTAs among democracies, and the non-aligned ‘global south’ defining development priorities in often diverse ways. The ‘polarization politics’ by populist ‘strongmen’ (like Presidents Bolsonaro, Erdogan, Putin, Trump and Xi Jinping) contributed to the rising number of authoritarian governments (e.g. also in ‘illiberal’ EU member states like Hungary and Poland) and to the declining number of democracies, thereby rendering democratic leadership for protecting the SDGs more difficult.

Transatlantic leadership beyond NATO remains fragile

Anglo-Saxon neo-liberalism prioritizes constitutional nationalism (as illustrated by the ‘Brexit’) and ‘process-based constitutionalism’ (as illustrated by the unwritten British Constitution, the lack of references in written Anglo-Saxon Constitutions to the SDGs) rather than rights-based, multilevel constitutionalism requiring all branches of government to protect (inter)national PGs

³⁰ Cf Petersmann (n 7), chapters 3, 7-8.

³¹ *Idem*, chapter 2.

(like UN HRL, regional common markets, global environmental protection).³² Europe's multilevel constitutionalism perceives democratic constitutions as expressing dynamically evolving 'higher laws of society' for responding to changing regulatory challenges and needs of citizens; HRL is interpreted as requiring both democratic legislators and the judiciary as 'constitutional guardians' to interpret and develop laws and policies responding to citizen demand for protecting PGs.³³ Conflicting regulatory and foreign policy conceptions were the main reason for the long-standing failures of the Transatlantic Partnership cooperation since the 1990s. The 'Brexiters' pursue a 'Singapore at Thames' as a deregulated competitor for the EU with more restrained judicial powers; like former US President Trump, they emphasize national sovereignty to disregard international agreements (like the EU-UK Brexit Agreement of 2020), the TTIP project of 'deep transatlantic economic integration', and European adjudication. Business-driven economic regulation and related 'regulatory capture' are today more restrained inside the EU (e.g. due to its public financing of political election campaigns) than in the USA, where business-financed presidential and congressional elections often lead to appointment of business leaders (like US President Trump, his Secretary of Commerce W.Ross), business lobbyists (like USTR R.Lighthizer, his deputy USTR D.Shea) and congressmen financed by business interests (like coal, steel, cotton, tobacco, gun and pharmaceutical lobbies). The Biden administration temporarily settled some of the EU-US trade disputes (like the long-running disputes over subsidies for aircraft makers Airbus and Boeing, European digital taxes on US tech groups, the US Section 232 tariffs on EU aluminum and steel). The Transatlantic Trade and Technology Council did, however, not prevent the illegal trade discrimination in the 2022 Inflation Reduction Act (e.g. in favor of producing electric vehicles and their batteries in the USA); it may also prove incapable of preventing re-introduction of discriminatory US steel tariffs if the EU should remain unwilling to accept the US proposals for imposing 'carbon tariffs' on 'dirty steel products' produced in China. NATO cooperation remains strong in implementing countermeasures against Russia's illegal wars of aggression. Yet, it is uncertain whether China's long-standing support for dictatorships (like Iran, Myanmar, North Korea, Russia) and Chinese military aggression against Taiwan will promote common transatlantic countermeasures similar to those introduced against Russia's military aggression.

Plurilateral protection of SDGs depends on democratic bottom-up constitutionalism

As democracies cannot trust totalitarian power politics, they increasingly resort to pluri- or unilateral policy responses and collective countermeasures within the constraints of UN/WTO law. The EU's multilevel constitutionalism, UN HRL and the recognition of affirmative constitutional duties to protect PGs (like protection of the environment) remain driven by multilevel constitutional, participatory and deliberative democracy as protected in Articles 9-12

³² Cf notes 3 and 4 above and related text.

³³ Fishkin/Forbath (n 4) similarly argue for 'affirmative constitutional obligations' (at 21 ff) of both legislative and judicial institutions to prevent oligarchic domination of the US economy resulting in socially unjust inequalities and failures to protect PGs, as they were recognized during most periods of US constitutionalism (like the early Republic, the post-civil war reconstruction and the New Deal legislation, when 'constitutional economic order hinged on a governmental duty to assure decent work and livelihoods, collective bargaining, social insurance, and other social goods to all Americans', at pp. 254–55). Yet, progressive arguments using 'living constitutionalism' for advocating political reforms as being constitutionally required remain challenged by US conservatives using 'originalist constitutional interpretation' for opposing such reforms. Given the Supreme Court's conservative view of the US Constitution and the difficulties of amending the US Constitution, US advocates of the SDGs often avoid constitutional interpretations and human rights arguments in support of the SDGs.

TEU. The defense of democracy in Ukraine against Russia's illegal aggression illustrates how rule-of-law and the survival of democracies may require 'democratic wars of independence' based on active citizenship³⁴ and defense alliances among 'militant democracies'. As the current health, environmental, economic, food, migration and security crises were provoked by governance failures, democracies and the EU have good reasons to base their foreign policies on defending democratic constitutionalism, as prescribed in Arts 3 and 21 Lisbon Treaty. For instance, the EU has introduced new regulations for:

- screening foreign investments inside the EU;
- limiting access of non-EU companies to government procurement inside the EU unless reciprocal access of EU companies is secured;
- avoiding 'carbon leakage' through unilateral EU carbon border adjustment measures;
- EU 'anti-coercion measures' providing for unilateral EU countermeasures against economic sanctions by third countries (like China);
- EU 'sustainability sanctions' in response to foreign violations of labor rights, human rights and sustainable development commitments;
- EU emergency powers for responding to supply chain problems (as they emerged during the Covid-19 and energy crises); and
- stronger EU anti-subsidy and emergency export control regimes.³⁵

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

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

Constitutionalism suggests embedding CBAMS into broader 'GHG reduction clubs' making market access conditional on, *inter alia*, agreed 'green product standards', agreed procedures for calculating 'embedded carbon' in products and equivalence of diverse GHG reduction policies, reductions of fossil fuel subsidies, agreed rules for renewable fuel subsidies, and the elimination of tariffs on environmental goods and services, with due respect for the WTO principles of special and differential treatment of less-developed countries and the environmental law principle of common but differentiated responsibilities. Just as the multilaterally agreed trade restrictions in the UN Convention on Trade in Endangered Species and in the Montreal Protocol on Transboundary Movement of Hazardous Wastes were never challenged in WTO dispute settlement proceedings, multilaterally agreed GHG reduction clubs, 'environmental goods agreements', newly agreed subsidy rules and fossil fuel disciplines should set incentives for voluntary global cooperation and for 'critical mass membership' promoting non-discriminatory treatment without free-riding. Consensus on a

³⁴ Cf J.Alexander/A.Conrad, *Citizens: Why the Key to Fixing Everything is All of Us* (Canbury Press 2022).

³⁵ Cf A.Hervé, *European unilateralism as a tool for regulating international trade: a necessary evil in a collapsing multilateral system*, in: *Fondation Robert Schuman Policy Paper* no 626, 29 March 2022.

'package deal' and 'grand bargain' might require a broader 'WTO sustainability agenda' on how to promote the broader policy objectives of a 'circular economy' (e.g. reducing waste and plastic pollution by re-cycling), sustainable agriculture (e.g. addressing bio-diversity, water and food security issues), greening of transport services, the 'blue economy' (like over-fishing, ocean pollution) and a 'just transition' assisting less-developed countries through financial assistance.

The diversity of governmental and private company pledges of GHG reductions also calls for setting civil society incentives for active participation in decentralized monitoring of market failures (like pollution harms) and governance failures (like non-implementation of GHG pledges). This can be promoted by enhancing synergies between human and legal rights to protection of the environment and stronger democratic and judicial remedies. As prices of internationally traded goods often do not reflect their environmental and social costs, the UN and WTO sustainable development goals must factor in the pollution costs, human and labor rights, and the 'planetary boundaries' in order to promote social welfare, just as neo-liberal 'shareholder conceptions' of company goals must be replaced by more inclusive 'stakeholder conceptions' and 'social corporate responsibilities'. This requires not only stronger reporting requirements of companies on their environmental, social and governance (ESG) performance. The 'constitutional politics'- and 'constitutional economics'-methodologies argue more broadly that constitutional democracies can remain effective only if the human and constitutional rights of citizens are protected by democratic legislation, administration and adjudication protecting rule-of-law and empowering citizens. Even if Europe's multilevel constitutionalism has no equivalent outside Europe, the transformation of *national* into *transnational 'aggregate PGs'* (like the SDGs) requires extending national constitutionalism to transnational governance of PGs. History suggests that such constitutional reforms require perennial struggles of citizens for collective protection of human rights limiting abuses of power. In a globalized 'world on fire', reasonable citizens should recognize themselves as human beings with cosmopolitan responsibilities rather than only as national citizens of this or that state. Without a cosmopolitan 'Sisyphus morality' and stronger leadership from constitutional democracies, realizing the SDGs remains a *utopia*.

Even if preference heterogeneity requires second-best strategies for protecting the SDGs, the EU countries should continue challenging protectionist discriminations as those in the 2022 US Inflation Reduction Act and those applied by 'totalitarian countries'. Continued EU leadership for reforming WTO third-party adjudication and investor-state arbitration remains necessary for protecting the SDGs, human rights and non-discriminatory conditions of competition. If regional cooperation among like-minded countries – rather than global economic integration also among geopolitical rivals – should become the new security policy paradigm, UN and WTO governance will become even less capable of protecting the SDGs. The entry into force, on 1 January 2022, of the Regional Comprehensive Economic Partnership (RCEP) between China and 14 Asia-Pacific countries, and its regulatory competition with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),³⁶ illustrates how Asian countries – similar to African countries participating in the Pan-African FTA, American countries participating in regional FTAs in Southern-, Central and North-America, and European countries participating in the EU, EFTA, EEA and external FTAs with third countries – remain determined to protect the advantages of rules-based, liberal trading

³⁶ The CPTPP is an FTA between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam, which entered into force in 2018 after US President Trump withdrew the USA in spite of the earlier signing of the agreement by the Obama administration.

systems, notwithstanding increasing challenges of the WTO system. The lack of provisions on labor right and environmental protection in the RCEP agreement, as in most bilateral 'Belt & Road' agreements concluded by China, illustrates China's lack of leadership for the human rights and environmental dimensions of the SDGs. By involving domestic democratic institutions, non-governmental actors (like business and 'green cities'), science-based regulatory agencies and epistemic communities, democratic support and 'checks and balances' can be enhanced. The UN's 'constitutional governance model' and Europe's multilevel constitutionalism are reminders that - without empowering citizens through human and democratic rights, parliamentary and judicial protection of transnational rule-of-law, and transnational democratic cultures - transnational PGs are unlikely to be effectively protected for the benefit of all citizens.