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**China and the Future of International  
Economic Law: European Perspectives  
on the Way Forward**

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**Department of Law**

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## **Abstract**

Human *civilization* is characterized by the transformation of power-based into rules-based social, economic, legal and political orders protecting rights of *citizens* against abuses of public and private power. All UN member states have adopted national Constitutions (written or unwritten) aimed at constituting, limiting, regulating and justifying governance powers for protecting public goods (PGs). Globalization and its transformation of *national* into *transnational* PGs also prompt states to participate in treaties of a higher legal rank protecting transnational PGs like human rights, rule-of-law and the sustainable development goals (SDGs). The current non-compliance with UN and WTO rules, illegal wars of aggression, violent suppression of human and democratic rights, global health pandemics, climate change, ocean pollution, overfishing and other biodiversity losses reflect 'governance failures' (e.g. to limit 'market failures') and 'constitutional failures' (e.g. to protect human and democratic rights and the SDGs). The geopolitical rivalries among totalitarian governments and democracies render constitutional UN and WTO reforms unrealistic. They entail 'regulatory competition' (e.g. among trade and investment agreements) and plurilateral responses aimed at limiting abuses of power (like collective countermeasures against Russia's illegal wars and war crimes) and at protecting transnational PGs (like plurilateral 'climate change mitigation clubs', appeal arbitration among WTO members, regional human rights and security agreements). The power politics disrupting the UN and WTO legal systems is bound to promote regionalization of economic law, re-globalization of supply chains, and geopolitical rivalries resulting from conflicting value priorities and neglect for the human rights underlying the SDGs.

## **Keywords**

constitutionalism; dispute settlement; economic law; environmental law, UN; WTO.

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## I. Legal civilization and multilateral economic law

As an external observer of the extraordinary economic and legal developments in China since its 1978 'reform and opening' strategy and recognition of 'one China, two systems' initiated by former President Deng Xiaoping, my lectures at universities in Hong Kong, Macau, Taiwan, Beijing, Shanghai, Xian, and Xiamen emphasized - during more than 35 years - the economic, legal and political benefits offered by China's participation in the world trading system based upon the 1947 General Agreement on Tariffs and Trade (GATT) and the 1994 Agreement establishing the World Trade Organization (WTO). The translation and publication in China of my 1991 book on *Constitutional Functions and Constitutional Problems of International Economic Law*<sup>1</sup> confirmed the increasing interest by academics and politicians in China in how the GATT/WTO legal commitments to liberalizing discriminatory trade barriers and protecting rule-of-law, transparent governance and judicial remedies could promote not only economic welfare, but also legal civilization and democratic self-government for the benefit of citizens. The Latin term 'civilization' refers to citizens (*cives*) and to the legal protection of their rights in the ancient Greek and Italian city republics around the Mediterranean Sea some 2500 years ago. The European traditions of rights-based individualism and constitutionalism had, however, no equivalent in China's imperial and Confucian traditions and communist government systems, whose underlying value premises remain authoritarian.<sup>2</sup> Hence, the accession of four Chinese customs territories to the WTO in 2001 could be seen as a 'constitutional moment' not only for the world trading system, but also for law and governance inside China.<sup>3</sup> Arguably, as the WTO membership of 4 Chinese customs territories is based on the principle of 'One China, two systems', UN and WTO law require China to settle its disputes with Taiwan peacefully through mutually beneficial agreements (e.g. on a confederation) rather than by military aggression. The rapid economic growth promoted by China's four WTO memberships confirmed the 'constitutional functions' of international economic law (IEL) for regulating transnational movements of goods, services, persons, capital and payments in ways respecting the decentralized demand by consumers, supply by producers, non-discriminatory conditions of competition, and mutually beneficial cooperation of people. China's more recent evolution from a cash-based into a digital payments economy

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<sup>1</sup> E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Policy in the United States, the European Community and Switzerland* (Fribourg University Press/Boulder Publishers, 1991; new editions 2019 and 2020 by Routledge). The Chinese translation was published in 2004 at Beijing by Higher Education Press.

<sup>2</sup> The two Chinese philosophical schools of Confucianism and Legalism shared a vision of individuals living in hierarchical societies where social distinctions and proper behaviour derived from an individual's status in those hierarchies. Western ideals of inalienable human rights derived from respect for human dignity and equal liberties remain inconsistent with Confucian and Chinese conceptions of constantly changing individual identities depending on the social context and related rights and duties; cf. S.B.Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press 1999), at 15–16, 19. See also S.Sebag Montefiore, *The World: A Family History* (Weidenfeld 2022), whose analyses of the sociological evolution of families over thousands of years confirm the unruly social nature and frequent conflicts also within most ruling families until equal, individual rights are legally protected. Yet, democratic constitutionalism, universal human rights and protection of rule-of-law by independent courts are explicitly ruled out for China in President Xi Jinping's political speeches; cf. M.Pottinger/M.Johnson/D.Feith, Xi Jinping in his own words, in: *Foreign Affairs – This Week* (2 December 2022).

<sup>3</sup> Cf E.U.Petersmann, 'Constitutional Functions and Constitutional Problems of International Economic Law in the 21st Century', in: *Collected Courses of the Xiamen Academy of International Law* Vol. 3 (2011), 149-236.

with transnational freedoms of trade, services (like tourism and university studies abroad), and foreign investments further illustrates these domestic transformations promoted by WTO law.<sup>4</sup>

The policy question underlying constitutionalism – how to constitute, limit, regulate and justify governance institutions and rules of a higher legal rank protecting informed, individual consent to production and consumption of private and public goods? – remains of existential importance for reasonable citizens in all states. All UN member states have adopted national Constitutions (written or unwritten) aimed at constituting, limiting, regulating and justifying governance powers for protecting PGs. Globalization and its transformation of *national* into *transnational* PGs also prompt states to participate in treaties of a higher legal rank protecting transnational PGs like human rights, rule-of-law and the SDGs. National Constitutions differ among countries according to their histories, preferences and interdependent social, economic, political and legal systems. For instance, the diverse forms of *democratic constitutionalism* (e.g. since the ancient Athenian democracy), *republican constitutionalism* (e.g. since the ancient Italian city republics), and of *common law constitutionalism* (e.g. in Anglo-Saxon democracies) aim at limiting ‘governance failures’ through commitments to agreed ‘principles of justice’ (like human rights, democratic self-governance, separation of powers) and institutions of a higher legal rank (like democratic and judicial protection of rule-of-law). Principles of democratic constitutionalism agreed upon since ancient Athens (like citizenship, democratic governance, courts of justice, ‘mixed government’), of republican constitutionalism since ancient Rome (like separation of power, rule-of-law, *jus gentium*), and of common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) have become recognized not only in national Constitutions protecting PGs. The 2030 UN Sustainable Development Agenda (SDA) emphasizes the importance of human rights, democratic governance and rule-of-law also for multilevel governance of transnational PGs like the universally agreed 17 SDGs. Yet, the ‘constitutional principles’ underlying UN human rights law (HRL) and the SDA are neither effectively implemented (‘constitutionalized’) in the legislative, administrative and judicial practices inside and among authoritarian states (like China, Iran, Myanmar, North Korea, Russia, Syria etc) nor in UN law. The European traditions of linking political, legal and economic civilization to constitutionalism - based on the historical and normative insights that constitutional contracts among free and reasonable citizens can limit abuses of public and private power and promote voluntary, mutually beneficial cooperation by institutionalizing public reason – remain contested by imperial autocrats and communist rulers.<sup>5</sup>

When China acceded to the WTO in 2001, US President Clinton said that China imported ‘one of democracy’s most cherished values, economic freedom’, and this, he added, ‘may lead to very pro-found change: ‘the genie of freedom will not go back into the bottle.’<sup>6</sup> According to President Xi Jinping, however, China ‘must never follow the path of Western constitutionalism,

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<sup>4</sup> Cf M.Chorzempa, *The Cashless Revolution: China’s Reinvention of Money and the End of America’s Domination of Finance and Technology* (Public Affairs 2022).

<sup>5</sup> On systemic public disinformation and distorted accounts of history in authoritarian states see: K.Stallard, *Dancing on Bones: History and Power in China, Russia and Korea* (OUP 2022).

<sup>6</sup> Quoted from C.Prestowitz, *The World Turned Upside Down. America, China and the Struggle for World Leadership* (Yale University Press 2020), according to whom ‘constructive engagement’ by investing in communist China in the hope of promoting greater freedom was a tragic delusion. US corporations became China’s most potent lobby in Washington DC using their corporate profits in China for influencing US policies and appease the Chinese government.



separation of powers or judicial independence'.<sup>7</sup> Since Xi Jinping became president in 2013, China has become more authoritarian, less liberal and more aggressive (e.g. in suppressing human rights, threatening military invasion of Taiwan, and illegally extending Chinese sovereignty in the South China Sea). The suppression of political freedoms and democratic rights inside China prompts most Chinese legal and political science scholars to support the government's nationalist, authoritarian conceptions of international law.<sup>8</sup> Since 2013, China promotes complementary - and in case of future conflicts possibly alternative - trade and investment networks of bilateral, power-oriented 'Belt and Road' agreements, regional free trade agreements (FTAs), financial and development institutions without guarantees of human rights, labor rights, non-discriminatory conditions of competition, multilateral environmental, social and judicial safeguards. Russia's military aggressions and war crimes, China's suppression of human rights and pledge of 'unlimited support' for Russia, and the 'weaponization of economic interdependence' in the context of geopolitical rivalries undermine the 'embedded liberalism' underlying UN and WTO law; they are bound to provoke disintegration of modern IEL.

## **II. Geopolitical rivalries and regulatory competition**

The authoritarian 'strongman politics' in China, Russia and in other states (including in the US Republican Party) – and the related prioritization of state sovereignty over popular sovereignty and human rights in 'member-driven' UN and WTO practices - suggest that nationalism, hegemonic power politics and regulatory competition will continue undermining UN and WTO law and politics (e.g. by maintaining market distortions, governance failures and related constitutional failures favoring powerful rulers at the expense of the people).

### ***Geopolitical rivalries undermining the UN legal system***

The 'Beijing consensus' prioritizes the power monopoly of China's communist party<sup>9</sup>, which is not effectively constrained by China's national Constitution (e.g. as the latter describes China as a 'dictatorship' and fails to protect human and constitutional rights through judicial remedies in independent Chinese courts). Similarly, Russia's President Putin and his kleptocratic

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<sup>7</sup> Quoted from one of President Xi's major policy speeches in 2018 (cf S Shih, 'In China, many are impressed that, yes, you can sue the US government' *Washington Post* 8 March 2019).

<sup>8</sup> Cf E.U.Petersmann, Legal, Constitutional and Cosmopolitan Pluralism: A Paradox? A short reply to my Chinese Critics, in: *China and WTO Review* 2018, 319-336; *idem*, International Economic Law without Human and Constitutional Rights? Legal Methodology Questions for my Chinese Critics, in: *JIEL* 21 (2018), 213-231.

<sup>9</sup> At the Communist Party congress in November 2022, President Xi Jinping followed the example of Mao Zedong of unifying his personal control over the Party, the state and the military apparatus, of evading constitutional time limits for his concentration of personal power, and of appointing ideological supporters from the military hierarchy to the standing Politburo Committee. Like Mao, Xi justified his power grab by his belief that the communist party must control 'the tools of dictatorship'; his prescription of 'Xi Jinping thought' in the constitution of the Chinese Communist party illustrates his creation of a personality cult relying on Marxist justifications of legitimation. This return to an imperial 'strongman rule', the endless lockdowns of citizens based on Xi's 'zero Covid-policy', the systemic risks of the draconian restrictions on individual freedom, and their economic and social costs remain challenged by civil society inside China. Even if government repression of civil society protests continues to work inside China (as inside Russia) as an alternative to correcting governance failures, the myth of the wisdom of disastrous strongman decisions to suppress human and democratic rights has been made evident for everybody.

oligarchs dominate Russia's police state without effective 'constitutional checks and balances'; their executive governance suspended human and democratic rights inside Russia (e.g. of the political opposition and public media) and outside Russia (e.g. ordering illegal invasions into neighboring countries, annexation and 'Russification' of occupied territories like Crimea and the Donbass in Ukraine). Totalitarian, non-transparent power politics – like China's 'politburo politics', 'surveillance capitalism', health-lockdowns, 'social credit systems', suppression of minority rights and abuses of military force (e.g. in the South China sea and vis-à-vis Taiwan) – are inconsistent with UN HRL and the 'embedded liberalism' underlying GATT/WTO law.<sup>10</sup> State-capitalism undermines citizen-driven market-competition, for instance by means of non-transparent business privileges, subsidies, state-owned enterprises, and manipulation of non-convertible currencies. Russia's political domination of the Eurasian Economic Community, China's political domination of bilateral 'Belt & Road agreements' on financial, trade and infrastructure networks, and related Eurasian agreements on regional Asian institutions and on 'China-Russia strategic cooperation' are based on power-oriented cooperation without multilateral rules and institutions protecting human, environmental and democratic rights. This prioritization of self-interests of rulers and power-monopolies (e.g. to avoid legal and democratic accountability) is also characteristic of many governments in former Soviet republics in Eurasia and less-developed countries (like Iran, Myanmar, North Korea, Syria). Their power politics tends to undermine UN HRL, the UN security system and international rule-of-law, for instance by undermining collective countermeasures against crimes of aggression by Russia and abstaining from UN General Assembly resolutions defending *erga omnes* UN legal obligations (like respect for democratic self-determination) against manifest violations by Russia.

### ***Hegemonic US disruption of the WTO legal and trading system***

In 2018, China's huge annual trade surpluses, increasing military power, hegemonic rivalries (e.g. in the South China Sea) and military threats against Taiwan provoked President Trump to initiate a trade war against China. Economic inter-dependencies and global supply chains with authoritarian countries, use of Chinese technologies, and multilateral legal constraints (like WTO adjudication) on US power politics were viewed by the Trump administration as strategic vulnerabilities. By illegally blocking the appointment of WTO Appellate Body (AB) members and, thereby, also the quasi-automatic adoption of WTO panel reports, the US government incapacitated WTO third-party adjudication - without submitting any evidence for its unjustified claims that the AB had exceeded its mandate, for instance by engaging in 'judicial activism' creating imbalances between the WTO's weak negotiating function (e.g. resulting in only few outcomes of the Doha Round negotiations since 2001) and the dynamic clarification of WTO rules through WTO dispute settlement jurisprudence. The lack of US proposals for improving the WTO Dispute Settlement Understanding (DSU) and the US denial of any 'judicial functions' of the WTO dispute settlement system revealed a general US opposition against

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<sup>10</sup> Arguably, the 'embedded liberalism principle' underlying WTO law has evolved beyond its limited meaning under GATT 1947 for protecting national sovereignty over non-discriminatory domestic regulations (Art III GATT), import tariffs (Arts II, XXVIII GATT), safeguard and security measures (Arts XIX-XXI), for instance by including also general international law obligations under UN and WTO law like human rights and the recognition of four Chinese customs territories as WTO members, thereby protecting the 'one China, two systems principle' by UN HRL and the limited trade policy autonomy of Hong Kong, Macao, and Taiwan.

independent judicial review of US trade policies and against 'WTO jurisprudence'.<sup>11</sup> Since 2021, the new US Biden administration continued discriminatory US trade restrictions against China, the illegal US blocking of the AB, and rejection of WTO panel findings against the USA, thereby further undermining the WTO legal system.

The 'politicization' of the WTO trading system is likely to continue, for instance if WTO members fail to extend the 'Covid-19 waiver' and the WTO agreement on unreported fishing subsidies of June 2022 and to agree on a 'climate waiver' for carbon border adjustment measures (CBAMs). The more authoritarian governments (e.g. in China and Russia) disregard global rules limiting 'market failures', 'governance failures' and 'constitutional failures', the stronger becomes the risk of economic disintegration, for instance between 'authoritarian alliances' (e.g. among China, Russia and other Eurasian countries), FTAs among democracies, and non-aligned less-developed countries prioritizing their particular development priorities. The 'polarization politics' by populist 'strongmen' (like Presidents Bolsonaro, Erdogan, Putin, Trump and Xi Jinping) contributed not only to the rising number of authoritarian governments (e.g. also in 'illiberal' EU member states like Hungary and Poland) and to the declining number of democracies, thereby rendering democratic leadership for protecting the SDGs more difficult. The challenges to the US domination of the GATT/WTO system also increase the risks of the US returning, once again, to nationalist foreign policies as after World War I (when the US did not join the League of Nations) and after World War II (when the US did not join the 1948 Havana Charter for an International Trade Organization).

### ***Regulatory competition and plurilateral countermeasures***

Following Russia's unprovoked, illegal military invasions of Ukraine since 2014, democracies introduced collective economic sanctions and – in 2022 - excluded Russia from most European institutions. The 40 democracies from Asia, the Americas and Europe offering Ukraine military assistance in its collective self-defense against Russia's war of aggression, and the 44 European democracies (plus representatives of the EU Commission and EU Council) that condemned Russia's aggression during their first 'European Political Community' conference at Prague in October 2022, may be forerunners of a new 'plurilateral liberal order' defending human and democratic rights and rule-of-law against the 'authoritarian international law' advocated by China, Russia and their authoritarian allies.<sup>12</sup> The current 'sanctions coalition' supporting Ukraine's self-defense against Russian aggression includes also non-European states like Canada, the USA and six democracies from the Asia-Pacific region (Australia, Japan, New Zealand, Singapore, South Korea and Taiwan). In economic regulation, however, the value-differences between Europe's ordo-liberal, multilevel constitutionalism and business-driven, neo-liberal US constitutional nationalism are likely to prevent 'deep economic integration' between Europe and the USA, as it was envisaged in the EU-US draft agreement on a Transatlantic Trade and Investment Partnership (TTIP) rejected by President Trump.<sup>13</sup>

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<sup>11</sup> Cf E.U.Petersmann, Neo-liberal, State-Capitalist and Ordo-liberal Conceptions of World Trade: The Rise and Fall of the WTO Dispute Settlement System, in: *China (Taiwan) Yearbook of International Relations* 38 (2020), 1-41.

<sup>12</sup> Cf D.L.Sloss/L.A.Dickinson, The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order, *AJIL* 115 (2022), 798-2022; T.Ginsburg, Authoritarian International Law, *AJIL* 114 (2021) 221ff.

<sup>13</sup> The German, European and Virginia Schools of ordo-liberalism perceive markets as legal constructs of reasonable citizens (rather than as gifts of nature), which cannot maximize general welfare without legal limitations of market failures, governance failures and 'constitutional failures'. Hence, the EU's ordo-liberal economic constitutionalism prioritizes human and constitutional rights (as codified in the EUCFR) and their multilevel

The geopolitical rivalries and de-globalisation between authoritarian countries and democracies risk provoking conflicts similar to those which emerged at the end of the ‘first de-globalisation’ ushering in World Wars I and II, the great economic depression, and the rise in dictatorships responsible for the killing of millions of people. Just as the ‘first globalization’ since the 1860 Cobden-Chevalier trade agreement between Britain and France (e.g. driven by industrial revolutions, modern corporate law, cheap ocean and land transports and communications) ended with World War I and the disintegration of the pre-1914 trade, monetary and imperial agreements, the ‘second globalization’ made possible by the 1944 Bretton Woods Agreements, GATT and the WTO risks being undermined, once again, by military conflicts, arbitrary abandonment of international adjudication, totalitarian state-capitalism, and increasing weaponization of trade policies (eg by China vis-à-vis Australia and Lithuania, Russia’s weaponization of energy and food supplies).<sup>14</sup> The positive outcome of the WTO ministerial conference in June 2022 confirmed that limited WTO agreements remain possible. The record-high levels of global merchandise trade in 2021/22 (including China-EU and China-US trade) prompted the WTO to emphasize the reality of ‘re-globalization’ (like ‘friend-shoring’ of supply chains) rather than de-globalization of world trade. Yet, authoritarian disrespect for human rights and rule-of-law, and return to military and trade wars, make fragmentation and regionalization of the liberal economic order increasingly likely:

- China, Russia and their authoritarian allies will promote cooperation among state-capitalist countries in ways further undermining the WTO objective of non-discriminatory conditions of competition.
- Anglo-Saxon neo-liberalism will continue to dominate FTAs in the Americas and in the Indo-Pacific, with the USA becoming more protectionist.
- Europe’s ordo-liberal, multilevel constitutionalism dominates European and some EU-Africa economic integration agreements with human rights and environmental conditionalities.
- Many less-developed countries remain non-aligned and prioritize their specific development needs.

As UN law and UN/WTO remedies do not effectively constrain power politics, the regulatory competition among neo-liberal, state-capitalist, and ordo-liberal constitutional conceptions of economic regulation – and the abuses of veto-powers in the UN Security Council and in WTO

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democratic and judicial protection (e.g. by national and EU democratic and judicial institutions) rather than liberalization, privatization, business-driven (de)regulation and financialization of economies as inside many Anglo-Saxon countries like the USA and ‘Brexit Britain’; cf. E.U.Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (OUP 2022), chapters 3-5. The recent support by the IMF and World Bank of activist fiscal, economic, health and environmental policies in response to the global health pandemics and climate change illustrates how distinctions between ‘neo-liberalism’, ‘state-capitalism’, and ‘ordo-liberalism’ refer to policy trends that elude precise legal definitions. Even in the USA, government spending, budget deficits, central bank interventions, welfare payments and corporate bailouts have increased over the past decades. The neo-liberal focus (as promoted notably by British Prime Minister Thatcher and US President Reagan) on business efficiency in terms of consumer prices is now challenged also in the USA by focusing on the welfare of workers, farmers, house owners, and citizens adversely affected by media concentration, rising health, energy and housing costs, and environmental harm.

<sup>14</sup> For a USA-centered interpretation of this dialectic between unprecedented economic and population growth and destructive politics in the 20<sup>th</sup> century see: J.Bradford DeLong, *Slouching toward Utopia. An Economic History of the 20<sup>th</sup> Century* (Basic books 2022). The fact the China emits more CO<sub>2</sub> than all 38 developed OECD countries illustrates how democracies and market economies no longer control the ‘sustainability’ of their own development.

consensus practices - are likely to continue undermining the UN and WTO 'world order treaties'. Unlike the independent EU Commission, neither the UN Secretary-General nor the WTO Director-General have sufficient powers to oppose 'member-driven power politics' (e.g. by invoking judicial remedies for enforcing constitutional restraints). The 'regulatory competition' remains distorted by the lack of effective UN and WTO legal disciplines on 'market failures' (like restraints of competition, adverse externalities, information asymmetries, social injustices), 'governance failures' (e.g. to respect rule-of-law and protect PGs), and 'constitutional failures' (e.g. in terms of protecting human rights against power politics). The needed global cooperation in UN and WTO institutions is further eroded by regional power politics provoking discriminatory countermeasures (e.g. by democratic alliances sanctioning 'governance failures' like suppression of human rights by China and Russia). Human rights, democratic governance, rule-of-law and 'corporate responsibilities' remain insufficiently protected also in the legal practices of the more than 10'000 transnational corporations participating in the 'UN Global Compact' on business and human rights. Yet, as discussed in the following section III, open democracies with competitive markets, independent civil societies, inclusive institutions, and multi-stakeholder coalitions tend to respond more flexibly to new regulatory challenges than autocracies suppressing criticism and democratic calls for change.<sup>15</sup> Moreover, as the ultimate source of values derives from voluntary, informed consent by individuals rather than only from macro-economic cost-benefit analyses, social and constitutional contracts supported by citizens enable more legitimacy, social acceptability and welfare than authoritarian power politics.

### **III. Plurilateral 'club approaches' to protecting sustainable development**

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

- process-based, representative democracies (e.g. in Anglo-Saxon countries) tend to prioritize constitutional nationalism, majoritarian institutions, democratic accountability, civil and political liberties (rather than economic, social and cultural rights of citizens), and discretionary foreign policy powers;<sup>16</sup>
- rights-based, multilevel democratic constitutionalism is practiced notably in the 27 EU member states interpreting their Treaties on European Union (TEU), on the Functioning of the EU (TFEU) and the EU Charter of Fundamental Rights (EUCFR) as functionally limited 'treaty constitutions' restraining
  - market failures (e.g. by competition, environmental and social rules protecting individual and common market freedoms, social rights and judicial remedies);

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<sup>15</sup> On why China's 'extractive institutions' may undermine China's current economic growth, and why 'inclusive institutions' create virtuous circles of innovation, economic expansion and more widely-held wealth, see: D.Acemoglu/J.A.Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile books 2012). China's dogmatic 'zero Covid lockdowns' of civil society since 2020 offer empirical evidence.

<sup>16</sup> Martin Loughlin, *Against Constitutionalism* (Harvard UP 2022), claims that the people and their elected representatives, rather than citizens and courts of justice invoking human and constitutional rights for social change, should define the nation's political identity and make its most important policy decisions (pp. 124–35). He disregards transnational constitutional, parliamentary, participatory and deliberative democracy as prescribed in EU law (e.g. Arts 9-12 TEU), including protection of *transnational PGs* as a task of 'living democratic constitutionalism'. The focus in US courts on 'negative freedoms' from coercion by government - and on judicial deference to 'political questions' to be decided by the US Congress (like the regulatory powers of the US Environmental Protection Agency) – impedes judicial recognition of 'positive constitutional rights' (e.g. to health and environmental protection) if they have not been explicitly recognized in legislation.

- constitutional failures (e.g. by constituting democratic, judicial and regulatory EU institutions protecting human and constitutional rights of EU citizens, transnational PGs and 'national identities'); and
- governance failures (e.g. by rule-of-law requirements, institutional 'checks and balances');<sup>17</sup>
- authoritarian states (like China and Russia) have adopted 'fake constitutions' that neither effectively constrain power monopolies (e.g. of China's communist party, the rulers in the Kremlin) nor protect human and democratic rights and independent, judicial remedies.

The ongoing geopolitical rivalries and their pluralist, constitutional roots suggest that diverse preferences and regulatory competition will impede future 'constitutional reforms' of UN and WTO practices. As democracies cannot trust totalitarian power politics, they increasingly resort to unilateral and plurilateral policy responses and collective countermeasures within the constraints of UN/WTO law.<sup>18</sup>

### **UN and WTO 'constitutional reforms' become a utopia**

The constitution, limitation, regulation and justification of legislative, executive and judicial UN institutions and procedures in the UN Charter, the UN Specialized Agencies, and the 1948 Universal Declaration of Human Rights (UDHR) initiated revolutionary transformations and decolonization of the international legal system. National constitutionalism and UN HRL induced some UN institutions to recommend 'constitutional governance models' (including protection of human rights, democracy, separation of powers, checks and balances, judicial remedies, rule-of-law) also for multilevel governance of the SDGs.<sup>19</sup> Yet, the proposed constitutional reforms remained limited to a few policy areas (like compulsory adjudication in the UN Convention on the Law of the Sea (UNCLOS), in WTO law and investment law). Moreover, China's refusal to comply with the 2016 UNCLOS arbitral award on China's illegal extension of sovereign rights in the South China Sea, the illegal US blocking of the WTO AB system since 2017, and Russia's refusal to comply with the 2022 judicial orders by the International Court of Justice and the European Court of Human Rights to suspend its illegal suppression of human rights in Ukraine and inside Russia illustrate a general decline in worldwide rule-of-law systems.<sup>20</sup> Without compulsory judicial remedies, also UN HRL cannot be effectively enforced. The UN Security Council system continues being blocked by abuses

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<sup>17</sup> European courts perceive their judicial mandates as 'constitutional guardians' more broadly in view of the multilevel guarantees of human and constitutional rights and related PGs in Europe's multilevel, democratic constitutionalism and 'European' democratic cultures. On the need for more 'progressive constitutionalism' also in the USA see: J.Fishkin/W.E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (Harvard UP 2022); A.Vermeule, *Common Good Constitutionalism* (Polity 2021).

<sup>18</sup> The systemic WTO violations introduced by the US Trump administration (as described in section II) remain exceptional as the 'big lies' by President Trump, notwithstanding the Biden administration's continuation of systemic WTO violations driven by domestic interest group politics.

<sup>19</sup> Cf G.Ziccardi Capaldo, Global Constitutionalism and Global Governance: Towards a UN-Driven Global Constitutional Governance Model, in M. Cherif Bassiouni (ed), *Globalization and its Impact on the Future of Human Rights and International Criminal Justice* (OUP 2015), 629-662.

<sup>20</sup> Cf E.U.Petersmann, The UN Sustainable Development Agenda and Rule of Law: Global Governance Failures Require Democratic and Judicial Restraints, in *Max Planck Yearbook of United Nations Law* 25 (2022, forthcoming).

of veto-powers. Only in exceptional situations did the UN Security Council (SC) assert 'legislative powers', for example to establish international criminal courts and respond to international health pandemics by adopting UN SC Resolutions 2532 and 2565 (2020) acknowledging that 'the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security'<sup>21</sup> and calling 'upon all parties to armed conflicts to engage immediately in a durable humanitarian pause' to provide humanitarian assistance to the world's most vulnerable in conflict zones.<sup>22</sup> Similar UN Security Council responses to environmental crises remain unlikely, notwithstanding the universal recognition of the need for decarbonizing economies and for protecting the potentially millions of climate refugees against the risks of climate change and rises in sea levels. Can regional leadership, plurilateral reforms and transnational networks of science-based cooperation serve as substitutes for UN and WTO governance failures to protect the SDGs in a multipolar world without hegemonic protection of global PGs?

The EU's multilevel human rights constitutionalism, economic and environmental constitutionalism, and the recognition of affirmative constitutional and human rights duties to protect PGs (like protection of the environment) remain driven by multilevel constitutional, participatory and deliberative democracy as protected in Articles 9-12 TEU. The defense of democracy in Ukraine against Russia's illegal aggression illustrates how rule-of-law and survival of democracies may require 'democratic wars of independence' based on active citizenship<sup>23</sup> and defense alliances among 'militant democracies'. As the current health, environmental, economic, food, migration and security crises are caused by governance failures, democracies and the EU have good reasons to base their foreign policies on defending democratic constitutionalism beyond national borders, as prescribed in Arts 3 and 21 Lisbon Treaty. For instance, the EU has introduced new regulations for:

- screening foreign investments inside the EU;
- limiting access of non-EU companies to government procurement inside the EU unless reciprocal access of EU companies is secured;
- avoiding 'carbon leakage' through unilateral CBAMs;
- EU 'anti-coercion measures' providing for unilateral EU countermeasures against economic sanctions by third countries (like China);
- EU 'sustainability sanctions' in response to foreign violations of labor rights, human rights and sustainable development commitments;
- EU emergency powers for responding to supply chain problems (as they emerged during the Covid-19 and energy crises); and
- stronger EU anti-subsidy and emergency export control regimes.<sup>24</sup>

Yet, Europe's multilevel democratic constitutionalism has no equivalent in Africa, in the Americas and Asia. Europe's past leadership for worldwide compulsory adjudication in trade and investment law and in UNCLOS is increasingly opposed by geopolitical power politics. Has 'constitutionalizing foreign policies' become a *utopia* beyond the EU? Arguably, the EU's

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<sup>21</sup> SC Res. 2532 (July 1, 2020) pmb. para 11; SC Res. 2565 (Feb. 26, 2021) pmb. 17.

<sup>22</sup> SC Resolution 2532 para 2.

<sup>23</sup> Cf J.Alexander/A.Conrad, *Citizens: Why the Key to Fixing Everything is All of Us* (Canbury Press 2022).

<sup>24</sup> Cf A.Hervé, European unilateralism as a tool for regulating international trade: a necessary evil in a collapsing multilateral system, in: *Fondation Robert Schuman Policy Paper* no 626, 29 March 2022.

climate policy leadership enabled by the EU's 'environmental constitutionalism' – like the multilevel 'stakeholder governance' for providing food and vaccines in response to the current global food and health pandemics crises – offer concrete examples for the advantages of continuing 'constitutional reforms' at plurilateral, functionally limited levels of multilevel governance of PGs. Environmental pollution and insufficient protection of PGs (like public health, food security) are systemic 'market failures' and 'governance failures' undermining the legitimacy and coherence of IEL unless – as in EU law – individual access to health, environmental protection and to food are protected by fundamental rights and remedies.

### ***EU leadership for multilevel 'environmental constitutionalism'***

UN climate politics since the 1992 UN Framework Convention on Climate Change (UNFCCC) failed to prevent climate change. The 2015 Paris Agreement prioritizes national sovereignty by focusing on 'nationally determined contributions' (NDCs), which continue to differ enormously among UN member states (e.g. regarding phasing-out of fossil-fuel subsidies and of coal-based energy). The regular 'conferences of the parties' (COP) to the UNFCCC, and their science-based and political review mechanisms exert pressures for progressive legal clarifications of greenhouse gas (GHG) reduction obligations. So far, the NDCs remain insufficient for realizing the goals of the COP 26 'Glasgow Climate Pact' to decarbonize economies by 2050 and limit global warming to 1.5 °C. Europe's multilevel democratic, parliamentary, executive and judicial climate mitigation governance in the context of EU 'environmental constitutionalism' is more legally developed compared with UN climate mitigation policies and their neglect in many UN member states.

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



and UN law.<sup>25</sup> The EU climate mitigation objectives, principles and legal obligations are more precise, more uniform, more democratically controlled and judicially enforceable than the respective objectives, principles and legal obligations under UN law.

Rights to the protection of the environment are increasingly recognized in the laws of now more than 150 states, regional treaties, and by the UN Human Rights Council (HRC).<sup>26</sup> Environmental rights have been invoked by litigants all over the world in hundreds of judicial proceedings on protection of environmental interests. In national and European environmental litigation, courts holding governments legally accountable for climate mitigation measures increasingly refer to human rights and constitutional principles. For example, the ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda* confirmed that Articles 2 (right to life) and 8 ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG emissions by at least 25% (compared to 1990 levels) by the end of 2020. The judgment clarified that human rights and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens to enforce positive obligations to take appropriate measures mitigating climate change.<sup>27</sup> The ruling of the District Court of The Hague on 26 May 2021 in *Milieudefensie v Royal Dutch Shell* was the first judgment in which a multinational corporation was held responsible for its contribution to climate change based on national and international law.<sup>28</sup> The case was brought as a public interest class action by a Dutch NGO; it does not focus on compensation for past damages but on corporate obligations to reduce emissions and invest more in cleaner fuels to protect the common interest of current and future generations in preventing dangerous climate change. Similar litigation against energy companies focusing on corporate responsibilities for climate change is pending in many countries. Even though the judgment is based on corporate duties of care under Dutch tort law, the Court's references to international law and to the shared responsibilities of corporate actors may influence the reasoning in future judgments by other courts. The Court found that the total CO<sub>2</sub> emissions of the Shell group exceeded the emissions of many states, including the Netherlands. The group's global CO<sub>2</sub> emissions contributed to global warming and climate change in the Netherlands; they entailed significant risks for residents of that country. The court agreed with the complainants that Shell had an obligation to reduce CO<sub>2</sub> emissions of the Shell group's entire energy portfolio, holding that:

- Shell is obliged to reduce the CO<sub>2</sub> emissions of the Shell group's activities by net 45 per cent by the end of 2030 relative to 2019 through the Shell group's corporate policy;
- the policy, policy intentions, and ambitions of the Shell group imply an imminent violation of this obligation;
- the Court, therefore, allowed the claimed order for compliance with this legal obligation.

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<sup>25</sup> Cf Petersmann (n 13), chapter 9.

<sup>26</sup> See Resolution 48/13 adopted by the HRC on 8 October 2021, recognizing that having a clean, healthy and sustainable environment is a human right.

<sup>27</sup> *Supreme Court, State of the Netherlands v Stichting Urgenda* (2019, ECLI:NL:HR:2019:2007, *Urgenda v NL*, 2019).

<sup>28</sup> *The Hague District Court, Milieudefensie et al. v. Shell* (2021, ECLI:NL: RBDHA:2021:5339).

The judgment took into account human rights and the Paris Agreement in its interpretation of the unwritten standard of care. The Court also referred to the UN Guiding Principles on Business and Human Rights (UNGP), which it found to constitute an authoritative, internationally endorsed soft law instrument setting out the responsibilities of states and businesses in relation to human rights; the UNGP 'are suitable as a guideline in the interpretation of the unwritten standard of care'. According to the Court, the responsibility to respect human rights encompasses the company's entire value chain' including the end-users of the products produced and traded by the Shell group. The Court concluded that the human rights standards, the UNGP, and the Paris agreement all support the conclusion that Shell should be ordered to reduce the CO<sub>2</sub> emissions of the Shell group's activities by net 45 per cent at the end of 2030 relative to 2019 through the group's corporate policy.

So far, the European climate mitigation litigation has been emulated in only few jurisdictions with independent constitutional courts outside Europe (like Brazil and Colombia).<sup>29</sup> In the USA, environmental constitutional and human rights tend to be denied by US courts, for instance on grounds of judicial deference towards 'political questions' left open in the US Constitution and not (yet) decided by the US Congress, which remains reluctant to enact legislation recognizing new human, constitutional or environmental rights and prescribing climate change mitigation based on the 'polluter pays principle' (aimed at enhancing 'Pareto efficiency' protecting all citizens against environmental harms) rather than on macro-economic 'Kaldor-Hicks-efficiencies' (justifying also polluting industries). The US Inflation Reduction Act adopted in August 2022 uses discriminatory tax credits, domestic content requirements and trade discrimination for promoting de-carbonization of the US economy, thereby further undermining WTO law and increasing trade conflicts. In China, neither environmental rights of citizens nor independent judicial remedies are recognized; even though China has become the world's biggest GHG emitter, China's government does not recognize the 2021 Glasgow Climate Pact goal of decarbonizing economies by 2050. China continues approving the construction of new coal-based power plants that risk emitting GHG also beyond China's current goal of phasing-out coal-based energy by 2060.

### **Creation of climate change mitigation clubs?**

The EU climate law of June 2021 prescribes introduction of carbon<sup>30</sup> border adjustments to prevent 'carbon leakage' by 'leveling the playing field' so that countries with ambitious climate change policies are not disadvantaged vis-à-vis competitors with less stringent GHG controls. To minimize the coercive effects of GHG-related tariffs imposed unilaterally and respect the environmental law principles in the 2015 Paris Agreement (like NDCs, 'common but differentiated responsibilities' of less-developed countries), the G7 countries recommended in June 2022 to embed the EU's CBAM into a broader 'carbon club' with GHG reduction

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<sup>29</sup> For comparative overviews of climate litigation see: C. Rodriguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action* (CUP 2021); F. Sindico/M. Mbengue, *Comparative Climate Change Litigation* (Springer Publishing 2021). For systemic collections of climate cases see: *Fighting Dangerous Climate Change: A Best Practice Guide for Judges and Courts* (World Commission of Environmental Law; <https://www.iucn.org/commissions/world-commissionenvironmental-law/our-work/climate-change-law/judicial-handbook-climate-litigation>).

<sup>30</sup> *Carbon* is used as shorthand for carbon dioxide (i.e. the most prevalent of GHGs) in full recognition that all GHG emissions need to be included into carbon mitigation clubs.

commitments among members and external trade restrictions vis-à-vis third countries.<sup>31</sup> The idea of 'climate protection clubs'<sup>32</sup>, like constitutional and 'club theories' more generally, explain why socially harmful 'free-riding' can be reduced by making membership and rights conditional on mutually agreed cooperation and corresponding duties. For instance, CBAMs can be made more effective and more acceptable by making market access conditional on, *inter alia*, agreed GHG reduction commitments, carbon tariffs, 'green product standards', agreed procedures for calculating 'embedded carbon' in products and equivalence of diverse GHG reduction policies, reductions of fossil fuel subsidies, agreed rules for renewable fuel subsidies, and elimination of tariffs on environmental goods and services, with due respect for the WTO principles of special and differential treatment of less-developed countries and the environmental law principle of 'common but differentiated responsibilities'. Just as the multilaterally agreed trade restrictions in the UN Convention on Trade in Endangered Species and in the Montreal Protocol on Transboundary Movement of Hazardous Wastes were never challenged in WTO dispute settlement proceedings, multilaterally agreed GHG reduction clubs, 'environmental goods agreements', newly agreed subsidy rules and fossil fuel disciplines should set incentives for voluntary global cooperation and for 'critical mass membership' promoting non-discriminatory treatment without free-riding. Consensus on a 'package deal' and 'grand bargain' might require a broader 'WTO sustainability agenda' on how to promote the broader policy objectives of a 'circular economy' (e.g. reducing waste and plastic pollution by recycling), sustainable agriculture (e.g. addressing bio-diversity, water and food security issues), greening of transport services, the 'blue economy' (like over-fishing, ocean pollution) and a 'just transition' assisting less-developed countries through financial assistance. The more decarbonization of economies is designed as an economic growth strategy, the more GHG reduction commitments as integral parts of 'climate protection clubs' are likely to become politically acceptable.

The diversity of governmental and private company pledges of GHG reductions also calls for setting civil society incentives for active participation in decentralized monitoring of market failures (like pollution harms) and governance failures (like non-implementation of GHG pledges). This can be promoted by enhancing synergies between human and legal rights to protection of the environment and stronger democratic and judicial remedies. As prices of internationally traded goods often do not reflect their environmental and social costs, the UN and WTO sustainable development goals must factor in the pollution costs, human and labor rights, and the 'planetary boundaries' in order to promote social welfare, just as neo-liberal 'shareholder conceptions' of company goals must be replaced by more inclusive 'stakeholder conceptions' and 'social corporate responsibilities.' This requires not only stronger reporting requirements of companies on their environmental, social and governance (ESG) performance. 'Constitutional politics'- and 'constitutional economics'-methodologies argue more broadly that constitutional democracies can remain effective only if the human and constitutional rights of citizens are protected by democratic legislation, administration and adjudication protecting rule-of-law and empowering citizens. Even if Europe's multilevel constitutionalism has no equivalent outside Europe, the transformation of *national* into *transnational* 'aggregate PGs' (like the SDGs) requires extending national constitutionalism to transnational governance of PGs. History suggests that such constitutional reforms require

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<sup>31</sup> On the 'Group of 7' proposal of June 2022 see: <https://www.g7germany.de/resource/blob/974430/2057926/2a7cd9f10213a481924492942dd660a1/2022-06-28-g7-climate-club-data.pdf?download=1>.

<sup>32</sup> Cf W. Nordhaus, Climate Clubs: Overcoming Free-riding in International Climate Policy 105 *American Economic Review* (2015) 1339–1370.

perennial struggles of citizens for collective protection of human rights limiting abuses of power. In a globalized 'world on fire', reasonable citizens should recognize themselves as human beings with cosmopolitan responsibilities rather than only as national citizens of this or that state. Without a cosmopolitan 'Sisyphus morality' and stronger leadership from constitutional democracies, realizing the SDGs remains a *utopia*.

#### IV. Conclusions: China and the Future of International Economic Law

This contribution defined IEL broadly not only in terms of multilevel regulation of transnational movements of goods, services, persons, capital and related payments. As values derive ultimately from informed individual consent, IEL must also protect human rights, democratic constitutionalism and other, socially agreed 'principles of justice' and limit 'market failures', 'governance failures' and 'constitutional failures' distorting equal freedoms. From such citizen-oriented perspectives<sup>33</sup>, protection of the environment and of social justice must be integral parts of IEL.

Section I emphasized the interdependence of social, economic, political and legal orders and the historical evidence that democratic and republican constitutionalism can transform the 'unsocial sociability' (I.Kant) and rational egoism ('struggle for survival') of human beings in power-based societies into rules-based, mutually beneficial social cooperation and 'legal civilization' protecting human and democratic right of citizens and rule-of-law. The post-1945 evolution of IEL and China's accession to the WTO succeeded in lifting billions of people out of poverty. Yet, communist and other power-based, authoritarian regimes continue suppressing human rights and democratic constitutionalism; they fail to fully cooperate in UN and WTO governance of global PGs like the SDGs. As democracies cannot trust authoritarian power politics, the current 're-globalization' in favor of like-minded countries is bound to continue. Global IEL will remain a highly imperfect, antagonistic system for promoting national economic welfare.

Section II described how geopolitical rivalries and hegemonic power politics progressively undermine the UN and WTO legal systems. Regulatory competition and multilevel governance of global PGs (like the SDGs) remain distorted, for instance by mutually conflicting neo-liberal, authoritarian, ordo-liberal and third-world-conceptions of economic regulation. Pascal Lamy remained the only WTO Director-General who emphasized synergies between HRL and WTO law, and invited the Inter-Parliamentary Union to convene regular parliamentary meetings inside the WTO in order to promote democratic support and accountability of trade policies; Lamy's call for 'cosmopolitics' aimed at enhancing the legitimacy and coherence of the world trading system, of its global governance, and of its support by civil societies and 'cosmopolitan constituencies'.<sup>34</sup> Outside Europe, nationalism, the frequent lack of adjusting national Constitutions to the existential challenges of the SDGs, process- rather than rights-based constitutional traditions, power politics and neo-liberal 'business capture' of economic and environmental legislation (e.g. in the US Congress) impede 'multilevel democracy' and rights-

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<sup>33</sup> See E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart 2012).

<sup>34</sup> Cf P.Lamy, *The Geneva Consensus. Making Trade Work for All* (CUP 2013); idem, *Towards World Democracy* (Polity 2004); S.Charnovitz, *The WTO and Cosmopolitics*, in: E.U.Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency and Democratic Governance* (OUP 2005), 437-445.

based ‘multilevel constitutionalism’ as policy strategies for protecting the SDGs. The UN SDA emphasizes the importance of human rights, democratic governance and rule-of-law for realizing the SDGs; yet, neither the money- and business-driven neo-liberalism practiced in the USA nor China’s totalitarian state-capitalism offer coherent policies for realizing the UN SDGs. President Xi Jinping’s threats of using military force for suppressing democracy in Taiwan – like President Putin’s war crimes aimed at suppressing democracy in Ukraine – are reminders of the historical experience that constitutionally unrestrained dictatorships remain the greatest danger for human civilization.

Section III emphasized that the global regulatory challenges (like the SDGs) require continued UN and WTO negotiations on global responses (e.g. to the need for climate change mitigation). The past success of the WTO Agreement in assisting all 164 WTO members to enhance their national welfare, and the agreements concluded during the WTO Ministerial Conference in June 2022, render it likely that future WTO negotiations on updating WTO law to the requirements of the 21<sup>st</sup> century - notably in areas like subsidies and competition rules, sustainable development, and plurilateral agreements (e.g. on digital trade, investment facilitation) – may enable additional WTO agreements. Yet, without a functioning WTO dispute settlement system, also the WTO negotiating and legislative systems are bound to progressively disintegrate. The more diverse constitutional traditions, value priorities, and increasing geopolitical rivalries prevent constitutional reforms of UN and WTO law (like legal limitations of abuses of veto powers, stronger judicial remedies protecting rule-of-law), the more will regulatory competition lead to plurilateral responses to perceived transnational ‘governance failures’ and to collective defense alliances among like-minded countries (e.g. protecting their citizens against foreign ‘weaponization’ of economic interdependence). Members of the WTO and of the 2015 Paris Agreement must elaborate multilateral legal disciplines for preventing ‘carbon leakage’ through CBAMs, which should be embedded into ‘climate protection clubs’ protecting non-discriminatory conditions of competition and respect the special responsibilities of developed countries for climate change. This requires clarifying the WTO legal obligations for promoting sustainable development and for special and differential treatment of less-developed countries. China as the world’s biggest GHG emitter should not continue approving new coal-based power plants, whose future GHG emissions risk subverting the UN climate change mitigation goals.

This section IV concludes that Russia’s wars of aggression, war crimes and ‘weaponization’ of energy and food supplies illustrate how – the more the UN and WTO systems are undermined by abuses of veto-powers, wars and authoritarian power politics - UN and WTO law and governance, and the ‘regulatory competition’ among authoritarian and democratic countries, fail to protect the universally agreed SDGs. As illustrated by their collective economic sanctions against Russia and the freezing of more than 300 billion \$ of Russian central bank assets abroad, most democracies no longer trust Russia as a reliable UN and WTO member country. It appears increasingly unlikely that second-best, plurilateral reforms among ‘willing countries’ (e.g. through democratic defense alliances like NATO, ‘climate protection clubs’ conditioning market access on protection of the SDGs) can prevent continuation of global health, environmental, food and security crises and protect human rights beyond democratic societies.

### ***China-US leadership for reforming IEL?***

The ‘Economic and Trade Agreement’ signed by the Chinese and US governments on 15 January 2020 provided for discriminatory Chinese commitments to buy US products, discriminatory US import tariffs and US trade restrictions (e.g. targeting Chinese technology

companies) without third-party adjudication. This bilateral 'opt-out' – by the two largest trading nations – from their WTO legal and dispute settlement obligations was subsequently continued and deepened (e.g. by additional US export restrictions on technology products as of 2022) by the US Biden administration in order to contain China's rise as a new military and technology threat openly challenging human and democratic rights and other UN legal obligations. Neither unilateral or bilaterally agreed, executive departures from WTO law – nor the proposal of the 2019 US-China Trade Policy Working Group to manage US-Chinese economic, political and security relations by new agreements on (1) prohibited conduct, (2) bilateral or plurilateral negotiations, (3) permitted proportionate unilateral adjustments, and (4) multilateral disciplines to avoid spillovers to third parties<sup>35</sup> - offer coherent guidance for multilateral reforms of IEL.

If regional cooperation among like-minded countries – rather than global economic integration also among geopolitical rivals – should become the new security policy paradigm, UN and WTO governance will become even less capable of protecting the SDGs. The entry into force, on 1 January 2022, of the Regional Comprehensive Economic Partnership (RCEP) between China and 14 Asia-Pacific countries, and its regulatory competition with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)<sup>36</sup>, illustrate how Asian countries – similar to African countries participating in the Pan-African FTA, American countries participating in regional FTAs in Southern-, Central and North-America, and European countries participating in the EU, EFTA, EEA and external FTAs with third countries – remain determined to protect the advantages of rules-based, liberal trading systems, notwithstanding increasing challenges of the WTO system. The lack of provisions on labor rights and environmental protection in the RCEP agreement, as in most bilateral 'Belt & Road' agreements and bilateral investment agreements concluded by China, illustrates China's lack of leadership for the human rights and environmental dimensions of the SDGs. Similarly, China's lack of independent judicial protection of rule-of-law cannot be compensated by the limited jurisdiction of China's commercial and investment arbitration centers<sup>37</sup>. China's insufficient protection of human rights, labor rights and minority rights in China entails that China's exports and technological inventions will remain subject to increasing restrictions in democratic trading partners of China. As NATO countries consider China as a threat to democratic values and security, modern technology exports from China impacting on the infrastructure and security of democracies risk being exposed to increasing trade restrictions.

### ***Transatlantic leadership for reforming IEL?***

The long-standing failures of the 'Transatlantic Partnership' cooperation since the 1990s (as illustrated by President Trump's discontinuation of the EU-US negotiations on a TTIP Agreement) illustrate how executive US power politics also impede joint EU-US leadership for

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<sup>35</sup> See the US-China Trade Policy Working Group Joint Statement, *US-China Trade Relations: A Way Forward* (2019). For a discussion of the proposals see: G.Shaffer, *Governing the Interface of US-China Trade Relations*, 115 *AJIL* 622ff. The four proposed categories of conduct also underlie the WTO Agreement, which does not provide for such bilaterally agreed opt-outs with inevitable competitive distortions for third countries.

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

<sup>37</sup> Cf W.Shan/S.Zhang/J.Su (eds), *China and International Dispute Settlement Resolution in the Context of the Belt and Road Initiative* (CUP 2020).

multilateral IEL reforms. Anglo-Saxon neo-liberalism prioritizes constitutional nationalism (as illustrated by the 'Brexit') and 'process-based constitutionalism' (as illustrated by the unwritten British Constitution, the lack of references in written Anglo-Saxon Constitutions to the SDGs) rather than rights-based, multilevel constitutionalism requiring all branches of government to protect (inter)national PGs (like UN HRL, regional common markets, environmental protection). Europe's multilevel constitutionalism perceives democratic constitutions as expressing dynamically evolving 'higher laws of society' ('living constitutions') for responding to changing regulatory challenges and needs of citizens. Europeans interpret HRL as requiring both democratic legislators and the judiciary as 'constitutional guardians' to interpret and develop laws and policies responding to citizen demand for protecting PGs. The 'Brexiters' pursue a 'Singapore at Thames' as a deregulated competitor for the EU with more restrained judicial powers; like former US President Trump, they assert national sovereignty to disregard international legal and judicial obligations (like the EU-UK Brexit Agreement of 2020). Business-driven economic regulation and related 'regulatory capture' are today more restrained inside the EU (e.g. due to its public financing of political election campaigns) than in the USA, where business-financed presidential and congressional elections often lead to appointment of business leaders (like US President Trump, his Secretary of Commerce W.Ross), business lobbyists (like USTR R.Lighthizer, his deputy USTR D.Shea) and congressmen financed by business interests (like coal, steel, cotton, tobacco, gun and pharmaceutical lobbies). The Biden administration temporarily settled some of the longstanding EU-US trade disputes (like the disputes over subsidies for aircraft makers Airbus and Boeing, European digital taxes on US tech groups, the US Section 232 tariffs on EU aluminum and steel). The Transatlantic Trade and Technology Council did, however, not prevent the illegal trade discrimination in the 2022 Inflation Reduction Act (e.g. in favor of producing electric vehicles, their batteries and 'green energy' in the USA); it may also prove incapable of preventing re-introduction of discriminatory US steel tariffs if the EU should remain unwilling to accept the US proposals for imposing 'carbon tariffs' on 'dirty steel products' produced in China. NATO cooperation remains strong in implementing countermeasures against Russia's illegal wars of aggression. Yet, due to the diverse conceptions of liberal democracy inside the EU and inside the USA, it remains uncertain whether China's long-standing support for dictatorships (like Iran, Myanmar, North Korea, Russia) and Chinese military aggression against Taiwan will promote common transatlantic countermeasures like those introduced against Russia's military aggression. Similarly, it remains uncertain whether EU-US cooperation in the field of climate change mitigation policies can avoid trade disputes over mutually inconsistent trade and climate policy instruments (such as US local content requirements, discriminatory 'green energy subsidies' and import restrictions).

### ***Complementarity of global and plurilateral reforms***

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

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

This recourse to second-best, plurilateral trade and investment rules is likely to continue. Democratic EU leadership for reforming WTO third-party adjudication, investor-state arbitration and UN law (like the EU proposal for a WHO global health pandemic treaty) remains necessary for protecting the SDGs, human rights and non-discriminatory conditions of competition. The outcome of many of these reform negotiations (e.g. on future WTO agreements on e-commerce, WTO appellate arbitration, the Energy Charter Treaty, the G7 proposal for a climate protection club) remain uncertain. The WTO procedures and institutions (like the WTO Committees on technical trade barriers, sanitary and phytosanitary measures) promoting transparency, coherent standards and regulatory cooperation remain important for reducing the costs of diverse implementing regulations. Involvement of domestic democratic institutions, non-governmental actors (like business and 'green cities'), science-based regulatory agencies and epistemic communities can enhance democratic and business support and transparent 'checks and balances'.<sup>38</sup> The UN's 'constitutional governance model' and Europe's multilevel constitutionalism are reminders that - without empowering citizens through human and democratic rights, parliamentary and judicial protection of transnational rule-of-law, and transnational democratic cultures - transnational PGs are unlikely to be effectively protected for the benefit of all citizens. Yet, the realities of Chinese and Russian power politics suggest that the future of IEL risks evolving in more dialectic and unpredictable ways disappointing the hopes of citizens all over the world for effective protection of human rights and sustainable development. The 'paradox of human liberty' remains that – even though the dissolution of the Soviet Union (1991) and the accession to the WTO of China (2001) and Russia (2012) justified hopes for 'legal civilization' protecting the human rights also of Chinese and Russian citizens – liberties risk being destroyed by abuses of authoritarian powers as long as freedoms are not effectively protected by democratic constitutionalism and 'active citizenship' defending human rights.

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<sup>38</sup> On the problematic relationships between democratic and 'stakeholder governance' see: H.Gleckman, *Multistakeholder Governance and Democracy. A Global Challenge* (Routledge 2018); L.B.Andonova/M.V.Faul/D.Piselli (eds), *Partnerships for Sustainability in Contemporary Global Governance* (Routledge 2022).