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Neo-Liberal, State-Capitalist and Ordo-Liberal  
Conceptions of Multilevel Trade Regulation

Ernst-Ulrich Petersmann and Armin Steinbach



European University Institute

**Robert Schuman Centre for Advanced Studies**

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## **Abstract**

Reforms of international trade and investment law and institutions are hampered by conflicting economic paradigms. For instance, utilitarian Anglo-Saxon neo-liberalism (e.g. promoting self-regulatory market forces privileging the homo economicus), constitutional European ordo-liberalism (e.g. protecting multilevel, constitutional rights and judicial remedies of EU citizens), and authoritarian state-capitalism (e.g. protecting totalitarian power monopolies of the communist party in China) pursue different legal and institutional designs of trade and investment agreements. Globalization and its transformation of national into transnational public goods (PGs) require extending constitutional and institutional economics to multilevel governance of transnational PGs in order to enhance the wealth of nations. Maintaining the worldwide legal and dispute settlement system of the World Trade Organization (WTO) - and interpreting its regional and national exception clauses broadly in order to reconcile diverse, national and regional institutions of economic integration and of 'embedded liberalism' - remains in the interest of all WTO member states.

## **Keywords**

Adjudication; climate litigation; constitutionalism; neo-liberalism; ordo-liberalism; public goods; state-capitalism; WTO.





## 1. Introduction\*

In his recent book on *Globalists. The End of Empire and the Birth of Neoliberalism* (2018), history Professor Q. Slobodian describes the WTO as ‘the paradigmatic product of Geneva School neoliberalism’, and the ‘creation of the WTO (as) a crowning victory of the neoliberal project of finding an extra-economic enforcer for the world economy in the twentieth century’.<sup>1</sup> Yet, like many other Anglo-Saxon commentators on neo-liberalism, Slobodian overlooks the categorical differences between Anglo-Saxon neo-liberalism and European ordo-liberalism: US neo-liberalism and Chicago School economists prioritize liberalization of market access barriers, deregulation, privatization and financialization of markets in order to empower utilitarian market actors (*homo economicus*) to pursue their self-interests and enhance the self-regulating forces of market competition as spontaneous information, coordination and sanctioning mechanisms. The German, European and Virginia Schools of ordo-liberalism perceive markets as legal constructs of reasonable citizens, who cannot maximize their general consumer welfare without legal limitations of market failures, governance failures and ‘constitutional failures’.<sup>2</sup>

GATT/WTO jurisprudence (e.g. on interpreting GATT/WTO rules as protecting non-discriminatory conditions of competition) emphasized the systemic, ordo-liberal functions of states and of the GATT/WTO legal and dispute settlement systems as ‘guardians’ of non-discriminatory conditions of competition. US President Trump’s assault on the world trading, health protection and environmental systems illustrates how ‘constitutional choices’ – like congressional delegation of vast trade policy powers to the US President, irresponsible congressional abdication of control over the ‘trade wars’ initiated by President Trump, and judicial deference vis-à-vis money-driven interest group politics and ‘regulatory capture’ of economic policies at Washington – can quickly destroy democratic governance and the rules-based international order.<sup>3</sup> Yet, the 1934 US Reciprocal Trade Agreements Act designed by US Secretary of State Cordell Hull also demonstrated how the protectionist interest group politics behind the congressional Smoot-Hawley tariffs of 1930 could be legally constrained by legislation enabling the Executive branch to negotiate reciprocal trade liberalization agreements.

The ordo-liberal school of thought contrasts sharply with the economic paradigm underlying the recent *Report on the Appellate Body of the WTO* by the US Trade Representative (USTR) of February 2020<sup>4</sup>, which perceives WTO law as an instrument of US power politics and disregards ordo-liberal ‘constitutional economics’ justifying the multilateral WTO legal and dispute settlement systems. The legal justifications by the Trump administration of their illegal ‘blocking’ of WTO Appellate Body (AB) nominations insist on US interpretations of WTO rules and US criticism of AB findings without any

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\* The views expressed in this article are strictly personal. This paper has been accepted for publication in *The Journal of World Investment & Trade* 2021.

<sup>1</sup> Quinn Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism* (Harvard UP 2018) 23-25.

<sup>2</sup> On the differences between Anglo-Saxon, utilitarian neo-liberalism and European, constitutional ordo-liberalism see: Ernst-Ulrich Petersmann, ‘Economic Disintegration? Economic, Political and Legal Drivers and the Need for Greening ‘Embedded Liberalism’’ (2020) 22 *JIEL* 347.

<sup>3</sup> It was only in a judgment of 14 July 2020 that the US Court of International Trade began annulling some of the executive import restrictions of US President Trump; cf. Steve Charnovitz/Gary Hufbauer, Landmark court decision limits presidential trade restrictions, in: <https://voxeu.org/content/landmark-court-decision-limits-presidential-trade-restrictions>. According to the *Financial Times* of 5 October 2020, there are now more than 3’500 lawsuits by US companies pending in the US Court of International Trade, which challenge US tariffs on imports from China imposed by executive orders. See also Ernst-Ulrich Petersmann, ‘The 2018 Trade Wars as a Threat to the World Trading System and Constitutional Democracies’ (2018) 10 *Trade L & Dev* 179..

<sup>4</sup> USTR, *Report on the Appellate Body of the WTO*, Washington February 2020. For a criticism of this report see: Ernst-Ulrich Petersmann, ‘WTO Adjudication@me.too: Are Global Public Goods like the World Trade Organization Owned by Governments or by Peoples and Citizens?’ (2020) 13 *Journal of East Asia and International Law* 21.

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). The USTR Report overtly acknowledges that its purpose ‘is not to propose solutions’.<sup>5</sup> If concerted defense of the multilateral WTO legal and dispute settlement system fails, the outlook for multilateral trade and environmental protection systems will be gloomy. Without a multilateral WTO dispute settlement system, the UN sustainable development goals, climate change mitigation, future WTO negotiations, and also US efforts at inducing market-oriented reforms in China’s totalitarian state-capitalism are unlikely to succeed. Authoritarian strongmen may benefit from intergovernmental power politics, neo-liberal interest group politics and from populist (e.g. anti-elitist and anti-pluralist) nationalism (‘America first’). Yet, 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 public goods (PGs).<sup>6</sup>

This contribution explores the different economic, legal and policy paradigms underlying the increasing clashes among American neo-liberal, China’s state-capitalist and European ordo-liberal conceptions of international trade law, policies and economic institutions. The core argument put forward in this article is that the neoclassical ‘maximization paradigm’ must be complemented by ‘constitutional contract/exchange paradigms’ for deliberative or evolutionary choices of constraints that protect informed, individual and democratic preferences. In contrast to the focus of politics on ‘winners’, ‘losers’ and distribution of power, the exchange paradigm of constitutional economics focuses on mutual individual and collective gains enabled by constitutional cooperation improving the ‘laws and institutions’ of the economic-political order. The emerging conflicts among competing paradigms reflect the realities of ‘constitutional pluralism’ and ‘regulatory competition’ among authoritarian economic systems (e.g. in China and Russia) and neo-liberal or ordo-liberal market economies committed to ‘methodological individualism’, ‘democratic constitutionalism’ and ‘rational choices’ by individuals and peoples.

Reference to these paradigms allows us to explain why globalization and its transformation of national into transnational PGs require extending constitutional and institutional economics to multilevel governance of transnational PGs in order to enhance the wealth of nations – not only through cooperation and division of labor among private economic actors, but also among lawmakers, governments and courts of justice. Efficient allocation of scarce resources and satisfaction of consumer preferences can be enhanced by both constitutional improvement of the contractarian efficiency of ‘laws and institutions’ (e.g. constraining coercive authority, protecting democratic preferences) and post-constitutional economics maximizing the available economic goods, services and resources.

## 2. Institutional Economics and International Law

Economic activities – like production, distribution and consumption of goods and services and related investments - are influenced not only by offer and demand from private economic actors like producers, investors, traders and consumers. They are also strongly influenced by political values (like human rights), legal institutions (like common law liberties, protection of monetary stability, property rights, contract law, corporate law, rule of law), technological progress (e.g. enabling past ‘industrial revolutions’ based on steam power, electricity, information and communication technologies), social

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<sup>5</sup> USTR Report (n 4), p. 121.

<sup>6</sup> On the economic distinction between private goods, non-excludable and non-exhaustible ‘pure PGs’, non-exhaustible ‘impure PGs’, and non-excludable ‘common pool resources’, their respective ‘collective action problems’, and the legal strategies for limiting market failures, governance failures and ‘constitutional failures’ (like formation of ‘clubs’ limiting free-riding among WTO members and among citizens) see Ernst-Ulrich Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (Hart 2017) 190ff.

institutions (like markets, trust, corruption, religious and cultural traditions like gender equality), political governance institutions and government policies as explored by ‘institutional economics’ and ‘ordo-liberal’ analyses of law, societies, polities and economies.<sup>7</sup> Humans create legal institutions (e.g. as formalized extension of social norms more generally) in order to live and cooperate peacefully, limit risks (like ‘Hobbesian wars of each against each other’), reduce transaction costs (e.g. due to uncertainty and incomplete information) and promote welfare through agreed rules limiting coordination problems and abuses of public and private power.<sup>8</sup>

While the design of legal institutions depends on public and private preferences and traditions, economic analysis looms increasingly prominently as normative and analytical yardstick for the design of legal institutions. Despite a wide range of economic perspectives on legal rules, institutional economics’ focus on legal rules offers a suitable, albeit under-researched framework and interdisciplinary approach to studying international trade law. While the institutional economic benchmark shares with neoclassical economic certain fundamental assumptions (such as methodological individualism or normative individualism), on other accounts it extends the analysis to other aspects that are typically ignored in neoclassical economics.<sup>9</sup> To the extent that neoclassical economics assumes the existence and market-clearing function of ‘perfect competition’ and the absence of transactions costs (allowing what is typically referred to the Coase theorem), institutional economics instills what lawyers may find more realistic when dealing with interpreting and analyzing legal rules – that in the real world without ‘perfect market competition’ and without equal access to human capabilities, economic resources and opportunities, a move toward ‘free markets’ may not enhance efficiency<sup>10</sup>; that the political economy environment with its heterogeneity of stakeholders and interests matters for the design of legal rules; that given the persistence of transactions costs, legal institutions offer plausible solutions to deal with transactions costs in cost-effective manners; and that emphasis should be given to constitutional choices regarding protection of human capabilities, constitutional rights of citizens (like equal access to education, health protection, satisfaction of basic needs) and the principal-agent relationships between citizens and governance agents with limited, delegated powers.

Specifically, constitutional economists (focusing on the constitutional rules that constrain the choices and activities of economic and political agents) apply the market assumption of individual pursuit of self-interests also to political markets. Constitutional contracts are interpreted as rules-based, contractarian processes (e.g. assigning all persons equal values), in contrast to post-constitutional governance that is often more akin to result-oriented search of truth, for instance when organizations (like firms, political governments) receive limited, delegated powers for realizing specified goals. As ‘political failures’ may be just as pervasive as ‘market failures’, the search for legal protection of individual preferences (e.g. by means of legal protection of human and fundamental rights) and for legal restraints on abuses of public and private power must explore not only legislative, but also potential constitutional rules and the use of multilevel governance mechanisms based on international law and

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<sup>7</sup> Cf. Claude Ménard and Mary M. Shirley (eds), *Introduction to a Research Agenda for New Institutional Economics* (Elgar Publishing 2018); Erik Furubotn and Rudolf Richter, *Institutions and Economic Theory The Contribution of the New Institutional Economics* (2nd edn, University of Michigan Press 2005); Kip Viscusi, John M. Vernon and Joseph E. Harrington, *Economics of Regulation and Antitrust* (2nd ed., MIT Press 1995). The German and European schools of ordo-liberalism are documented in the more than 70 volumes of the annual *ORDO-Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, first published in 1949 by the two founders of the Freiburg school of ordo-liberalism (i.e. Walter Eucken and Franz Böhm) together with Friedrich August v. Hayek. On the need for ‘responsive regulation’ and the role of ‘procedural justice’ in promoting voluntary compliance see: Peter Drahos (ed), *Regulatory Theory. Foundations and Application* (Australian National University Press 2017), chapters 1-3, 7-8.

<sup>8</sup> On the importance of transaction costs in the emergence of firms and other market institutions see: Ronald Coase, *The Problem of Social Cost* (1960) 3 *The Journal of Law and Economics* 1; Oliver E. Williamson, *Markets and Hierarchies. Analysis and Antitrust Implications* (Free Press 1975).

<sup>9</sup> Furubotn and Richter (n 7) 482-508.

<sup>10</sup> On the history of feudal, capitalist, communist and neo-liberal ‘inequality regimes’ distorting market competition, the distribution of incomes and wealth see: Thomas Piketty, *Capital and Ideology* (Belknap Press 2019).

‘institutional checks and balances’. Hence, rather than calculating efficiency only by way of cost-benefit studies, constitutional economists search for inclusive, reasonable agreements among citizens protecting democratic preferences, limiting special interests and constraining government powers to discriminate (e.g. in response to rent-seeking pressures).

The ‘social contract ideal’ of citizens making reasonably informed ‘constitutional choices’ is often confronted with the reality that economic actors and political regulators have only limited knowledge of the complex interactions among private and public, national, transnational and international legal, economic, political and social rules and institutions.<sup>11</sup> Their decisions may be influenced also by ‘rational ignorance’ and intuitive or irrational motives, as illustrated by the diversity of ‘social contract’ theories and assumptions.<sup>12</sup> The ‘paradox of freedom’ – *i.e.* the inherent risks of human freedoms destroying themselves by ‘destructive abuses’ (e.g. of public and private power) rather than ‘constructive uses’ respecting the equal freedoms of all others – has prompted all 193 UN member states to adopt national Constitutions (written or unwritten) limiting governance failures in the supply of national PGs. The more globalization continues to transform national into transnational PGs, with increasing spillovers between countries’ policies offering the economic rationale for policy coordination, the stronger becomes the need for ‘constitutionalizing’ also foreign policy powers and the law of international organizations.<sup>13</sup>

Both neoclassical theory and institutional economics offer valuable analytical tools in addressing international law and economic regulation. For instance, scholarship has put emphasis on the issue of compliance with or disregard for international law rules (like customary law, national jurisdiction, establishment of international organizations) and the extent to which this may be influenced by economic considerations and choices.<sup>14</sup> Likewise, the notion of institutional competition normatively inspires the idea of political competition for, within and between government(s) in order to produce benefits for citizens similar to those generated by economic market competition, for instance by promoting regulatory competition. The ‘sovereign equality’ of states and related legal freedoms foster ‘regulatory competition’ among states; however, regulatory competition is often abused, for instance by extra-territorial power politics of stronger actors or if governments (like the US Trump administration) welcome the adoption by the WTO Dispute Settlement Body (DSB) of ‘constructive WTO dispute settlement rulings’ supporting their legal complaints *vis-à-vis* other WTO members, but reject similar WTO dispute settlement findings against themselves as defendant on the ground that the rulings create ‘new obligations’ not consented to by their government.<sup>15</sup> Institutional economics explains the need for legal institutions limiting ‘moral hazard’ inside multilevel governance and federal states<sup>16</sup>, with rules on

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<sup>11</sup> Cf. Geoffrey Brennan and James M. Buchanan, *The Reason of Rules. Constitutional Political Economy* (Cambridge UP 1985).

<sup>12</sup> On behavioral economics exploring intuitive or irrational economic behavior see, e.g.: Anne van Aaken and Jürgen Kurtz, ‘Beyond Rational Choice: International Trade Law and the Behavioral Political Economy of Protectionism’ (2020) 22 *JIEL* 601. On the historical evolution and institutional diversity of social contract theories from Plato’s *Republic* (conceiving justice as a social contract among rational egoists), Thomas Hobbes (social contracts as rational submission to the absolute political power of a monarch), John Locke (social contracts establishing constitutional governments with limited powers restrained by human rights retained by citizens), Jean-Jacques Rousseau (social contracts as reconciling equal individual freedoms with the General Will exercised by democratic legislators) to John Rawls (constitutional contracts protecting equal freedoms, equal opportunities and difference principles of egalitarian justice), and their diverse conceptions of human beings (e.g. as naturally good by Rousseau contrary to Hobbes’ conception of ‘*homo homini lupus est*’), see e.g.: David Boucher and Paul Kelly (eds), *The Social Contract from Hobbes to Rawls* (Routledge 1994).

<sup>13</sup> On the different kinds and governance challenges of PGs see Petersmann (n 6).

<sup>14</sup> Cf. Joel P. Trachtman, *The Economic Structure of International Law* (Harvard UP 2008).

<sup>15</sup> On the illegal blocking and contradictory criticism by the United States of the WTO dispute settlement system see Petersmann (n 4); *idem*, ‘How Should WTO Members React to their WTO Governance Crises?’ (2019) 18 *World Trade Review* 503.

<sup>16</sup> Cf. Robert D. Cooter, *The Strategic Constitution* (Princeton University Press 2000), 127ff.

governing bailouts of banks and states (more recently controversially discussed in the Eurozone) as prominent examples.

Just as national Constitutions can become effective only through progressive transformation of their constitutional rules into democratic legislation, administration and adjudication protecting rule of law and equal rights of citizens, so can ‘world order treaties’ - like the UN Charter and the WTO Agreement – protect global PGs only through additional legislative, administrative and judicial implementing acts (like political or judicial interpretations clarifying indeterminate treaty provisions). Moreover, unequal distribution of human and economic resources risks aggravating social inequalities to a point that citizens lose trust (e.g. in social justice, political élites), circumvent the law (e.g. through tax avoidance, black markets, illegal transactions), or appoint populist, demagogic rulers advocating narrowly conceived ‘national identities’.<sup>17</sup> Normative institutional economics (as discussed in section 6) therefore emphasizes the need for ‘social embedding’ of international economic regulation and for ‘institutionalizing public reason’, for instance by human rights law (HRL) promoting ‘cosmopolitanism’, independent monetary authorities protecting monetary stability, independent competition authorities protecting non-discriminatory conditions of competition, impartial third-party adjudication protecting rule-of-law and equal rights of citizens, and ‘social market economies’ protecting also social rights and ‘social peace’ (as discussed in section 10).

History confirms this dialectic evolution of law as an instrument of rules-based, social, political and economic ordering and of result-oriented utility-maximization. The – often spontaneous – emergence and functioning of local markets (e.g. responding to supply and demand for local goods and services) depended, *inter alia*, on legal guarantees of contract law (*pacta sunt servanda*), private property rights, monetary means of payment or barter, tort and criminal law (e.g. limiting fraud). In response to abuses of monetary and police powers entailing legal insecurity and market distortions, democratic and republican city states (e.g. since the ancient Greek and Italian city republics) introduced republican laws limiting monetary, tax and fiscal powers of governments, and regulating monetary, trade, investment and health policies, related contractual and property rights, and transnational trade and investment agreements (e.g. among city republics around the Mediterranean Sea, the ‘Hanse cities’ around the Baltic seas).<sup>18</sup> The 1944 Bretton Woods Agreements and decolonization initiated progressive worldwide, legal and institutional reforms of economic regulation aimed at limiting abuses of power (e.g. in authoritarian and imperial trade regimes) and protecting transnational PGs. The current ‘schism’ fracturing the global legal, trade and communication systems through return to ‘authoritarian nationalism’, geopolitical rivalries and extra-territorial power politics (e.g. by China, Russia, Saudi-Arabia, Turkey, the United States) requires re-thinking the design of international economic law (IEL) and of regulatory methodologies.

### **3. Design of Economic Law Requires Institutional Economics**

Empirical evidence confirms close interrelationships between legal systems and economic welfare (e.g. widespread poverty in communist countries like China, Cuba and the Soviet Union prior to their introduction of market reforms based on private property and commercial laws). Institutional economics explores the organization and institutions related to production, distribution and consumption of goods and services, including the legal limitation of ‘market failures’ (e.g. related to abuses of power, cartel agreements, mergers and acquisitions, externalities, information asymmetries, public goods), ‘governance failures’ and ‘constitutional failures’ through democratic regulation and institutions. It complements neo-liberal welfare economics (e.g. focusing on markets and competition as incentives for reducing the scarcity of goods and services through division of labor exploiting comparative advantages)

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<sup>17</sup> Cf. Anne Case and Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton University Press 2019).

<sup>18</sup> For ‘institutional economics analyses’ of the ancient economies of Rome and Greece see: Taco T.Terpstra, *Neo-Institutionalism in Ancient Economic History*, in: Ménard/Shirley (n 7), chapter 26.

and ‘constitutional economics’ (e.g. exploring economic rights of citizens and principles for constituting market competition, monetary stability and rule-of-law reducing transaction costs in free societies).

The institutional characteristics of economies and of their legal, political and social organization vary enormously across space and time. Understanding the concrete social-historical factors and cultures shaping the functioning of economies can be enhanced through comparative studies (e.g. of behavioral production and consumption patterns, informal social belief systems, formal legal and political institutions). Neo-liberal economies (e.g. like the United States), ordo-liberal economies (e.g. like the European common market) and state-capitalist economies (e.g. in China) are founded on different values (like Anglo-Saxon utilitarianism, European rights-based economic constitutionalism, totalitarian power monopolies in China), representing dominant models of normativity in the relationship between states, markets and citizens and feeding more broadly in the discussion on the varieties of capitalism.<sup>19</sup>

The lens provided by institutional economics enables the analysis to differentiate the variable influence of different economic schools on international cooperation and on legal institutions, which they have fostered or undermined. The Bretton Woods agreement and the 1947 General Agreement on Tariffs and Trade (GATT) had been negotiated and progressively implemented under the leadership of the United States; they were strongly influenced by Anglo-Saxon, economic liberalism aimed at liberalizing trade barriers and promoting monetary stability and convertibility of currencies. However, while driven by liberal market paradigms, they were a first step of institutionalization and rules-generation with the aim to restrain political and economic power. From an institutional economics perspective, the Bretton Woods environment established an institutional setting that, while maintaining the hegemonic predominance of the US economy (e.g. due to the use of the US dollar as global reserve currency and its convertibility into gold), reduced legal uncertainty in international relations and fostered predictability through a web of international treaties.

GATT 1947 never entered into force and was applied on the basis of a ‘Protocol of provisional application’. The design of GATT institutions and of GATT’s dispute settlement system progressively evolved through decisions of the GATT Contracting Parties and additional trade agreements resulting from eight ‘GATT Rounds’ of multilateral trade negotiations. The WTO institutions and multilevel WTO dispute settlement system resulted from the multilateral Uruguay Round negotiations (1986-1994) ushering in the 1994 Agreement establishing the WTO and its Dispute Settlement Understanding (DSU). The separation of legislative, executive and judicial powers of WTO institutions (cf. Article III WTO), the multilevel WTO governance structures (cf. Article IV), the coordination of WTO activities with those of other worldwide and regional organizations (cf. Articles V WTO, XXIV GATT), and the multilevel WTO dispute settlement system ‘providing security and predictability to the multilateral trading system’ (Article 3 DSU) went beyond the market liberalization logic of economic liberalism by strengthening the ordo-liberal foundations of international cooperation (e.g. explaining welfare gains from informed consent to rules, rule of law, multilateral treaties, third-party adjudication of trade disputes) rather than only utilitarian neo-liberalism (e.g. pursuing maximization of individual ‘utilities’ and of ‘Pareto’- and ‘Kaldor-Hicks’-efficiencies).<sup>20</sup>

With the progressive development from non-enforceable trade arrangements to sanction-based adjudication, the institutional changes towards closer cooperation were – in line with the seminal work by North – driven by states pursuing profits from closer cooperation in terms of, *inter alia*, reduced uncertainty and lower transactions costs involved in international relations.<sup>21</sup> However, since the

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<sup>19</sup> Peter A.Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (OUP 2001).

<sup>20</sup> On the differences between Anglo-Saxon, utilitarian neo-liberalism and European, constitutional ordo-liberalism see Petersmann (n 2).

<sup>21</sup> Douglas C.North and Robert P.Thomas, ‘The Rise and Fall of the Manorial System: A Theoretical Model’ (1971) 31 *Journal of Economic History* 777; Douglas C. North and Robert P. Thomas, *The Rise of the Western World: A New*

founding thinkers of institutional economics (like R. Coase, D. North, E. Ostrom, O. Williamson) received their respective economic Nobel prizes, globalization and hegemonic power politics continue to transform worldwide economic regulation. While the ‘Brussels school of law and economics’ (mainly driven by the EU Commissioners for competition policy, common market regulation and legal services, and their academic advisers like Prof. E.J. Mestmäcker) and the jurisprudence of European economic courts influenced the ‘Geneva school of law and economics’<sup>22</sup> and the jurisprudence of the WTO Appellate Body (AB)<sup>23</sup>, the trade wars by the US Trump administration and the ‘Brexit’ confirmed that global cooperation is no longer a one-way development towards more rules-orientation.

The US Trump administration’s assault on the established order, particularly on WTO legal and dispute settlement systems is driven by a return of hegemonic, mercantilist power politics and neo-liberal interest group politics, thus allowing a renaissance of political and economic forces which the trade systems sought to restrain by rules-based market competition and adjudication. Since December 2019, the illegal US blocking of the filling of Appellate Body (AB) vacancies prevents the AB from accepting new appeals; by enabling the unilateral blocking of WTO panel reports (e.g. by ‘appealing into the void’) and weakening the legal enforceability of WTO rules, it risks undermining the whole WTO legal and dispute settlement system. The rising influence of authoritarian state-capitalism threatens to undermine the rules-based trading system through state-induced, anti-competitive practices in guises as different as hidden subsidy practices, forced technology transfers, indirect discrimination, other market distortions and trade sanctions for political reasons.

On a more general level, these developments feed into geopolitical rivalries among Anglo-Saxon neo-liberalism, European ‘social market economies’ and authoritarian state-capitalism (e.g. in China and Russia), which entail new risks (e.g. as illustrated by US justifications of discriminatory import restrictions by invoking national security exceptions), transaction costs and institutional challenges (e.g. for limiting market distortions by state-owned enterprises, SOEs), security risks (e.g. resulting from dependence on Chinese SOEs controlling transnational energy, communication and technology networks).<sup>24</sup> The global health pandemic (Covid-19) of 2020 revealed insufficient health care institutions and medical supplies in many countries and protectionist, nationalist responses with adverse effects on the public health emergencies in other countries; these developments and regulatory responses need to be studied with the analytical tools provided by institutional economics.

#### **4. Globalization Requires Multilevel Governance of Transnational Public Goods**

Market mechanisms of demand and supply tend to offer spontaneous incentives for decentralized production of private goods and services demanded by people. In line with standard rational choice theory, optimal market solutions do not occur for the supply of public goods (PGs). The ‘non-

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*Economic History* (Cambridge UP 1973); Douglas C.North, *Structure and Change in Economic History* (W.W.Norton 1981).

<sup>22</sup> For a discussion of the ‘Geneva school of law and economics’, and its comparison with other schools of ‘law and economics’, see: Ernst U.Petersmann ‘International Economic Theory and International Economic Law - On the tasks of a legal theory of international economic order’ in Ronald S.J.Macdonald and Douglas M.Johnston (eds), *The Structure and Process of International Law* (Nijhoff 1983) 227–261. The ‘constitutional approach’ was endorsed also by WTO Director-General and former EU trade commissioner Pascal Lamy, *The Geneva Consensus. Making Trade Work for All* (Cambridge UP 2013), who initiated regular parliamentary meetings inside the WTO and emphasized the synergies among human rights and rules-based trade (e.g. at p. 148ff: ... ‘human rights and trade rules, including WTO rules, are based on the same values – individual freedom and responsibility, non-discrimination, rule of law and welfare through peaceful co-operation among individuals’... ‘Human rights and trade are mutually supportive’... ‘It is through the extension and deepening of such fundamental rights that the benefits of trade must finally be measured’... ‘One could almost claim that trade is human rights in practice!’).

<sup>23</sup> Cf. Tommaso Soave, ‘European Legal Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva’ (2020)19 *The Law and Practice of International Courts and Tribunals* 107.

<sup>24</sup> Cf. Cheryl Long, ‘The China Experience: An Institutional Approach’ in Ménard and Shirley (n 7), chapter 15.

excludable' and 'non-exhaustive' characteristics of 'pure PGs' – like sunshine or human rights, whose benefits are non-rivalrous in consumption and non-excludable – impede their production and offer in private markets. International legal cooperation governing national defense, clean air or the absence of armed threat typically allow all citizens to enjoy benefits, yet at the same time gives rise to collective action problems. As for all PGs, the universal regulation of common goods makes intuitive sense because it has the potential to impact on every member of global society. Extensive participation must be achieved with the regulation of common goods; however, this often bears collective action problems such as 'free-riding', which can diminish the effectiveness of global regimes, even if the rationale of the multilateral framework is reasonable in theory.

Public goods theories distinguish different kinds of – and diverse supply strategies for - pure or impure PGs and 'common pool resources'.<sup>25</sup> Globalization transforms national into transnational PGs (like markets, monetary stability, legal, food and health security, climate change mitigation) requiring multilevel governance institutions limiting the collective action problems of intergovernmental politics. Going beyond the neoclassical externality analysis, institutional economics contributes to PG analysis by integrating insights of behavioral economics and 'public choice theories'. It explains why 'intergovernmental supply of PGs' requires 'institutional checks and balances' limiting abuses of public and private powers: Just as executive powers inside national jurisdictions have often been abused until democratic and republican constitutionalism progressively succeeded – in many countries – in protecting constitutional rights of citizens and collective supply of national PGs, so have the multilevel constitutional 'checks and balances' and judicial protection of constitutional and human rights inside the EU – or the multilevel judicial protection of transnational rule of law among the 164 WTO members – enhanced the efficiency of multilevel governance of transnational PGs, for instance by reducing transaction and coordination costs.

Most transnational PGs are 'aggregate PGs' that must be produced collectively through aggregation and integration of local, national, regional and worldwide 'building blocks' (e.g. for limiting greenhouse gas (GHG) emissions). Transforming 'pure' into 'impure PGs' (e.g. by formation of 'clubs') – like the WTO trading, legal and dispute settlement systems - can reduce 'collective action problems' (e.g. by making club-membership conditional on cooperation and limitation of free-riding). The particular characteristics of PGs risk leading to actions that may be rational from an individual's perspective (like use of fossil fuels, burning of tropical forests) but harmful from a collective PGs viewpoint (like reduction of GHG emissions so as to promote 'green', carbon-free economies). International organisations facilitate international cooperation among state actors, for instance by enabling access to information, negotiating agreed rules, supervising and promoting rule-compliance.

As the optimal supply strategies differ depending on the particular characteristics of PGs (like non-proliferation of nuclear weapons) and on the diverse preferences and interests of countries, the 15 UN Specialized Agencies for collective supply of different PGs often use diverse regulatory instruments (like the three-partite structure of labor, employer and government representatives in the International Labor Organization, weighted majority voting in the IMF and World Bank). Multilevel governance of transnational PGs suffers from various gaps diminishing scope and effectiveness of cooperation. Participation gaps (e.g. withdrawal of the United States from the 2015 Paris Agreement on climate change mitigation) occur with increasing number of participating states; as the transaction costs on determining a compensation solution (e.g. for protecting tropical forests as 'carbon sinks' benefitting all countries) increase, achieving Kaldor-Hicks improvements becomes more difficult.

The dilemma associated with the negotiations occurring among multiple parties is akin to Coasean bargaining, in which parties negotiate towards an equilibrium where cooperation gains are maximized.<sup>26</sup> Incentive gaps (e.g. for less-developed economies dependent on fossil fuels) materialize when some

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<sup>25</sup> Cf. Petersmann (n 6).

<sup>26</sup> Ronald Coase, 'The Problem of Social Cost' (1960) 3 *J. L. and Econ.* 1, 2-8.



countries do not see any overall improvement from contributing to the PG for their welfare position in terms of the Pareto or Kaldor Hicks criteria. Jurisdiction gaps (e.g. inadequate international agreements on fossil fuel subsidies, carbon taxes, border carbon adjustments and emission trading systems) highlight the existence of significant transactions costs (as stressed in institutional economics<sup>27</sup>) such as ‘sovereignty costs’ occurring whenever states cannot choose their national prerogatives and surrender competencies. Negotiation costs increase not only with the number of participating states or the degree of heterogeneity of preferences, but also according to the nature and complexity of the substance.<sup>28</sup> Implementation and enforcement costs depend on the complexity of the technicality of the substance. Monitoring costs increase when compliance with the agreement must be controlled and international organizations are established to administer an agreement.<sup>29</sup>

## **5. ‘Constitutional Pluralism’ Furthers Institutional Competition and Requires Respect for ‘Legal-Institutional Pluralism’**

Modern HRL and the ‘sovereign equality of states’ protect individual and democratic diversity as well as legal diversity among today’s 193 UN member states. Almost all states have adopted (written or unwritten) national Constitutions, have ratified one or more UN human rights conventions, and cooperate in the context of hundreds of international organizations for the collective supply of transnational PGs. The hundreds of national legal systems, thousands of international treaty systems, and millions of transnational legal systems (e.g. governing transnational corporations, their foreign investments and trade in goods and services) entail ‘legal-institutional pluralism’, embedded into diverse national Constitutions constituting legal and political governance systems for the collective supply of national PGs.

National and transnational governance of ‘aggregate PGs’ (like monetary, trade, investment, environmental, human rights and legal systems) interact in complex ways. The interdependencies between diverse social, political, economic, cultural and legal systems require respect also for the reality of ‘constitutional pluralism’ and ‘legal-institutional pluralism’ constraining human cooperation. From economic perspectives, legal-institutional pluralism promotes institutional competition between jurisdictions, thereby furthering knowledge, enhancing efficiency, restraining power<sup>30</sup> and promoting experimentation with innovative legal-institutional arrangements.<sup>31</sup> Institutional competition can promote variability and quality, for instance if socially and economically viable institutions are imitated while unsuccessful policies are refused by *competing* jurisdictions.

Empirical studies of ‘embedded liberalism’ confirm that the legal design of multilevel institutions in economic integration differs among jurisdictions, for instance inside and among state-capitalist economies (like China and Russia), neo-liberal economies (like the United States) or ordo-liberal economies (like the European common market) and their diverse polities and legal systems. Each of these competing economic systems proceeds from competing value premises, such as the political power monopoly of China’s communist party, the US democracy prioritizing civil and political constitutional rights of US citizens and pursuing economic hegemony over foreign countries, and the more comprehensive protection of multilevel civil, political, economic, social and cultural human and constitutional rights in the multilevel constitutional law of the EU and its 27 EU Member States.

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<sup>27</sup> Furubotn/Richter (n 7), at XX.

<sup>28</sup> Kenneth Abbott, ‘Modern International Relations Theory: A Prospectus for International Lawyers’ (1989) 14 *YJIL* 335, 398.

<sup>29</sup> Armin Steinbach, ‘The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective’ (2016) 27 *EJIL* 643, 646.

<sup>30</sup> Lüder Gerken, ‘Institutional Competition: An Orientative Framework’ in Lüder Gerken (eds) *Competition among Institutions* (Palgrave Macmillan 1995).

<sup>31</sup> Wallace E.Oates, ‘An Essay on Fiscal Federalism’ (1999) 37 *Journal of Economic Literature* 1120, 1132.

The initial post-1945 expectation of inducing all GATT member countries to follow the US model of neo-liberal liberalization of market access barriers, deregulation, privatization and financialization of markets (as spontaneous information-, coordination- and sanctioning mechanisms) has proven illusory. As a consequence, GATT/WTO trade rules and investment rules need to be adjusted to the reality of member states with diverse neo-liberal, ordo-liberal or state-capitalist economic systems and to the resulting geopolitical rivalries (e.g. between US-dominated Bretton Woods institutions at Washington, China-dominated Asian institutions like the Asian Infrastructure Investment Bank at Beijing). The competing value premises entail that, for example, China's Belt and Road Initiative agreements with more than 60 countries along the ancient territorial and maritime 'Silk Roads' are based on different legal and institutional principles (e.g. for dispute settlement, government procurement, protection of individual rights) compared with the free trade agreements concluded by the United States or by the EU. Due to the institutional diversity inside and among states, views on how to define 'market distortions' in the global trading system<sup>32</sup>, or how to design international trade and investment adjudication<sup>33</sup>, are increasingly contested.

## 6. Welfare Economics Must Be Complemented by Constitutional Economics

Theories of knowledge (e.g. by Nobel Prize economist F.A. Hayek) justify markets, price mechanisms and spontaneous emergence of 'market rules' as decentralized information, coordination and sanctioning mechanisms reflecting decentralized knowledge among individuals, which no central government can possess. Welfare economists demonstrate the existence of 'market failures' (like abuses of power, cartel agreements, externalities, information asymmetries, PGs) that distort the efficient functioning of market mechanisms; they may justify governmental trade and competition rules and other market interventions aimed at 'efficiency gains' resulting from governmental limitations of 'market failures'. Public choice economists warn of 'governance failures' and 'constitutional failures' that risk impeding or distorting governmental attempts at correcting market failures. 'Constitutional economists' offer descriptive and normative insights. Descriptively, they assess and compare institutional arrangements of how societies transform individual preferences into collective choices and design institutions to correct market failures and avoid government failures.<sup>34</sup>

Descriptive analysis may uncover institutional differences shaped by fundamentally divergent paradigms. For example, 'constitutional reforms' (e.g. in communist economies) may be of more existential importance for citizens than the utility maximization paradigm of 'efficient choices within existing constraints' (like use of 'black markets'). Normatively, constitutional economists address the constitutional question of how people can live together in liberty, peace and prosperity by using the 'exchange paradigm' for exploring efficient 'choices of constraints': How should constitutional rights, obligations and institutions be designed in order to 'constitute markets', protect democratic preferences, ensure individual freedoms, limit governance failures, and enhance economic welfare and social support through 'embedding' economic law into 'social justice systems' responding to democratic preferences and citizen demand for PGs?<sup>35</sup>

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<sup>32</sup> Cf. A. Lang, 'Heterodox markets and 'market distortions' in the global trading system' (2019) 22*JIEL* 677.

<sup>33</sup> See section 10 below.

<sup>34</sup> Stefan Voigt, 'Constitutional Economics and the Law' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts* (OUP 2017), 206.

<sup>35</sup> Cf. Viktor J. Vanberg, *The Constitution of Markets. Essays in Political Economy* (Routledge, 2001); Robert B. McKenzie (ed), *Constitutional Economics. Containing the Economic Powers of Government* (Lexington Books, 1984); James M. Buchanan, *The Economics and the Ethics of Constitutional Order* (University of Michigan Press 1991). Constitutional economics locates the ultimate sources of value only in individuals and in their constitutionally limited, democratic agreements and informed exchange contracts.

### **6.1 Legal Ranking of Economic Policy Instruments According to Their Efficiency**

On a more general level, the economic paradigms inspiring governments' choice of institutions can be categorized along the bipolar relationship between state intervention and market freedom, with country- or region-specific paradigms varying in the degree to which one or the other prevails. For the success of developing legally binding international rules, a careful balancing of state policies and market freedoms in the design of binding law is decisive – both as matter of political feasibility and economic efficiency. As 'constitutional pluralism' at national levels of governance is likely to remain a permanent fact, international trade law must strike a balance between outlawing policies that cause significant harmful cross-border effects, on the one hand, and preserving policy spaces for states allowing them to pursue policy choices in line with their value system, on the other hand.

Economics mirrors this need for balancing along criteria such as 'market failure' and 'government failure', with each of them offering ground for efficiency considerations to allow for 'optimal intervention'. To that end, GATT and WTO law, regional economic integration law and domestic implementing laws rank alternative economic policy instruments according to their respective economic efficiency as explained by theories of 'optimal intervention', while at the same time maintaining scope for national regulation as needed to find support in states to surrender national policies to an international regime. For instance, Article III GATT allows non-discriminatory domestic economic regulations (like tax, competition, consumer and environmental protection rules, consumption and research subsidies). Article II GATT allows border tariffs up to the level of reciprocally negotiated tariff bindings. In turn, discriminatory non-tariff trade barriers tend to be prohibited (e.g. Article XI GATT) unless they can be justified as being necessary for protection of non-economic PGs like public health, 'public morality' (Article XX GATT) and national security (Article XXI GATT).

### **6.2 Constitutional Approaches to Economic Regulation**

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, the ordo-liberal European and Virginia Schools of 'constitutional economics' perceive economic markets as legal constructs (rather than as gifts of nature). Their 'principled thinking' assigns the state the function to formulate and enforce 'framework policies', which set out the general rules applicable to all economic actors non-distinctively to avoid market failures, such as promoting non-discriminatory conditions of competition in the economy as a whole; by contrast, states should refrain from 'process policies' which interfere with or distort individual business decisions and market solutions. Rather than steering sectors or individual business decisions on basis of centralized planning, economic policies ought to be guided by '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 and social policies and institutions), and constitutional 'checks and balances' (e.g. democratic constitutionalism limiting 'governance failures', protecting rule-of-law and holding governments accountable, judicial remedies of citizens, subsidiarity principles protecting decentralized governance mechanisms).

The principled thinking in 'rules-based orders' reflects the notion of a state seeking to reconcile both – respect and promotion of individual liberties associated with the belief in the welfare-enhancing effects of market forces, as well as state powers for value-based interventions to ensure commonly agreed levels of social and environmental results in society. This bipolar paradigm of ordo-liberal 'constitutional economics' influenced the embedding of Germany's 'social market economy' into German and

European constitutional law. The EU's 'micro-economic common market constitution'<sup>36</sup>, 'macro-economic monetary constitution'<sup>37</sup>, their progressive evolution and judicial review<sup>38</sup> were influenced by German and European ordo-liberalism.<sup>39</sup> Due to its 'constitutional embeddedness', the regulatory functions of economic law inside the EU often diverge from those inside neoliberal and state-capitalist countries.<sup>40</sup>

Ordo-liberalism calls for legal safeguards that the competitive order (protecting 'performance competition' and price mechanisms) remains embedded 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 and judicial remedies). In line with the ordo-liberal paradigm, normative constitutional economics criticizes the neo-liberal focus on utility-maximization, rational rent-seeking, assumptions of 'perfect market competition' without transaction costs, and gross-domestic products to the extent 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 EU Charter of Fundamental Rights (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 a 'competitive social market economy' (Article 3 TEU) with ever more guarantees of social rights structured around three priorities – equal opportunities for education, professional training and access to labor 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 United States.

### 6.3 The 'Geneva School' of Ordo-Liberalism

Constitutional economics justifying multilevel economic constitutionalism (like multilevel legal and judicial protection of EU common market freedoms, European competition law and fundamental rights) has become an integral part of European integration law as practiced in the 30 member states of the

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<sup>36</sup> 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.

<sup>37</sup> E.g. based on EU legal disciplines for monetary, fiscal, debt and economic policies supervised by multilevel, independent central banks and intergovernmental economic cooperation.

<sup>38</sup> Cf. Herwig C.H.Hofmann and Katerina Pantazatou/Giovanni Zaccaroni (eds), *The Transformation of the European Economic Constitution* (Elgar 2019); Clemens Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart 2016).

<sup>39</sup> On the EU's sectoral (e.g. micro-economic, macro-economic and social) 'constitutions' see: Karlo Tuori, *European Constitutionalism* (Cambridge UP 2015), 127 ff. On 'constitutional economics' and the controversies over applying ordo-liberalism to the EU's monetary union see: Thomas Biebricher and Frieder Vogelmann (eds), *The Birth of Austerity. German Ordoliberalism and Contemporary Neoliberalism* (Rowman & Littlefield 2017); Josef Hien and Christian Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart 2017).

<sup>40</sup> Cf. Poul F.Kjaer (ed), *The Law of Political Economy: Transformations in the Function of Law* (Cambridge UP 2020).

European Economic Area (EEA). The 'Geneva School of multilevel ordo-liberalism'<sup>41</sup> focused on constitutional justifications of worldwide economic order so as to enable welfare states and multilevel legal, institutional and judicial guarantees of non-discriminatory market competition limiting abuses of public and private powers beyond European integration. Notably the economists (like GATT's chief economist J. Tumlrir) and lawyers working inside GATT's economic research and legal divisions were more influenced by 'constitutional economics'<sup>42</sup> than by utilitarian Chicago school economists (e.g. in view of their normative premises underlying the distributive effects of 'Kaldor-Hicks efficiencies').

Some of the constitutional, competition and social policy principles of 'ordo-liberalism' have influenced the progressive legal construction and political legitimation of the GATT/WTO legal and dispute settlement systems, for instance in designing multilevel legal restraints of trade policy instruments according to their respective economic efficiency (as illustrated by Articles I-III, XI GATT, VI-IX GATS); separating trade and monetary policy instruments (cf. Article XV GATT, XI GATS); interpreting GATT/WTO market access commitments as protecting non-discriminatory conditions of competition; protecting and prioritizing sovereign powers to regulate and protect non-economic public goods in non-discriminatory ways (cf. Articles XIX-XXI GATT, XIV-XIV<sup>bis</sup> GATS); providing for legal accountability and multilevel judicial remedies limiting rule-violations and other abuses of power (e.g. in Articles X, XXIII GATT, XXIII GATS); and promoting progressive evolution of the incomplete GATT/WTO system through progressive legal, political and judicial clarifications and development of indeterminate GATT/WTO rules and underlying principles, in close cooperation with trade-related, other international organizations.<sup>43</sup>

Yet, policy recommendations from institutional and constitutional economics remain controversial, as illustrated by the disagreements on the future design of the European monetary and banking union and related constitutional restraints of the EU (e.g. for financing EU and national expenses through 'Euro-bonds'). Similarly, the WTO Doha Round negotiations since 2001 have failed to adjust WTO rules to the regulatory challenges of the 21<sup>st</sup> century and contributed to the US assault on the WTO dispute settlement system ushering in the 'blocking' of the WTO AB and its jurisprudence. The EU initiatives at replacing investor-state arbitration inside the EU - as well as in the external relations of the EU - by new kinds of multilevel adjudication respond to the increasing civil society challenges of 'investor biases' and insufficient guarantees of public interests in international investment arbitration.<sup>44</sup> The 'systemic rivalries' between neo-liberal, state-capitalist and ordo-liberal policies entail also increasing challenges of other international jurisdictions like the International Tribunal for the Law of the Sea, the International Criminal Court and the European Court of Human Rights as independent and impartial institutions for protecting transnational rule-of-law and, thereby, reducing also international transaction costs.

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<sup>41</sup> Cf. Petersmann (n 22) and Lamy (n 22).; Heinz Hauser *et alii*, 'The Contribution of Jan Tumlrir to the Development of a Constitutional Theory of International Trade Rules (in German with English summary)' (1988) 39 *Ordo – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 219; Slobodian (n 1), 7ff, 183ff, 208ff, 260ff. Petersmann's review of Slobodian's book criticizes his failure to recognize the ordo-liberal - rather than neo-liberal - foundations of the 'Geneva school': cf. (2018) 19 *JIEL* 915. Similarly, the critical book review by Frieder Roessler, (2019) 18 *World Trade Review* 353.

<sup>42</sup> E.g. as taught by the ordo-liberal 'Freiburg school' (e.g. of Walter Eucken, Franz Böhm, Friedrich A. Hayek, Viktor Vanberg) and 'Virginia school' (e.g. James Buchanan) defining economic efficiency not only in terms of 'Pareto'- and 'Kaldor-Hicks efficiency' (based on utilitarian premises), but also by (hypothetical) individual and democratic consent to inclusive, reasonable rules reconciling the interests of all affected citizens. Buchanan cooperated with Freiburg School scholars (like Vanberg) and received the 1986 Nobel Prize in Economic Sciences for his 'development of the contractual and constitutional bases for the theory of economic and political decision-making' (e.g. rejecting 'any organic conception of the state' as superior in wisdom to its citizens).

<sup>43</sup> Cf. Slobodian (n 1) and Lamy (n 22). The GATT/WTO jurisprudence (e.g. on interpreting GATT/WTO rules as protecting non-discriminatory conditions of competition) reinforces this ordo-liberal function of states and of the GATT/WTO dispute settlement systems as 'guardians of the competitive order'.

<sup>44</sup> Cf. Maria L. Marceddu and Pietro Ortolani, 'What is Wrong with Investment Arbitration?' (2020) 31 *EJIL* 405.

## 7. Transnational Public Goods Require ‘Embedded Liberalism’

Trade liberalization before World War I reflected ‘dis-embedded liberalism’ based on *laissez faire*-attitudes in most countries vis-à-vis the social adjustment problems created by colonialism and the first industrial revolution (based on machines driven by steam power). The post-war second industrial revolution (based on mass assembly line production driven by electricity) was embedded into domestic economic regulation, competition and social policies in most industrialized countries, notwithstanding the ‘social dis-embedding’ resulting from the global financial crises and economic disintegration during the 1930s.<sup>45</sup> The ‘embedded liberalism’<sup>46</sup> underlying GATT 1947 not only permitted governmental regulations of ‘market failures’ (like externalities, market power, PGs, information asymmetries) and of related ‘governance failures’ and constitutional problems (like principal-agent relationships, cognitive and volitional limitations of ‘rational choices’ observed by behavioural economists); it also enabled and promoted welfare states through reciprocal trade liberalization enhancing mutually beneficial division of labour and economic and legal cooperation in producing private and public goods.

The economic ‘theory of optimal intervention’ justifying GATT’s legal ranking of alternative policy instruments in terms of their economic efficiency (e.g. allowing non-discriminatory internal taxes, product and production regulations; limiting border tariffs; and prohibiting discriminatory non-tariff trade barriers subject to ‘exceptions’ for non-economic, non-discriminatory domestic regulations) enabled mutually welfare-enhancing, legal harmonization reducing transaction costs and political conflicts – without limiting national sovereignty over non-discriminatory, domestic regulation of the economy and polity.<sup>47</sup> As reciprocal trade liberalization depends on inclusive policy-making supported by citizens (‘all politics is local’), some GATT lawyers interpreted these ‘domestic policy functions’ of GATT’s ‘embedded liberalism compromise’ as ‘constitutional functions’ of GATT rules for promoting equal freedoms, non-discrimination, rule of law, judicial remedies and social justice also inside domestic economies and polities for the benefit of citizens.<sup>48</sup>

WTO law responded to the third industrial revolution of computers and telecommunications by additional, multilateral harmonization of product and production standards, competition and trade remedy rules, liberalization and regulation of services trade, protection of intellectual property rights, and of transnational rule of law through compulsory jurisdiction for settlement of trade disputes through domestic judicial remedies and WTO dispute settlement procedures. WTO law changed the embedded liberalism underlying GATT 1947 in ways reflecting both neo-liberal Anglo-Saxon interest-group politics (e.g. resulting in the WTO Anti-dumping and Trade-related Intellectual Property Rights (TRIPS) Agreements)<sup>49</sup> and ordo-liberal insistence on rule compliance (through the compulsory jurisdiction of

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<sup>45</sup> As criticized in the book by Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (Farrer 1944).

<sup>46</sup> 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 John G.Ruggie, ‘International regimes, transactions and change: Embedded liberalism in the postwar economic order’ (1982) 36 *International Organization* 379.

<sup>47</sup> Cf. Max Corden, *Trade Policy and Economic Welfare* (OUP 1974). On the economic, legal and political functions of GATT 1947 see GATT’s chief economist Jan Tumlir, ‘GATT Rules and Community Law’ in Meinhard Hilf, Francis G.Jacobs and Ernst U.Petersmann (eds), *The European Community and GATT* (Kluwer, 1986) 1.

<sup>48</sup> Cf. the contributions by Frieder Roessler, Ernst U.Petersmann, John H.Jackson, Robert E.Hudec, Jacques Bourgeois, Pierre Pescatore, Thomas.Cottier, Mitsuo Matsushita and numerous other American, Asian and European GATT lawyers to Meinhard Hilf and Ernst U.Petersmann (eds), *National Constitutions and International Economic Law* (Kluwer 1993).

<sup>49</sup> The inconsistencies of anti-dumping laws and practices with non-discriminatory competition rules are widely recognized; they prevented WTO negotiators from agreeing on a Preamble text explaining the economic rationale of the WTO Anti-dumping Agreement. Many competition lawyers express concerns (e.g. in Hanns Ullrich *et alii*, eds, *TRIPS Plus 20. From Trade Rules to Market Principles*, Springer, 2016) that some anti-dumping and TRIPS rules – whose drafting was dominated by domestic industry lobbyists – offer too much protection stifling competition and innovation (e.g. as exemplified by recent complaints of 35 major technology companies that ‘patent trolls’ are being abused for rent-seeking

the WTO dispute settlement system, and the (quasi)automatic adoption of more than 420 WTO panel, appellate and arbitration reports), non-discriminatory conditions of competition (e.g. as reflected by the non-discrimination and ‘necessity’ requirements in the WTO Agreements on technical barriers to trade and (phyto)sanitary standards, the phasing-out of the Agreement on Textiles and Clothing) and strengthening ‘sustainable development’. Compared with the ‘provisional application’, lack of parliamentary ratification and ‘grandfather exceptions’ of the intergovernmental GATT 1947, the WTO Agreement strengthened the ‘constitutional dimensions’ of WTO law, as illustrated by the democratic ratification of the WTO Agreement, its incorporation into the domestic legal systems of many WTO members, the separation of legislative, administrative and judicial powers of WTO institutions (cf. Article III WTO Agreement), and provisions for majority voting (cf. Article IX).

Anglo-Saxon neo-liberalism and ‘private ordering ideals’ (e.g. based on private and common law rules for contracts, property, torts, arbitration, criminal law) reinforced calls for liberalization, deregulation, privatization and interest-group-driven economic policies ushering in ‘hyper-globalization’ (e.g. of financial markets, global value chains) enhancing financial instability, social inequality inside countries, environmental pollution and climate change. The failures of the Doha Round negotiations, circumvention of WTO disciplines by China’s totalitarian state-capitalism, and, since 2017, the hegemonic trade mercantilism of the US Trump administration increasingly disrupted the WTO legal, dispute settlement and negotiation systems, ushering in illegal blocking of the WTO AB system, increasing non-compliance with WTO subsidy and trade remedy disciplines, hegemonic abuses of trade sanctions (e.g. in the context of the US-China trade wars) and protectionist US trade restrictions (e.g. on aluminium and steel).

Arguably, similar to the successful adjustment of GATT’s embedded liberalism to the challenges of decolonization, the embedded liberalism underlying the WTO trading system<sup>50</sup> needs to be adjusted not only to the ‘new nationalism’ underlying President Trump’s hegemonic mercantilism, the United Kingdom’s ‘Brexit’ from the European Union (EU), and protectionism in BRICS countries (Brazil, Russia, India, China, South Africa). In order to enable WTO members to realize their ‘sustainable development’ objectives, WTO rules and institutions must also adjust to the 2015 Paris Agreement aimed at mitigating climate change. The adoption by all 193 UN member states of the UN ‘sustainable development goals’ - and the increasing ‘climate change litigation’ requiring governments to limit greenhouse gas emissions in order to protect human rights<sup>51</sup> - justify ‘greening embedded liberalism’ in conformity with the universal recognition of ‘indivisible’ civil, political, economic, social and cultural human rights and the underlying ‘constitutional insight’ that the complex interactions among civil societies, polities, economies, social and cultural cooperation require domestic empowerment of citizens and their support for protecting transnational PGs. Just as democratic constitutionalism differs among countries in response to their different circumstances, histories and democratic preferences, so must IEL and institutional economics account for the diversity of local circumstances, for example by responding to the reality of populist nationalism (e.g. by the US Trump administration) denying international PGs.

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licensing practices blocking development and use of new technologies; cf. ‘Apple, Microsoft and BMW urge EU to stop patent trolls’ *Financial Times* of 16 January 2020, available at <https://www.ft.com/content/26230960-37a7-11ea-a6d3-9a26f8c3cba4>).

<sup>50</sup> Our use of the term embedded liberalism differs from that by Andrew Lang, *World Trade Law after Neoliberalism* (OUP 2011), who describes the period from 1947 to the early 1970s as ‘the period of embedded liberalism’ (p.16) and the following period up to around 2000 as ‘the neoliberal turn’ (p.17). While some Tokyo Round and Uruguay Round Agreements and national trade policies in some GATT/WTO member states pursued neo-liberalism since the late 1970s, other GATT/WTO agreements (like the 1979 GATT ‘Enabling Clause’, the WTO Dispute Settlement Understanding) and domestic economic law developments (e.g. in EU competition, monetary, social and environmental regulation) pursued ordo-liberal regulation rather than deregulation and liberalization of markets. The influence of ordo-liberalism on the European Monetary Union and its Eurozone crisis measures remains contested (cf. Hien/Joerges, n 41).

<sup>51</sup> Cf. André Nollkaemper and Laura Burgers, ‘A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case’ *EJIL Talk* (blog of 6 January 2020). References to climate change lawsuits can be found in: <http://climatecasechart.com/>.

## 8. Need for Adjusting WTO Rules to Geopolitical Regulatory Competition

President Trump's withdrawal from the 2015 Paris Agreement, his assault on the WTO legal system, the US-China trade wars, China's 'Belt and Road Initiative' for bilateral economic cooperation agreements with 65 countries along the ancient 'Silk Roads', and China's territorial expansion in the South China Sea challenge the ordo-liberal multilateralism underlying EU law, WTO law, the Paris Agreement on climate change mitigation and other multilateral agreements from which the US withdrew (like the 2016 Trans-Pacific Partnership Agreement) or which China disregards (like the UN Convention on the Law of the Sea). The institutional diversity among the more than 400 regional economic integration agreements suggests that mankind must learn through 'trial and error' (K. Popper) and progressive 'institutionalization of public reason' (J. Rawls) how to overcome the current geopolitical rivalries among Anglo-Saxon neo-liberalism (as illustrated by the 'Brexit' and Britain's rejection of European regulatory harmonization and European courts), President Trump's mercantilist disregard for multilateral trade and environmental agreements protecting global PGs (like climate change mitigation), authoritarian state capitalism (e.g. in China and Russia), and European ordo-liberal, multilevel economic constitutionalism.

Due to the mutually incoherent value premises of utilitarian neo-liberalism, hegemonic mercantilism, totalitarian state-capitalism and rights-based, multilevel economic constitutionalism, these systemic divergences among WTO members are increasingly disrupting the WTO legal, dispute settlement and negotiation systems (e.g. as a result of US invocation of national security exceptions for justifying discriminatory import restrictions on steel and aluminum, US invocation of GATT's 'public morals exception' for justifying trade sanctions against China).<sup>52</sup> In contrast to the end of the post-1945 cold war among communist dictatorships and Western democracies, the current geopolitical rivalries are unlikely to disappear in the near future, for instance in view of the fact that China's successful economic and social transformation since 1978 seems bound to make China the world's largest economy and to increasingly limit US military and economic hegemony and political leadership.<sup>53</sup> The systemic rivalries risk further increasing due to the need for mitigating climate change by, *inter alia*, carbon taxes, border carbon adjustments, limitation of fossil fuel subsidies and GHG emission trading systems (cf. section 9); WTO adjudication and investor-state arbitration are increasingly challenged not only by neo-liberal and mercantilist, but also by state-capitalist and ordo-liberal WTO member states (cf. section 10).

As a consequence, the subsidiarity principle suggests that the WTO provisions on 'exceptions' (e.g. GATT Articles XX, XXI, GATS Articles XIV and XIV*bis*) and the 'embedded liberalism compromise' underlying WTO law may need more flexible, legal interpretations enabling WTO members to adjust their economic laws and institutions to the changing regulatory challenges (e.g. by using WTO trade remedy rules for protecting domestic industries against foreign market distortions, use of WTO exception clauses and WTO 'waivers' for making carbon border adjustments WTO-consistent so as to limit GHG emissions and 'carbon leakage'). The more the 'new nationalism' in neo-liberal WTO members (like the UK, the United States) and in some of the 'BRICS countries' (Brazil, Russia, India, China and South-Africa), and US President Trump's assault on the WTO legal and dispute settlement system render the success of WTO reform negotiations unlikely, the stronger become the reasons for decentralized reforms of world trade rules through (inter-)regional and bilateral agreements among 'willing' and like-minded governments (e.g. insisting on protection of non-economic *national PGs* like 'cyber sovereignty' inside communist China and 'cyber security' inside the United States).

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<sup>52</sup> President Trump's introduction of discriminatory tariffs on imports of China worth up to \$360 bn was found to be inconsistent with GATT/WTO rules in the panel report in *United States - Tariff Measures on Certain Goods from China* (DS543) of 15 September 2020. The US invocations of the 'security exception' in GATT Article XXI for justifying other trade sanctions are, likewise, likely to be found illegal in the pending WTO dispute settlement proceedings; cf. James Bacchus, WTO Signals National Security No Longer Trump Card in Trade Disputes, in: *Newsweek* 7 July 2020.

<sup>53</sup> Cf. Kishore Mahbubani, *Has China Won? The Chinese Challenge to American Primacy* (Hachette, 2020).



Constitutional and institutional economics offer transaction cost rationales for moving from multilateral cooperation efforts towards regional or plurilateral approaches, as the costs vary in finding interaction partners, negotiating contract details, monitoring compliance and enforcing sanctions.<sup>54</sup> Just as reducing complexity is a rationale for non-multilateralism proposed both in the international relations<sup>55</sup> and international law<sup>56</sup> literature, transaction costs in political, technical, or economic dimension can be reduced when moving from multilateral efforts to regional or bilateral agreements.<sup>57</sup>

During the 2020 global health pandemic (related to the COVID-19 virus), many WTO members introduced import and export restrictions on goods and services (like land, air and maritime transports) in conformity with the medical guidance and advice from the World Health Organization (WHO); some of these ‘crisis measures’ are likely to raise strategic long-term questions regarding the previous openness and dependence of countries (e.g. over 80% of active pharmaceutical ingredients of US medicines coming from abroad) and of industries on foreign supplies (e.g. by global supply chains and ‘just-in-time-deliveries’ of inputs for manufacturing). To the extent that a shift in states’ preferences towards more autonomy and autarky in terms of public health, medical supply and services will ensue from the current crisis, this will have an impact on both globalization and cooperation, with nationalization of production facilities leading to a reduction of economic interdependence and institutional cooperation in the WHO being challenged (notably by the United States).

## **9. Need for Cooperation among Global Public Goods Regimes: The Example of Climate Change Mitigation**

The UN pursues its 2030 ‘SDGs’ in cooperation with networks of 15 UN Specialized Agencies, the WTO and additional multilateral treaty regimes (like human rights conventions, the 2015 Paris Agreement on climate change mitigation). In conformity with Nobel Prize economist J. Tinbergen’s theory of ‘separation of policy instruments’<sup>58</sup>, each of these functionally limited ‘PG treaty regimes’ focuses on different, complementary policy instruments for protecting a specific global PG. The 2015 UN Resolution on the 2030 Agenda for Sustainable Development coordinates the implementation of the 17 SDGs (like overcoming poverty, hunger and global warming, protecting health, education, gender equality, access to water, sanitation and clean energy, urbanization, the environment, human rights and social justice); it aims at ‘localizing the SDGs’ so as to empower local institutions, actors and civil society support.<sup>59</sup> It recognizes ‘that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change’ (para. 31).

As trade and climate change regulation are inseparable, the UN also relies on WTO negotiations (e.g. on promotion of ‘sustainable development’ through limiting fishing subsidies and fossil fuel subsidies) and on comprehensive coordination among national and international actors, including the EU as an international member of both the 1994 WTO Agreement and the 2015 Paris Agreement. The Paris Agreement entered into force in November 2016 and was ratified by 187 Parties (2019). 182 countries plus the EU notified their ‘nationally determined contributions’ (NDCs) by 2019. These voluntary

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<sup>54</sup> Ronald Coase, ‘The Nature of the Firm’, (1937) 4 *Economica* 386.

<sup>55</sup> James A. Caporaso, ‘International relations theory and multilateralism: the search for foundations’ (1992) 46 *International Organization* 599, 611.

<sup>56</sup> Andrew T. Guzman, ‘Against Consent’ (2012) 52 *VJIL* 751, 760; Andrew T. Guzman and Beth Simmons, ‘To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO’ (2002) 31 *J. Leg. Stud.* 205.

<sup>57</sup> Steinbach (n 31).

<sup>58</sup> Cf. Jan Tinbergen, *On the Theory of Economic Policy* (North Holland 1952) (arguing that – in order to be effective – a public policy instrument should only aim to secure one goal).

<sup>59</sup> Cf. *Transforming our World: the 2030 Sustainable Development Agenda*, UN General Assembly Resolution A/RES/70/1 of 25 September 2015.

contributions to reduce GHGs differ enormously; they remain insufficient for realizing the climate change mitigation objectives of the Paris Agreement. The United States – as the largest economy and second-largest emitter of GHGs – notified its withdrawal from the Agreement. During the UN climate conference in Madrid in December 2019 focusing on ‘carbon market systems’, other major emitters of GHGs (like China, India, Australia) avoided committing to ambitious limitations of GHGs. The Paris Agreement includes neither trade and competition rules to safeguard a level playing field among competing industries in countries with diverse carbon constraints, nor effective legal disciplines (e.g. for fossil-fuel subsidies, GHG emissions, carbon taxes, border carbon adjustments) and dispute settlement procedures (e.g. regarding NDCs and their consistency with WTO law).

With climate change mitigation typically suffering from insufficient remedies due to its PG nature, institutional economics highlights how constitutional rights accorded to individuals can be effective towards achieving a higher level of climate protection efforts. This is illustrated by the ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda*<sup>60</sup> (a Dutch NGO suing the state on behalf of around 900 citizens), which confirmed the 2018 Court of Appeals judgment that Articles 2 (right to life) and 8 ECHR (right to private and family life) entail legal duties of the Dutch government to reduce GHG emissions by at least 25% (compared to 1990 levels) by the end of 2020. Similar to recent findings of UN human rights bodies and other national courts acknowledging human rights to live in an environment without pollution endangering human health<sup>61</sup>, the Dutch Supreme Court judgment confirms, *inter alia*,<sup>62</sup> that:

- HRL (e.g. the ECHR) and related constitutional and environmental law guarantees (like the 1998 Aarhus Convention on access to justice in environmental matters) may be invoked by citizens in order to enforce positive obligations to take appropriate measures mitigating climate change;
- even if the respondent state is only a minor contributor to climate change, a court can determine the legal responsibilities to reduce emissions of an individual state that shares responsibility with other actors for climate change (‘partial causation justifies partial responsibility’; the failure of other states to meet their responsibilities does not justify non-performance); and
- as the disputing parties agreed that climate change presents serious risks, the court did not need to decide on these facts; it relied on the precautionary principle and the internationally agreed need for reducing emissions by at least 25% by 2020, leaving it to the political government branches to determine how to implement this legal obligation.

The legal-economic innovation of the Dutch ruling is to reconcile legal interpretation of HRL with the economic PG character of the environment. Outside the EU, there is a lack of direct invocability of international treaty law by individuals; individual and judicial efforts at obliging states to take positive action often fail due to the high hurdles posed by the notions of ‘direct effect’ and ‘direct applicability’ of international rules inside domestic legal and judicial systems. In order for a provision to gain direct effect, it must be sufficiently clear and precise and enable enforceability by the individual invoking the norm without further implementation through legal acts; courts’ reluctance in acknowledging direct effect has been particularly high in relation to international treaties stipulating primarily state obligations (such as WTO law)<sup>63</sup>, while international treaties granting individual rights (such as ECHR) are more likely to be recognized by courts as invocable by individuals and to serve as legality standards of states’ measures. With PGs creating positive or negative effects on virtually everyone, it is sound to extend the scope of constitutional rights (such as the right to life in Article 2 ECHR, the right to private and family

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<sup>60</sup> De Staat der Nederlanden (Ministerie van Economische Zaken en Klimaat) tegen Stichting Urgenda, Hoge Raad der Nederlanden, Civiele Kamer, Nummer 19/00135, 20 December 2019.

<sup>61</sup> References to climate change lawsuits can be found in: <http://climatecasechart.com/>. See also: Jacqueline Peel and Jolene Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2020) 114*AJIL* 114 (2020).

<sup>62</sup> Cf. Nollkaemper/Burgers (n 53).

<sup>63</sup> Francesca Martines, ‘Direct Effect of International Agreements of the European Union’ (2014) 25 *EJIL* 129.

life in Article 8 ECHR)) to protection against encroachments on individual rights resulting from insufficient public efforts to mitigate climate change.

In that vein, the Dutch government's commitment to comply with the judgment sets an important precedent for legal, judicial and rules-based, political protection of PGs like climate change mitigation. In order to garner the social and democratic support for implementing the EU's 'New Green Deal' and make the WTO and Paris Agreements mutually coherent, EU leadership for climate mitigation policies must go beyond merely environmental discourse by emphasizing the constitutional and ordo-liberal foundations of EU environmental policies limiting 'market failures' (like environmental pollution) and 'governance failures' (e.g. to prevent climate change). The EU will elicit sufficient support to overcome internal and external opposition to climate mitigation policies only if limitation of fossil fuels and of GHG emissions, the introduction of carbon taxes and border carbon adjustments, and prevention of 'carbon leakage' (e.g. by shifting production of cement, steel and other products using fossil fuel-based energy from the EU to third countries with less stringent restrictions) are not perceived as 'green protectionism' distorting 'fair competition' and creating social injustices. Hence, the carbon border adjustment measures (e.g. taxes) envisaged in the EU's 'New Green Deal' should be based on multilaterally agreed, non-discriminatory standards rather than being imposed unilaterally at national levels of governance.

## **10. Legitimacy and Efficiency of Economic Adjudication**

The increasing number of – and interactions among – international 'PGs treaties' cannot realize their legal and policy objectives without transnational rule-of-law protecting overall coherence between national and international, legal and political governance systems. As illustrated by the US withdrawal from the 2015 Paris Agreement and by the US assault on the WTO legal and dispute settlement system, neo-liberal interest group politics and nationalism ('America first') risk neglecting harmful externalities like environmental pollution, climate change and US violations of multilateral WTO commitments. Is it realistic – in a world where multilateralism is increasingly challenged by nationalist power politics – to pursue the need for stronger multilateral rules and dispute settlement procedures 'institutionalizing public reason' and holding governments accountable for violations of multilateral treaties protecting transnational PGs?

### ***10.1 Legitimacy and Necessity of Judicial Protection of 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'.<sup>64</sup>

The second half of the 20<sup>th</sup> century has seen an unprecedented increase in the number of international trade, investment, economic and other courts at bilateral, regional and worldwide levels of governance aimed at protecting transnational rule-of-law. They often interact – e.g. in international trade, investment, regional economic integration law, human rights and international criminal law – with domestic courts aimed at multilevel protection of transnational rule of law for the benefit of citizens. The legitimacy of specialized trade, investment and intellectual property courts and arbitration tribunals – e.g. in the sense of justification of their legal and judicial authority, protection of their independence, and their personal integrity vis-à-vis rent-seeking interests groups – remains contested in democratic

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<sup>64</sup> 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.

and civil societies, just as the ‘politicization’ of judicial appointments in national courts (e.g. in the United States) is increasingly contested.<sup>65</sup>

Legitimacy challenges of courts depend on their diverse judicial mandates, subject matters, specific goals, design choices, applicable law, processes, audiences, institutional contexts and results.<sup>66</sup> From an institutional economics perspective, legitimacy matters to the extent that it ties public measures back to the claim of normative individualism guiding ordo-liberal principled thinking. While legitimacy may be conceptualized in different guises and draw from different disciplines, it ultimately contributes to stabilize the relationship between public authority and those governed or affected by public measure. Source-based legitimacy and process-based legitimacy suggests that the approval of WTO agreements by national parliaments and democratic institutions also conferred legitimacy on the WTO dispute settlement jurisprudence. Normative legitimacy suggests that WTO law promoted and protected non-discriminatory conditions of trade, rule-of-law and democratic preferences of citizens. WTO law can claim result-oriented legitimacy to the extent that it enhanced economic efficiency satisfying economic and legal demand of citizens benefitting from international trade and the global division of labor. Historical evidence confirms that rights-based, ordo-liberal conceptions of transnational rule-of-law cannot be realized without legitimate third-party adjudication.

### **10.2 Efficiency Justifications of Judicial Protection of Rule of Law**

From an economic perspective, independent and impartial third-party adjudication can limit not only public and private rule-violations and related costs in ways promoting constitutionally agreed rights, rule-of-law and other PGs for the benefit of all citizens in conformity with their democratically expressed preferences; they also contribute to reducing transaction costs, in the context of WTO law no less than in the context of national and other international legal systems protecting PGs and rules-based cooperation among citizens.

Efficient allocation of governmental authority and ‘jurisdiction’ for peaceful settlement of disputes is no less important for promoting consumer and citizen welfare than efficient market allocations of private goods and services.<sup>67</sup> In terms of external legitimacy (e.g. beliefs of outside constituencies like EU citizens, traders, producers, investors and consumers affected by trade and investment adjudication), WTO law protects not only international third-party adjudication among WTO member states and other supra- or sub-national WTO members (like the EU, Hong Kong, Macau and Taiwan). Numerous WTO provisions provide also for individual access to domestic courts or international commercial arbitration (e.g. pursuant to Article 4 of the WTO Agreement on Pre-shipment Inspection), which offer less costly judicial remedies for the settlement of transnational trade disputes.

Empirical evidence suggests that the 316 dispute settlement proceedings under GATT 1947 and the 1979 Tokyo Round Agreements<sup>68</sup>, and the more than 600 formal dispute settlement proceedings under the WTO Agreement (1996-2020), have considerably enhanced the policy objective of ‘providing security and predictability to the multilateral trading system’ through compulsory third-party adjudication of disputes over the interpretation and application of WTO rules ‘in accordance with customary rules of interpretation of public international law’ (Article 3.2 DSU), thereby reducing transaction costs in international trade also for the benefit of consumers. Judicial protection of rule-of-law also promote individual and democratic autonomy by assisting citizens and governments in

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<sup>65</sup> Richard H.Fallon, *Law and Legitimacy in the Supreme Court* (Harvard UP 2018); Adam Cohen, *Supreme Inequality: The Supreme Court’s Fifty-Year Battle for a More Unjust America* (Penguin Press 2019).

<sup>66</sup> The following legitimacy criteria are explained in: Nienke Grosman/Harlan Grant Cohen/Andreas Follesdal/ Geir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge UP, 2018).

<sup>67</sup> Cf. Trachtman (n 14).

<sup>68</sup> Cf. the list and analyses of cases in: *GATT Disputes 1948-1995*, 2 vols. (WTO 2018).

maximizing long-term benefits and minimizing costs in the pursuit of individual and collective preferences.

## **11. Conclusion: Constitutional Economics Requires ‘Constitutionalization’ of Economic Rules and Institutions**

The ordo-liberal ‘constitutional perspective’ proceeds from ‘methodological individualism’; yet, it acknowledges and protects the communitarian dimensions of individuals, their civil, political, economic, social and cultural rights and voluntary cooperation, and the multilevel interactions between democratic, executive and judicial governance institutions confronted with rational choices limited by scarcity of resources and respect for equal human rights and transnational rule-of-law. Ordo-liberal European economic constitutionalism differs from neo-liberal American nationalism and totalitarian Chinese state-capitalism; as the latter’s nationalism and power-oriented economic and foreign policies offer no multilateral models for efficient governance of global PGs, constitutional struggles for justice (e.g. for democratic control of US trade policies, limitation of arbitrary ‘Brexit politics’, protection of China’s ‘one state’ two system’ commitments) become more necessary than before.

### ***11.1 Need for Recognizing the Importance of ‘Constitutional Choices’***

If economics is about the arrangements within which individuals and collective actors make ‘efficient choices’ in response to scarcity, it is important to distinguish choices within existing constraints (as studied by ordinary economics) from choices among alternative legal and institutional constraints (as studied by constitutional and ‘institutional economics’). Hence, the neoclassical ‘maximization paradigm’ must be complemented by ‘constitutional contract/exchange paradigms’ for deliberative or evolutionary choices of constraints that protect informed, individual and democratic preferences. In contrast to the focus of politics on ‘winners’, ‘losers’ and distribution of power, the exchange paradigm of constitutional economics focuses on mutual individual and collective gains enabled by constitutional cooperation improving the ‘laws and institutions’ of the economic-political order.

This analysis has highlighted why globalization and its transformation of national into transnational PGs require extending constitutional and institutional economics to multilevel governance of transnational PGs in order to enhance the wealth of nations – not only through cooperation and division of labor among private economic actors, but also among lawmakers, governments and courts beyond national frontiers. Efficient allocation of scarce resources and satisfaction of consumer preferences can be enhanced by both constitutional improvement of the contractarian efficiency of ‘laws and institutions’ (e.g. constraining coercive authority) and post-constitutional economics maximizing the available economic goods, services and resources.

### ***11.2 Need for Adjusting to ‘Constitutional Pluralism’***

The current state of IEL faces opposing realities of ‘constitutional pluralism’ and ‘regulatory competition’ among authoritarian economic systems (e.g. in China and Russia) and neo-liberal or ordo-liberal market economies committed to ‘methodological individualism’, ‘democratic constitutionalism’ and ‘rational choices’ by individuals and peoples. Diverse European schools of ordo-liberalism and of ‘Virginia constitutional economics’ influenced the progressive development of European economic constitutionalism and the ordo-liberal dimensions of the WTO legal and dispute settlement systems. There is a need for international cooperation among ‘overlapping PGs regimes’ by exploring the interrelationships between the WTO trading, legal and dispute settlement systems and the need for climate change mitigation through introduction of carbon taxes, border carbon adjustments, limitation of fossil fuel subsidies and promotion of carbon-free ‘green circular economies’, as envisaged in the context of the 2015 Paris Agreement and the EU’s ‘New Green Deal’.

Private and public, national and transnational courts of justice and arbitration should promote ‘judicial comity’ aimed at reducing transaction costs and protecting transnational rule-of-law, democratic and individual preferences as expressed in mutually agreed, human and constitutional rights of citizens. The constitutional transformations of common markets (notably among the 30 EEA countries) and the regulatory challenges of globalization and climate change require reforms not only of international trade, investment, economic and human rights adjudication. Also the law of international organizations for multilevel governance of PGs requires ‘constitutional approaches’ in order to make the ‘disconnected governance’ in UN and WTO institutions more legitimate and more effective.<sup>69</sup> International organizations increasingly move beyond constituting mere fora for negotiations between governments by providing for multilevel legislative, executive and judicial decision-making processes and for coordination among legally separate organizations. Yet, the theory and practices (e.g. of the United States) of institutional law-making have failed to catch up with many new, innovative practices going beyond the traditional framework of intergovernmentalism. Institutional economics can assist in improving the analytical tools that international lawyers need to close the gap between theory and practice of institutional law-making and of related constitutional reforms.

### ***11.3 European Protection of Rules-Based Order in a World of Power Politics?***

Reforms of international trade, investment and environmental law and institutions are increasingly hampered by the conflicting value principles underlying utilitarian Anglo-Saxon neo-liberalism (e.g. promoting self-regulatory market forces privileging the *homo economicus*), constitutional European ordo-liberalism (e.g. protecting ‘common market freedoms’ and multilevel, constitutional rights and judicial remedies of EU citizens), and authoritarian state-capitalism (e.g. protecting totalitarian power monopolies of the communist party in China). This reality of ‘constitutional pluralism’ at national levels of governance is unlikely to disappear; it may require broader re-interpretations of WTO ‘exception clauses’ and pragmatic adjustments of the WTO dispute settlement system in response to the US assault on the WTO Appellate Body, as illustrated by the successful EU initiative for a new ‘Multi-Party Interim Arbitration’ (MPIA) arrangement enabling mutually agreed appellate arbitration based on Article 25 DSU until the WTO AB can resume its lawful functions pursuant to Article 17 DSU.<sup>70</sup>

In view of the increasing need for ‘greening the embedded liberalism’ underlying international trade, investment and environmental regulation, the ‘Anthropocene’ – i.e. our new global context of humans having become a geophysical force provoking climate change, massive biodiversity losses and other geological changes that can no longer be prevented through intergovernmental ‘management’ – also necessitates stronger EU leadership for constitutional responses to the obvious ‘governance failures’ in environmental policies so as to prevent the human destruction of our environmental system.<sup>71</sup> As people in less-developed countries risk being most adversely affected by WTO power politics and climate change<sup>72</sup>, citizens in all ‘willing countries’ must defend ‘public reason’ and global PGs, for instance by resisting President Trump’s invocation of ‘America first’ for justifying the US assaults on WTO law and on the Paris Agreement.

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<sup>69</sup> Cf. Petersmann (n 13).

<sup>70</sup> Cf. Elisa Baroncini, ‘The EU Approach to Overcome the WTO Dispute Settlement Vacuum: Article 25 DSU Interim Appeal Arbitration as a Bridge between Renovation and Innovation’ in Colin Picker, Junji Nakagawa/Peter T. Stoll, Rostam Neuwirt and Meredith Kolsky Lewis (eds), *The Post WTO Legal Order: Paradise Lost* (Springer 2020) 115.

<sup>71</sup> Cf. Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016).

<sup>72</sup> Cf. the UN Report on ‘Climate Change and Poverty’, A/HRC/41/39 (25 June 2019), para. 11.

### **11.4 Constitutional Policy Challenges**

Strategic constitutionalism argues that the design, interpretation and adaptation of constitutional rules should more focus on their real-world consequences (e.g. in terms of incentives for citizens, politicians, administrators, judges, enterprises) and dynamic, multilevel governance of PGs than on the ‘originalist intentions’ of constitutional ‘founding fathers’: The ‘four-stage sequence’ of national constitutionalism, as described by Rawls in his *Theory of Justice* (1971) using the historical example of the US Constitution<sup>73</sup>, must be transformed into a transnational ‘six-stage-process’ including also transnational legislation and executive and judicial protection or transnational rule-of-law.<sup>74</sup>

Just as ordo-liberal constitutionalism acknowledges dynamic interactions between moral, political, economic and legal freedoms and justifies economic competition on economic and non-economic grounds<sup>75</sup>, so can democracy be identified with competitive government dependent on constitutional safeguards of democratic competition (e.g. promoting ‘median democracy’ in constitutional democracies, ‘political bargain democracy’ in neo-liberal democracies, multilevel constitutional democracy inside the EU). Transforming national constitutionalism protecting national PGs into multilevel constitutionalism for multilevel governance of transnational PGs raises a host of strategic policy questions, as discussed in sections 1 to 10. These include:

- Why are so many economic and legal textbooks neglecting the task of justifying economic law and policies in terms of ‘principles of justice’ even though voluntary rule-compliance also depends on perception of the rules as ‘just’? Which human rights and constitutional ‘principles of justice’ can justify modern trade and investment regulation in ‘efficient’ ways that reasonable citizens can understand and support?<sup>76</sup>
- Can European competition law and common market principles (like free movement of persons, fundamental rights, judicial remedies) serve as models for reforming international trade, investment and environmental law beyond Europe?
- The less social, economic, political and legal interactions can be separated in the evolution and design of economic institutions (e.g. ‘equilibrium prices’ and ‘exchange rates’ balancing supply and demand of traded goods and currencies, democratic preferences influencing the ‘efficiency’ of decision-making), the more interdisciplinary cooperation is needed for understanding and designing institutions in national and international economic regulation. How can the legal discipline integrate insights produced in other disciplines in ways respecting the methodological frontiers of each discipline?

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<sup>73</sup> Cf. John Rawls, *A Theory of Justice (revised edition)* Harvard UP 1999), at 171ff (reasonable citizens, after having agreed (1) on their constitutional ‘principles of justice’ (e.g. in the 1776 US Declaration of Independence and Virginia Bill of Rights), (2) elaborate national Constitutions (e.g. the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of citizens; and (4) the agreed constitutional and legislative rules need to be applied and enforced by administrators and courts of justice in particular cases so as to promote rule-of-law and rule-compliance by citizens).

<sup>74</sup> For ‘law and economics’ approaches to constitutionalism see Cooter (n 16) and Petersmann (n 6), who explains the need for a multilevel, transnational ‘six-stage constitutionalization process’ at 112f, 126ff, 174ff.

<sup>75</sup> E.g. as information, coordination and sanctioning mechanism enhancing individual freedom, promoting consumer welfare in terms of consumer surplus, inducing individuals to use their decentralized knowledge and limit abuses of power; cf. Viktor Vanberg, ‘Consumer welfare, social welfare and economic freedom – on the normative foundations of competition policy’ in Joseph Drexel *et alii* (eds), *Competition Policy and the Economic Approach. Foundations and Limitations* (Elgar 2011) 44.

<sup>76</sup> On the neglect of theories of justice in most IEL textbooks see Ernst U.Petersmann, *International Economic Law in the 21<sup>st</sup> Century* (Hart 2012), at 1ff. This book’s definition of the ‘first principle of justice’ in terms of Kantian and Rawlsian theories of justice also justifies a presumption of transnational economic freedoms subject to other principles of justice and human rights (cf. chapter III).

- Can the EU's multilevel common market constitution remain effective without further 'constitutionalizing' the EU's fiscal and monetary constitution and 'banking union'? How can the institutional asymmetry between decentralized fiscal policy and centralized monetary policies in the euro zone be developed achieving both resilience of the monetary union against crises and avoiding 'moral hazards' undermining EU citizens' trust in the EU constitutional law principles (like limited delegation of EU powers, national sovereignty over fiscal and debt policies)?<sup>77</sup> Should the EU be authorized to issue euro-bonds? Under what conditions?
- How can the 'constitutional problems' of the compulsory WTO dispute settlement system be reduced such as the insufficient, democratic accountability of the WTO AB for its 'judicial clarifications' of WTO rules? Does the political failure of WTO members to hold WTO jurisprudence accountable – e.g. by adopting majority decisions on authoritative interpretations of WTO rules (Article IX.2 WTO Agreement), amending WTO rules, negotiating new WTO rights and obligations, or by establishing a DSB committee of legal experts for elaborating proposals for reforming WTO jurisprudence – undermine the 'democratic legitimacy' of WTO jurisprudence based on quasi-automatic adoption of WTO panel and appellate reports?
- How much will the strengthening of the *intra*-EU constitutional restraints on economic adjudication of trade and investment disputes and on judicial protection of individual rights influence the ongoing negotiations on reforms of ISA procedures in the external EU relations with third states and foreign investors?

The tensions and geopolitical rivalries between American hegemonic neo-liberalism, European constitutional ordo-liberalism and China's totalitarian state-capitalism render 'constitutional' and 'institutional economics' more contested, for instance due to the lesser constitutional restraints on governmental conferral of privileges and rent-seeking interest groups in neo-liberal and state-capitalist economies than in ordo-liberal, constitutionally more restrained democracies. Yet, the current global governance crises, health pandemics and climate change make constitutional reforms of multilevel governance of PGs ever more urgent. In order to be democratically legitimate and politically supported by citizens, these reforms can no longer prioritize 'negative freedoms' and economic neo-liberalism; they must protect also universally recognized positive freedoms (like health rights, environmental rights and other human rights) and constitutional, democratic and environmental reforms.

As criticized by economic Nobel Prize laureate Buchanan more than 40 years ago, economists must not neglect 'the constitutional-institutional or framework requirements of an economic system'<sup>78</sup>, just as politicians must acknowledge that transnational PGs cannot be protected without international law and multilevel governance institutions supported by all citizens (rather than only by utility-maximizing economic actors). The conflicts between rational pursuit of self-interests, legal promotion of common interests (e.g. through non-discriminatory economic and democratic competition), and reasonable protection of public interests and PGs through constitutional law and democratic regulation are at the root of why economic constitutionalism and constitutional economics are needed for rules-based, efficient responses to the knowledge problems, incentive problems, reputation and legitimacy problems of economies.<sup>79</sup>

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<sup>77</sup> Cf. Brigitte Young, 'Is Germany's and Europe's Crisis Politics Ordo-liberal and/or Neo-liberal?' in Biebricher and Vogelmann (n 41) 221.

<sup>78</sup> James Buchanan, *Freedom in Constitutional Contract* (Texas University Press 1977) 5.

<sup>79</sup> Cf. Viktor Vanberg, 'Ordnungspolitik, the Freiburg School and the Reason of Rules' (2001) 14 *Freiburger Diskussionspapiere zur Ordnungsökonomik*.



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