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Abstract

This contribution begins with an overview of the historical evolution of international trade leading to, today, five competing conceptions of international economic regulation (section I). The more some areas of trade regulation (like trade remedies, subsidies, internet services, intellectual property rights, appellate review) became dominated by business-driven, neo-liberal interest-group politics (section II), or are circumvented by non-transparent practices of state-capitalism and state-owned enterprises (section III), the less successful have the 'regulatory functions' of the World Trade Organization (WTO) become. From the entry into force of the WTO Agreement in 1995 up to 2020, the more than 420 WTO panel, appellate and arbitration findings – similar to the, by now, more than 1,020 publicly known investor-state arbitration (ISA) cases and related national court decisions (e.g. enforcing ISA awards) – protected higher degrees of transnational rule-of-law in worldwide trade and investment relations than in any previous period (section IV). Compared with rule-of-law among the 30 member states of the European Economic Area, however, ordo-liberal European economic constitutionalism has limited market failures, governance failures and rule-of-law deficits through more comprehensive judicial remedies and 'constitutional methods' than in neo-liberal and state-capitalist economies (section V). Since 2017, the hegemonic US assault on the WTO legal and dispute settlement system has disrupted WTO appellate review by re-introducing power politics (section VI). Similar to the criticism of neo-liberal 'investor biases' in commercial ISA, some WTO Appellate Body judges from the USA revealed political biases in support of neo-liberal, US trade policies (section VII). Justice, democratic constitutionalism and rule-of-law require protecting impartial WTO third-party adjudication as a precondition for rules-based, multilevel governance protecting global public goods like 'sustainable development', climate change mitigation, poverty reduction and public health for the benefit of citizens and their human rights, yet with due respect for legitimately diverse 'constitutional pluralism' (section VIII).

Keywords

Appellate Body; constitutionalism; neo-liberalism; ordo-liberalism; state-capitalism; WTO.

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International Trade and Modern International Economic Law*

Since ancient times, the human desire for more, better and a larger variety of goods and services has given rise to trade, division of labor and regulation of markets.[1] The technological transformations of the international economy (e.g. based on steam power, electricity, automation and digitalization) – and legal limitations of 'market failures' (e.g. through competition, social and environmental rules) and 'governance failures' (e.g. through tax reforms, protection of public goods and related human rights) – progressively transformed also international economic law (IEL). The first globalization during the 19th century, like the second globalization since the 1970s, of production, supply chains, trade and communications confirmed how different economic actors often prioritize different values and perspectives of IEL, like

- *private autonomy* advocated by private traders, producers and investors;
- *public autonomy* ('sovereignty') advocated by governments representing States;
- *economic efficiency* and consumer welfare emphasized by consumers;
- *democratic input-legitimacy* emphasized by democratic parliaments;
- *republican output-legitimacy* emphasized by counter-majoritarian, republican institutions (like central banks and regulatory agencies); or
- *transnational rule of law* and *equal individual rights* protected by courts of justice.

These competing 'legal perspectives' have promoted competing conceptions of IEL, as discussed below in section I. The private and public law, multilevel economic, administrative and constitutional conceptions of IEL also reflect 'struggles for justice' limiting abuses of power by transforming agreed 'principles of justice' (like judicial remedies protecting 'access to justice') into IEL legislation, administration and adjudication protecting citizens and their fundamental rights.[2] This is also true for the private and public, national and international law dimensions of the multilevel WTO legal and dispute settlement system constraining abuses of trade policy powers.[3] The 1994 agreements on the compulsory WTO jurisdiction for peaceful settlement of disputes, the launching of the 'Doha Round' of multilateral trade negotiations in 2001, and China's 2001 accession to the WTO were influenced by exceptional historical circumstances (like the fall of the Berlin Wall in 1989, the breakdown of the Soviet Union in 1991, the terrorist attacks on 9/11 in 2001) demonstrating the advantages of rules-based, multilateral cooperation. Yet, the destruction by the US Trump administration of the WTO appellate review system in December 2019 illustrates that international law developments reflect 'dialectic struggles' rather than linear 'enlightenment reforms'. The current rule-of-law crises, environmental and health crises suggest that the 'psychology' driving international legal practices often remains dominated

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[1] Cf. P.Coggan, More: The 10,000 Year Rise of the World Economy (London: Profile Books 2020).

[2] For a more detailed discussion of the five competing conceptions of IEL see E.U.Petersmann, International Economic Law in the 21st Century (Oxford: Hart 2012) Chapter I.

[3] On the transformation of the GATT into the WTO dispute settlement system, and its protection of private and public, national, international and transnational judicial remedies (like arbitration initiated by exporters challenging pre-shipment inspection company practices pursuant to Article 4 of the WTO Agreement on Pre-shipment Inspection), see E.U.Petersmann, The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement (Deventer: Kluwer 1997).

by 'fast thinking', selfish deal-making and populist (e.g. anti-élitist and anti-pluralist) power politics unless human animal instincts (like utility maximization) are institutionally limited by 'constitutional checks and balances' protecting 'slow reasoning' (e.g. in parliaments, courts of justice and 'deliberative democracies') and rule-of-law.[4]

IEL as private commercial law and international private law

Most transnational trade, financial and investment transactions are based on private contracts, property rights, national private law and 'conflicts law'. From the Roman *jus gentium* governing trade with foreigners, the medieval *lex mercatoria* serving as transnational commercial law in many parts of Europe, up to the common law freedoms in Anglo-Saxon countries and modern codifications of private and commercial law, international private law continues to evolve through national court decisions and commercial arbitral awards supervised and enforced in national jurisdictions. Some textbooks describe IEL from this 'bottom-up' perspective of private contract law regulating international trade transactions, financial services, investments and the global division of labor across hundreds of national and international legal systems and thousands of non-governmental regulations by transnational corporations. They emphasize

- the reality of competition, rivalry and decentralized legal coordination in transnational society;
- the 'private ordering ideal' and inevitable limits of 'top-down global governance';
- lessons from private international law for coordinating and resolving conflicts among jurisdictions and among transnational governance mechanisms; and
- the advantages of using private international law concepts for resolving conflicts among multiple systems of governmental and private ordering.

Yet does the confrontation of private and public international law with common regulatory problems – such as the need for overcoming parochial legacies of discrimination (e.g. against foreigners) – justify the conceptualization of IEL as 'conflicts law'? Arguably, the recognition by all UN member States of 'inalienable' human rights and of corresponding public goods (PGs) requires justifying IEL also in terms of constitutional rights of citizens, rather than only in terms of private law principles, economic utilitarianism and 'state sovereignty'.[5] 'Conflicts law principles' of private law for determining whether foreign jurisdictions, conflicting government regulations and transnational governance mechanisms 'deserve recognition' are no substitute for the necessary review of the 'constitutional legitimacy' and coherence' of IEL. They cannot replace legal and judicial 'balancing' of diverse constitutional principles in applying and interpreting IEL 'in conformity with principles of justice' and the human rights obligations of governments, as prescribed by the customary rules of treaty interpretation (as codified in the Preamble and Article 31-33 of the Vienna Convention on the Law of Treaties, VCLT) as well as by constitutional law systems. Private law doctrines offer no coherent answers for the constitutional and 'collective action problems' of multilevel governance of transnational PGs.

IEL as public international law of States regulating the economy

The State-centered 'Westphalian conception' of international law and 'political realism' emerged from the power struggles against the Church, the Holy Roman Empire and colonialism in support of a new

[4] Cf. World Development Report 2015: Mind, Society and Behavior, Washington: World Bank 2015 (discussing rational choice-, behavioural economics-, public choice- and deliberative democracy-theories explaining how individuals, institutions and societies often adopt unreasonable decisions, laws and social practices).

[5] On the mutation of 'sovereignty' as describing an 'unlimited, undivided and unaccountable locus of authority' (e.g. during the European wars of religion in the 16th and 17th centuries, in communist countries) to its modern conception as being constitutionally limited, divided and accountable to citizens with 'inalienable' human and democratic rights to self-government see: D.Herzog, Sovereignty RIP (Yale UP 2020).

system of States with 'sovereign equality' (Article 2 UN Charter). It continues to dominate United Nations (UN) law and IEL textbooks in spite of the increasingly comprehensive human rights obligations acknowledged by all UN member States in hundreds of UN and regional human rights instruments. Government executives often have self-interests in prioritizing 'state immunity' and 'diplomatic immunity' in order to avoid accountability; they claim broad foreign policy powers to conclude intergovernmental agreements regulating international movements of goods, services, persons, capital and related payments among States. The 1944 Bretton Woods Agreements establishing the International Monetary Fund (IMF) and the World Bank, the 1945 UN Charter, the General Agreement on Tariffs and Trade (GATT 1947), UN institutions (like UNCTAD) and UN Specialized Agencies regulating international services (like the Universal Postal Union, the International Telecommunications Union, the International Civil Aviation Organization, the International Maritime Organization) were all negotiated by diplomats representing States, under the leadership of the most powerful industrialized countries.

State sovereignty, the 'weighting' of voting in the Bretton Woods institutions according to the financial contributions by States, and the 'consensus' practices in most UN, GATT and WTO decision-making processes entail power-oriented, intergovernmental bargaining (e.g. on reciprocal tariff liberalization in GATT and the WTO) prioritizing rights among States over duties vis-à-vis citizens inside States. Intergovernmental rule-making often identifies 'State interests' with those of powerful, domestic interest groups (e.g. agricultural and industry lobbies demanding subsidies and 'safeguard measures'). The diverse legal structures of UN Specialized Agencies (e.g. exclusive membership of States, 'tripartite membership' of workers, employers and governments only in the ILO) and of the WTO (e.g. WTO membership of some sub-State 'customs territories' like Hong Kong, Macao and Taiwan) are more due to power politics (e.g. the strong political influence of trade unions after World War I when the ILO was created) than to 'principles of justice'. The 'neo-liberal bias' of the Bretton Woods Agreements – e.g. their lack of effective protection of non-economic PGs due to the economic doctrine of 'separation of policy instruments' – is often criticized for its lack of democratic legitimacy. 'Black box conceptions' of States and 'chess-board conceptions' of 'international law among States' leave domestic rule-implementation to the discretion of governments. Such focus on reciprocal rights, obligations and bargaining among States is not only challenged by civil societies; it also explains why most worldwide economic agreements often fail to protect human rights and other global PGs inside many countries.

IEL as 'multilevel economic regulation' informed by 'law and economics'

All UN member States participate in transnational economic cooperation in order to advance their economic welfare through division of labor. Conceptions of IEL as multilevel economic regulation are informed by economic theories of 'separation of policy instruments' (e.g. of trade and monetary restrictions as prescribed in Article XV GATT) and of economically efficient 'optimal policy instruments' (e.g. prioritizing *non-discriminatory* internal taxes, product and production regulations over trade-distorting subsidies and border discrimination).

The 'Chicago School of law and economics' and the 'Virginia School of public choice and constitutional economics', like the German 'Freiburg School of ordo-liberalism' and 'Cologne School of social market economy', focused on interactions of legal rules and economic principles in the regulation of *national economies*. The economists and lawyers cooperating in the 'Geneva School of multilevel ordo-liberalism'[6] and in the construction of European economic integration law were more attentive to

[6] For a discussion of the 'Geneva school of law and economics' and its comparison with other schools of 'law and economics', see: E.U.Petersmann, International Economic Theory and International Economic Law - On the tasks of a legal theory of international economic order, in: R.S.J.Macdonald/D.M.Johnston (eds), The Structure and Process of International Law (The Hague: Nijhoff 1983) 227–261; Q.Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism (Harvard UP 2018) 7 ff., 183 ff., 208 ff., 260 ff. See also my critical review of this book, which overlooks the categorical differences

questions of *international economic order* as a condition for empowering welfare states and limiting abuses of public and private powers through multilevel, legal, institutional and judicial guarantees of non-discriminatory market competition. The 1944 Bretton Woods Agreements and GATT 1947 were strongly influenced by US neo-liberalism (e.g. advocating reciprocal liberalization of monetary, financial and trade restrictions, de-regulation, privatization and 'financialization' of economies) so as to promote the information-, coordination- and sanctioning-functions of market competition and 'private ordering ideals'. The 'ordo-liberal constitutionalism' underlying European economic integration perceives common markets as legal constructs requiring systematic limitations of 'market failures' (e.g. by means of competition law, banking law, investment law, labor law, environmental law), of 'governance failures' (like welfare-reducing protectionism) and 'constitutional failures' (e.g. to protect human rights and restrain abuses of power). Anglo-Saxon 'law and economics' and authoritarian state-capitalism offer no coherent legal and political theories for protecting the 'input legitimacy' and 'output legitimacy' of multilevel governance of transnational PGs, e.g. by protecting rights of citizens in global cooperation beyond State borders and limiting the 'collective action problems' in multilevel governance of PGs.

IEL as 'global administrative law' (GAL)?

In order to enhance transparency, rule of law and legal accountability in multilevel governance of PGs, an increasing number of lawyers interpret the law of international organizations as administrative law of regulatory agencies.[7] GAL approaches seek to ensure that 'global regulatory decision-makers are accountable and responsive to all of those who are affected by their decisions'. For instance, 'the challenges faced by the WTO can be addressed by greater application of GAL decision-making mechanisms of transparency, participation, reason-giving, review and accountability to the WTO's administrative bodies including its councils and committees and the Trade Policy Review Body'. GAL principles and procedures should be strengthened in three dimensions:

(a) The efficacy and legitimacy of the *internal WTO governance structures* and decision-making procedures could be improved by strengthening transparency, participation, reason-giving and the law-making role of the WTO's regulatory, administrative and adjudicatory bodies. For instance, just as WTO Director-General P.Lamy's initiative for convening regular parliamentary meetings inside the WTO enhanced transparency and 'deliberative democracy' in WTO decision-making processes, the transparency and legitimacy of WTO third-party adjudication could be enhanced by opening panel and appellate hearings to the public.

(b) In the *vertical interrelationships between the WTO and its regulation of members' domestic administrations*, the incorporation of GAL principles and procedures into domestic administrative rules and procedures could strengthen the rule of law, transparency of trade regulation, uniform and impartial administration, due process of law and judicial review.

(c) In the increasingly close '*horizontal linkages' among different global regulatory institutions*, the WTO should recognize regulatory standards issued by other global regulatory bodies only if generated through transparent procedures and 'regulatory due process', affording rights of participation and based on 'public reason' supported by the decisional record and reflecting fair consideration of all affected interests. Interpreting and applying the 'Washington

between utilitarian, Anglo-Saxon neo-liberalism and rights-based, European ordo-liberalism: 21 Journal of International Economic Law (2018) 915.

[7] Cf. R.Stewart/M.Ratton Sanchez Badin, 'The WTO and Global Administrative Law' in C.Joerges/E.U. Petersmann (eds), Constitutionalism, Multilevel Trade Governance and International Economic Law (Oxford: Hart 2011) Chapter 16 ('Much global regulatory governance – especially in fields such as trade and investment, financial and economic regulation – can now be understood as administration, by which we include all forms of law-making other than treaties or other international agreements on the one hand and episodic dispute settlement on the other'). The following quotations in the text are from these authors.

consensus' underlying the law of the Bretton Woods institutions and GATT/WTO law in conformity with the 'Geneva consensus', which underlies UN human rights law (HRL) and the law of rights-based UN Specialized Agencies (like the ILO and WHO), could promote common GAL principles, and strengthen and legitimize multilevel governance of 'overlapping PGs'.

The focus of 'GAL norms' on the procedural elements of administrative law has 'served not only to secure implementation of the substantive norms of liberalized trade but also to promote broader goals including open administration, even-handed treatment of foreign citizens, and the rule of law'. The standards seek 'to provide safeguards against abuse of power, counter-factional capture, and temper the tunnel vision of specialized regulatory bodies'; they pragmatically respond to the 'accountability gaps' in the administrative practices of international institutions and the recognition that the ultimate aim of many of these regimes is to regulate the conduct of private actors rather than States. Yet, GAL proponents acknowledge that - due to the absence of democratic legislation and democratic accountability at the global level - administrative procedures alone may be relatively ineffective in overcoming disparities in power and the biases of specialized mission-orientated organizations.

Multilevel constitutional conceptions of IEL

The more territorially based national sovereignty is transformed by functionally limited, multilevel governance of transnational aggregate PGs, the stronger becomes the need for reconceiving sovereignty in terms of duties of governments to protect human rights and transnational 'aggregate PGs' demanded by citizens. Both territorially limited *national governments* and functionally limited *transnational governance* must be reconstituted, limited, regulated and justified more coherently in terms of the 'inalienable' human rights and constitutional rights of citizens and of their democratic self-governance. The 'multilevel constitutional approaches' underlying European economic law emphasize that the legitimacy and effectiveness of IEL – as an instrument for promoting consumer welfare and human rights of citizens – depend on its consistency with HRL and other constitutional obligations of governments. Such approaches are practiced by the European Court of Justice (CJEU), the European Free Trade Area (EFTA) Court, and the European Court of Human Rights (ECtHR) in cooperation with national courts, parliaments and governments throughout Europe. They interpret and develop an increasing number of trade, investment, competition, common market rules, labor law and HRL as 'cosmopolitan law' empowering private actors.[8] Transnational rule of law is protected for the benefit of citizens (e.g. EU citizens, investors, migrant workers and their families), with due respect for the legitimate diversity of constitutional democracies.[9] The legal primacy of constitutional rules over post-constitutional rule-making prompts many States to grant international treaties only an *infra*-constitutional legal rank in domestic legal systems, and to exclude 'direct applicability' of many IEL law rules in domestic courts. As international law's claim (as codified in Article 27 VCLT) to legal primacy over domestic law must remains subject to constitutional restraints, constitutional democracy may require higher levels of *national* protection of human rights than the minimum standards prescribed in UN HRL. Whenever *international guarantees* of freedom, non-discrimination and rule of law go beyond those of *national legal systems* (as in many areas of IEL), countries increasingly use IEL for complementing 'incomplete national Constitutions' by limiting 'government failures' through international agreements. EU constitutional, common market and competiton laws, for instance, empower citizens and non-governmental organizations to invoke and enforce common market freedoms and other fundamental rights of European law in national courts vis-à-vis welfare-reducing, national border discrimination against foreign goods and services. The EU Charter of Fundamental Rights

[8] Cf. A.Stone Sweet, Kant, Cosmopolitanism and Systems of Constitutional Justice in Europe and Beyond, in: Journal of Global Constitutionalism 2020 (forthcoming).

[9] See Petersmann (n 2) Chapter III; Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 Global Constitutionalism 53.

(EUCFR) protects legal and judicial remedies of citizens against abuses of multilevel economic regulation inside and beyond State borders.

Neo-liberal 'Capture' of Trade and Investment Regulation?

The negotiations leading to the 1944 Bretton Woods agreements and GATT 1947 were dominated by the USA, the United Kingdom (UK), their Anglo-Saxon economic liberalism and utilitarian trade policies. US hegemony and British colonialism contributed to the legal design of GATT as a club of 'like-minded market economies' prioritizing market-based trade policies and intergovernmental power politics (e.g. due to the US rejection of the 1948 Havana Charter for an International Trade Organization, parliamentary non-ratification of GATT 1947). The 'embedded liberalism'[10] underlying GATT 1947 protected regulatory autonomy of GATT contracting parties. *Neo-liberalism* refers not only to 'Chicago School economics' as practiced by Prime Minister Thatcher, US President Reagan and many other governments since the late 1970s, i.e. strong preferences for liberalizing market access barriers, deregulation, privatization and 'financialization' of the economy so as to empower 'self-regulatory markets' (and the '*homo* economicus') as spontaneous information, coordination and sanctioning mechanisms. It is also characterized by 'public-private partnerships' (e.g. in the drafting of trade and investment agreements), rent-seeking business lobbying influencing economic rule-making (e.g. discriminatory import protection for cotton, textiles, steel and car manufacturers), tax evasion by multinational corporations (e.g. through profit-shifting to tax havens), increasing 'politicization' of judicial remedies (e.g. due to the US destruction of the WTO Appellate Body, UK rejection of European courts) and social inequality inside countries (like the USA) justified by a money-driven focus on individual utility-maximization.[11] For instance, the 1979 Tokyo Round Agreements introduced 'globalization' of business-driven US antidumping and countervailing duty practices by requiring other GATT members to adopt North-American dumping and countervailing duty rules, which redistribute domestic income from consumers for the benefit of import-competing producers. US trade agreements reinforced 'buy domestic' legislation (e.g. prescribing the purchase of domestic inputs for automobile manufacturers and protecting domestic transport and shipping companies). Most of the more than 3'000 bilateral investment treaties (BITs) respond to business interests in 'privatizing' dispute settlement through investor-state arbitration and in limiting public interest regulation (e.g. through 'stabilization commitments', incorporating investment concessions by host states into BITs). The 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and many US trade agreements increased legal protection of intellectual property rights to levels, which many economists consider as anti-competitive rent-seeking by multinational corporations. Under-regulation of the financial sector was a major reason for the US and global financial crises since 2007/2008. Neglect for protection of competition, the environment, consumer interests (e.g. in health protection, data privacy, transparent and honest financial practices), labor and human rights interests entailed increasing social inequalities inside many states prioritizing neo-liberalism.

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[10] This term was coined for describing the dual GATT 1947 objectives of international trade liberalization and domestic political autonomy (e.g. to regulate markets and their social adjustment problems, and to stabilize the economy in case of external shocks) by J.G.Ruggie, International regimes, transactions and change: Embedded liberalism in the postwar economic order, in: International Organization 36 (1982), 379-415.

[11] On the perverse, social effects (like rising mortality of middle-aged, white Americans without college education) of the money-driven US politics, health system and racial discrimination see: A.Case/A.Deaton, Deaths of Despair and the Future of Capitalism (Princeton UP 2020). On the need for socially more inclusive definitions of economic policy goals (e.g. in terms of promoting human capacities, decent work conditions and satisfying basic needs of everybody) see: G.Sperling, Economic Dignity (New York: Penguin 2020). On why citizens demand more inclusive 'social contracts' offering better protection against health, environmental, economic and social emergencies see: M.Shafik, What Do We Owe Each Other? Social contracts for the 21st century (publication forthcoming and summarized by the author in Financial Times 10 July 2020).

Following the 2016 'Brexit' referendum and the election of US President Trump, the UK and US governments increasingly relied on executive powers for deregulating IEL (e.g. for terminating EU membership, abandoning the EU-US draft agreement on a Transatlantic Trade and Investment Partnership). President Trump unilaterally declared the WTO Doha Round negotiations for terminated, destroyed the WTO Appellate Body (AB) by illegal US blocking of AB members, and introduced discriminatory, WTO-inconsistent tariffs restricting imports (e.g. of steel, aluminum, Chinese goods and services) worth more than $350bn without requesting legislative authorization by the US Congress.[12] US government positions in the commerce and economic field were filled with businessmen, trade remedy lawyers and former lobbyists; they reflect US business interests (e.g. in disrupting OECD negotiations on a global tax framework for technology and internet companies, unilaterally sanctioning Russia's gas pipeline for supplying gas to EU countries, threatening illegal tariffs on automobile imports from Europe). As a consequence, US companies (like Apple, Facebook, Google and other tech giants) enjoy dominant market positions and avoid taxes in many countries. Judicial review inside the US, in the WTO, in other worldwide courts (like the International Criminal Court) and regional agreements (like NAFTA) became increasingly politicized.[13]

The US Court of International Trade, in a judgment of 14 July 2020, began annulling some of the discriminatory trade sanctions imposed by executive orders of President Trump on the basis of alleged 'security interests' (Section 232).[14] As trade restrictions are about redistributing domestic income from consumers to import-competing producers, economists explain the 'trade wars' and discriminatory 'bilateral trade deals' of President Trump in terms of welfare-reducing, domestic 'governance failures', notably due to conflicts 'between the very rich and everyone else'[15] and 'political deals' offering economic rents to domestic producers in exchange for their political support. J.Bolton's book on his experiences inside the Trump administration describes US President Trump as 'erratic and impulsive', 'stunningly uninformed', 'irrational' and 'a danger for the republic' because US policies are influenced by President Trump's political and business self-interests.[16] President Trump's hegemonic nationalism ('America first') and his embrace of authoritarian dictators entailed US withdrawal from multilateral agreements (like the 2015 Paris Agreement on climate change mitigation, the Trans-Pacific Partnership Agreement, the WHO) and US disruption of worldwide and regional organizations (like the WTO, NAFTA, NATO). US leadership for multilevel governance of global PGs (like limiting climate change, protecting public health) and for democratic reforms has become replaced by power politics and 'populist demagogy' inside the USA and 'BRICS countries' (like Brazil, Russia and China).

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[12] On the vast delegation of trade policy powers to the US President (e.g. under Sections 232 and 301 of the US Trade Acts) see E.U.Petersmann, The 2018 Trade Wars as a Threat to the World Trading System and to Constitutional Democracies, in: Trade, Law and Development X (2018), 179-225.

[13] Cf. A. Cohen, Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America (New York: Penguin 2019). On the arbitrary politicization of the WTO AB jurisprudence – as reflected in the US Trade Representative (USTR) Report on the Appellate Body of the WTO (Washington February 2020) - see: E.U.Petersmann, WTO Adjudication@me.too: Are Global Public Goods like the World Trade Organization Owned by Governments or by Peoples and Citizens? in: Journal of East Asia and International Law 13 (2020), 21-52.

[14] US Court of International Trade, Slip Op 20-98, Transpacific Steel LLP v US et al., Court No 19-00009, judgment of 14 July 2020.

[15] Cf. Martin Wolf: what trade wars tell us, Financial Times 18 June 2020: 'Trade war is often presented as a war between countries. It is not: it is a conflict mainly between bankers and owners of financial assets on the one side and ordinary households on the other – between the very rich and everyone else'… 'the overall balance in goods and services is explained by savings, investment and capital flows, not by bilateral trade balances, as Donald Trump imagines' (summarizing the conclusions of M.Klein/M.Pettis, Trade Wars Are Class Wars, Yale UP 2020, arguing that the recent financial, debt and trade policy crises in leading economies can only be understood as pathologies of domestic politics, where wealthy people do not spend what they earn and their 'savings glut' leads to underconsumption resulting in trade and financial imbalances).

[16] Cf. A.Williams, Bolton says Trump poses a 'danger for the republic', in: Financial Times 22 June 2020; J.Bolton, The Room Where it Happened: A White House Memoire (New York: Simon & Schuster 2020).

The Rise of State-Capitalism Distorting International Markets

China's accession to the WTO in 2001, like Russia's accession in 2012, were influenced by the expectation that their WTO commitments for trade liberalization and market-conforming trade policy instruments would offer non-discriminatory trade opportunities to all other WTO members. Similar to Prime Minister Johnson's program aimed at economic deregulation for establishing what he called a 'Singapore at Thames', President Trump's preference for managing foreign trade deficits through 'bilateral deals' exploiting US power responds to trade 'management' by authoritarian countries. In contrast to Anglo-Saxon neo-liberalism (prioritizing individual liberty and market-driven utilitarianism) and European ordo-liberalism (prioritizing protection of human dignity through constitutional rights and a 'social market economy'), China's state capitalism prioritizes totalitarian control of the state, the polity and economy by China's communist party (CCP) and nationalist 'Xi Jinping thinking'.[17] China continues to transform communist state capitalism into a 'socialist market economy with Chinese characteristics' based on state-owned enterprises (SOEs), an increasing number of private-owned enterprises, and totalitarian control of the Chinese economy (including also of private enterprises) by the CCP and its state apparatus. China's 'Belt and Road' (BRI) initiative recreates China-centred, bilateral networks of transnational road and maritime infrastructures - based on agreements with 65 countries supported by financial, technical and government procurement assistance from Chinese and Asian institutions – following China's ancient perception as the 'middle kingdom'. As the world's largest trading nation and, by 2030, the world's largest economy, China is mistrusted by the USA as a technological, geopolitical and, potentially, also military rival using state subsidies, SOEs, government procurement practices, regulatory, administrative and financial privileges for distorting markets and pursuing totalitarian, political goals without respect for human rights. China's foreign policies under President Xi are becoming ever more assertive using power politics (e.g. for appropriating more than 80% of the South China Sea, China's contested borders with India) without regard for human rights and for China's 'one state, two systems' agreements.

The regulatory challenges of SOEs result not from their *existence*, but from the financial and regulatory advantages granted to SOEs (e.g. monopolies and exclusive rights), the advantages (such as capital and inputs) transferred from SOEs (e.g. state banks, raw material producers) to other economic actors, related competitive distortions affecting competitors and consumers, and the use of SOEs for political or military objectives (such as technological domination and internet control). The existing WTO legal disciplines (e.g. in Arts XVII GATT, VIII GATS, China's Protocol of WTO Accession, WTO subsidy and trade remedy rules) are insufficient for controlling discriminatory trade and financial distortions caused by SOEs. There is broad agreement on the need for additional WTO trade, competition, subsidy, dumping, safeguard and investment rules for limiting abuses by SOEs.[18] In the absence of such WTO reforms, many WTO members unilaterally adjust their trade remedy laws (e.g. by focusing on 'cost distortions' and 'particular market situations' in applying anti-dumping and countervailing duty regulations).[19] The US, under President Trump, considers the WTO as incapable of adequately responding to China's alleged violations and circumvention of WTO rules. President Trump's bilateral US-China negotiations and trade wars have not limited, so far, China's state influence on public and private enterprises (e.g. China's active industrial policies), Chinese non-compliance with certain WTO

[17] 'We must never follow the path of Western "constitutionalism", "separation of powers" or "judicial independence"', President Xi warned in one of his major policy speeches in 2018. Yet, he also stated that '(i)n the struggle against foreign powers, we must take up legal weapons, occupy the high ground of the rule-of-law' (quoted from S.Shih, In China, many are impressed that, yes, you can sue the US government, Washington Post of 8 March 2019).

[18] Cf. Y.Wu, Reforming WTO Rules on State-Owned Enterprises (Singapore: Springer 2019).

[19] For comparative analyses of how WTO members use their trade remedy laws for responding to 'non-market situations' in China see: J.J.Nedumpara/W.Zhou (eds), Non-market Economies in the Global Trading System (Singapore: Springer 2018).

rules, China's military expansion (e.g. in the South China Sea), military threats (e.g. vis-à-vis Taiwan) and related strategic challenges to US hegemony. Unlike the multilateral disciplines for SOEs in Chapter 17 of the TPP Agreement, the bilateral US-China trade negotiations prioritize short-term 'managed trade deals' (e.g. on China's purchase of US soya beans). The geopolitical and technological rivalries and policy divergences risk 'decoupling' certain sectors of economic integration (e.g. digital trade using 'dual use' technologies of strategic importance), diverting 'global supply chains' (e.g. from China to other Asian countries like Vietnam), and emulation by other authoritarian rulers of China's bilateralism, state interventions and 'managed trade'. The communist ideologies underlying China's 'CCP state' render it unlikely that its pervasive government control of the economy and polity can be liberalized through WTO negotiations. Yet, there remain many economic and political voices inside China recognizing that Chinese citizens could enormously benefit from additional WTO competition, e-commerce and rule-of-law disciplines preventing abuses of public and private power inside China, as illustrated also by China's continued participation in the WTO dispute settlement system and China's implementation of WTO dispute settlement findings on illegal trade restrictions inside China.

Multilevel Judicial 'Common Law Approaches' Protecting Rule-of-Law

The UN has defined 'rule of law at national and international levels' as 'a principle of governance in which all persons, institutions and entities, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with internationally recognized human rights'.[20] *Among* the 30 member states of the European Economic Area (EEA), rule-of-law in trade and investments is secured by national and European courts protecting civil, political, economic and social rights. In *worldwide* trade and investment relations, rule-of-law emerged only in the 1990s based on the WTO dispute settlement system and investor-state arbitration (ISA) leading to now more than 1'020 publicly known ISA cases. Both the more than 420 WTO panel, appellate and arbitration findings, ISA awards and related national court decisions (e.g. enforcing ISA awards) are based on international treaties and procedural and substantive, international law principles, such as the customary rules of treaty interpretation as codified in the VCLT. Human rights are neither mentioned in WTO law nor in most BITs. Yet, the WTO objectives, 'general exceptions' and many BIT provisions protect human rights values like 'public morals', 'public order', 'human, animal or plant life of health', 'protection of national treasures of artistic, historic or archaeological value', 'conservation of exhaustible natural resources', protection of the environment, 'essential security interests', 'raising standards of living', 'sustainable development' or labor rights. WTO jurisprudence has interpreted these WTO provisions broadly; it has, thereby, protected also human rights values (e.g. by enabling countries to lift more than 1 billion of poor people out of poverty). For instance:

- The 2018 WTO panel and 2020 appellate reports on complaints by tobacco exporting countries against Australia's legislation on plain-packaging of tobacco products confirmed that these health regulations restricting intellectual property rights and sales of tobacco products were consistent with WTO law (e.g. on technical barriers to trade and intellectual property rights). The reports refrained from referring to human rights, which had neither been invoked by the complainants nor by the defendant. But the interpretation of WTO rules in conformity with the 2001 WTO Declaration on the 'TRIPS Agreement and Public Health' and with the 2003 WHO Framework Convention on Tobacco Control avoided conflicts with health rights, thereby illustrating the importance of 'systemic treaty interpretation' (Article 31.3 VCLT) for maintaining the consistency of WTO rights and obligations with other international treaty commitments.[21]

[20] Cf. Report of the Secretary-General, Delivering Justice: programme of action to strengthen the rule-of-law at the national and international levels, A/66/49 of 16 March 2012, para. 2.

[21] Cf. E.U.Petersmann, How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law? WTO Dispute Settlement Panel Upholds Australia's Plain Packaging Regulations of Tobacco Products, in: The Global

- The 2014 WTO panel and appellate reports on EU import restrictions on seals products acknowledged, *inter alia*, that the EU exceptions for products from indigenous people in Greenland were justifiable under the 'public morals' exception in GATT Article XX(a) provided they did not discriminate against seal products imported from Canada and Norway.[22]
- The 2011 panel and 2012 appellate reports on US restrictions on tuna based on the 'Dolphin Protection Consumer Information Act' confirmed that US 'dolphin-safe' labelling measures would be consistent with WTO law provided they were applied in non-discriminatory ways. [23]
- The 2007 WTO panel and appellate reports on Brazil's import restrictions on retreaded tyres implied that the restrictions could be justified as being necessary for health protection reasons if applied in non-discriminatory ways.[24]
- The 2004 panel and 2005 appellate reports on US restrictions of cross-border gambling and betting services implied that such restrictions can be justified as being necessary for protecting 'public morals' (Article XIV(a) GATS) if applied in non-discriminatory ways.[25]
- The 2003 panel and 2004 appellate reports on EC tariff preferences for combatting drug production and trafficking in less-developed countries implied that such preferences can be consistent with WTO law if applied in non-discriminatory ways.[26]
- The 2001 appellate report on EC import restrictions on asbestos confirmed the justifiability of these health protection measures; as health risks can affect the competitive relationship of asbestos and substitute products, non-discriminatory health protection measures may neither violate GATT Article III nor need justification under GATT law.[27]
- The 1998 and 2001 appellate reports on US import restrictions on shrimps confirmed that non-discriminatory animal protection conditioning imports of shrimp on the use of certain fishing nets protecting turtles is justifiable under GATT Article XX(g).[28]

All these WTO dispute settlement findings affected the regulation of business activities with potentially harmful or discriminatory, economic, health or environmental effects. The findings influenced also global application of WTO rules beyond the specific disputes. They confirm the sovereign rights under WTO law to adopt *non-discriminatory* regulations protecting non-economic PGs like 'public morals' (including also human rights), public health and the environment. There is no evidence, so far, that any of the more than 600 GATT/WTO dispute settlement findings since 1949 have violated human rights.[29]

Depending on the ISA jurisdictions, human rights law may be part of the applicable domestic and international law rather than only 'relevant context' for 'systemic treaty interpretation' and 'judicial administration of justice' in ISA. Empirical analyses demonstrate increasing references by investors, host states, third parties and arbitrators to human rights in ISA procedures.[30] Yet, the one-sided privileging of foreign investor rights and investment protection standards in many BITs - with

Community Yearbook of International Law and Jurisprudence 2018, 69-102. The Appellate Body (AB) reports confirming the panel findings were published on 9 June 2020: WT/DS435/AB/R and WT/DS441/AB/R.

[22] Cf. WT/DS400,401/R/AB adopted on 18 June 2014.

[23] Cf. WT/DS/381/R/AB adopted 13 June 2012.

[24] Cf. WT/DS/332/R/AB adopted on 12 December 2007.

[25] Cf. WT/DS/285/R/AB adopted on 20 April 2005.

[26] Cf. WT/DS246/R/AB adopted on 20 April 2004.

[27] Cf. WT/DS135/R/AB adopted on 5 April 2001.

[28] Cf. WT/DS58/R/AB adopted on 6 November 1998 and 21 November 2001 (Article 21.5 DSU).

[29] Cf. E.U.Petersmann, Human Rights, Constitutional Justice and International Economic Adjudication: Legal Methodology Problems, in: M.Scheinin (ed), Human Rights in 'Other' Non-Human Rights Courts (CUP 2019).

[30] Cf. E.U.Petersmann, Can Invocation of Human Rights Enhance Justice and Social Legitimacy in Investment Adjudication? in: Indian Journal of International Economic Law XII (2020), 58-105.

inadequate regard to the regulatory duties of host states to protect human and constitutional rights of all citizens - continue leading to re-negotiations of BITs, of ISA procedures and of 'corporate social responsibilities' aimed at protecting the 'public law dimensions' in ISA (e.g. by limiting party-appointed arbitrators and their 'affiliation biases'), sovereign rights, duties of host states and 'corporate social responsibilities' to protect PGs.[31] Among the 27 EU member states, civil society challenges of the procedural and substantive 'investor biases' in ISA - and the jurisprudence of the CJEU protecting constitutional rights of 'access to justice' (Article 47 EUCFR) - have led to progressive termination of BITs and ISA among EU member states and their replacement by EU common market law and multilevel judicial remedies in European courts.[32]

Ordo-liberal European Economic Constitutionalism

In contrast to neo-liberal Chicago School recommendations for liberalizing market access barriers, deregulating and privatizing economic activities, and for 'financialization' enhancing the self-regulatory forces of market competition and individual utility-maximization by the homo economicus, the ordo-liberal European and Virginia Schools of 'constitutional economics' perceive economic markets as legal constructs (rather than as gifts of nature). Their efficient, welfare-enhancing functioning depends on, inter alia

- 'constituent principles' (like economic freedoms, property rights and other fundamental rights of citizens, monetary and price stability protected by independent central banks);
- 'regulative principles' (e.g. for limiting 'market failures' by competition, environmental, health and social policies and institutions); and
- constitutional 'checks and balances' (e.g. democratic constitutionalism limiting 'governance failures', protecting rule-of-law, holding public and private actors accountable by judicial remedies, subsidiarity principles protecting decentralized governance mechanisms).

Ordo-liberal 'constitutional economics' influenced the embedding of Germany's 'social market economy' into German and European constitutional law and the EU commitment to a 'competitive social market economy', as prescribed in the Lisbon Treaty on European Union (e.g. Article 3 TEU). The EU's 'micro-economic common market constitution',[33] 'macro-economic monetary constitution',[34] their progressive evolution and judicial review[35] were all influenced by German and European ordo-liberalism as developed in the 'Freiburg school of ordo-liberalism', the 'Cologne school of social market economy', and the 'Brussels schools' of multilevel protection of a 'competitive social market economy' in EU competition, common market and monetary law.[36] Their 'principled thinking' is characterized by

[31] Cf. I.Bantekas/M.Stein (eds), Business and Human Rights in International Law and the Role of Non-State Actors (CUP 2021, forthcoming); S.Puig, Debiasing International Economic Law, EJIL 30 (2019), 1339-1357.

[32] For details see E.U.Petersmann, Ten Lessons from 'Institutional Economics' for Designing Multilateral Trade and Investment Institutions, in: EUI Law Working Paper 2020-05, 19ff.

[33] E.g. based on multilevel common market freedoms, competition, environmental and social rules, multilevel competition institution, and 'regulatory competition' constrained by multilevel judicial protection of civil, political, economic and social rights.

[34] E.g. based on EU legal disciplines for monetary, fiscal, debt and economic policies supervised by multilevel, independent central banks and intergovernmental economic cooperation.

[35] Cf. H.C.H.Hofmann/K.Pantazatou/G.Zaccaroni (eds), The Transformation of the European Economic Constitution (Cheltenham: Elgar 2019); C.Kaupa, The Pluralist Character of the European Economic Constitution (Oxford: Hart 2016).

[36] On the EU's sectoral (e.g. micro-economic, macro-economic and social) 'constitutions' see: K.Tuori, European Constitutionalism (Cambridge: CUP 2015), 127 ff. For a detailed comparison of Anglo-Saxon neo-liberalism and European ordo-liberalism see: E.U.Petersmann, Economic Disintegration? Political, Economic and Legal Drivers and the Need for 'Greening Embedded Liberalism', in: JIEL 22 (2020), 347-370.

'order policies' aimed at limiting 'process policies' (like fiscal, debt, competition, environmental, social and industrial policies) through

- 'interdependent, rules-based orders';
- 'governing through market mechanisms' and regulatory competition; and
- republicanism protecting PGs (res publica).

Ordo-liberalism calls for legal safeguards embedding the competitive order (protecting 'performance competition' and price mechanisms) into mutually coherent monetary order (e.g. protecting price stability, fiscal discipline), democratic constitutionalism (e.g. holding 'European network governance' accountable through multilevel competition, monetary and other regulatory agencies and their parliamentary and judicial control) and social order (e.g. protecting labour markets, welfare states, social justice, judicial remedies, public health and education systems). Constitutional economists criticize neo-liberal focus on utility-maximization and 'Kaldor-Hicks efficiencies' on the ground that satisfaction of the basic needs of all citizens, enhancement of 'human capacities' (A.K.Sen) and their mutually agreed protection through constitutional rights offer better benchmarks for human well-being. The EUCFR guarantees civil, political, economic, social and 'European citizenship rights' that protect not only 'negative freedoms' (e.g. constraining abuses of public and private power). Rights empowering individuals to exercise 'positive freedoms' (e.g. human rights to education, health protection, freedom of association, decent life and work conditions) through governmental protection of individual self-development (e.g. 'human dignity') can be seen as constitutional core values of social market economies. The 'social market economy' progressively established in Germany since the 1960s, and the EU law commitments to ever more guarantees of social rights structured around three priorities – equal opportunities for education, professional training and access to labour markets; fair working conditions; and access to social protection and health care for all – illustrate how ordo-liberal constructivism differs from neo-liberal faith in self-regulatory capacities of markets generating ever larger social inequalities inside neoliberal economies like the USA.

The EU legal guarantees of 'access to judicial remedies' have given rise to a comprehensive economic and human rights jurisprudence in national and European courts reconciling civil, political, economic and social rights of citizens on the basis of EU constitutional law principles (like limited delegation of powers, respect for 'proportionality' and 'subsidiarity principles' in their exercise, multilevel judicial remedies and cooperation among national and European courts, and respect for the diverse 'constitutional identities' of EU member states).[37] Even though the ultimate unit of moral concern in human rights law are individuals, national and European courts interpret European constitutional law and the European Convention on Human Rights (ECHR) as conferring also rights on 'people' and other associations of individuals including corporate actors (like due process rights and remedies, common market freedoms, property rights).

Outside the EU, trade, investment and other economic courts - in applying human rights to disputes over rights and obligations of business actors - rely less on constitutional law hierarchies than on systemic treaty interpretation, general principles of law and mutual 'balancing' of specific trade and investor rights (e.g. intellectual property rights) with broader human rights duties and corresponding legal obligations (e.g. to protect public health, to prevent child labor and gender discrimination). The *dicta* of the WTO AB in *Korea-beef* – i.e. that the more measures are designed to pursue 'common interests or values' rather than 'narrow national interests', the more likely they will be accepted by the AB as necessary to achieve state objectives under GATT Article XX – resemble the dynamic reliance by

[37] Cf. the various case studies in Scheinin (n 29); C.Callies/G. van der Schyff (eds), Constitutional Identity in a Europe of Multilevel Constitutionalism (CUP 2020).

European courts on the 'common constitutional traditions' of the member states.[38] Judicial administration of justice may justify focusing on *governmental* rights and duties to protect PGs (rather than on corresponding human and constitutional rights) if – for example, in WTO and investment disputes - neither the complainant nor the defendant invoked *human rights*; for, the judicial 'weighing' of competing 'constitutional values' and 'balancing' of competing claims should lead to the same judicial findings regardless of whether *individual rights* or corresponding *governmental duties* were invoked.

The US Assault on the WTO Dispute Settlement System: Neo-liberalism vs Ordo-liberalism

Article III WTO Agreement distinguishes three 'functions of the WTO' as a forum for (1) 'further negotiations among its Members concerning their multilateral trade negotiations'; (2) the settlement of disputes pursuant to the WTO Dispute Settlement Understanding (DSU); and (3) the facilitation and monitoring of the implementation of WTO rules and deliberations on trade policies. Since the beginning of the Doha Round negotiations in 2001, the 164 WTO members could reach agreement on only few new trade agreements (like the 2013 Trade Facilitation Agreement). The increasing number of WTO dispute settlement proceedings prompted the US Trump administration to criticize the imbalance between the unsuccessful 'negotiation function' and the very active dispute settlement system of the WTO, where WTO dispute settlement bodies progressively clarified the contested meaning of WTO rules through (quasi)judicial procedures and successfully challenged violations of WTO legal disciplines. In view of President Trump's preference for 'bilateral deals' and his disdain for what he perceives as 'terrible WTO agreements', the US began challenging 'judicial functions' of WTO dispute settlement bodies, their 'systemic interpretation methodologies' based on the customary rules of treaty interpretation, the WTO dispute settlement system as an 'ordo-liberal guardian' of non-discriminatory conditions of competition (e.g. as reflected in the GATT/WTO jurisprudence interpreting GATT/WTO rules as protecting non-discriminatory conditions of competition), and the WTO Agreement's separation of legislative, executive and judicial powers as a 'constitutional restraint' on neo-liberal interest-group politics (as reflected in the WTO jurisprudence limiting discriminatory abuses of WTO trade remedy disciplines). The differences between the neo-liberal power politics and interest group politics of the US Trump administration and European ordo-liberalism became also evident in the

- illegal US blocking of WTO AB vacancies since 2017 resulting in the incapacity of the AB, since 10 December 2019, to accept new appeals;
- the 2020 USTR Report on the AB, which perceives WTO law as an instrument of US power politics and disregards the (quasi)judicial mandates of WTO dispute settlement bodies and their (quasi)judicial methodologies;[39] and
- the non-participation of the USA in the EU-initiative for the 'Multi-Party Interim Appeal Arbitration (MPIA) Arrangement' under Article 25 DSU, which is in effect as of 30 April 2020 for appellate review among 23 WTO members until the WTO AB can resume its lawful functions, as prescribed by parliaments when they approved the WTO Agreement.[40]

[38] Cf. A.Stone-Sweet/T.L.Brunell, Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union and the WTO, Journal of Law and Courts 1 (2013), 61, at 85.

[39] See United States Trade Representative (USTR), Report on the Appellate Body of the WTO, Washington February 2020, 177 pages (https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body)

[40] The text to the MPIA was notified to the WTO in WTO document JOB/DSB/1/Add.12 of 30 April 2020 and was subsequently accepted also by other WTO members.

According to Article 17.2 DSU, AB vacancies 'shall be filled as they arise'. Since 2017, the US has blocked all appointments to the WTO AB ushering in the incapacitation of the AB since 10 December 2019, when only one single AB member remained in office. The legal justifications by the Trump administration of its 'blocking' of WTO AB nominations insist on US interpretations of WTO rules and US criticism of AB findings without any evidence that legal interpretations by the AB violated the customary rules of treaty interpretation or the (quasi)judicial AB mandate for impartial, independent and prompt third-party adjudication through quasi-automatic adoption of WTO panel and AB reports by the Dispute Settlement Body (DSB).[41] The 2020 USTR Report – notwithstanding its valid criticism of some WTO rules and dispute settlement practices (e.g. that the AB no longer consults with the parties when deciding to disregard the 90 day deadline in Article 17.5 DSU) – suffers from legal biases and incorrect claims such as:

- US denial of (quasi)judicial functions of WTO third-party adjudication, even though numerous WTO publications, WTO dispute settlement reports and statements by WTO panellists, AB members and WTO arbitrators over more than 20 years acknowledged the (quasi)judicial mandates of WTO dispute settlement bodies (*i.e.* WTO panels, the AB and the quasi-automatic adoption of their reports by the DSB);
- US disregard for judicial AB arguments in the performance of the DSU's mandate 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3 DSU), for instance whenever the AB found compliance with the time limit of 90 days (Article 17.5 DSU) – which was imposed by US negotiators in 1993 notwithstanding the widespread criticism that no other court seems to be limited by such an unreasonably short time limit – impossible to reconcile with the other AB tasks (e.g. due to illegal US blocking of the filling of AB vacancies, large numbers of pending AB proceedings, inadequate administrative WTO resources for translation and other support services);
- contradictory USTR claims that AB legal findings against the US violated the DSU prohibition to 'add or diminish the rights and obligations in the covered agreements' (Article 3.2 DSU) – even if the AB had justified these legal findings on the basis of the customary rules of treaty interpretation and its (quasi)judicial mandate -, notwithstanding the USTR's regular support of AB reports accepting 'creative WTO interpretations' advocated by the USTR as a legal complainant;
- US description of US 'zeroing practices' as a 'common-sense method of calculating the extent of dumping'[42] even if their protectionist biases had been consistently condemned by the AB and DSB as violations of the WTO obligations of 'fair price comparisons' (which are hardly mentioned in the USTR report);
- one-sided focus on WTO texts as interpreted by US negotiators without regard to the customary law and DSU requirements to clarify the meaning of the often indeterminate WTO provisions with due regard also to WTO legal texts revealing the 'context, object and purpose' of WTO provisions and the explicitly recognized 'systemic character' of what the WTO Agreement calls 'this multilateral trading system' (Preamble) and its 'dispute settlement system' (Article 3 DSU);

[41] For a detailed refutation of the false USTR claims concerning (1) the continued service of AB members after the expiration of their term (i.e. the US disregard for 'Rule 15' in the AB Working Procedures); (2) the 90 day deadline for circulating AB reports (i.e. the US disregard for inherent judicial powers for 'due process of law' if WTO members make compliance with deadlines objectively impossible); (3) AB review of facts and (4) of municipal law to the extent that such panel findings include 'legal qualifications'; and the false US claims concerning (5) alleged 'advisory opinions' in - and (6) 'precedential effects' of – AB reports see: J.Lehne, Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? (Berlin: Grossmann 2019).

[42] USTR Report (n 40), at 2.

- denigration of AB members as 'three unelected and unaccountable persons'[43] whose 'overreaching violates the basic principles of the United States Government' (USTR Report, Introduction), notwithstanding the election of every AB member through consensus decisions of WTO member governments (including the US), their (quasi)judicial mandate, and the approval of WTO agreements (including the DSU) by the US government and US Congress;
- insulting claims that the AB Secretariat had weakened the WTO dispute settlement system by not respecting WTO rights and obligations.[44]

The USTR Report acknowledges that its purpose 'is not to propose solutions'.[45] The USTR Report repeats what the US ambassador had stated in DSB meetings since 2017: 'WTO Members must come to terms with the failings of the Appellate Body set forth in this Report if we are to achieve lasting and effective reform of the WTO dispute settlement system'.[46] Yet, nothing suggests that – if WTO members should accept the false US claims of the AB's 'persistent overreaching […] contrary to the Appellate Body's limited mandate', and 'the Appellate Body's failure to follow the agreed rules' – the US would be willing to comply with its DSU obligation of filling AB vacancies 'as they arise' and return to the WTO third party adjudication, appellate review and customary rules of treaty interpretation (including 'judicial interpretations' in the 'prompt settlement of WTO disputes) as prescribed in the DSU. Past WTO members' 'appeasement' of false USTR claims (e.g. in Ambassador Walker's informal mediation proposal for overcoming the WTO dispute settlement crises) never changed the USTR's refusal to return to WTO third party adjudication as prescribed in the DSU. So far, the USTR has failed in its efforts at destroying the social and legal legitimacy of AB jurisprudence, even if the previously celebrated 'crown jewel' of the WTO dispute settlement system has been stolen by the USTR without any intention of giving it back. Paradoxically, compared with other WTO members, the USTR seems to have been the most successful litigator in past WTO dispute settlement practices. Yet, it remains isolated in its efforts at de-legitimizing the AB; most AB findings continue being supported and implemented by the WTO membership.

The 'Economic and Trade Agreement' signed by China and the US on 15 January 2020 provides for discriminatory Chinese commitments to buy US products, discriminatory US import tariffs and trade restrictions (e.g. targeting Chinese technology companies) without third-party adjudication. This bilateral 'opt-out' – by the two largest trading nations – from their WTO legal and dispute settlement obligations seems to be the policy option preferred by those USTR officials who pursue additional 'bilateral US trade deals'.[47] In June 2020, the USTR publicly considered the US withdrawal from the WTO Agreement on Government Procurement - and 'unbinding' US tariff and market access commitments in the WTO - in order to better use power asymmetries for rebalancing US trade deficits through bilateral reciprocity negotiations, as advocated by Trump's trade policy advisor P. Navarro.[48] The US-China trade deal provides for dispute settlement through unilateral USTR determinations; this unilateralism illustrates the hegemonic trade mercantilism, which USTR Lighthizer would like to impose on the rest of the world. The ever more frequent disregard by the Trump administration of WTO rules (e.g. GATT Articles I, II and III) and dispute settlement procedures, the unwillingness of other WTO members to protect the WTO appellate review system by majority decisions on the filling of AB

[43] Idem, at 8, 13.

[44] Idem, at 120.

[45] Idem, at 121.

[46] USTR Report, Introduction.

[47] Cf. 'Superpower showdown – trading blows in a new cold war', Financial Times 4 July 2020 (citing USTR Lighthizer as publicly stating: 'The only fucking arbitrator I trust is me').

[48] On the disagreement of most economists with Trump's trade theory (e.g. rejecting multilateralism and bilateral trade deficits) as advocated by his main trade policy advisor P.Navarro see, e.g.: A.Lowrey, The 'Madman' behind Trump's Trade Theory, in: The Atlantic December 2018 issue (https://www.theatlantic.com/magazine/archive/2018/12/peter-navarro-trump-trade/573913/); M.Wolf, Dealing with America's trade follies, in: Financial Times, 20/04/2017.

vacancies (as, arguably, prescribed by Article IX:1 WTO Agreement)[49], and the dissolution of the AB Secretariat inside the WTO in spring 2020 (following US threats to block adoption of the WTO budget) illustrate a progressive *de facto* breakdown of rule-of-law in the WTO trading system.

The 'MPIA' agreement presented by the EU on behalf of its 27 EU member states and 21 other WTO members in the DSB meeting on 29 June 2020 provides for arbitration procedures under Article 25 DSU as a temporary substitute for appeals pending the incapacity of the AB, which no longer has the minimum three members necessary to review appeals due to the continued US blocking of Mexico's regular requests – on behalf of 121 WTO members – to initiate the nominations of the 6 vacant AB positions. Longer-term appeasement of the US destruction of the WTO legal and dispute settlement systems would have systemic repercussions far beyond the WTO. For, without a multilateral WTO dispute settlement system, not only the UN goals for sustainable development, climate change mitigation and future WTO negotiations, but also the US' efforts at inducing market-oriented reforms in China's totalitarian state-capitalism are bound to fail. Citizens all over the world will suffer from neglect of the ordo-liberal task of limiting governance failures and 'constitutional failures' in multilateral governance of transnational PGs.

Case-study: Contradictions between Tom Graham's '2013 Speech' as an AB Member and his '2020 Speech' as a Washington Trade Remedy Lawyer

Tom Graham is one of Washington's best-known trade remedy lawyers. He served on the AB from 2011 until December 10, 2019. On 6 February 2013, he gave a public speech on 'It Sure Looks Different From the Inside: Deciding International Disputes at the WTO' at Hofstra University Law School in the USA[50], in which he emphasized, *inter alia*:

- AB members, 'although they don't call us that, are in effect judges, on what is in effect the highest appeals court for the rules of global trade', 'applying a legal craft'; 'it is as craftsmen – not statesmen – that we work together to get it right'; 'we are the final arbiters of what the rules of international trade mean';
- the AB staff 'serves the Appellate Body as a whole – that is, Members don't have their own law clerks - which contributes to the sense of group commitment and collegiality, that is part of our tradition'; 'the sense of responsibility and dedication to the institution of my fellow Members have been enormously impressive, as has been the extraordinary ability and dedication of our truly great multinational staff';
- 'No decision of the Appellate Body has ever been overturned by the WTO Dispute Settlement Body – the committee of the whole WTO membership that oversees us'; 'losing governments have complied with all but a very small handful of our decisions in 110 cases over the past 18-year history of the Appellate Body. In terms of the percentage of disputes resolved successfully, and the record of compliance, this is perhaps the most successful international dispute settlement system in the history of the world,'
- 'As a practical matter, we have the final word not only in deciding cases but also in creating a body of jurisprudence for this global trade institution that is still new in the sense of the usual timeframe for creating international law'.

[49] On the legal duties under Article IX:1 WTO Agreement to overcome illegal abuses of veto-powers in the DSB by recourse to administrative majority voting on the filling of AB vacancies see: E.U.Petersmann, Between 'Member-Driven Governance' and 'Judicalization': Constitutional and Judicial Dilemmas in the World Trading System, in: Chang-fa Lo/J.Nakagawa/Tsai-fang Chen (eds), The Appellate Body of the WTO and its Reform, Singapore: Springer Publisher 2020, 15-42, at 33ff.

[50] See the text in: https://pdfs.semanticscholar.org/f76f/889303add145bdcaad7d7aa4dc13bc45f5a3.pdf.

In his speech on 'The Rise (and Demise?) of the WTO Appellate Body' on 5 March 2020, back in Washington after the end of his term as an AB member, Graham contradicted his legal findings in his 2013 speech[51], for instance by:

- criticizing 'an orthodoxy of viewpoint about the role of the Appellate Body as a self-anointed international court, with much broader authority to over-reach the rules and create judge-made law than I thought was permitted by the WTO agreements, or intended by the negotiators who created them'; as a result, 'the Appellate Body acting like a court … was not accountable to anyone'; 'the negotiating history strongly indicates that (the AB) was intended not as an international court, but as a check on occasional egregious mistakes by panels';
- proposing to '(p)rohibit anyone other than the team – deciders, and staff working directly on a case – from discussing the case' ('no private lobbying of individual deciders by staff leadership not part of the team on the case');
- 'Belief in a single, correct interpretation, and seeking it through expanded analyses, encouraged gap filling and overreach. It made the Appellate Body strain to look for that "one correct" interpretation instead of asking whether the panel made a serious error, whether the challenged measure was prohibited by the rules as written';
- stretching 'the words of agreed text, and to stretch decisions beyond merely resolving a particular dispute so as to create a body of jurisprudence, or to head off future disputes, (was) beyond the Appellate Body's mandate'; 'an undue adherence to precedent … bake in mistakes'.

According to Graham, his criticism of 2020 reflects his seven years of practical experiences as an AB member. He said: 'increasingly as I saw things from the inside, I mostly agreed with what has been […] the overall view of the United States as to the Appellate Body's proper role as negotiated by governments and written into the WTO Dispute Settlement Understanding. And I mostly agreed with the US critique of the Appellate Body's departure from that proper role.'[52] Yet, neither the USTR's denial of (quasi)judicial WTO dispute settlement functions nor the USTR's claims of the AB exceeding its powers by violating the DSU prohibitions of 'add(ing) to or diminish(ing) the rights and obligations provided in the covered agreements' (Articles 3.2 and 19.2 DSU) are convincing:

- Even though 'hidden in plain sight', WTO law prescribes impartial, independent and compulsory third-party adjudication of WTO disputes. Notwithstanding the deliberate avoidance, at the insistence of USTR negotiators in 1993, of references to 'judges', 'courts' and 'adjudication' in the DSU treaty provisions, the (quasi)judicial dispute settlement mandate is emphasized in the DSU (again, 'hidden in plain sight'), in WTO working procedures for WTO panelists, AB members and arbitrators, in numerous WTO dispute settlement reports, annual AB reports, official WTO publications, hundreds of books and thousands of articles published by WTO lawyers over the past 25 years. For years, even the official 'WTO badge' given to AB members by the WTO Secretariat used the title 'judge' (until this administrative practice was terminated by a WTO Deputy Director-General from the USA).
- All practicing WTO adjudicators (panelists, AB members, arbitrators) and WTO litigators representing WTO member governments (except some USTR lawyers and their trade remedy clientele) have consistently acknowledged the (quasi)judicial duties of independent, impartial, 'prompt settlement' of WTO disputes through, inter alia, clarifications of 'the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3 ***DSU***). In his 2013 speech, Graham convincingly described these tasks of AB

[51] Cf. Henry Gao, It Sure Looks Different from the Inside, and Now the Outside Too (or 'Graham on Graham'), in: International Economic Law and Policy Blog (Washington), 11 March 2020. The text of Graham's 2020 speech was published in: International Economic Law and Policy Blog (Washington), 9 March 2020.

[52] See pp. 4-5 of this 2020 speech (n 51).

members as 'judges applying a legal craft – not statesmen'.[53] As all AB reports have been (quasi)automatically adopted by 'negative consensus' decisions of the DSB, their legal interpretations and clarifications of WTO rights and obligations – including interpretation as: (1) a 'process of cognition' (e.g. of the common intentions of the law-maker as declared in the legal texts, whose words may have different meanings); (2) an 'act of volition' and choice by the interpreter constrained by the customary rules of treaty interpretation, and (3) as an 'authoritative rendering of the meaning of the applicable rules of law' for the settlement of the specific dispute[54] - have been exclusively determined by the AB, even if the legally binding nature of the dispute settlement rulings derives from the adoption of panel and AB reports by the DSB.

- As explained by the AB in its long-standing jurisprudence, the WTO legal interpretations clarifying WTO provisions in conformity with the customary rules of treaty interpretation – as prescribed in Article 3 DSU - cannot simultaneously violate the DSU prohibitions (inserted into the draft DSU in 1993 at the request of US negotiators) of 'add(ing) to or diminish(ing) the rights and obligations provided in the covered agreements' (Articles 3.2 and 19.2 DSU).[55] Having served myself as secretary to the Uruguay Round Negotiating Group 13 that elaborated the DSU, I recall that this same legal reservation was expressed during the drafting of Articles 3 and 19 DSU when these DSU provisions were inserted into the draft text upon the insistence of the USTR even though – as pointed out by other negotiators – no similar provisions exist in the founding texts for other international courts and dispute settlement bodies.

Graham's justification, as a trade remedy lawyer back in Washington, of his support for the lack of respect for the AB by the Trump administration[56] remains difficult to reconcile with his support for the judicial tasks as an AB judge. The conclusion of Graham's 2020 speech - '[t]he Appellate Body is gone and it is not returning'[57] - flatters the illegal power politics by the USTR and offers incentives for Washington's trade remedy lobbyists to continue their WTO-inconsistent trade remedy practices (e.g. of transferring revenue from illegal US dumping and countervailing duties to the protected US industries); but it fails to convince the more than 120 WTO members requesting, at each DSB meeting, to proceed to the filling of AB vacancies. The contradictory reasoning of Graham offers a taste of how contradictory WTO dispute settlement practices risk becoming without appellate review of panel reports pursuant to Article 17 DSU. Graham suggests in his 2020 speech that the AB should limit itself to reviewing 'whether the panel made a serious error' without creating 'a body of jurisprudence or to head off future disputes'. Such a limitation of AB review would not only be inconsistent with the text of the DSU as interpreted by the AB and all WTO members during 25 years. It would also undermine the central DSU objective of 'providing security and predictability to the multilateral trading system' in the 'prompt settlement' of WTO disputes through quasi-judicial clarifications of 'the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3.2 DSU).

US government pressures on US AB members to act 'patriotically' in support of US legal positions, and US opposition to reappointments of former AB members from the USA (like M.Janow and J.Hillman)

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[53] See note 51, at p. 11.

[54] On these three dimensions of legal interpretation see: G.Abi-Saab, Introduction: A Meta-Question, in: G.Abi-Saab/K.Keith/G.Marceau/C.Marquet (eds), Evolutionary Interpretation and International Law (2019), 7-12.

[55] Cf. AB Report, WT/DS110/AB/R, Chile-Alcoholic Beverages (2000), para.79. For an explanation of the interpretative approaches of the AB see: P.Van den Bossche/W.Zdouc, The Law and Policy of the World Trade Organizatio. Text, Cases and Materials (4th ed. 2017), 190 ff.

[56] See his short reply on the International Economic Law and Policy Blog (Washington), 11 March 2020: https://ielp.worldtradelaw.net/2020/03/it-sure-looks-different-from-the-inside-and-now-the-outside-too-or-graham-on-graham.html?

[57] See note 51, at p.6.

after they concurred in AB findings against the USA, reflect long-standing US traditions of politicizing the appointment of judges and the exercise of judicial powers. For example, in his book on *Supreme Injustice: Slavery in the Nation's Highest Court*, US history professor P.Finkelman recalls how the 'slavery jurisprudence' of the three most important, pre-civil war US Supreme Court justices (Marshall, Taney and Story) contributed to the US civil war responding to systemic hostilities in US law to human rights and social justice.[58] US law professor R.H.Fallon, in his book on *Law and Legitimacy in the US Supreme Court*[59], concurs with other US constitutional lawyers that the politicization of the US Supreme Court judges and judgments calls into question the legitimacy and reputation of the Court. Recent critics of the US Supreme Court, like A. Cohen's book on *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America*, point to social injustices, which the Court's jurisprudence continues to cause by often protecting powerful rather than vulnerable interests.[60] The WTO AB crisis – and the US refusal of accepting the compulsory jurisdiction of any other international court (like the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the Inter-American Court of Human Rights) – appear part of this politicization of independent, impartial third-party adjudication by American interest group politics. The 'Washington speech' of former AB member Graham seems to confirm two important policy lessons:

- the rights-based 'Geneva consensus', as described by former WTO Director-General P.Lamy, protects a higher degree of institutionalized 'public reason' than the money-driven 'Washington consensus';[61] and
- the three psychological principles of 'thinking automatically' (e.g. 'fast' and 'spontaneous' rather than 'deliberative' and 'reasonable slow thinking'), 'thinking socially' (e.g. adjusting to social contexts of corruption) and 'thinking with context- and culture-specific, mental models' (like 'rent-seeking' in under-regulated financial and trade-remedy industries), as described by 2017 Nobel Prize economist R. Taler[62], shape the political discourse and neo-liberal cost–benefit calculations of Washington's trade remedy lawyers like USTR Lighthizer and former AB member Graham.

Fortunately, among the 27 AB members since 1995, Graham remains the only one who seems to be proud of now pleading for the destruction of what he himself praised in 2013 'as the most successful international dispute settlement system in the history of the world'. History confirms that legal civilizations evolve dialectically; they never remain guaranteed – unless citizens defend PG and 'public reason' and resist intergovernmental power politics. The DSU and its AB system can certainly be improved, even if the DSU reform negotiations in special DSB sessions since 1998 have so far eluded any agreements. Neither the 164 WTO members nor their citizens have reasonable self-interests in destroying the uniquely successful AB system of the WTO. The reform proposals by Graham (e.g. for disregarding the customary methods of treaty interpretation and the 'collegiality principle' practiced in AB deliberations) would further undermine the WTO dispute settlement system; in any judicial system, interpretative methods – within the constraints prescribed by the applicable law - remain a matter for each individual Justice to decide, as long as each Justice adopts a legally consistent method in good faith and remains open to modifying her interpretive method in response to the judicial arguments of her colleagues.[63] How should citizens, democratic institutions and WTO institutions respond to the US assault on the WTO at a time when US trade wars ignore WTO law and President Trump withdraws from global PGs treaties like the 2015 Paris Agreement on climate change mitigation and the WHO constitution for protecting public health?

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[58] P.Finkelman, Supreme Injustice: Slavery in the Nation's Highest Court' (Harvard UP 2018), at 76ff.

[59] R.H.Fallon, Law and Legitimacy in the Supreme Court (Harvard UP 2018), at 155ff.

[60] Cf. Cohen (n 13), at 309ff.

[61] Cf. P.Lamy, The Geneva Consensus: Making Trade Work for All (CUP 2003).

[62] On these 'three principles' see n 4.

[63] This is also acknowledged in the above-mentioned book by Fallon (n 60), at 131.

Conclusion: Justice, Democratic Constitutionalism and Rule-of-law Require Constitutional Restraints on Power Politics

The WTO trading, legal and dispute settlement systems regulate more than 90% of world trade. Their legal 'civilization' of trade policies enabled governments to lift billions of people out of poverty though rules-based, peaceful cooperation. President Trump's nationalist assault on the economic, political and legal foundations of the WTO challenge global PGs like sustainable development, climate change prevention, poverty reduction and human rights. This concluding section explains why adversely affected WTO members need to defend (1) 'constitutional justice', (2) democratic constitutionalism and (3) transnational rule-of-law in international trade in order to protect the welfare and human rights of their citizens and enable the WTO to cope with the challenges of climate change.[64]

Need for defending 'constitutional justice'

The idea of independent, impartial 'courts of justice administering justice' historically preceded the social contract ideals of democratic constitutionalism (e.g. since ancient Athens), republican constitutionalism (e.g. in ancient Rome and other Italian city republics) and of 'democratic struggles for justice' (e.g. in 17th century England, 18th century America and France, post-1945 struggles for decolonization). The customary rules of treaty interpretation (as codified in the Preamble and Article 31, 32 VCLT) prescribe interpretation of treaties based not only on their text, context, object and purpose, but also 'in conformity with principles of justice' and 'human rights and fundamental freedoms for all'. The universal recognition of 'inalienable' human rights, democratic self-determination of peoples and of their modern *jus cogens* core refutes path-dependent, power-oriented claims of unlimited 'state sovereignty' and of separating 'legal positivism' from 'principles of justice'.

The legal philosopher J.Rawls, in his *Theory of Justice* (1971), described constitutionalism as a 'four-stage sequence' based on: (1) agreed constitutional 'principles of justice' (e.g. in the US Declaration of Independence 1776); (2) a constitutional convention elaborating a national constitution providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation progressively implementing and protecting the constitutional principles of justice for the benefit of citizens; and (4) the daily application of the agreed constitutional and legislative rules to particular cases by administrators, judges and citizens so as to promote rule-of-law and rule-compliance by citizens.[65] In his later book on *Political Liberalism*, Rawls emphasized the legitimacy challenges arising from the permanent fact of a plurality of diverse religious, philosophical and moral doctrines endorsed by citizens: the democratic exercise of power is justifiable only to the extent it remains consistent with the essential constitutional principles and institutionalizes 'public reason' supported by free and equal citizens as reasonable and rational in spite of their diverse moral beliefs.[66] Sections II and III of this contribution described increasing abuses (e.g. by President Trump and authoritarian rulers) of foreign policy powers for circumventing parliamentary, judicial and democratic control; Anglo-Saxon neo-liberalism, authoritarian state-capitalism and the trade wars among the incumbent and rising 'superpowers' undermine the 'social contracts' justifying the GATT/WTO trading system. Sections V and VI explained why President Trump's assault on the WTO legal and appellate review system violates not only specific WTO legal obligations (like Article 17 DSU), but also broader 'constitutional principles' justifying the WTO dispute settlement system (like WTO limitations of arbitrary abuses of veto-powers, WTO provisions enabling majoritarian appointments of WTO officials, justification of AB

[64] On the need for 'greening the embedded liberalism' underlying WTO law, see Petersmann (n 36).

[65] Cf. J Rawls, A Theory of Justice. Revised edition (Harvard UP 1999) 171ff, 176: 'the four-stage sequence is a device for applying the principles of justice. This scheme is part of the theory of justice as fairness and not an account of how constitutional conventions and legislatures actually proceed. It sets out a series of points of view from which the different problems of justice are to be settled, each point of view inheriting the constraints adopted at the preceding stage.'

[66] J Rawls, Political Liberalism (Columbia UP 1993).

legal interpretations by the customary rules of treaty interpretation vis-à-vis nationalist claims of lack of state consent). My books on *International Economic Law in the 21st Century* and on *Multilevel Constitutionalism for Multilevel Governance of Public Goods* followed from Rawls' *theory of justice as fairness* – and from the fact of globalization, which prevents every state from protecting global PGs demanded by citizens without international cooperation based on international law and international organization – that Rawls' 'four-stage sequence' of democratic constitutionalism must be enlarged by (5) international law and (6) multilevel governance institutions so as to become a constitutionally restrained, transnational '6-stage process' of multilevel governance of PGs in a globally interdependent world – as practiced inside the EU's multilevel constitutionalism. Protecting human rights and agreed principles of justice inside and beyond states (including also China's 'one state, two systems' confederation) requires recognition that state citizens – as 'democratic principals' - must control also multilevel governance of transnational PGs as 'cosmopolitan citizens' holding governments accountable whenever they transgress their limited, delegated powers.[67] Critical legal positivism must acknowledge that modern international law (including WTO law) includes not only rules and principles based on state consent, but also 'inalienable' human rights and agreed 'principles of justice' protecting human and democratic rights of citizens and peoples justifying 'struggles for justice'.[68]

Constitutional approaches – based on citizen-oriented (e.g. Kantian and Rawlsian) theories of justice for justifying 'the basic structures' of (trans)national legal systems – are more appropriate for evaluating the regulatory challenges of IEL, including WTO law, than the power politics underlying UN law, the current WTO crises and related, neo-liberal and state-capitalist abuses of foreign policy powers. Just as Chinese citizens (e.g. in Hong Kong and Taiwan) have good reasons to defend their constitutional contracts prescribing 'constitutional tolerance', so have citizens and their governments in the 164 WTO members reasonable self-interests in defending transnational rule-of-law and 'constitutional justice' in their multilevel trading systems. President Trump justifies his disdain and rejection of what he perceives as 'terrible multilateral agreements' (like the WTO Agreement, the 2015 Paris Agreement on climate change mitigation, the WHO Agreement and the UN Charter itself) by his preference for hegemonic nationalism ('America first'). Adversely affected WTO member governments must review whether their pragmatic responses to US power politics – like their recourse to interim 'appellate arbitration' based on Article 25 DSU - will suffice for protecting the global PG of the WTO legal system. If the November 2020 US elections should not empower a more reasonable, democratic US President, WTO members may have good reasons for filling the vacant WTO AB positions by means of majority voting (as prescribed in Article IX.1 WTO Agreement) as a necessary *ultima ratio* defending rule-of-law in the WTO trading, legal and dispute settlement system. In order to remain legitimate and sustainable, WTO law must be justified not only by state consent to the 'law in the books', but also by respect for 'principles of justice' and impartial third-party adjudication constitutionally limiting the 'law in action', including the arbitrary power politics of the US Trump administration. The constant interactions between 'WTO law as a legal order' and 'WTO legal practices' require 'struggles for justice' (e.g. for defending rule-of-law and the WTO AB as part of WTO law as approved by parliaments) as the ultimate proof of human 'reason and conscience', as universally acknowledged in the Preamble and Article 1 of the 1948 Universal Declaration of Human Rights (UDHR) and as practiced by reasonable and responsible citizens since ancient times.

[67] Cf. E.U.Petersmann, Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law (Oxford: Hart 2017) 112f, 126f, 174ff. On my use of Kantian and Rawlsian theories of justice for justifying economic constitutionalism, see also: Petersmann (n 2), introduction and chps. I-III.

[68] On 'critical legal positivism' see Petersmann (n 2), at 12ff; R.Alexy, The Argument from Injustice. A Reply to Legal Positivism (OUP 2002).

Need for defending 'democratic constitutionalism'

This contribution has used the conflicting neo-liberal, state-capitalist and European ordo-liberal conceptions of IEL as an illustration of the reality of fundamental disagreements among the 164 WTO members on 'democratic constitutionalism' and on their legal design of WTO adjudication. The evolution of WTO jurisprudence was influenced by ordo-liberal, 'constitutional' and 'judicial approaches' (e.g. reviewing the 'necessity' and 'proportionality' of trade restrictions by rules-based 'balancing' of competing values and judicial administration of 'due process of law'[69]). Yet, President Trump's assault on the AB now denies *any* independent WTO adjudication and impartial, judicial use of the customary rules of treaty interpretation. It remains to be seen whether the illegal power politics by WTO members can be limited with the help of a different, democratic US President willing and capable of protecting rule-of-law and impartial adjudication inside and beyond the USA. Can the European tradition of 'judicialization' of economic integration law (e.g. based on weighing and balancing of the competing principles and interests at stake in each dispute) be continued in the WTO against the will of the USA with the support from other WTO members? Why did WTO diplomats discontinue the past WTO practices of convening regular parliamentary conferences inside the WTO enabling members of national parliaments to hold WTO diplomats democratically accountable? Will the lack of US leadership and of democratic legitimacy of illegal WTO power politics (like the destruction of the WTO AB) entail fragmentation of trade law by plurilateral agreements among 'willing WTO members'[70] defending rule-of-law, climate change mitigation and other PGs and related rights of citizens?

Similar to the explanation by J.Rawls of why political liberalism requires respect for 'reasonable disagreements' among citizens within the limits of the agreed 'constitutional principles of justice', also reasonable disagreements among states require respect for legitimate 'constitutional pluralism'. For instance, as long as the UN legal principle of 'sovereign equality of states' (Article 2 UN Charter) protects the very diverse choices concerning ratification of UN human rights conventions, the customary law scope of UN human right law remains limited, contested and not effectively protected (e.g. due to lack of effective judicial remedies inside many states). This ineffectiveness of UN HRL entails that the collective defence of 'democratic constitutionalism' beyond states must build on 'coalitions among willing countries', like the multilevel democratic constitutionalism among the 27 EU member countries based on their agreed ECHR and EUCFR rights and obligations, or the comparatively less effective, multilevel judicial protection of human rights based on regional human rights conventions in Africa, Europe and in Latin America. The 'Brexit', the non-ratification of the Inter-American Convention on Human Rights by Canada and the USA, and President Trump's rejection of the EU-US 'Transatlantic Trade and Investment Partnership' illustrate opposition from Anglo-Saxon neo-liberalism against the EU's constitutionalism and the EEA's 'constitutionalism light' (e.g. as protected by the comparatively less effective cooperation among the EFTA Court and national courts). Inside the EU, it was mainly due to the jurisprudence of the CJEU that – in relations among the 27 EU member states – the settlement of trade and investor-state disputes through GATT and ISA procedures was replaced by the more comprehensive, multilevel judicial remedies in national courts and the CJEU, protecting judicial remedies also of EU citizens and non-governmental actors.[71] It remains an open question to what extent the external EU trade and investment agreements with third states can strengthen democratic governance, transnational rule-of-law and judicial protection of fundamental rights in the world trading system. Even inside the EU's common market law, it remains contested to what extent the EU's common

[69] Cf. T.Soave, European Legal Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva, in: The Law and Practice of International Courts and Tribunals 10 (2020), 107-133.

[70] In his book on The Willing World: Shaping and Sharing a Sustainable Global Prosperity (CUP 2018), former US congressman and WTO AB judge J.Bacchus begins by asking his readers: Will you join with others working now to find the 'right way to make life better for billions of people on our imperiled planet'? (at ix).

[71] On the inconsistency of ISA among EU member states with EU constitutional law see Case C-284/16 The Slovak Republic v. Achmea BV [2018] ECLI:EU:C:2018:158.

competition law should be construed in conformity with fundamental rights and constitutional democracy principles rather than only in terms of 'economic efficiency' principles.[72]

Need for defending 'rule-of-law'

Since the 1948 UDHR, an increasing number of human rights instruments recognize 'that human rights should be protected by the rule of law' (Preamble UDHR); effective protection of human rights requires a 'fair and public hearing by an independent and impartial tribunal' (Article 10 UDHR). Since 1945, ever more national Constitutions and international agreements provide for national and international courts of justice, judicial remedies by state and non-state actors, and for other constitutional principles (like 'legality', supremacy of the law, public monopoly of power to enforce the law, separation of powers, democratic legitimacy of law) which, together, define 'the basic principles of the rule of law'.[73] The co-existence of hundreds of functionally limited, international organizations for the multilevel governance of transnational PGs – and the need for promoting the overall coherence of their 'primary' and 'secondary law' regulating interdependent (e.g. economic, environmental, social and technological) PGs collectively produced by the 193 UN member states for the benefit of their citizens – render transnational rule-of-law ever more necessary. The universal recognition of 'inalienable' human and democratic rights entails that law and 'legal positivism' can no longer be separated from morality and agreed 'principles of justice'. Without related 'struggles for justice' inside and beyond states for subjecting governmental powers to multilevel constitutional, legislative, administrative and judicial restraints, protection of human rights and PGs will become ever more difficult in a globally interdependent world.

Transnational rule-of-law - as defined by the UN (e.g. in terms of legal and judicial compliance with UN human rights)[74] - has emerged only after World War II inside and among constitutional democracies in the context of multilateral treaty systems protecting human and democratic rights and judicial remedies at national and international levels of governance. As described in section IV above, the transformation of the power-oriented GATT 1947 into the WTO legal and dispute settlement system has enabled 25 years of economic development and transnational rule-of-law up to the arbitrary destruction of the WTO appellate review system by the US Trump administration in December 2019. Even if there is no rule-of-law protecting human rights *inside* many authoritarian WTO members like China, China remains committed to compliance with the WTO dispute settlement system in relations with most third WTO members (e.g. except in its 'trade war' with the USA, and its authoritarian national policies vis-à-vis Hong Kong, Macao and Taiwan). Empirical studies suggest that China's formal record of complying with WTO dispute settlement rulings is comparatively good.[75] As for '17 years, from its entry into the WTO in December 2001 to December 2018, China has timely and satisfactorily implemented the findings and recommendations of WTO tribunals in all but one dispute'[76], China's

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[72] Cf. the EUI doctoral law thesis by E.R.Caspa, Of Masters, Slaves, Behemoths and Bees. The Rise and Fall of the Link between Competition, Competition Law and Democracy, defended on 9 July 2020 and available in the EUI Library.

[73] Cf. B.Z.Tamanaha, On the Rule of Law. History, Politics, Theory (CUP 2004); C.A.Feinäugle (ed), The Rule of Law and its Application to the UN (Baden-Baden: Nomos 2017).

[74] See n 20 above and related text.

[75] Cf. W.Zhou, China's Implementation of the Rulings of the World Trade Organization (Oxford: Hart 2019). By December 2018, China had been a complainant in 20 WTO disputes, a respondent in 43 disputes, and a third party in 143 disputes. Zhou's book examines China's implementation measures in the 43 disputes, where China had been a respondent, including also cases that have not (yet) been adjudicated. The fact that China had never been subject to requests for authorization of retaliation confirms the empirical conclusion of Zhou that China, as a respondent, has fully participated in the dispute settlement and adjudication processes, including 10 disputes settled without WTO rulings (analyzed in Part II of the book) and implementation of adverse WTO rulings in 12 WTO dispute settlement findings by the end of 2018 (as demonstrated in Parts III to VII of the book). The book shows how WTO law and WTO dispute settlement rulings were used for reforming China's own legal system.

[76] Zhou (n 75), 183.

record of compliance with WTO dispute settlement rulings compares favourably also with US dispute settlement practices (in contrast to China, the US has faced many WTO requests for authorizing retaliation following WTO findings on US 'non-compliance' with WTO dispute settlement rulings). Yet, China's good record of complying with adverse WTO dispute settlement rulings does not justify generalizations on China's compliance with WTO rules, which remains problematic in many respects (e.g. regarding transparency and subsidy disciplines, SOEs, intellectual property obligations and judicial remedies). The empirical finding that

> 'at the core of China's approach has been the use of WTO rulings as an external lever to facilitate domestic economic reforms while at the same time limiting the impacts of the rulings on its policy objectives and regulatory framework designed to pursue such objectives'[77],

corresponds with similar findings on the impact of adverse WTO dispute settlement rulings on domestic policy-making and legal implementation of WTO law in other states like Canada and the USA.[78] Thus, even if President Xi rejects 'Western constitutionalism', 'separation of powers' and 'judicial independence' as restraints on his 'communist party state' monopoly, he seems to support international 'rule-of-law' as a legal restraint on trade policy powers and strategic policy instrument for regulatory reforms also inside China.

WTO members should, therefore, seize China's participation in the MPIA agreement for using arbitration procedures under Article 25 DSU as a temporary substitute for appeals pending the incapacity of the AB. The EU, China and other WTO members should also continue their support for Mexico's regular requests at each DSB meeting – on behalf of 121 WTO members – to initiate the nominations of the 6 vacant AB positions. If re-election of President Trump in the US elections in November 2020 risks leading to complete destruction of the WTO legal and dispute settlement, WTO members should fill the AB vacancies by majority decisions of the WTO Ministerial Conference or General Council as prescribed in Article IX.1 WTO Agreement, together with a pragmatic 'waiver' for the USA to continue remaining outside the WTO appellate review system.

Return to the rule-of-law among WTO members is necessary for protecting sustainable development, climate change mitigation, poverty reduction and peaceful reforms of the world trading system, including market-oriented reforms in China's totalitarian state-capitalism and stronger regional cooperation. Taiwan could assume a leadership role not only in these necessary WTO reforms bridging the ideological differences among neo-liberal, state-capitalist and ordo-liberal approaches to international trade regulation. It should also continue its 'enlightenment efforts' at convincing China's communist rulers that moderate forms of 'communist constitutionalism' (e.g. including confederal guarantees of China's 'one state, two systems' commitments aimed at protecting peaceful cooperation and collective learning from regulatory competition) will *strengthen* rather than weaken China and the welfare of all its citizens.

As regards China's external economic cooperation in the context of China's BRI for bilateral infrastructure investments, trade, investment and financial cooperation of China with 65 countries bordering the ancient territorial and maritime silk roads, also China's Supreme People's Court has confirmed the importance of protecting rule-of-law and judicial remedies.[79] Chinese BRI investments

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[77] Zhou, idem, 184.

[78] J.D.Krikorian, International Trade Law and Domestic Policy (Vancouver: University of British Columbia Press 2012), 81: 'the US government has acted in its own self-interest and thwarted the potential impact of the dispute settlement mechanism either by effectively ignoring its decisions or by implementing them in such a way as to minimise their overall effect'.

[79] See the Opinion, issued on 16 June 2015 by China's Supreme People's Court, that 'the rule of law is an important safeguard for China's Belt and Road Initiative, in which the role of the judiciary is indispensable' ("Several Opinions of the Supreme People's Court on the Judiciary's Provision of Judicial Services and Safeguard for the Belt and Road", Fa Fa (2015) 9 Hao, 16 June 2015, quoted by J. Wang, (2019), China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law, in NUS Law Working Paper No. 2019/005, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346427.)

inside the 11 EU member states that, so far, have concluded 'memoranda of understandings' on their participation in China's BRI, risk running into legal problems if they neglect the EU legal guarantees of civil, political, economic, social and cultural rights, EU competition and social laws, open government procurement procedures and multilevel, judicial remedies (e.g. in legal conflicts about "justice at work" in the power relationships between Chinese employers and their employees inside EU member states if liberal values like equal individual freedoms, privacy and co-determination of workers are disregarded).[80] It remains to be seen whether the ongoing negotiations on reforms of ICSID and UNCITRAL arbitration procedures, and the EU proposals for a multilateral investment court system and a bilateral EU-China investment agreement, will strengthen the public law dimensions of investor-state disputes in ways that will also be accepted by China. The jurisprudence of the CJEU and of the ECtHR on protecting worker rights (e.g. based on EU anti-discrimination law, Articles 8, 11 and 14 ECHR) have strengthened the legal disciplines for foreign investors inside the EU and for the protection of their workers (e.g. against being treated like commodities or robots), for instance by limiting the terms of labor contracts through mandatory principles of constitutional law and human rights law aimed at guaranteeing 'justice at work for all'.[81] The more China continues cooperating with constitutional democracies protecting human rights and transnational rule-of-law, the more such rules-based economic cooperation may induce rule-of-law reforms also inside China. Even if China seems to be less liberal in 2020 than it was in 2001 at the time of its accession to the WTO, reasonable citizens must never stop struggling for rule-of-law as a constitutional constraint on abuses of public and private power at national and transnational levels of governance.

[80] Cf. E.U.Petersmann, International Settlement of Trade and Investment Disputes over Chinese 'Silk Road Projects' inside the EU, in: G,Martinico/XWu (eds), A Legal Analysis of China's Belt and Road Initiative: Towards a New Silk Road? (Cham: Palgrave MacMillan 2020), 45-68.

[81] Cf. H.Collins, Justice at Work, LSE Law, Society and Economy Working Papers 18/2019.