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Economic Disintegration? Political, Economic, and Legal Drivers and the Need for 'Greening Embedded Trade Liberalism'

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ABSTRACT

This contribution uses the examples of Great Britain's withdrawal from the EU (Brexit) and US withdrawal from multilateral trade and environmental agreements for exploring political, economic, environmental, social, and legal reasons driving the backlash against economic integration agreements. In both examples, populist battle-cries for 'taking back control' and for lowering regulatory standards were followed by governmental attempts at evading parliamentary control over executive foreign policy powers to violate, or withdraw from, multilateral agreements. Anglo-Saxon neo-liberalism, President Trump's mercantilist power politics, authoritarian state-capitalism (e.g. in China), and European ordo-liberalism reflect systemic divergences that may justify broad interpretations of WTO 'exceptions' (e.g. for WTO trade remedies and climate change mitigation). Europe's multilevel, democratic constitutionalism protecting 'social market economies' was comparatively more effective in limiting protectionism and carbon emissions inside Europe's common market. The EU's 'new green deal' for a carbon-neutral 'green economy' was made possible by stronger, social, and democratic support based on 'constitutional interpretations' of Europe's ordo-liberalism assisting adversely affected workers, producers, traders, investors, and other citizens to adjust economic and environmental activities to climate change mitigation. EU leadership for WTO-consistent climate change rules requires 'greening embedded liberalism' by interpreting the WTO 'sustainable development' objectives in conformity with the 2015 Paris Agreement, the UN 'sustainable development goals', and human rights (e.g. as legal basis for climate change litigation in Europe).

INTRODUCTION

Globalization increasingly transforms *national* into *transnational public goods* (PGs). This renders international agreements the central policy instrument for protecting PGs through multilevel governance and regulation. The interconnections between multilevel legal, economic, and governance systems require mutual coherence in order to protect 'aggregate PGs'—like mutually beneficial trading, environmental protection, rule of law, and human rights systems—effectively. Section II discusses 'embedded

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liberalism' as a strategy for 'embedding' trade and economic integration agreements into domestic legal, political, and social systems protecting PGs. Section III describes the 'new nationalism', its disintegrating introduction of discriminatory border barriers, and related challenges to embedded liberalism from the perspective of Anglo-Saxon neo-liberalism, President Trump's hegemonic mercantilism, the spread of authoritarian state-capitalism, and Europe's ordo-liberal 'social market economies'. Section IV explains why climate change, the 'new green deal' adopted by the European Union (EU) in December 2019, and the UN/WTO 'sustainable development' objectives require 'greening' embedded liberalism in accordance with the 2015 Paris Agreement and the UN sustainable development goals (SDGs), as illustrated by recent climate change litigation. Section V concludes that climate change reflects market failures, governance failures, and 'constitutional failures' to protect human welfare; the necessary 'greening' of embedded liberalism—as a multilevel strategy for protecting human rights and 'transitional justice'—risks provoking further disintegration, even if global supply chains circumvent bilateral trade barriers.

I. HISTORICAL EVOLUTION OF EMBEDDED TRADE LIBERALISM

All societies use law as an instrument for social ordering and for limiting pursuit of self-interests. The history of 'legal civilization' (e.g. in the sense of adjusting law to the needs of citizens in cities and states) documents progressive regulation of markets, investments and trade supplying goods and services demanded by people. In order to reduce transaction costs and promote security for traders and investors, transnational trade and investment agreements were concluded since ancient times. Also, imperial trade contributed, for example, to the application of Roman commercial law in many jurisdictions across Europe, and to the extension of Anglo-Saxon common law freedoms and judicial remedies to overseas trade with British colonies. Following Britain's repeal of its corn laws in 1846, the 1860 Cobden-Chevalier free trade agreement between the United Kingdom (UK) and France sparked successive trade liberalization agreements with other European countries, whose most-favored nation commitments created the first *de facto* 'multilateral European trading system'. The first globalization ended with World War I, the Great Depression during the late 1920s, the protectionist US Smoot-Hawley Tariff Act of 1930 and the retaliatory trade and payments restrictions by many of the USA's trading partners. US efforts at recreating an international trading system through bilateral trade agreements—negotiated by the US President on the basis of the 1934 Reciprocal Trade Agreements Act—were undermined by World War II. The 1944 Bretton Woods Agreements, the 1947 General Agreement on Tariffs and Trade (GATT), and regional free trade and customs union agreements laid the foundations for the postwar multilateral trading system. The eight successive 'GATT Rounds' of multilateral trade negotiations ushered in the 1994 WTO Agreement with today 164 members covering 98% of world trade. This contribution argues that—similar to GATT's embedded liberalism[1] and to its successful adjustment to decolonization—the

1 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

embedded liberalism underlying the WTO trading system[2] needs to be adjusted to the 'new nationalism' underlying President Trump's hegemonic mercantilism, Brexit, and protectionism in BRICS countries (Brazil, Russia, India, China, and South Africa) so as to enable the WTO to realize its 'sustainable development' objectives in conformity with the 17 SDGs accepted by UN member states.

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 postwar 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 within the constraints of GATT 1947. This embedded liberalism not only *permitted* governmental regulations of 'market failures' (like externalities, market power, PGs, and information asymmetries) and of related 'governance failures' and constitutional problems (like principal-agent relationships and cognitive and volitional limitations of 'rational choices' observed by behavioral economists); it also *enabled* and *promoted* welfare states through reciprocal trade liberalization enhancing mutually beneficial division of labor and economic and legal cooperation in producing private and public goods. The economic 'theory of optimal intervention' underlying GATT's legal ranking of alternative policy instruments according to their economic efficiency (e.g. allowing nondiscriminatory internal taxes, product and production regulations, limiting border tariffs, and prohibiting discriminatory nontariff trade barriers subject to 'exceptions' for noneconomic, nondiscriminatory domestic regulations) enabled mutually welfare-enhancing, legal harmonization reducing transaction costs and political conflicts—without limiting national sovereignty over nondiscriminatory, domestic regulation of the economy and polity.[3] Some GATT lawyers interpreted these political, economic and legal theories justifying GATT's 'embedded liberalism compromise' as 'constitutional functions' of GATT rules for promoting equal freedoms, nondiscrimination, rule of law, judicial remedies, and social justice also inside domestic economies and polities for the benefit of private economic actors.[4]

the economy in case of external shocks) by Ruggie JG, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', 36 *International Organization* 379–415 (1982).

2 My use of the term embedded liberalism differs from that by Lang A, *World Trade Law after Neoliberalism* (OUP, 2011), who describes the period from 1947 to the early 1970s as 'the period of embedded liberalism' (at 16) and the following period up to around 2000 as 'the neoliberal turn' (at 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.

3 Cf. Corden M, *Trade Policy and Economic Welfare* (OUP, 1974). On the economic, legal and political functions of GATT 1947, see GATT's chief economist Tumlir J, 'GATT Rules and Community Law', in Hilf M, Jacobs FG and Petersmann EU (eds), *The European Community and GATT* (Deventer: Kluwer, 1986), 1–22.

4 Cf. the contributions by Roessler F, Petersmann EU, Jackson JH, Hudec RE, Bourgeois J, Pescatore P, Cottier T, Matsushita M and numerous other American, Asian and European GATT lawyers to Hilf M and Petersmann EU (eds), *National Constitutions and International Economic Law* (Deventer: Kluwer, 1993).

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 Agreement on Trade-related Intellectual Property Rights (TRIPS))[5] and ordo-liberal insistence on strengthening 'sustainable development', nondiscriminatory conditions of competition (e.g. as reflected by the nondiscrimination and 'necessity' requirements in the WTO Agreements on technical barriers to trade and (phyto)sanitary standards) and rules-based dispute settlement. 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), majority voting (cf. Article IX), the compulsory jurisdiction of the WTO dispute settlement system, and the (quasi)automatic adoption of more than 420 WTO panel, appellate, and arbitration reports. Anglo-Saxon neo-liberalism and 'private ordering ideals' (e.g. based on private and common law rules for contracts, property, torts, arbitration, and 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 and environmental pollution. 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 system, ushering in the destruction of the WTO Appellate Body (AB) system, increasing noncompliance 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 trade restrictions (e.g. on aluminium and steel).

II. NEW NATIONALISM AIMED AT 'TAKING BACK CONTROL': CHALLENGES TO EMBEDDED LIBERALISM

Trade policy powers include powers to tax and restrict mutually beneficial trade cooperation. As they can be used for redistributing income among domestic groups (e.g. by

5 Many competition lawyers have expressed concerns (e.g. in Ullrich H et al. (ed), *TRIPS Plus 20. From Trade Rules to Market Principles*, Heidelberg: Springer, 2016) that some TRIPS rules—whose drafting was dominated by intellectual property 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 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).

means of tariffs and subsidies), they risk being exercised in arbitrary, welfare-reducing ways. Hence, many national Constitutions, European integration law, and international trade agreements limit and regulate trade policy powers so as to protect transparent policy-making, nondiscriminatory conditions of competition, transnational rule of law, economic welfare, and rights and remedies of economic actors and citizens.[6] WTO law prescribes neither particular forms of 'market economies' nor 'democracies' inside WTO members; yet, many WTO rules limit the legal and institutional pluralism among national economies by nondiscrimination requirements and legal limitations of regulatory instruments (like subsidies, state-trading enterprises, and trade remedy laws). Most of these legal limitations aim at inducing governments to apply economically efficient policy instruments (like nondiscriminatory taxes and tariffs) subject to flexible exceptions, transparency, and dispute settlement requirements. Hence, most WTO rules *enable* governments to *enhance national welfare* and *resist protectionist pressures* to redistribute income by discriminatory, trade-distorting nontariff barriers. Yet, the neo-liberal turn to liberalization, deregulation, and privatization, since the end of the 1970s, in the UK, the USA, other Anglo-Saxon, Asian, Eastern European, and Latin American countries (like Chile) also enhanced 'regulatory capture' of trade policies by rent-seeking industries benefitting from, e.g. subsidies, anti-dumping duties, countervailing duties, related 'voluntary export restraints', and other trade remedy laws.

Why is it that—since the Brexit referendum and the election of President Trump in 2016—populist plutocrats (like Trump D, Farage N) succeeded in persuading democratic majorities to withdraw from multilateral trade agreements in order to 'take back control' from 'nonelected, expert-run international organizations' in the name of 'defending national freedom', restricting immigration, and de-regulating the economy? Section A argues that US neo-liberalism and its neglect for social adjustment problems have progressively undermined social and democratic support for neo-liberal conceptions of international trade and investment law. Section B recalls that—due to inadequate parliamentary support for trade mercantilism—governments relied increasingly on *executive powers* side-lining *parliamentary control*, which was limited in the UK by successive domestic court judgments[7] and by the 2019 'Benn Act' prohibiting a 'no-deal Brexit'. Section C discusses how the Anglo-Saxon turn to nationalist trade policies, 'bilateral trade deals' and disregard for multilateral legal obligations responded

6 Cf. the comparative legal and 'public choice' studies in: Hilf/Petersmann (n. 4).

7 In the United Kingdom, the Supreme Court ruled in January 2017 that the government executive could not lawfully initiate withdrawal from the EU pursuant to Article 50 of the Treaty on the European Union (TEU) without an Act of Parliament permitting the government to do so, Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3) [2017] UKSC 5 (24 January 2017). In September 2019, the Supreme Court ruled that Prime Minister B. Johnson acted unlawfully in proroguing parliament for 5 weeks so as to reduce parliamentary opposition against the UK leaving the EU on 31 October 2019, Miller, R (on the application of) v The Prime Minister [2019] UKSC 41 (24 September 2019). On the court cases pending in the USA challenging President Trump's invocation of executive powers for imposing tariffs on aluminum, steel and Chinese imports in violation of WTO law, see: Petersmann EU, 'The 2018 Trade Wars as a Threat to the World Trading System and to Constitutional Democracies', 10 (2) *Trade, Law and Development* 179–225 (2018), at 195ff.

to 'management' of trade policies in Asian countries. Section D contrasts the 'constitutional failures' and 'tribal politics'[8] underlying trade protectionism with the 'ordo-liberal' constitutional constraints and more stable, democratic support for liberal trade in the EU. Part IV discusses why 'greening' of the WTO's embedded liberalism is needed for avoiding disintegration in response to climate change prevention measures (like carbon taxes and their border adjustments). Part V concludes that governance of transnational PGs—like climate change mitigation—requires limiting collective action problems by promotion of 'club goods,'[9] limitation of abuses of executive powers (like President Trump's imposition of import tariffs worth $350 billion violating WTO law), and protection of social justice in economic and environmental cooperation.

A. Neo-liberalism erodes social justice

Postwar US trade policies—and the economic arguments of many Brexit advocates[10]—relied on 'Chicago school' recommendations of liberalization, deregulation, and privatization of the economy in order to promote 'free markets', 'justice as efficiency' (usually defined in terms of 'Kaldor-Hicks efficiency'), and economic freedoms in a world of scarce resources. Similarly, US constitutional law prioritizes civil and political liberties and private property protection over economic, social and cultural human rights as protected in the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR), which was never ratified by the US. The 'Virginia school of public choice' warns of 'protectionist capture' of regulatory powers by organized interests influencing regulations in ways beneficial to them, as illustrated by 'rent-seeking capture' of US legislation on trade remedies, control of guns, toxic tobacco products, and environmental pollution.[11] President Trump invokes stock-exchange and profit values for justifying deregulation (e.g. of financial markets); assistance to domestic industries to adjust to import competition and protection of 'social justice' remains insufficient.[12] President Trump and his trade advisor Peter Navarro reject the liberal postwar economic consensus that

8 This term is increasingly used in both the UK and the USA for the prioritization of political party interests over national interests, e.g. by Tory Party members supporting the Brexit regardless of the national welfare costs resulting from Brexit; and by US congressmen representing industries benefitting from the Trump administration's internal tax reductions and deregulation, and tolerating external mercantilism without insisting on US congressional involvement in the introduction of new tariffs.

9 On the economic distinction between private goods, nonexcludable and nonexhaustible 'pure PGs', nonexaustible 'impure PGs', and nonexcludable '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 Petersmann EU, *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law* (Oxford: Hart, 2017).

10 For example, Prime Minister Johnson's goal of establishing a 'Singapore at Thames', surrounded by free ports in the coastal areas of the United Kingdom (UK), his refusal of regulatory harmonization of UK and EU law and of its supervision by the EU Court of Justice (CJEU) conflict with the EU's negotiation position that access to the EU market depends on the degree of regulatory harmonization avoiding competitive distortions and protecting PGs.

11 Cf. the 'public choice analyses' in Hilf/Petersmann (n 4).

12 Cf. Rodrik D, 'Populism and the Economics of Globalization', (1) *Journal of International Business Policy* 12–33 (2018), (criticizing the existing, yet under-financed and often ineffective 'trade adjustment assistance' in the USA).

> '(t)rade openness ... has brought about higher productivity, greater competition, lower prices and improved living standards'; 'open trade ... benefits especially lower-income households who consume a disproportionately higher share of tradable goods and services'; governments have 'to better communicate the benefits of open trade to a public that may become sceptical' and have to facilitate 'trade-related adjustments'.[13]

Democratic constitutionalism and 'constitutional economics' (e.g. as taught by the Virginia school), which emphasizes the welfare-enhancing advantages of 'constitutional contracts' limiting rent-seeking and related 'collective action problems' through legislation protecting democratic preferences and equal rights of citizens, have not prevented increasing delegation of trade policy powers to the US President and 'regulatory capture' by rent-seeking interest groups (e.g. influencing US trade remedy, subsidy, tax, financial, government procurement, shipping, and environmental legislation). The more US trade policies focused on protecting domestic producers (e.g. of agricultural, cotton, textiles, and steel products), the more the US insisted on limiting GATT/WTO rules by protectionist exceptions (e.g. for cotton subsidies, textiles restrictions, steel, and aluminium) and abusive trade remedies (e.g. for alleged 'dumping'). Similarly, the GATT/WTO negotiations were strongly dominated by US economic and political interests (e.g. in designing WTO rules on trade in services, trade-related investment protection, and intellectual property rights). The frequent use of GATT/WTO trade remedies by the USA entailed that more than half of the 590 invocations (2019) of WTO dispute settlement procedures challenged safeguard measures, subsidies, dumping, and countervailing duties. The US frequently used 'aggressive unilateralism' (e.g. unilateral trade sanctions based on sections 262, 301 and 307 of the US Trade Act). The US' 'blockage', since 2017, of the filling of vacant WTO AB positions is widely interpreted as aimed at preventing the WTO AB from exercising judicial control over US trade policy measures.[14] The legal justifications by the Trump administration of their illegal 'blocking' of the AB insist on US interpretations of WTO rules and US criticism of AB findings without any evidence that legal interpretations by the AB violated the customary rules of treaty interpretation or the (quasi)judicial AB mandate for impartial, independent, and prompt third-party adjudication; the 2020 USTR Report criticizing the jurisprudence of the AB is distorted by legal biases and incorrect claims,[15] such as

- US denial of (quasi)judicial functions of WTO third-party adjudication, even though numerous WTO publications and WTO dispute settlement reports over more than 20 years acknowledged the (quasi)judicial mandates of WTO dispute settlement bodies (e.g. WTO panel and AB reports as adopted by the DSB);
- US disregard for judicial AB arguments in the performance of the Dispute Settlement Understanding (DSU)'s mandate 'to clarify the existing provisions of

13 IMF, World Bank and WTO (eds), *Making Trade an Engine for Growth. The Case for Trade and for Policies to Facilitate Adjustment* (2017), 4.

14 Cf. Petersmann EU, 'How Should WTO Members React to their WTO Governance Crises'? (18) *World Trade Review* 503–525 (2019).

15 Cf. n 14 and the *Report on the Appellate Body of the WTO*, United States Trade Representative (USTR, Washington, 2020).

those agreements in accordance with customary rules of interpretation of public international law' (Article 3 DSU), for instance whenever the AB found compliance with the time limit of 90 days (Article 17:5 DSU)—which was imposed by US negotiators in 1993 notwithstanding the widespread criticism that no other court seems to be limited by such an unreasonably short time limit—impossible to reconcile with the other judicial AB tasks (e.g. due to illegal US blocking of the filling of AB vacancies);

- Contradictory USTR claims that AB legal findings against the US violated the DSU prohibition to 'add or diminish the rights and obligations in the covered agreements' (Article 3:2 DSU)—even if the AB had justified these legal findings on the basis of the customary rules of treaty interpretation and its (quasi)judicial mandate—, notwithstanding the USTR's regular support of AB reports accepting 'creative WTO interpretations' advocated by the USTR as a legal complainant;
- One-sided focus on WTO texts as interpreted by US negotiators without regard to the customary law and DSU requirements to clarify the meaning of the often indeterminate WTO provisions with due regard also to WTO legal texts revealing the 'context, object, and purpose' of WTO provisions and the explicitly recognized 'systemic character' of what the WTO Agreement calls 'this multilateral trading system' (Preamble) and its 'dispute settlement system' (Article 3 DSU);
- US description of US 'zeroing practices' as a 'common-sense method of calculating the extent of dumping'[16] even if their biases had been consistently condemned by the AB and DSB as violations of the WTO obligations of 'fair price comparisons' (which are hardly mentioned in the USTR report);
- Denigration of AB members as 'three unelected and unaccountable persons'[17] whose 'overreaching violates the basic principles of the United States Government,'[18] notwithstanding the election of AB members through consensus decisions of 164 DSB member governments (including the USA), their (quasi)judicial mandate, and the approval of WTO agreements (including the DSU) by the US government and US Congress;
- Insulting claims that the AB Secretariat has weakened the WTO dispute settlement system by not respecting WTO rights and obligations.

The 'Economic and Trade Agreement' signed by the Chinese and US governments on 15 January 2020[19] provides for discriminatory Chinese commitments to buy US products, discriminatory US import tariffs and US trade restrictions (e.g. targeting Chinese technology companies) without third-party adjudication. Similarly, UK Prime

16 Cf. USTR report (n 15), at 2.

17 *Idem*, Introduction and para 8, 13.

18 *Idem*, Introduction.

19 Economic and Trade Agreement between the Government of The United States of America and the Government of The People's Republic of China, signed on January 15, 2020, available at https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf.

Minister Johnson rejects control by European courts of his Brexit plans for economic deregulation and national regulatory autonomy.[20]

Arguably, many US violations of WTO rules and dispute settlement procedures reflect 'interest group politics' and politicization of appointments of judges inside the USA. The less domestic governance failures were limited, the more US protectionism (e.g. for US steel industries) undermined WTO law, WTO dispute settlement, and US trade policies (e.g. by appointing former trade lobbyists to the positions of USTR and US ambassador to the WTO). The criticism by US voters of increased market concentration, 'financialization' and financial shocks, corporate tax avoidance (e.g. exploiting tax and regulatory loopholes), soaring social inequality and environmental pollution inside the USA weakened democratic support for neo-liberal 'globalization strategies' of US companies (e.g. outsourcing the manufacture of ever more industrial inputs to less-developed countries with low wages). Similar to the British government's attempts at avoiding parliamentary involvement in the 2019 Brexit negotiations, also US President Trump interprets his democratic election as a mandate for using his foreign policy powers for introducing protectionist trade restrictions without asking for additional congressional legislation. 'Taxation without representation' led to a democratic revolution in the 18th century. President Trump's imposition and threats of import taxes of up to $500 billion—by executive orders in violation of US legal obligations under WTO law—remained little contested by US congressmen and US industries benefitting from US tax reductions, deregulation, and from financial business donations for the election campaigns of US congressmen. The power-oriented mercantilism of the Trump administration and the USTR's demands for 'patriotic support' by American AB members for US legal claims in WTO dispute settlement proceedings remain driven by neo-liberal interest group politics (e.g. protecting US steel, automobile, and plane manufacturers).

B. President Trump's trade wars risk destroying the WTO system

Following the Brexit referendum for 'leaving the EU', the US elections leading to the Presidency of Trump were influenced by widespread, public opposition against multilateral trade agreements like the Trans-Pacific Partnership (TPP), the North-American Free Trade Agreement (NAFTA), the Transatlantic Trade and Investment Partnership (TTIP), and WTO agreements. Early in 2017, President Trump acted upon his election promises to either withdraw from, or re-negotiate these 'terrible agreements' (Trump) in order to reduce the US trade deficit and protect 'losers' of trade competition (notably manufacturing workers in the USA): the US withdrew from the TPP, discontinued the negotiations of TTIP, re-negotiated NAFTA and the US-Korea Free Trade Agreement, and insisted on reforming WTO rules and procedures (e.g. WTO AB procedures, self-selection of 'less-developed country' status, and termination of the Doha Round negotiations). The more President Trump defined his 'America first' policies in ways disregarding multilateral trade and environmental agreements (like the

20 Cf. 'We won't accept EU supervision in post-Brexit deal, UK tells EU', Euronews, daily newsletter of 20 February 2020.

2015 Paris Agreement on climate change mitigation and adaptation), the more the USA engaged in openly disrupting WTO law and dispute settlement procedures, for instance by:

- Blocking the filling of WTO AB vacancies in violation of the DSU (e.g. Articles 3, 17, 23);
- Unilaterally declaring the end of the Doha Round negotiations and of US recognition of 'less-developed country status' of some WTO members;
- Unilaterally imposing discriminatory, illegal import restrictions (e.g. on steel and aluminium);
- Threatening additional protectionist restrictions in order to impose 'bilateral trade deals' (e.g. voluntary export restrictions accepted by Australia, Korea, and other WTO members in violation of WTO law) aimed at limiting bilateral US trade deficits;
- Imposing discriminatory tariffs on imports from China aimed at inducing trade policy changes in China (e.g. China's subsidies and industrial policies);
- Prohibiting US companies and US government institutions to buy from, or sell to, specified Chinese technology companies (like Huawei);
- Using the Trump doctrine of 'economic security is national security' for justifying US import restrictions on grounds of 'national security' and denying jurisdiction of WTO dispute settlement bodies to review such 'national security invocations'.[21]

Observers suggest four explanations for President Trump's turn to mercantilist protectionism and hegemonic bilateralism exploiting power asymmetries:

First, since the 1980s, Trump continues to publicly reject the prevailing conception of international trade as a 'win-win competition' ('all trading countries gain') in favor of a 'zero sum conception': bilateral trade deficits and relocation of US manufacturing abroad are criticized as 'losses'; import restrictions are described as necessary 'to bring back' the jobs and manufacturing industries that had been 'lost' to less-developed countries and trade surplus countries. President Trump claims that mercantilist tariff protection enhances US economic welfare.[22]

Second, President Trump prioritizes nationalism ('America first') and denounces 'globalists', international organizations, and international adjudication limiting hegemonic US claims. Trump supports 'Brexit' and disdains supranational organizations like the EU.

Third, President Trump has merged US economic and trade policies with US national security strategies: import tariffs, trade sanctions, and blacklists of foreign government officials and foreign companies (e.g. Chinese technology companies) are

21 For details see: Blustein P, *Schism. China, America and the Fracturing of the Global Trading System*, (Waterloo: Center for International Governance Innovation, 2019); VanGrasstek C, *Trade and American Leadership. The Paradoxes of Power and Wealth from Hamilton to Donald Trump* (CUP, 2019); Petersmann (n. 7 and 14).

22 For discussion of Trump's trade mercantilism see: VanGrasstek (n 21), at 427ff; Lamp N, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and their Implications for the Redesign of International Economic Agreements', *European Journal of International Law* (2020, forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290590.

justified by invoking (inter)national security exceptions (e.g. in sections 262 and 301 of US trade laws, GATT Article XXI) in response to perceived foreign policy threats and to 'national economic security' concerns (e.g. for US steel, aluminium and automobile industries); this blurring of the traditional separation of trade and security policies under GATT, WTO, and NAFTA policies (e.g. avoiding invocations of GATT Article XXI and related dispute settlement proceedings) risks destroying the multilateral trading system, as illustrated by similar 'security invocations' by authoritarian WTO member countries.[23]

Fourth, foreign trade surplus countries are criticized as engaging in 'unfair competition'; the job losses caused by US investments in manufacturing industries abroad are denounced as 'theft' (e.g. threatening US steelworkers with 'death by China'). Blaming foreign trading partners for 'cheating' and 'unfair trading surpluses' aims at generating emotional support for President Trump's trade protectionism by domestic political constituencies, which often ignore the economics justifying liberal trade competition and global supply chains of US businesses.[24] In addition to the mercantilist, nationalist, geostrategic, and demagogic justifications by the Trump administration of US trade restrictions, the 'framing' of President Trump's trade protectionism (e.g. as being necessary for remedying individual and national 'losses' and 'security risks' caused by imports from China) reinforces 'protection biases' and public 'discourse failures' in domestic political constituencies.[25] As President Trump's domestic tax reductions and deregulation (e.g. of financial industries, environmental restraints) benefit many US industries that financially support US congressmen, congressional opposition against President Trump's trade protectionism and extensive interpretation of executive policy powers remains weak.

C. Spread of authoritarian conceptions of embedded liberalism

Similar to Prime Minister Johnson's program aimed at economic deregulation and establishing a 'Singapore at Thames', President Trump's preference for managing foreign trade deficits through 'bilateral deals' exploiting US power responds to trade 'management' by Asian countries. In contrast to Anglo-Saxon neo-liberalism (prioritizing individual liberty and market-driven utilitarianism) and European ordo-liberalism (prioritizing protection of human dignity through constitutional rights and a 'social market economy'), China's state capitalism prioritizes totalitarian control of the state, the polity, and economy by China's communist party (CCP) and nationalist 'Xi Jinping thinking'. Since its accession to the WTO in 2001, China continues to transform communist state capitalism into a 'socialist market economy with Chinese characteristics' based on state-owned enterprises (SOEs), an increasing number of private-owned enterprises, and totalitarian control of the Chinese economy by the CCP and its state

23 On Trump's invocation of national security exceptions and 'framing' of trade policy as part of security policy, and the currently (2019) 6 WTO disputes over such 'security invocations', see VanGrasstek (n 21), 434 ff; Blustein (n 21), 231 ff.

24 On Trump's narrative of 'unfair' foreign policies 'stealing' jobs from US workers, 'destroying their way of life', and 'cheating' through subsidies and currency devaluations see Lamp (n 22).

25 Cf. van Aaken A and Kurtz J, 'Beyond Rational Choice: International Trade Law and the Behavioral Political Economy of Protectionism', 22 *Journal of International Economic Law* 601–628 (2020).

apparatus. China's 'Belt and Road' (BRI) initiative recreates China-centred, bilateral networks of transnational road and maritime infrastructures—based on agreements with 65 countries supported by financial, technical, and government procurement assistance from Chinese and Asian institutions—following China's ancient perception as the 'middle kingdom'. In response to the US-China trade war since 2018, China is promoting its Regional Comprehensive Economic Partnership negotiations with the Association of South-East Asian Nations, Australia, India, Japan, New Zealand, and South Korea, as well as China's cooperation with central-Asian countries cooperating in the Eurasian Economic Union. As the world's largest trading nation and, by 2030, the world's largest economy, China remains committed to promoting the WTO legal and dispute settlement system. Yet, the WTO governance crises and President Trump's trade war undermining China's rights under WTO law risk pushing China to prioritize its economic integration in Asia based on authoritarian 'management' of trade.

SOEs and sovereign wealth funds are used in many countries for maximizing state profits. Their regulatory challenges result not from their *existence*, but from the financial and regulatory advantages granted to SOEs (e.g. monopolies and exclusive rights), the advantages (such as capital and inputs) transferred from SOEs (e.g. state banks, raw material producers) to other economic actors, related competitive distortions affecting competitors and consumers, and the use of SOEs for political or military objectives of governments. The existing WTO legal disciplines (e.g. in Arts XVII GATT, VIII GATS, China's Protocol of WTO Accession, WTO subsidy and trade remedy rules) are insufficient for controlling discrimination and trade distortions caused by SOEs. There is broad agreement on the need for additional WTO trade, competition, subsidy, dumping, safeguard, and investment rules for limiting abuses by SOEs.[26] In the absence of such WTO reforms, many WTO members unilaterally adjust their trade remedy laws (e.g. by focusing on 'cost distortions' and 'particular market situations' in applying anti-dumping and countervailing duty regulations).[27]

China has implemented most of the WTO dispute settlement rulings by terminating violations of China's WTO obligations as established in WTO dispute settlement proceedings challenging Chinese trade measures.[28] As for '17 years, from its entry into the WTO in December 2001 to December 2018, China has timely and satisfactorily

26 Cf. Wu Y, *Reforming WTO Rules on State-Owned Enterprises* (Singapore: Springer, 2019).

27 For comparative analyses of how WTO members use their trade remedy laws for responding to 'nonmarket situations' in China, see: Nedumpara JJ and Zhou W (eds), *Nonmarket Economies in the Global Trading System* (Singapore: Springer, 2018).

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

implemented the findings and recommendations of WTO tribunals in all but one dispute,'[29] China's record of compliance with WTO dispute settlement rulings compares favorably with other WTO members including the USA (which, in contrast to China, has faced many WTO requests for authorizing retaliation following WTO findings on US 'noncompliance' with WTO dispute settlement ruling). Yet, China's good record of complying with adverse WTO dispute settlement rulings does not justify generalizations on China's compliance with WTO rules, which remains problematic in many respects (e.g. regarding transparency, subsidy, SOEs, intellectual property obligations, and judicial remedies). The empirical finding that

> 'at the core of China's approach has been the use of WTO rulings as an external lever to facilitate domestic economic reforms while at the same time limiting the impacts of the rulings on its policy objectives and regulatory framework designed to pursue such objectives,'[30]

corresponds with similar findings on the impact of adverse WTO dispute settlement rulings on domestic policy-making and legal implementation of WTO law in other states like Canada and the USA:

> 'the US government has acted in its own self-interest and thwarted the potential impact of the dispute settlement mechanism either by effectively ignoring its decisions or by implementing them in such a way as to minimize their overall effect'.[31]

Regarding the implementation of trade remedy disputes, China emulated the 'avoidance techniques' practiced by the USA and other WTO members by re-initiating investigations and often maintaining anti-dumping or countervailing duties on different legal grounds unless the re-investigation was found to continue violating WTO rules in compliance proceedings.[32] China's compliance record with adverse WTO dispute settlement rulings confirms that—even if the annual USTR 'China compliance reports' continue identifying breaches of WTO legal obligations by China—WTO dispute settlement procedures offer more effective instruments for clarifying and enforcing WTO legal obligations than the bilateral power politics prioritized by President Trump.

The communist ideologies underlying China's 'CCP state' render it unlikely that its pervasive government control of the economy and polity can be liberalized through WTO negotiations. The US considers the WTO as incapable of adequately responding to China's alleged violations and circumvention of WTO rules. But President Trump's bilateral US-China negotiations and trade wars do not appear to have limited, so far, China's state influence on public and private enterprises (e.g. China's active industrial policies), Chinese noncompliance with certain WTO rules, China's military expansion

29 Zhou (n 28), at 183.

30 Zhou, *idem*, at 184.

31 Krikorian JD, *International Trade Law and Domestic Policy* (Vancouver: University of British Columbia Press, 2012), 81. See also the case-studies on the limited judicial review of US trade policies inside the USA in Hilf/Petersmann (n 4).

32 Zhou (n 28), at 185ff.

(e.g. in the South China Sea), military threats (e.g. vis-à-vis Taiwan), and related strategic challenges to US hegemony. Unlike the multilateral disciplines for SOEs in Chapter 17 of the 2016 TPP Agreement, the bilateral US-China trade negotiations prioritize short-term 'managed trade deals' (e.g. on China's purchase of US soya beans). The geopolitical and technological rivalries and policy divergences risk 'decoupling' certain sectors of economic integration (e.g. digital trade using 'dual use' technologies of strategic importance), diverting 'global supply chains' (e.g. from China to other Asian countries like Vietnam), and emulating China's bilateralism, state interventions, and 'managed trade'.

D. Europe's ordo-liberal paradigm of 'social market economies'

The German 'Freiburg School of ordo-liberalism' and 'Cologne School of social market economy' perceived economic markets as legal constructs (rather than as gifts of nature), whose efficient and welfare-enhancing functioning depends on 'constituent principles' (like fundamental rights of citizens and monetary and price stability protected by independent central banks), 'regulative principles' (e.g. for limiting 'market failures' by competition, environmental, and social policies) and constitutional 'checks and balances' (e.g. democratic constitutionalism holding governments accountable, judicial remedies of citizens, subsidiarity principles protecting decentralized governance mechanisms). Ordo-liberal 'constitutional economics' influenced not only the embedding of Germany's 'social market economy' into German and European constitutional law. Also the EU's 'micro-economic common market constitution,'[33] 'macro-economic monetary constitution,'[34] their progressive evolution, and judicial review[35] were influenced by German and European ordo-liberalism.[36] Due to its 'principled thinking' in terms of 'interdependent, rules-based orders', 'governing through market mechanisms' and republicanism protecting PGs (*res publica*), ordo-liberalism emphasizes that the *competitive order* (safeguarding the proper functioning of 'performance competition' and price mechanisms) must remain 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 *social order* (protecting labor markets, welfare states, and social justice). The EU Charter of Fundamental Rights' (EUCFR) guarantees of civil, political, economic, social, and 'European citizenship

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

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

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

36 On the EU's sectoral (e.g. micro-economic, macro-economic and social) 'constitutions' see: Tuori K, *European Constitutionalism* (Cambridge: CUP, 2015), 127ff. On 'constitutional economics' and the controversies over applying ordo-liberalism to the EU's monetary union, see: Biebricher T and Vogelmann F (eds), *The Birth of Austerity. German Ordoliberalism and Contemporary Neoliberalism* (London: Rowman & Littlefield, 2017).

rights' protect not only 'negative freedoms' (e.g. constraining abuses of public and private power). Rights to facilitate 'positive freedoms' through governmental protection of individual self-development (e.g. 'human dignity') can be seen as constitutional core values of the 'social market economy', for instance protecting labor, health, environmental rights, and public education. 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.

The 'Geneva School of multilevel ordo-liberalism'[37] focused on questions of *international economic order* as a condition for empowering welfare states and limiting abuses of public and private powers through multilevel, legal, institutional, and judicial guarantees of nondiscriminatory market competition. Notably, the economists (like GATT's chief economist Tumlir J) and lawyers working inside GATT's economic research and legal divisions were more influenced by 'constitutional economics'[38] than by utilitarian Chicago school economists (e.g. in view of their dubious, normative premises underlying the distributive effects of 'Kaldor-Hicks efficiencies').[39] Some of the constitutional, competition, and social policy principles of 'ordo-liberalism'

37 For a discussion of the 'Geneva school of law and economics', and its comparison with other schools of 'law and economics', see Slobodian Q, *Globalists. The End of Empire and the Birth of Neoliberalism* (Cambridge Mass.: HUP, 2018), 7ff, 183ff, 208ff, 260ff. My review of this book criticizes Slobodian's failure to recognize the ordo-liberal—rather than neo-liberal—foundations of the 'Geneva school': cf. 19 *Journal of International Economic Law* 915–921 (2018). See also the critical book review by Roessler F, 18 *World Trade Review* 353–359 (2019).

38 E.g. as taught by the ordo-liberal 'Freiburg school' (e.g. of Eucken W, Böhm F, Hayek FA, and Vanberg V) and 'Virginia school' (e.g. Buchanan J) 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 (cf. Brennan G and Buchanan JM, *The Reason of Rules. Constitutional Political Economy* (Cambridge: CUP, 1985). For a summary of the economic and legal conceptions of the 'ordo-liberal Geneva school', see: Petersmann EU, 'International Economic Theory and International Economic Law—On the tasks of a legal theory of international economic order', in Macdonald RSJ and Johnston DM (eds), *The Structure and Process of International Law* (The Hague: Nijhoff, 1983), 227–261; Hauser H et al., 'The Contribution of Jan Tumlir to the Development of a Constitutional Theory of International Trade Rules (in German with English summary)', in *Ordo—Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 39 (1988), 219–238. The *Ordo-Yearbook* and the Journal *Constitutional Political Economy* publish ordo-liberal research (e.g. on 'constitutional economics' as 'economic analysis of constitutional law' and of economic rights of citizens). Buchanan J cooperated closely with the Freiburg School 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).

39 See also the 'liberal paradox' criticized by Sen AK, 'The Impossibility of a Paretian Liberal', 78 *Journal of Political Economy* 152 (1970) (discussing situations when constitutional rules do not allocate rights regarding the distributive effects of economic rules and actions). Sen's criticism of utilitarian welfare economics ('the only things of intrinsic value for ethical calculations and evaluations of state of affairs are individual utilities') and his human 'capability approach' support the ordo-liberal priority given to human and constitutional rights empowering individuals; cf. Sen AK, *On Ethics and Economics* (Oxford: Blackwell, 1987), 40, 46f: 'since the claim of utility to be the only source of value rests allegedly on identifying utility with well-being,

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 nondiscriminatory conditions of competition;
- Protecting and prioritizing sovereign powers to regulate and protect noneconomic public goods in nondiscriminatory ways (cf. Articles XIX-XXI GATT, XIV-XIV*bis* 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.[40]

The reality of increasing policy divergences among WTO members illustrates that Europe's economic constitutionalism goes far beyond what may ever be possible in worldwide governance institutions. Yet, the 'Geneva ordo-liberalism' underlying the legal protection of national sovereignty over nondiscriminatory, internal regulations, the separation of legislative, executive, and judicial powers in WTO law (e.g. Article III WTO Agreement), the multilevel, compulsory WTO dispute settlement system, and the WTO commitments to trade liberalization, nondiscriminatory conditions of competition and 'sustainable development', including its human rights dimensions as universally recognized in the 'Geneva consensus' (Lamy P) and the 2030 SDGs, offers coherent principles also for modernizing WTO rules by more comprehensive limitations of market failures, governance failures and 'constitutional failures' (like climate change and illegal power politics).[41] Europe's cosmopolitan constitutionalism, as reflected also in the European Convention on Human Rights (ECHR) and in the

it can be criticized both (i) on the ground that well-being is not the only thing that is valuable; (ii) on the ground that utility does not adequately represent well-being'.

40 Slobodian (n 37) describes the WTO as 'the paradigmatic product of Geneva School neoliberalism' (at 25), 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' (at 23). The GATT/WTO jurisprudence (e.g. on interpreting GATT/WTO rules as protecting nondiscriminatory conditions of competition) reinforces this ordo-liberal function of states and of the GATT/WTO dispute settlement systems as 'guardians of the competitive order'.

41 On ordo-liberal GATT/WTO reforms see also Hilf/Petersmann (n 4); Petersmann (n 14), 518–525; Hauser H and Petersmann EU (eds), 'International Competition Rules in the GATT/WTO System', 49 *Swiss Review of International Economic Relations* 169–424 (1994); Petersmann EU, *International Economic Law in the 21st Century* (Oxford: Hart, 2012), 378–387.

EUCFR, offers more coherent 'theories of justice' justifying the basic structures of rights- and rules-based market integration than the power-oriented, utilitarian interpretations of WTO law by Anglo-Saxon and Asian WTO scholars, whose nationalism often neglects human rights, social justice and other transnational PGs.[42] As UN law and politics (like the SDGs, the 'human development index' used by the UN Development Program) recognize individual and democratic self-determination and respect for human rights, economic utilitarianism must remain 'embedded' in constitutional safeguards of equal access to 'primary social goods' (Rawls J) and 'basic human capabilities' (Sen A), including human and constitutional rights.[43] The necessary adaptation of WTO law to the requirements of climate change mitigation—as discussed in the following section IV—requires an unprecedented degree of global cooperation at a time when the 'embedded liberalism compromise' underlying WTO law is increasingly contested by American neo-liberalism and authoritarian state-capitalism.

III. HOW TO PREVENT 'GREEN PROTECTIONISM'?

The 2018 G20 meeting in Buenos Aires called for 'the necessary reforms of the WTO' to improve the functioning of the multilateral trading system. From ordo-liberal citizen perspectives, these reforms should include, *inter alia*, protecting rule of law (e.g. the WTO AB system); stronger disciplines for transparency, nondiscriminatory conditions of competition, limitation of trade-distorting subsidies (including fossil-fuel and fishery subsidies) and of trade distortions caused by SOEs; updating traditional WTO rules (e.g. on agriculture, services, intellectual property rights, government procurement, special and differential treatment of less-developed countries); and elaborating additional WTO disciplines on agreed, new regulatory challenges (like electronic commerce, data flows, data privacy, investment facilitation, labor and environment issues). As government support for *worldwide* WTO reforms remains insufficient, the 'subsidiarity principle' calls for more decentralized, *plurilateral* trade agreements (e.g. PTAs regulating e-commerce and climate change mitigation) with or without most-favored-nation commitments. Some reform negotiations (e.g. on 'greening' WTO rules) require close cooperation with other international institutions (like the 2015 Paris Agreement on climate change mitigation and adaptation); they may even be initiated outside the WTO in mega-regional free trade agreements (e.g. innovating new disciplines on SOEs and border carbon tax adjustments) and sectoral organizations (e.g. carbon

42 On this neglect for justifying international economic law (IEL) by theories of justice see Petersmann (n 41), chapters I–IV; this textbook follows the ordo-liberal European tradition (e.g. by economic lawyers like Mestmäcker EJ and Fikentscher W) of justifying modern IEL in terms of citizen-oriented, rights-based theories of justice (e.g. based on Kantian, Rawlsian and Sen's theories of justice) rather than state-centered power politics and economic utilitarianism. For a coercion-based justification of egalitarian justice (focusing on institutionalized coercion rather than on citizen-based justification of the basic legal structures) see: Suttle O, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* (OUP, 2018). As WTO law reflects both neo-liberal and ordo-liberal regulatory approaches, the increasing conflicts between US' neo-liberal interpretations (e.g. of trade remedy rules, WTO nondiscrimination requirements) and their more restrictive, ordo-liberal interpretation by the AB were predictable.

43 On Kantian legal theory and cosmopolitan constitutionalism see Petersmann (n 41), chapter III; on freedoms, capabilities and human rights as constraints on utilitarianism see: Sen A, *The Idea of Justice* (Cambridge Mass: HUP, 2009), chapters 11 and 17.

reduction commitments for civil aviation to be agreed by the International Civil Aviation Organization, for international maritime shipping by the International Maritime Organization). This section IV suggests that—given the reality of WTO power politics, for instance rendering the WTO AB ineffective without any democratic mandate for such *de facto* amendment and without complying with the WTO legal requirement to appoint WTO officials (including AB judges) 'by a majority of the votes cast', if necessary (Article IX:1 WTO Agreement)[44]—adjusting WTO law to the requirements of climate change mitigation and adaptation will not be possible without EU leadership for making carbon taxes, border carbon adjustments (BCAs) and carbon emission trading systems WTO-consistent (below A); the WTO's sustainable development goals must be rendered more effective by interpreting embedded liberalism in conformity with UN law and forming 'regulatory alliances' to overcome the collective action problems in WTO governance (below B and C).

A. Can carbon taxes and BCAs be made consistent with WTO law?

The 2019 'Sustainable Development Goals Report' identifies climate change (e.g. cutting 'record-high greenhouse gas emissions now' so as to prevent displacement of up to 140 million people by 2050) and 'increasing inequality among and within countries' as the two most challenging issues of our time.[45] The 2015 Paris Agreement on climate change 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 contributions to reduce greenhouse gases (GHGs) differ enormously and remain insufficient. The USA—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 does not include trade and competition rules to safeguard a level playing field among competing industries in countries with diverse carbon constraints. The EU Commission is committed to supplementing the EU emission trading system by carbon taxes and BCAs for imports from third countries in order to avoid 'carbon leakage' (by relocating emissions-intensive production to countries with less or no taxes on carbon use). Such BCAs aim at (i) increasing carbon prices so as to (ii) reduce carbon emissions; (iii) preventing 'carbon leakage'; (iv) inducing polluting industries (notably steel, aluminum, cement producers, and long-distance transporters) and 'free-riding countries' to participate in climate mitigation; and (iv) maintaining nondiscriminatory conditions of competition ('trade neutrality').

In order to make carbon taxes compatible with WTO rules on nondiscriminatory treatment and avoid protectionist abuses and competitive distortions, an *import BCA* would tax emission-intensive imports at a rate equivalent to that for an average domestic producer (with possibility of tax rebates if the foreign producer could demonstrate

44 Cf. Petersmann (n 14).

45 *The Sustainable Development Goals Report 2019* (Geneva: UN, 2019), 3, 42, 48.

lower carbon usage, for instance due to use of renewable energy); an *export BCA* could reimburse domestic carbon taxes paid to the extent they exceed carbon taxes in the country of destination. Calculating the 'carbon footprint' of products risks being abused and contested, especially if the CO_2 is not included in the final product, and the product includes components from many countries. Unilateral extension of BCAs to third countries is likely to create trade conflicts, as illustrated by past EU efforts at extending emissions trading to international flights. Hence, fair, transparent and predictable rules for administration of BCAs (e.g. for calculating the carbon footprint of imports, exemptions for less-developed countries) should be internationally agreed among members of the Paris and WTO agreements rather than enforced unilaterally. The consistency of any BCA with GATT nondiscrimination requirements (e.g. in Arts. I-III GATT), environmental exceptions (e.g. in Arts XX GATT and XIV GATS), and subsidy disciplines depends on its specific design features and administration.[46] WTO supervision of BCAs and the availability of WTO dispute settlement procedures are crucial for maintaining transnational rule of law among WTO members. In view of the US withdrawal from the Paris Agreement, EU leadership for elaborating a 'Paris Agreement on BCAs' could avoid trade conflicts over 'green protectionism' by safeguarding nondiscriminatory conditions of competition among countries with different carbon emission policies. Reconciling WTO rules with climate mitigation policies under the Paris Agreement (e.g. by means of WTO 'waivers', 'WTO peace clauses', agreed interpretations of WTO exceptions) is necessary for avoiding further disruption of the multilateral trading system.

B. 'Greening the WTO' requires democratic and social participation

The Paris Agreement involved—both during its elaboration and its implementation—*supra-* and *sub*-national actors like the EU and hundreds of other, nonstate, and nongovernmental actors (e.g. cities and companies). Similarly, the UN 2015 Resolution on the 2030 Agenda for Sustainable Development describes the implementation of its 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) as 'localizing the SDGs' so as to empower local institutions, actors, and civil society support.[47] 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); it also relies on WTO negotiations (e.g. on limiting fishing and fossil fuel subsidies) for realizing the sustainable development objectives. The annual WTO *Public Fora* involve hundreds of nongovernmental actors. Yet, the *de facto* amendment of the WTO AB system—without democratic mandate and in clear violation of the WTO agreements approved by parliaments on behalf of their citizens—reveals ineffective

46 Cf. Mehling MA et al., 'Designing Border Carbon Adjustments for Enhanced Climate Action', 113 *American Journal of International Law* 433–481 (2019).

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

parliamentary and democratic accountability of intergovernmental WTO power politics. Just as climate change prevention and protection of the 17 SDGs cannot succeed without democratic and civil society support, so will the necessary greening of WTO law and of neo-liberal economic policies not be feasible without stronger involvement of parliaments, courts of justice, civil society institutions, and citizens committed to protecting sustainable development in their daily lives. The history of European integration demonstrates that limitations of utilitarian liberalism and of intergovernmental power politics depend on legal empowerment and judicial protection of citizens and of their democratic and civil society institutions vis-à-vis abuses of executive and economic powers. Harmful 'environmental externalities' and adaptation of WTO rules (e.g. outlawing fossil fuel subsidies, limiting fishery subsidies, regulating carbon taxes, emission trading systems, and BCAs) risk distorting competition and being opposed without 'transitional justice'. How to incentivize citizens, parliaments, and courts of justice to support 'green transformations' of multilateral trading systems?

Sections II and III explained why—just as GATT's embedded liberalism rejected the prewar *laissez faire*-liberalism and successfully adjusted to the structural changes of decolonization—the social injustices caused by 'embedded neo-liberalism' call for taking into account 'constitutional economics': trade and environmental policies undermining rights of citizens are not only undemocratic; they are also inefficient means for satisfying citizen preferences as recognized in human rights law (HRL) and in the 17 SDGs.[48] The historical lessons—e.g. from theories of justice and citizen-driven 'struggles for justice'—confirm that multilevel governance of transnational PGs (including climate change mitigation) can become more democratic, politically more powerful and economically more efficient if citizens are recognized as 'democratic principals' entitled to equal rights and to holding governments accountable through democratic and judicial institutions and justifications of legitimate governance. In European integration, both the micro-economic 'common market constitution', the macro-economic 'monetary constitution' and the EU's rights-based 'foreign policy constitution' became more effective through their decentralized legal, democratic, and judicial enforcement by EU citizens invoking their civil, political, economic, social and other 'citizenship rights' (as codified in the EUCFR) in national and European democratic institutions and courts.[49] The following sub-section C illustrates this constitutional experience by European climate litigation based on HRL. International commercial law, criminal law, investment, intellectual property, and environmental law confirm this experience: interpreting domestic laws and international treaties as protecting not only rights of governments, but also rights of citizens makes multilevel governance of transnational PGs more effective and more legitimate; protecting PGs—inside and beyond states—requires republican governance based on 'constitutional checks and balances' limiting abuses of public and private power.[50]

48 Cf. n. 38 and 39 on 'constitutional economics' defining 'efficiency' in terms of agreed rules protecting democratic preferences for avoiding market failures and governance failures impeding sustainable development; see also Vanberg VJ, *The Constitution of Markets. Essays in Political Economy* (London: Routledge, 2001).

49 Cf. n. 35 and 36.

50 Cf. Petersmann (n. 9), 321ff. HRL and ordo-liberalism justify rules-based competition as offering superior solutions to the knowledge problems, incentive problems, coordination and reputation problems of

C. Climate-change litigation in European courts: the 2019 Urgenda judgment

Since the 2017 Advisory Opinion of the Inter-American Court of Human Rights[51] affirming national jurisdiction in cases when transboundary environmental harms adversely affect the human rights of persons outside the territory, legal actions are increasing in national courts (e.g. in Peru, Germany, Italy, Ireland, the Netherlands, and Norway) and European courts initiated by citizens and nongovernmental organizations (NGOs) holding governments and corporations accountable for failing to address the climate crisis. The ruling of the Dutch Supreme Court on 20 December 2019 in *State of the Netherlands v Urgenda*[52] (a Dutch NGO suing the state on behalf of around 900 citizens)—confirming 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—sets important precedents for climate litigation,[53] notably by the following legal findings:

- 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 nonperformance);
- 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 Dutch government's commitment to comply with the judgment sets a welcome political precedent for rules-based legal, judicial and political protection of PGs like climate change mitigation; it confirms the Netherland's historical record of successful adaptation to environmental changes like rising sea levels.

economies. China's 'socialist market economy' relies on result-oriented, discretionary politics and specific interventions by the CCP.

51 IACtHR, Advisory Opinion OC-23/17, 15 November 2017, Requested by the Republic of Columbia, para 81.

52 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.

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

IV. CONCLUSION: NEED FOR ADJUSTING THE WTO's EMBEDDED LIBERALISM TO INCREASED POLICY DIVERGENCE

Section II interpreted embedded liberalism as a constitutional response to the fragmentation of national and international legal systems in order to protect citizens as 'democratic principals' of governments with limited, delegated powers to protect PG. Sections III and IV illustrated that ordo-liberal constitutionalism and European courts protect more coherent integration of multilevel trade, environmental, and human rights regulation for the benefit of citizens; trade regulation by neo-liberal and authoritarian states often remains dominated by interest group politics and intergovernmental power politics with less effective parliamentary control and judicial protection of equal rights of citizens. As a result, the 'paradox of liberty'—i.e. the inherent tendencies of legal safeguards of equal liberties and 'sovereign equality of states' to destroy themselves due to unequal distribution of resources and 'destructive' rather than 'constructive uses' of liberties—risks provoking more market failures and governance failures (like social inequalities) inside neo-liberal and state-capitalist governance systems than in ordo-liberal, constitutionally more restrained economies and democracies.

Section IV suggested to render the WTO's embedded liberalism and sustainable development objectives more effective and more legitimate by interpreting them in conformity with the 17 SDGs accepted by UN member states. For instance, as the SDGs aim at reconciling 'climate change measures' with other sustainable development objectives (like poverty reduction, sustainable agriculture, sustainable use of marine resources, and terrestrial ecosystems) and with trade rules, they offer 'relevant context' for interpreting WTO rules and for evaluating the WTO-consistency of NDCs under the Paris Agreement. This does not require incorporating human rights and international environmental law into WTO law (e.g. following the example of EU law). John Rawls' citizen-oriented *Theory of Justice* (1971) prioritizes equal freedoms and 'difference principles' for governing the basic structure of national societies without mentioning most of the civil, political, economic, social and cultural human rights prescribed in UN HRL: human rights are 'not enough'[54] for justifying the basic structures of social and legal systems, for example because HRL protects legal 'status equality' of human beings without guaranteeing the rules, resources, goods and services necessary for satisfying popular demand, which depends on constitutional and economic law and institutions (like markets supplying consumers with needed goods). Changing environmentally harmful conduct (like carbon emissions, use of plastics, over-fishing) requires changing conduct of citizens all over the world, which cannot be realized without stronger legal and judicial protection of human and environmental rights and decentralized accountability mechanisms. UN and WTO paradigms of 'member-driven governance' have proven to be 'not enough' for changing political and social conduct governing daily lives. Climate change mitigation and adaptation requires following the multilevel governance approaches of the UN SDGs and of the Paris Agreement empowering also nonstate and nongovernmental actors, civil society institutions, and citizens to participate in multilevel governance, for instance by using domestic

54 Cf. Moyn S, *Not Enough. Human Rights in an Unequal World* (Cambridge Mass.: HUP, 2018).

parliamentary and judicial institutions for holding governments accountable for non-compliance with UN SDGs and human rights. 'Systemic interpretation' of the 'basic structures of WTO law' in conformity with UN HRL and the 17 SDGs is already legally required by the customary rules of treaty interpretation. In order to hold WTO members more accountable, civil societies must insist on 'new social contracts' for greening and 'constitutionalizing' multilevel trade and environmental regulation for the benefit of citizens.[55] The more trade, environmental, and social problems are interrelated, the more economic disintegration, climate change, and sustainable development require integrated responses protecting equal rights of citizens.

Why is it that reasonable citizens protect common markets as 'social drivers' of mutually beneficial trade and 'democratic peace' *inside* states, but remain reluctant to constitutionally protect mutually beneficial trade and environmental cooperation across national frontiers? This contribution argued that the GATT paradigm of embedded liberalism enabling welfare states and international economic integration has become challenged by

- Neo-liberal interest group politics undermining constitutional democracies (e.g. in the USA), for instance by basing deregulation and trade protectionism on *executive powers* and *majoritarian populism* without effective parliamentary and democratic control, judicial remedies of adversely affected citizens, and enlightened support for transnational PGs;
- The emergence of a multipolar world where hegemonic, US mercantilism and its contestation (e.g. by Chinese insistence on national 'cyberspace sovereignty') entail increasing restrictions (e.g. on internet connectivity and technologies) based on invocations of security exceptions; and
- By climate change necessitating carbon taxes and BCAs that risk provoking disintegration and green protectionism unless WTO rules and global supply chains can be adjusted through multilateral agreements.

The signing of the African Continental Free Trade Agreement, in May 2019, by 54 African countries confirms the need for international trade integration. The European invention—in response to two World Wars and the holocaust—of multilevel democratic constitutionalism for multilevel governance of transnational PGs based on cosmopolitan rights of 'EU citizens' remains the democratically most developed form of embedded trade liberalism. It illustrates how protection biases in discretionary 'political markets' can be limited by constitutional contracts protecting fundamental rights and social market economies beyond national frontiers. In a globalized world, protecting *national interests* requires protecting *shared transnational interests* as 'aggregate PGs' through international agreements and multilevel governance recognizing citizens as democratic principals that must hold all governance agents legally and democratically accountable for complying with their limited mandates. As explained

55 For cosmopolitan justifications of international economic law—and of multilevel governance of transnational PGs—grounded in HRL, constitutional pluralism and 'constitutional economics' see Petersmann (n. 9 and 41).

in section IV, the EU has, so far, been more capable than other WTO members to exercise leadership for mitigating climate change. The EU's political agreement, in December 2019, on a 'green deal' aimed at transforming polluting industries based on fossil fuels into a climate-neutral economy with net-zero GHG emissions by 2050—which is expected to be transformed into EU climate legislation as of 2020 (e.g. progressively limiting fossil-fuel subsidies, introducing carbon taxes and BCAs)—requires development of additional national, regional, WTO and UN climate change mitigation rules, which cannot succeed without democratic support by citizens and transnational 'climate protection alliances' protecting both sustainable development and transitional justice.

By interpreting and developing the WTO sustainable development objective in conformity with the universally agreed 17 SDGs and the Paris Agreement on climate change, embedded neo-liberalism should be transformed into environmentally responsible ordo-liberalism so as to promote civil society support for limiting GHG emissions in WTO member states with due respect for legitimate policy divergences.[56] More cooperation among UN and WTO governance systems can help states, citizens and other (non)governmental actors to elaborate more coherent, multilateral disciplines for market failures and related governance failures so as to counter both climate change denial and green protectionism by institutionalizing 'public reason' and 'transitional justice' supported by citizens. Just as neo-liberal 'shareholder conceptions of corporate governance' are increasingly replaced by 'responsible stakeholder conceptions' of inclusive corporate governance (i.e. recognizing also employees, consumers, suppliers, local communities and the environment as 'corporate stakeholders' whose interests will affect the value and success of corporate activities), so must multilevel trade and environmental governance empower and serve all affected citizens and stakeholders. The new nationalism weakens 'economic constitutionalism,'[57] multilevel governance of transnational PGs, and limitation of collective action problems in a world of rational egoists with limited public reason and altruism justifying legal civilization beyond borders.

56 Cf. also Moon G and Toohey L (eds), *The Future of International Economic Integration. The Embedded Liberalism Compromise Revisited* (CUP, 2018). The contributions do not explore the 'greening' of world trade law aimed at mitigating climate change. Most contributors come from Anglo-Saxon countries and explore modernizing Anglo-Saxon neo-liberalism by references to human rights, food security, cultural diversity, and sustainable development. Constitutional arguments—e.g. that interpretation of the WTO sustainable development goals in conformity with UN law may justify broad interpretations of WTO exceptions (e.g. for BCAs calculating the carbon footprint of imports with components from many countries)—remain neglected.

57 On the evolution from constitutional nationalism (Constitutions as social contracts for production of national PGs) to transnational 'constitutionalism 2.0 and 3.0' for providing transnational PGs (e.g. regulating markets as competitive 'constitutional orders' constituting and limiting both decentralized, self-coordination among private actors and public market regulation, and extending the market ideal of voluntary exchange within rules to 'constitutional contracts' choosing among rules) see Petersmann (n 9), 321ff (e.g. criticizing the frequent neglect for 'normative individualism' in the law of many international organizations outside Europe and their neglect for constitutionalism as the historically most effective method for 'institutionalizing public reason' and transforming 'apologetic' power politics into progressive implementation of 'world order treaties' like UN and WTO agreements).