

# Legal, Constitutional and Cosmopolitan Pluralism: A Paradox? A Short Reply to My Chinese Critics

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*In their recent article titled *Pluralism or Cosmopolitanism? Reflections on Petersmann's International Economic Law Constitutionalism in the Context of China*, Tao Li and Zuoli Jiang have criticized the alleged 'paradox' that my publications "stress 'legal pluralism' on the one hand, while calling for a cosmopolitan conception of IEL on the other hand." This short comment aims not only at clarifying conceptual misunderstandings due to our different "constitutional law perspectives," but also explaining why China should embrace a 'dialogical' rather than "exclusive legal perspectivism" by continuing to implement its international legal obligations (e.g., under the UN/WTO law) in good faith and assuming more leadership for the global public good of the rules-based world trading system, with due respect for its underlying 'legal pluralism' and often indeterminate 'basic principles.' My Chinese critics' emphasis on the reality of authoritarian Chinese "top-down conceptions" of law and governance neglects China's obligations under international law and China's compliance with the WTO, investment and commercial adjudication.*

**Keywords:** IEL, Constitutionalism, WTO, China, Top-Down Conceptions

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## 1. Introduction

In their recent article titled *Pluralism or Cosmopolitanism? Reflections on Petersmann's International Economic Law Constitutionalism in the Context of China*, Tao Li and Zuoli Jiang have criticized the alleged 'paradox' that my publications "stress 'legal pluralism' on the one hand, while calling for a cosmopolitan conception of IEL on the other hand."<sup>1</sup> They claim that there are no 'universalizable' principles and common constitutional principles that can guarantee the compatibility between the two;<sup>2</sup> as evidence, they mention my references to "bottom-up individual struggles" for justice in "cosmopolitan legal systems" like transnational commercial, trade, investment and human rights law ("HRL"),<sup>3</sup> whereas Chinese thought is characterized by "top-down overall consideration."<sup>4</sup> Is their conclusion justified that "the value divergence between the goodness of human nature in Chinese thought and the evil of human nature in Western thought makes 'legal pluralism' an insurmountable obstacle to a cosmopolitan conception of IEL"? Is it realistic to deny "struggles for justice and human rights" also inside China since the establishment of the first Republic of China in 1912? Even today, citizens and human rights advocates invoke human rights (e.g., of foreigners, minorities, citizens in separate customs territories like Hong Kong and Taiwan) inside the People's Republic of China ("PRC").<sup>5</sup> Can President Xi Jinping's declared commitment - for instance, in his speeches of 17 January 2017 at the World Economic Forum at Davos and of 10 April 2018 at the Boao Forum for the Asia Annual Conference 2018 - to Chinese leadership for maintaining an open, rules-based, equitable and sustainable world trading system be realized without respecting the 'constitutional pluralism' and agreed 'basic principles' underlying the UN/WTO law?

This short reply continues the discussions triggered by Tao Li and Zuoli Jiang's previous article on *Human Rights, Justice and Courts in IEL: A Critical Examination of Petersmann's Constitutionalization Theory*.<sup>6</sup> As I developed my 'constitutional approach' to international economic law ("IEL") from German, European and the UN law perspectives, my critics rightly note that I "have taken little consideration of Chinese philosophy and thought, which is likely to provide new valuable insights on supplying transnational public goods."<sup>7</sup> My Chinese critics are to be commended for explaining different Chinese legal and moral perspectives

and their impact on interpretation and conflict avoidance in international law. This short comment aims not only at clarifying conceptual misunderstandings due to our different “constitutional law perspectives.” It also explains why China should embrace a ‘dialogical’ rather than ‘exclusive legal perspectivism’ by continuing to implement its international legal obligations (e.g., under the UN/WTO law) in good faith and assuming more leadership for the global public good (“PG”) of the rules-based, mutually beneficial world trading system, with due respect for its underlying ‘legal pluralism’ and often indeterminate ‘basic principles’ (e.g., as explicitly mentioned in the Preamble of the WTO Agreement).

My Chinese critics emphasize the methodological differences between authoritarian Chinese “top-down conceptions” of law and governance and democratic “bottom-up constitutionalism.” Yet, I share their sociological premises that:

- the “implications of ‘human rights,’ ‘justice’ and ‘judicial review’ as related concepts are intimately shaped by the philosophical ideas, culture and even natural conditions in a specific society”;<sup>8</sup>
- “people still tend to devote their loyalty to and value commonality with families, intimates, and groups of the same identity rather than abstractive and void cosmopolites”;<sup>9</sup> and
- “the friction between Petersmann’s theory and Chinese thought can be explained from the perspective of their different views of human nature,”<sup>10</sup> as illustrated by my emphasis on supplementing historical ‘sociological lessons’ (including those emphasized by Confucius) by the modern Kantian ‘enlightenment imperative’ to strive for “man’s release from his self-incurred tutelage” through intellectual self-liberation, individual and democratic self-determination, and public use of human reason challenging authoritarian restraints of democratic self-governance.<sup>11</sup>

My “European legal perspectivism” emphasizes that human rights, democracy and constitutionalism require respect for legitimate ‘constitutional pluralism’ resulting from different legal cultures and democratic preferences. My publications acknowledge that human rights, rule of law, democracy and constitutionalism remain indeterminate legal concepts and principles that are legitimately construed in diverse ways depending on the legal cultures and democratic preferences of local people. Yet, one-sided Chinese insistence on interpretive and normative

autonomy of China's legal system risks undermining the need for protecting transnational rule of law and coherent multilevel governance of global PGs. In order not to repeat my previous reply to Chinese criticism of my European conceptions of human rights and of judicial protection of justice (*e.g.*, in the sense of publicly justified legal reasoning respecting "due process of law" for all affected persons),<sup>12</sup> this short comment focuses on why the UN/WTO law and globalization require interpreting legal and 'constitutional pluralism' and 'cosmopolitanism' in mutually compatible ways, notwithstanding the *de facto* differences between Chinese law and European law and their normatively often diverse interpretations of indeterminate 'principles' underlying the UN/WTO law. Clarifying these methodological problems of IEL is important for peaceful cooperation and conflict prevention among different jurisdictions.

## 2. Factual vs. Normative 'Legal Pluralism'

The 'Hart-Dworkin debate' on the role of indeterminate 'principles' as integral parts of rules-based legal systems continues for now more than half a century.<sup>13</sup> Also, Anglo-Saxon legal systems and the UN HRL do not follow the European constitutional traditions of protecting economic freedoms of profession and business as in Article 16 of the 2009 European Charter of Fundamental Rights and in the constitutional laws of European federal states (like Germany and Switzerland). My Chinese critics are to be commended for exploring legal and methodological IEL questions from the different perspectives of 'Asian values' and legal cultures, including their difficulty "to arrive at an 'overlapping consensus' in the constitutionalization of IEL from Petersmann's advocating of economic freedoms."<sup>14</sup> My publications call for "critical legal positivism" in view of the need for clarifying the dynamic interrelationships between the "law in the books" and the "law in action" from the legal-cultural perspective of how diverse private and public, national and international legal actors justify their legal practices through often conflicting interpretations of 'principles' underlying legal rules and institutions. The term 'legal pluralism' is used in two different ways:<sup>15</sup>

- As a *descriptive term*, legal pluralism refers to the factual coexistence of more than 200 diverse national legal orders with thousands of public and

private, transnational and international legal orders governed by hundreds of international organizations, thousands of transnational corporations (*e.g.*, TNCs governing production and trade of goods and services through contractual regimes and global supply chains), and millions of other producers, investors, traders and consumers participating in the global division of labor through global communications and economic transactions. Due to globalization, this plurality of legal systems interacts in “overlapping legal spaces” as illustrated by commercial and investment arbitration inside China, or by implementation of WTO legal rules and dispute settlement findings by the Chinese government.

- As a *normative legal term*, legal pluralism challenges traditional, binary conceptions of national and international legal systems as separate ‘black-boxes’ in view of their complex, normative interactions in multilevel governance of PGs. Most national and international legal systems require mutually consistent interpretation and integration of ‘overlapping legal systems’, as explicitly prescribed

- in many national Constitutions incorporating international law rules into domestic legal systems;
- in the ‘systemic integration principle’ of Article 31:3(c) of the Vienna Convention on the Law of Treaties (“VCLT”); and also
- by the universal recognition of the ‘interdependence’ and ‘indivisibility’ of civil, political, economic, social and cultural human rights.

Transnational economic and legal cooperation cannot remain consistent and efficient without promoting the mutual coherence of the multiple legal systems involved through domestic implementation of international legal obligations, as prescribed in international treaties (like Article XVI:4 of the WTO Agreement, Article 27 of VCLT, Article 103 of the UN Charter). Hence, the more globalization transforms *national* into *transnational PGs* (like monetary, trading, investment, environmental, communications and security systems) and UN member states limit their national legal, political, economic and welfare systems through multilevel ‘PGs treaties’ regulating the collective supply of such transnational PGs for the benefit of citizens, the more must multilevel governance of transnational PGs be interpreted and protected as a functional unity aimed at protecting PGs in a globalizing world where no single state can protect such PGs without international law and multilevel governance.

Law exists only in the human minds of legal actors and in their legal practices. The ‘legal perspectivism’ of my Chinese critics emphasizes the authoritarian characteristics of the national legal system of China’s communist party state, whose basic norms (*e.g.*, rules of recognition, change and adjudication) and ‘public interests’ are defined by the communist bureaucracy denying - as my Chinese critics - “universalizable, common constitutional principles.” Yet, such dogmatic ‘exclusive perspectivism’ is empirically contradicted by China’s acceptance of human rights treaties, trade, investment and other treaties, and general international law rules based on universal ‘legal principles’ like the customary treaty requirement of interpreting treaties “in conformity with principles of justice,” including also “human rights and fundamental freedoms for all” (as codified in the Preamble of the VCLT).

“Normative legal pluralism” is also recognized by China’s acceptance of commercial and investor-state arbitration and by domestic implementation inside China of the WTO legal obligations and the related WTO dispute settlement rulings. Such Chinese and international legal practices challenge “exclusive legal perspectivism”; they confirm “inclusive legal pluralism,” for instance, if:

- the UN, the WTO and investment courts review the consistency of Chinese legal measures with international law;
- foreign governments, foreign visitors and investors, human rights advocates, or commercial arbitrators inside China invoke and apply China’s international law obligations as agreed legal restraints of China’s legal autonomy;
- the Chinese government itself introduces “rule of law reforms” inside China so as to better ensure the consistency of Chinese trade governance with China’s WTO legal obligations (*e.g.*, to protect trading rights, property rights and judicial remedies as defined in China’s WTO Accession Protocol); or
- the Chinese government exercises ‘diplomatic protection’ abroad in order to protect Chinese citizens or companies in foreign jurisdictions by invoking internationally agreed legal rules and principles restraining other UN member states.

This transnational legal enforcement (*e.g.*, through arbitration and adjudication) of some of China’s transnational legal rights and responsibilities refutes the “black box model” of territorially isolated legal systems. Rather, it confirms the modern reality of overlapping, interdependent legal spaces of multilevel governance

of transnational PGs, even if international claims of legal authority are always limited to particular fields of mutually agreed cooperation. Also, the UN human rights bodies do not share Chinese claims that the UN HRL applies only in external relations among States without requiring legal and judicial protection of individual rights inside national jurisdictions.<sup>16</sup> This transnational law protecting also individual rights and remedies (*e.g.*, under human rights law, criminal law, consular law, commercial, trade and investment law, labor law, internet law)<sup>17</sup> contradicts claims of isolated legal nationalism, as advocated by my Chinese critics.

### **3. ‘Constitutional Pluralism’ and the Need for Inclusive ‘Cosmopolitan Democracy’**

Today, there exist more than 200 states with national constitutions (written or unwritten). This ‘constitutional pluralism’ bears witness to the universal recognition of constitutionalism as the most important political invention and ‘legal methodology’ for constituting, limiting, regulating and justifying limited government powers “of the people, by the people, and for the people” guiding and constraining their collective governance of PGs. Similar to the factual diversity of legal cultures, the term ‘constitutional pluralism’ may be used for describing the *de facto* diversity of constitutional instruments, including national constitutions ‘without constitutionalism’ (*e.g.*, denying ‘constituent powers’ of the people).<sup>18</sup> As a normative term, ‘constitutionalism’ refers not only to long-term rules, principles and institutions of a higher legal rank constituting, limiting, regulating and justifying legal and political systems (*e.g.*, the law and polity of a nation state, or of a functionally limited international organization), including such sectorial sub-systems like the economic, social, security and “foreign policy constitutions” of the European Union.<sup>19</sup> Constitutionalism also refers to the normative task of promoting transnational rule of law based on ‘principled coherence’ and progressive ‘constitutionalization’ of multilevel private and public, domestic and international legal systems for collective supply of ‘overlapping PGs’ (like monetary, trading, investment, financial, environmental and related legal and communications systems).

By acknowledging that China's 1982 Constitution and the UN human rights treaties ratified by China are *not* among the 'applicable laws' that can be invoked, protected and enforced in Chinese courts, my critics admit that China lacks an effective *legal constitution* protecting human rights and 'access to justice' as defined in UN law. [Emphasis added] Currently, China's *real constitution* - e.g., in terms of its *de facto* power structures dominated by China's Communist Party ("CCP") - does not seem to aim at *constitutionalization* (e.g., in the sense of progressive, legal institutionalization) of the human and constitutional rights formally recognized in the successive amendments of China's constitutional documents. [Emphasis added] From this current perspective of China's *real constitution*, my Chinese critics may be right that some of the legal principles universally recognized in UN law - like human rights, rule of law and democracy - are not implemented by the 'CCP state' inside China. [Emphasis added]

Yet, other universally recognized principles - like those underlying transnational commercial, trade and investment law and adjudication and general international law (like freedom of contract and commercial arbitration, individual trading, property and investor rights and related adjudication, state sovereignty and state responsibility, the 'sustainable development' principle recognized in the UN/ WTO law) - are recognized and practiced in China's transnational relations. Due to China's active participation in regulating transnational cooperation and 'globalization,' Chinese emigrants abroad (e.g., Chinese students and investors in foreign countries), like foreign immigrants inside the PRC, constantly invoke rules and principles of 'transnational law' and of consular and diplomatic protection of migrants. In his 2017 speech at the World Economic Forum at Davos, President Xi Jinping acknowledged that globalization transforms the world community into a 'global village' requiring legal protection of all people involved in the global division of labor.<sup>20</sup>

This challenge of 'overlapping membership' of citizens in home and host states benefitting from transnational movements of goods, services, investments and persons requires China - no less than other countries - to protect domestic and foreign citizens and related 'stakeholders' in transnational cooperation (like China's ambitious "Belt and Road" investment programs). Also, in the bilateral and multilateral relations with other Chinese customs territories that are economically autonomous members of the WTO, peoples and governments insist



on respect for shared legal principles like China's 'state sovereignty,' the Chinese people's right to democratic self-determination, and mutually agreed WTO and investment law rules and principles governing trade among WTO members.

Due to China's participation in ever more 'PGs treaties' responding to the globalization of PGs, the 'constitutional challenges' discussed in European legal integration – like protecting legitimate 'dual citizenships', regulating the 'demos problem' accordingly (*e.g.*, by allowing EU citizens to participate in local self-determination in their chosen 'host countries'), and protecting *all affected interests* and *all subjected persons* in multilevel regulation of transnational movements of persons – increasingly exist also in China, as illustrated:

- by the recent WTO complaints challenging China's restrictions of intellectual property rights and discrimination of foreign investors;
- by democratic protests against the PRC's limitations of human and constitutional rights in Hong Kong; or
- by democratic contestation in Taiwan on how to define their *demos* and democratic polity.<sup>21</sup>

Rather than continuing dogmatic "friend-enemy dichotomies" (Carl Schmitt)<sup>22</sup> and menacing neighbors by unilateral military extension of territorial jurisdiction, respect for legitimate 'constitutional pluralism' calls for protecting citizens by applying the "all affected interests principle," "all subject to coercion principle," and "all citizenship stakeholders principle," as practiced in the multiple citizenship regulations in European integration.<sup>23</sup> China's authoritarian "socialist market economy" is designed in very different ways (*e.g.*, in terms of domination by the CCP) than the decentralized "competitive social market economy" prescribed in Article 3 of the 2009 Lisbon Treaty on European Union ("TEU"). My 2015 lectures at the Xiamen Academy of International law emphasized the social and legal advantages of elaborating a *sui generis Chinese constitutionalism* transforming China's *real, political constitution* into a transparent *legal constitution* acknowledging China's human rights obligations more specifically and taking into account the regulatory experiences of other countries with limiting market failures, governance failures as well as 'constitutional failures,' which exist in China no less than in other countries.<sup>24</sup> Constitutional pluralism argues for finding peaceful ways of promoting pragmatic forms of democratic and 'stakeholder

inclusion' - also in China - with due respect for diverse local, regional and national polities with different memberships, as recognized in the openness of the WTO membership not only for states, but also for sub-national and supra-national customs territories.<sup>25</sup> "Inclusive legal perspectivism" based on overlapping, democratic and cosmopolitan memberships of citizens, immigrants and emigrants - as it continues to influence the design of multilevel economic and HRL in Europe<sup>26</sup> - is also likely to promote Chinese unity, peace, welfare and inclusive citizenships more legitimately and more effectively than power politics based on "exclusive legal perspectivism" imposing power-oriented, imperial claims.

#### **4. Chinese Leadership for the UN and World Trading System Requires Respect for 'Cosmopolitan Constitutionalism'**

Even though the neo-liberal, postwar Bretton Woods agreements were initiated by the US under the leadership of Secretary of State Cordell Hull based on his previously adopted Reciprocal Trade Agreements Act of 1934,<sup>27</sup> the American 'Chicago School' and 'Virginia School' of "law and economics" focus on reforms of *national* economic law (e.g., inclusion of "balanced budget rules" in some US state constitutions) rather than on the coherent, multilevel regulation of the world economy. The 'Freiburg School' and 'Cologne School' of *ordo*-liberalism in Germany strongly influenced the legal and institutional design of postwar German and European economic law for a "social market economy" (as prescribed in Article 3 of TEU) founded on a micro-economic common market constitution (e.g., based on EU competition law, EU common market freedoms, economic and social rights protected in national and EU laws) and on a complementary, macro-economic monetary constitution. Yet, it was only the postwar 'Geneva School' of economists and lawyers, which systematically explored the multilevel economic and legal principles necessary for institutionalizing a coherent, *ordo*-liberal worldwide monetary and trading system based on the Bretton Woods and GATT/WTO agreements with their underlying economic principles.<sup>28</sup> By acceding to these agreements and implementing their legal obligations in domestic monetary and trade laws and policies, China has legally committed itself to complying with

the rules and principles of these worldwide economic integration agreements. Just as the UN bodies and tribunals (*e.g.*, based on the UN Convention on the Law of the Sea) and investment arbitral tribunals interpret China's international legal rights and obligations in light of the legal principles that are integral parts of the UN law and investment law, so do the WTO dispute settlement bodies interpret, apply and enforce China's rights and obligations under the WTO law in conformity with "the basic principles underlying this multilateral trading system" (Preamble to the WTO Agreement) as well as the "dispute settlement system of the WTO" (Article 3 of DSU). This 'systemic nature' of the WTO law cannot be understood without interpreting the - often indeterminate - WTO rules in light of their agreed, underlying legal and economic principles. China has exercised little leadership, so far, for adapting outdated WTO rules (*e.g.*, on state-trading companies, subsidies and other competition problems) to new regulatory challenges and for responding to the current WTO governance crises, for instance, by 'authoritative interpretations' pursuant to Article IX:2 of the WTO Agreement on the collective WTO legal duties to protect and maintain the WTO Appellate Body as defined in Article 17 of DSU (*i.e.*, as being "composed of seven persons," with vacancies being filled "as they arise") so as to contain the illegal US power politics blocking the appointment of the Appellate Body members since 2016.<sup>29</sup>

Chinese - and also some Western - economists have argued that "China's phenomenal economic success is largely due to its orthodox-defying institutional tinkering."<sup>30</sup> Similar arguments may be made from political and legal perspectives: Transforming and socially embedding China's 'economic revolution' since 1978 into a democratic and 'constitutional revolution' may require much more time. Democracy was invented for small city republics like ancient Athens; its effective protection - as, arguably, required by the UN law - in large 'continental states' (like China, India, Russia, the US) remains confronted with numerous difficulties. Yet, 40 years after China's 'economic revolution' of 1978 and 17 years after China's accession to the WTO, Chinese lawyers, politicians and economists should no longer deny that China's good faith implementation of the WTO legal and dispute settlement rights and obligations must respect the legal, political and economic "principles underlying this multilateral trading system," as prescribed in the WTO Agreement. The increasing number of the WTO dispute settlement proceedings initiated against China reflects this concern of the WTO

members that - as acknowledged by my Chinese critics - the *de facto* unlimited powers of the 'CCP state' (e.g., to discriminate foreign investors and force them to transfer intellectual property rights to Chinese companies) are inconsistent with 'basic principles' of the WTO and the UN law. Similarly, the arbitration award of July 12, 2016 under Annex VII of the UN Convention on the Law of the Sea ("UNCLOS") found the Chinese claims to control more than 80 percent of the South China Sea to be inconsistent with the principles of international maritime law.<sup>31</sup> It is encouraging that - during the WTO Public Forum in September 2017 - China's WTO Ambassador welcomed initiatives from Chinese academics for China joining the Trans-pacific Partnership ("TPP") and using this TPP (including its numerous rights-based provisions on trading, investment and judicial rights) for transforming the WTO into a new World Investment and Trade Organization<sup>32</sup> so as to promote more legal and institutional coherence between multilevel trade and investment rules and institutions. Yet, as revealed by the current WTO governance and dispute settlement crises and by resistance in some countries against Chinese 'Silk Road' projects, insufficient Chinese leadership for further developing the 'basic principles' of China's trade and investment agreements with third countries risks undermining the consistency and legitimacy of China's internal and external trade and investment policies.<sup>33</sup>

Having enormously benefitted from its active participation in the global division of labor based on the UN/WTO law, China should accept legal and political leadership for protecting the global PG of the rules-based world trading system by adjusting the WTO principles and rules to the regulatory challenges of the 21st century. China has criticized the 'legal discrimination' implicit in the "WTO plus commitments" in China's WTO Accession Protocol. As other WTO member states (like India) and US President Trump also criticize the 'unfairness' of some WTO rules and principles, China should lead initiatives for further developing WTO legal principles (e.g., of non-discrimination). China's "Silk Road projects" refer to China's ancient, cosmopolitan traditions at the time when Marco Polo travelled to, and worked at the imperial court in Xi'an. Today's legal reality of worldwide commercial, trade, investment, monetary, environmental and HRL and adjudication depends, likewise, on protecting transnational economic actors - and their movements of goods, services, persons, capital and related payments - through 'cosmopolitan IEL' (e.g., as a de-politicized basis for China's 'Silk Road'

investments and infrastructure cooperation projects). Without acknowledging this legal reality, China's participation in the WTO negotiations on new WTO rules (e.g., for subsidies, state-trading enterprises, excess capacities for steel production, digital e-commerce, liberalization of trade in services, investment facilitation) risks remaining 'un-principled' and incoherent. The more China and the US criticize each other for engaging in mutually harmful trade and economic policies - and third countries (like Japan and EU member states) respond to the "Chinese late-comer problem" and the US "diminished-giant problem" by prioritizing free trade agreements ("FTAs") with third countries outside the WTO framework -, the stronger becomes the need for transforming the current WTO legal, political and dispute settlement structures into a new 'WTO 2.0'.<sup>34</sup> The tensions among state-centered Chinese trade policies, private business-centered US trade policies, and citizen-centered EU FTAs require reviewing the WTO rules and institutions with a view to preventing 'populist disruption' of multilateral trade agreements (e.g., by the US Trump administration, the 'Brexit', and 'populist protectionism' inside the EU opposing the EU-Canada FTA).

## 5. Conclusion

By ratifying UN conventions on human rights, acceding to the WTO and concluding international investment agreements, China has committed itself to legal protection of human rights, private property rights, judicial remedies and other "basic principles underlying this multilateral trading system"<sup>35</sup> in its transnational regulations and governance. The UN and WTO bodies, investment arbitrators and national governments are legally required to interpret and apply these treaty obligations "in conformity with the principles of justice," including, *inter alia*, "human rights and fundamental freedoms for all," as prescribed by the customary rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties ("VCLT").<sup>36</sup> The UN/WTO law protect the sovereign discretion of states to design their domestic legal systems in legitimately diverse ways in conformity with the democratic preferences of their people. Yet, the *de facto* diversity and normative legal pluralism of domestic legal systems remain legally limited by the international rights and duties of states and of multilevel

governance institutions to respect and protect inalienable human rights and the legal primacy of international legal obligations over domestic law.<sup>37</sup> Multilevel governance of transnational PGs cannot remain effective without respect for the ‘cosmopolitan principles’ underlying transnational commercial, trade, investment, intellectual property, human rights law and other fields of multilevel governance of transnational PGs like global communications. China has not only legally recognized that “in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>38</sup> China and its government institutions are also legally required to implement the ‘principles’ and rules of the UN/WTO law in its domestic legal system. The recent WTO dispute settlement proceedings challenging Chinese violations of economic freedoms and property rights confirm the legal limits of ‘legal pluralism’ in China’s internal and external relations with third countries and foreigners.

Yet, there is also a danger of over-burdening WTO governance by using trade rules as a substitute for responding to other governance failures (*e.g.*, to prevent climate change, protect bio-diversity, reduce unnecessary poverty, or contain ‘free riding’ and power politics in non-trade policy areas). Results-driven rather than rules-based trade policies - as advocated not only by my Chinese critics, but also by the US Trump administration - have contributed to TPP and WTO governance crises that cannot be overcome without promoting more agreement on the ‘basic principles’ underlying the UN/WTO law as foundations of “freedom, justice and peace in the world.”<sup>39</sup> Unless China, the EU and other WTO Members assume their collective legal duties to protect the WTO legal and dispute settlement system (*e.g.*, the Appellate Body) against the recent, unilateral rule-violations by the US Trump administration (like discriminatory import duties on steel and aluminum, the illegal blockage of the filling of Appellate Body vacancies since 2016), the global PG of a mutually beneficial, rules-based world trading system risks being seriously undermined to the detriment of citizens all over the world.

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15. E.U. PETERSMANN, MULTILEVEL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS - METHODOLOGY PROBLEMS IN INTERNATIONAL LAW 113ff (2017).
16. *Supra* note 5. See also S. Besson, *Human rights as transnational constitutional law*, in HANDBOOK ON GLOBAL CONSTITUTIONALISM 234ff (A. Lang & A. Wiener eds., 2017).
17. M. MADURO, K. TUORI, & S. SANKARI (EDS), TRANSNATIONAL LAW. RETHINKING EUROPEAN LAW AND LEGAL THINKING (2014).
18. D. Law & M. Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 4ff (2013).
19. See generally K. TUORI, EUROPEAN CONSTITUTIONALISM (2015); E.U. Petersmann, *The EU’s Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements*, 21 EUR. FOREIGN AFF. REV. 449-69 (2016).
20. N. Barkin & E. Piper, *In Davos, Xi makes case for Chinese leadership role*, REUTERS, Jan. 17, 2017, available at <https://www.reuters.com/article/us-davos-meeting-china/in-davos-xi-makes-case-for-chinese-leadership-role-idUSKBN15118V>. See also A. Bruce-Lockhart, *Is China the new world power? The view from Davos*, World Economic Forum, available at <https://www.weforum.org/agenda/2017/01/china-new-world-power-davos-2017> (all last visited on July 12, 2017).
21. K. Fan Hsu, *Beijing Can’t Understand Taiwan’s Democracy*, FOREIGN POL’Y, Dec. 15, 2017, available at <https://foreignpolicy.com/2017/12/15/beijing-cant-understand-taiwans-democracy> (last visited on July 30, 2018). [Emphasis added]
22. In his book, THE CONCEPT OF THE POLITICAL (translated into English from the original German



edition in 1932 by G. Schwab, University of Chicago Press 2007), Carl Schmitt - who later in the 1930s became the 'crown jurist' of the German Nazi dictatorship - famously claimed that "the specific political distinction ... is that between friend and enemy" as hostile, political groups (*Id.* at 26) that may justify political dictatorship suppressing or eliminating the 'political enemies' who risk undermining the political identity of national communities and their protection against internal and external enemies. Schmitt admitted (*Id.* at 58) the 'theological grounding' of his conception of friend-enemy-politics and of his 'Hobbesian conception' of the allegedly evil nature of man, which needs to be kept in check by a strong state protecting social and political order.

23. *See generally* R. BAUBÖCK ET AL. (EDS), *DEMOCRATIC INCLUSION. RAINER BAUBÖCK IN DIALOGUE* (2018).
24. E.U. Petersmann, *Methodology Problems in International Trade, Investment and Health Law and Adjudication*, 11 *COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW* 228-32 (2017). [Emphasis added]
25. *See generally* C. H. WU, *WTO AND THE GREATER CHINA: ECONOMIC INTEGRATION AND DISPUTE RESOLUTION* (2012).
26. A. Peters, *Compensatory Constitutionalism : the function and potential of fundamental international norms and structures*, 19 *LEIDEN J. INT'L L.* 583 (2006). He maintained: Global constitutionalism is "a stand of thought (outlook or perspective) and a political agenda which advocates the application of constitutional principles, such as the rule of law, checks and balances, human rights protection and democracy, in the international legal sphere in order to improve the effectivity and fairness of the international legal order." *See also* G. Brown, *Cosmopolitanism and Global Constitutionalism*, in Besson, *supra* note 16, at 93-105.
27. K.W. Dam, *Cordell Hull, the Reciprocal Trade Agreements Act and the WTO*, in *REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE* 83-96 (E.U. Petersmann ed., 2005).
28. For a detailed account of these American, European and international schools of 'constitutional economics' and multilevel 'ordo-liberalism,' *see generally* Q. SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018). Notwithstanding the CCP's pragmatic reforms of communism (*e.g.*, of its claim to abolish private property), my Chinese critics neglect the 'economic principles' justifying market economies and IEL agreements ratified by China. *Ordo-liberalism* differs from neo-liberalism by perceiving markets as legal constructs, whose welfare-enhancing functioning depends on systematic limitations of 'market failures' and 'governance failures' through equal rights of citizens, constitutional and legal rules and institutions of a higher legal rank (like common market freedoms and social rights of citizens, competition and monetary laws protecting undistorted markets and price stability). Neo-liberalism is often influenced by 'bad economics' (like presumptions that de-regulation, liberalization and privatization always enhance social welfare).

29. E.U. Petersmann, *Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement*, 21 J. INT'L ECON. L. 103-22 (2018); *The Crown Jewel of the WTO has been stolen by US Trade Diplomats - and they have no Intention of Giving it Back*, in RESTORING TRUST IN TRADE - LIBER AMICORUM FOR PETER VAN DEN BOSSCHE (D. Prevost et al. eds., 2018).
30. D. Rodrik, *Rescuing Economics from Neoliberalism*, BOSTON REV., Nov. 6, 2017, available at <http://bostonreview.net/class-inequality/dani-rodrik-rescuing-economics-neoliberalism> (last visited on July 30, 2018).
31. South China Sea Arbitration (Phil. v. P.R.C.) (Perm. Ct. Arb. 2013), available at <http://www.pcacases.com/web/view/7> (last visited on July 30, 2018).
32. See World Investment and Trade Organization: Is It Possible for Global Governance? G20, TPP and WTO, Chinese Initiative of International Law, WTO Public Forum (Sept. 27, 2017), available at <file:///C:/Users/user/AppData/Local/Microsoft/Windows/INetCache/IE/3LCSH9VO/pf17programme.pdf> (last visited on Aug. 10, 2018).
33. E.U. Petersmann, *Trade and investment adjudication involving 'silk road projects': Legal methodology challenges* (EUI Working Paper Series 2018/02), available at [file:///C:/Users/user/AppData/Local/Microsoft/Windows/INetCache/IE/3ILT3G2Q/LAW\\_2018\\_02.pdf](file:///C:/Users/user/AppData/Local/Microsoft/Windows/INetCache/IE/3ILT3G2Q/LAW_2018_02.pdf) (last visited on July 30, 2017).
34. See, e.g., C. PRIMO BRAGA & B. HOEKMAN (EDS), FUTURE OF THE GLOBAL TRADE ORDER (EUI, 2d ed., 2017).
35. WTO Agreement pmbl.
36. VCLT pmbl. & art. 31.
37. *Id.* arts. 27, & 53; U.N. Charter art. 103.
38. International Covenant of Economic, Social and Cultural Rights of 1966, ratified by China in 2001, pmbl.
39. UDHR pmbl.