The Trade Wars of President Trump as a Threat to the Rule Of Law and to Constitutional Democracy

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The worldwide trading system based on the 1994 Agreement establishing the World Trade Organization (WTO) is one of the most important global public goods (PGs) that has helped to lift billions of people out of poverty by promoting unprecedented economic welfare, transnational rule of law and compulsory third-party dispute settlements in and among the 164 WTO members. Since 2017, US President Trump has

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not only continued to block the filling of WTO Appellate Body (AB) vacancies and, thereby, to undermine the WTO dispute settlement system. In 2018, he also used Section 232 of the US Trade Act for imposing discriminatory tariffs on imports of aluminum and steel, and section 301 of the US Trade Act for imposing tariffs on imports of China; the legal consistency of this 'nationalist protectionism' with WTO law (e.g. Articles I and II GATT, Article 23 of the WTO Dispute Settlement Understanding (DSU)) is challenged by numerous WTO members. This contribution in honor of Werner Meng – with whom I collaborated since the late 1970s in the German Ministry of Economic Affairs and, since the 1980s, as academic colleagues in numerous university seminars and conferences exploring American and European trade law and policies – begins with a brief discussion of the legal inconsistencies of these US trade policies with WTO law (section I). It then discusses the increasing challenges inside the USA of using Sections 232 and 301 of the US Trade Act for undermining the multilateral trading system by illegal import restrictions, procedural violations of the DSU, and executive threats to withdraw from worldwide and regional trade agreements (section II). Also, the common commercial policy of the European Union (EU) has failed to exercise leadership for protecting the international rule of law and the rights of citizens in world trade (section III). The contribution concludes that multilevel governance of PGs cannot remain effective if citizens and democratic institutions fail to hold their governments democratically and legally accountable for violating 'PGs treaties'. In both the USA and the EU, citizens and parliaments must insist on additional, democratic trade legislation protecting the WTO legal system for the benefit of citizens. Constitutional democracy and multilevel governance of transnational PGs require citizens, parliaments and courts of justice to limit populist abuses of trade policy powers to tax and restrict citizens in manifestly illegal ways reducing general consumer welfare, non-discriminatory competition, economic productivity and the rule of law.

I. President Trump's Assault on the Rules-Based World Trading System

The retreat by the US Trump administration – since 2017 – from 70 years of US leadership for the multilateral trading system, China's state-led 'Belt and Road Initiative' for redesigning its external trade and investment relationships with more than 65 third countries, and the disruption of the WTO legal system by illegal US import restrictions and illegal US blockage of the WTO AB dispute settlement system illustrate not only 'shifting paradigms' in worldwide trade and investment regulation;[1] they also

1 Cf. *Petersmann*, International Economic Law without Human and Constitutional Rights? Legal Methodology Questions for my Chinese Critics, *JIEL* 21/2018, pp. 213-231.

reveal 'populist governance failures'[2] – including in parliamentary democracies – to protect PGs like the rules-based WTO trading, legal and dispute settlement systems. Most of the legal and political challenges of today's WTO legal system had already existed under the General Agreement on Tariffs and Trade (GATT 1947), such as:

- controversies over GATT interpretations;
- abuses of veto-powers in GATT negotiations;
- political interventions into GATT dispute settlement procedures;
- 'blocking' of the adoption of GATT dispute settlement reports;
- voluntary export restraints (VERs) circumventing GATT rules;
- delegation of vast parliamentary trade policy powers to executives and their protectionist abuses in response to 'interest group lobbying' (e.g. from US steel industries and other corporate interests).

Why is it that these problems under 'GATT 1947' have re-emerged now as existential threats for the WTO system even though the WTO Agreement had legally limited these 'collective action problems', for instance by prohibiting VERs and 'aggressive unilateralism' and providing for

- the possibility of majority decisions and 'authoritative interpretations' of WTO rules (Article IX WTO Agreement);
- use of the customary rules on treaty interpretation (Article 3:2 DSU);
- adoption of WTO dispute settlement reports by 'negative consensus' (Arts 16,17 DSU);
- compulsory jurisdiction for challenging violations of WTO rules and DSU procedures through WTO dispute settlement (Article 6 DSU);
- parliamentary approval and domestic good faith implementation of WTO law (Arts XIV, XVI WTO Agreement); and
- additional WTO guarantees of judicial remedies also inside domestic legal systems of WTO members (e.g. in Arts X GATT, VI GATS, 41 ff. TRIPS Agreement) so as to protect rule of law at international and domestic levels of trade governance?

This paper argues that, since the global financial crisis of 2008, the increasing number of financial, environmental, migration, trade and related rule-of-law crises reveal systemic failures of parliamentary democracies to regulate 'market failures', 'governance failures' and 'constitutional failures' in the multilevel governance of transnational PGs. Many adversely affected citizens (like taxpayers, pensioners, import-competing steelworkers, financial debtors) criticize democratic elites for 'regulatory failures' (e.g. due to vested interests in rent-seeking financial and oligopolistic high-tech-sectors) and for increasing income gaps between poor and rich; they turn to 'populist politicians' blaming import competition, foreign migrants and international organizations pro-

2 The term 'populism' is used here for 'demagogic, political opportunism' misleading 'ordinary people' by offering incoherent, often illegal 'simple solutions' to complex, transnational governance problems (like global public goods, migration, climate change, international rule of law) without inclusive democratic debates, adequate expertise (e.g. presenting 'elites' and 'free media' as corrupt and self-serving), respect for human rights and rule-of-law. The 'illiberal democratic governments' in Hungary, Italy, Poland, Turkey, Russia and the USA offer current examples.

tecting PGs, and unilaterally imposing trade taxes and restrictions distorting global supply chains and competition. National parliaments are increasingly circumvented by authoritarian leaders advocating for 'Brexit', 'bilateral deals' and intergovernmental rule-making far away from citizens, resulting in increasing disregard for democratic responsibilities to regulate market failures (like inadequate accountability of financial institutions, environmental pollution, unemployment and social injustice) and related governance failures (like welfare-reducing financial, trade and environmental legislation). This paper uses the example of insufficient, democratic trade regulation in the USA (section II) and the EU (section III) as an illustration of a wider 'systemic problem' of multilevel governance of transnational PGs like human rights, the rule of law, inclusive democracy and 'sustainable development' based on a mutually beneficial, worldwide division of labour, as universally postulated in the United Nations (UN) 2015 Resolution on the 2030 Agenda for Sustainable Development.[3] The paper acknowledges that some of these 'systemic problems' (like the US return to the 'aggressive unilateralism' and 'bilateral reciprocity' principles applied during the 1980s) are linked to the challenge of the WTO system by governmental trade distortions and violations of WTO rules by China and other authoritarian WTO members.

The WTO dispute settlement system and many other WTO rules (e.g. Article 11 WTO Safeguards Agreement outlawing VERs) limit trade policy discretion far beyond GATT 1947. Yet, WTO diplomats failed to use their existing legal powers for meeting their democratic mandates and collective legal duties to comply with the WTO legal and dispute settlement system as approved by parliaments in the 163 WTO member states plus the EU, for instance by preventing the illegal blockage by the USA of the appointment of AB judges since 2016 through majoritarian WTO decisions maintaining the AB as prescribed in Article 17 DSU (i.e. as 'composed of seven persons', whose 'vacancies shall be filled as they arise'). Global PGs like the WTO system cannot be protected if member states and their parliaments allow diplomats to collectively violate 'PGs treaties' ratified by parliaments for the benefit of citizens (e.g. Article 17 DSU on the timely appointment of AB members, Article 23 DSU prescribing WTO-consistent dispute settlements and prohibiting unilateral trade sanctions in response to alleged WTO violations). Also, constitutional democracy cannot remain effective without democratic legislation transforming the agreed 'constitutional principles of justice' into democratic and administrative rulemaking, and adjudication

3 Cf. *UN General Assembly*, Resolution A/RES/70/1 of 25 September 2015, Transforming our World: the 2030 Sustainable Development Agenda (focusing on 17 global goals like overcoming poverty, hunger and global warming, and protecting health, education, gender equality, access to water, sanitation and clean energy, urbanization, the environment, human rights and social justice). Implementation of these 'sustainable development goals' is described as 'localizing the SDGs' to highlight the role of local institutions, actors and civil society support.

supported and controlled by citizens.[4] Government executives (like the US Trump Administration) taxing and restricting domestic citizens through illegal import restrictions (e.g. taxes amounting to hundreds of billions of US dollars) without parliamentary approval and effective judicial remedies are undermining constitutional democracies.

The recent change of the USA from a supporter to a 'disruptor' of multilevel governance of the world trading system, climate change prevention, and of other multilateral agreements protecting transnational PGs raises fundamental questions also about the future of international law and multilevel governance of transnational PGs. The democratic legitimacy of WTO law and governance derives not only from state consent but also from respect for human rights, constitutional democracies and the rule of law, including PGs treaties approved by parliaments for the benefit of citizens. National parliaments have given their governments limited mandates to implement the WTO Agreement so as to promote sustainable development, transnational rule of law and other PGs. The re-emergence of inter-governmental power politics without effective, democratic control undermines not only the economic efficiency of the rules-based world trading system; illegal taxes and trade restrictions but also democratic legitimacy and the overall consistency of efforts at reforming trade, investment and environmental regulation and adjudication in mutually coherent ways – without one-sidedly privileging private interests of traders and investors at the expense of general citizen and consumer interests.

Section II explains why 'American neo-liberalism' has failed to protect sustainable development reconciling economic, social, environmental, democratic and constitutional interests of citizens in inclusive, rules-based ways, for instance by preventing US President Trump's administration from disrupting multilateral PGs treaties approved by parliaments through 'irrational, discriminatory trade protectionism'.[5] Section III recalls that 'European ordo-liberalism' and its 'multilevel constitutionalism' (e.g. as set out in the 2009 Lisbon Treaty on European Union) require (e.g. in Articles 3, 21 TEU) the EU – as an international organization with limited powers – to protect the EU's citizen-oriented 'constitutional values' and general citizen interests also in EU external relations. Yet, the EU institutions also failed to use their WTO membership to protect the global PG of the WTO AB as prescribed in Article 17 DSU, for

4 On national constitutional democracies as a 'four-stage process' of transforming (1) agreed principles of justice into (2) national Constitutions, (3) democratic and administrative law-making and (4) impartial, independent adjudication protecting 'constitutional rights retained by the people', and on multilevel, democratic governance of transnational PGs as requiring transformation of *national* into *transnational constitutionalization* through (5) international law-making and (6) multilevel judicial protection of rights of peoples and citizens as 'constitutive powers' and 'democratic principals' of governance agents see : *Petersmann*, Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law, 2017, pp. 15, 17, 112-113, 126-127, 174 ff.

5 Cf. *Pelkmans*, Trade policy-making under irrationality, Center for European Policy Studies, CEPS Commentary of 12 March 2018 (e.g. criticizing President Trump's belief that the macroeconomic and competitive determinants of the US trade deficit are due to 'bad deals' and can be corrected by illegal import protection).

instance through WTO majority decisions on the basis of Article IX:1,2 WTO Agreement clarifying and implementing the collective duty of WTO members to fill AB 'vacancies as they arise' (Article 17:2 DSU). The increasing resistance from EU citizens and national parliaments against non-inclusive EU free trade agreements (FTAs) and investor-state arbitration disempowering EU citizens' calls for additional, democratic legislation also inside the EU. Section IV concludes that national and European parliaments must assume their democratic responsibilities vis-à-vis citizens by adopting trade legislation limiting abuses of trade policy powers and strengthening the transnational rule of law, democratic control and judicial remedies in multilevel governance of PGs so as to protect democratic constitutionalism, equal rights of citizens, public reason and sustainable development more effectively.

II. American Constitutionalism and Neo-Liberalism fail to protect the Rules-Based World Trading System

The 1929 financial crisis on Wall Street prompted the US Congress to adopt the infamous 1930 Smoot-Hawley Tariff Act, which erected high tariff walls around the USA, provoked protectionist countermeasures from other trading countries, and deepened the 'Great Depression' in North America and Europe. US Secretary of State Cordell Hull's initiatives for the 1934 Reciprocal Trade Agreements Act, and the 1941 Atlantic Charter's commitment by US President Roosevelt and British Prime Minister Churchill 'to further the enjoyment by all States, great or small, victor or vanquished, of access on equal terms to the trade and the raw materials of the world which are needed for their economic prosperity', laid the foundations for the post-war US leadership for a multilateral trade and financial system. The 1944 Bretton Woods Agreements establishing the International Monetary Fund (IMF) and the World Bank, the 1945 United Nations (UN) Charter, the GATT 1947 and its 'provisional application' since 1948 as a substitute for the stillborn 1948 Havana Charter for an International Trade Organization (ITO), and the eight 'GATT Rounds' of multilateral trade negotiations on extending GATT rules by additional trade agreement – including also the 1994 Uruguay Round Agreement establishing the WTO – were all successfully concluded due to US leadership for the multilateral trade and financial system.

President Trump's withdrawal from the 2015 Paris Agreement on Climate Change Prevention and from the 2016 Transpacific Partnership Agreement (TPP), his introduction of vast US import restrictions – in manifest violation of GATT Articles I and II – by means of executive orders, the US blockage of the WTO AB system in violation of Article 17 DSU, and the imposition by the USA of recent changes of the North American Free Trade Agreement (NAFTA) reveal unilateral and bilateral power politics disregarding multilaterally agreed on PGs treaties. Adversely affected third countries and US citizens increasingly challenge – both in WTO as well as in domestic US jurisdictions – the legality of some of these executive orders and threats of President Trump, e.g. to withdraw the USA from the WTO notwithstanding the requirement in the 1994 Uruguay Round Agreements Act of a joint resolution of the US Congress authorizing such a US withdrawal from the WTO. Many of the legal justi-

fications by the US Trump Administration (e.g. of discriminatory import tariffs on steel and aluminum on grounds of US security interests, of the US blockage of the AB system on grounds of 'judicial overreach') are widely criticized as 'sinister distractions' from his true objective of advancing 'America first' through illegal protectionism in response to US lobbying interests (e.g. of US steel lobbies benefitting from US anti-dumping rules) and his mercantilist aims of 'repatriating' US companies abroad by disrupting their global supply chains and exports to the US market.[6]

1. Democratic (input-)legitimacy of US legislation tolerating illegal protectionism?

The 'commerce clause' in Article I, section 8 of the US Constitution allocates the power to regulate commerce to the US Congress. The President – notwithstanding his extensive foreign policy powers (e.g. as Commander-in-chief) – engages in trade negotiations only to the extent his Administration is authorized to by Congress. Trade agreements are concluded in the US as 'congressional-executive agreements', involving both houses of Congress and the President.[7] Notwithstanding the US Constitution's recognition of international treaties as part of 'the supreme law of the land' (Article VI, section 2), congressional implementing legislation of the Tokyo Round and Uruguay Round Agreements excluded 'direct effects' of trade agreements inside the US legal system except whenever the federal government invokes treaty obligations in US jurisdictions. The US Trade Act (as regularly amended since 1934) and Trade Promotion Authority enacted by Congress set out detailed trade policy goals and procedures for international negotiations on trade liberalization and regulation. For instance, the US Trade Act of 1974 (as extended in 1979 and amended in 1984, 1988, 2002 and 2015) conditions the granting of negotiating authority for non-tariff measures (NTMs) by special objectives, benchmarks and procedural requirements to consult with Congress and private sector committees so that parliamentarians and civil society discuss the trade negotiation issues from the beginning of trade negotiations rather than – as criticized by civil society in Europe vis-à-vis the EU practices of trade negotiations – only during the negotiating process or *ex post* during the approval of draft agreements reached.[8] Under the 'fast-track procedures' provided for in US trade legislation, Congress approves or refutes – by simple majorities of both Houses – trade agreements and their implementing legislation submitted by the President as a package deal without changes or amendments being made at this stage.

6 Cf. *Luce*, Donald Trump's circus act is a sinister distraction, Financial Times of 26 August 2018.

7 On the US constitutional and legislative regulation of the commerce power see, e.g., the contributions by *Jackson, Morrison* and *Hudec*, in: Hilf/Petersmann (eds.), National Constitutions and International Economic Law, 1993; *Dam*, Cordell Hull, the Reciprocal Trade Agreements Act and the WTO, in: Petersmann (ed.), Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance, 2005, pp. 83-96.

8 Cf. the criticism by *Cottier*, Front-Loading Trade Policy-Making in the European Union: Towards a Trade Act, European Yearbook of International Economic Law 8/2017, pp. 49ff.

The limitation of 'direct applicability' and judicial review of trade agreements inside the US legal system, and the one-sided influence of domestic business groups on trade negotiations and on the drafting of US trade legislation, entail that US trade legislation and its domestic application have often been challenged in WTO dispute settlement proceedings as being inconsistent with the WTO legal requirements of good faith implementation of WTO rules in domestic legal systems. For instance, in *US-Sections 301-310 of the Trade Act of 1974*, the WTO panel report found the legislative authorization of the President to adopt unilateral import restrictions to be consistent with WTO law only on the condition that – as promised by the US Trade Representative vis-à-vis the WTO dispute settlement panel – such unilateral trade restrictions would be adopted only in conformity with the US obligations under WTO law (e.g. to pursue WTO dispute settlement proceedings confirming the WTO-inconsistency of foreign trade measures before any US finding that other WTO members violated their WTO obligations).[9] In response to the 2018 US invocation of Section 301 and subsequent unilateral US introduction of discriminatory tariffs on imports of China, China initiated WTO dispute settlement proceedings challenging the apparent illegality of these US violations of US tariff bindings under Articles I, II GATT and US dispute settlement obligations under Article 23 DSU.[10] Numerous WTO panel and AB proceedings have found US regulations and calculation methods ('zeroing practices') for anti-dumping measures to be inconsistent with the WTO Agreement on Article VI GATT.[11]

Similar to the threat by US Trade Representative (USTR) C.Hills in 1991 that the continued jurisdiction of the GATT Legal Division for servicing GATT dispute settlement proceedings challenging US anti-dumping measures risked impeding US consent to a successful conclusion of the Uruguay Round negotiations,[12] US expert observe that the US blockage – since 2016 – of the filling of vacancies of AB members seems to be motivated by insistence from the same lobbying representatives inside the US Congress and inside the USTR to resist compliance with the WTO AB case-law on anti-dumping and re-negotiate WTO anti-dumping rules.[13] US claims of 'judicial over-reach by the AB' were made only more recently and are inconsistent with US requests for 'dynamic judicial interpretations' in many WTO disputes; they are also inconsistent with the WTO legal requirement of interpreting and clarifying indeter-

9 WT/DS152/R adopted 22 December 1999.
10 WT/DS543 of 5 April 2018.
11 For a discussion of the, by now, about 20 WTO dispute settlement reports on 'zeroing' in anti-dumping see, e.g.: *Ahn/Messerlin*, US-Anti-dumping measures on certain shrimp and diamond sawblades from China: never ending zeroing in the WTO?, 13 World Trade Review 2014, pp. 267-279.
12 This threat prompted GATT Director-General *Dunkel* to transfer the jurisdiction for legally assisting GATT dispute settlement panels examining anti-dumping, countervailing duties or subsidies disputes from the GATT Legal Division to a newly created 'Rules Division', which was then staffed with several US anti-dumping lawyers from the US International Trade Commission.
13 Cf. the analysis by the former US congressman and former AB chairman *Bacchus*, How to Solve the WTO Judicial Crisis, in: CATO Institute of 6 August 2018.

minate WTO rules 'in accordance with customary rules of interpretation of international law' (Article 3 DSU). They were not supported, so far, by other WTO members in view of the adoption of all 136 AB reports by the WTO membership (June 2018), thereby creating legitimate expectations in the continuation of these legal interpretations consistently approved by the WTO Dispute Settlement Body (DSB). The unusual lack of any Preamble explanation of the objectives of the WTO Anti-dumping Agreement confirms that most WTO members – who introduced anti-dumping legislation only in response to the longstanding abuses of anti-dumping laws inside the USA – continue to disagree on any coherent economic justification of discriminatory anti-dumping measures. As in the Uruguay Round negotiations, the USTR is resorting, once again, to massive power politics to impose additional legal exemptions for such discriminatory import restrictions reducing general consumer welfare without remedying related competition problems in non-discriminatory ways. As the Uruguay Round Agreements Act gives a limited, democratic mandate for implementing the WTO legal and dispute settlement rules approved by Congress and incorporated into the US legal system, arbitrary violations of WTO law by the US trade administration – as formally established in numerous WTO dispute settlement findings (e.g. on illegal 'zeroing practices' in the calculation of anti-dumping duties by US authorities) reflect power politics undermining the democratic input-legitimacy of US trade regulation inconsistent with the 'faithful execution' of laws prescribed by the US Constitution (e.g. in Article II, section 3) and by the WTO Agreement (Article XVI:4).

2. Democratic output-legitimacy of illegal, executive import taxes and restrictions without legal and judicial restraints?

The US Congress has delegated almost unlimited, discretionary powers to the US executive to restrict trade and control US borders and immigration on economic or national security grounds, as confirmed in the 2018 US Supreme Court decision in *Trump v Hawaii.*[14] The domination of the drafting of US congressional legislation and executive orders on many issues (like taxation, arms, health, financial, trade and environmental regulation) by special interest group politics[15] raises doubts about the democratic legitimacy of import taxes and restrictions introduced by US executive orders in manifest violation of international treaties approved by the Congress. As the Republican majority in the US Congress prevents effective democratic control of trade

14 5:4 Decision of 26 June 2018 (No.17-965), upholding President Trump's 'muslim travel ban' prohibiting nationals from majority-Muslim countries from coming to the USA under certain visa categories.

15 For a 'public choice explanation' of the strong business and lobbying influences on trade decision-making in the US Congress and US administration see, e.g.: *Rowley/Thorbecke*, The Role of the Congress and the Executive in US Trade Policy Determination: A Public Choice Analysis, in: Hilf/Petersmann (eds.), (fn. 7), pp. 347-369; *Skaggs*, How Can Parliamentary Participation in WTO Rule-Making and Democratic Control Be Made More Effective in the WTO? A United States Congressional Perspective, in: Petersmann, (fn. 7), pp. 409-412.

policies under President Trump, constitutional democracy in the trade policy area – and the postwar US-led multilevel trading system – are no longer effectively protected inside the USA. This is illustrated by the increasing number of import restrictions ordered by President Trump, whose illegality with international and US trade law is challenged in both WTO and US jurisdictions.[16] For instance, in the context of the 2018 US import restrictions against China based on Section 301 of the US Trade Act, the leading US trade law professor S.Charnovitz filed a public comment explaining why the proposed imposition of an additional 25 % ad valorem duties on numerous Chinese products would violate WTO law (e.g. GATT Article II, Article 23 DSU) and impose 'disproportionate economic harm to US interests'.[17] The 2018 US import restrictions on steel and aluminum products ordered by the Trump administration on the basis of Section 232 of the US Trade Act (national security interests), were challenged as illegal safeguard measures violating the WTO Safeguards Agreement in WTO dispute settlement proceedings initiated against the USA by, *inter alia*, China, India, the EU, Canada, Mexico, Norway, Russia and Switzerland.[18] The American Institute for International Steel and two companies also challenged Section 232 in US courts as an unconstitutional, improper delegation of legislative authority violating the US constitutional principle of separation of powers. Even though there 'is virtually no constitutional basis for individual challenges to trade policy measures' inside the USA (such as those based on Section 232) and 'the general tendency of federal statutes in the trade policy area is to provide the executive with extremely broad discretion, leaving little room for judicial review',[19] the following quotations from the plaintiffs Motion for a Summary Judgment illustrate the constitutional and democratic problems of unlimited delegation of discretionary trade policy powers to the US executive without effective judicial remedies; they are worth citing also in view of the WTO complaints that the US import tariffs were imposed for economic reasons rather than for 'security interests' as defined in Article XXI GATT, and constitute safeguard measures inconsistent with Article XIX GATT:

> '"Plaintiffs" non-delegation challenge to section 232 and the 25% tariff issued pursuant to it has two inter-related elements: the delegation to the President in section 232 lacks the "intelligible principle" required by the Supreme Court since it decided J.W. Hampton, Jr,. & Co. v. United States, 276 U.S. 394, 409 (1928), and the President's choice of remedies under section 232 is not subject to judicial review or to any of the other procedural checks that are the hallmarks of controlling Executive Branch decisionmaking in the administrative state. The result is that President has unbridled discretion to impose whatever trade barriers he chooses with nothing in section 232 to limit him in any way. That result—"a blank check for the President," cf. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)—is

16 On the limited judicial standards of review and limited judicial protection of individual rights under US trade laws see: *Morrison/Hudec*, Judicial Protection of Individual Rights under the Foreign Trade Laws in the United States, in: Hilf/Petersmann (eds.), (fn. 7), pp. 91-133.

17 Federal Register filing USTR-2018-0018 by Charnovitz of 23 July 2018.

18 Cf. WT/DS 544 (5 April), 547 (18 May), 548 (1 June), 550 (1 June), 551 (5 June), 552 (12 June), 554 (29 June) and 556 (9 July 2018).

19 *Morrison/Hudec*, (fn. 16), p. 132.

wholly antithetical to the separation of powers and checks and balances embodied in our Constitution and therefore cannot stand.

The Framers understood that "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands... may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). To guard against that possibility, the Constitution contains a separate Article for each of the three branches, which spells out their respective duties. Article I, section 1 of the Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST., art. I, § 1. As for the President, the Constitution specifies the powers of the office and then in Article II, section 3, directs that "he shall take Care that the Laws be faithfully executed." U.S. CONST., art. II, § 3. As Justice Black observed for the majority in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952): "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Justice Black then applied that principle to the case before him in language fully applicable to this challenge: "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress —it directs that a presidential policy be executed in a manner prescribed by the President." Id. at 588.

To be sure, Congress is not precluded from assigning to the President or others in the Executive Branch the authority to carry out directives of Congress embodied in duly enacted laws. Congress may constitutionally permit officials in the Executive Branch to make some policy decisions. But in section 232, Congress granted the President virtually unlimited discretion over the core Article I power to impose taxes and to do so in unlimited amounts and duration, as well as to mandate quotas, licensing requirements, and similar measures on entire classes of imported goods affecting wide swaths of the U.S. economy. There is a point beyond which the Executive Branch's delegated authority may not constitutionally go. The Constitution requires that Congress "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform...." Mistretta v. United States, 488 U.S. 361, 372 (1989) (alteration in original) (quoting J.W. Hampton, 276 U.S. at 409). As Plaintiffs now show, section 232 does not have intelligible principles for either its trigger finding or its remedies, nor does it contain any other protections against presidential misuse of its powers that will assure that the President complies with the law and that principles of separation of powers are preserved.

1. Section 232 Lacks Intelligible Principles and Other Protections Necessary to Assure that the President Executes the Law and Does Not Make the Law.

Under section 232, the President is free to act as long as he concurs in the finding of his own Secretary of Commerce that a subject article (here steel) "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security...." 19 U.S.C. § 1862(c)(1)(A). National security is broad term on its own, but Congress has vastly expanded it beyond its ordinary meaning in section 232(d):

> the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding

> other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d) (emphasis added). The result is that national security in section 232 includes the impact of potentially any imported product—with no guidance or restrictions on the definition of the product—on the economic welfare of any domestic industry, the impact of foreign competition on our internal economy, and the impact of foreign competition on federal government revenues. Indeed, "national security" as defined in section 232(d) has no conceptual limits as underscored by the emphasized "without" phrase. The President is expressly authorized to consider any "other factors" he wishes, without any guidance or limit on what those factors should be.

Both section 232(b), governing the Secretary's finding, which serves as a trigger for the President's authority under section 232(c), and section 232(c), governing the President's authority to adjust imports, refer to "national security." The elastic—indeed, virtually unbounded—definition of national security set forth in section 232, lacks the necessary intelligible principle to serve as a constitutional trigger to activate Presidential powers to impose trade barriers under section 232(c). But even if "national security" as defined in section 232 could be considered sufficient to provide a required intelligible principle, section 232(c) is still a constitutionally improper delegation because it allows the President to "determine the nature and duration of the action [i.e. trade barriers] that, in the judgment of the President, must be taken to adjust the imports of [steel] and its derivatives so that such imports will not threaten to impair the national security," 19 U.S.C. § 1862(c)(1)(A)(ii), as that term has been expansively defined. It is this limitless grant of discretionary remedial powers, as applied to section 232's capacious definition of national security, which eliminates any doubt as to the constitutionally improper delegation of lawmaking authority to the President, as the imposition of the 25% tariff illustrates. …

Last, and in addition to these multiple failures of Congress to cabin the unbounded discretion of the President under section 232(c), there is no provision in section 232 for the judicial review of the President's decisions under it. Moreover, since the 1990s, the APA has not been available as an avenue for judicial review of the President's actions. In both Franklin v. Massachusetts, 505 U.S. 788 (1992), and Dalton v. Specter, 511 U.S. 462 (1994), plaintiffs sought APA review of decisions made by the President under other statutes. The Court, however, refused to consider the merits of those claims, although it did consider a constitutional claim in Franklin. Franklin, 505 U.S. at 796, 806; Dalton, 511 U.S. at 476. It held that, under the relevant statutes, only the final decision of the President can be challenged. See Franklin, 505 U.S. at 779. Moreover, because the President is not an agency under the APA, his actions are also not subject to judicial review under the APA for claims that his discretionary decisions failed to comply with the APA and the applicable substantive statutes (like, in the present case, section 232). Franklin, 505 U.S. at 801; Dalton, 511 U.S. at 476....

In short, the final protection against presidential arbitrary action—the ability of injured parties such as Plaintiffs to seek redress from Article III judges—is foreclosed, and the President is free to do what he did here: to decide unilaterally whether to impose trade barriers, which ones to utilize, at what levels, for what duration, applicable to what products, which countries should receive exemptions, and whether to ignore the inevitable adverse consequences from imposing the selected barrier. Section 232 allows such limitless discretion, and in doing so violates the nondelegation doctrine and creates an administrative scheme that is inconsistent with the separation of powers and the checks and bal-

ances embedded in our Constitution. As Justice Scalia observed in his dissenting opinion, in which Chief Justice Roberts and Justice Alito joined, in Zivotofksy v. Kerry, 135 S. Ct. 2076, 2116 (2015):

> Before this country declared independence, the law of England entrusted the King with the exclusive care of his kingdom's foreign affairs... The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.'[20]

3. Democratic legitimacy of executive powers to terminate trade agreements?

The more globalization transforms *national* into *transnational PGs* which no single state or government can protect unilaterally without international treaties and multi-level governance (e.g. of global supply chains for 'international production' of goods; protection of transnational monetary, trading, investment, environmental and rule-of-law systems), the more multilateral 'PGs treaties' and their good faith implementation inside domestic legal systems serve legislative functions for the protection of PGs demanded by citizens. In 2017, President Trump unilaterally withdrew from the 2016 TPP and 2015 Paris Climate Change Prevention Agreement; he threatened US withdrawal also from other trade agreements like NAFTA and from what he described as the 'terrible WTO Agreement'. Yet, President Trump's claim to have independent power to terminate international trade agreements remains contested among US constitutional lawyers in view of the exclusive congressional power under the Commerce Clause and the lack of explicit allocation of authority in the US Constitution to terminate treaties. Some US constitutional lawyers construe US constitutional law as being 'inconsistent with independent presidential authority to terminate trade agreements'; as there is also no statutory authority for the President to terminate trade agreements, they conclude that the President lacks authority – without new authorization from Congress – to unilaterally terminate existing trade agreements.[21] By repealing agreements incorporated by Congress into domestic federal law and rendering ineffective entire areas of congressional trade legislation without a constitutional or statutory authorization of the President to unilaterally terminate trade agreements, the President would upset the constitutional balance of legislative and executive powers.[22]

20 Text quoted from the 'International Economic Law and Policy Blog' of 23 July 2018.

21 *Trachtman*, Power to Terminate US Trade Agreements: the Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty, SSRN Research Paper of 16 October 2017, p. 1.

22 *Trachtman*, (fn. 21), cites in this respect a judicial finding in *US v. Yoshida* : …'no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency' (526 F2nd 560, 572, CCPA 1975). *Trachtman* explains why there is neither a statutory authority for Presidential termination of trade agreements nor an implicit authorization of the President to terminate trade agreements unilaterally without concurrent authorization by Congress: 'Termination of commercial treaties … may be either an area of exclusive Congressional authority or an area of concurrent authority' (p. 10).

The 'Bipartisan Trade Priorities and Accountability Act of 2015'[23] recognizes as 'the principal negotiating objectives of the United States' to 'achieve full implementation and extend the coverage of the World Trade Organization and multilateral and plurilateral agreements to products, sectors and conditions of trade not adequately covered' (Sect. 102(b)(13)). The blatant violations of substantive and procedural WTO obligations by the US Trump administration ignore this democratic mandate. This neglect by the US Trump administration for democratic constitutionalism was also illustrated by its leaked draft of new trade legislation authorizing and legitimizing the increasing use of presidential powers to raise import taxes in clear violation of the basic principles of WTO law (e.g. Article I GATT on most-favoured-nation treatment and Article II GATT on 'bound tariff rates'). The draft bill – titled the 'United States Fair and Reciprocal Tariff Act' – ignores the GATT/WTO principles for reciprocal trade liberalization; it would give the US President unilateral power to raise US tariffs at will, without congressional consent and compliance with US trade agreements like GATT and the WTO Agreements.[24] This would not only amount to a congressional delegation of more unlimited trade policy powers dispensing the President from his current efforts at justifying his imposition of WTO-inconsistent import duties by invoking existing executive powers (e.g. under Sections 232 and 301 of the US Trade Act). Arguably, such legislation would also be inconsistent with international trade agreements concluded by the USA, for instance, Article XVI:4 WTO Agreement requiring '(e)ach Member (to) ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

Even though the Republican majorities in both houses of the US Congress have so far failed to democratically control the illegal trade policies of the Trump administration, the adoption of this draft legislation by Congress appears unlikely in view of the increasing calls from US trade lawyers to legally limit the executive trade policy powers. For instance, in a 2017 lecture at Georgetown University, former US Ambassador A.M.Wolff recommended, *inter alia*, the following democratic reforms:[25]

- 'Congress can and should at a minimum provide for a process of exit from a trade agreement, expedited if necessary, which is as extensive as the procedures for entering into a trade agreement. Congress should also consider creation of a limited due process right for interested US persons in trade agreement-based US tariff rates and other trade agreement bound treatment of imports more generally.'
- 'The Chairmen of the Senate Finance Committee and of the House Ways and Means Committee should ask the International Trade Commission for a report on the likely effects on the US economy of trade agreements to which the US is not a party, starting immediately with the Free Trade Agreement (FTA) that … Canada

23 P.L. 114-26 of 6 January 2015.

24 Cf. the text and comments published on the International Economic Law and Policy Blog of 2 July 2018.

25 *Wolff*, Stressed in an Age of Populism: Recommendations for Changes in US Trade Law and Policy, Institute of International Economic Law (IIEL), Issue Brief 04/2017.

has with the EU'… 'This report should then be required by statute to be updated annually.'

- 'Congress should enact a specific requirement that in order to utilize the TPA's Congressional approval procedures for a bilateral agreement, the President must make a finding that a multi-party (multilateral or plurilateral) approach was not feasible or not in the best interests of the United States and consult before issuing this finding with the Senate Finance Committee and the House Ways and Means Committee.'
- 'Congress should review the authorities it has delegated to the President to increase tariffs or take other trade or trade-related action against foreign unfair trade policies, practices and measures, to make sure that they are sufficient but not unlimited to advance US national interests. Congress should consider enacting: (1) a specific requirement analogous to that contained in the 1974 Act's balance of payments authority that a section 301 measure shall remain in place for no more than 12 months absent Congressional approval by Joint Resolution under TPA "fast track procedures" for extension of the measure; and (2) a provision for a joint resolution of disapproval available under those procedures at any time after US retaliatory measures are announced or made effective, such resolution to have the effect of preventing a US measure from going into effect or terminating the US measure.'
- 'The Congress should establish a WTO Dispute Settlement Review Commission composed of retired federal judges to review WTO panel and Appellate Body decisions adverse to the United States in order to render an independent opinion as to whether in the Commission's view the decision was correct. The Commissioners should give detailed reasons for their findings. The President should take into account the Commission's findings in taking any action in response to a Panel or Appellate Body Report including where he determines to make a recommendation to Congress to change US law. The President by statute should inform Congress of any disagreement that he may have with the findings of the Commission.'

Implementation of these recommendations would enhance democratic control over US trade policies. By institutionalizing more inclusive 'public reason' and enhancing democratic accountability, it could also limit what former AB President J.Bacchus has criticized as 'the American assault on the rule of law in world trade' based on President Trump's belief that 'might makes right'.[26] Even though former US AB judges (like J.Bacchus, J.Hillman) and other leading US trade lawyers openly criticize the illegality of President Trump's trade policies, the US Congress has, so far, failed to defend the rule of law in the trade policy area.

26 Cf. *Bacchus*, Might Unmakes Right. The American Assault on the Rule of Law in World Trade, Centre for International Governance Innovation CIGI Papers No. 173, May 2018.

II. European Economic Constitutionalism as an alternative paradigm for multilevel governance of public goods?

The neo-liberal, post-war Bretton Woods agreements were initiated by the USA under the leadership of Secretary of State Cordell Hull, who had previously initiated the Reciprocal Trade Agreements Act of 1934. The American 'Chicago School' and 'Virginia School' of 'law and economics' focus, however, on reforms of *national* economic law (e.g. inclusion of 'balanced budget rules' in some US State Constitutions) rather than on the coherent, multilevel regulation of the world economy. This national focus of American economic neo-liberalism was influenced by the hegemonic role of the USA in both the 1944 Bretton Woods Agreements (e.g. due to the use of the US dollar as global reserve currency) as well as in the 'provisional application' of GATT 1947, following the non-ratification by the USA of the 1948 Havana Charter for an ITO and its subsequent abandonment. The eight 'GATT Rounds' of multilateral trade negotiations were strongly shaped by US trade interests (e.g. in multilateralizing US trade remedy laws, restrictions of cotton and textiles trade, liberalization of agricultural and services trade, protection of intellectual property rights). International investment and environmental law, regional economic integration law and other forms of multilevel governance of PGs were, by contrast, more developed by initiatives from European countries.

The 'Freiburg School' and 'Cologne School' of *ordo*-liberalism in Germany strongly influenced the legal and institutional design of post-war German and European economic law for a 'social market economy' (as prescribed in Article 3 TEU) founded on a micro-economic common market constitution (e.g. based on EU competition law, EU common market freedoms, economic and social rights and judicial remedies protected in national and EU laws) and on a complementary, macro-economic monetary constitution (e.g. based on fiscal, debt and monetary disciplines for the Euro as a common currency administered by the Eurozone system of national and European central bank cooperation). Yet, it was only the post-war 'Geneva School' of economists and lawyers who systematically explored the multilevel economic and legal principles necessary for institutionalizing a coherent, worldwide trading system based on the Bretton Woods, GATT and WTO agreements and their underlying economic and legal principles.[27] This 'Geneva School' of European academics teaching at Geneva and/or working inside the GATT Secretariat persistently criticized one-sided, *neo-liberal economic arguments* for liberalizing, de-regulating and privatizing trade and investments without coherent conceptions for limiting 'market failures' and related 'governance failures', and for protecting general consumer welfare and equal rights of citizens as 'constitutive powers' and 'democratic principals' of governance agents. This *ordo-liberal school* of economists and lawyers acknowledged that economic markets are legal constructs, whose proper economic functioning requires systemic limitations of 'market failures' (e.g. through competition, social and environ-

27 For a detailed account of these diverse schools of 'law and economics', 'constitutional economics', multilevel 'ordo-liberalism' and 'ordo-constitutionalism' see: *Slobodian*, Globalists. The End of Empire and the Birth of Neoliberalism, 2018.

mental rules) and of 'governance failures' (like welfare-reducing trade protectionism and trade discrimination). Hence, it was more inspired by the evolution of regional common market law – e.g. in the EU, the 1993 European Economic Area (EEA) Agreement between EU and European Free Trade Area (EFTA) states, and the 1993 NAFTA – for designing trade and investment regulation in more coherent ways in the 1994 WTO Agreement.

Compared with GATT 1947, the WTO Agreement aimed at out-phasing discriminatory textiles trade restrictions, prohibiting VERs, legally limiting anti-competitive abuses of trade policy powers (e.g. discriminatory anti-dumping measures, subsidies, state-trading practices), and at protecting transnational rule of law (e.g. through compulsory dispute settlement remedies at international and domestic levels of trade governance) and national sovereignty over non-discriminatory national regulations (e.g. tax, competition, labour and environmental laws) and over national safeguard measures (for protecting economic and non-economic PGs). The 2001 Doha Round Agenda for multilateral trade negotiations in the WTO aims at constructing a more coherent, rules-based trading system protecting 'sustainable development' (WTO Preamble) for the benefit of all 164 WTO members and their citizens. Notably under WTO Director-Generals who had previously served as EU competition or trade commissioners (like Peter Sutherland and Pascal Lamy), the WTO actively promoted 'ordo-liberal efforts' at strengthening the coherence of trade, competition, investment and environmental rules and adjudication, convening annual WTO meetings of members of national parliaments, and promoting synergies also between WTO law and human rights law.[28]

1. Also EU trade policies lack adequate democratic legislation and accountability

In contrast to the state-centered US model of congressional prerogatives for trade legislation, the exclusive EU competence for the common commercial policy (cf. Article 207 TFEU) is exercised more by the EU's executive institutions (EU Commission and EU Council) than by the European Parliament which, together with the Council, has co-legislative powers to 'adopt the measures defining the framework for implementing the common commercial policy' (Article 207:2 TFEU) and conclude international trade agreements (Article 218 TFEU). In European common market law, it was largely due to the EU Court of Justice (CJEU) and the EFTA Court, in cooperation with national courts, that the treaties establishing the European Communities and the EEA were interpreted as 'democratic law' protecting the rights of citizens and the transnational rule of law that can be effectively enforced through multilevel judicial remedies of governmental as well as non-governmental actors in the now 31 EEA member states. Since the 1990s, the CJEU, the EFTA Court and also the European Court of Human Rights (ECtHR) interpreted their respective 'constitutive agreements' as 'constitutional instruments' protecting rights of governments and of citizens

28 Cf. *Petersmann*, International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods, 2012, ch. VII.

through multilevel, legal and institutional democratic and judicial institutions and 'checks and balances'. National and European courts recognized fundamental rights also as general principles of European constitutional law constituting, limiting, regulating and justifying multilevel governance powers, including trade policy powers. EU law is interpreted as a multilevel legal system embedded not only in diverse *national constitutional systems*; international treaties concluded by the EU are also incorporated as 'integral parts' into European law (e.g. UN, WTO and Council of Europe agreements protecting transnational PGs inside and beyond the EU) 'integrating' the EU's multilevel governance system.

In the external relations with third countries, however, the CJEU insists on the legal and judicial autonomy of EU law. It has not only refrained from recognizing UN, WTO or investment adjudication as legally binding obligations also of the CJEU; it has also denied legal liability of EU institutions or EU states vis-à-vis citizens adversely affected by EU violations of UN and WTO agreements in their rights protected by the EU Charter of Fundamental Rights (EUCFR).[29] Since the beginning of the EU's secretive free trade negotiations with Canada in 2009 and with the USA in 2013, civil society and parliaments increasingly criticized the EU negotiations for disregarding 'constitutional principles' of EU law:

- EU law requires taking 'decisions as openly as possible and as closely as possible to the citizen' (Articles 1, 10 TEU) so as to promote democratic accountability, inclusive 'democratic public reason' and 'democratic law' recognizing EU citizens as legal subjects of EU law. But the EU negotiates FTAs in non-transparent ways far away from citizens. In the EU's 2014 'public consultation' on transatlantic investment rules, the criticism by EU citizens illustrated how democratically inclusive treaty negotiations may require re-negotiation of intergovernmental treaty drafts so as to better protect 'public interests' (for instance, in transparent and inclusive investment adjudication). Even though EU trade policies have recently become more transparent, EU citizens continue to complain that FTAs signed by the EU risk undermining the fundamental rights of citizens.
- The Union 'is founded on respect for human rights' and requires 'protection of its citizens' and of their rights also in external relations (Articles 2, 3 TEU). Yet, in contrast to FTAs among European countries, EU FTAs with non-European countries – like Article 30.6 of the EU-Canada FTA – preclude citizens from invoking FTA provisions in domestic legal systems. Preventing EU citizens from invoking precise and unconditional FTA provisions – and from exercising the 'right to an effective remedy' of 'everyone' (Article 47 EUCFR) against harmful FTA market regulations – runs counter to the EU obligations (e.g. under Arts 9-12 TEU) of protecting constitutional, representative, participatory and deliberative democracy and the fundamental rights of citizens. The EU has failed to meet its legal duty (for instance pursuant to Article 52 EUCFR) to justify how such 'disempowerment of EU citizens' could be necessary for 'protection of citizens' (Article 3 TEU). As 'the

29 Cf. *Cremona/Thies/Wessel* (eds.), The EU and International Dispute Settlement, 2017; *Steinbach*, EU Liability and International Economic Law, 2017.

Union is founded on the rule of law' (Article 2), Articles 3, 21 TEU prescribe 'strict observance of international law' and 'consistency' of internal and external market regulations for EU external relations without conferring EU powers to violate international treaties approved by parliaments for the benefit of EU citizens. Preventing citizens from invoking FTAs in domestic courts and offering foreign investors arbitration privileges (cf Articles 8.18, 30.6 EU-Canada FTA) risk distorting and undermining citizen-driven rule-of-law based on equal access to justice.

- The EU principles of constitutional, representative, participatory and deliberative democracy (Articles 9-12 TEU) protect the right of 'every citizen to participate in the democratic life of the Union'. Yet, the fundamental rights of 'everyone' protected by the EUCFR – such as 'freedom to conduct a business in accordance with Union law' (Article 16), property rights (Article 17), access to justice (Article 47) and to 'necessity' and 'proportionality' of restrictions (Article 52) – are neither mentioned nor protected in transatlantic FTAs (e.g. with Canada and Mexico).
- EU law requires to 'ensure consistency' of internal and external market regulations as well as among the 'different areas of external action' (Article 21 TEU). EU common market law became effective due to its citizen-driven, decentralized enforcement. Equally, FTAs with other European countries (like EFTA countries and Turkey) can be invoked and enforced by citizens in domestic courts. 'Disempowerment' and discrimination of EU citizens in FTAs with transatlantic democracies run counter to the EU's promise of 'transformative transatlantic FTAs' that can limit the long-standing market failures and governance failures in transatlantic markets, which gave rise to numerous transatlantic disputes over the past decades.[30]

2. Need for 'constitutionalizing' EU trade policies through democratic legislation

The EU's disregard for its 'cosmopolitan foreign policy constitution' (e.g. based on Articles 3, 21 TEU, the EUCFR)[31] has failed to prevent the EU executive from violating WTO rules (e.g. the collective duty under Article 17 DSU to maintain the AB as being 'composed of seven persons', with vacancies being 'filled as they arise') and from disempowering EU citizens through intergovernmental trade negotiations and agreements. *T. Cottier* has explained why parliamentary elaboration of 'a European Trade Act, perhaps called International Trade, Investment and Co-operation Regulation', could assist in 'constitutionalizing' EU trade policymaking, for example by 'front-loading trade policy and investment policy debates within the Union' and, thereby, enhancing inclusiveness and democratic legitimacy in EU negotiations of

30 Cf. *Petersmann/Pollack* (eds.), Transatlantic Economic Disputes. The WTO, the EU and the USA, 2003.

31 Cf. *Petersmann*, The EU's Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements, 21 European Foreign Affairs Review, 2016, pp. 449-469.

trade and investment agreements with third countries.[32] As the lack of transparent, inclusive negotiations of EU FTAs has provoked more and more opposition from civil society and national parliaments, the stronger becomes the need for institutionalizing 'democratic public reason' by requiring parliaments to define – through inclusive, democratic legislation specifying the general EU treaty provisions – the legitimate goals, constitutional restraints and 'consistency requirements' of external trade and investment agreements negotiated by the EU, regardless of whether such agreements are to be concluded as exclusive EU agreements or as 'mixed agreements' involving national and EU competences.

Providing for comprehensive civil society consultations from the beginning of such treaty negotiations, transparent procedures, protection of EU citizen rights, and respect for uniform, coherent treaty principles will promote democratic understanding and support, the rule of law and trust of citizens. Thereby, the repetition of past conflicts could be avoided, such as conflicts arising from EU civil society protests against non-transparent treaty negotiations and inadequate civil society consultations, from national referenda on EU external agreements (like the rejection of the EU-Ukraine Trade Agreement by Dutch voters on 6 April 2016), or from later disputes over their conclusion as 'Community agreements' rather than as 'mixed agreements' (like the reluctant concession by the EU Commission in July 2016 to conclude the EU-Canada FTA as a mixed agreement). *Ex ante* regulation of such potential political problems with the consent of national and European parliaments could enhance democratic *input legitimacy* as well as *output legitimacy*, for instance by limiting political abuses of national veto-powers linking national approval of mixed agreements to EU concessions in other, unrelated policy areas. As in the case of the US Trade Act of 1974, treaty negotiations on behind-the-border 'non-tariff trade barriers' require stronger parliamentary involvement and approval requirements.

3. Lessons from the EU's multilevel constitutionalism for limiting 'populist protectionism' undermining global public goods?

The Brexit, Euro-crises, WTO crises and disruptions of other multilateral treaty systems (like NAFTA, the 2015 Climate Change Prevention Agreement) reflect similar governance failures caused by 'populist resistance' against social adjustment pressures.[33] Populist politicians

- resist – rather than support and facilitate – the adjustment pressures resulting from democratically agreed market regulation (e.g. EU free movement rules, EU fiscal

32 Cf. *Cottier*, (fn. 8), p. 35. On 'constitutionalization' as a dynamic process of democratic transformation of constitutionally agreed 'principles of justice' into multilevel legislation, administration, judicial protection of constitutional rights of citizens, and institutionalization of 'democratic public reason' promoting the use of decentralized knowledge (e.g. about human and natural resources, democratic preferences) dispersed among millions of individual citizens, see *Petersmann*, (fn. 4).

33 On 'populism' see (fn. 2) above.

and debt disciplines, WTO rules, US banking sector reforms following the 2008 financial crisis);

- they misinform domestic public opinion (e.g. about the costs of 'Brexit', the reality of climate change, inadequacies of financial regulation), disrupt mutually beneficial economic and legal integration, and fail to promote the rule of law and social adjustment assistance; and
- present people in their local constituencies (e.g. the less than 200.000 steelworkers inside the USA, taxpayers and pensioners suffering from unsustainable public debt in Greece, xenophobic minorities in Italy) as the victims of the resulting adjustment costs – notwithstanding the democratic approval by national parliaments of multilateral treaty systems transforming national welfare states through stronger, multilevel protection of 'aggregate PGs' (like monetary and financial stability in IMF member states, non-discriminatory import protection and social adjustment assistance permitted by WTO rules, protection of political refugees by UN law).

Due to the 'democratic disconnect' between citizens and UN/WTO governance institutions, the public reason justifying PGs treaties is not sufficiently defended inside democracies against opportunistic, political and legal disintegration. Multilevel governance of transnational PGs cannot remain effective if citizens and democratic institutions do not effectively control multilevel governance institutions and are not legally empowered through 'multilevel constitutionalism' to invoke and defend PGs treaties in domestic jurisdictions as 'democratic principals' that must hold multilevel governance agents legally, democratically and judicially more accountable in order to maintain the transnational rule of law. National welfare states are not 'victims' of UN/WTO law or EU law, but rather of domestic populism and of inconsistent, domestic policies. The post-war 'revolutions' triggered by globalization and by transforming national welfare states into multilevel governance of transnational PGs – like the universal recognition of human rights and related constitutional principles (like the rule of law, democracy, limited delegation of powers, independent third-party adjudication), and mutually beneficial monetary, financial, world trading and communications systems – require 'systemic integration' of the often fragmented conceptions and regulation of international economic law (IEL) as (1) private commercial law, (2) international law among states, (3) multilevel economic regulation, (4) global administrative law and (5) multilevel constitutional regulation aimed at limiting abuses of public and private governance powers and making legal and economic development sustainable and more legitimate.[34]

The adoption of national Constitutions (written or unwritten) by all 193 UN member states reflects worldwide recognition of *constitutionalism* (e.g. as a legal commitment to agreed rules, institutions and principles of justice of a higher legal rank) as the most important 'political invention' for limiting abuses of public and private power. Yet, *constitutionalisation* (e.g. as progressive transformation of the agreed constitutional principles into democratic legislation, administration and judicial protection of

34 For a discussion of these competing conceptions of IEL and of the need for their 'systemic interpretation' and integration see *Petersmann*, (fn. 4), pp. 338 ff.

PGs and equal constitutional rights of citizens limiting multilevel governance institutions) is impeded by power politics inside many UN member states. As a result, notwithstanding the adoption of *legal Constitutions* constituting national peoples inside territorial states, the *political constitutions* often remain dominated by power politics (e.g. by political monopolies of communist parties, military or authoritarian regimes). As both economic markets as well as 'political markets' risk destroying themselves through abuses of power ('paradox of liberty'), both market economies, as well as democracies, can remain stable over time only by protecting undistorted market mechanisms (e.g. their economic and democratic functions as decentralised information, coordination and sanctioning mechanisms) through multilevel constitutional restraints of market failures (e.g. through competition, environmental, labour and social laws) as well as of governance failures and constitutional failures. Hence, the diverse collective action problems in the economy and other sectorial areas of transnational cooperation require complementing legal and political constitutionalism by *sectorial constitutionalism* like the EU's microeconomic common market constitution and macroeconomic monetary constitution. The diverse democratic preferences and legal traditions of people require respect for the reality and legitimacy of *constitutional pluralism* and *individual, democratic and legal diversity* as positive constitutional values that must be coordinated across national frontiers through mutually agreed rule of law systems and market competition (e.g. as decentralized, cybernetic information, coordination and sanctioning systems).

Arguably, the very diverse forms of European economic integration law and related 'multilevel constitutionalism' (e.g. inside the EU, the EEA, in EU FTAs with third countries like Israel and Turkey) could serve as a model for limiting *some abuses of trade policy powers* also in regional economic integration outside Europe, for example hegemonic abuses of power and inadequate judicial protection of economic and social rights in North and Latin American economic integration. Yet, as discussed above, abuses of veto-powers and 'disempowerment of citizens' in consensus-based, intergovernmental negotiations undermine also the democratic legitimacy of WTO and European economic governance of transnational PGs (like the WTO dispute settlement system). They can be overcome only by strengthening constitutional, representative, participatory and deliberative forms of multilevel, '*demoi*-cratic governance' and constitutionalism (e.g. based on stronger forms of judicial comity in the multilevel judicial protection of the transnational rule of law and equal individual rights). For instance, regular evaluation and public criticism of WTO dispute settlement reports by the DSB and by an inter-parliamentary WTO body – in close cooperation with civil society and trade lawyers discussing WTO jurisprudence in most WTO member states – could assist in preventing hegemonic power politics as currently practised by the US Trump administration. As national parliaments fail to exercise effective democratic control of WTO governance, citizens have strong reasons for requesting their parliamentary representatives to transform the *de facto inter-parliamentary meetings inside the WTO* into a formal WTO institution protecting citizens, their rights and the transnational rule of law against intergovernmental power politics.

IV. Conclusion: need for democratic trade legislation protecting transnational rule of law and public goods

Section I asked why democratic constitutionalism in many WTO member states has failed to protect the WTO legal and dispute settlement system against illegal power politics by the USA and by other WTO members. Section II argued that US constitutional law and US membership in the WTO require additional, democratic legislation limiting protectionist abuses of trade policy powers by the US executive violating and undermining the WTO legal and dispute settlement system. Section III explained why – also in the EU – citizens and parliaments should 'take back democratic control' over illegal, welfare-reducing abuses of trade policy powers. The 'disconnect' between 'member-driven WTO governance' and inadequate control by domestic democratic and judicial institutions – both in the USA, the EU and in most other WTO members – undermines the transnational rule of law and promotion of citizen welfare through a rules-based world trading system.

Constitutional democracy requires stronger legal, democratic and judicial accountability of WTO members and of trade policy-making undermining PGs. The more globalization transforms *national PGs* into *transnational PGs* that no state can unilaterally protect without international treaties and without their domestic implementation, the stronger becomes the need for legal and institutional limitations of intergovernmental UN/WTO power politics by protecting equal rights of citizens – as 'democratic principals' of governance agents – in multilevel governance of PGs. Parliaments should limit executive powers – e.g. to unilaterally withdraw from 'PGs treaties' without parliamentary consent, to restrict transnational movements of goods, services and persons in arbitrary ways taxing domestic consumers and redistributing domestic income to rent-seeking industries – by strengthening legal, democratic and judicial remedies of adversely affected citizens; in both economic as well as political markets, empowering market actors through equal rights and judicial remedies can promote decentralized correction of 'market failures' as well as of 'governance failures' by 'institutionalizing public reason', impartial third-party administration of justice, and multilevel judicial protection of rule of law (e.g. defined as all public legal power being subject to democratically approved law as interpreted and enforced by international and domestic courts). For example, even if 'direct effects' of UN and WTO treaty obligations for the benefit of citizens continue to be denied inside the EU, the case law of the CJEU on the non-contractual liability of the EU under Article 340 TFEU (e.g. as interpreted by the CJEU ruling in the case of *Francovich*) justifies compensation of EU citizens adversely affected by manifest non-compliance of EU institutions with their EU legal obligations to comply with international 'PGs treaties' approved by parliaments. The EU's democracy principles (Arts 9-12 TEU) and 'cosmopolitan foreign policy mandate' (e.g. in Articles 3, 21 TEU) require the EU to 'place the individual at the heart of its activities' (Preamble EUCFR) by taking 'decisions as openly as possible and as closely as possible to the citizen' (Article 1 TEU). Constitutional democracy and stronger protection of a mutually beneficial world trading system require additional trade legislation specifying, limiting and controlling execu-

tive trade policy powers – inside the EU and in other WTO members – for protecting global PGs.

1. The 2018 EU proposals for 'WTO modernization'

In June 2018, the European Council gave the EU Commission a mandate to pursue WTO modernization in pursuit of the objectives of making the WTO more relevant and adaptive to a changing world and strengthening the WTO's effectiveness. In July 2018, the EU Commission submitted to the EU Trade Policy Committee a background note presenting the Commission's proposals on WTO modernization, notably concerning (1) WTO regular work and transparency; (2) rulemaking in the WTO including the approach to the development question; and (3) WTO dispute settlement.[35] The document proceeds from acknowledging that

> 'the rules-based multilateral trading system is facing its deepest crisis since its inception. For the first time, the basic tenets of the WTO, both in setting the essential rules and structure for international trade and in delivering the most effective and developed dispute settlement mechanism of any multilateral organization, are threatened.'

The risk of imminent paralysis of the AB dispute settlement system, and indirectly also of the enforceability of WTO panel reports (whose adoption can be prevented by appealing them), could mean 'going back to a trading environment where rules are only enforced where convenient and where strength replaces rules as the basis for trade relations'.

The EU Commission proposals for modernizing the WTO's negotiation, rulemaking and monitoring functions (e.g. by negotiating additional disciplines for subsidies, state-owned enterprises, barriers to services and investments such as forced technology transfers, strengthening the role of the WTO Secretariat in WTO negotiations, improving notification compliance, adjusting WTO rules incrementally) are laudable. Likewise, it is urgent for the WTO membership to respond to the US 'concerns with the approach of the Appellate Body' as listed in the 2018 Trade Policy Agenda published by the USTR. Yet, all these US concerns relate to long-standing AB legal interpretations (e.g. of Article 3:2 DSU regarding treatment of AB legal interpretations as precedent absent 'cogent reasons', Article 17:5 DSU regarding the 90 days deadline, Article 17:6 regarding 'issues of law' and legal qualifications of facts, Article 17:12 DSU regarding *obiter dicta*) and judicial practices (e.g. the elaboration and long-standing practices of AB Working Procedures as prescribed in Article 17:9 DSU) that had been justified on the basis of the customary rules of treaty interpretation and were consistently accepted by the DSB since 1996 without any prior initiatives for correcting this jurisprudence through 'authoritative interpretations' or amendments of the WTO Agreement. Moreover, some of the related legal problems (like the disregard for the 90 days deadline for appeals) were caused by the USA itself, for instance

35 *Council of the EU*, document WK 8329/2018 INIT of 5 July 2018. All subsequent citations are from this document.

- by insisting on the insertion of such an unreasonably short and – in most pending AB disputes – impossible deadline into the DSU in order to avoid changing the corresponding deadlines for administrative remedies in US trade laws; the fact that no other international or domestic courts appear to be constrained by a similar deadline confirms the lack of 'judicial experiences' of US trade negotiators in these DSU negotiations;
- by disregarding the DSU obligations to provide the AB 'with appropriate administrative and legal support' (Article 17:7) and fill 'vacancies … as they arise' (Article 17:2); and
- by contributing to the increasing number and complexity of appeals (e.g. more than 10 pending AB disputes in September 2018) which – *de facto* – render compliance with the 90 days deadline impossible without introducing radically new procedures (like 'summary judgments' prior to publication of the full AB report, publication of AB reports in the language of the dispute before translation into the other official WTO working languages).

2. 'Constitutional justice' as a limitation of utilitarian trade bargains?

Democratic constitutionalism in America and the EU is based on rights-based interpretations of 'social contracts' (e.g. as developed by J.Locke, J.J.Rousseau, J.Madison and I.Kant) and on pre-commitments to 'principles of justice' and human rights (e.g. in the US Constitution, the EUCFR), whose legal primacy over 'secondary law-making' limit alternative 'Hobbesian conceptions' of social contracts as 'utilitarian bargains' (as advocated by the US Trump administration).[36] US trade negotiators perceive WTO law – notwithstanding its incorporation into the US legal system – as a mere 'contract', whose reciprocally agreed 'balance of concessions' has become unilaterally distorted by China's alleged non-compliance with WTO disciplines (e.g. on subsidies, state-owned enterprises, government procurement, intellectual property rights) and by the failure of the Doha Round negotiations to progressively develop and improve WTO legal disciplines. Hence, USTR Lighthizer's strategy is to prioritize power-oriented 'bilateral deals' and return to the US' 'aggressive unilateralism' of the 1980s so as to unilaterally re-balance perceived asymmetries in the trading system, contain Chinese state-capitalism, and limit judicial rule-clarifications of WTO rules – rather than continuing the elusive Doha Round negotiations on agreed improvements of the WTO legal system and risking additional WTO jurisprudence limiting US trade policy powers.[37]

This contribution has argued that the constitutional limits of trade policies and of multilevel governance of transnational PGs for the benefit of citizens remain contro-

36 Cf. *Petersmann*, The Crown Jewel of the WTO has been stolen by US Trade Diplomats – and they have no Intention of Giving it back, in: Prevost et al. (eds.), Restoring Trust in Trade – Liber Amicorum for Peter Van den Bossche, 2018, pp. 105-118; *Freeman*, Justice and the Social Contract, 2007.

37 Cf. the references to various speeches by USTR Lighthizer in : *Slobodian*, You Live in Robert Lighthizer's World Now, Foreign Policy of 6 August 2018.

versial and are increasingly ignored by government executives; they need to be clarified through democratic legislation rather than through executive 'bilateral deals' as proposed by the US Trump administration. If American trade law experts – like former US Congressman and WTO AB chairman J. Bacchus – are right that US President Trump's blockage of the WTO AB system and US violations of the 'terrible WTO rules' (Trump) are an 'American assault on the rule of law in world trade'[38] rather than only attempts at improving the WTO disciplines for trade with China (e.g. WTO rules on subsidies, state-trading enterprises, trade remedies, intellectual property rights), then the EU Commission proposals for 'modernizing the WTO' cannot realize the EU Council mandate of 'strengthening the WTO's effectiveness' without majoritarian WTO decisions filling the vacancies of the AB and protecting the '*acquis*' of the past AB jurisprudence as approved by the DSB. The 'Trump strategy' of disrupting global supply chains and WTO third-party adjudication in order to impose 'bilateral deals' has, so far, been undermining the WTO legal system no less than Chinese practices circumventing WTO legal disciplines.

DSU reforms through formal amendments or 'authoritative interpretations' of WTO/DSU rules remain certainly desirable. Yet, the WTO membership and their DSU review negotiations since 1998 have persistently failed to reach agreement on such reforms. As the US reform proposals appear to be inconsistent with the DSU rules on using the customary rules of treaty interpretation as a means for 'providing security and predictability to the multilateral trading system' (Article 3:2 DSU), it remains doubtful how they can contribute to the EU objective of 'preserving and further strengthening' the WTO dispute settlement system. The WTO membership may be better advised to defend the existing WTO dispute settlement system through majoritarian 'authoritative interpretations' confirming the power and collective duty of WTO institutions under Article IX WTO to fill AB vacancies 'as they arise' and comply with coherent AB jurisprudence unless WTO members agree 'not to adopt the Appellate Body report' (pursuant to Article 17:14 DSU), or to reform WTO/DSU rules in conformity with the relevant WTO procedures (Articles IX, X WTO Agreement).[39] It is time for European parliaments to protect the rule of law inside and beyond the EU by insisting on resistance by EU executives against illegal US power politics aimed at undermining WTO rules through 'bilateral deals', and against US disregard for the customary rules of treaty interpretation as justification of unjustified US claims of 'judicial overreach'. As the multilateral WTO trading system is an integral part of agreed UN strategies for realizing the '2030 Sustainable Development Agenda'

38 See *Bacchus*, (fn. 26). This view is confirmed by many other observers: 'the top US trade officials are disdainful of any supranational bodies that might constrain US sovereignty — from WTO rules and dispute settlement panels, to arbitration tribunals used by companies to challenge unfair government policies when they invest abroad'… 'For Mr Lighthizer, as well as Peter Navarro, the chief trade hawk in the White House, the goal is not only to disentangle the US from its Chinese supply chains, and to shift production back home, but to do the same with the rest of America's traditional trading partners as well', Financial Times Free Trade, FT@newsletters.ft.com of 10 September 2018.

39 Cf. *Petersmann*, 'Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement', 21 JIEL 2018, pp. 103-122.

for the benefit of citizens and their human and constitutional rights, European parliaments should endorse the proposal by the EU Commission that 'it is crucial to bring the WTO and its trade agenda closer to citizens and ensure that trade contributes to the pursuit of broader objectives set by the global community, in particular as regards sustainability'. Democratic institutions must adopt additional democratic legislation defining the constitutional limits of utilitarian, intergovernmental power politics and protecting PGs treaties approved by parliaments for the benefit of citizens, but increasingly disregarded by trade diplomats in response to interest group politics.