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HOW TO RESPOND TO UN GOVERNANCE FAILURES? LESSONS FROM EUROPE'S ECONOMIC AND ENVIRONMENTAL CONSTITUTIONALISM

Abstract: *How should citizens respond to UN governance failures with respect to preventing climate change, wars of aggression, global health pandemics, and violations of human rights like access to food and public health protection? Europe's multilevel constitutionalism has enabled the European Union (EU) to exercise a leadership role for realizing the universally agreed "sustainable development goals" (SDGs), including in the external relations of the EU. But democratic constitutionalism – as a political and legal strategy for protecting rights of citizens and supporting rules-based, democratic governance – remains contested by governments prioritizing authoritarian and neo-liberal policies. As an analytical research method, constitutionalism explains "market failures", "governance failures" and "constitutional failures" – as well as related remedies – more convincingly than alternative methods like "realism" and "welfare economics". The more power politics impedes UN and WTO reforms, the more necessary become second-best plurilateral governance reforms which make membership conditional on promoting human rights and rules-based, multilevel private-public partnerships for realizing the SDGs. Europe's economic and "environmental constitutionalism" illustrates how constitutionalism can also facilitate sustainable development reforms in the UN, WTO and the plurilateral governance of global public goods, like climate change mitigation and transnational rule-of-law.*

Keywords: climate change mitigation, constitutional economics, constitutionalism, EU, sustainable development, UN, WTO

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INTRODUCTION

The Global Stocktake Decision, adopted by the Conference of the Parties (COP 28) of the 1992 UN Framework Convention on Climate Change (UNFCCC) on 13 December 2023 at Dubai, recognizes the need for "transitioning away from fossil fuels in energy systems in a just, orderly and equitable manner (...) so as to achieve net zero by 2050 in keeping with the science."[1] Yet the international commitments for reducing production and consumption of fossil fuels and related greenhouse gas (GHG) emissions, and for financial and technical assistance for a "just, orderly and equitable" energy transition, remain insufficient for realizing the universally agreed goal of keeping the temperature rise below 2° C, and ideally at 1.5° C, above preindustrial levels. As the Decision acknowledges the complex interdependencies between climate change mitigation, biodiversity losses, food and health security, and other sustainable development goals (SDGs), UN governance on climate change mitigation needs to be evaluated in the broader context of the UN 2030 Agenda for Sustainable Development, which is aimed at "Transforming our World" in order to "realize the human rights of all"; "to end poverty and hunger everywhere"; and to implement 17 agreed SDGs over the next 15 years with "the participation of all countries, all stakeholders and all people."[2] The Resolution 70/1 recognized that "democracy, good governance and the rule of law (...) are essential for sustainable development" (para. 9). This linking of economic, environmental, and social rules with human rights, rule-of-law and democratic governance responds to the "paradox of freedom", as discussed since Plato (e.g. in his book about *The Laws*); i.e. the historical experience that human freedoms risk destroying themselves unless abuses of public and private power – and the bounded rationality of human beings – are constitutionally restrained by laws and institutions.[3] The suppression of human and democratic rights by authoritarian states (like China and Russia), and the current disruption of the World Trade Organization (WTO) rules on non-discriminatory competition and rule-of-law offer empirical evidence of this paradox of freedom; disregard for human rights remains the main reason for unprovoked wars of aggression and related war crimes (as currently in Ukraine), as well as for UN and WTO governance failures to prevent unnecessary poverty (SDG1); to protect food security (SDG2); public health (SDG3); public education for all (SDG4); gender equality

[1] United Nations Framework Convention on Climate Change, *Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, 30 November to 12 December 2023, FCCC/PA/CMA/2023/L.17, para. 28.

[2] UNGA resolution of 25 September 2015, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Doc. A/RES/70/1, preamble.

[3] For more on the "paradox of freedom" *see* K. Popper, *The Open Society and its Enemies*, Princeton University Press, Princeton: 1994, pp. 117, 257, 333–339; E.U. Petersmann, *International Economic Law in the 21st Century*, Hart Publishing, Oxford: 2012, pp. 61–74.

(SDG5); access to water and sanitation for all (SDG6); as well as many other SDGs like climate change mitigation (SDG13); the protection of marine and terrestrial ecosystems (SDGs 14–15); and access to justice (SDG16).[4]

These "governance failures" raise the question: Can the SDGs be realized in the absence of more effective legal restraints on transnational governance failures, such as the rapidly increasing number of coal-powered energy plants (e.g. in China and India) as well as the increase in GHG emissions which are accelerating climate change? Can international agreements of a higher legal rank (like the 2015 Paris Agreement on climate change mitigation) overcome the problems with collective action in terms of ensuring global public goods (PGs, like the prevention of global health and of food and climate crises), which no state can protect without international cooperation? As about three-quarters of carbon emissions come from fossil fuel burning as the biggest contributor to climate change and more than 100 countries, including the EU, have pushed for a commitment to phase out fossil fuels: How to overcome the opposition from fossil fuel industries, petrostates and consumers in rich countries against the necessary actions? Are there common lessons to be learned from the increasing UN governance failures to protect international peace, human rights, and the SDGs for the benefit of all citizens?

Section 1 of this paper posits that constitutionalism – as a citizen-driven political strategy and analytical research methodology – more convincingly explains the need for limiting abuses of public and private powers in the multilevel governance of PGs (like the SDGs) than alternative political theories. Section 2 draws political lessons from Europe's multilevel democratic, economic, and environmental constitutionalism for exercising leadership for protecting human rights and the SDGs. Section 3 concludes that the geopolitical rivalries between power-oriented authoritarian states, business-driven neo-liberal states, and Europe's ordoliberal constitutionalism render "constitutional reforms" of UN and WTO governance of PGs unlikely. "Plurilateral club strategies" – as pursued in the European Union (EU) and in its broader European Economic Area (EEA) – offer the best way forward in terms of protecting the SDGs in a multi-polar world, where global PGs are no longer protected by benevolent hegemons (like the US leadership in elaborating the post-WWII UN and Bretton Woods systems). Beyond Europe, the mutual synergies enabled by constitutional politics, constitutional economics, and constitutional law for improving the input- and output-legitimacy of transnational governance and foreign policies (as acknowledged in Arts. 3 and 21 of the Treaty on European

[4] The importance of democratically inclusive "good governance" and of "inclusive institutions" for promoting sustainable development is explained by S. Dercon, *Gambling on Development: Why Some Countries Win and Others Lose*, Hurst & Co., London: 2022; D. Acemoglu, J. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, Profile Books, London: 2013.

Union (TEU)) remain widely neglected. This contribution explains why – even if democratic reforms of UN law and governance are resisted by authoritarian governments – citizen-driven "struggles for justice" remain crucial for protecting the SDGs, for instance by limiting governance failures through human rights and judicial remedies; holding governments and non-governmental organizations more accountable; protecting transnational rule-of-law through third-party adjudication of disputes; responding to global governance crises through private-public partnerships (e.g. for providing vaccines and food aid, carbon emission trading systems and related carbon-border adjustment measures); and promoting climate justice in the needed transition to green and circular economies.

1. CONSTITUTIONALISM AS A GOVERNANCE STRATEGY AND ANALYTICAL RESEARCH METHOD

The COP 28 conference was attended by government representatives from all 198 UNFCCC Member States and carefully prepared by the COP Presidency and interest-based alliances of governments (e.g. from small island states), with leadership from the UNFCCC Secretariat and other international organizations. Yet most of the 85,000 conference participants represented "non-party stakeholders" from civil societies, businesses, cities, and subnational regions. This global inclusivity in the deliberations and decision-making processes – focusing on people and local livelihoods – differs from the intergovernmental negotiations in most other UN bodies. It has long been recognized as enhancing not only the input- and output-legitimacy of COP decisions, which require parties to also "respect, promote and consider their respective obligations with respect to human rights" such as "the right to a clean, healthy and sustainable development; the right to health; the rights of Indigenous Peoples, local communities, migrants, children, and persons with disabilities and people in vulnerable situations"; COP decisions also emphasize "that sustainable and just solutions to the climate crisis must be founded on meaningful and effective social dialogue and participation of all stakeholders."[5] Multi-stakeholder participation also facilitates educating public opinion; strengthening political will; and transforming COP commitments into legally binding "nationally determined contributions" under Art. 4 of the Paris Agreement, as well as implementing the commitments through national legislative, executive, judicial, business and civil society actions. The UN Secretary-General's Common Agenda for responding to the "triple crisis of climate disruption, biodiversity loss and pollution destroying

[5] Decision 19/CMA.5 of 13 December 2023, review of the functions, work programme and modalities of the forum on the impact of the implementation of response measures, midterm review of the workplan and report of the forum, preamble and para. 9.

our planet" emphasizes the need "to renew the social contract between Governments and their people and within societies"; and to view "human rights as a problem-solving measure" for a "renewed social contract anchored in a comprehensive approach to human rights",[6] without which a social contract at the national level anchored in human rights and transnational cooperation across countries cannot remain effective.[7] The UN's inclusive response to the "constitutional question" – how to constitute, limit, regulate and justify governance institutions and rules of a higher legal rank protecting human rights and democratic support for collective protection of the SDGs? – is also justified by Europe's successful experimentation with multilevel human rights and economic and environmental constitutionalism.

1.1. Lessons from Europe's multilevel constitutionalism

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, the rule-of-law, and the SDGs. National Constitutions differ among countries according to their histories, preferences and 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-upon "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 the rule-of-law). Principles of democratic constitutionalism agreed upon since ancient Athens (like citizenship, democratic governance, courts of justice, and "mixed government"); of republican constitutionalism since ancient Rome (like separation of power, rule-of-law, *jus gentium*); and of common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) have become recognized in national Constitutions as well as in UN and regional human rights law (HRL) and in the multilevel governance of PGs. Constitutional rules respond to collective action problems, e.g. that PGs are not spontaneously provided in private markets due to their non-excludable and/or non-exhaustible benefits (like human rights and rule-of-law principles).[8] The collective supply of PGs may be based not only on

[6] *Our Common Agenda. Report of the Secretary-General*, 1 November 2021, A/75/982, paras. 3, 6, 22.

[7] *Ibidem*, para. 10.

[8] 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

written constitutional agreements, but also on "evolutionary constitutionalism", as illustrated by Art. 6:3 TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." However, Europe's multilevel constitutionalism continues to be resisted outside Europe, for instance based on national traditions in Anglo-Saxon "island democracies" (like "Brexit Britain")[9]; "continental democracies" (like Australia, India, the USA); and by authoritarian governments prioritizing national power monopolies (e.g. China's communist party; Russian oligarchs in the Kremlin) suppressing human and democratic rights.

1.2. Constitutionalism as "struggle for justice" and analytical method

All governments seek to justify themselves by some conception of "justice". The Universal Declaration of Human Rights (UDHR) grounds human rights in respect for human reason, conscience and human dignity (Art. 1). Similarly, individual and democratic self-determination (e.g. pursuant to Art. 21) require limited delegation, separation of legislative, executive and judicial governance powers, and judicial remedies aimed at limiting the "bounded rationality" of human beings, and their frequent domination by individual passions, so as to protect "justice" (in the sense of reasonable justification of governance) and prevent "rebellion against tyranny and oppression" (Preamble).[10] The 18th century democratic revolutions created citizen-driven common markets without effective competition rules and human rights guarantees (e.g. for slaves, blacks, and indigenous people in the USA). Europe's "rights revolutions" since the 1950s and EU common market law aim at protecting a "competitive social market economy" (Art. 3 TEU) based on equal common market rights (e.g. including also labor and social rights) and effective competition

responses, *see* E.U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law*, Hart Publishing, Oxford: 2017.

[9] *Cf.* M. Loughlin, *Against Constitutionalism*, Harvard University Press, Cambridge: 2022, pp. 124–135, who criticizes the European "rights revolution", "judicial revolution", and "invisible constitutions" for protecting a new "constitutional legality" undermining his conception of Anglo-Saxon democracy represented by "the Crown, the Lords and the Commons". Loughlin claims that the people and their elected representatives, rather than citizens and courts of justice invoking and defending human and constitutional rights, should define the nation's political identity and make its most important policy decisions. His focus on nation states neglects the democratic demand of citizens for protecting transnational PGs as a task of "living democratic constitutionalism"; he also ignores the collective action problems of transnational rule-of-law, which require multilevel protection of human and constitutional rights and transnational constitutional, parliamentary, participatory and deliberative democracy as prescribed in EU law (e.g. Arts. 9–12 TEU).

[10] On the unruly nature of human beings (T. Hobbes: "*homo homini lupus est*") and their "unsocial sociability" (I. Kant) as the main justification of law and struggles for "justice" (*e.g.* in the sense of reasonable justification of law), "social contracts" and for "institutionalizing public reason" (J. Rawls); *see* E.U. Petersmann, *Teaching International Economic Law in the 21st Century*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill–Nijhoff, Leiden: 2023, p. 349.

rules.[11] Beyond Europe, it remains contested to what extent state-capitalist economies without effective legal protection of human, economic and property rights against totalitarian distortions of competition (e.g. by unlimited state subsidies for state-trading enterprises) are (in)consistent with the GATT/WTO legal requirements of protecting non-discriminatory conditions of competition.[12] Inasmuch as neoliberal calculations of "Kaldor-Hicks-efficiencies" disregard the social and environmental costs of production (like GHG emissions contributing to climate change and other environmental pollution), carbon emission trading systems and related carbon border adjustment measures (CBAMs) are justifiable not only on environmental but also on competition and social grounds (like transparent and efficient taxation in conformity with the "polluter pays principle").[13]

As an analytical methodology, European ordoliberalism differs from authoritarian state-capitalism and Anglo-Saxon neoliberalism by its systemic, legal limitations of *market failures* (like restraints on competition, environmental pollution, social injustices, information asymmetries, failures of market and price mechanisms to protect PGs demanded by citizens) and related *governance failures* and *constitutional failures* (e.g. to effectively regulate and limit market and governance failures for the benefit of citizens). Why then is it that – beyond European integration law – the legal practices of many UN Member States remain power-oriented (e.g. prioritizing realism in terms of national security) without effective legal protection of the embedded liberalism underlying UN and WTO law through rights of citizens, competition rules, judicial remedies, and social justice (like the "just, orderly and equitable energy transition" advocated in the 2023 COP Decisions)? Why do civil societies' "struggles for justice" (e.g. by the stakeholder participants at the COP 28 conference) find it so difficult to stop the obvious governance failures, which contribute to climate change, biodiversity losses, pollution of the oceans, global health pandemics, food crises, wars of aggression and related war crimes, and refugee and

[11] *Cf.* E.U. Petersmann, *Neoliberalism, Ordoliberalism and the Future of Economic Governance*, 26(4) Journal of International Economic Law 836 (2023). The emphasis on the need for systemic, multilevel limitations of market failures, governance failures and constitutional failures so as to better protect rule-of-law and social justice in transnational "competitive social market economies" distinguishes European ordoliberalism from neoliberal (*e.g.* Anglo-Saxon) beliefs in business-driven self-regulation with much weaker safeguards of non-discriminatory conditions of competition and other legal restraints on market failures and social injustices.

[12] *Cf.* J. Bacchus, *China's Economic System Isn't 'Incompatible' with WTO Rules*, Cato at Liberty Blog, 13 December 2023, available at: https://www.cato.org/blog/yes-china-violates-wto-rules-doesnt-mean-its-system-incompatible-wto (accessed 30 August 2024).

[13] *See* K. Georgieva, U. von der Leyen, N. Okonjo-Iweala, *No more business as usual: the case for carbon pricing*, Financial Times, 3 December 2023, available at: https://www.ft.com/content/921381a8-48a4-4bb9-9196-b1d49f871bb7#:~:text=Carbon%20pricing%20must%20be%20a%20transparent (accessed 30 August 2024). For more on the need for replacing GDP calculations by a human development index, *see* UN Secretary-General, *supra* note 6, para. 34.

migration crises? The European integration experiences since the 1950s suggest that the "constitutional disconnect" between UN and WTO law and domestic constitutional, political and legal systems is one of the root causes of the failures of UN and WTO governance to protect the SDGs.

1.3. From constitutional politics and constitutional economics to multilevel constitutional law?

In his *Theory of Justice* (1971), the American philosopher Rawls described constitutionalism as a "four-stage sequence", as reflected in the history of the US Constitution: reasonable citizens, after having agreed (1) on their constitutional "principles of justice" (*e.g.* in the 1776 US Declaration of Independence and Virginia Bill of Rights); (2) elaborate national Constitutions (e.g. the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of all citizens; and (4) the agreed-upon constitutional and legislative rules need to be applied and enforced by administrations and courts of justice in particular cases so as to protect equal rights, the rule of law, and rule-compliance by citizens.[14] The more globalization transforms *national* into *transnational PGs* (like the SDGs), the more it renders national "constitutionalism 1.0" an incomplete system for governing PGs. Some of the 15 UN Specialized Agencies explicitly provide for "treaty constitutions" for multilevel governance of specific PGs, as illustrated by the "constitutions" (*sic*) establishing:

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

Yet in contrast to the transformation of the EU treaties into multilevel constitutional systems embedded into the constitutional rights of "EU citizens" and protected by multilevel parliamentary, judicial and executive governance institutions, UN/WTO practices prioritize an "international community of States" (Art. 53 of the Vienna Convention on the Law of Treaties) without effective enforcement of

[14] *Cf.* J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge: 1999, p. 171.

UN HRL inside many UN Member States. Compulsory international adjudication is increasingly challenged, for instance in:

- UN law (e.g. by China's disregard for the arbitration award under the UNCLOS against China's illegal maritime expansion in the South China Sea);
- HRL (e.g. by Russia's disregard for judgments of the European Court of Human Rights on human rights violations inside Russia);
- WTO law (e.g. by the illegal US obstruction of the WTO Appellate Body system);
- and in international investment law (e.g. by withdrawals from the 1994 Energy Charter Treaty and the increasing challenges associated with investor-state arbitration).

The "constitutional economics" underlying the European common market, competition, and environmental rules derives democratic legitimacy from the informed, voluntary consent of individuals ("methodological individualism") through the multilevel protection of civil, political, economic, social and cultural rights and non-discriminatory conditions of competition – rather than only from neoliberal cost-benefit analyses and "welfare economics".[15] Constitutional economics offers more analytically and normatively coherent methodologies for identifying and limiting "governance failures" than *welfare economics*, which aims at promoting the efficient allocation of scarce resources through market competition and trade within a given set of national rules and institutions. Constitutional economics re-directs the focus of economic analysis away from quantitative cost-benefit analyses and towards designing markets and political arenas such that "consumer sovereignty" in economic markets and "citizen sovereignty" in political markets form the analytical and normative benchmarks.[16] In its *normative* dimension, it highlights the synergies between democratic constitutionalism (e.g., protecting civil and political freedoms, voter preferences, limitation of all government powers, and democratic

[15] For more on "constitutional economics" and "economic constitutionalism" *see* S. Voigt, *Constitutional Economics: A Primer*, Cambridge University Press, Cambridge: 2020; E.U. Petersmann, *Transforming World Trade and Investment Law for Sustainable Development*, Oxford University Press, Oxford: 2022, pp. 90–163; E.U. Petersmann, A. Steinbach, *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 75–106. On the EU's economic constitutionalism, *see* G. Grégoire, X. Miny (eds.), *The Idea of Economic Constitution in Europe. Genealogie and Overview*, Brill–Nijhoff, Leiden: 2022.

[16] *Cf.* E.U. Petersmann, A. Steinbach, *Neo-liberalism, State-capitalism and Ordo-liberalism: 'Institutional Economics' and 'Constitutional Choices' in Multilevel Trade Regulation*, 22 Journal of World Investment and Trade 1 (2021); Petersmann, Steinbach, *supra* note 15. 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 (controversially discussed in the Eurozone) as prominent examples. Constitutional economics argues for rules-based, regulatory competition among states and for the "legal ranking" of efficient policy instruments (*e.g.* as in EU law and GATT law).

accountability) and economic constitutionalism (e.g. protecting economic and social rights, consumer preferences, non-discriminatory competition, and legal accountability); and it requires designing rules and institutions with due regard to the political economy environment (e.g. decentralized invention, clinical testing, and production of vaccines by pharmaceutical industries dependent on the protection offered by intellectual property rights, subsidies, and government procurement) – for instance to limit rent-seeking interest group politics and regulatory capture (e.g. when political election campaigns are financed by business). Arguably, analyzing the multilevel governance of PGs in terms of market-, governance-, and constitutional-failures enables more precise policy responses. For example, without taking into account pollution costs in the legal design of markets, the welfare effects of trade governance cannot be known, and corrective measures may not directly target the source of market distortions. Climate policies should target fossil-fuel industries and energy consumption in rich countries by non-discriminatory policy instruments intervening directly at the source of GHG emissions (like carbon taxes, and the prohibition of fossil fuel subsidies and of new coal-powered energy plants).

1.4. Constitutional pluralism and regulatory competition

An analysis of the different kinds of market failures, constitutional failures, and governance failures in policy fields characterized by collective action dilemmas (like international rule-of-law; division of labor through international trade and investments; climate change mitigation, etc.) is influenced by the reality of *constitutional pluralism*, with its diverse governance types for protecting PGs; to wit:

- Anglo-Saxon democracies continue to prioritize civil, political and economic rights in their pursuit of liberalization, deregulation, privatization, and the financialization of international trade and investments based on neoliberal trust in market competition, business-driven self-regulation and military power, complemented by increasing resort to nationalist industrial policies (like the 2022 US Inflation Reduction Act);
- EU and EEA Member States prioritize "social market economies" with multilevel democratic, executive and judicial institutions (like European parliaments, regulatory agencies, courts, and EU citizenship) protecting the civil, political, economic, social and cultural rights more comprehensively (e.g. as codified in the EU Charter of Fundamental Rights, EUCFR), complemented by common market, monetary, competition, environmental, commercial, and foreign policy rules and institutions of a higher legal rank;
- states with authoritarian power monopolies (like China, Iran, North Korea, Russia) increasingly disregard the "embedded liberalism" under-

lying UN HRL and the WTO legal guarantees of non-discriminatory conditions of market competition;

– "third world countries" (like the BRICS members Brazil, India and South Africa) prioritize their national development interests over collective countermeasures against violations of UN law (e.g. Russia's wars against Ukraine and China's military expansion in the South China Sea).

Each of these diverse "value priorities" (like neoliberalism, ordoliberalism, authoritarian power monopolies, and national industrialization) and diverse constitutional contexts give rise to diverse (and sometimes divergent) "international legal policies". For instance:

– In the WTO, the business-driven US insistence on its own interpretations of WTO trade remedy rules, safeguard measures, and security exceptions has led to illegal US blocking of the WTO Appellate Body (AB) system, disrupting the compulsory WTO third-party adjudication and international rule-of-law.
– The EU's constitutional commitment to protecting rule-of-law also in international relations has prompted the EU Commission to initiate voluntary "interim appellate arbitration" – based on Art. 25 of the Dispute Settlement Understanding (DSU) – among more than 50 WTO members.
– Authoritarian WTO members (like China and Russia) started (or threatened to start) unprovoked military aggression against other WTO members (like Ukraine, the Philippines, and Taiwan); and
– Less-developed WTO members insist on special and differential treatment and WTO waivers (e.g. from the WTO Agreement on Trade-Related Intellectual Property Rights) as a response to their particular development needs (like access to vaccines, non-reciprocal preferential treatment).

The "sovereign equality" of States and related legal freedoms foster "regulatory competition", with frequent distortions by subsidies and extra-territorial power politics exercised by the stronger actors. For example, state-capitalist countries distort competition by state subsidies; and the US Trump administration welcomed the adoption by the WTO Dispute Settlement Body of "constructive WTO dispute settlement rulings" supporting US legal complaints vis-à-vis other WTO members, while at the same time rejecting similar WTO dispute settlement findings against the USA on the ground that the rulings create "new obligations" not consented to by their government.[17]

[17] For more on the illegal blocking and contradictory criticism by the United States of the WTO dispute settlement system, *see* Petersmann, *supra* note 15, pp. 90–126.

The diverse constitutional traditions, democratic preferences, and resources (e.g. for subsidies) often entail diverse interpretations and legal implementations of "constitutional principles" (like the judicial administration of justice) among jurisdictions; to wit:

- process-based national constitutionalism prioritizes democratic elections and decisions (e.g. on Brexit), as well as majoritarian institutions (like the US Congress), favoring democratic accountability and unilateral power politics (like illegal US trade restrictions on imports from China) if needed to limit allegedly unfair foreign practices;
- rights-based European constitutionalism makes free trade agreements conditional on human rights protection and environmental conditionalities, authorizing trade restrictions in response to foreign human rights violations (e.g. in foreign supply chains);
- the trade and investment agreements concluded by China with Belt and Road partner countries refrain from including human rights and environmental guarantees; and
- less-developed countries increasingly challenge European import restrictions imposed in response to foreign violations of labor rights and the burning of tropical forests.

These diverse legal perspectives promote diverse legal interpretations of the linking of economic, environmental, and social rules with human rights and rule-of-law requirements in the UN SDGs and in COP decisions. US courts tend to construe human and constitutional rights and delegated, executive powers (e.g. of the US Environmental Protection Agency) narrowly insofar as they relate to "political questions" (like the limitation of GHG emissions caused by fossil fuels), arguing that they are not decided by the US Congress. European courts often interpret their constitutional and judicial mandates more broadly by invoking the more comprehensive human rights and sustainable development obligations in EU law. Authoritarian constitutionalism (e.g. in China and Russia) does not effectively constrain executive power monopolies via independent adjudication.

2. EUROPE'S REPUBLICAN CONSTITUTIONALISM PROMOTING UN AND WTO SUSTAINABLE DEVELOPMENT REFORMS

Constitutionalism emerged as a "political strategy" in response to the failures of alternative modes of human self-ordering (e.g. through sociality, morality, reasonableness, religiosity, and legality) to suppress humans' animal instincts (like violence) and rational egoism (e.g. in anti-competitive agreements) in the collective governance of PGs that are not provided spontaneously in private markets. Democratic consti-

tutionalism can improve the input-legitimacy of inclusive governance in the ordering of societies, economies, and polities;[18] republican constitutionalism aims at enhancing the output-legitimacy of protecting PGs, for instance by commitments in national Constitutions to support international rule-of-law and sustainable development (as in some national Constitutions, like Arts. 20a, 23–26 of the German Basic Law). Even if democratic governance remains contested in worldwide intergovernmental organizations, republican constitutionalism can still strengthen the UN and WTO governance of PGs like the SDGs by means of, e.g., principles of non-discrimination; rule-of-law; judicial remedies; transparency; necessity and proportionality requirements; and the protection of equal freedoms and property rights. The collective action problems of regulating private goods and PGs – including also "club goods" with limited membership; exhaustible common pool resources; and global commons (like outer space, the High Seas, Antarctica, the atmosphere, cyberspace, biodiversity, cultural heritage) - differ among each other. Hence, also the legal design and practices of the 15 UN Specialized Agencies and of the WTO differ accordingly, as illustrated by their diverse approaches to protecting equal individual rights as legal restraints on abuses of power and safeguards of the participatory governance of PGs.[19]

2.1. UN law as global constitutional law?

The universal recognition of human rights, democracy. and rule of law principles in UN HRL has not prevented failures on the part of many governments to protect human and democratic rights and rule of law in their legal practices.[20] In both

[18] The relationship between market competition and state regulation remained highly contested at the Walter Lippmann colloquium at Paris in 1938, where Alexander Rüstow coined the term "neoliberalism" as an alternative to "market anarchy" and economic dictatorship. Today, European constitutionalism and "constitutional economics" are supported by a broad consensus on market, governance and constitutional failures as agreed benchmarks for economic regulation and governance of PGs; *Cf.* Petersmann, *supra* note 15, pp. 6–206.

[19] *See* above section 1.3. *See also* M. Wolf, *The Crisis of Democratic Capitalism*, Penguin Press, New York: 2023, who concludes his criticism of "rentier capitalism" and of speculative financialization of economies undermining modern democracies (*e.g.* through money-driven political campaign financing and lobbying industries influencing legislation, especially in the UK and USA) by his call for a renewed concept of citizenship.

[20] *See e.g.* G. Ziccardi Capaldo, *Facing the Crisis of Global Governance – GCYILJ's Twentieth Anniversary at the Intersection of Continuity and Dynamic Progress*, Global Community Yearbook on International Law and Jurisprudence 5 (2020). G. Ziccardi Capaldo defines the global community as a "universal human society" based on "global constitutional principles". Her view of a "unified/integrated" world system under global principles and procedures developed by the UN global governance model (including the rule of law, protection of human rights, democracy, separation of powers, checks and balances, and judicial review) postulates that UN governance provides the basic constitutional framework for an integrated system of global governance that unifies the different legal systems under constitutional principles and procedures respecting pluralism and overall diversity. The 20 volumes of the GCYILJ edited by Ziccardi Capaldo since 2001 document the empirical evolution of UN law-making, law-enforcement and law-adjudication for an "integrated global governance system" aimed at guaranteeing global PGs.

the practice of political UN institutions (like the UN Security Council) and of the International Court of Justice (ICJ), propositions to interpret and develop the UN Charter as the "constitution of mankind" are avoided.[21] The disconnect between UN/WTO governance institutions and effective parliamentary and judicial accountability mechanisms facilitates intergovernmental power politics and interest group politics, thus undermining the legitimacy and effectiveness of the multilevel governance of PGs. The less citizens control their "principal-agent mandates" for limited, multilevel governance of PGs, the more *legal constitutions* and their underlying *constitutional ideals* (e.g. as reflected in the SDGs) risk becoming replaced by power-based *legal practices* (like the *de facto* incapacitation of the UN Security Council and of the WTO AB), inconsistent with the *law in the books* (like Art. 17 of the DSU). While the inclusive forms of UN climate change governance at COP conferences, with thousands of civil society representatives and non-governmental stakeholders, remain the exception, they nevertheless demonstrate how increased "democratic accountability" can "institutionalize public reason" by counterbalancing power-oriented discourse.

European integration confirms that the political effectiveness of constitutionalism in terms of protecting human and constitutional rights and related PGs depends on the dynamic struggles of citizens for protecting PGs at the national, international, and transnational levels of governance. The citizen-driven transformation of EU treaties into multilevel constitutionalism (e.g. based on direct effects and the direct applicability in national jurisdictions of precise and unconditional EU treaty obligations protecting citizens) has no equivalent in UN legal and judicial treaty practices. The EU's commitment (e.g. in Arts. 3 and 21 TEU) to protect human rights and the rule of law also in external relations has pushed the EU to become the main advocate for introducing compulsory adjudication in UN law (e.g. under the UNCLOS jurisdiction), WTO law, international investment law, and international criminal law. Yet China, Russia and the USA oppose the compulsory jurisdiction of the ICJ and the International Criminal Court (ICC); and adverse judicial findings (e.g. of human rights violations by Russia; violation of the UNCLOS rules on maritime borders by China's military expansion in the South China Sea; and violations of WTO obligations by the USA) are increasingly disregarded. The UN and WTO responses to the global financial, health, food, environmental and security crises since 2008 were considerably less transformative than the EU's responses introducing legislative reforms for more effective EU protection against financial, health, environmental, and security crises, as illustrated in the following sections by the example of EU environmental constitutionalism.

[21] *Cf.* P.M. Dupuy, *The Constitutional Dimension of the UN Charter Revisited: Almost One Quarter of a Century Later*, 25(1) Max Planck Yearbook of United Nations Law 89 (2022).

2.2. EU environmental constitutionalism as driver for UN and WTO sustainable development reforms

The formation of a customs union prompted the EU to join the WTO and some UN agencies (like the FAO) as a full member promoting transformation of state-centered international legal systems by recognizing sub-state actors (like Hong Kong and Macau as WTO members) and supra-national actors (like the EU) as members of international treaties and multilevel governance institutions. The rules-based internal and external EU mandates have pushed the EU to become a leading advocate for compulsory adjudication in international trade law, investment law, international criminal law, and the Law of the Sea. For example, when the WTO AB was rendered dysfunctional in 2019 by the illegal US vetoes of the consensus-based nominations of AB judges, the EU introduced voluntary Multi-Party-Interim Arbitration agreements (based on Art. 25 DSU) providing for compulsory appellate arbitration among WTO members pending the blockage of the WTO AB, thereby limiting the increasing abuses of "appeals into the void of a dysfunctional AB", which prevented the adoption of WTO panel reports.[22] The ongoing bilateral and UN negotiations on transforming investor-state arbitration into more transparent and more accountable investment adjudication were initiated by the EU Court of Justice (CJEU) ruling that investor-state arbitration was inconsistent with EU constitutional law and had to be reformed in both the EU's internal and external relations.[23] EU common market regulations often have global "Brussels effects" if access of foreign goods, services, and investments to the EU market is made conditional on compliance with EU fundamental rights and common market regulations (such as EU product and production standards).[24] The EU's environmental constitutionalism, climate legislation and related climate litigation illustrate how domestic constitutional reforms inside the EU can create incentives for governments and non-governmental organizations outside the EU to also increase their environmental and human rights protection standards.

[22] *Cf.* P. van den Bossche, *Can the WTO Dispute Settlement System be Revived? Options for Addressing a Major Governance Failure of the World Trade Organization*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 308–335.

[23] *Cf.* L. Marceddu, *EU and UN Proposals for Reforming Investor-State Arbitration*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 336–361.

[24] *Cf.* A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, Oxford: 2020, according to whom it is wrong to cast the EU "as an aging and declining power" (p. xiii) beset by slow growth (p. 267). The most fundamental constraint on EU power – its lack of autonomous capacity to mobilize fiscal and military power to project power in a traditional sense – compelled the EU to mobilize "regulatory power" based on an extensive apparatus of rules to govern the Union's large internal market (pp. 16, 36). In order to access that market, external actors must meet the EU's often stringent regulatory demands, and this generates a broader compliance pull with strong extraterritorial ramifications. The global impact of this regime, as well as its likely durability, demonstrate how the Union is "an influential superpower that shapes the world in its image" (p. xiii).

The Single European Act of 1986 introduced the first treaty provisions for a European Community environmental policy requiring protection of the environment, as now prescribed in detail in Art. 3 TEU as well as in Arts. 191–193 of the Treaty on the Functioning of the EU (TFEU). Art. 3:3 TEU requires the Union to regulate the internal market consonant with "the sustainable development of Europe", based on "a high level of protection and improvement of the quality of the environment." Art. 191 TFEU commits the EU's environmental policy to the principles of precaution, preventive action, proximity and polluter pays. These legal foundations enabled the EU to adopt hundreds of environmental acts on the protection of water, waste management, air quality, climate change, other natural resources and chemicals management. More than 80% of the national environmental legislation in the 27 EU Member States are now based on EU regulations, directives, and other EU environmental policy measures. Moreover, Art. 11 TFEU stipulates that environmental protection requirements must be integrated into the definition and implementation of other Union policies and activities. Hence, protections against pollution of the environment must be internalized also in the EU's internal market, energy, transport, fisheries, and agricultural policies, as well as its fiscal and foreign affairs policies.

The EU's environmental constitutionalisation has evolved from a sectoral policy to a transversal transformation of the EU legal order. The constitutional dimension of environmental protection is reflected in environmental objectives, principles, and rules in both EU primary and secondary law, which have promoted "environmental democracy" and an environmental dimension also in the EUCFR. Environmental transition is particularly visible in EU secondary law, like the adoption of the 2021 European climate law[25] 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 CBAMs – aimed at reducing GHG emissions; inducing industries to use greener technologies; and at preventing "carbon leakage" (i.e. relocation of production outside EU borders to countries with lower environmental standards) – confirm the transformative nature of the EU's environmental constitutionalism.

The emergence of the Anthropocene, caused by human transgressions of laws of nature provoking climate change, biodiversity losses, and disruption of other ecosystems (like water and land uses), continues to promote support by EU citizens for the regulation of environmental rights, duties, principles and policy goals in the

[25] *Cf.* Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law) [2021] OJ L 243/1.

EUCFR (like Art. 37); in the Lisbon Treaty (e.g. Arts 11, 191–193 TFEU); as well as in national Constitutions and HRL. EU primary and secondary law empowers citizens to complement the constitutional, parliamentary, participatory, and deliberative dimensions of European democracy (*cf*. Arts. 9–12 TEU) by engaging in strategic climate litigation (as discussed below), thereby promoting citizen-driven transformation of agreed-upon environmental principles into democratic legislation, administration, and the judicial protection of rule-of-law, including also international law and multilevel governance of transnational PGs for the benefit of citizens. The multilevel legal and political means for enforcing EU environmental law – for instance, by the EU Commission (Art. 17 TEU) and the CJEU, Member States and citizens resorting to EU and national law enforcement institutions – distinguish EU law from other national and international jurisdictions; they also strengthen the enforcement of UN environmental agreements and legal principles, such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[26] Yet, as is apparent from the European Commission's regular reports on monitoring compliance with Union law, considerable gaps between the current statutory requirements and their effective enforcement continue to exist also in EU Member States, notably in areas like waste management, nature protection, and water and air quality. Fossil fuel subsidies also continue to persist in some EU countries.

2.3. Constitutionalization through EU climate change litigation

Ratification of the Aarhus Convention required the EU and its Member States to ensure that citizens are guaranteed rights to access information concerning the environment; rights to participate in certain decisions affecting the environment (like planning and approval of development projects); as well as rights securing effective access to environmental justice (notably by administrative and judicial review of breaches of national environmental laws). The effectiveness of EU environmental legislation is strengthened by its "constitutional embedding" into multilevel judicial remedies, by its democratic constitutionalism promoting civil society participation, and by European and national environmental agencies which ensure the legal implementation and monitoring of EU environmental requirements by the public and private sectors.[27] The environmental regulations, directives, and other EU environ-

[26] The Convention was signed on 25 June 1998 and approved on behalf of the European Community by Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [2005] OJ L 124/1.

[27] The importance of individual rights and judicial remedies for the decentralized enforcement of EU law is explained in EU Commission, *70 Years of EU Law. A Union for its Citizens*, Publications Office of the European Union, Brussels: 2023, available at https://data.europa.eu/doi/10.2880/543607 (accessed 30 August 2024).

mental acts (like EU decisions and environmental agreements) proposed by the EU Commission and adopted by the EU parliamentary and legislative procedures can ensure higher "democratic input-legitimacy" compared with UN environmental agreements, negotiated among democratic and non-democratic UN Member States alike. The European Green Deal, adopted by the EU Commission in 2019[28], sets out the Commission's strategy for tackling climate and environmental challenges, such as global warming, the changing climate, the risk of extinction for a large number of species, and challenges related to the pollution and destruction of forests and oceans. The EU's ambitious targets to reduce net greenhouse gas emissions (e.g. by at least 55 % by 2030 compared with 1990) are specified in the European Climate Law and in 14 additional implementing regulations and directives in various policy areas, such as climate change, energy, the environment, mobility and the circular economy; and they facilitated similar COP 28 commitments to boost energy efficiency, multiply renewable energy generation capacity, and reduce other GHG emissions.

The principal mechanisms at the disposal of the Commission to ensure the application of EU environmental law – like the powers and infringement procedures laid down in Arts. 258 and 260 TFEU enabling it to take legal action against defaulting Member States – have no equivalent in UN law. The various legal duties to implement and enforce EU law with respect to the Union's environmental policy are enhanced by the requirement in Art. 192(4) TFEU that Member States "shall implement the environmental policy." EU infringement proceedings in the CJEU (pursuant to Art. 258 TFEU) challenging state failures to secure the implementation of EU environmental legal obligations tend to be widely supported by EU citizens. Since the entry into force of the Lisbon Treaty on 1 December 2009, the CJEU has also acquired the power to impose penalty payments not exceeding an amount specified by the Commission in cases which concern failures by Member States to notify the Commission of measures to transpose a legislative EU directive into national law by the deadlines set in the legislative instrument. When a Member State fails to take such steps, Art. 260 TFEU gives the Commission the option of bringing further legal proceedings against the Member State concerned. In practice, several hundred infringement judgments have been handed down by the CJEU concerning breaches of EU environmental law by Member States.

[28] European Commission, *Commission communication – The European Green Deal*, 11 December 2019, COM(2019) 640 final, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX-:52019DC0640 (accessed 30 August 2024). On the EU's "Green Deal Diplomacy" promoting the EU's GHG reduction and ecological transformation objectives also in the external relations of the EU *see*: *Reinforcing the EU's Green Deal Diplomacy*, 4 College of Europe Policy Brief 1 (2023), pp. 1–7.

The citizen-driven dimension of the EU's environmental constitutionalism, and the contribution of judicial remedies and of citizens to the "constitutionalization" of environmental law, are also illustrated by the increasing climate litigation relying on international human right treaties and environmental commitments originating outside the EU legal order. For example, the Dutch Supreme Court in *Urgenda* relied on the right to life (Art. 2 of the European Convention on Human Rights, ECHR) and the right to respect for private and family life (Art. 8 ECHR) in order to oblige the Dutch government to reduce the overall emissions from its territory.[29] Neither of these provisions directly refer to the environment. While the European Court of Human Rights (ECtHR) had earlier interpreted these rights to cover situations where people's lives were affected by environmental pollution, the courts in *Urgenda* pioneered by interpreting Arts. 2 and 8 ECHR to entail an obligation to mitigate climate change. These legally binding norms are interpreted in light of the political commitments by national and European governments specifying what they consider necessary to mitigate climate change. The judicial reasoning process uses these political commitments to concretize what is meant by open-textured, legally binding norms in an individual case.[30] In this way climate litigation can implement not only the constitutional and legislative, but also the political commitments of governments.

Other successful instances of climate litigation inside the EU include the Irish climate case,[31] the *Neubauer* case in Germany,[32] the *Grand Synthe* and *Notre Affaire à Tous* cases in France,[33] *Klimaatzaak* in Belgium,[34] and the *Net Zero Strategy* case in the UK.[35] While the ultimately unsuccessful cases of *Plan B* in the UK,[36] *Natur og Ungdom* in Norway,[37] the ongoing case of *Klimatická* žaloba *ČR* in Czechia,[38]

[29] *State of the Netherlands v. Stichting Urgenda* [Supreme Court of the Netherlands], judgment of 31 January 2019, NL:HR:2019:2007.

[30] *Cf.* C. Eckes, *Constitutionalising Climate Mitigation Norms in Europe*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 107–144.

[31] *Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney General* [Supreme Court of Ireland], judgment of 31 July 2020, Appeal no. 205/19.

[32] *Neubauer and Others v. Germany* [German Federal Constitutional Court], judgment of 24 March 2021, 1 BvR 2656/18, 96/20, 78/20, 288/20, 96/20, 78/20.

[33] *Commune de Grande-Synthe v. France* [Conseil d'Etat], judgment of 1 July 2021, No. 427301; *Notre Affaire à Tous and Others v. France* [Paris Administrative Court], judgment of 3 February 2021, No. 1904967, 1904968, 1904972, 1904976/4-1.

[34] *VZW Klimaatzaak v. Kingdom of Belgium & Others* [Brussels Court of First Instance], judgment of 17 June 2021, 2015/4585/A.

[35] *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* [England and Wales High Court], decision of 18 July 2022, EWHC 1841.

[36] *Plan B Earth and Others v. Secretary of State for Transport* [Supreme Court], judgment of 16 December 2020, EWCA Civ 214.

[37] *Nature and Youth Norway and others v. Norway* [Supreme Court of Norway], judgment of 22 December 2020, HR-2020-24720P.

[38] *Klimatická žaloba ČR v. Czech Republic* [Supreme Administrative Court in Czech], judgment of 20 February 2023, 9 As 116/2022-166.

the Finnish climate case,[39] and *Klimaseneriorinnen* in Switzerland[40] did not impose emission reduction obligations, they nevertheless contributed to the ongoing climate constitutionalization, for instance by prompting some of these complainants (e.g. in *Klimaseniorinnen*[41] and *Carême/Grande Synthe*[42]) to challenge the national judgments in the ECtHR. This precedent induced new climate litigation (like *Duarte Augustino*[43]) in the ECtHR.[44] Apart from recognizing human rights to the protection of the environment – including climate change mitigation – most of these court cases also refer to states' responsibility for adaptation, as regulated in the 2015 Paris Agreement and progressively specified in COP decisions.

2.4. Development of UN and WTO climate mitigation law through European emission trading and carbon border adjustment systems

The UN climate law regime – based essentially on the 1992 UNFCCC; the 1997 Kyoto Protocol; the 2015 Paris Agreement; and the numerous decisions of the parties to these instruments – aims at "(h)olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change" (Art. 2(a) of the Paris Agreement). As part of their "nationally determined contributions" (NDCs), and in conformity with both WTO law and the Paris Agreement, the EU Member States have adopted the EU Emission Trading System (ETS) as a "cap and trade" scheme intended to lower GHG emissions in the most cost-effective ways without significant government intervention.[45] The CBAM complementing the ETS requires that for all products subject to the relevant legislation (iron and steel, cement, fertiliser, aluminium, hydrogen and electricity) – whether domestic or imported – a carbon price is paid commensurate with the carbon emissions generated during production. Payments under CBAM will begin after a transitional period (2023–25) and be phased in over a decade from 2026 to 2035 in parallel with the

[39] *Greenpeace Nordic and the Finnish Association for Nature Conservation v. Finland* [Supreme Administrative Court of Finland], judgment of 6 June 2023, FI:KHO:2023:62.

[40] *KlimaSeniorinnen Schweiz and Others v. Federal Department of the Environment, Transport, Energy and Communications* [Supreme Court in Switzerland], judgment of 5 May 2020, 1C_37/2019.

[41] ECtHR, *KlimaSeniorinnen Schweiz and Others v. Switzerland* (App. No. 53600/20), 26 November 2020. On the judgments by the ECtHR of 9 April 2024 in favor of the complainants see the critical analysis by K. Schayani, *No Global Climate Justice from this Court*, Völkerrechtsblog, 15 April 2024, available at: https://voelkerrechtsblog.org/no-global-climate-justice-from-this-court/ (accessed 30 August 2024).

[42] ECtHR, *Carême v. France* (App. No. 7189/21), 7 June 2022; *see* Schayani, *supra* note 41.

[43] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Other States* (App. No. 39371/20), 1 December 2020; *see* Schayani, *supra* note 41.

[44] All these climate cases are discussed by Eckes, *supra* note 30.

[45] For an explanation of the ETS, the CBAM and their legislative framework, *see* European Commission ,*EU Emissions Trading System (EU ETS)*, available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en (accessed 30 August 2024).

phasing-out of the free allowances which are currently available under the ETS, thereby ensuring equal treatment between EU and non-EU producers. In conformity with Art. 6 of the Paris Agreement if, for an imported product, the carbon price has been paid in the non-EU country, no adjustment is required upon importation into the EU; if not, an adjustment tariff must be paid equivalent to the carbon price that would have been paid if the product had been made in the EU. As any effective decarbonisation is likely to reduce ETS/CBAM payments, ETS/CBAM systems promote the internalization of the environmental costs of carbon emissions by giving effect to the polluter pays principle. Apart from the EU ETS, national or sub-national emission trading systems are now tested or under development in about 70 countries. The EU ETS legislation provides for the possibility to link the EU ETS – as the world's first major and biggest international carbon market – with other compatible emissions trading systems (e.g. as agreed with EFTA countries). The EU's bilateral and multilateral consultations with exporting countries – e.g. in the OECD, the G7's Climate Club, the WTO, and the UNFCCC – are assisting exporting countries and industries to find WTO-consistent agreements on participation in the ETS, promoting decarbonization of industries in ever more third countries. As the voluntary NDCs under the Paris Agreement fall short of preventing climate change, and emission trading systems outside Europe apply only at the national or sub-national levels of governance, the EU's multilateral ETS/CBAM system promotes EU leadership in the development of additional ETS/CBAM systems and GHG reductions in third countries.[46]

The EU remains committed to regulating and implementing its CBAM in conformity with both UN and WTO law.[47] Even though collecting carbon tariffs at the border as an integral part of the EU ETS could be deemed to violate GATT Arts. II or III, Art. XX GATT justifies the EU's ETS/CBAM system to the extent that it is non-discriminatory and necessary for protecting the human right to protection of the environment (Art. XX, para. a); human, animal and plant life or health (para. b); non-discriminatory internal product and production standards like ETS systems (para. d); or is related to the conservation of exhaustible natural resources "in conjunction with restrictions on domestic production or consumption" (para. g).[48] The EU Commission also initiated bilateral negotiations with third countries (such as India, African countries, the USA) on, *inter alia*, how to define agreed production standards (e.g. for carbon-intensive "dirty steel"); and agreed-

[46] *See* EU Commission, *supra* note 27, pp. 154, 268.

[47] *Ibidem*, p. 268.

[48] For a detailed legal explanation *see* J. Flett, *The EU Carbon Border Adjustment Mechanism. A Transnational Governance Instrument Whose Time Has Come*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 172–205.

on procedures for calculating the carbon content of traded products and services; the mutual recognition of diverse climate change mitigation policies in import and export countries (e.g. environmental taxes and subsidies); and "common but differentiated responsibilities" (e.g. exemptions of least developed countries and of small and medium enterprises from less-developed countries).

2.5. Sustainable development as new regulatory integration paradigm

EU law recognizes (e.g. in Art. 3 TEU) "sustainable development" as a regulatory task of both internal and external EU policies, and EU legal practices integrate trade and environmental policies in mutually coherent ways. The UN Sustainable Development Agenda and the sustainable development objectives of WTO law lack, so far, a similarly coherent interpretation and development of UN and WTO rules and practices. The more UN HRL and democracy are contested by authoritarian governments, the more the universally agreed SDGs and republican constitutionalism could become the new focus of UN governance. In order to assist UN Member States in designing mutually coherent NDCs under Art. 4 of the Paris Agreement, the WTO – during the "Trade Day" at the COP 28 conference at Dubai – recommended using efficient, WTO-consistent trade policy tools for climate change mitigation policies.[49] WTO Director-General Ngozi Okonjo-Iweala also welcomed the "steel standards principles for decarbonization" launched at COP 28 and developed by standard-setting bodies, international organizations, steel producers, and industry associations. Given that non-discriminatory carbon taxes and emission trading systems offer efficient and democratically accountable policy instruments for mitigating climate change by reducing harmful carbon emissions, the EU's CBAMs set incentives for all trading countries to make their NDC commitment under the Paris Agreement more efficient and WTO-consistent.[50] The 2022 WTO agreement on Fisheries Subsidies – which establishes binding prohibitions and rules to ensure that fishery subsidies do not undermine the sustainability of marine resources – is the first WTO agreement prioritizing environmental sustainability. Civil society has

[49] *Cf. Trade Policy Tools for Climate Action*, World Trade Organization, Geneva: 2023, which describes the options as (1) introducing trade facilitation measures to reduce greenhouse gas emissions associated with cumbersome border customs procedures; (2) deploying green government procurement policies; (3) using international standards to avoid fragmentation when upgrading energy efficiency regulations; (4) reviewing regulations and restrictions on providers of climate-related services to support climate mitigation and adaptation efforts; (5) rebalancing import tariffs to increase the uptake of low-carbon technologies; (6) reforming environmentally harmful subsidies to unlock additional resources for climate action; (7) facilitating and increasing trade finance to support the diffusion of climate-related technologies and equipment; (8) improving how food and agricultural markets function to support climate adaptation and mitigation by easing trade in food; (9) strengthening sanitary and phytosanitary systems to protect economies from the spread of disease, pests and other related risks heightened by climate change; and (10) improving the coordination of climate-related internal taxes, including carbon pricing and equivalent policies, to reduce policy fragmentation and compliance costs.

[50] For a detailed legal explanation, *see* Flett, *supra* note 48.

been calling ever more on the WTO Ministerial Conference in February 2024 to adopt WTO Ministerial Declarations clarifying the WTO sustainable development goals and WTO rules (e.g. on environmental subsidies, CBAMs, and process and production standards) in conformity with UN law.[51]

3. CONCLUSIONS: ADVANTAGES AND LIMITS OF CONSTITUTIONALISM

Section 1 explained why political realism (e.g. prioritizing national security) and the embedded liberalism underlying UN and WTO law (such as security exceptions, UN HRL, WTO rules on non-discriminatory trade competition) have not prevented governance failures which are undermining the universally agreed upon SDGs. Yet the reality of constitutional pluralism existing alongside power-oriented legal disintegration among authoritarian and democratic countries does not prevent an "overlapping consensus" on functionally limited, multilevel constitutionalism in areas of common interest (like climate change mitigation and other SDGs). Section 2 illustrated why European integration law, democratic, republican, and common law constitutionalism have enabled greater input- and output-legitimacy in the EU governance of SDGs (like climate change mitigation) than in UN governance and in most UN Member States. Multilevel constitutionalism in internal and external EU relations – based on the ancient insight that *foreign policy* and military powers require no less constitutional restraints than *domestic policy* powers[52] – remains the main driver for defending the international rule of law and protecting human rights (e.g. of millions of refugees from Ukraine fleeing to the EU) in internal and external EU relations.

3.1. The need for transformative constitutional politics

Since the creation of the European economic communities in the 1950s, the democratic input-functions, republican output-functions, and human rights-functions of Europe's transformative, multilevel constitutionalism have succeeded in creating a European society as a sociological reality (as acknowledged in Art. 2 TEU), whose

[51] *See* D. Esty, J.Y. Remy, J. Trachtman, *Villars Framework for a Sustainable Global Trade System*, Remaking Trade for a Sustainable Future, 7 September 2023, available at: https://shridathramphalcentre.com/wp-content/uploads/2024/02/Villars-Framework-2.0.pdf (accessed 30 August 2024).

[52] That foreign policy powers (*e.g.* to conclude peace treaties and military alliances) are among the most dangerous policy powers that must remain subject to domestic constitutional restraints, was already emphasized by D. Giannotti, after the fall of the third Florentine republic (1527–1530) due to alliances concluded by the Medici with the Pope and the German emperor. *Cf.* the critical edition and introduction by G. Silvano, D. Giannotti, *De Republica Fiorentina*, Droz, Geneva: 1990.

ordoliberal governance has become part of European constitutional law and practices; it can be characterized by the following five "ordoliberal principles":

1. The *interdependence of orders* in European economic, political, legal and social integration and policy processes is emphasized in Art. 2 TEU and has promoted social and political support for European solidarity, evidenced in the EU's constructive responses to financial, environmental, health, security, and other recent global crises.
2. The TEU prescribes a "*competitive social market economy*" (Art. 3) with active social policies responding to the social, economic and political pressures caused by economic and democratic competition, for instance by assisting market participants (like workers, consumers, producers, citizens and migrants) to adjust to open competition, and supporting non-discriminatory conditions of competition in both the economic and political markets.
3. The EU's multilevel democratic constitutionalism is supplemented by "*economic*" and *"environmental constitutionalism*" structured by mutually coherent legal, political, economic and social principles for limiting market failures, related governance failures, and constitutional failures (as recognized in Arts. 3–12 TEU).
4. The EU's *foreign policy constitution* prescribes *transnational, rules-based liberal orders* based on respect for human and constitutional rights, transnational rule-of-law, and multilevel constitutionalism (e.g. as recognized in Arts. 3 and 21 TEU).
5. The dynamic evolution of EU constitutional, legislative, administrative, judicial and foreign policy practices is driven by *constitutional politics and constitutional economics*, both inside and beyond the EU and its broader EEA, for instance seeking solutions to new regulatory challenges by balancing the EU constitutional principles in multilevel democratic and judicial decision-making processes focused on citizens' interests – rather than only through state-driven intergovernmentalism as in the UN and WTO governance practices.

Section 2 offered and described examples where the EU's economic and environmental constitutionalism contributed to UN and WTO legal reforms (e.g. with respect to judicial remedies, human rights, and environmental protection). The *factual realities* of power politics do not justify abandoning the universally agreed UN human rights and governance ideals in the never-ending human search for justice (e.g. in the sense of reasonable justification of law and governance). Constitutional democracies must continue to follow their mandates (e.g. in Art. 21 TEU) to promote human rights, democratic self-government, the rule-of-law, and the universally agreed SDGs both at home and abroad. Yet factual realities – like the insufficient NDCs under the Paris Agreement, illegal WTO practices disrupting the WTO dispute settlement system,

and neoliberal biases in the 1994 Energy Charter Treaty and related investor-state arbitration undermining sustainable development – call for *normative consequences*, such as the enhanced use of plurilateral agreements as second-best policies and withdrawal from the Energy Charter Treaty (as approved by the EU Council in May 2024). Reasonable citizens and UN and WTO member governments should support EU leadership for designing ETS/CBAM systems in conformity with UN and WTO law – in contrast to the US Inflation Reduction Act of 2022 with its WTO-inconsistent tax and subsidy discriminations, and to the unwillingness of China and India to accept the COP climate policy commitment of phasing-out fossil fuel electricity and coal subsidies aimed at realizing zero-carbon economies by 2050. Plurilateral climate clubs are more likely to remedy some of the failures of the Paris Agreement (like disagreements on "common but differentiated responsibilities"; financial and technical assistance for GHG reductions in less-developed countries). Reasonable citizens must continue their democratic struggles for sustainable development reforms (e.g. at COP conferences) following the example of the EU's unique, multilevel constitutional, parliamentary, participatory and deliberative democracy (*cf.* Arts. 9–12 TEU).

3.2. Political limits of constitutionalism

Europe's millennia of constitutional traditions facilitated the adoption of the EU's unique "foreign policy constitution" requiring the EU to "support democracy, the rule of law, human rights and the principles of international law", including "strict observance of international law", including in the EU's external policies.[53] Yet Europe's multilevel democratic and republican constitutionalism has no parallel in Africa, the Americas and Asia. Section 1 explained why the incoherencies between neoliberal, ordoliberal, totalitarian and third world approaches to multilevel governance of PGs render constitutional reforms of UN and WTO law increasingly unlikely. The diverse prioritization of values in business-driven internet regulations (e.g. prioritizing self-regulation by American tech companies); in state-driven Chinese internet regulation (e.g. prioritizing censorship and politically imposed localization requirements for data storage); and in European internet regulation (prioritizing e.g. data privacy and other fundamental rights protection);[54] and the

[53] *Cf.* E.U. Petersmann, *The EU's Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements*, 21(4) European Foreign Affairs Review 449 (2016), pp. 449–468. For more on the ancient constitutional principles that "the polis should make reason into a law for itself and be guided thereby both internally and in its relations with other poleis" (Plato, *The Laws*, Book I, Harvard University Press, London: 1968, p. 645b, available at: https://topostext.org/work/484 (accessed: 30 August 2024)), and on the constitutional particularities of EU foreign policy, *see* M. Cremona (ed.), *Structural Principles in EU External Relations Law*, Hart Publishing, Oxford: 2018.

[54] *For details see* A. Bradford, *Digital Empires: The Global Battle to Regulate Technology*, Cambridge University Press, Cambridge: 2023. For more on the "telecommunications revolution" enabling the "weaponization" of social media and of political elections through disinformation (*e.g.* through abuses of

refusal by hegemonic countries (like China, Russia and the USA) to accept the jurisdiction of the ICC and to further the non-proliferation treaty's goal of nuclear disarmament; Russia's imperial wars of conquest; and the 2022 exclusion of Russia from the Council of Europe (also terminating Russian membership in the ECHR) confirm the existence of geopolitical rivalries provoking international legal disintegration. They demonstrate the political limits of constitutionalism vis-à-vis authoritarian governments disregarding the most fundamental UN legal principles of human rights, the sovereign equality of UN Member States, and rule-of-law.

If former US President Trump should be re-elected as US President in 2024 and realizes his plan to introduce a protectionist tariff wall around the US market, the world risks a repetition of the retaliatory trade protectionism provoked by the 1930 Smoot-Hawley Tariff Act of the US Congress, leading to further economic disintegration and political conflicts. As decarbonization of economies (e.g. by carbon taxes, border carbon adjustments, limitation of fossil fuel subsidies, GHG emission trading systems) will inevitably create trade, investment and environmental disputes, it is to be welcomed that most WTO members continue opposing the US disruption of the compulsory WTO dispute settlement system. In order for humanity to learn from its past constitutional failures and from Europe's multilevel constitutionalism which has enabled 70 years of unprecedented peace and social welfare among more than 40 democracies cooperating in the Council of Europe, the UN Secretary-General rightly promotes "cosmopolitan human rights values" and private-public partnerships providing PGs (like pharmaceutical industries producing vaccines; environmental technology industries promoting the decarbonization of economies; global internet companies assisting in the protection of cyber security; and the International Chamber of Commerce using its global network of national chambers of commerce and of some 50 million enterprises for carrying out UN food security programs).[55] Such private-public governance partnerships can enhance civil society support and "participatory democracy", thereby legitimizing the multilevel governance of PGs. They render collective responses to global governance crises more effective, for instance by initiating democratic climate protection legislation and climate litigation holding governments more accountable.[56] As European in-

artificial intelligence, internet censorship, China's data-driven surveillance capitalism and social credit systems for individuals and corporations, computer hacking and subversion) *see* M. Galeotti, *The Weaponisation of Everything: A Field Guide to the New Way of War*, Yale University Press, New Haven: 2022.

[55] *See* P. Lamy, *Reforming International Governance: Multilateralism or Polylateralism?*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 238–242; J. Denton, *Transnational Governance Failures – a Business Perspective and Roadmap for Future Action*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 243–250

[56] By defining economic welfare in terms of informed, voluntary consent to mutually beneficial rules, rather than only as utilitarian output efficiency (like macro-economic "Kaldor-Hicks efficiency" gains greater

tegration and EU enlargement policies have proven to be the most effective policy tools for protecting human rights, democratic peace, and other PGs since World War II, the EU and UN institutions must continue promoting democratic and republican constitutionalism as policy tools for protecting transnational PGs also beyond Europe.

than related social costs), constitutional economics sets strong incentives for rights-based, participatory and deliberative democratic and economic bottom-up reforms (like enhancing judicial remedies in trade, investment and environmental laws, stakeholder responsibilities of transnational corporations, and their monitoring by civil society). Constitutional economics also justifies the practice in the Athenian democracy 2,500 years ago to use the Greek term "idiot" for denouncing those citizens who pursue only their private self-interests without understanding that PGs require peaceful cooperation among all citizens.