CHAPTER 1

Introduction and Conclusions

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This Introduction summarizes the contents and explains the methodology of the book and of its main policy conclusions on how constitutional democracies should respond to the increasing governance failures inside and beyond states. All UN member states have employed constitutional law for providing national public goods (PGs) such as protection of the environment; they also participate in multilateral treaties of a higher legal rank and multilevel governance institutions for protecting transnational PGs such as UN rules and institutions for the protection of the environment and human rights. However, international treaty commitments are often not effectively implemented inside UN member states, for instance if UN member states prioritize national communitarian values over internationally binding agreements (e.g. in Anglo-Saxon democracies with parliamentary supremacy); or if they continue being governed by authoritarian governments insisting on the UN Charter principle of 'sovereign equality of states' even if multilateral treaties and human and democratic rights are not effectively protected by governments. The 2030 UN Sustainable Development Agenda (SDA) emphasizes the need for international cooperation in protecting 17 universally agreed sustainable development goals (SDGs) based on respect for human rights, democratic governance and rule-of-law. Yet, these 'constitutional principles' and SDGs are not effectively protected inside and among many UN member states, especially if their domestic legal systems fail to subject foreign policy powers to effective constitutional restraints.[1]

The increasing 'executive power politics' and transnational 'governance failures' are influenced by numerous political, legal, economic and social causes. For instance, legal civilization in terms of protecting rights and judicial remedies of citizens (*cives*) in democratic and republican city states around the Mediterranean Sea 2500 years ago, and during Europe's medieval constitutionalism, had no parallel traditions outside Europe. Following the 'democratic enlightenment revolutions' in the Americas and Europe since the 18th century,

1 Like those in the 2009 Lisbon Treaty on European Union (TEU), whose Articles 3 and 21 require the EU to respect human rights, rule-of-law, democratic governance and other constitutional EU governance principles and judicial remedies also in the EU's external relations.

domestic constitutionalism and constitutionalization of foreign policies continued to develop in diverse ways. Today's reality of 'constitutional pluralism' also includes 'fake constitutions' enabling authoritarian rulers (e.g. in China and Russia) to abuse domestic and foreign policy powers without effective democratic, legal and judicial accountability. Among democracies, process-oriented governance prioritizing legislative supremacy over individual rights differs from rights-based, multilevel democratic and economic constitutionalism. While the EU Charter of Fundamental Rights (EUCFR) and the Lisbon Treaty on European Union recognize human rights and diverse democracies as co-constitutive of Europe's multilevel constitutional democracies,[2] citizens and governments outside Europe often argue 'against constitutionalism beyond states', for instance on the ground that 'it institutes a system of rule that is unlikely to carry popular support'.[3] As illustrated by increasing 'executive power politics', this may even culminate in the violation of treaties ratified by parliaments for the benefit of citizens. The conflicting value premises and conceptions of international law among authoritarian, neoliberal and ordoliberal state systems, as discussed throughout the Paris conference and in the book contributions, draw attention to the unresolved 'constitutional problems' of today's 'multipolar world' where diverse social conceptions of justice (e.g in the sense of socially accepted justifications of international law and governance of PGS) pose challenges to the UN and WTO governance of the SDGs.

Part I of this book explains why – notwithstanding this reality of 'constitutional pluralism' based on diverse cultural and constitutional traditions among the 193 UN member states – constitutionalism, constitutional politics, and constitutional economics offer the most coherent, analytical methods for explaining, and responding to, transnational 'governance failures' in protecting the SDGs, also in the 'interface relations' between democratic and authoritarian UN member states. Parts II and III of this book offer case-studies explaining the importance of 'environmental constitutionalism' and of multilevel democratic constitutionalism for strengthening multilevel governance of the SDGs through democratic participation, private-public partnerships and stronger 'stakeholder responsibilities'. These case-studies must be seen in the

2 Cf E.U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Oxford: Hart 2017).

3 Cf Martin Loughlin, *Against Constitutionalism* (Harvard UP 2022), at 202, who rejects European 'ordo-constitutionalism' and 'cosmopolitan constitutionalism' as being inconsistent with his nationalist conception of representative democracy – without offering any solutions for limiting transnational governance failures and responding to citizen demand for protecting transnational PGS more democratically and more effectively.

broader context of 'structural transformations' of societies, international relations and international law since World War II. As social, economic, political and legal systems are interdependent, mere liberalization of some economic sub-structures (e.g. in China and Russia) was unlikely, anyhow, to protect equal freedoms in the political, legal and social systems of authoritarian states.[4]

1 Structural Transformations of the International Legal System

In contrast to the 'international law of coexistence' (1648–1945) and failures of the League of Nations to protect human rights and transnational rule-of-law, the UN Charter and the 15 UN Specialized Agencies established a new kind of 'international law of cooperation' (W.Friedmann) for multilevel governance of transnational PGs. The decisive US leadership in defeating imperialism (e.g., through World Wars I and II, the dissolution of the Soviet Union at the end of the cold war) and in elaborating and globalizing UN and GATT/WTO law promoted decolonization and 'constitutionalization' of the post-1945 transnational relations based on increasing respect for individual and democratic self-determination in a rules-based, neoliberal economic order. The accession of authoritarian states like China (2001) and Russia (2012) to the World Trade Organization (WTO) enabled also authoritarian rulers to reform their dysfunctional economies. However, their continuing authoritarian suppression of human and democratic rights provoked new geopolitical rivalries – like Russian wars of aggression, the trade war started by US President Trump against China, and the US disruption of the WTO legal and dispute settlement system – demonstrating the politically unrealistic nature of the UN and WTO objectives of a rules-based and market-driven, liberal world order.[5]

Since the 1950s, European states used the GATT provisions for free trade areas and customs unions for transforming international law in Europe into multilevel legal, democratic and judicial protection of human and constitutional rights of EU citizens in a common market among more than 30 European democracies practicing new kinds of multilevel, democratic constitutionalism protecting peace and unprecedented social welfare. In the 1990s, following the end of the cold war, the EU commitments to promoting

4 On this 'interdependence of orders' emphasized by ordoliberalism see E.U. Petersmann, Neoliberalism, Ordoliberalism and the Future of Economic Governance, in *JIEL* 26 (2023) 836–842.

5 See E.U. Petersmann, The Future of International Economic Law in the Asian Century, in *JIEL* 26 (2023) 595–613.

transnational rule-of-law led to adoption of compulsory third-party adjudication also in WTO law, international investment law, the UN Convention on the Law of the Sea (UNCLOS), and in the 1998 Rome Statute of the International Criminal Court. Yet, as discussed in Part I, the geopolitical rivalries of the 21st century increasingly prompt China, Russia and the USA to oppose judicial protection of transnational rule-of-law; and, as discussed in Parts II and III, while the increasing number of UN environmental conferences and environmental agreements since the 1972 Stockholm Conference and the 1992 Rio Conference have led to universal acceptance of the environment and of climate change mitigation as global PGs, enforcing multilateral trade and environmental agreements through multilevel legal and judicial protection of economic, environmental and human rights – as successfully practiced in Europe – remains deeply contested by hegemonic and many other states outside Europe.

As described in Chapters 2, 4 and 5 of this book, the progressive 'constitutionalization' of EU environmental law and policies enabled a leading role of the EU also in the negotiations and domestic legal implementation of the UN Framework Convention on Climate Change (UNFCCC 1992) and the related Kyoto (1997) and Paris Agreements (2015), as illustrated by the EU's emission trading system and complementary Carbon Border Adjustment Mechanism (CBAM) inducing third countries to tax and restrict carbon emissions. Yet, just as the EU insistence on inserting 'human rights clauses' and providing for compulsory adjudication of disputes in international agreements remains contested by third countries, so are many WTO members challenging the legal consistency with UN and WTO law of EU environmental measures (like the CBAM and EU import restrictions on palm oil produced in illegally deforested tropical lands). If international law is defined by treaties, customary rules and general principles of law (as in Article 38 of the Statute of the International Court of Justice), the changing structures of international law may not be obvious. This book focuses on the dynamic interactions between international rules and related *legal practices* (like abuses of the WTO Appellate Body system, plurilateral countermeasures like multi-party interim arbitration in the WTO, increasing challenges to investor-state arbitration), and on plurilateral and regional agreements such as the Regional Comprehensive Economic Partnership (RCEP) in Asia, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), transatlantic cooperation among the EU and the USA, and the EU's CBAM in response to insufficient greenhouse gas emission reductions in third countries; arguably, these legal practices (e.g. favoring plurilateral reforms in response to failures of the UN and WTO legal systems) reveal structural changes in the international legal system.

2 Research Questions and Methodology of This Book

The editors of this book share the view underlying Europe's multilevel constitutionalism that ordoliberal and constitutional methodologies could inspire a humane rebuilding also beyond European integration of the world trading, investment and environmental systems if it should ever be possible to reform the suppression of human rights in authoritarian UN member states and neoliberal nationalism (as illustrated by the 'Brexit' and by money-driven US protectionism) disrupting multilateral economic order.[6] Yet, the realities of 'constitutional pluralism' suggest that the diverse constitutional traditions of European, American, African and Asian countries will continue promoting regulatory competition, geopolitical rivalries and transnational governance failures like the 'executive power politics' disrupting the UN and WTO 'world order treaties'. How should reasonable citizens and democratically accountable governments respond to such governance failures like suppression of human and democratic rights, abuses of veto powers, and insufficient cooperation in responding to health pandemics, climate change, food crises, Russian wars of aggression and threats of using nuclear weapons? Europe's legal commitment to 'competitive social market economies' (Article 3 TEU) is based on Europe's social experiences that citizens must be empowered by human and constitutional rights and social security to develop their human capacities and adjust to, and support, the changes imposed in open societies with economic and democratic competition. The current human disasters – like illegal wars of aggression, global health pandemics, climate change, ocean pollution, overfishing and other biodiversity losses, non-compliance with UN and WTO law and dispute settlement systems – reflect transnational governance failures and 'constitutional failures' to protect human and democratic rights and the SDGs. Both left-wing and right-wing 'populist politicians' polarize societies by blaming science-based elites (e.g. demonstrating man-made climate change) and pluralist societies (e.g. defending human rights, democratic accountability and protection of minorities); they call for returning to authoritarian governance so that 'strongmen politics' can impose 'social peace' and 'social justice'. Yet, social inequalities, political exclusion, corruption and suppression of human and democratic rights remain much more characteristic of authoritarian states than of constitutional democracies. This book explores how to

6 See Petersmann (n 4), reviewing *The Oxford Handbook of Ordoliberalism* edited by T. Biebricher/W. Bonefeld/P. Nedergaard (Oxford University Press, 2022); *idem*, Transforming Trade, Investment and Environmental Law for Sustainable Development?, *Austrian Review of International and European Law* 26 (2023), 1–38.

rethink constitutionalism and governance of global PG by using the analytical lenses of 'constitutional politics' (e.g. emphasizing the need for transforming 'constitutional contracts' into democratic legislation and administrative and judicial protection of rule-of-law at national and international levels of governance of PGs) and of 'constitutional economics' (e.g. exploring the limitation of market failures, governance failures and constitutional failures by multilevel constitutionalism).

The book aims to explain transnational governance failures as well as how to remedy them, building on 'constitutional pluralism' in rules-based approaches to mitigating climate change and to other regulatory challenges in UN and WTO governance of PGs. The term 'constitutionalism' is used in a broad sense for constituting, limiting, regulating and justifying multilevel rules and governance institutions of a higher legal rank for providing PGs.[7] It covers evolutionary constitutionalism (e.g. as emphasized in the chapter by J. Flett), transformative national constitutionalism (e.g. as elaborated by E. Daly/M. Tigre/N. Urzola for the Americas), and constructive, multilevel constitutionalism at national and international levels of governance (e.g. as emphasized by

7 This 'open definition' differs from the state-centered definition proposed by Loughlin (n 3, pages 6–7), according to whom a modern Constitution '(1) establishes a comprehensive scheme of government, founded (2) on the principle of representative government and (3) on the need to divide, channel, and constrain governmental powers for the purpose of safeguarding individual liberty. That constitution is also envisaged (4) as creating a permanent governing framework that (5) is conceived as establishing a system of fundamental law supervised by a judiciary charged with elaborating the requirements of public reason, so that (6) the constitution is able to assume its true status as the authoritative expression of the regime's collective political identity'. From the point of view of European constitutionalism, such traditional definitions neglect the transformation of most *national* into *transnational PGs* resulting from globalization, the 'republican task' of constitutions to respond to demand by citizens for protecting such transnational PGs, and the democratic task of constitutionalism to protect democratic input-legitimacy and output-legitimacy of multilevel governance of global PGs, which no single state can protect without international law and multilevel governance institutions. Mere constitutional nationalism without regard to transnational governance failures has become parochial and democratically irresponsible. The public disinformation of the nationalist 'Brexit politics' is also increasingly recognized in Britain; cf Martin Sandbu, *No, there isn't a 'democratic deficit' in the EU,* Financial Times 14 August 2023. See also Philip Stevens, *The EU is doing more – lots more*, Financial Times of 18 August 2023 (explaining why – contrary to the predictions during the Brexit referendum in 2016 that a leave vote would see the EU collapse under the weight of its intrusions into national affairs – the new EU migration, health, environmental and common defense policies responding to the migration, COVID-19, climate change and security crises continue being supported by EU citizens and their democratic institutions). Even if recent opinion polls in the UK now show clear and consistent expressions of regret that the country left the EU, 'rejoining the EU remains a very distant dream' (Robert Shrimsley, *Financial Times* 31 August 2023).

European lawyers and in the negotiations on reforming investor-state arbitration); Anglo-Saxon claims 'against constitutionalism' (e.g. based on nationalist conceptions of representative democracy and insufficient popular support for constitutionalism beyond states) offer no coherent responses for protecting transnational PGs; in Europe, they have been refuted by the effectiveness of European constitutional law and by the 'constitutional patriotism' of EU citizens supporting multilevel democratic and republican constitutionalism for limiting national governance failures, as discussed in various chapters of this book.

The legal, political, economic and social processes of constitutionalism – like democratic 'constitutional politics' transforming agreed 'constitutional contracts' (e.g. on national Constitutions) into democratic legislation and administrative and judicial protection of rule-of-law – are complicated by globalization, its transformation of *national* into *transnational PGs* (like protection of the environment, rule of law, public health), and by the reality of 'constitutional pluralism'. Depending on their historical evolution and democratic preferences, UN member states often prioritize conflicting values (like state sovereignty, popular sovereignty, inalienable rights of citizens) ushering in regulatory competition and geopolitical rivalries. The linking of economic, environmental and social rules with human rights and rule-of-law principles in the UN SDA could not prevent transnational governance failures undermining the universally agreed SDGs like food security (SDG2), healthy lives (SDG3), climate change mitigation (SDG13) and protection of other environmental commons (SDGs 14 and 15), access to justice and rule-of-law (SDG16). Exploring 'constitutional pluralism' reveals fundamental divergences on how to protect PGs, as illustrated by the diverse EU and US climate change legislation and litigation analyzed in Part II of this book. The protection of civil, political, economic and social human rights in the national constitutional systems of the member states of the EU and of the broader European Economic Area (EEA) – reinforced by EU law, EEA law, the European Convention of Human Rights (ECHR) and UN human rights law – has no equivalent in Africa, the Americas and Asia. Europe's multilevel 'constitutional politics' (e.g. in national and European parliaments), like the 'constitutional economics' underlying Europe's unique economic and environmental constitutionalism, are characterized by multilevel legal, democratic and judicial restraints on abuses of public and private power, 'institutional checks and balances', science-based regulatory agencies, and legal protection of individual preferences (e.g. by judicial protection of human and fundamental rights and non-discriminatory competition as a discovery procedure and as restraint on abuses of power). The editors share the EU's ordo-liberal commitment to 'normative and methodological individualism', which is justified by

UN and European human rights law (HRL). The 1948 Universal Declaration of Human Rights acknowledges the perennial human search for morality, reasonableness and universal protection of human rights (cf Article 1 UDHR); the social and political nature of human beings as reflected in human rights to individual and democratic self-development (cf the Preamble and Articles 19–21 UDHR); the limitation of 'human dignity' by human passions provoking perennial abuses of public and private power (as recalled in the Preamble of the UDHR), resulting in the need for institutionalizing public reason and democratic constitutionalism based on rule-of-law and communitarian, democratic and judicial institutions protecting PGS (cf Articles 27–29 UDHR), including also undistorted market competition as a decentralized information, coordination and sanctioning mechanism inducing citizens to supply and demand scarce goods and services.[8] Yet, the realities of 'constitutional pluralism' based on diverse conceptions and traditions of constitutionalism are reflected in the chapters of this book written by authors from diverse continents. The ubiquity of transnational governance failures illustrates how UN HRL is not effectively implemented through 'constitutional politics' and 'constitutional economics' in many UN member states. Constitutional economics (as discussed in *Chapter 3*) aims at protecting 'consumer sovereignty' in Europe's common market and 'citizen sovereignty' in Europe's constitutional democracies; its normative individualism (acknowledging voluntary, informed consent of citizens as primary source of democratic and economic values) goes far beyond the basic principles of the Bretton Woods agreements, GATT, the WTO, international investment and environmental law, which – even though historically designed by and for market economies – include only insufficient legal disciplines for non-discriminatory conditions of competition and rule-of-law, notably in state-capitalist countries. 'Constitutional economics' as economic discipline originated in the USA.

8 For a human rights approach to international economic regulation challenging the neoliberal focus on the utility-maximizing rationality of the *homo economicus* (as emphasized by utilitarian neoliberalism as advocated by UK Prime Minister Thatcher and US President Reagan during the 1980s) by acknowledging the social and political vulnerability of the *homo laborans* and *homo politicus* see: E.U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart 2012). The editors of this book emphasize that the needed legal protection of general interests in non-discriminatory conditions of market competition (e.g. by protecting 'consumer sovereignty' in economic markets and 'citizen sovereignty' in democratic markets) must be complemented by legal safeguards of special interests (e.g. for protecting decent working conditions) and by democratic and judicial 'balancing procedures' (e.g. for promoting social justice, reconciling investor rights and shareholder interests in profit-maximization with larger 'stakeholder interests' in sustainable development).

Yet, its multilevel policy implementation remained essentially limited to economic agreements among democracies in Europe and in third countries (like Canada), which concluded free trade agreements (FTAs) with human rights guarantees with the EU. Neither constitutional economics nor the liberal, economic principles underlying the IMF, GATT and WTO agreements (like monetary convertibility, protection of private rights, rules-based open markets aimed at non-discriminatory conditions of competition) are effectively protected in authoritarian states like China and Russia, which acceded to the Bretton Woods and WTO agreements without effectively implementing their underlying 'embedded liberalism'.

UN and WTO law have not prevented public and private abuses of power nurturing geopolitical rivalries undermining HRL and WTO rules for non-discriminatory conditions of trade. In contrast to Europe, the responses by African, American and Asian governments to the global governance challenges remain guided by diverse constitutional and political governance traditions, as discussed in the various chapters of this book. Cultural, social, and legal diversity fosters economic and legal incoherencies between neoliberal, ordoliberal, totalitarian and 'third world' approaches to multilevel governance of PGS (like the SDGS). Russian wars of aggression and trade wars between China and the USA have made 'constitutional reforms' of UN and WTO law unlikely. The 'unipolar moment' after the dissolution of the Soviet Union (1991) has given rise to a new multipolar world with increasing regulatory competition and transnational governance failures disrupting the diverse UN/WTO governance regimes for PGS.[9] This book explores reasonable responses to the global governance crises.

3 Part I: Constitutional Pluralism, Constitutional Politics and Constitutional Economics

Chapter 2 on *Constitutional pluralism, regulatory competition and transnational governance failures* proceeds from the fact that all UN member states use constitutionalism for protecting national PGS. The current human disasters – like illegal wars of aggression, violent suppression of human and democratic

9 For a discussion of the different kinds of (trans)national PGS (like non-rival and non-excludable 'pure PGS', excludable 'club goods', and exhaustible 'common pool resources'), which require diverse policy responses, see E.U. Petersmann (n 2), at 190 ff. On the lack of rights-and citizen-based 'legal civilization' in many non-European countries with non-democratic, communitarian cultures see Petersmann (n 5).

rights, global health pandemics, climate change, ocean pollution, overfishing and other biodiversity losses, and non-compliance with UN and WTO law and dispute settlement systems – reflect transnational governance failures and 'constitutional failures' to protect human and democratic rights and the SDGs. Since the 1950s, Europe's multilevel constitutionalism succeeded in progressively limiting transnational governance failures; yet, it is not followed outside Europe. Geopolitical power politics and constitutional nationalism prompted China, Russia and the USA to resist constitutional reforms of UN/WTO governance and 'environmental constitutionalism'. Constitutionally unbound 'totalitarian states' (like China and Russia) and Anglo-Saxon neo-liberal interest group politics (notably in the USA) disrupt the rules-based world trading system. The more globalization is perceived as creating vulnerabilities justifying national security restrictions (e.g. against spread of viruses, weaponization of interdependence), the more important become plurilateral second-best responses like free trade and investment agreements prescribing respect for human rights and judicial remedies, 'de-risking' global supply chains, and 'climate protection clubs' conditioning market access on greenhouse gas reductions. The sociological insight underlying the ordoliberal objective of a 'social market economy' – that citizens must be empowered by human and constitutional rights and social security to adjust to, and support, the changes imposed in open societies with economic and democratic competition – remains true also for the needed transformation of international economic law (IEL) to better protect the universally agreed SDGs. The neoliberal paradigm of a utility-maximizing *homo economicus* must be supplemented by the human rights paradigm of individual and democratic self-determination by reasonable citizens who remain socially and politically vulnerable unless they are protected by civil, political, economic, social and cultural rights to develop their diverse human capacities. Yet, authoritarian rulers reject this primacy of reasonable citizen interests and the legal-institutional framework for market economies and constitutional democracies reconciling the individual pursuit of self-interests with the common citizen interests in PGs and social justice.

Chapter 3 on *Constitutional economics and transnational governance failures* explains 'constitutional economics' as a methodology for analyzing legal strategies aimed at 'constitutionalizing' foreign policy powers and the law of international organizations. Constitutional economics distinguishes between 'market failures' (like distortions of competition, environmental pollution, social injustices), 'governance failures' (like insufficient protection of PG like the SDGs, suppression of human and democratic rights), and 'constitutional failures' (like non-existence of rules of higher rank limiting market and governance failures, inadequate rule of law, lack of democratic governance

institutions). These three types of transnational governance failures disrupt equal human and constitutional rights and different policy fields characterized by collective action dilemmas (like climate change mitigation, international rule-of-law, division of labor through international trade and investments). With its 'normative individualism' prioritizing mutual agreeability of constitutional arrangements for all members of society aimed at protecting 'consumer sovereignty' and 'citizen sovereignty', constitutional economics has been the conceptual underpinning of European multilevel governance; it could promote also UN/WTO governance protecting legislative, administrative and adjudicative rule of law and equal rights inside and beyond states through international rules of a higher legal rank. Disentangling policy failures into *market*, *governance* and *constitutional* failures offers analytical insights and normative guidance for responding to the causes of policy failures. The distinctions clarify responsibilities and allow targeting policy responses; they reveal deficiency of rules and inform their re-design; and highlight systemic rivalries between rules-based, state-controlled, and business-determined governance regimes. Many countries outside Europe reject Europe's 'normative individualism' for protecting non-discriminatory market competition through multilevel democratic protection of human and constitutional rights and independent regulatory and judicial institutions.

Chapters 1–3 form Part I which discusses and defines 'transnational governance failures' by the failure of markets, governments and international organizations to protect transnational PGs (like compliance with UN and WTO law as ratified by national parliaments) and to effectively contribute to the universally agreed 17 SDGs. The emergence of a multi-polar world with authoritarian governments disregarding UN and WTO law entails regulatory competition and systemic rivalries undermining the UN SDA and human rights. Transnational governance failures violating international law confirm that path-dependent governance methods – like constitutional nationalism, intergovernmental power politics, and conceptions of international organizations as 'international functionalism' among states (rather than as multilevel governance for the benefit of citizens) – may not suffice for realizing the universally agreed SDGs. Part I explains the methods suggested by the book editors (i.e. normative and methodological individualism) for exploring alternative policy responses remedying collective action problems (such as climate mitigation) and maintaining international rule-of-law (e.g. through reforms of trade, investment and environmental rules and dispute settlement procedures, plurilateral agreements on carbon taxes and carbon-border adjustment measures). The following three research questions had been proposed by the

book editors for the elaboration of all book chapters in view of their universal importance for realizing the SDGs:

(1) To what extent will the realities of the 'multipolar world' undermine the supply of transnational PGs such as the rule-of-law objectives of the UN SDA (SDG16) and environmental preservation (cf SDGs13–15)? Can the lack of effective UN and WTO legal disciplines on 'market failures' (like restraints of competition, external effects, information asymmetries), 'governance failures' (e.g. to respect rule-of-law and protect PGs) and 'constitutional failures' (e.g. in terms of protecting human rights against authoritarian power politics) be compensated by more decentralized private-public partnerships (e.g. for decarbonizing and digitalizing economies, inventing and distributing vaccines for everybody) and plurilateral agreements? Contributions in this book offer multiple avenues towards the supply of transnational PGs. Private-public partnerships are at the core of the contributions by Lamy and Denton, whose recommendations aim at moving from a state-centered Westphalian order towards one that emphasizes the different contributions of societal actors (societal groups, business, individuals, states) towards the achievement of the SDG. The shift towards plurilateral approaches looms behind the EU's endeavour to introduce a CBAM (discussed by Flett) as core element of a 'climate club' that would offer incentives for more ambitious SDG efforts.

(2) Can republican constitutionalism be extended to multilevel governance of transnational PGs (like compulsory judicial remedies in WTO law) and remain democratically and legally accountable to citizens and their representative institutions? The policy responses discussed in Part III explore how new and decentralized forms of cooperation may contribute to effective PG supply (Lamy, Denton), or how regional and plurilateral cooperation may offer 'second-best policies' for preserving rules-based cooperation overcoming collective action dilemmas (Chaisse, Fahey) and disagreements on trade and investment adjudication (van den Bossche, Marceddu).

(3) Are there lessons from Europe's multilevel constitutionalism for reforming multilevel governance of global PGs like the SDGs? This book does *not* claim that the European experiences with transforming governance failures (e.g. in monetary, competition, environmental and human rights policies) into multilateral constitutional reforms should serve as a role model for governance reforms in different global and regional contexts. The 'interdependence of orders' (like social, cultural, economic, political and legal systems) and the unique context of European

integration may exclude such 'policy transfers' to diverse institutional, legal, and cultural traditions. For example, Europe's focus on individual rights limiting 'market failures' (e.g. by competition, environmental and social rights and judicial remedies), 'governance failures' (e.g. by rule-of-law requirements, institutional 'checks and balances') and 'constitutional failures' (e.g. protecting human and constitutional rights of EU citizens) has no equivalent in constitutionalism in Africa, the Americas or Asia. Yet, as discussed in Part II of this book, the EU's climate change litigation and 'environmental constitutionalism' are influencing environmental governance and 'climate litigation' also in some countries outside Europe (like Brazil and Colombia) (Daly/Tiger/Urzola). The more geopolitical rivalries prompt hegemonic governments to disrupt UN and WTO governance and related third-party adjudication, the more important become regional and functionally limited, plurilateral alliances of countries and private-public partnerships (e.g. for decarbonizing and digitalizing economies, providing vaccines to all countries) supporting global PGs like transnational rule-of-law (van den Bossche, Marceddu).

4 Part II: Constitutional Pluralism, Rule-of-Law and Climate Change Mitigation: How to Limit Transnational Governance Failures in Climate Change Mitigation?

The contributions in Part II explore origins and remedies of transnational governance failures by using the example of the perennial failures of mitigating climate change effectively in the context of the 1992 UN Framework Convention on Climate Change (UNFCCC). The 2015 Paris Agreement on climate change mitigation recognizes the sovereignty of its more than 190 contracting states to decide on their 'nationally determined contributions' (NDCs) – subject to periodic, international surveillance procedures – for realizing the universally agreed goal of decarbonizing economies to limit global temperature rises to 1.5°C, and to keep them 'well below' 2.0°C above pre-industrial times. The authors from Europe, the US and Asia explain why European, US and Asian views on 'environmental constitutionalism' differ fundamentally among these three regions of the world. This entails what Part I described as regulatory competition among competing conceptions of regulation. Comparative studies of EU, US, Latin American, Chinese, Japanese and UN environmental policies demonstrate how diverse constitutional contexts contribute to diverse environmental and climate change regulations and policies. Constitutionalism,

decarbonizing economies, regulatory competition and perceived national security risks interact dynamically; they explain some of the environmental governance failures (like insufficient phasing-out of fossil fuels, lack of support in the US Congress for carbon taxes, 'carbon leakage' caused by diverse regulatory standards and regulatory competition for attracting 'green investments'). 'Environmental constitutionalism' – inspired also by constitutional economics insights – increasingly influences European environmental practices (like EU primary and secondary law, environmental litigation) and also some Latin American countries prone to transformative constitutionalism; yet, it remains contested outside the EU (e.g. in US federal courts exercising 'judicial deference' vis-à-vis democratic legislatures), and seems to play no role in authoritarian countries like China and Russia.

The 'implementation deficits' undermining the SDGs can be reduced by bottom-up approaches promoting parliamentary, participatory and deliberative, democratic constitutionalism where possible, particularly in the EU with its tradition of fundamental rights recognition, economic and environmental constitutionalism and climate litigation (as discussed in the chapter by Eckes). The EU's constitutional requirements to protect the EU's internal constitutional principles also in the EU's external policies prompted the EU legislation on introducing WTO-consistent Carbon Border Adjustment Measures (CBAMs) as discussed in the chapter by Flett. Rights-based trade and climate litigation exists also in Latin American countries like Brazil and Colombia; it remains resisted in more process-oriented governance systems like the US and its constitutional nationalism (as discussed in the chapter by Daly/Tigre/Urzola). In Anglo-Saxon federal states (like Australia and the USA), regional or state-level bottom-up constitutionalism could be more promising rather than top-down federal obligations (Daly). Similarly, in China, regional autonomy offers potential leverage (e.g. for 'green cities') to promote bottom-up environmentalism; but it has also enabled resistance against top-down reforms (e.g. for phasing-out of coal-based energy plants at the request of China's central government), as discussed by Gao and Zhou.

The EU's *'environmental constitutionalisation'* has evolved from a sectoral policy to one of the core, transversal and guiding components of the EU legal order. The constitutional dimension of environmental protection is reflected in environmental objectives, principles and rules in EU primary and secondary law, which have promoted 'environmental democracy' and an environmental dimension also in the EUCFR. The EU's environmental constitutionalism responds to global environmental challenges emphasizing the 'intrinsic value' of environmental protection within the EU legal order and the *'constitutional consensus'* among EU Member States that environmental protection warrants

high levels of legal and judicial protection. Environmental transition is particularly visible in EU secondary law following the approval, in 2020, of the EU Green Deal for decarbonizing and greening the EU's economy. The multiple policy tools and mandatory standards aim at a socially 'just transition' with active industrial policies to secure continuing economic growth. Their promotion of 'climate change litigation' and of external 'carbon border adjustment measures' confirm the transformative nature of the EU's environmental constitutionalism.

Chapter 4 on *Governance failures in court: How litigation constitutionalizes norms on climate change mitigation* illustrates the citizen-driven dimension of the EU's environmental constitutionalism and of the central role of individual preference orientation that constitutional economics posits. The contribution emphasizes the role of individuals in claiming effective supply of environmental PGs and strengthening multilevel 'climate constitutionalism' in Europe through strategic climate litigation relying on international or regional environmental commitments that originate outside the domestic legal order, with a higher legal rank than the domestic executive and legislative actions and inactions that they challenge. Often, later cases replicate successful legal arguments and strategies from earlier cases and vest them with additional authority. Some climate litigation relies on international and European human rights norms – like the right to life (Article 2 ECHR) and the right to respect for private and family life (Article 8 ECHR) – and norms relating to states' responsibility for adaptation and mitigation, such as the 2015 Paris Agreement and the 2021 Glasgow Climate Pact. Ratifying and participating in the UNFCCC has repeatedly been viewed as justification for demanding greater mitigation efforts than originally planned by national institutions. While the European Court of Human Rights had earlier interpreted human rights to cover situations where people's lives were affected by environmental pollution, the court pioneered by interpreting Articles 2 and 8 ECHR to entail an obligation to mitigate climate change.

Chapter 5 on *EU Proposals for WTO-consistent Carbon Border Adjustment Mechanisms* emphasizes the evolutionary nature of the process by which States construct appropriate multilateral governance in response to their search for proper governance of PGs. The EU's quest for WTO-consistent, multilateral solutions respects the realities of constitutional pluralism. This is also why each WTO Member only has one vote (there is no weighting); why, even though voting is provided for, in practice no Member ever calls for a vote and decisions are taken by consensus; and there is no independent executive. Mandatory and binding adjudication is a step down the evolutionary path but is temporarily partially obstructed by the United States. In these

circumstances, geopolitical rivalry and power play are inevitable elements of international governance and can be used by states in pursuit of the protection of the transnational PG, as illustrated by the EU proposal for a Carbon Border Adjustment Mechanism. This 'CBAM' is quite particular because credit is given for any carbon price already paid in the third country; this is central both to establishing its exclusively environmental credentials and to understanding the very specific regulatory nudge created for third countries providing, in the current circumstances, the best available model for propelling the evolutionary protection of sustainable global governance of PGs.

In contrast to Europe's 'environmental constitutionalism', the United States' climate and environmental regulations can be characterized as a process-based – rather than rights-based – regulatory approach. This absence of US environmental constitutionalism is also influenced by regulatory competition favoring the use of second-best policy instruments in the 2022 US Inflation Reduction Action Act aimed at reducing CO_2 emissions (as a transnational PG). The US Supreme Court has not recognized constitutional rights to protection of the environment, for example in terms of negative rights against harmful externalities (built on a commitment to end uninternalized externalities). The U.S. Congress – rather than introducing non-discriminatory carbon taxes – has chosen second-best, discriminatory 'subsidies strategies' for climate change in the 2022 US Inflation Reduction Act, which sets strong incentives for industry investments into green technologies. The co-existence of diverse NDCs under the 2015 Paris Agreement – such as emission trading systems, carbon taxes and related carbon border tariffs, green subsidies, environmental standards and other NDCs – intensifies regulatory competition and potential trade disputes over discriminatory CBAMs, for instance if such CBAMs focus only on explicit domestic carbon prices without taking into account other NDCs like the phasing-out of fossil fuel subsidies.

Chapter 6 on *'Environmental constitutionalism' for improving UN environmental law and governance: Latin American and US perspectives* discusses the different forms which environmental constitutionalism has taken in the Americas in response to climate change mitigation. This contribution describes recent developments in the United States, Colombia, and Brazil, highlighting the divergent constitutional and legal approaches to climate protection. Notwithstanding the rhetoric of rights in the popular imagination, rights-based approaches have never driven policy in the United States, either in the context of environmental and climate policy or otherwise. Nor has popular will often impelled government action. Nor for that matter has the U.S. tended to be swayed by international winds. Instead, the U.S. tends to rely on a combination of market-based approaches and administrative enforcement of broad

legislative principles to advance national well-being, in the belief that markets, rather than political or judicial elites, are more likely to be responsive to both existing conditions and popular will. Where pursuit of national welfare meets with geoeconomic competition, business-driven approaches marry with state intervention engaging in discriminatory and protective means in order to protect domestic business. In this regard, the Inflation Reduction Act of 2022, which contains the most innovative and ambitious climate mitigation goals in the country's history, exemplifies this approach. This contrasts with the more constitutional economic approaches elsewhere in the Americas: rights-based approaches have held sway as constitutional courts have been especially responsive to individual and collective claims for environmental protection and climate change mitigation in the context of robust environmental constitutionalism. In particular, the courts of Colombia and Brazil have been global pioneers in the recognition of environmental and even climate rights to galvanize political action. Colombia's Constitutional and Supreme Courts have for many years protected environmental rights as part of an integrated web of human rights including rights to food, water, shelter, health, education and dignity for indigenous and non-indigenous communities. Brazil's judiciary has been equally committed to environmental protection; in the summer of 2022, the Brazilian Federal Supreme Tribunal held that the obligation to comply with the Paris Agreement creates enforceable human rights that individuals can vindicate in court and that the government is obligated to respect; failure to establish a climate fund, for instance, is not only a violation of the accord but an actionable violation of a constitutional and human right that controls the government. While the US may provide a model of political and economic approaches to climate mitigation, courts in Latin America, as exemplified by Brazil and Colombia, are providing a model of progressive rights-based action. This chapter analyzes these national examples from a comparative perspective, assessing their effectiveness to climate mitigation and their connection to the editors' analytical framework. The transformative constitutionalism of some Latin American countries can be likened with the constitutional economics approach and the assertive role of European courts in enforcing individual rights.

Chapter 7 on *Constitutional Failures or Market Failures: China, Climate Change and Energy Transition* analyzes Chinese climate change mitigation policies embedded into state planning and state-authoritarian approaches to the protection of the environment. China's greenhouse gas emissions exceed those of all OECD market economies. In September 2016, China formally ratified the Paris Agreement. Four years later, President Xi announced China's plan to further scale up its intended NDCs, which aim to have CO_2 emissions

peak before 2030 and achieve carbon neutrality before 2060. Due to China's unique political system, many people expect China to be a leader in climate change mitigation given the personal commitment of the top leader to climate issues. Can state-authoritarian systems ignoring individual rights be a role model in effectively supplying environmental PGs? This paper illustrates the complex political economic tensions between the different stakeholders behind China's climate policy, especially between the central and local governments, through a case study on the reduction of the reliance on coal power, as announced by China in April 2021. As the result, in 2021, China's new coal power plants saw a reduction of 57% compared to 2020. However, the good progress in energy transition was interrupted by the power outage sprawling over 20 provinces in China in September 2021, which resulted in a U-turn in the policy. As the consequence, China reversed its course of action, with more coal power plants approved in the last month of 2021 than all 11 months before combined. This chapter explores the reasons behind China's policy shift; the major domestic factors driving China's policy; the major players involved in the decision-making; whether this kind of policy-making engenders transnational policy failures; how conflicts between national and subnational interests and approaches have been resolved; and how the bargaining between different domestic players impacts China's approaches in FTAs and other trade and investment negotiations.

At the HEC conference at Paris in September 2022, an additional presentation on *Japanese and Asian leadership for climate change mitigation?* described how Japan's climate law and policy have always been driven by international developments of climate policy, especially international climate treaties. The Climate Action Plan of Government is a key tool to implement climate policy under the 1998 Law Concerning the Promotion of Measures to Cope with Global Warming (1998 Law); yet, it looks as a mere compilation of measures taken or planned by relevant ministries rather than as a comprehensive strategy. The minimal intervention of law in climate actions is another feature; it barely obliges private entities to undertake climate actions. Japan's climate law and policy raise problems of effectiveness and equity. Since acknowledgment of the net zero by 2050 goal in October 2020 and its aligned pledge (in its 2030 NDC) to reduce carbon emissions by 46 to 50 per cent below 2013 levels, significant changes have emerged. Climate change consideration permeates also other areas of laws and policies such as circular economy regulation and aviation law, aligned with the net zero by 2050 goal. The long-term goal drives climate law and policy toward a more integrated system and its 'constitutionalization'. Private sectors' behaviour has been changing through integration and mainstreaming of climate consideration into its business and management,

promoted by financial institutions requesting sustainability reporting and undertaking ESG investing. Integration and convergence of sustainability reporting standards by private sector at the global level are in progress through elaboration of rules for sustainability reporting by the International Sustainability Standard Board. The private standard-making impacts and interacts with rule making by public authorities. However, voluntary actions by companies and social sanction from capital market may cause problems of effectiveness, of equity and of legitimacy. Transforming existing rules consistent with net zero goal to enhance actions by private sectors is more essential than ever, for instance through legalization of sustainability reporting, modernization of the Energy Charter Treaty and of trade rules. For Japan and Asian countries where spontaneous drivers for stringent climate actions are relatively weak, international norm-making is more critical than in other parts of the globe. Japanese and Asian leadership will be determined by whether and what appropriate public policy at all levels, especially at the international one, should be introduced for decarbonization.

5 Part III: Policy Proposals for Limiting Transnational Governance Failures

SDG 16 recalls obligations to 'promote the rule of law at the national and international levels and ensure equal access to justice for all', including in international trade and investments whose systemic importance for sustainable development and for decarbonization of economies the SDA acknowledges. With transnational governance failures challenging the rule of law in international trade, investment, and environmental policies, Part III discusses reforms of UN and WTO governance (Chapters 8 and 9), of transatlantic leadership for reforming international trade, investment and environmental regulation (Chapters 10 and 11), of the WTO dispute settlement system (Chapter 12) and investor-state arbitration (Chapter 13). The realities of 'constitutional pluralism', regulatory competition, power rivalries and unilateralism undermine UN and WTO law and related 'economic constitutionalization' (like compulsory third-party adjudication in WTO law, in investment agreements and in the UN Law of the Sea Convention), thereby weakening legal accountability for transnational governance failures and provoking additional power rivalries. The concluding Chapter 14 explains how Asian countries seek to maintain the advantages of rules-based trade and investment integration by concluding an increasing number of regional trade and investment agreements influenced by Asia's communitarian rather than individualist, constitutional traditions.

In *Chapter 8* on *Reforming UN and WTO governance: Multilateralism and polylateralism*, former WTO Director-General Pascal Lamy emphasizes the multiple types of transnational policy failure resulting from interpreting UN and WTO governance as based on inter-national treaties, member-driven institutions and state sovereignty. Human rights and UN law failed to prevent President Putin's illegal war of aggression, Russia's interpretation of UN law as a framework for intergovernmental power politics, and Russia's public disinformation and authoritarian suppression of democratic rights. Similarly, business-driven neoliberalism prevented prioritization of citizen interests and regulation of market failures like global pollution and climate change. Power-oriented 'Westphalian conceptions of law' facilitate abuses of power unless citizens, democratic and judicial institutions, NGOs, multinational corporations, major cities and science-based institutions are effectively empowered to participate in purpose-driven, multi-stakeholder coalitions protecting transnational PGs. Such 'polylateralism' has been tested at the Paris Peace Forum, a five years old promising innovation in global governance, as evidenced by several successes in various domains such as the environment, supply of vaccines, financial support of independent media, SDG benchmarks for transnational corporations, Internet protection of children, and protection of Antarctica. Citizens should not expect too much from intergovernmental multilateralism and invest more in polylateralism.

In *Chapter 9* on *Business views on transnational 'governance failures' and 'corporate responsibilities'*, the Secretary-General of the International Chamber of Commerce, John W.H. Denton AO, explains why the member-driven character of international organizations undermines the contribution of non-members to effective problem-solving. The current institutional governance architecture is inadequate in light of the rapidly changing context of technological progress, digitization and environmental challenges driven by nongovernmental actors. Recent crises such as COVID-19 have demonstrated the value of cooperation between states and non-state actors in responding to governance crises more effectively (like state-sponsored cyber-attacks, production and distribution of vaccines in response to global health pandemics, private financial and food assistance, development of green technologies). The International Chamber of Commerce and its global network of national chambers of commerce (coordinating some 50 million enterprises) can strengthen the contribution of non-state actors (like pharmaceutical industries, environmental technology industries, global internet companies) in multilevel governance of PGs. Intergovernmental institutions (like the WTO, the WHO, the FAO) must cooperate more closely with private stakeholders to effectively respond to global health pandemics, the need for decarbonizing economies, limiting

ocean pollution and over-fishing. Negotiations on reforming the UN and WTO governance architectures should provide for stronger business advisory groups capable of practically harnessing the expertise, resources and ideas of non-state actors.

In *Chapter 10* on *U.S. Trade and Multilateralism*, former WTO Appellate Body member Merit Janow describes the evolution of US trade policies from being a key architect of the postwar GATT/WTO trading system to the current US blockage of the WTO Appellate Body system and frequent disregard for WTO law by the US Congress and executive trade policies. While acknowledging the importance of a functioning WTO and multilateralism, the Biden Administration is intensely focused on domestic issues in the US economy. Recent US legislation and executive measures aim at incentivizing domestic investment and production, bringing supply chains back to the US ('homeshoring') or nearby, expanding trade and supply chain resilience with 'friendly' nations, promoting production of semiconductors and clean technologies, and reducing technology dependency and interaction with China.

Chapter 11 on *Democratic Leadership through Transatlantic Cooperation for Trade and Environmental reforms?* explores transatlantic relations as a case study for responding to transnational policy failures, as a major platform of experimentation, and as a political and legal willingness to lead. Since the 1990s, the Transatlantic Partnership mostly provides evidence of 'law-light' 'institution light' commitments to bilateral law-making at best, and at worst to many failed global governance experiments. Civil society has historically been excluded. The establishment of the Trade and Technology Council (TTC) illustrates how trade and technology are now viewed by the EU and US as the lynchpins of solutions to global challenges. The paper considers the place of soft law and institutions in transatlantic cooperation, the place of multilateralism and international law within this framing. It focuses on two case studies: the 2022 US CHIPS and Science Act relating to subsidies and microchips; and the promotion of clean technologies for climate change mitigation through the 2022 US Inflation Reduction Act. The TTC offers potential for inclusion of civil society and responsiveness to policy needs; but its intergovernmental coordination opens the door also to regulatory capture and power politics.

In *Chapter 12*, former WTO Appellate Body member Peter van den Bossche examines: *Can the WTO Dispute Settlement System be Revived? Options for Addressing a Major Governance Failure of the World Trade Organization'.* He discusses the nature of the crisis, its impact on the rule of law in world trade, and the 'concerns' of the United States regarding the functioning of the Appellate Body, which triggered this crisis – underscoring how weak constitutional restraints on power politics and on business-driven regulatory capture lead to

transnational governance failure. The analysis then examines how the paralysis of the Appellate Body since December 2019 has affected the WTO dispute settlement system as a whole and has resulted in a significant weakening of the rule of law in world trade. The paralysis of the Appellate Body has left many disputes in legal limbo, has caused a drastic drop in the number of disputes brought to the WTO for resolution, and has triggered recourse to unilateral action in response to alleged breaches of WTO law. This chapter explores what kind of reform would be needed to 'revive' the Appellate Body and restore binding WTO dispute settlement. It questions whether the adoption of a more deferential standard of appellate review, more flexibility regarding the time frame for appellate review, enlarging the Appellate Body and strengthening its independence, and/or establishing a Dispute Settlement Review Committee to oversee the Appellate Body, are elements of the reform needed. It emphasizes that any reform of the Appellate Body would need to be accompanied by a reform of the panel process and of the remedies for breach of WTO law. There is also a need to address the WTO's institutional imbalance by strengthening its negotiation/rule-making function. Finally, the chapter discusses the lessons for the governance of international adjudication that can, and should, be drawn from the crisis of the Appellate Body, and offers some views on the prospects for overcoming the crisis. Considering current international and national political realities and constitutional pluralism, the article considers it unlikely that it will be possible to overcome the crisis any time soon. This sad state of affairs may, however, give room for experimentation with other methods of trade dispute settlement, such as mediation, conciliation, arbitration or regional dispute resolution.

Chapter 13 on *EU and UN Proposals for reforming investor-state arbitration* explores the dissatisfaction with investment arbitration, which has grown considerably both in academia and the political debate. More than ever, the investment regime is nowadays under scrutiny and contested, mostly because the system has evolved into a complex regime in which foreign investments have to be accommodated with other needs that go beyond the purely economic sphere – for example, health, environmental, social and labor issues. The current efforts to reform investor-state dispute settlement, undertaken by the European Union, the United Nations Commission on International Trade Law (UNCITRAL), and the United Nation Conference on Trade and Development (UNCTAD) respond to these non-economic needs. The article, first, considers justice as *openness*. In democratic adjudicative processes, powers like those of arbitrators reviewing matters of public interest and issuing compensation from public funds need to be exercised publicly to ensure accountability and fairness. Second, it investigates justice in the decision-making process. Unlike

other adjudicative systems, investment arbitration lacks institutional safeguards of judicial independence and procedural fairness. To this end, institutionalization and judicialization are advanced, especially by the European Commission, as remedies to enduring systemic malaise. Third, justice is conceived as a remedy to failures and social injustice. The investment arbitration system is rather asymmetric given that access is permitted to the claimant investor and the respondent government, but other parties, whose rights or interests may be affected by the decision-making, have no standing in the process.

Chapter 14 on *The future of regional economic cooperation and rivalries in Asia: Open regionalism or closed clubs?* explores Asia Pacific as home to two of the largest FTAs in the world: the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). In addition to these normative developments, the Indo-Pacific Economic Framework (IPEF) was launched in 2022, which has the potential to foster even greater economic and regulatory integration. This chapter explores the reasons for the proliferation of trade pacts in Asia Pacific, and discusses the future of regional economic cooperation in the region by drawing from a few key trends: the rise of China; the pivot to Asia by the US; the rivalry between the US and China; the competition and convergence of regional blocs; non-traditional agreements such as the Digital Economy Partnership Agreement (DEPA), the Singapore-New Zealand Declaration on Trade in Essential Goods, and IPEF; and the role of small open economies. The chapter reflects on whether the future will lead to open regionalism or closed clubs, as well as on transnational governance failures.

6 Policy Conclusions

Realizing the SDGs, and 'global survival governance' responding to transnational PGs (such as climate change mitigation and 'rule of law'), require maintaining and, to the extent possible, further developing UN and WTO law and governance and judicial remedies protecting transnational rule-of-law in multilevel governance of PGs. Yet, the increasing violations of UN and WTO law – a result of systemic rivalry and the reality of constitutional pluralism – by UN member states reflect transnational governance failures undermining the input-and output-legitimacy of UN and WTO governance and the effective protection of the SDGs. Among the many analytical findings and policy recommendations in the following 13 book chapters, the following conclusions of the editors are singled out:

(1) Human rights and democratic constitutionalism require UN member states to protect 'normative individualism' (e.g. respect for, and legal protection of informed, individual and democratic consent as most legitimate sources of values) in their legal design of multilevel governance of PGs like the SDGs, as confirmed by the EU Treaty requirements to protect human rights and rule-of law also in EU external relations (Part I).

(2) In order to circumvent state-centered opposition and respond to governance crises more effectively (like state-sponsored cyber-attacks, production and distribution of vaccines in response to global health pandemics, private financial and food assistance for less-developed countries, development of green technologies), the contribution of non-state actors (like pharmaceutical industries, environmental technology industries, global internet companies, the International Chamber of Commerce and its global network of national chambers of commerce coordinating some 50 million enterprises) needs to be strengthened and institutionalized (Denton); such 'polycentric governance approaches' leveraging more flexible stakeholder cooperation integrating and incentivizing civil society actors (Lamy) are increasingly important in multilevel governance of PGs (like cyber security, decarbonization of economies and investment law reforms).

(3) Intergovernmental institutions (like the WTO, the WHO, the FAO) must cooperate more closely among each other and with private stakeholders (like pharmaceutical industries protected by intellectual property rights, shipping companies capable of transporting wheat exports from Ukraine) in order to effectively respond to global health pandemics and to the need for decarbonizing economies (Denton). Conceptualization of international organizations as 'international functionalism' among states ('member-driven governance') disregards the need for cooperating with non-governmental actors and civil societies in the implementation of international rules (Lamy). A human rights approach insists on democratic input-and output-legitimacy of multilevel governance of PGs for the benefit of citizens (Petersmann).

(4) Path-dependent standard tools of formal and hard law approaches to rule-making may need to be relativized in favor of informal 'law-light policy dialogues' attenuating formal conceptions of 'sovereign veto powers' by pragmatic expert cooperation (Lamy, Fahey). Constitutional commitments to sustainable development (such as laid down in EU, UN and WTO law) need to be politically, judicially and scientifically clarified (e.g. by monitoring climate change governance by

expert-driven surveillance based on scientific indicators); they can be rendered more effective by legal and judicial remedies (see the chapters by Eckes, van den Bossche, Flett). Even in the absence of formal changes of treaties, customary rules and general principles of international law, the dynamic interactions between rules and legal practices reveal structural changes in the international legal system (Chapter 1).

(5) The realities of 'constitutional pluralism' render impossible a one-size-fits-all constitutionalism that could remedy the diverse kinds of transnational governance failures identified in this book. Neither the 'constitutional politics' required for transforming UN and WTO governance principles into effective legislation and administrative and judicial protection of rule-of-law, nor the 'constitutional economics' underlying UN and WTO law and European integration law are effectively implemented in many jurisdictions. The *normative* goal of constitutional economics – like individual and democratic consent to rules of a higher legal rank protecting 'consumer sovereignty' and 'citizen sovereignty' through equal fundamental rights, democratic and social inclusion – remain contested inside and outside Europe, notably in authoritarian countries (Petersmann and Steinbach).

(6) 'Sovereign equality' of states and related 'constitutional pluralism' (e.g. maintaining power-based political and legal traditions) foster 'regulatory competition' and hegemonic rivalries among states prioritizing diverse values (like human rights, representative democracy, authoritarian traditions); such competition is often abused, for instance by extra-territorial power politics of stronger actors (e.g. if governments like the US Trump administration welcome the adoption by the WTO Dispute Settlement Body of 'constructive WTO dispute settlement rulings' supporting their own legal complaints vis-à-vis other WTO members, but reject similar WTO dispute settlement findings against themselves as defendant on the ground that the rulings create 'new obligations' not consented to by their government).[10] Institutional economics explains the need for legal institutions limiting 'moral hazards' inside multilevel governance and federal states, with rules on governing bailouts of banks and states (as controversially discussed in the Eurozone) as prominent examples.

10 On the illegal blocking and contradictory criticism by the United States of the WTO dispute settlement system see E.U. Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022), Chapter 3; *idem*, 'How Should WTO Members React to their WTO Governance Crises?' (2019) 18 *World Trade Review* 503.

(7) The interdependencies among social, economic, political and legal orders require designing rules and institutions with due regard to the political economy environment (e.g. political election campaign financing by business) in order to limit 'rent-seeking interest group politics' and 'regulatory capture' by protectionist interest groups. Decentralized supply of PGs (like invention, testing and production of pharmaceutical products and 'green technologies') requires private-public partnerships and 'corporate responsibilities' extending inter-state cooperation to private business and civil societies ('polylateralism' as proposed by Lamy).

(8) The normative recognition of citizen-oriented, reasonable 'constitutional choices' respecting human dignity (human and democratic rights), protection of human capabilities, constitutional rights of citizens (like equal access to education, health protection, satisfaction of basic needs), social justice (e.g. promoting 'social market economies' reducing unjust income distribution) and the principal-agent relationships between citizens and governance agents with limited, delegated powers remains limited to democratic jurisdictions, especially those with ordo-liberal traditions recognizing the need for limiting market failures, governance failures and constitutional failures; process-based neo-liberal traditions (e.g. in the USA) and authoritarianism (e.g. in China and Russia) favor different approaches to multilevel governance of transnational PGs.

(9) Successful pursuit of the UN SDGs requires plurilateral reforms (like 'climate clubs') and rules-based third-party adjudication of trade and investment disputes as envisaged in SDG16 (Flett). Rules-based trade and investments remain crucial for realizing the SDGs (like ending poverty and hunger, decarbonizing economies). Yet, geopolitical rivalries and China's successful economic and social transformation, which is expected to make China the world's largest economy and increasingly limit US military and economic hegemony and political leadership, risk to further disrupt international trade and investment law, energy supply, climate change mitigation (e.g. by carbon taxes, CBAMs, limitation of fossil fuel subsidies, GHG emission trading systems), WTO adjudication, investor-state arbitration, and the UN and European collective security systems. The regulatory problems of 'free-riding' and geopolitical rivalries can be reduced by transforming global PGs into 'club goods' conditioning membership on GHG reductions and rule-of-law commitments.

(10) In view of diverging perceptions of vulnerabilities justifying national security restrictions (e.g. against foreign technologies, spread of viruses, weaponization of interdependence), plurilateral second-best responses become more important, like trade, investment and environmental agreements conditioning market access on respect for human rights and greenhouse gas reductions. With heterogenous policy preferences and systemic rivalries requiring policy space, transnational governance must strike a balance between constitutional flexibility towards national approaches reflecting divergent value choices, and a constitutional architecture reinforcing national contributions to PGs such as climate change mitigation and respect for multilateral trade rules. Hence, flexibility building on the subsidiarity principle, as enshrined in several multilateral architectures offering national policy leeway (e.g. GATT Articles XX, XXI), and the 'embedded liberalism compromise' underlying WTO law may justify more flexible, legal interpretations (e.g. of WTO trade remedy rules for protecting domestic industries against foreign market distortions, use of WTO exception clauses and WTO 'waivers' for decentralized production of vaccines and for making CBAMs WTO-consistent so as to limit GHG emissions and 'carbon leakage'). If geopolitical power politics should prevent reforms of WTO negotiations and of the WTO dispute settlement system, decentralized reforms of world trade rules through (inter) regional and bilateral agreements among 'willing' and like-minded governments are inevitable. The non-discrimination and reciprocity principles underlying trade and investment law require maintaining third-party adjudication and transnational rule-of-law de-politicizing disputes.

(11) With flexibility on the one side, multilevel governance promoting the SDGs requires, on the other hand, a transnational constitutional architecture overcoming the collective action problems, such as climate change mitigation suffering from insufficient commitments under the 2015 Paris Agreement. In Europe and some Latin-American countries, judicial empowerment of individuals invoking their human and environmental rights (like rights to life) has helped to achieve higher levels of climate protection efforts, as illustrated by climate litigation invoking human rights (e.g. to live in an environment without pollution endangering human health) for clarifying legal duties of states to reduce GHG emissions.[11] Reconciling legal interpretation of human

11 Climate change litigation is discussed in the book chapters by Daly, Tigre, Urzola and Eckes.

rights law with the economic PG character of the environment can improve remedies to solve market failures and constitutional failures (Eckes, Daly/Tigre/Urzola).

(12) Constitutional approaches to multilevel governance of PGs must avoid 'one-size-fits-all claims' of constitutionalism, for instance taking one regional approach (like the individual rights experiences of the EU) as role model to be followed around the globe. Yet, they should learn from the normative tenets of HRL and constitutional economics prioritizing 'citizen sovereignty' and 'consumer sovereignty' as paradigms for how societal choices and market choices should be made and can be legally protected by equal rights. Criticism of totalitarian and neo-liberal variants of constitutionalism and 'constitutional failures' must be taken more seriously, even if 'constitutional pluralism' and the obvious lack of a global *'constituent power'* will remain permanent facts. UN HRL can be construed as requiring that also international law must remain democratically and legally accountable to democratic self-government in national democracies. History suggests that constitutionally unrestrained governance powers risk being abused more than constitutionally limited powers subject to 'institutional checks and balances' protecting equal rights of citizens. Constitutionalization should neither be understood as striving for an empire of uniformity (e.g. disregarding the legitimately diverse political cultures of nation states and of their people) nor as contrary to representative democracy and its popular support by citizens (Petersmann).

(13) The controversial relationship between constitutionalism and fragmentation in international law raises the question of what procedures and mechanisms of constitutionalization are suitable for coordinating specialized international organizations and for reconciling diverging rationales of special branches of international law. The political reality of constitutional pluralism and the legitimate diversity of constitutional theories and traditions (e.g. regarding 'optimal levels' of legal and judicial protection of individual rights) requires also re-thinking how Europe's unique multilevel constitutionalism constraining domestic and foreign EU policies should be reconciled in relations with hegemonic and authoritarian governments disregarding human rights. For instance, it remains an open question whether UN climate change law and its international surveillance mechanisms can promote a functionally limited 'common good constitutionalism' protecting humanity against the existential risks of climate change. The obvious governance failures in authoritarian states (as illustrated by their suppression of

human rights and threats of wars, weaponization of energy and food supplies) require 'de-risking interdependencies'.

(14) Multilevel constitutional politics and constitutional economics remain under-researched. Their focus on market failures, governance failures and constitutional failures in multilevel governance of PGs offers innovative, analytic insights and policy proposals – also for authoritarian countries, which joined the open WTO trading system without political willingness to legally limit their state-capitalism and authoritarian government powers. Europe's ordo-liberal focus in EU and WTO law on legal limitations of market failures, governance failures and constitutional failures (e.g. in EU common market and constitutional law, multilevel WTO adjudication protecting non-discriminatory conditions of competition and rule-of-law as approved by national parliaments) rejects neoliberal conceptions of 'laissez faire competition' and of discriminatory trade protectionism (e.g. based on 'regulatory capture' of US trade remedy regulations by rent-seeking US industries). Some WTO agreements (e.g. on antidumping and trade-related intellectual property rights) reflect business-driven industry pressures without adequate regard for promoting non-discriminatory conditions of competition; other WTO agreements (e.g. on agricultural and textiles trade, the WTO Dispute Settlement Understanding) limit discriminatory trade distortions in order to protect rules-based, non-discriminatory competition. Equating constitutionalization of international economic governance (e.g. through compulsory WTO appellate jurisprudence) with neoliberal de-regulation favoring business interests to the detriment of general consumer welfare – as suggested by Loughlin[12] and by Slobodian[13] – disregards the categorical differences between utilitarian Anglo-Saxon neo-liberalism and rights-based, European

12 Cf Loughlin (n 3), at 184, 186, who wrongly likens ordo-liberal constitutionalism to a neo-liberal stance for 'laissez-faire' regimes and minimum regulatory and legal restraints on economic activities. It is rather Loughlin's rejection of transnational constitutional restraints which promotes neoliberal power politics.

13 Q. Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism* (Harvard UP 2018) at 23–25. Slobodian describes the WTO as 'the paradigmatic product of Geneva School neoliberalism', and the 'creation of the WTO (as) a crowning victory of the neoliberal project of finding an extra-economic enforcer for the world economy in the twentieth century'. On Slobodian's misunderstandings of the categorical differences among rights-based, ordoliberal constitutionalism and utilitarian, neoliberal nationalism see E.U. Petersmann, Book review of Q. Slobodian, Globalists: The End of Empire and the Birth of Neo-liberalism (Harvard University Press 2017), in: JIEL 21 (2018), 915–921.

ordo-liberalism: The German, European and Virginia Schools of ordo-liberalism perceive markets as legal constructs of reasonable citizens (rather than as gifts of nature), who cannot maximize their general consumer welfare without legal limitations of market failures, governance failures and 'constitutional failures'.[14] GATT/WTO jurisprudence (e.g. on interpreting GATT/WTO rules as protecting non-discriminatory conditions of competition) emphasized the systemic, ordoliberal functions of the GATT/WTO legal and dispute settlement systems as 'guardians' of non-discriminatory conditions of competition. China's compliance with most WTO dispute settlement findings would have enabled using WTO jurisprudence for progressively clarifying the vague WTO disciplines on state-trading enterprises and the 'WTO plus' obligations accepted by China in its WTO accession protocol. Yet, the US trade war against China and the US disruption of the WTO Appellate Body system risk promoting authoritarian alliances rejecting the 'embedded liberalism' underlying UN/WTO law and the relevance of 'constitutional economics' for the changing structures of worldwide and regional IEL and its insufficient regulation of state-trading enterprises and state-capitalism.

14 Cf Petersmann (n 10), Chapters 3 and 4.