The UN Sustainable Development Agenda and Rule of Law: Global Governance Failures Require Democratic and Judicial Restraints

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Abstract

The 2030 United Nations (UN) Sustainable Development Agenda defines its 17 Sustainable Development Goals (SDGs) in terms of human rights and multilevel governance of related public goods. The global health pandemics, environmental crises, and geopolitical trade wars reveal governance failures and related 'constitutional failures' to protect human and constitutional rights effectively by democratic legislation, administrative and judicial remedies of citizens, and transnational rule of law. The SDGs require stronger, multilevel legal restraints on 'market failures' (like environmental pollution), 'governance failures' (like insufficient remedies against abuses of executive powers) and 'constitutional failures' (like neglect for transnational rule of law and the 'Anthropocene'). Democratic legislation and citizen-driven, administrative, and judicial remedies must strengthen accountability of governments for decarbonizing economies and protecting human rights (e.g., environmental and public health protection). Worldwide protection of the SDGs requires reforming multilevel governance beyond Europe's multilevel constitutionalism in order to prevent policy conflicts through transnational rule of law and 'constitutional embedding' of UN/World Trade Organization (WTO) governance.

Keywords climate change – constitutionalism – human rights – Rule of Law – sustainable development – United Nations (UN) – World Trade Organization (WTO)

1 Global Governance Crises Undermine the UN Sustainable Development Agenda

At the 70th anniversary of the UN in 2015, a summit meeting with the heads of government of some 150 UN Member States adopted the '2030 Agenda for Sustainable Development' aimed at 'transforming our world' in order to 'realize the human rights of all', 'to end poverty and hunger everywhere', and to implement 17 agreed SDGs over the next 15 years with 'the participation of all countries, all stakeholders and all people'.[1] The Resolution 70 (2015) explicitly recognized (in paragraph 9) that 'democracy, good governance and the rule of law … are essential for sustainable development'. Universal agreement on this ambitious 'Global Partnership for Sustainable Development' was rendered possible by the fact that — notwithstanding agreement on SDGs and 169 specific policy targets — the legally non-binding UN General Assembly resolution neither prescribes precise rights and obligations nor specifies the legal instruments (like carbon taxes) and other legal changes necessary for implementing the SDGs. Similarly, the 2015 Paris Agreement on climate change mitigation, ratified by 193 countries as of 2022,[2] relies on 'nationally determined contributions' (NDCs) and science based governance indicators

[1] UNGA Res 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015), at Preamble of the Declaration.

[2] Paris Agreement to the United Nations Framework Convention on Climate Change (concluded 12 December 2015, entered into force 4 November 2016) TIAS No. 16–1104.

without prescribing the precise content of NDCs and policy instruments (like phasing out of coal subsidies), which need to be progressively clarified.

Since 2015, climate change, biodiversity losses, the information and communication technology (ICT) revolution, global health pandemics and the task of providing vaccines to all people increased the regulatory challenges and need for more precise legal implementation commitments. For example, on 14 July 2021, the European Union (EU) proposed introducing carbon taxes aimed at reducing greenhouse gas (GHG) emissions; the EU also called for concluding a World Health Organization (WHO) pandemic treaty on reducing the risk of disease outbreaks (e.g., by pathogens jumping from animals to humans) and disease spread; the World Trade Organization (WTO) intensified negotiations on limiting harmful fishery subsidies and on proposals (e.g., from India and South Africa) to waive intellectual property protections related to Covid-19 vaccine technologies. The 25th and 26th Conferences of the parties to the UN Framework Convention on Climate Change (UNFCCC) in November 2019 and November 2021 acknowledged that the world was not on track to meeting the Paris Agreement's long term goal of holding the increase in global average temperature to well below 2°Celsius compared to pre-industrial levels, preferably to about 1.5°Celsius. In 2020–2021, the Covid-19 health pandemic killed more than 5 million people; it increased the number of people living in extreme poverty by more than 120 million, reduced economic growth in many countries by 'lockdowns' and slow rollouts of vaccination, enhanced foreign debt and further limited policy space.

On 12 May 2021, the Independent Panel for Pandemic Preparedness & Response published its highly critical findings that a swifter response to the 2019 Covid-19 outbreak in China could have prevented a global catastrophe in 2020; the Panel's recommendations include setting up a Global Health Threats Council, additional powers of the WHO to investigate and

publish information about disease outbreaks without government approval, and new funding for an International Pandemic Financing Facility.[3] Even though the SDGs and the goals of the Paris Agreement cannot be achieved without more precise international regulation, additional environmental protection commitments (like limitations of GHG emissions, fossil fuel subsidies, fishery subsidies) and leadership by the G20 countries remain insufficient. For instance, similar to the establishment of the Financial Stability Board by the G20 countries in response to the 2008 financial crisis, the climate, biodiversity, and other environmental crises could justify additional G20 institutions coordinating multilevel governance of global public goods (PGs). Yet, political and legal views on how to implement the SDGs in conformity with UN and WTO law differ enormously.

UN Secretary General Guterres called on all UN Member States to abolish fossil fuel subsidies, phase out coal power plants, and enforce the polluter-pays principle with the aim of decarbonizing economies by 2050 (i.e., shifting from fossil fuels like coal, oil, and natural gas to zero-carbon energy systems based on solar, wind, hydro, geothermal, biomass and nuclear power). As more than 80% of the increase in carbon dioxide emissions up to 2050 are likely to come from less developed countries (notably China and India), leadership and assistance by developed countries (notably the biggest carbon emitters like Australia, Canada, the EU, Japan, Russia, UK, and USA) for less developed countries remain crucial. The necessary adjustments of UN and WTO law to the global climate, health, and governance crises are further impeded by the geopolitical rivalries and increasing number of human disasters revealing a breakdown of the

[3] The Independent Panel for Pandemic Preparedness and Response, 'Covid-19: Make it the Last Pandemic' (12 May 2021). The Panel criticized the International Health Regulations of the WHO and proposed numerous reforms.

'social contract' in many less developed countries (like Afghanistan, Haiti, Lebanon, and Venezuela).

This contribution proceeds from the fact that globalization transforms ever more national into transnational 'aggregate PGs' (like public health, security, climate change mitigation, transnational rule of law) which no state can protect without international law and institutions. The 'embedded liberalism' underlying UN and WTO law – and its evolution from a neo-liberal 'Washington Consensus' to a more human rights based 'Geneva Consensus' as expressed in the SDGs – fail to effectively protect transnational rule-of-law as a restraint on geopolitical and regulatory competition among states with diverse legal, political, and economic systems (Section 2). Europe's constitutional approaches to human rights law (HRL), common market law, monetary integration and common foreign and security policies suggest that – without 'constitutionalism' as a reasonable self-commitment to rules, institutions and principles of justice of a higher legal rank aimed at limiting 'bounded rationality' and social conflicts in governance of PGs – human rights, rule of law and the SDGs cannot be effectively protected (Section 3).[4]

[4] Notwithstanding the diversity of national constitutional systems, constitutional principles are increasingly extended to the law of international organizations and invoked in multilevel governance and adjudication, such as human and constitutional rights; democratic self-determination by the people as constituent power; national sovereignty; limited delegation of powers; proportionality of their exercise; rule of law; separation of – and 'checks and balances' among – legislative, executive and judicial powers; access to justice and judicial remedies; multilevel judicial cooperation based on principles of 'judicial comity'; constitutional restraints on executive emergency powers; legal accountability of independent regulatory agencies; multilevel governance through

Reforming world trade and investment law and their compulsory dispute settlement systems is of crucial importance for 'transforming our world', decarbonizing economies, limiting environmental pollution and other abuses of public and private power (Section 4).[5] By emphasizing the value differences between neo-liberal Anglo-Saxon, totalitarian Chinese, ordo-liberal European and 'third world' conceptions of international economic law (IEL), this article substantiates the literature on divergent national and regional approaches to international law and the need for embedding multilevel governance of PGs in theories of 'constitutional pluralism'.[6]

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international organizations; principles of subsidiarity and federalism. See E.U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems of International Law* (Hart Publishing 2017).

[5] Just as UN, WTO and EU law introduced transformative legal and institutional changes, so does realizing the SDGs require new multilevel governance rules, institutions and 'systemic interpretations' limiting path dependent neoliberalism and authoritarian state capitalism. See E.U. Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022).

[6] On how international lawyers in different states often pursue different conceptions of international law see A. Roberts, *Is International Law International?* (OUP 2017). On the need for extending constitutionalism to the 'primary' and 'secondary law' of international organizations constituting, limiting, regulating and justifying multilevel governance of functionally limited PGs, see E.U. Petersmann, 'Constitutionalism and International Organizations' (1996) 17 Northwestern Journal of International Law and Business. This need for linking functionally limited 'treaty constitutions' for multilevel governance of transnational PGs with domestic constitutionalism remains neglected.

The article concludes that the human rights- and rule-of-law-objectives of the UN Development Agenda require rules based, democratic 'network governance', judicial safeguards of rule of law and democratic resistance against authoritarian power politics invoking 'international law among states' for disregarding human and democratic rights of citizens (Section 5).

2 UN/WTO Law Fails to Protect the SDGs

The term 'embedded liberalism' was first used for describing the dual objectives of the General Agreement on Tariffs and Trade (GATT 1947) to liberalize international trade and protect domestic political autonomy (e.g., national sovereignty to choose legal and political systems and regulate markets and their social adjustment problems by non-discriminatory regulations).[7] It can be used also for the human rights guarantees of UN law protecting individual and democratic autonomy inside and among UN Member States. UN HRL reflects the post-1945 'constitutional insights' that peaceful cooperation in and among societies requires moral, legal, democratic, and economic order based on mutually coherent principles of justice supported by citizens, human rights, and respect for human dignity. Both UN and WTO law provide for limited delegation and separation of legislative, executive, and judicial powers of UN/WTO institutions and for legal and judicial restraints of Member States aimed at protecting non-discriminatory competition inside and among national polities and economies, for instance by:

- Legal harmonization and ranking of economic policy instruments according to their economic efficiency (e.g., in the law of the International Monetary Fund, GATT, and WTO law);

[7] See J.G. Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization.

– Non-discrimination and proportionality requirements limiting governmental restrictions of human rights and freedoms (e.g., prohibitions of gender, racial, and economic discrimination);
– Multilevel legal and judicial remedies at national and international levels of governance (like private property rights, access to justice).

From constitutional citizen perspectives like that adopted by some of the founding fathers of GATT 1947 (notably US Secretary of State and Nobel Peace Prize laureate Cordell Hull) and of the post-1950 European Integration Treaties, the self-imposed UN and GATT legal constraints responded to 'bounded rationality' and past 'governance failures' to limit welfare reducing abuses of policy powers (like the trade protectionism enacted in the 1930 US Smoot-Hawley Tariff Act triggering worldwide economic crises) and protect equal freedoms of economic actors beyond national borders.[8] The multilevel legal and judicial WTO safeguards of non-discriminatory trade competition based on transnational rule of law complement the 'cosmopolitan constitutionalism' underlying HRL by 'institutionalizing public reason' for designing and interpreting domestic legal systems, UN and WTO rules in mutually beneficial, legally coherent ways.

[8] See K. Dam, 'Cordell Hull, the Reciprocal Trade Agreements Act and the WTO: An Essay on the Concept of Rights in International Trade' in E.U. Petersmann (ed.), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (OUP 2005), at 83–98. On constitutionalism as a response to conflicts between 'rational egoism' and limited, human reasonableness see Petersmann, *Transforming World Trade and Investment Law for Sustainable Development*, at Chapter 5.

2.1 Prioritization of State Sovereignty Weakens Human Rights in Legal Practices

Legal systems are characterized by dialectic interactions among normative legal rules, principles and institutions and legal practices influenced by power politics and self-interests of legal actors. The UN Charter had been adopted in the name of 'We the Peoples of the United Nations' so as, *inter alia*, 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and from other sources of international law can be maintained'.[9] Yet, UN membership remains limited to States. State centred UN 'principles' – e.g., in Article 2 focusing on 'sovereign equality of all its members', prohibition of the use or threat of force, peaceful settlement of disputes, international cooperation, non-intervention into domestic jurisdictions – dominate UN legal practices. The 1945 UN Charter included seven references to human rights. The Universal Declaration of Human Rights (UDHR),[10] approved in the 3rd UN General Assembly by 48 UN Member States without opposition (albeit subject to 8 abstentions), listed civil and political liberties, democratic participatory rights, economic, social, and cultural rights with due respect for the diversity of views on how to justify the universal recognition that:

[9] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, at Preamble.

[10] UNGA Res 217 A (III) 'Universal Declaration of Human Rights' (10 December 1948).

> (a)ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[11]

The 'inherent dignity' and 'equal and inalienable rights of all members of the human family' proclaimed as 'the foundation of freedom, justice and peace in the world',[12] continue being construed in different ways as:

(1) 'inherent moral birth rights' and 'justice claims' (e.g., to have rights) of every human person derived from human conscience, other common humanity values (like responsibility, moral powers for conceptions of a good life and social justice) and universally shared responses to what the Preamble describes as 'disregard and contempt for human rights' (e.g., during the preceding World Wars, Nazi dictatorship and Holocaust) that resulted 'in barbarous acts which have outraged the conscience of mankind';

(2) deriving from 'reasonable free good will' respecting human dignity (e.g., in the Kantian sense of a 'categorial imperative') and acknowledging the moral need for human rights, 'cosmopolitan international law' and an international federation of liberal republics protecting equal freedoms and 'democratic peace';

(3) moral rules deriving from the 'golden rule', reciprocity and agreed prohibitions of discrimination (e.g., Article 2 UDHR protecting human rights 'without distinction

[11] Ibid., at Article 1.

[12] Ibid., at Preamble.

of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status');

(4) moral 'natural rights' deriving from respect for human dignity in the sense of 'free' and 'full development of his personality'[13] and human capabilities (such as life, health, reason, conscience, etc.) and basic human needs;

(5) legal human rights universally recognized by all 193 UN Member States in, *inter alia*, the UN Charter, UN and regional human rights agreements, national Constitutions and other legal acts implementing the moral human rights recognized in the UDHR; or as

(6) political, participatory human rights recognized in UN Member States, notably by democratic institutions in constitutionally restrained 'deliberative democracies' acknowledging the 'co-originality'[14] of individual and democratic autonomy.[15]

The disagreements underlying UN HRL (e.g., among China, the EU, Islamic countries, the USA) and the hegemonic self-interests of the veto powers in the UN Security Council entailed that the legal relationships between state sovereignty (e.g., of China), democratic self-determination and human rights (e.g., of people in Taiwan, minorities in Xinjiang) remain contested in legal

[13] UNGA Res 217 A (III) 'Universal Declaration of Human Rights' (10 December 1948), at Articles 22, 26 and 29.

[14] See J. Habermas' conceptualization on this issue.

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

practices. The UN Sustainable Development Agenda lacks effective democratic, legal, and judicial remedies of citizens in many UN Member States. Recent power politics (like Russia's annexation of parts of Ukraine) illustrates how neither the UN Charter nor general international law effectively limit violations of UN law by protecting rights and remedies of citizens. Moreover, human rights are 'not enough' for protecting the SDGs, for example because HRL protects legal 'status equality' of human beings without guaranteeing the rules, democratic institutions, resources, goods, and services necessary for satisfying popular demand and essential needs of citizens, which depend on constitutional, economic, social and other legal rules and institutions (like economic markets supplying consumers with needed private goods, democratic 'political markets' and governments providing PGs).[16]

In contrast to the EU Charter of Fundamental Rights (EUCFR) as incorporated into the 2009 Lisbon Treaty on European Union (TEU), the 1966 UN human rights conventions on civil and political rights (ICCPR) and economic, social and cultural rights (ICESCR) do not include legal guarantees of market freedoms (like freedom of contract, freedom of profession, freedom of trade), private property and other legal guarantees (like monetary stability) for mutually beneficial division of labour, private trade, competition, innovation and rule of law. As each UN Member State remains sovereign to decide which UN human rights conventions it wants to ratify and implement in its domestic legal system, many UN Member States (like China, Russia, and the USA) have not ratified – or not effectively implemented – major UN and regional human rights conventions. The current geopolitical, environmental, and public health crises and social inequalities confirm this insufficient implementing legislation protecting democratic and judicial remedies: UN law – even though it promoted decolonization, 'human rights revolutions',

[16] See S. Moyn, *Not Enough. Human Rights in an Unequal World* (Harvard University Press 2018).

'international economic law revolutions' and development assistance all over the world – has not effectively empowered citizens by protecting human rights, rule-of-law and other SDGs in many UN Member States. UN legal practices often prioritize state sovereignty and intergovernmental power politics over effective protection of human and democratic rights, the SDGs and related PGs like public health and protection of the environment. How should democracies respond if hegemonic governments (e.g., in China, Russia and the USA) undermine PGs by violating UN and WTO rules? Can citizens and democratic institutions hold governmental power politics more accountable?

2.2 State Centred 'Embedded Liberalism' Fails to Protect the SDGs

The drafters of the UDHR were driven by a shared vision for 'cosmopolitan justice' perceiving all human beings as members of the same family of mankind – rather than by 'state interests' (e.g., of the veto-powers in the UN Security Council) and negotiations based on reciprocity. UN HRL promoted *universal recognition* of moral, political, and legal human rights and related struggles for justice (like decolonization, racial and gender equality). UN law was less successful in institutionalizing multilevel, *legislative, and judicial protection* of human rights inside UN Member States, where many governments claim priority of government power over 'inalienable human rights', democracy, and judicial protection of rule-of-law. Governmental consent to international law and adjudication is often construed narrowly and arbitrarily (as discussed in section 4). The drafting of the 1944 Bretton Woods agreements and of GATT 1947 had been dominated by US hegemonic interests (e.g., in access to foreign markets, use of the US dollar as universal reserve currency, containment of communist countries, neo-liberalism driven by US corporate interests). The post-1945 ideological differences among UN Member States and the

money-driven, neo-liberal 'Washington Consensus' entailed that GATT and the WTO were never formally incorporated into the UN legal system.

Trade liberalization before World War I reflected 'dis-embedded liberalism' based on protection of 'negative freedoms' and *laissez faire* attitudes in most countries vis-à-vis the social adjustment problems created by colonialism, the first industrial revolution (based on machines driven by steam power) and by the first globalization during the second half of the 19th century. The post-war 2nd industrial revolution (based on mass assembly line production driven by electricity) was embedded into domestic economic regulation, competition, and social policies in most industrialized countries, notwithstanding the 'social dis-embedding' resulting from the global financial crises and economic disintegration during the 1930s. The 'embedded liberalism' underlying GATT 1947 enabled and promoted welfare states protecting also 'positive, personal freedoms' through reciprocal trade liberalization enhancing mutually beneficial division of labour and economic and legal cooperation in producing private and public goods (like human rights to health protection).

WTO law responded to the 3rd industrial 'ICT revolution' by additional, multilateral harmonization of product and production standards, competition and trade remedy rules, liberalization and regulation of services trade, protection of intellectual property rights, and of transnational rule of law through compulsory jurisdictions for settlement of trade disputes through domestic judicial remedies and WTO dispute settlement procedures. WTO law changed the embedded liberalism underlying GATT 1947 in ways reflecting both neo-liberal Anglo-Saxon interest group politics (e.g., resulting in the WTO Agreements on Anti-dumping and Trade

Related Intellectual Property Rights: TRIPS),[17] Europe's ordo-liberal insistence on rule compliance (e.g., as protected by the WTO dispute settlement system and 'necessity' requirements in numerous WTO Agreements), and '3rd world' insistence on phasing out of the Agreement on Textiles and Clothing and protecting 'sustainable development'. Compared with the 'provisional application', lack of parliamentary ratification and 'grandfather exceptions' of the intergovernmental GATT 1947, the WTO Agreement strengthened the 'constitutional dimensions' of WTO law, as illustrated by parliamentary approvals of the WTO Agreement, its incorporation into the domestic legal systems of many WTO Members, the separation of legislative, administrative, and judicial powers of WTO institutions (see Articles III and IV of WTO Agreement), provisions for majority voting (see Article IX) and for domestic implementation of WTO rules (Article XVI.4) and of WTO dispute settlement rulings. WTO law prompted domestic trade law reforms also in less developed countries enabling the BRICS (Brazil, Russia, India, China, South-Africa) to become major stakeholders and beneficiaries of the world trading system.

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

The progressive adjustment of the 'embedded liberalism' underlying GATT/WTO law – e.g., to the emergence of social welfare states,[18] decolonization,[19] and to regional economic integration[20] – needs to be continued in order to render WTO law consistent with the regulatory challenges of globalization, climate change and with SDGs like public health, food security and protection of human rights. WTO law acknowledges 'sustainable development' as a WTO objective; it includes provisions permitting national measures 'necessary to protect human, animal or plant life of health' (e.g., Article XX of GATT and Article XIV of GATS), 'the protection of the environment' (e.g., Preamble of TBT Agreement), and 'to avoid serious prejudice to the environment' (e.g., Article 27 of TRIPS Agreement).

The 1994 'Decision on Trade and Environment' recognizes 'that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory, and equitable multilateral trading system on the one hand; and acting for the protection of the environment and the promotion of sustainable development on the other'. The WTO Committee on 'Trade and Environment' has a broad mandate 'to enhance positive

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[18] E.g., General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, at Articles III, XVI, XIX, XX (consistency of social policies; and related WTO agreements).

[19] E.g., General Agreement on Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187, at Article XXVI (5)(c) (for easy transition from 'dependent' to 'independent' GATT membership), Part IV (on 'Trade and Development'; and 'special and differential treatment' in many WTO provisions).

[20] E.g., recognition of sovereign rights to form customs unions and admitting EU membership in the WTO.

interaction between trade and environmental measures, for the promotion of sustainable development' and of positive synergies between trade and environmental agreements and their respective dispute settlement mechanisms.[21] If the WTO 'sustainable development' objectives and the WTO provisions (e.g., in Article V of WTO Agreement) for cooperation with other international organizations are construed in conformity with the UN Sustainable Development Agenda, the WTO legal and institutional mandates are sufficient for responding to the fact that – in contrast to the initial focus of 'sustainable development' on converging economic development and environmental protection[22] – the 2030 UN Development Agenda pursues SDGs also in the field of social inclusion and human and labour rights with a view to eradicating poverty in all its forms.[23] By describing the SDGs as realizing 'the human rights of all', the universal endorsement of the UN Sustainable Development Agenda reflects the paradigm shift from the neo-liberal, money driven 'Washington Consensus' to an ordo-liberal, citizen driven 'Geneva Consensus' on an international order explicitly committed to human rights, good governance and rule of law as defined in numerous multilateral agreements and institutions in Europe.[24]

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[21] GATT Decision on Trade and Environment (29 March 1994) GATT Doc. MTN.TNC/W/141.

[22] See UNGA 'Rio Declaration on Environment and Development' (12 August 1992) UN Doc. A/CONF.151/26.

[23] See UNGA Res 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015), at the 3rd Recital of the Preamble and paras 2 and 9.

[24] Like labour rights protected by ILO conventions, health rights protected by WHO agreements, rights to food protected by FAO conventions, rights to education protected by UNESCO conventions, human rights and rights of refugees protected by the UN High

The regulatory challenges of climate change, pollution, health pandemics and of the 'digital ICT revolution' illustrate the ongoing need for adjusting UN and WTO law to new regulatory challenges requiring new agreements, for instance on specifying the 'NDCs' for reducing GHG emissions under the 2015 Paris Agreement, introducing WTO-consistent carbon taxes and carbon border adjustment mechanisms (CBAMs), complying with the WTO dispute settlement system as a limitation on illegal power politics, providing Covid-19 vaccines to all people in all countries, and protecting privacy of information and cyber security in the Internet regardless of whether countries prioritize protection of state interests (e.g., in China), business interests (e.g., in the USA) or individual interests (e.g., in EU law) in their domestic Internet regulations. The human disasters and governance failures recalled in Section 1 confirm that the increasing UN and WTO power politics fail to effectively protect the cosmopolitan, citizen oriented SDGs.

3 Human Rights Cannot Protect the SDGs without Democratic Constitutionalism

Commissioners for Human Rights and for Refugees and other UN institutions, rights of citizens to receive environmental information and access to environmental justice under the 1998 Aarhus Convention. On the increasing contestation of the neoliberal, interest group driven 'Washington Consensus' by the more human rights centred 'Geneva Consensus' and 'Brussels Consensus', see Petersmann, *Transforming World Trade and Investment Law for Sustainable Development*, at Chapter 2; P. Lamy, *The Geneva Consensus. Making Trade Work for All* (CUP 2013).

The universal recognition of human rights, democratic governance, and rule of law by UN Member States has not prevented failures of many governments to protect human and democratic rights and rule of law in legal practices. European law illustrates why the 'normative pull' of human rights depends on their 'normative push', i.e., their effective legal implementation through (1) constitutional law, (2) democratic legislation, (3) administration and (4) adjudication supporting 'public reason', (5) international treaties, (6) multilevel governance institutions and (7) 'secondary law' of international institutions (like the jurisprudence of European economic and human rights courts) and (8) its domestic, legal implementation. The limitation of EU membership to constitutional democracies, the democratic EU institutions and citizen driven enforcement of EU law promoted progressive recognition and judicial protection in EU law of constitutional guarantees of civil, political, economic and social rights, multilevel judicial remedies and explicit guarantees of a 'competitive social market economy' (Article 3 of TEU) with common market freedoms (like free movements of goods, services, persons, capital and related payments, freedom of profession), protection of private property and social rights across national borders, which the more than 450 million EU citizens never enjoyed before the creation of the EU. European economic law became embedded and restrained by multilevel human and constitutional rights of EU citizens protected by multilevel constitutional, democratic and judicial institutions and treaty systems like the EUCFR, the European Convention on Human Rights (ECHR), the EU's common market constitution, its partial extension to the European Economic Area (EEA), the EU's incomplete monetary constitution and functionally limited 'foreign policy constitution'.[25]

[25] Petersmann, *Transforming World Trade and Investment Law for Sustainable Development*, at Chapter 5; K. Tuori, *European Constitutionalism* (CUP 2015).

The democratic, judicial, and other institutional 'checks and balances' constraining 'executive emergency governance' inside the EU during economic, financial, public health and environmental crises empirically confirmed how HRL can become more effective if citizens can invoke and enforce precise, unconditional, international rules inside States and challenge power politics (e.g., by judicial remedies of citizens in national and European courts). It was in response to similar, democratic and multilevel constitutional pressures that the EU's comprehensive climate legislation – notably the European climate law approved in June 2021 and the 13 legislative EU Commission proposals published on 14 July 2021 aimed at making Europe the first carbon neutral continent by 2050 – offered leadership inside and beyond Europe for implementing the Paris Agreement on climate change mitigation.

3.1 Multilevel Constitutionalism Beyond Europe?

The collective supply of PGs demanded by citizens through constitutional rules and institutions of a higher legal rank ordering individual and social interests in societies, economies, and polities is the central challenge of constitutionalism. As human self-ordering (e.g., through sociality, morality, reasonableness, religiosity, legality) cannot suppress animal instincts (e.g., power politics) and rational egoism (like anti-competitive agreements between profit-maximizing business and power-seeking politicians), the constitutional task of providing PGs requires limiting 'market failures', 'governance failures' and 'constitutional failures'.

In his Theory of Justice, the American philosopher J. Rawls described constitutionalism as a 'four stage sequence' as reflected in the history of the US Constitution: reasonable citizens, after having agreed (1) on their constitutional 'principles of justice' (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 promote rule of law and rule compliance by citizens.[26]

Globalization transforms ever more national into transnational PGs (like human rights, rule of law, and sustainable development) requiring multilevel governance and multilevel constitutional restraints on abuses of power beyond such national 'four stage sequences'. 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 and (7) communitarian domestic law effects (like legal primacy, direct effects and direct applicability by citizens) of EU law protecting PGs for the benefit of citizens.[27] The EU's (8) commitment to protecting human rights and rule of law also in external relations contributed to worldwide recognition of multilevel judicial protection of rule of law in trade and investment agreements by limiting abuses of foreign policy powers (Section 4). Yet, transforming national into multilevel constitutionalism remains resisted by authoritarian governments prioritizing nationalism and resisting constitutional restraints on their political power.

3.2 Constitutional Perspectivism

[26] See J. Rawls, *A Theory of Justice* (Harvard University Press 1999), at 171 ff.

[27] See Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems of International Law*, at 112 f, 126 ff and 174 ff.

The above mentioned four and eight stage sequences of constitutionalism are devices for applying agreed constitutional principles of justice for constraining legal systems from different perspectives of justice, 'each point of view inheriting the constraints adopted at the preceding stage'.[28] Hence, the legal design of democratic legislation protecting SDGs must respect – and remain constitutionally and institutionally restrained by – the diverse constitutional and international legal principles and institutional restraints democratically agreed upon at the eight different levels of multilevel governance. For example, European courts – and increasingly also climate litigation outside Europe – acknowledge GHG reduction obligations of governments by invoking multilevel GHG reduction commitments recognized in domestic laws and UN law.[29] Investor state arbitration (ISA) awards based on the more than 3.200 bilateral or multilateral investment agreements tend to be legally enforceable in national courts. Yet, as illustrated by the US$ 15 billion compensation claim filed in 2021 by Canadian company TC Energy challenging President Biden's cancellation of the Keystone XL oil pipeline, international arbitration can

[28] See Rawls, *A Theory of Justice*, at 176. Arguably, individual and social perspectivism creates regulatory problems similar to the 'Heisenberg Principle' in quantum physics. The mere fact of observation from different perspectives risks changing realities like 'social identities'. Individual, communitarian, national, international or cosmopolitan perspectives may justify diverse regulatory understandings and responses. Maintaining their overall consistency requires respect for constitutional diversity, 'struggles for justice' and judicial protection of rule of law.

[29] See below Section 5; and I. Alogna, C. Bakker and J.P. Gauci (eds), *Climate Change Litigation. Global Perspectives* (Brill Nijhoff 2021).

undermine climate change mitigation and other SDGs if the arbitrators disregard international environmental law.

The WTO and SDG commitments to 'sustainable development' require governments and judges to construe multilevel trade, investment and environmental regulation in conformity with the SDGs and HRL for the benefit of citizens; but such citizen oriented, constitutional cooperation remains rare in ISA and outside Europe (as discussed in Section 4). Many UN Member States have failed to incorporate, *e.g.*, the labour and health rights based on the 'constitutions' *[sic]* establishing the ILO and WHO into their domestic legal systems. Arguably, the 'Brexit', the US disruption of the compulsory WTO dispute settlement system, and authoritarian power politics (e.g., in China and Russia) illustrate how judicial protection of transnational rule-of-law and multilevel governance of PGs may disintegrate due to 'constitutional failures' and neo-liberal power politics ('America first'). The 'criminalization' and 'weaponization' of social media, politics and undeclared wars facilitated by the 'ICT revolution' (e.g., using systemic disinformation and subversion) multiply the 'constitutional imperatives' for limiting permanent low level conflicts and related abuses of public and private power through multilevel constitutionalism civilizing, stabilizing, and legitimizing multilevel governance of PGs.[30]

3.3 Multilevel Constitutional Pluralism

As human rights protect individual and democratic diversity, the permanent fact of diverse moral and political 'perspectivism' endorsed by citizens entails the need for respecting 'constitutional

[30] See M. Galeotti, *The Weaponisation of Everything: A Field Guide to the New Way of War* (Yale University Press 2022); B.F. Walter, *How Civil Wars Start – and How to Stop Them* (Viking 2022).

pluralism' and for institutionalizing 'public reason' so that free and equal citizens support multilevel governance of PGs (like climate change mitigation) in spite of their diverse moral beliefs. Multilevel constitutionalism must build on an 'overlapping consensus' respecting legitimate diversity of cultures.[31] For example, in contrast to the social contract theories proposed by T. Hobbes (e.g., interpreting social contracts as submission to the absolute powers of monarchs protecting social peace) and by J.J. Rousseau (e.g., interpreting social contracts as submitting free and equal citizens to the 'general will' of democratic legislators), the US founding fathers were inspired by J. Locke's conception of social contracts among citizens delegating only limited governance powers restrained by human and constitutional rights retained by citizens, as specified in the US Bill of Rights added to the US Constitution in 1791.

Multilevel constitutionalism for limiting abuses of power and for protecting human rights in multilevel governance of PGs must respect legitimate 'constitutional pluralism' (e.g., in Anglo-Saxon neo-liberal democracies and European ordo-liberal constitutionalism). Yet, are China's lack of constitutional restraints on its 'communist party state' and Russian aggression against neighbouring states (like Georgia and Ukraine) consistent with UN/WTO law, for instance if Chinese forced labour practices violate UN HRL and Russia's annexation of part of Ukraine violates the sovereignty principles underlying UN/WTO law? Will 'failed states', WTO inconsistent trade wars, and 'regulatory capture' (e.g., of US congressmen by coal, steel, and pharmaceutical lobbyists) undermine the SDGs? Can rights based climate litigation, conditional

[31] See E.U. Petersmann, '"Constitutional Constructivism" for a Common Law of Humanity? Multilevel Constitutionalism as a "Gentle Civilizer of Nations"' (2017) Max Planck Institute for Comparative Public Law and International Law Research Paper Series No. 2017–24.

membership in ‘climate protection clubs’ and ‘environmental constitutionalism’ force governments to reduce GHG emissions and phase out coal subsidies?

Many authoritarian UN Member States invoke UN principles (like ‘sovereign equality of states’, ‘non-intervention’ into domestic affairs) as ‘shields’ against external criticism (e.g., of domestic suppression of human and minority rights of Uighur and Tibetan minorities). The disagreements – also among the five veto powers in the UN Security Council – on the scope of UN HRL reflect the incomplete ratification and domestic implementation of UN human rights conventions:

- China ratified the ICESCR but not the ICCPR in order to shield its communist party’s political monopoly;
- the USA ratified the ICCPR but not the ICESCR in view of US political preferences for money driven, neo-liberalism dominated by US business and by prioritization of civil and political over economic, social and cultural rights;
- most European countries ratified both the ICCPR and the ICESCR and – in contrast to China and the USA, which reject regional human rights conventions and human rights courts – protect civil, political, economic, social, and cultural rights also through regional HRL;
- Russia ignores human rights and democratic self-determination (e.g., in Ukraine) in spite of its ratification of the ECHR and of UN human rights conventions.

Europe’s multilevel constitutionalism facilitated worldwide legal reforms like the compulsory WTO dispute settlement system accepted by all 164 WTO Members. Yet, domestic ‘implementation deficits’ of UN and WTO law entail that citizen driven human rights and environmental litigation holding governments accountable for implementing the SDGs are most

developed in Europe (see Section 5). Without multilevel constitutionalism, UN human rights commitments and also the SDGs risk remaining a utopia.

4 The SDGs Require Reforming Trade and Investment Law and Adjudication

The SDGs 'seek to realize the human rights of all' and explicitly recognize the need for 'democracy, good governance and the rule of law'. Most UN Member States recognize compulsory third-party adjudication of disputes protecting rule of law in world trade and investments. Trade and investment rules and adjudication remain crucial for realizing most SDGs and related PGs (like supplying food and vaccines, de-carbonizing, de-plastifying and digitalizing economies). Hence, President Trump's neo-liberal destruction of the WTO dispute settlement system remains resisted by most other WTO Members. This section explains why most SDGs cannot be realized in and beyond countries without effective safeguards of rule of law and human rights as constitutional restraints on abuses of power.

Yet, as illustrated by the collapse of the health infrastructures in India's capital New Delhi in response to India's more than 400.000 daily Covid-19 infections in May 2021, democratic governance does not guarantee protection of PGs. The democratic and judicial 'checks and balances' limiting 'executive emergency governance' in Europe's Covid-19 crises illustrate how the deliberative and control functions of legislatures, the dispute settlement functions of courts, and independent expertise of regulatory agencies enhanced – rather than impeded – the legitimacy and effectiveness of executive emergency measures. They refute

modern proposals (e.g., by C. Schmitt and his disciples) for 'unbound executive emergency governance' and totalitarian 'survival governance'.[32]

SDGs like human health protection require limiting 'market failures' and 'governance failures'. For example, private patent rights for pharmaceutical products – as incentives and compensation for private research and inventions of medicines – may be viewed as a 'death sentence' in poor countries that cannot afford paying monopoly prices for newly developed vaccines offered and sold initially in developed country markets. Does the speedy invention of Covid-19 vaccines confirm the efficiency of patent laws? Or does the insufficient supply of vaccines to less developed countries prove the inadequacy of the TRIPS Agreement and the need for additional TRIPS waivers?

The EU and other countries increasingly resort to plurilateral trade, investment and environmental reforms like agreed WTO 'interim appeal arbitration' since 2020, CBAMs as of 2023, new free trade agreements (FTAs) transforming voluntary NDCs under the Paris Agreement into legally enforceable obligations for climate change mitigation, and investment court systems protecting SDGs more specifically.[33] Such agreed legal reforms for promoting SDGs among

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[32] See E. Posner and A. Vermeule, *The Executive Unbound: After the Madisonian Republic* (OUP 2011); P. Drahos, *Survival Governance: Energy and Climate Change in the Chinese Century* (OUP 2021).

[33] See M. Bronckers and G. Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 Journal of International Economic Law. The EU is reviewing the 'trade and sustainable development' chapters in its FTAs and wants to insert more environmental conditions also into the EU's Generalised Scheme of Preferences (GSP), which makes lower tariffs for certain developing countries conditional on compliance

'willing countries' – like climate change mitigation, freedom from hunger, access to water, protection of biodiversity, universal health care, access to 'green electricity' and education for all – take into account historical lessons of constitutionalism for constituting, limiting, regulating and justifying participatory, rules based and accountable forms of governance. The needed reforms (like limitation of fossil fuel subsidies, fishing subsidies, patent rights impeding universal access to vaccines, carbon emission reductions) require democratic support from citizens, parliamentary implementing legislation, rule of law constraints on populist opposition (e.g., from republican US Congressmen denying climate change and democratic election results), judicial protection of human rights and legal sanctions for rule violations.

The abuses of executive emergency powers during health pandemics, environmental and geopolitical crises – e.g., for circumventing parliamentary control of executive limitations of individual freedoms and democratically approved treaty obligations – threaten democratic governance and science based governance indicators (e.g., for climate change, over-fishing). Section 4.1 explains why multilevel judicial remedies in world trade, investment and European integration law are of crucial importance for protecting SDGs, the rule of law and regulatory

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with 15 international agreements on labour standards and human rights (the 8 countries presently eligible for 'GSP+' preferences have to ratify 27 international conventions on human rights, labour standards, the environment and good governance, and submit to monitoring of their implementation by the European Commission). The EU's 'Taxonomy Regulation' of June 2020 entered into force on 12 July 2020 and requires companies to conduct 'human rights due diligence' for designating any good or service as 'sustainable'.

competition between neo-liberal, state capitalist, ordo-liberal and 'third world' conceptions of economic regulation. Section 4.2 discusses reforms of world trade and investment adjudication.

4.1 Sustainable Development Requires Rule of Law in World Trade and Investments

The 2030 UN Agenda emphasizes the need for a 'global partnership' with 'the participation of all countries, all stakeholders and all people' based on 'universal respect for human rights and human dignity, the rule of law, justice, equality, and non-discrimination'.[34] The Agenda's explicit commitment to 'the rule of law at the national and international levels' and ensuring 'equal access to justice for all'[35] recalls earlier UN definitions of 'rule of law at national and international levels' as 'a principle of governance in which all persons, institutions and entities, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with internationally recognized human rights'.[36]

This focus on (1) legal accountability, (2) public promulgation of law, (3) equality before the law, (4) independent judicial remedies, and (5) compliance with human rights remains

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[34] UNGA Res 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015), at paras 3–9.

[35] UNGA Res 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015), at Preamble and paras 8, 9 and 'Goal 16'.

[36] See UNGA 'Report of the Secretary-General: Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels' (16 March 2012) UN Doc. A/66/749, at para. 2.

contested, for instance by 'interactional' and 'constitutional conceptions of law' focusing on whether the agreed rules of law are supported by consistent legal practices not only of governments, but also of citizens and other non-governmental actors.[37] The compulsory WTO dispute settlement system – and the worldwide web of now more than 3.200 bilateral and multilateral investment agreements – have provided for multilevel, judicial remedies promoting 'rule of law at national and international levels' through comprehensive third party adjudication.

4.1.1 The GATT/WTO Dispute Settlement System

The 316 dispute settlement proceedings under GATT 1947 and the 1979 Tokyo Round Agreements,[38] and more than 600 formal dispute settlement proceedings under the WTO Agreement (1996–2020), protected – for the first time in world history – transnational rule of law in trade relations among, currently, 164 WTO Members.[39] The jurisprudence approved by GATT/WTO Members clarified the rights and duties under international trade law with due regard to general international law and the more than 400 FTAs among GATT/WTO Members (often providing for additional judicial remedies). As more than 85% of the more than 500 GATT/WTO dispute settlement findings were approved and implemented, the GATT/WTO dispute settlement system was the most frequently used, worldwide dispute settlement system in the history of international law. Article X.3 of GATT and equivalent provisions in GATT/WTO agreements on

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[37] See H. Krieger and G. Nolte (eds), *The International Rule of Law – Rise or Decline? – Approaching Current Foundational Challenges* (OUP 2019).

[38] See World Trade Organization, *GATT Disputes 1948–1995 – Vols I and II* (WTO Geneva 2018).

[39] See G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO. The Development of the Rule of Law in the Multilateral Trading System* (CUP 2015).

specific trade subjects (e.g., anti-dumping duties, subsidies, technical barriers to trade, services trade, intellectual property rights) and on the accession of specific countries (e.g., China) provide for access also to domestic legal or judicial remedies.

Most GATT/WTO Members did not allow 'direct application' and judicial enforcement of GATT/WTO obligations by citizens in domestic jurisdictions. Yet, many GATT/WTO disputes were preceded or followed by domestic court proceedings (e.g., challenging illegal trade remedies). The global 'interpretive community' of trade lawyers, academics and judges scrutinizing GATT/WTO jurisprudence strengthened a 'trade law culture' promoting 'public reason' (e.g., in the sense of shared systems of public justification of multilevel trade rules and of their decentralized enforcement), providing 'security and predictability to the multilateral trading system' (Article 3 of DSU) and reducing transaction costs in the global division of labour.

'Diplomatic conceptions' reducing rule of law among states to the availability and relative effectiveness of international dispute settlement procedures are criticized by citizen-oriented conceptions of 'interactional law' exploring whether international law rules are supported by citizens in a common practice of legality (e.g., rooted in Fuller's eight criteria of legality) in day to day decision making.[40] The legitimate authority of modern legal systems

[40] On Fuller's 'inner morality of law' based on eight principles of legality (i.e., generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, congruence), see L.L. Fuller, *The Morality of Law* (Yale University Press 1969), at 197–200. On constitutional conceptions of rule of law, see the comparative law contributions M. Hilf and E.U. Petersmann (eds), *National Constitutions and International Economic Law* (Kluwer 1993). On 'interactional law' focusing on consent by citizens to the enactment and

depends on the consent of free and equal citizens and of their democratic institutions; as the WTO Agreement has been voluntarily approved in 163 WTO Member States and the EU and continues to promote their economic welfare through rules based, market driven division of labour, the WTO legal and dispute settlement systems can assert 'input' and 'output legitimacy'. The WTO's 'sustainable development' objectives, the WTO legal rules and judicial remedies, and each WTO Member's legal obligations to 'ensure the conformity of its laws, regulations and administrative procedures with its obligations under the annexed Agreements' (Article XVI.4 of WTO Agreement) created global trading, legal and compulsory dispute settlement systems enabling Member States to enhance economic welfare and peaceful legal, economic, and political cooperation as never before in human history.

WTO Members recognize that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered Agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3.2 of DSU). The codification of these customary rules in Articles 31–33 of the VCLT prescribes interpretation of treaties based not only on their text, context, object and purpose; interpretation must also take into account, *inter alia*, 'any relevant rules of international law applicable in the relations between the parties' (Article 31.3(c)), including also 'principles of justice' and 'human rights and fundamental freedoms for all', as recalled in the Preamble of the VCLT.

4.1.2 WTO Jurisprudence Protects Human Rights Values

application of legal rules, see J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).

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

Does the fact that human rights are nowhere mentioned in WTO law – and hardly ever invoked and discussed in WTO bodies and referred to in WTO dispute settlement reports – undermine the legitimacy of the WTO legal and dispute settlement system? WTO Members amended WTO rules and agreed on new WTO agreements only rarely; they failed to adopt authoritative interpretations of WTO law. The dynamic WTO dispute jurisprudence led to rule-clarifications that were increasingly contested by adversely affected trade lobbies (notably inside the USA). As WTO law does not provide for individual access to WTO dispute settlement bodies, WTO complainants and defendants hardly ever invoke human rights in WTO dispute settlement proceedings. The intergovernmental WTO procedures entail judicial WTO practices focusing on 'objective PGs values' underlying human rights (e.g., public health protection underlying the human right to health) rather than on individual human rights. GATT/WTO jurisprudence suggests that judicial protection of human rights values in WTO dispute settlement proceedings can be as effective as if the judges had referred to individual human rights in interpreting and 'balancing' state-centred WTO rights, obligations, and exceptions.

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

– The 2018 WTO panel and 2020 appellate reports on complaints by tobacco exporting countries against Australia's legislation on tobacco plain-packaging

(TPP) confirmed that these health regulations restricting intellectual property rights and sales of tobacco products were consistent with WTO law (e.g., on technical barriers to trade and intellectual property rights). The reports refrained from referring to human rights, which had neither been invoked by the complainants nor by the defendant. But the interpretation of WTO rules in conformity with the 2001 WTO Declaration on the 'TRIPS Agreement and Public Health' and the 2003 WHO Framework Convention on Tobacco Control (FCTC) avoided conflicts with health rights, thereby illustrating the importance of 'systemic treaty interpretation' for maintaining the consistency of WTO rights and obligations with other international treaty commitments.[41]

– The 2014 WTO panel and appellate reports on EU import restrictions on seals products acknowledged, *inter alia*, that the EU exceptions for products from indigenous people in Greenland were justifiable under the 'public morals'

[41] See E.U. Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law? WTO Dispute Settlement Panel Upholds Australia's Plain Packaging Regulations of Tobacco Products' in G.Z. Capaldo (ed.), *The Global Community: Yearbook of International Law and Jurisprudence 2018* (OUP 2019), at 69–102. See the Appellate Body reports confirming the panel findings, WTO Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Report of the Appellate Body (9 June 2020) WT/DS435/AB/R, WT/DS441/AB/R.

exception in GATT Article XX(a), provided they did not discriminate against seal products imported from Canada and Norway.[42]

– The 2011 panel and 2012 appellate reports on US restrictions on tuna based on the 'Dolphin Protection Consumer Information Act' confirmed that US 'dolphin-safe' labelling measures would be consistent with WTO law provided they were applied in non-discriminatory ways.[43]

– The 2007 WTO panel and appellate reports on Brazil's import restrictions on retreaded tyres implied that the restrictions could be justified as being necessary for health protection reasons if applied in non-discriminatory ways.[44]

– The 2004 panel and 2005 appellate reports on US restrictions of cross-border gambling and betting services implied that such restrictions can be justified as being necessary for protecting 'public morals' (Article XIV(a) of GATS) if applied in non-discriminatory ways.[45]

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[42] See WTO European Communities – Measures Prohibiting the Importation and Marketing of Seal Products –Report of the Appellate Body (22 May 2014) WT/DS400/AB/R, WT/DS401/AB/R.

[43] See WTO United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body (16 May 2012) WT/DS/381/AB/R.

[44] See WTO Brazil – Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body (3 December 2007) WT/DS/332/AB/R.

[45] See WTO United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body (7 April 2005) WT/DS/285/AB/R.

- The 2003 panel and 2004 appellate reports on EC tariff preferences for combatting drug production and trafficking in less developed countries implied that such preferences can be consistent with WTO law if applied in non-discriminatory ways.[46]
- The 2001 appellate report on EC import restrictions on asbestos confirmed the justifiability of these health protection measures; as health risks can affect the competitive relationship of asbestos and substitute products, non-discriminatory health protection measures may neither violate GATT Article III nor need justification under GATT law.[47]
- The 1998 and 2001 appellate reports on US import restrictions on shrimps confirmed that non-discriminatory animal protection conditioning imports of shrimp on the use of certain fishing nets protecting turtles is justifiable under GATT Article XX(g).[48]

All these WTO dispute settlement findings affected the regulation of business activities with potentially harmful or discriminatory, economic, health or environmental effects. The findings influenced also global application of WTO rules beyond the specific disputes. They confirm the sovereign rights under WTO law to adopt non-discriminatory regulations protecting non-

[46] See WTO European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Report of the Appellate Body (7 April 2004) WT/DS246/AB/R.

[47] See WTO European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body (12 March 2001) WT/DS135/AB/R.

[48] See WTO United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body (12 October 1998) WT/DS58/AB/R (Article 21(5) DSU).

economic PGs like 'public morals' (including also human rights), public health and the environment. There is no evidence, so far, that any of the more than 500 GATT/WTO dispute settlement findings since 1948 has violated human rights.

4.1.3 'Systemic WTO Interpretation' Limits 'Legal Fragmentation'

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

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

property law, investment law, health law, and Australia's constitutional law and adjudication. As tobacco use is classified as a global epidemic responsible for the deaths of nearly 6.000.000 people annually, including 600.000 non-smokers exposed to second hand smoke, the WTO disputes affected people and health regulations all over the world. After separate complaints by tobacco industries in the national courts of Australia[49] and in investor-state arbitration (under an investment treaty between Hong Kong and Australia) had already been rejected,[50] two of the four separate, yet largely identical WTO panel findings were adopted by the Dispute Settlement Body (DSB) in August 2018.[51] The two other WTO panel reports were appealed; both appeals

[49] For an overview of tobacco litigation in national, European and investment courts, see Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems of International Law*, at 241ff and 256ff.

[50] *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia (Award on Jurisdiction and Admissibility)* (17 December 2015) Case No. 2012–12.

[51] WTO Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (28 June 2018) WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R. For detailed legal analyses, see Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law? WTO Dispute Settlement Panel Upholds Australia's Plain Packaging Regulations of Tobacco Products' in G.Z. Capaldo (ed.), *The Global Community: Yearbook of International Law and Jurisprudence 2018*.

were rejected in two WTO AB reports adopted in June 2020.[52] The four Panel and two AB reports dismissed all claims of violations of GATT and WTO rules (notably under the TBT and TRIPS Agreements); as neither the complainants nor defendant had referred to human rights (e.g., to health protection), the judicial balancing of economic rights (e.g., market access rights and intellectual property rights protected by WTO law) and public health protection focused on governmental rights to protect public health rather than on corresponding human rights. The dozens of separately negotiated agreements included into the WTO Agreement and WTO treaty practices (e.g., the 2001 WTO Declaration on the TRIPS Agreement and Public Health) were construed by the WTO dispute settlement bodies as a mutually coherent legal system.

Multilateral treaties on tobacco control negotiated in the WHO, WIPO Conventions and related treaty practices were duly taken into account in the legal findings on the consistency of Australia's TPP regulations with WTO law. The 'systemic interpretations' of WTO rules in conformity with HRL and health law set an example for future WTO disputes relating to environmental measures like CBAMs.

4.1.4 Judicial Protection of Rule of Law

The geopolitical rivalries, environmental and health emergencies have given rise to increasing invocations of WTO exceptions and the use of emergency powers of governments for imposing discriminatory trade restrictions. So far, the invocations by Russia, the US's Trump administration, and some US allies (e.g., Saudi Arabia) of WTO 'security exceptions' for

[52] WTO Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Report of the Appellate Body (9 June 2020) WT/DS435/AB/R and WT/DS441/AB/R.

justifying discriminatory trade restrictions – and for denying WTO jurisdiction to review related decisions – remain contested by most other WTO Members. In the WTO dispute initiated by Ukraine in 2016 against Russia's discriminatory restrictions on traffic in transit, Ukraine claimed that these transit restrictions were inconsistent with Russia's obligations under GATT Article V (freedom of transit), Article X (publication and administration of trade regulations) and with related commitments in Russia's Accession Protocol. Russia asserted that the measures were necessary for the protection of its essential security interests and had been taken in response to an emergency in international relations (i.e., Russia's annexation of Crimea in 2014). Russia invoked the national security exceptions in GATT Article XXI(b)(III) and claimed that the WTO panel lacked jurisdiction to further address this dispute. The WTO panel report, adopted on 26 April 2019, found, *inter alia*, that:

- WTO panels have jurisdiction to review some of the aspects of a WTO Member's invocation of Article XXI(b)(iii);
- Russia had met the objective requirements for invoking this Article XXI(b)(III) in relation to the transit restrictions at issue; and
- Russia's restrictions were covered by Article XXI(b)(III).[53]

Since 2017, there is an increasing number of WTO panel proceedings in which complainants challenged discriminatory trade restrictions that were justified by the respondent WTO Members (e.g., Saudi Arabia, United Arab Emirates, Bahrain, the USA) by invoking national security exceptions in WTO law. For instance, the US justification of its 2018 import tariffs on aluminium and steel on grounds of national security prompted China, India, the EU, Canada, Mexico,

[53] WTO Russia – Measures Concerning Traffic in Transit – Report of the Panel (5 April 2019) WT/DS512/R.

Norway, Russia, Switzerland, and Turkey to request the establishment of WTO dispute settlement panels against the US.[54] The Panel report on Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights of June 2020,[55] concerned discriminatory trade sanctions against Qatar and one of its companies (called 'beIN') in Saudi Arabia because of Qatar's alleged support of terrorist activities. The Panel established that the requirements of Article 73(b)(III) of the TRIPS Agreement for justifying Saudi Arabia's violations of Articles 42 and 41 of the TRIPS Agreement on national security grounds were met. Yet, Saudi Arabia's additional violation of

[54] See WTO United States – Certain Measures on Steel and Aluminium Products DS 544, 547, 548, 550, 551, 552, 554, 556 and 564 respectively. Some of these WTO Members adopted trade restrictions against the US as countermeasures under Article 8 of the Safeguards Agreement (arguing that the US measures are disguised safeguards). The US challenged these countermeasures as unjustified (e.g., requesting WTO dispute settlement proceedings against Canada, China, the EU, Mexico and Turkey; see WTO Canada –Additional Duties on Certain Products from the United States (23 May 2019) DS557; WTO China – Additional Duties on Certain Products from the United States (25 January 2019) DS558; WTO European Union – Additional Duties on Certain Products from the United States (20 January 2022) DS559, WTO Mexico – Additional Duties on Certain Products from the United States (28 May 2019) DS560; WTO Turkey – Additional Duties on Certain Products from the United States (28 February 2019) DS561 respectively).

[55] WTO Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights – Report of the Panel (16 June 2020) WT/DS567/R. Adoption of this panel report was prevented by Saudi Arabia's 'appeal into the void'. In the following quotations from this Panel report, the footnotes are omitted.

Article 61 TRIPS Agreement had not been justified by Saudi Arabia under the 'security exception' of Article 73(b)(III). In examining the security exception in Article 73 TRIPS Agreement, the Panel noted (in para. 7.230) that:

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

– 7.231: In this dispute, both parties interpreted Article 73(b)(III) of the TRIPS Agreement by reference to, and consistently with, the interpretation of Article XXI(b)() of the

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

The Panel further noted that the 'parties in this dispute and multiple third parties each express agreement with the general interpretation and analytical framework enunciated by the panel in Russia – Traffic in Transit. These parties and third parties therefore considered that both can be transposed to Article 73(b)(III) of the TRIPS Agreement'.[56] Following detailed examinations of these contested issues, the Panel concluded:

- 'With respect to Saudi Arabia's invocation of the security exception in Article 73(b)(III) of the TRIPS Agreement;
- I. the requirements for invoking Article 73(b)(III) are met in relation to the inconsistency with Article 42 and Article 41.1 of the TRIPS Agreement arising from the measures that, directly or indirectly, have had the result of preventing

[56] WTO Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights – Report of the Panel (16 June 2020) WT/DS567/R, at para. 7.243.

beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi courts and tribunals; and

– II. the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non-application of criminal procedures and penalties to beoutQ'.

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

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

It remains to be seen whether the legal reasoning in the two panel reports reviewing invocations of WTO 'security exceptions' – and confirming their partial 'justiciability' – will be followed in future WTO jurisprudence. The pending WTO panel proceedings on US invocations of the 'security exception' in GATT Article XXI (e.g., for justifying import restrictions on steel and aluminium) are likely to follow the reasoning of the panel reports and confirm the WTO-inconsistency of these US invocations of Article XXI of GATT. At the DSB meeting on 22 February 2021, the US invoked Article XXI of GATT in response to Hong Kong's complaint against US requirements that goods produced in Hong Kong must be marked to indicate that

their origin is 'China';[57] the US objected to the establishment of a panel on the following grounds:

- 'The clear and unequivocal U.S. position, for over 70 years, is that issues of national security are not matters appropriate for adjudication in the WTO dispute settlement system. We therefore do not understand the purpose of this request for panel establishment, seeking WTO findings that the United States has breached certain WTO provisions. The WTO cannot, consistent with Article XXI of the General Agreement on Tariffs and Trade 1994, consider those claims or make the requested findings'.
- 'No WTO Member can be surprised by this view. For decades, the United States has consistently held the position that actions taken pursuant to Article XXI are not subject to review in GATT or WTO dispute settlement. Each sovereign has the power to decide, for itself, what actions are essential to its security, as is reflected in the text of GATT 1994 Article XXI'.[58]

China's WTO complaint of 6 December 2018 leading to the WTO Panel report of 15 September 2020 on United States – Tariff Measures on Certain Goods from China[59] illustrated how 'systemic incoherencies' among state-capitalist and liberal economic systems may provoke 'systemic disputes'. The US invoked the findings in the USTR's Section 301 report on China's

[57] WTO United States – Origin Marking Requirement (29 April 2021) DS597/5.

[58] 'United States Statements at the DSB Meeting on 22 February 2021', Office of the United States Trade Representative.

[59] WTO United States – Tariff Measures on Certain Goods from China – Report of the Panel (15 September 2020) WT/DS543/R.

unfair trade practices as demonstrating violations of the 'public morals' and 'standards of right and wrong' enshrined in US legislation (like norms against theft and misappropriation of intellectual property and unfair competition) as justification of the additional tariff sanctions imposed by the US. The Panel report confirmed that the US tariff increases were inconsistent with the US obligations under GATT Articles I and II.

As regards the US invocation of the 'public morals' exception in GATT Article XX(a) as justification of discriminatory US tariff sanctions, the Panel concluded that the 'standards of right and wrong' invoked by the United States could be covered by the term 'public morals' within the meaning of Article XX(a) of the GATT 1994. In its assessment of whether the USA had demonstrated the 'necessity' of the import tariffs at issue, the Panel examined the existence of a genuine relationship of ends and means between the public morals objective as invoked by the United States and the measures at issue. After examining the nexus between the measures, the United States had chosen (i.e., additional duties on a wide range of products) and the US public morals concerns, the Panel concluded 'that the United States has not provided an explanation that demonstrates how the imposition of additional duties on the selected imported products contributes to the achievement of the public morals objective as invoked by the United States. It follows that the United States has not adequately explained how the measures the United States has chosen are necessary to protect such public morals'.[60] As the USA had not met its burden of demonstrating that the measures were justified under Article XX(a) of the GATT 1994, the Panel upheld its previous findings that the US measures at issue were inconsistent with Articles I.1, II.1(a) and II:1(b) of the GATT 1994. The US appealed the Panel report, once again, 'into the void'

[60] WTO United States – Tariff Measures on Certain Goods from China – Report of the Panel (15 September 2020) WT/DS543/R, at para. 7.238.

of a dysfunctional WTO AB. The panel report could not be adopted so far, yet, the WTO jurisprudence on 'good faith review' of the application of WTO exceptions – and its acceptance by almost all WTO Members (including China and Russia) – defends transnational rule of law in a world of increasing power politics.

4.2 Need for Reforming Trade and Investment Law and Adjudication

Since December 2019, the illegal US 'blocking' of the filling of vacant AB positions left the AB without the 'quorum' of 3 AB members needed for accepting new appeals.[61] Between December 2019 and December 2021, only two WTO panel reports were adopted, the others being 'appealed into the void' of a dysfunctional AB without adoption of the panel reports. By the end of 2021, 32 complaints were pending before WTO panels and 21 appeals before the AB. Compared to 39 requests for WTO dispute settlement consultations in 2018 and 19 in 2019, only five requests for consultations were made in 2020, and nine in 2021. Like the US Trump administration, the US Biden administration continued to:

- block DSB consensus on the regular requests from more than 120 WTO Members at each DSB meeting to proceed to the prompt filling of AB vacancies as prescribed in Article 17.2 of DSU;
- block adoption of the mediation proposals elaborated by ambassador David Walker for agreed reforms of the DSU in exchange for US approval of filling the

[61] For detailed analyses of the US disruption of the WTO AB, see E.U. Petersmann, 'Neo-liberal, State-Capitalist and Ordo-liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System' (2020) Chinese (Taiwan) Yearbook of International Law and Affairs 38, at 1–41.

AB vacancies, without submitting US proposals on how the AB crisis could be resolved;

- refuse US participation in the Multi-Party Interim Appeal Arrangement based on Article 25 of DSU and accepted by 25 WTO Members (plus the 27 EU Member States) by June 2021; and
- reject the widely supported legal interpretation that Article IX.1 of WTO Agreement authorizes – and requires – majority voting for overcoming illegal blocking of consensus decisions on AB nominations.[62]

The intergovernmental suspension of the AB was inconsistent with what democratic institutions had prescribed by approving the WTO Agreement and – in many jurisdictions – incorporating it into domestic legal systems. The US disruption of the WTO dispute settlement system was part of the mercantilist trade policies imposed by US President Trump since 2017 by:

- withdrawing from FTAs (like the Trans-Pacific Partnership); or
- insisting on protectionist amendments of FTAs (e.g., the Korea-US FTA, NAFTA) and limitations of third party adjudication (e.g., investor-state arbitration among NAFTA countries);
- introducing discriminatory tariffs on imports of China worth more than $360 billion;
- restricting also imports from other countries in order to reduce bilateral US trade deficits;
- protecting US aluminium and steel producers by restricting aluminium and steel imports (e.g., also from NATO allies like Canada and EU countries); and

[62] For details, see ibid.

– invoking national 'security exceptions' in US and WTO law (e.g., GATT Article XXI) for justifying discriminatory import restrictions and sanctioning Chinese technology companies.

The US import restrictions were based on the broad executive trade policy powers of the US President without asking for approval from the US Congress, thereby circumventing parliamentary control. Due to the limited standards of judicial review (like the 'rational basis test') in US trade law, it remained rare that – as in the judgment of 14 July 2020 by the US Court of International Trade – US courts annulled discriminatory trade sanctions imposed by executive orders on the basis of alleged 'security interests' (Section 232).[63] Due to the business driven financing of congressional elections, the US Biden administration fears losing the 2022 US mid-term elections by proposing trade and environmental reforms not supported by US business.

Since 2020, the lockdowns, export restrictions, massive subsidies in support of domestic industries, advocacy for self-sufficiency and for re-location of global value chains in the context of the Covid-19 health pandemics further restricted and disrupted world trade. In spite of initial 'vaccine nationalism', EU institutions assumed global leadership for:

– supplying vaccines also to third countries;
– responding to the global environmental crises by adopting the European climate law in June 2021 and 13 legislative proposals for decarbonizing the European economy by 2050; and

[63] *Transpacific Steel LLP v US et al*. (13 July 2021) Case No. 2020–2157; see S. Charnovitz and G. Hufbauer, 'Landmark Court Decision Limits Presidential Trade Restrictions' (28 July 2020) Vox EU.

– initiating multilateral reforms of international trade and investment law and adjudication in order to better protect transnational rule of law in trade and investment disputes.

The increasing resort to 'executive emergency governance' in the context of health, environmental and geopolitical crises enhanced the need for judicial remedies against abuses of power. The illegal US disruption of the WTO appellate review system responded to US industry pressures rejecting the AB jurisprudence limiting the use of trade remedies (safeguards, anti-dumping, and countervailing duties); President Trump's appointment of long-standing industry lobbyists to the positions of US Trade Representative (USTR R. Lighthizer), deputy USTR (WTO ambassador D. Shea) and commerce secretary (W. Ross) institutionalized rent-seeking protectionism as official US trade policy. The 2020 USTR Report on the AB jurisprudence perceived WTO law as an instrument of US power politics; it ignored the (quasi)judicial mandates of WTO dispute settlement bodies and their (quasi)judicial methodologies by insisting on controversial US interpretations of WTO rules without identifying violations by the AB of the customary law rules of treaty interpretation.[64]

[64] See 'USTR Issues Report on the Appellate Body of the WTO' (11 February 2020) Office of the United States Trade Representative. 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?* (Carl Grossmann Verlag 2019); Petersmann, 'Neo-liberal, State-Capitalist and Ordo-liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System' (2020) Chinese (Taiwan) Yearbook of International Law and Affairs 38.

In the context of the bilateral and multilateral negotiations on reforming international investment rules and arbitration, the EU proposals for transforming ISA into multilateral investment court systems remain, likewise, resisted by hegemonic governments (e.g., in China, Russia, the USA) due to their preference for power oriented bargaining rather than for impartial third party adjudication. Just as the EU's cosmopolitan conception of European common market and community law is due to Europe's post-1950 traditions of multilevel constitutionalism, the US traditions of using international economic agreements for power oriented bargaining are influenced by US hegemonic policies and neo-liberalism (e.g., the influence of business lobbying on US elections and US law-making). Even though the US used past ISA and WTO dispute settlement proceedings more successfully than other countries (e.g., in terms of 'winning' US complaints and defending the USA against complaints),[65] the geopolitical rivalries and neo-liberal industry pressures reinforced US skepticism vis-à-vis impartial third-party adjudication. Cosmopolitan and constitutional arguments – e.g., that defining 'state interests' in terms of citizen oriented SDGs (e.g., human rights and related PGs) can de-politicize conflicts among states and facilitate rules based third party adjudication, as illustrated by multilevel cooperation among national and European economic, constitutional and human rights courts since the 1950s – remain unconvincing for hegemonic and autocratic rulers viewing international relations as 'zero-sum' power politics aimed at reinforcing their relative power.

The increasingly diverse conceptions of IEL – like neo-liberal prioritization of interest group politics in the USA (e.g., rent-seeking industries benefitting from discriminatory trade and

[65] For statistical evidence, see R. Basedow, 'Why de-judicialize? Explaining State Preferences on Judicialization in World Trade Organization Dispute Settlement Body and Investor to State Dispute Settlement reforms' (2021) Regulation & Governance, at 1–20.

investment protection and corresponding limitations of impartial adjudication), authoritarian government regulation in totalitarian countries (e.g., China and Russia), and cosmopolitan, constitutional conceptions of EU law – prompt governments and industries to adopt diverse positions on reforms of trade and investment adjudication. Civil societies criticize the – often secretive – *ad hoc* ISA procedures and more than 1.100 publicly known ISA awards as being based on one-sided protection standards and procedures privileging foreign investors in ways that risk being inconsistent with inclusive, transparent, legal, and judicial protection of the SDGs. Path-dependent trade and investor-biases (e.g., in the Energy Charter Treaty) are perceived as potential threats to the necessary decarbonization of economies. Without independent, impartial trade and investment adjudication and an effective WTO appellate review system, the inevitable trade disputes (e.g., about CBAMs) and investment disputes (e.g., about decarbonizing investments and energy markets) risk disrupting rule of law and human rights oriented SDGs. The constitutional, administrative law and international public law dimensions of modern trade and investment disputes require judicial administration of justice, which path-dependent WTO panels composed by trade diplomats and investment arbitrators from private law firms dependent on corporate clients may not ensure.[66]

[66] On proposals for reforming WTO and investment adjudication, see Petersmann, *Transforming World Trade and Investment Law for Sustaianble Development*, at Chapters 6–8; Basedow, 'Why de-judicialize? Explaining State Preferences on Judicialization in World Trade Organization Dispute Settlement Body and Investor to State Dispute Settlement Reforms'.

5 Conclusion: Need for Strengthening the SDG Commitments to Human Rights, Democratic Governance and Rule of Law

The current health, environmental, trade and geopolitical crises reveal 'governance failures' (e.g., to provide vaccines to all, protect human rights, rule of law and ecosystems as envisaged in SDGs 13 to 15) and underlying 'constitutional failures' (e.g., in controlling 'unbound executives', their 'emergency governance' and restrictions of fundamental rights).

5.1 A New 21st Century Environmental and Emergency Constitutionalism?

While governance crises undermine the UN and WTO legal systems (as explained in Sections 1 and 2), European HRL has strengthened democratic constitutionalism and rule of law in multilevel governance of SDGs (as discussed in Sections 3 and 4). The Covid-19 and climate crises require private-public partnerships for inventing new vaccines and 'green technologies' and for reforming international health, environmental, trade and investment law and adjudication. Rights to the protection of the environment are now recognized in the laws of more than 150 States, regional treaties, and by the UN Human Rights Council (HRC).[67]

Environmental and human rights have been invoked by litigants all over the world in hundreds of judicial proceedings on protection of environmental interests over the past years.[68] Democratic and judicial control (e.g., of emergency restrictions of fundamental rights) and science-based governance helped to limit abusive 'executive emergency measures'; they

[67] See UN HR Council Resolution 48/13: 'The Human Right to a Clean, Healthy, and Sustainable Environment' (8 October 2021) UN Doc. A/HRC/RES/48/13.

[68] See P. de Vilchez Moragues and A. Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation?' (2021) SSRN Electronic Journal.

increased calls for 'environmental constitutionalism' limiting the human destruction of eco-systems ('Anthropocene') and disregard for 'planetary boundaries'. Rules based civil society pressures also challenge 'social media capture' distorting information and undermining individual rights.[69] The anti-democratic protesters storming the US Congress in January 2021 in response to Trump's 'big lie' that the 2020 congressional election was 'stolen' from the Republicans, illustrated systemic dangers of 'unbound executive governance'; US politicians and military officials warned of a 'Weimar moment' of US democracy with the risk of a 'Hitler-like political coup'.[70]

The high mortality rates caused by mishandling of the Covid-19 pandemic in populist democracies confirmed the need for democratic, judicial, and institutionalized, scientific 'checks and balances' enhancing the effectiveness and legitimacy of emergency health governance. Likewise, the protectionist US disruption of the WTO dispute settlement system illustrated the need for constitutional safeguards limiting executive powers to disrupt, or withdraw from, multilateral PGs treaties ratified by parliaments. While American, Chinese, and Russian power politics undermine transnational rule of law, Europe's multilevel constitutionalism has enabled civil societies to enhance democratic and judicial accountability of governments in Europe for climate mitigation and other SDGs.

5.1.1 European Democratic and Judicial Reform Strategies

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[69] See A. Schiffrin (ed.), *Media Capture. How Money, Digital Platforms and Governments Control the News* (Columbia University Press 2021).

[70] 'Donald Trump Lashes Out at Top US Military Officer: I'm not Into Coups' (16 July 2021) Financial Times.

In European democracies, constitutional, human rights and environmental complaints and civil society litigation increasingly hold governments accountable for protecting SDGs. For example:

– The ruling of the Dutch Supreme Court, on 20 December 2019 in State of the Netherlands v Urgenda,[71] (a Dutch NGO suing the State on behalf of around 900 citizens) confirmed the 2018 Court of Appeals judgment that Articles 2 (right to life) and 8 of ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG emissions by at least 25% (compared to 1990 levels) by the end of 2020. The judgment clarified that HRL (e.g., the ECHR) and related constitutional and environmental law guarantees (e.g., the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens in order to enforce positive obligations to take appropriate measures mitigating climate change. Even if the respondent State is only a minor contributor to climate change, a court can determine the legal responsibilities to reduce emissions of an individual State that shares responsibility with other actors for climate change ('partial causation justifies partial responsibility'; the failure of other States to meet their responsibilities does not justify non-performance). As the disputing parties agreed that climate change presents serious risks, the court did not need to decide on these facts; it relied on the precautionary principle and the international commitments to reduce emissions by at least 25% by 2020,

[71] *De Staat der Nederlanden (Ministerie van Economische Zaken en Klimaat) tegen Stichting Urgenda, Hoge Raad der Nederlanden, Civiele Kamer* (20 December 2019) Case No. 19/00135.

leaving it to the political government branches to determine how to implement this legal obligation.

– In November 2020, the *Conseil d'Etat* – France's highest administrative court – delivered a climate related ruling in *Commune de Grande Synthe I,* by acknowledging France's obligation to reduce GHG emissions.[72] The *Conseil d'Etat* accepted that the municipality of *Grande Synthe* had *locus standi* resulting from its 'direct and certain exposure' to climate change (notably sea rise); its request relating to GHG emissions reductions had been based on international, European, and French legal obligations for emissions reduction, notably the EU's second energy-climate package of 2018 and its implementation in French law, which made the objective of GHG emissions reductions enforceable against the government.

– The Order of the German Constitutional Court of 24 March 2021 protected constitutional complaints by German climate activists challenging Germany's Federal Climate Change Act of 2019.[73] The Federal Climate Change Act makes it obligatory to reduce greenhouse gas emissions by at least 55% by 2030 relative to 1990 levels. The complainants claimed that the legislation failed to introduce a

[72] See N. de Arriba-Sellier, 'Another Urgenda in the Making The Conseil d'Etat's first ruling in Grande Synthe' (25 November 2020) Verfassungsblog.

[73] Order of the First Senate (24 March 2021) Bundesverfassungsgericht No. 1 BvR 2656/18, available at http://www.bverfg.de/e/rs20210324_1bvr265618.html (accessed 10 March 2022).

> legal framework sufficient for swiftly reducing greenhouse gases, especially carbon dioxide (CO2). The Court found that the legislative emission reduction targets respond to the constitutional duty (Article 20a of Basic Law) to protect the claimants from harm against climate change at present. Yet, the challenged provisions were found to violate the freedoms of young complainants by irreversibly offloading major emission reduction burdens onto periods after 2030. The Court defined the constitutional climate goal arising from Article 20a of Basic Law, which protects the natural foundations of life like the environment, in accordance with the Paris target as being to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. The statutory provisions on adjusting the reduction pathway for greenhouse gas emissions from 2031 onwards were found to be insufficient to ensure that the necessary transition to climate neutrality is achieved in time. The Court ordered the legislator to enact provisions by 31 December 2022 that specify in greater detail how the reduction targets for greenhouse gas emissions are to be adjusted for periods after 2030. The provisions of the Federal Climate Change Act governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights insofar as they lacked sufficient specifications for further emission reductions from 2031 onwards.

It was due to civil society initiatives that – on 28 November 2019 – the European Parliament declared a global climate emergency; it requested the EU Commission to cut emissions by 55% to ensure a carbon-neutral 'circular economy' with net-zero GHG emissions in the EU by 2050. The EU's 2019 'Green Deal' promoted legislative reforms for transforming Europe into the first

carbon-neutral continent by 2050. The 'European Climate Law', adopted by the European Parliament and European Council in June 2021,[74] makes the EU's goals of cutting GHG emissions 55% by 2030 (compared with 1990 levels) and reaching climate neutrality by 2050 legally binding; it establishes a governance framework for climate mainstreaming, extending the EU's emission trading system (e.g., to automobiles and housing), tightening EU reduction requirements for car emissions, and providing for CBAMs for imports from countries without equivalent carbon taxes and GHG emission reductions.

5.1.2 A Global UN Pact for the Environment (GPE)?

Proposals for rendering the dozens of functionally limited UN environmental agreements more coherent through a GPE were postponed in 2019 in favour of another UN Declaration to be adopted in 2022, on the 50th anniversary of the UN Stockholm Conference on the Human Environment. Civil society initiatives and climate litigation in Europe have relied more on international law than environmental litigation outside Europe (e.g., in the USA), where political opposition against judicial protection of human and environmental rights derived from UN law remains widespread.[75] The high mortality rates in 'populist democracies' (e.g., Brazil, India, the

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

[75] See Petersmann, *Transforming World Trade and Investment Law for Sustainable Development*, at Chapters 6–8; Basedow, 'Why de-judicialize? Explaining State Preferences on Judicialization in World Trade Organization Dispute Settlement Body and Investor to State Dispute Settlement reforms'; UN HRCouncil Resolution 48/13: 'The Human Right to a

United Kingdom, and USA) led by nationalist governments during the 2020 – 2021 Covid-19 health pandemic suggest that competent, multilevel governance respecting UN and WTO law – and democratic, judicial and independent scientific 'checks and balances' – may be more important for protecting SDGs than national political systems. Trade agreements are increasingly recognized as necessary instruments for resolving the current health, environmental, economic, and geopolitical crises. Plurilateral agreements establishing 'environmental protection clubs' can put pressure on 'free-riders', provided such agreements remain open for all 'willing countries'.[76]

The WTO negotiations on limiting plastic pollution, fisheries subsidies, vaccine nationalism, and on promoting access to 'green' and health technologies, respond to systemic governance failures; promoting GHG reductions and 'environmental compliance mechanisms' raise dispute settlement problems different from trade agreements limiting trade distortions rather than also environmental harms. Trade and investment disputes will inevitably multiply in the needed de-carbonization, digitalization, de-plastification and humanization of economies. Can constitutional nationalism be adjusted to the needed multilevel protection of SDGs? Human civilization needed millennia for separating religious from political loyalties, for limiting monarchical powers by national Constitutions, and for institutionalizing global law protecting human rights. Convincing people – as the legitimate source of legal authority – of the need for holding multilevel governance powers democratically, legally, and judicially more accountable

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Clean, Healthy, and Sustainable Environment' (8 October 2021) UN Doc. A/HRC/RES/48/13.

[76] See R. Leal-Arcas, *Climate Clubs for a Sustainable Future: The Role of International Trade and Investment Law* (Kluwer 2021).

for protecting the SDGs remains confronted with realities of power politics that risk preventing the constitution of a new utopia protecting the SDGs.

Proposals for 'environmental constitutionalism' – as a reasonable self-restraint on the 'Anthropocene'[77] caused by environmental pollution disregarding 'laws of nature' – postulate a degree of 'political enlightenment' that seems unrealistic in times of hegemonic power politics dominated by autocrats and extremists (even inside the US Congress) denying climate change and democratic self-determination. The 'implementation deficits' undermining the SDGs (e.g., health protection requiring global distribution of vaccines, termination of fossil fuel subsides, more humane migration and refugee practices) call for 'democratic struggles' for adjusting social and 'constitutional contracts' (e.g., on what we owe each other) to global governance challenges.

Anglo-Saxon advocates of 'evolutionary self-constitution of humanity' transforming international law into a communitarian *Eunomia* now admit the 'legal wasteland' of current power politics.[78] Citizens and politicians often lack the courage (e.g., of *Sisyphos*), 'Kantian morality' and 'constitutional mindset' to treat all strangers with human dignity as part of 'cosmopolitan law' and of 'constitutional patriotism' (see Habermas) defending human rights as 'human identity core' for multilevel constitutionalism and 'survival governance'. Judicial remedies offer venues for criticizing and remedying governance failures and for engaging civil societies in struggles for justice and for the SDGs. Do EU law and the domestic reforms introduced by the US Biden administration justify hopes that democracies might live up to their

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

[78] See Petersmann, '"Constitutional Constructivism" for a Common Law of Humanity? Multilevel Constitutionalism as a "Gentle Civilizer of Nations"'; E.U. Petersmann, 'Self-Constitution of Mankind without Constitutional Constructivism?' (4 January 2022) EJIL: Talk!.

responsibilities to protect the cosmopolitan SDGs at least inside Europe and North America? Unfortunately, the money driven 'neo-liberal capture' of US economic and democratic regulation (e.g., due to business financing of political election campaigns) has, so far, excluded US leadership for returning to rule of law in the WTO dispute settlement system and for CBAMs mitigating climate change. As explained in Sections 3 and 4, without institutionalizing 'public reason' and multilevel remedies protecting human rights and rule of law in international trade, investment and environmental policies, the UN and WTO legal systems risk disintegrating into competing, regional blocs. Geopolitical rivalries risk further weakening the 'constitutional infrastructures' needed for realizing the SDGs.

Notes on Contributor

Petersmann taught constitutional law, international and European law at numerous Universities in Europe, the USA, Latin-America, South-Africa, China, India, and Singapore. He represented Germany in European and UN institutions and worked as legal counsel in GATT, legal consultant for the EU, WTO and UNCTAD, as secretary, member or chairman of GATT and WTO dispute settlement panels, and as chairman of the International Trade Law Committee of the International Law Association (1999–2014).

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