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Prof. Ernst-Ulrich Petersmann, *The 2018
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THE 2018 TRADE WARS AS A THREAT TO THE WORLD TRADING SYSTEM AND CONSTITUTIONAL DEMOCRACIES

PROF. ERNST-ULRICH PETERSMANN*

The American and Chinese trade wars of 2018 risk undermining not only the law of the World Trade Organization (WTO), as explained in Part I, but also the democratic mandates given by parliaments when they approved the 1994 WTO Agreement. Illegal import tariffs (e.g., as imposed by US President Donald Trump) and the collective undermining of the WTO dispute settlement system run counter to the WTO principles that are incorporated into the trade laws in the United States of America (USA/US), dealt with in Part II, and in the European Union (EU), detailed in Part III. Multilevel governance of global public goods (PGs)—like the WTO trading system, which has helped lift billions of people out of poverty by promoting unprecedented economic welfare, transnational rule of law and compulsory third-party dispute settlements—cannot remain effective if citizens and democratic institutions fail to hold their governments democratically and legally accountable for violating ‘PGs treaties’ (Part IV). This contribution uses the example of the USA and the EU to argue that constitutional democracies—including Asian democracies like India, Korea and Japan—must adopt more specific trade legislations to protect the WTO legal system. Multilevel governance of transnational PGs requires empowering citizens, parliaments and courts of justice to limit populist abuses of trade policy powers to tax and restrict citizens in manifestly illegal ways that reduce general consumer welfare, non-discriminatory competition and rule of law.

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I. THE 2008 AMERICAN AND CHINESE TRADE WARS UNDERMINE THE WTO

The WTO Agreement is the only worldwide treaty establishing a compulsory legal system for the peaceful resolution of disputes through panel, appellate and arbitration findings. These findings, in more than 80% of all disputes, have so far been complied with by the more than hundred WTO member countries involved in over 560 WTO dispute settlement proceedings since 1995.¹

A. Risk to the WTO Legal System

In March 2018, US President Trump invoked Section 232 of the US Trade Act for imposing—as of June 1, 2018—additional tariffs of 25% on imports of steel and 10% on imports of aluminium from WTO members that have not agreed to limit their exports of these products to the USA. The US Secretary of Commerce also started an investigation into auto imports, based on the same Section 232, to determine whether importation of automobiles and automobile parts is threatening national security in the USA.² In July 2018, US President Trump invoked Section 301 of the US Trade Act for imposing tariffs on \$34 billion of imports from China in order to counter Chinese “acts, policies and practices . . . related to technology transfer, intellectual property and innovation” that the US Trade Representative (USTR) had deemed, following a nine months investigation, to be “unreasonable or discriminatory and burdensome or restrictive to US commerce”.³ As China responded with retaliatory tariffs imposed on imports from the USA, President Trump imposed, in early September 2018, 10% duties on about \$200 billion worth of Chinese imports and threatened to increase the tariff rate to 25%, as of 2019, if no bilateral trade deal were reached with China. The latter retaliated again by imposing additional tariffs of 5% and 10% on imports of goods from the USA worth \$60 billion. In response, President Trump threatened to impose additional import duties on all imports from China, which totalled more than \$500 billion in 2017. In August 2018, President Trump also imposed discriminatory trade restrictions against Turkey in response to Turkey’s detention of an American evangelical pastor on terrorism charges.

¹ For lists of all WTO dispute settlement proceedings and WTO members involved, see *Chronological List of Disputes Cases*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Dec. 6, 2018).

² For lists of US import restrictions and related investigations, see the website of the US Department of Commerce. See Press Release, U.S. Dep’t of Commerce, U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports (May 23, 2018), <https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports> [hereinafter U.S. Dep’ of Commerce].

³ *Id.*

In response to the US import tariffs on aluminium and steel, many affected WTO members—like Canada, China, the EU, India, Mexico, Norway, Russia and Turkey—invoked WTO dispute settlement procedures on the ground that, *inter alia*, the discriminatory US import restrictions were inconsistent with WTO law (e.g., Articles I and II of the General Agreement on Tariffs and Trade (GATT)) and could not be legally justified on national security grounds (Article XXI of the GATT) or as safeguard measures (Article XIX of the GATT).⁴ These WTO members also adopted retaliatory suspensions of market access commitments vis-à-vis the USA, which some of these WTO members justified by invoking Article 8 of the WTO Agreement on Safeguards based on the argument that the US import tariffs on aluminium and steel had been introduced for economic rather than national security reasons.⁵ China criticised the discriminatory US import tariffs imposed under Section 301 as a ‘trade war’ violating WTO law (e.g., Articles I and II of the GATT and Article 23 of the Dispute Settlement Understanding (DSU)). Further, it did not justify its retaliatory tariffs by invoking specific WTO rules. Even though China and the USA invoked the WTO dispute settlement procedures for challenging the WTO consistency of their reciprocal trade sanctions, the imminent breakdown of the WTO Appellate Body (AB) system risks undermining the whole WTO dispute settlement system by enabling WTO members to prevent the adoption of WTO panel reports by appealing panel findings.⁶

⁴ Cf. Request for Consultations by China, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS 544/1 (Apr. 5, 2018); Request for Consultations by India *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS547/1 (May 18, 2018); Request for Consultations by the European Union *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS548/1 (June 1, 2018); Request for Consultations by Canada, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS550/1 (June 1, 2018); Request for Consultations by Mexico, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS551/1 (June 5, 2018); Request for Consultations by Norway, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS552/1 (June 12, 2018); Request for Consultations by the Russian Federation, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS554/1 (June 29, 2018); Request for Consultations by Switzerland, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/1 (July 9, 2018).

⁵ For instance, in view of the very small amount of US production of steel and aluminium “for the purpose of supplying a military establishment” in terms of GATT Article XXI (b), and because US imports of aluminium and steel had not increased over the past two years, some affected exporting countries claimed to be free to suspend “substantially equivalent concessions” of other obligations as permitted by Article 8:2 of the WTO Agreement on Safeguards.

⁶ This is due to Article 16:4 of the DSU, according to which “the report of the panel shall not be considered for adoption by the DSB until after completion of the appeal”. As the number of AB judges has been reduced from seven to three and is likely to be further reduced to one single AB member in December 2019 upon the expiry of the mandates of

B. Risk to the WTO Dispute Settlement System

After initially blocking the consensus in the WTO Dispute Settlement Body (DSB) for filling WTO AB vacancies for reasons related to the on-going transition in the US political leadership, the United States focused, from August 2017, on the issue of ‘Rule 15’ of the Working Procedures for Appellate Review. Pursuant to this rule, the AB may authorize its outgoing members to complete the disposition of pending appeals. The USA has repeatedly stated in DSB meetings that it is not in a position to support the launching of the selection processes for new AB members. It considers that the first priority is for the DSB to discuss and decide how to deal with reports being issued by persons who are no longer members of the Appellate Body. Even though the AB Working Procedures were adopted in 1995 in conformity with Article 17 of the DSU and have been applied in WTO practice for more than twenty years, the US repeatedly reiterated that it “remains resolute in its view that Members need to resolve that issue as a priority”⁷.

More recently, the US has also voiced in DSB meetings a number of other ‘systemic concerns’ relating to the functioning of the AB, such as the criticism of a Korean AB member for having raised issues (*obiter dicta*) that, in the view of the USA, had not been necessary for the resolution of the dispute. The ‘US concerns with WTO dispute settlement’ have recently been summarised in the President’s 2018 Trade Policy Agenda.⁸ Some of these concerns had already been formulated under the previous US administrations, whereas other examples of concerns with the approach of the Appellate Body are new; they focus on the following cross-cutting issues:

- Disregard for the 90-day deadline for appeals: The US criticises the AB for not respecting Article 17.5 of the DSU, according to which “[i]n no case shall the proceedings exceed 90 days.” In the US view, this raises concerns of transparency, inconsistency with ‘prompt settlement of disputes’, and uncertainty regarding the validity of the report issued after ninety days.
- Continued service by persons who are no longer AB members: The US claims that, notwithstanding ‘Rule 15’ of the AB Working Procedures and

two AB judges, it is unlikely that the AB will be capable of completing AB reports on all twelve currently pending appeals and future appeals.

⁷ WTO Members Review Requests for Panels on Canadian Wine Sale Measures, US Fish Duties, WORLD TRADE ORG. (June 22, 2018), https://www.wto.org/english/news_e/news18_e/dsb_22jun18_e.htm.

⁸ OFF. U.S. TRADE REP., 2018 TRADE POL’Y AGENDA & 2017 ANN. REP. ON TRADE AGREEMENTS PROG. 22-28 (Mar. 2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF> (last visited Dec. 9, 2018).

its consistent application in WTO dispute settlement practices to date, the Appellate Body “does not have the authority to deem someone who is not an Appellate Body member to be a member”. In the view of the US, only the DSB—not the AB—has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving.

- Issuing advisory opinions on issues not necessary to resolve a dispute: The US criticizes “the tendency of AB reports to make findings unnecessary to resolve a dispute or on issues not presented in the dispute”.
- Appellate Body review of facts and review of a member’s domestic law *de novo*: The US criticises the AB’s approach to reviewing facts. Under Article 17:6 of the DSU, appeals are limited to “issues of law covered in the panel report and legal interpretations developed by the panel.” Yet, in the view of the US, the AB has “consistently reviewed panel fact-finding under different legal standards, and has reached conclusions that are not based on panel factual findings or undisputed facts”. In the USA’s view, this is particularly the case for Appellate Body review of panel findings as to the meaning of domestic legislation (which should be an issue of fact).
- Appellate Body claims its reports are entitled to be treated as precedent: The US claims that the AB has asserted its reports effectively serve as precedent, and that panels are to follow prior AB reports absent ‘cogent reasons’, which has no basis in the WTO rules. The US puts forward that “[w]hile Appellate Body reports can provide valuable clarification of the covered agreements, Appellate Body reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed.”
- Adding or diminishing of rights and obligations by the AB in various disputes: The US exemplifies these concerns by using AB rulings on the following issues: the interpretation of the notion of ‘public body’ under the Subsidies Agreement; the interpretation of the non-discrimination obligation under Article 2.1 of the TBT Agreement; certain interpretations relating to safeguard measures (notably on ‘unforeseen developments’); outcomes in the cases launched by the EU against the Byrd amendment (giving the proceeds from anti-dumping/countervailing duties to US industry); and on tax treatment for ‘Foreign Sales Corporations’ (that was considered to be an export subsidy). In the view of the US, the findings in these disputes departed from the relevant WTO agreements as negotiated.

Arguably, all these US concerns relate to long-standing AB legal interpretations (e.g., of Article 3:2 of the DSU regarding treatment of AB legal interpretations as precedent absent ‘cogent reasons’, Article 17:5 of the DSU regarding the ninety days deadline, Article 17:6 regarding ‘issues of law’ and legal qualifications of facts, and Article 17:12 of the DSU regarding *obiter dicta*) and judicial practices (e.g., the elaboration of AB Working Procedures as prescribed in Article 17:9 of the DSU) that had been justified in the 148 AB reports (October 2018) on the basis of the customary rules of treaty interpretation. WTO Members adopted all these reports since 1996 without correcting this AB jurisprudence through ‘authoritative interpretations’ or amendments of the WTO Agreement.⁹ Moreover, some of the legal problems criticised by the US (like the disregard for the ninety days deadline for appeals) were caused by the USA itself, for instance:

- 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. No other international or domestic court appears to be constrained by a similar deadline.
- 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., twelve pending AB disputes in October 2018) which—*de facto*—render compliance with the ninety days deadline impossible without political agreement on radically new procedures (like ‘summary judgments’ prior to publication of the full AB report and publication of AB reports in the language of the dispute before translation into the other official WTO working languages).

Former US Congressman and WTO AB chairman, James Bacchus, has interpreted US President Trump’s blockage of the WTO AB system and US violations of the ‘terrible WTO rules’ as an “American assault on the rule of law in world trade”¹⁰ rather than as attempts at improving the WTO dispute settlement system

⁹ The DSU review negotiations since 1998 have so far not led to any agreement on DSU amendments or ‘authoritative interpretations’ of WTO rules. The above-mentioned US criticism of judicial interpretations of WTO rules by the AB amounts to *political* proposals for DSU amendments rather than legally convincing criticism of judicial AB interpretations. Even though they cannot justify the illegality of the US blockage of the filling of AB vacancies, most WTO Members perceive the US criticism as political explanations of the US efforts at unilaterally blocking the functioning of the AB.

¹⁰ See James Bacchus, *Might Unmakes Right: The American Assault on the Rule of Law in World Trade* (CIGI Papers No. 173, May 2018),

and the WTO disciplines for trade with China (e.g., WTO rules on subsidies, state-trading enterprises, trade remedies, and intellectual property rights). Other observers confirm that “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”.¹¹ Many of the legal justifications by President Trump (e.g., of discriminatory import tariffs on steel and aluminium on grounds of US security interests and of the US blockage of the AB system on grounds of ‘judicial overreach’) are criticised 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).¹² DSU reforms through formal amendments or ‘authoritative interpretations’ of WTO/DSU rules remain certainly desirable. Yet, 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 of the DSU), they do not appear to pursue the DSU reform objective of preserving and further strengthening the WTO dispute settlement system.

C. *Why have WTO Members Failed to Protect the WTO AB System?*

Democratic constitutionalism is founded on rights-based interpretations of ‘social contracts’ (e.g., as developed by John Locke, Jean-Jacques Rousseau, James Madison, and Immanuel Kant) and on constitutional pre-commitments to ‘principles of justice’ and human rights (e.g., in democratic Constitutions) and their constitutional primacy over ‘secondary law-making’, thereby limiting alternative ‘Hobbesian conceptions’ of social contracts as ‘utilitarian bargains’.¹³ Even though American and EU constitutional law are interpreted as incorporating international treaties approved by parliaments into domestic legal systems, US trade negotiators perceive WTO law as a mere inter-governmental ‘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, and intellectual property rights) and by the failure of the

<https://www.cigionline.org/sites/default/files/documents/Paper%20no.173.pdf> (last visited Dec. 9, 2018).

¹¹ James Politi, *Donald Trump’s China Pivot*, FIN. TIMES FREE TRADE, Sept.10, 2018 (“For Mr. Robert Emmet 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.”).

¹² Cf. Edward Luce, *Donald Trump’s Circus Act is a Sinister Distraction*, FIN. TIMES, Aug. 26, 2018, <https://www.ft.com/content/1683fb06-a791-11e8-926a-7342fe5e173f>.

¹³ Cf. SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT (2d. ed. 2007).

Doha Round negotiations to progressively develop and improve WTO legal disciplines. Hence, USTR Robert Emmet Lighthizer's strategy is to prioritise 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 continue the elusive Doha Round negotiations on agreed improvements of the WTO legal system and risk additional WTO jurisprudence limiting US trade policy powers.¹⁴

In the EU, by contrast, the Lisbon Treaty prescribes—e.g., in Articles 3 and 21 of the Treaty on European Union (TEU) and in the EU Charter of Fundamental Rights (EUCFR)—the promotion of human rights, rule of law, and democracy in the external relations of the EU in conformity with the EU's internal, constitutional principles. This functional interrelationship between multilevel legal guarantees of equal freedoms, rule of law, and judicial remedies prompts many EU lawyers to acknowledge 'constitutional functions' of worldwide 'PGs treaties' like the WTO Agreement constituting, limiting, regulating and justifying limited legislative, judicial and executive powers for a rules-based, mutually beneficial world trading system.¹⁵ When parliaments approved the 1994 WTO Agreement in constitutional democracies like the USA and in the EU, they gave limited mandates to their respective executives to implement and further develop WTO law. Why did constitutional democracies not prevent governments from persistently violating the WTO Agreement, for instance by:

- imposing import restrictions in manifest violation of WTO law (like discriminatory US tariffs violating GATT Articles I and II)?
- adopting 'voluntary export restrictions' (VERs) (e.g., VERs on steel and aluminium adopted by Australia and Korea in response to US pressures) notwithstanding their clear prohibition in Article 11 of the WTO Agreement on Safeguards?
- or by failing to maintain the WTO AB as legally prescribed in Article 17 of the DSU (i.e., being "composed of seven persons", with vacancies being "filled as they arise")?

¹⁴ Compare the references to various speeches by USTR Lighthizer in Quinn Slobodian, *You Live in Robert Emmet Lighthizer's World Now*, FOREIGN POL'Y, Aug. 6, 2018, <https://foreignpolicy.com/2018/08/06/you-live-in-robert-lighthizers-world-now-trump-trade>; Ernst-Ulrich Petersmann, *The Crown Jewel of the WTO has Been Stolen by US Trade Diplomats – And They Have No Intention of Giving it Back*, in RESTORING TRUST IN TRADE – LIBER AMICORUM FOR PETER VAN DEN BOSSCHE 105-18 (D. Prevost et al. eds., 2018).

¹⁵ Cf. Ernst-Ulrich Petersmann, *The EU's Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements*, 21 EURO. FOREIGN AFF. REV. 449 (2016).

According to Article IX:1 of the WTO Agreement, the appointment of AB members by the DSB is governed by the “practice of decision-making by consensus followed under GATT 1947”, thus enabling the US veto-practice of objecting to the filling of vacant AB positions since 2016. Yet, Article IX:1 of the WTO Agreement also provides that “where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting” either at “meetings of the Ministerial Conference” or of “the General Council”, where “each Member of the WTO shall have one vote”. Just as controversies over the interpretation of the DSU (e.g., the admission of *amicus curiae* briefs by the AB) have been submitted to the WTO General Council in past WTO practices, the WTO Ministerial Conference or the General Council could have prevented the illegal diminution of the AB membership to—as of October 2018—only three judges through majority decisions, for instance by:

- adopting an ‘authoritative interpretation’ based on “a three-fourths majority of the Members” (Article IX:2 of the WTO Agreement) clarifying their collective duty and existing power to fill “vacancies . . . as they arise” (Article 17 of the DSU) through majority decisions; and/or
- establishing directly “by a majority of the votes cast” (Article IX:1 of the WTO Agreement) an *ad hoc* WTO Committee for the selection and timely appointment of vacant AB positions, justifying such exceptional, non-discriminatory selection procedures by the lack of any legal justification of the two years of US blocking of the collective WTO duties to maintain the AB as prescribed in Article 17 of the DSU.¹⁶

D. Democratic Constitutionalism Requires Limiting Governance Failure by Democratic Legislation

During the Uruguay Round negotiations, the WTO Agreement had been deliberately designed so as to outlaw protectionist trade practices that had undermined the GATT legal system during the 1980s, like:

- VERs circumventing GATT rules;

¹⁶ Note 3 to Article IX:1 of the WTO Agreement (“Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of the Dispute Settlement Understanding”) is no legal obstacle to such decisions by the WTO Ministerial Conference or the General Council deliberately *not* convening as DSB in order to meet the collective duties of WTO members to comply with Article 17 of the DSU. This legal priority of Article IX of the WTO Agreement over illegal abuses of ‘veto powers’ under the DSU is also confirmed by Article XVI:3 of the WTO Agreement.

- political interventions in the GATT dispute settlement system (e.g., insistence by USTR Carla Hills that dumping and subsidy disputes should be serviced no longer by the GATT legal division but rather by a newly established ‘Rules Division’ staffed with American lawyers from the US trade administration); and
- abuses of veto-powers for the blocking of the adoption of GATT dispute settlement reports.¹⁷

The re-emergence of such illegal trade practices over the past years reflects a failure of the WTO legal obligation of “[e]ach Member [to] ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements” (Article XVI:4 of the WTO Agreement). The legal, governance and ‘judicial dilemmas’ underlying the current WTO governance crises¹⁸ go far beyond trade law as they reveal ‘populist governance failures’¹⁹—also in parliamentary democracies—to protect global PGs beyond the rules-based WTO trading, legal and dispute settlement systems.

For instance, 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 limit market failures, governance failures and ‘constitutional failures’ in multilevel governance of transnational PGs. Many adversely affected citizens (like taxpayers, pensioners, import-competing steel workers, and 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 the poor and the rich. They turn to ‘populist alternatives’ by blaming import competition, foreign migrants, and international organisations protecting PGs. National parliaments are increasingly circumvented by authoritarian leaders advocating for ‘Brexit’, bilateral deals, and inter-governmental rule-making far away from citizens, resulting in increasing disregard for democratic responsibilities to regulate market failures (like inadequate

¹⁷*Cf.* ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM – INTERNATIONAL LAW, INTERNATIONAL ORGANIZATION AND DISPUTE SETTLEMENT* 90 ff, 177 ff (1997).

¹⁸*Cf.* Ernst-Ulrich Petersmann, *Between ‘Member-Driven’ WTO Governance and ‘Constitutional Justice’: Judicial Dilemmas in GATT/WTO Dispute Settlement*, 21 J. INT’L ECON. L. 103 (2018).

¹⁹ 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, and 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. *Cf.* STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

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 examples of insufficient, democratic trade regulations in the USA (*Part II*) and in the EU (*Part III*) as illustrations of wider ‘systemic problems’ of multi-level governance of transnational PGs like human rights, 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.²⁰ Not only multilateral treaties approved by parliaments for protecting transnational PGs for the benefit of citizens, but constitutional democracy also cannot remain effective without democratic legislation transforming agreed ‘constitutional principles of justice’ into democratic and administrative rulemaking and adjudication supported and controlled by citizens.²¹ Government executives (like the US Trump Administration) taxing and restricting domestic citizens through illegal taxes amounting to hundreds of billions of US dollars—without parliamentary approval and effective judicial remedies—risk undermining constitutional democracies.²² As discussed in *Part IV*, constitutional democracies in Asia should exercise leadership for protecting global PGs by assuming their constitutional responsibilities for defining—through democratic legislation—more precisely the constitutional limits of utilitarian, inter-governmental power politics undermining PGs treaties

²⁰ Cf. *Transforming our World: The 2030 Sustainable Development Agenda*, UN G.A. Res.A70/1 (Sept. 25, 2015) (focusing on seventeen global goals like overcoming poverty, hunger and global warming, and protecting health, education, gender equality, access to water, sanitation and clean energy, urbanisation, the environment, human rights and social justice). Implementation of these ‘sustainable development goals’ is described as ‘localising the SDGs’ so as to empower local institutions, actors and civil society support.

²¹ 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 constitutionalisation* through (5) international law-making and (6) multi-level judicial protection of rights of peoples and citizens as ‘constitutive powers’ and ‘democratic principals’ of governance agents, see ERNST-ULRICH PETERSMANN, MULTILEVEL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS. METHODOLOGY PROBLEMS IN INTERNATIONAL LAW 15, 17, 112-13, 126-27, 174 ff (2017).

²² Cf. LEVITSKY & ZIBLATT, *supra* note 19, at 206 (“America is no longer a democratic model. A country whose president attacks the press, threatens to lock up his rival, and declares that he might not accept election results cannot credibly defend democracy . . . [T]he Trump presidency—together with the crisis of the EU, the rise of China, and the growing aggressiveness of Russia—could make [the idea of a global democratic recession] a reality.”).

approved by parliaments for the benefit of citizens and increasingly disregarded by trade diplomats in the WTO.

I. 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 counter-measures 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 of 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 General Agreement on Tariffs and Trade (GATT 1947) and its ‘provisional application’ since 1948 as a substitute for the stillborn 1948 Havana Charter for an International Trade Organisation (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 of the DSU, and the US-imposed recent changes to the North American Free Trade Agreement (NAFTA) reveal unilateral and bilateral power politics disregarding multilaterally agreed 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., the withdrawal of the USA from the WTO notwithstanding the requirement in the 1994 Uruguay Round Agreements Act of a joint resolution of the US Congress authorising such withdrawal of the USA from the WTO.

A. 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 that his Administration is authorised by the Congress. Trade agreements are concluded in the US as ‘congressional-executive agreements’, involving both houses of the Congress and the President.²³ Notwithstanding the US Constitution’s recognition of international treaties as part of “the supreme law of the land” (Article VI, section 2), congressional implementation of the 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 liberalisation and regulation. For instance, the US Trade Act of 1974 (as extended in 1979 and amended in 1984, 1988, 2002, and 2015) conditions the grant of negotiating authority for non-tariff measures 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 criticised 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.²⁴ 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.

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

²³ On the US constitutional and legislative regulation of the commerce power see, for example, the contributions by John Jackson, F.L. Morrison & Robert Hudec, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & E.U. Petersmann eds., 1993); Kenneth W. Dam & Cordell Hull, *The Reciprocal Trade Agreements Act and the WTO*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE 83-96 (E.U. Petersmann ed., 2005).

²⁴ Compare the criticism by Thomas Cottier, *Front-Loading Trade Policy-Making in the European Union: Towards a Trade Act*, EURO. Y.B. INT’L ECON. L. 35, at 49 ff (2017).

panel report found the legislative authorisation of the President to adopt unilateral import restrictions to be consistent with WTO law only on the condition that—as promised by the USTR 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-inconsistent nature of foreign trade measures before any US finding that other WTO members violated their WTO obligations).²⁵ Hence, 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 and II of the GATT and US dispute settlement obligations under Article 23 of the DSU.²⁶ Numerous WTO panel and AB proceedings have found US regulations and administrative acts (e.g., ‘zeroing practices’ for calculating anti-dumping duties) to be inconsistent with WTO law.²⁷

Similar to the threat by USTR, Carla 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,²⁸ the US blockage—since 2016—of the filling of vacancies of AB members seems to be motivated by insistence from the same protectionist lobbies to resist compliance with the WTO AB case-law on anti-dumping and to re-negotiate WTO anti-dumping rules.²⁹ US claims of ‘judicial over-reach by the AB’ were made only more recently; they are not only inconsistent with US requests for ‘dynamic judicial interpretations’ in many WTO disputes but also with the WTO legal requirement of interpreting and clarifying indeterminate WTO rules “in accordance with customary rules of interpretation of

²⁵ Panel Report, *United States — Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000).

²⁶ Request for Consultations by China, *United States — Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543 (Apr. 5, 2018).

²⁷ For a discussion of the, by now, about twenty WTO dispute settlement reports on ‘zeroing’ in anti-dumping see, for example, Dukgeun Ahn & Patrick Messerlin, *US Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China: Never Ending Zeroing in the WTO?*, 13 WORLD TRADE REV. 267 (2014).

²⁸ This threat prompted GATT Director-General, Arthur 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 experts in anti-dumping laws.

²⁹ See, in this sense, the analysis by former US congressman and former AB chairman, James Bacchus. James Bacchus, *How to Solve the WTO Judicial Crisis*, CATO AT LIBERTY (Aug. 6, 2018), <https://www.cato.org/blog/how-solve-wto-judicial-crisis>.

international law” (Article 3 of the DSU). So far, they were not supported by other WTO members; all 146 AB reports up to June 2018 were adopted by the WTO membership, thereby creating legitimate expectations in the non-discriminatory application of the legal interpretations consistently approved by the DSB. The unusual lack of any Preamble explanation of the objectives of the WTO Anti-dumping Agreement confirms that most WTO members—who introduced their own 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 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 the 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 legitimacy of US trade regulation; they are 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).

B. Democratic 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*.³⁰ 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,³¹ raises doubts about the democratic legitimacy of import taxes and restrictions introduced by US

³⁰ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), upholding President Trump’s ‘Muslim travel and immigration ban’ prohibiting nationals from majority-Muslim countries from coming to the USA under certain visa categories.

³¹ For a ‘public choice explanation’ of the strong business and lobbying influences on trade decision-making in the US Congress and US administration see, for example, Charles Kershaw Rowley & Willem Thorbecke, *The Role of the Congress and the Executive in US Trade Policy Determination: A Public Choice Analysis*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 347-69 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993); David E. 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, *supra* note 23, at 409-12.

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 policies under President Trump, constitutional democracy in the trade policy area—and the post-war US-led multilevel trading system—are no longer effectively protected inside the USA.³²

In both WTO and US jurisdictions, the legality of import restrictions ordered by President Trump is increasingly being challenged.³³ 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, Steve Charnovitz, filed a public comment explaining why the proposed imposition of additional 25% *ad valorem* duties on numerous Chinese products would violate WTO law (e.g., GATT Article II and Article 23 of the DSU) and impose “disproportionate economic harm to US interests”.³⁴ The 2018 US import restrictions on steel and aluminium products ordered by the Trump administration on the basis of Section 232 of the US Trade Act (national security interests), were challenged not only as illegal safeguard measures in WTO dispute settlement proceedings initiated against the USA by, *inter alia*, China, India, the EU, Canada, Mexico, Norway, Russia, and Switzerland.³⁵ The American Institute for International Steel and two companies also challenged Section 232 in the Federal US Court of International Trade as an unconstitutional, improper delegation of legislative authority violating the US constitutional principle of separation of powers. Notwithstanding the lack of a 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 . . . to provide the executive with extremely broad discretion, leaving little room for judicial review”³⁶, 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 same US import tariffs were imposed for

³² Cf. *supra* notes 12 & 14.

³³ On the limited judicial standards of review and limited judicial protection of individual rights under US trade laws, see F.L. Morrison & R.E. Hudec, *Judicial Protection of Individual Rights under the Foreign Trade Laws in the United States*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 91-133 (M. Hilf & E.U. Petersmann eds., 1993).

³⁴ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Docket No. USTR-2018-0018, NOTICE OF ACTION AND REQUEST FOR PUBLIC COMMENT CONCERNING PROPOSED DETERMINATION OF ACTION PURSUANT TO SECTION 301: CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018), https://ustr.gov/sites/default/files/2018-0018%20notice%206-15-2018_.pdf (last visited Dec. 9, 2018).

³⁵ Cf. note 4.

³⁶ Morrison & Hudec, *supra* note 33, at 132.

economic rather than for ‘*security interests*’ as defined in Article XXI of the GATT and constitute safeguard measures inconsistent with Articles I, II, and XIX of the 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 decision-making 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 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 a 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 law-making 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*³⁷, 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. ...

³⁷ *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

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 non-delegation doctrine and creates an administrative scheme that is inconsistent with the separation of powers and the checks and balances embedded in our Constitution. As Justice Scalia observed in his dissenting opinion, in which Chief Justice Roberts and Justice Alito joined, in *Zivotofsky 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 organised 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.”³⁸

C. Democratic Legitimacy of Executive Powers to Terminate Trade Agreements?

The more globalisation transforms *national* PGs into *transnational* PGs—which no single state or government can protect unilaterally without international treaties and multilevel governance³⁹—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 from the 2015 Paris Climate Change Prevention Agreement; he threatened US withdrawal also from trade agreements like the 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

³⁸ Simon Lester, *The Constitutional Claim Against Section 232*, INT’L ECON. L. & POL’Y BLOG (July 23, 2018), <http://worldtradelaw.typepad.com/ielpblog/2018/07/the-constitutional-claim-against-section-232.html>.

³⁹ Examples include global supply chains for ‘international production’ of goods, or protection of transnational monetary, trading, investment, environmental and rule-of-law systems. *Cf.* Petersmann, *supra* note 21.

conclude that the President lacks authority—without new authorisation from the Congress—to unilaterally terminate existing trade agreements.⁴⁰ By repealing agreements incorporated by the Congress into domestic federal law and rendering ineffective entire areas of congressional trade legislation without constitutional or statutory authorisation of the President to unilaterally terminate trade agreements, the President would upset the constitutional balance of legislative and executive powers and undermine constitutional democracy in the USA.⁴¹

D. Need for Legislative Restraints on Trade Policy Powers

The Bipartisan Trade Priorities and Accountability Act of 2015⁴² recognizes as “the principal negotiating objectives of the United States” to “achieve full implementation and extend the coverage of the World Trade Organisation and multilateral and plurilateral agreements to products, sectors and conditions of trade not adequately covered” (Section 102(b)(13)). The blatant violations of substantive and procedural WTO obligations by the US Trump administration ignore this democratic mandate. This neglect for democratic constitutionalism was also illustrated by its leaked draft of new trade legislation authorising and legitimising the increasing use of presidential powers to raise import taxes in clear violation of the basic principles of WTO law (e.g., Article I of GATT on most-favoured-nation treatment and Article II of 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 liberalisation; 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.⁴³ This would not amount to just 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

⁴⁰ J.P. Trachtman, *Power to Terminate US Trade Agreements: The Presidential Dormant Commerce Clause Versus an Historical Gloss Half Empty*, TUFTS UNIV. FLETCHER SCH. L. DIPLOMACY 1 (Oct. 15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015981.

⁴¹ Trachtman, *id.*, 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”). Trachtman explains why there is neither a statutory authority for Presidential termination of trade agreements nor an implicit authorisation of the President to terminate trade agreements unilaterally without concurrent authorisation by Congress: “Termination of commercial treaties . . . may be either an area of exclusive Congressional authority or an area of concurrent authority”. *Id.* at 10.

⁴² P.L. 114-26 of 6 January 2015.

⁴³ Compare the text and comments under *How to Negotiate Lower Tariffs*, INT’L ECON. L. & POL’Y BLOG (July 1, 2018).

instance, Article XVI:4 of the 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”.

The Republican majorities in the US Congress have so far failed to democratically control the illegal trade policies of the Trump administration. However, the adoption of this draft legislation by the Congress appears unlikely in view of the increasing calls from US trade lawyers for legally limiting 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 reforms⁴⁴:

- “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 U.S. persons in trade agreement-based U.S. 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 U.S. economy of trade agreements to which the U.S. is not a party, starting immediately with the Free Trade Agreement (FTA) that . . . Canada 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

⁴⁴ Albert Moritz Wolff, *Stressed in an Age of Populism: Recommendations for Changes in US Trade Law and Policy* (IIEL Issue Brief 04/2017, 2017).

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 U.S. retaliatory measures are announced or made effective, such resolution to have the effect of preventing a U.S. measure from going into effect or terminating the U.S. 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 decisions were 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 U.S. 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 institutionalising more inclusive ‘public reason’ and enhancing democratic accountability, it could also limit what former AB President, James Bacchus, has criticised as “the American assault on the rule of law in world trade” based on President Trump’s belief that “might makes right”.⁴⁵ Even though former US AB judges (like James Bacchus and Jennifer 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 rule of law in the trade policy area.

II. EUROPEAN ECONOMIC CONSTITUTIONALISM AS ALTERNATIVE PARADIGM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS

As recalled in Part II, the neo-liberal, post-war Bretton Woods agreements were initiated by the USA under the leadership of Secretary of State, Cordell Hull. 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 of the 1948 Havana Charter for an ITO by the US). The eight

⁴⁵ Cf. Bacchus, *supra* note 10.

‘GATT Rounds’ of multilateral trade negotiations were strongly shaped by US trade interests (e.g., in multilateralising US trade remedy laws, restrictions of cotton and textiles trade, liberalisation of agricultural and services trade, and 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 influenced by 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 of the TEU) founded on a micro-economic common market constitution (e.g., based on EU competition law, EU common market freedoms, and 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 institutionalising a coherent, worldwide trading system based on the Bretton Woods, GATT and WTO agreements and their underlying economic and legal principles.⁴⁶ This ‘Geneva School’ of European academics teaching at Geneva and/or working in the GATT Secretariat persistently criticised one-sided, *neo-liberal economic arguments* for liberalising, de-regulating and privatising 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 environmental 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, limiting anti-

⁴⁶ For a detailed account of these diverse schools of ‘law and economics’, ‘constitutional economics’, multilevel ‘ordo-liberalism’ and ‘ordo-constitutionalism’, see QUINN SLOBODIAN, *GLOBALISTS, THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018).

competitive abuses of trade policy powers (e.g., discriminatory anti-dumping measures, subsidies, and 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’ (Preamble to the WTO Agreement) 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, participating in annual WTO meetings of members of national parliaments and promoting synergies also between WTO law and human rights law.⁴⁷

A. EU Trade Policies Lack Adequate Democratic Legislation and Accountability

In contrast to the state-centred US model of congressional prerogatives for trade legislation, the exclusive EU competence for the common commercial policy (compare Article 207 of the Treaty on the Functioning of the European Union (TFEU)) is exercised more by the EU’s executive institutions (the EU Commission and the 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 of the TFEU) and conclude international trade agreements (Article 218 of the 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 also rights of citizens and transnational rule of law that can be effectively enforced through multilevel judicial remedies by governmental as well as non-governmental actors in the now thirty-one EEA member states. Since the 1990s, the CJEU, the EFTA Court, and also the European Court of Human Rights interpreted their respective ‘constitutive agreements’ as ‘constitutional instruments’ protecting rights of governments and of citizens through multilevel, legal and institutional democratic and judicial institutions and ‘checks and balances’. National and European courts recognised fundamental rights also as general principles of European constitutional law constituting, limiting, regulating and

⁴⁷ Cf. ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS, ch. VII (2012).

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*, but international treaties concluded by the EU are also incorporated as ‘integral parts’ into European law (e.g., the UN, the WTO, and the Council of Europe agreements protecting transnational PGs inside and beyond the EU) ‘integrating’ the EU’s multilevel governance system.

In external relations with third countries, however, the CJEU insists on legal and judicial autonomy of EU law. It has not only refrained from recognising UN, WTO or investment adjudication as legally binding obligations of the CJEU, but has also denied legal liability of EU institutions or EU states vis-à-vis citizens whose rights protected by the EUCFR are adversely affected by EU violations of UN and WTO agreements.⁴⁸ 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 have increasingly criticised 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 and 10 of the TEU) so as to promote democratic accountability, inclusive ‘democratic public reason’, and ‘democratic law’ recognising EU citizens as legal subjects of EU law. But, until recently, the EU negotiated free trade agreements (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).⁴⁹ Even though EU trade policies have recently become more transparent, EU citizens continue to complain that FTAs signed by the EU risk undermining 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 and 3 of the 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

⁴⁸ Cf. THE EU AND INTERNATIONAL DISPUTE SETTLEMENT (M. Cremona, A. Thies & R.A. Wessel eds., 2017); A. STEINBACH, EU LIABILITY AND INTERNATIONAL ECONOMIC LAW (2017).

⁴⁹ Cf. Petersmann, *supra* note 15.

effective remedy” of ‘everyone’ (Article 47 of the EUCFR) against harmful FTA market regulations—runs counter to the EU obligations (e.g., under Arts 9-12 of the TEU) of protecting constitutional, representative, participatory and deliberative democracy and fundamental rights of citizens. The EU has failed to meet its legal duty (for instance, pursuant to Article 52 of the EUCFR) to justify how such ‘disempowerment of EU citizens’ could be necessary for ‘protection of citizens’ (Article 3 of the TEU). As “the Union is founded on . . . the rule of law” (Article 2 of the TEU), Articles 3 and 21 of the TEU prescribe “strict observance . . . of international law” and ‘consistency’ of internal and external market regulations for EU external relations without conferring on the 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 (compare Articles 8.18 and 30.6 of the 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 of the TEU) protect every citizen’s “right 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 the ‘necessity’ and ‘proportionality’ of restrictions (Article 52)—are neither mentioned nor protected in transatlantic FTAs (e.g., those with Canada and Mexico).
- EU law requires the Union to ‘ensure consistency’ of internal and external market regulations as well as among the “different areas of its external action” (Article 21 of the TEU). EU common market law became effective due to its citizen-driven, decentralised enforcement. Equally, FTAs with other European countries (like the EFTA countries and Turkey) can be invoked and enforced by citizens in domestic courts. The ‘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.⁵⁰

B. Need for ‘Constitutionalising’ EU Trade Policies through Democratic Legislation

⁵⁰ Cf. TRANSATLANTIC ECONOMIC DISPUTES: THE WTO, THE EU AND THE USA (Ernst-Ulrich Petersmann & M. Pollack eds., 2003).

The EU's 'cosmopolitan foreign policy constitution' (e.g., based on Articles 3 and 21 of the TEU and the EUCFR)⁵¹ has failed to prevent the EU executive from violating WTO rules (e.g., the collective duty under Article 17 of the 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. Thomas Cottier has explained why parliamentary elaboration of "a European Trade Act, perhaps called International Trade, Investment and Co-operation Regulation", could assist in 'constitutionalising' 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 trade and investment agreements with third countries.⁵² The more lack of transparent, inclusive negotiations of EU FTAs has provoked opposition from civil society and national parliaments, the stronger becomes the need for institutionalising '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' for 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 competencies.

Providing for comprehensive civil society consultations from the beginning of such treaty negotiations, transparent procedures, protection of EU citizens' rights, and respect for uniform and coherent treaty principles will promote democratic understanding and support, 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 April 6, 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

⁵¹ Cf. Petersmann, *supra* note 15.

⁵² Cf. Cottier, *supra* note 24, at 35. On 'constitutionalisation' 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 institutionalisation of 'democratic public reason' promoting the use of decentralized knowledge (for example, about human and natural resources, democratic preferences) dispersed among millions of individual citizens, see Petersmann, *supra* note 21.

national approval of mixed agreements to EU concessions in other unrelated policy areas. As illustrated by the US Trade Act of 1974, EU treaty negotiations on behind-the-border ‘non-tariff trade barriers’ also require stronger parliamentary control, involvement and approval requirements.

C. 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 the NAFTA and the 2015 Climate Change Prevention Agreement) reflect similar governance failures caused by ‘populist resistance’ against social adjustment pressures.⁵³ 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 and debt disciplines, WTO rules, and US banking sector reforms following the 2008 financial crisis);
- misinform domestic public opinion (e.g., about the costs of ‘Brexit’, the reality of climate change, and inadequacies of financial regulation), disrupt mutually beneficial economic and legal integration, and fail to promote rule of law and social adjustment assistance; and
- present people in their local constituencies (e.g., the less than 200,000 steel workers inside the USA, taxpayers and pensioners suffering from unsustainable public debt in Greece, and 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 and Eurozone member states, non-discriminatory trade competition among WTO member states, and 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 to invoke and defend ‘PGs treaties’ in domestic jurisdictions as ‘democratic principals’ that must hold multilevel governance agents

⁵³ On ‘populism’, see *supra* note 19.

legally, democratically, and judicially more accountable in order to maintain transnational rule of law. National welfare states are not ‘victims’ of UN/WTO law or EU law, but rather of domestic populism reflecting inconsistent, domestic policies. The post-war ‘revolutions’ triggered by globalisation and by the transformation of national welfare states into multilevel governance of transnational PGs—like the universal recognition of human rights 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). This must be done by reconciling and ‘integrating’ the five competing conceptions of 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 so as to make legal and economic development sustainable and more legitimate.⁵⁴ The careful ‘balancing’ of trade, intellectual property and health rights and obligations in the WTO panel reports on *Australia — Certain Measures Concerning Trademarks, Geographical Indications and other Plain-Packaging Requirements Applicable to Tobacco Products and Packaging* of June 28, 2018 confirms that impartial, independent third-party adjudication in the WTO can protect public health and related human rights through ‘interpretative, systematic integration’ of fragmented treaty regimes negotiated by WTO members in separate international institutions like the WTO, the World Intellectual Property Organization, the World Health Organization, and UN human rights institutions.⁵⁵

Arguably, the very diverse forms of European economic integration law and related ‘multilevel constitutionalism’ (e.g., inside the EU, the EEA, and 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 some African, American and Asian economic integration agreements. As discussed above, abuses of veto-powers and ‘disempowerment of citizens’ in intergovernmental FTAs can be limited by strengthening constitutional, representative, participatory and deliberative forms of multilevel, ‘democratic governance’ and constitutionalism (e.g., based on stronger forms of ‘judicial comity’ in multilevel judicial protection of transnational rule of law and equal individual rights). For instance, regular evaluation and public criticism of trade adjudication reports by political and parliamentary institutions—in close cooperation with civil society and trade lawyers—could assist in

⁵⁴ For a discussion of these five competing conceptions of IEL and of the need for their ‘systemic interpretation’ and integration, see Petersmann, *supra* note 21, at 338 ff.

⁵⁵ See E.U. Petersmann, *How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law?: WTO Dispute Settlement Panel Upholds Australia’s Plain Packaging Regulations of Tobacco Products* (EUI Working Paper Law 2018/19, 2018).

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 transformation of the *de facto inter-parliamentary meetings inside the WTO* into a formal WTO institution protecting citizens, their rights, and transnational rule of law against intergovernmental power politics.

III. CONSTITUTIONAL DEMOCRACIES IN ASIA SHOULD SUPPORT STRONGER MULTILEVEL GOVERNANCE OF PUBLIC GOODS

Part I asked why democratic constitutionalism in 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. *Part 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. *Part 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—in the USA and the EU, no less than in Asian WTO members—undermines the promotion of citizen welfare through a rules-based world trading system. Constitutional democracy requires stronger legal, democratic and judicial accountability of UN/WTO governance of PGs—in Asia, no less than in Africa, the Americas, and Europe.⁵⁶ The more globalisation transforms *national PGs* into *transnational PGs* that no state—also in Asia—can unilaterally protect without international treaties and without their domestic implementation, the stronger becomes the need for legal and institutional limitations of inter-governmental 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 decentralised correction of market failures as well as of governance failures by ‘institutionalising public reason’ and impartial third-party adjudication protecting rule of law and administration of justice.

⁵⁶ Cf. Petersmann, *supra* note 21; GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES (T. Suami et al. eds., 2018).

This concluding Part uses the example of India for explaining why constitutional democracies—also in Asia—have reasonable self-interests in defending transnational rule of law, individual and democratic rights and judicial accountability in multilevel governance of PGs like the rules-based world trading system. In contrast to China’s state-led ‘Belt and Road Initiative’ for redesigning its external trade and investment relationships with more than sixty-five third countries without regard for human rights⁵⁷, constitutional democracies in Asia should join other democratic WTO member countries in protecting the WTO legal and dispute settlement system in conformity with the human and constitutional rights of their citizens as increasingly protected beyond national borders through multilevel, transnational economic and human rights law.⁵⁸ The constitutional limits of trade policies and of multilevel governance of transnational PGs for the benefit of citizens remain controversial; the more they are ignored by government executives, the greater the need for them to be clarified through democratic legislation rather than through executive ‘bilateral deals’ and power politics as proposed by the US’ Trump administration.⁵⁹

A. *India’s Incomplete ‘Economic Constitutionalism’*

The adoption of national Constitutions (written or unwritten) by all 193 UN member states reflects worldwide recognition of *constitutionalism* (e.g., as 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 PGs, and equal 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

⁵⁷ Cf. E.U. Petersmann, *International Economic Law Without Human and Constitutional Rights?: Legal Methodology Questions for My Chinese Critics*, 21(1) J. INT’L ECON.L.213 (2018). Both Chinese and US external economic policies are strongly influenced by national security and political self-interests.

⁵⁸ Cf. TRANSNATIONAL LAW: RETHINKING EUROPEAN LAW AND LEGAL THINKING (M. Maduro et al. eds., 2014); Samantha Besson, *Human Rights as Transnational Constitutional Law*, in HANDBOOK ON GLOBAL CONSTITUTIONALISM 234 (A.F. Lang & A. Wiener eds., 2017) [hereinafter HANDBOOK].

⁵⁹ On the need for functionally limited ‘multilevel constitutional restraints’ on multilevel governance of transnational PGs, see Petersmann, *supra* note 21. Global constitutionalism is “a stand of thought (outlook or perspective) and a political agenda which advocates the application of constitutional principles, such as the rule of law, checks and balances, human rights protection and democracy, in the international legal sphere in order to improve the effectivity and fairness of the international legal order”. Garrett Wallace Brown, *Cosmopolitanism and Global Constitutionalism*, in HANDBOOK, *supra* note 58, at 93-105.

national peoples inside territorial states, the *political constitutions* often remain dominated by power politics (e.g., by political monopolies of communist parties and 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 in other sectors of transnational cooperation require complementing legal and political constitutionalism by *sectorial constitutionalism* like the EU’s microeconomic common market constitution and macroeconomic monetary constitution.⁶⁰ The diverse democratic preferences and legal traditions of people require respect for the reality and legitimacy of *constitutional pluralism* and of *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 decentralised, cybernetic information, coordination and sanctioning systems).

India’s democratic constitutionalism was a response to the universal commitment to human rights in the UN Charter and to British colonial rule, during which the economy of British India was remarkably stagnant and characterised by social oppression (e.g., caste systems), famines, and low life expectancy. India’s post-independence achievements in pioneering democratic governance, maintaining a secular state, and achieving rapid economic growth since the 1990s (i.e., after previous experimentation with Gandhi’s promotion of a ‘return to the spinning wheel in the village’ and Nehru’s socialist economic policies) saw a drive towards liberalisation of the economy and of trade barriers. Yet, the legal promises of economic and social human rights remain inadequately realised in India’s economy, as illustrated by unnecessary poverty, environmental problems, social discrimination (e.g., against Dalit castes and women), inadequate infrastructures and social services (from schooling and health care to provision of food security, safe water, and drainage), unequal income distribution, and corruption.⁶¹ Today, the universal recognition of ‘inalienable’ human rights by all UN member states entails that law as an instrument of regulating the socialisation of citizens in societies, economies, and polities must be legitimised not only by consent of citizens and democratic governance, but human and constitutional rights must also constitute, limit, regulate and justify multilevel governance of PGs so that citizens can hold

⁶⁰ Cf. KAARLO TUORI, EUROPEAN CONSTITUTIONALISM (2015).

⁶¹ Cf. JEAN DRÉZE & AMARTYA SEN, AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS (2013).

multilevel governance powers accountable in case of abuses of power or violations of human and constitutional rights. An editorial published in *The Economic Times* of July 6, 2016, *25 Years of Economic Reforms: From Super-Beggar to Potential Superpower*,⁶² critically remarked:

“The economic reforms launched by PV Narsimha Rao in July 1991 have transformed India so much that it’s difficult to recall how bad things used to be.

Back in 1991, India pretended to be a Third World leader. In fact, its development model evoked derisive laughter among many developing countries that had grown twice as fast. They found Indians good at drafting resolutions in international meetings, but little else.

Today, India is called a potential superpower by journals ranging from Forbes to The Guardian. India is called the only Asian power that can check China in the 21st century. This is why the US arranged for its entry into the nuclear club and now backs it for a permanent seat in the UN Security Council.”

During the Uruguay Round negotiations leading to the 1994 WTO Agreement, India’s claim of being a Third World leader by focusing on the negotiation of ‘special and differential treatment’ provisions in the Uruguay Round Agreements was criticised by other developing countries with much more active involvement in trade liberalisation and GATT dispute settlement proceedings than India. Since the 1990s, the ‘great economic divergence’ between ‘West’ and ‘East’ since colonial times (e.g., industrialisation in Western countries and exploitation of Asian colonies) continues to be transformed into the ‘great economic convergence’ driven by rapid industrialisation, dynamic trade and economic growth in many Asian countries.⁶³ By reducing its tariffs from more than 80% in 1990 to about 13% in 2017 (e.g., due to Prime Minister Modi’s ‘Make in India’ campaign), India progressively opened its market to foreign competition. As the world’s largest democracy, India should be among the most legitimate and most powerful leaders for protecting the WTO trading and legal system for the benefit of citizens and their human rights. Yet, in the Doha Round negotiations and the recent undermining of the WTO dispute settlement system, the Indian government has been criticised for exercising insufficient leadership and neglecting its

⁶² S.A. Aiyar, *25 Years of Economic Reforms: From Super-Beggar to Potential Superpower*, ECON. TIMES, July 6, 2016, <https://blogs.economictimes.indiatimes.com/Swaminomics/25-years-of-economic-reforms-from-super-beggar-to-potential-superpower/>.

⁶³ Cf. RICHARD BALDWIN, *THE GREAT CONVERGENCE, INFORMATION TECHNOLOGY AND THE NEW GLOBALISATION* (2016).

constitutional mandate of protecting the ‘freedom of trade, commerce and intercourse within the territory of India’ (Articles 301 to 307 of India's Constitution) for the benefit of Indian citizens engaged in transnational trade and investments.⁶⁴

B. India's Successful Use of the WTO Dispute Settlement System

Following the entry into force of the 1994 WTO agreements, Dr. Rao—then director of the legal affairs division in India's Ministry of Foreign Affairs—asked me (in my role as WTO legal consultant for developing countries involved in WTO dispute settlement proceedings) how India could ever actively use the WTO dispute settlement system in view of its lack of international lawyers knowledgeable of GATT/WTO jurisprudence. India's active participation in the WTO dispute settlement system since 1995—for instance, in forty-four WTO disputes involving India as complainant (twenty-one) or respondent (twenty-three) during the first twenty years of the WTO (1995-2015)⁶⁵—vindicated my reply to Dr. Rao that India had thousands of brilliant lawyers who could quickly become experts in GATT/WTO law and adjudication, provided that the government supported their legal education. It also illustrated why ‘argumentative Indian lawyers’ so often played a key role in developing WTO jurisprudence by clarifying the often indeterminate “basic principles . . . underlying this multilateral trading system” (Preamble to the WTO Agreement).

India's regular participation in more than 150 WTO dispute settlement proceedings (e.g., as complainant or respondent in forty-four disputes and as a third party in 115 disputes up to early 2016) contrasts with India's participation in only three GATT disputes during 1948-1994. India's rare participation in GATT dispute settlement proceedings had been handled with a minimum of human and legal resources (e.g., India's ambassador to the GATT drafting the legal submissions to a GATT dispute settlement panel together with one official from India's Ministry of Commerce). India's much more active use of WTO dispute settlement proceedings had been rendered possible by building-up domestic legal capacities for international trade law and by more effective coordination inside India between trade policy officials, legal experts, and industry representatives. India's trade liberalisation and increasing foreign exchange earnings have facilitated active use of the legal services of foreign law firms and of the Geneva Advisory

⁶⁴ Cf. Ernst-Ulrich Petersmann, *Legal Methodology Problems in International Economic Law and Adjudication*, 7 JINDAL GLOB. L. REV. 279 (2016).

⁶⁵ The following discussion of India's GATT and WTO dispute settlement practices is based on the case-studies in WTO DISPUTE SETTLEMENT AT TWENTY: INSIDERS REFLECTIONS ON INDIA'S PARTICIPATION (Abhijit Das & J.J. Nedumpara eds., 2016).

Centre on WTO law. In the forty-four WTO disputes involving India as a complainant or defendant, eighteen resulted in WTO panel and/or AB proceedings and dispute settlement reports that required systemic input from government officials, legal experts, and industry representatives in order to defend India's legal arguments convincingly. The now more than 560 WTO dispute settlement proceedings inevitably contribute to legal and judicial clarification of WTO rules and judicial procedures. India actively influenced this jurisprudence rather than remaining a passive observer. While India's complaints focused on a narrow category of products (notably steel, textiles, pharmaceuticals, and marine products), India's measures challenged by its trading partners involved a much broader range of products. India's complaints were mainly motivated by:

- mitigating the adverse trade impact of WTO-inconsistent measures of India's trading partners;
- addressing systemic issues that could adversely affect future trade; and
- seeking to better understand and apply WTO rules (e.g., by using WTO dispute settlement procedures for obtaining additional information on foreign regulations).

India's preference for settling rather than litigating WTO disputes is in line with the declared DSU objective "to secure a positive solution to a dispute", preferably a "solution mutually acceptable to the parties" (Article 3:7). In all the disputes that India lost, its compliance measures were adopted within the 'reasonable period of time' and were not challenged by a 'compliance panel'. Like other federal states, India has been confronted with particular implementation problems if the WTO legal obligations had been violated by provincial measures (e.g., local fees levied by State governments). Some of India's WTO disputes have clarified important WTO provisions (like the GATT provisions on balance-of-payments measures, Article XXIV GATT, the 1979 'Enabling Clause', the anti-dumping rules on 'fair price comparisons', the concept of 'public body' in the WTO subsidy rules, and legal principles like 'legitimate expectations') and WTO dispute settlement procedures (e.g., on allocation of burden of proof, *amicus curiae* briefs, non-violation complaints, *res judicata*, joint representation of several WTO members by the Advisory Centre on WTO Law, and enhanced third party rights). India's dependence on foreign law firms has come down substantially in recent years without tangibly compromising India's prospects in WTO dispute settlement. Owing to the successful cooperation between government officials, other domestic legal experts, and industry associations, India's domestic 'trade-related legal capacity' has dramatically increased and exemplifies how developing countries can actively defend their national interests in the WTO dispute settlement system. India's complaint in the *EC-drug seizure dispute* illustrated India's capacity to persuade the EC to change its relevant Regulation without recourse to WTO panel proceedings. As a complainant, India used WTO dispute settlement proceedings for gaining greater

market access abroad (e.g., by challenging illegal US safeguard measures). As a respondent in WTO disputes, adverse WTO dispute settlement rulings often assisted India in reforming its domestic trade laws (e.g., by promoting scientific ‘risk assessment procedures’, phasing out balance-of-payments restrictions and welfare-reducing protectionism, and undertaking domestic tax reforms) and using the flexibilities provided in WTO rules (e.g., for adjusting intellectual property regulations to developmental needs).

India’s active participation in landmark WTO disputes (such as *EC — Bed Linen*, *India — Autos*, *US — Offset Act (Byrd Amendment)*, *EC — Tariff Preferences*, and *Turkey — Textiles*) contributed to clarifying WTO rules and dispute settlement procedures (e.g., the application of ‘non-discrimination’ in the Enabling Clause). It also helped India’s Ministry of Commerce, business associations, Indian law schools, and law firms to steadily increase their expertise in WTO law and, thereby, reduce the need for hiring foreign lawyers to take up India’s cases at the WTO at high costs. The ‘public-private participation model’ used by India in its WTO dispute settlement proceedings has promoted bottom-up participation in WTO disputes by vigilant industries and professional trade lawyers supporting the work of governmental trade officials and their ‘domestic legal capacities’ in participating in WTO disputes and in designing ‘litigation strategies’ (which often depend on industry support in identifying foreign market access barriers). India’s strategy to influence WTO jurisprudence by actively participating in WTO dispute settlement proceedings (e.g., by intervening as a third party), like India’s establishment of governmental trade centers promoting cooperation among government officials, businesses and lawyers knowledgeable of WTO law, were facilitated by India’s independent judicial system and long-standing litigation practices in English language. India’s experiences with promoting civil society participation and ‘legal capacity-building’ in India’s active use of the WTO dispute settlement proceedings offer important lessons for other less-developed countries.

C. Could India hold WTO Power Politics More Legally and Democratically Accountable?

India is the largest ‘constitutional democracy’ in the world. In contrast to many other Asian countries (like China and some of the ten ASEAN countries) with ‘communist’ or ‘communitarian’ (e.g., Confucian) legal traditions without effective legal and judicial protection of individual rights, India’s Constitution guarantees fundamental rights, independent ‘courts of justice’, and ‘freedom of trade and commerce’. India’s active participation in UN human rights conventions and ILO labour rights conventions also offer a multilevel, legal framework for Indian leadership in multilevel trade governance, for instance, by using free trade and investment agreements for promoting human and fundamental rights of citizens and transnational rule of law in India’s relations with other Asian countries and WTO members. Such free trade and investment agreements of India with other

democratic WTO members—like promotion of rights-based plurilateral trade agreements among WTO members (following the example of the WTO Government Procurement Agreements)—could offer legally and democratically more justifiable models for citizen-oriented, legal ‘bottom-up reforms’ of the world trading system compared with the top-down Chinese initiatives for intergovernmental trade and investment agreements for a ‘Silk Road Economic Belt’ (following the ancient silk road from China through central Asia and the Middle East to Europe) and for a ‘21st Century Maritime Silk Road’ (linking China to Southeast Asia and East Africa) without protecting human and labour rights and other, multilevel judicial safeguards of transnational rule of law.

1. Why do ‘Cosmopolitan Legal Systems’ Tend to be More Effective and Legitimate?

Democratic, republican and cosmopolitan constitutionalism argue that constitutional rights of and remedies available to citizens serve not only as ‘principles of justice’ empowering citizens and constitutionally limiting abuses of power, but they also operate as incentives for using the knowledge and ‘republican virtues’ of citizens and their reasonable self-interests in decentralised enforcement of rule of law, thereby contributing to the ‘constitutionalisation’ and transformation of legal systems in conformity with the demands of citizens for protecting PGs.⁶⁶ Cosmopolitan principles, rights and responsibilities continue to dynamically evolve through hundreds of human rights treaties, private law and economic law treaties, environmental, criminal, humanitarian and consular law and other treaties and related jurisprudence. Multilevel judicial protection of such rights and of transnational rule of law promotes ‘civilising’, de-politicising and ‘constitutionalising’ ever more fields of international law for the benefit of citizens, for instance through:

- (1) co-operation between national courts and arbitral tribunals in the recognition, surveillance and enforcement of arbitral awards (e.g., deciding on contractual commercial rights, property rights, and judicial remedies) pursuant to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards;
- (2) cooperation among national and regional economic and human rights courts that protect individual rights and transnational rule of law for the benefit of citizens in free trade areas and customs unions, for instance, by

⁶⁶ Cf. Ernst-Ulrich Petersmann, *Cosmopolitan Constitutionalism: Linking Local Engagement with International Economic Law and Human Rights*, in LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS 26 (L. Biukovic & P. Pitman eds., 2017).

protecting individual rights beyond national frontiers through EU law, the law of the EEA, other regional economic and human rights agreements, and by multilevel judicial protection of such rights in domestic and regional courts;

- (3) the arbitration, annulment and enforcement procedures of the International Centre for the Settlement of Investment Disputes (ICSID) in cooperation with national courts that enforce ICSID arbitral awards on protection of investor rights and obligations under bilateral and multilateral investment treaties; or
- (4) the more than half a dozen of international criminal courts complementing national criminal jurisdictions and protecting individual rights and legal accountability through multilevel judicial cooperation.

The more globalisation transforms *national* into *transnational* PGs that no single state can unilaterally protect without international law and institutions, the more national Constitutions reveal themselves as ‘partial Constitutions’ that increasingly depend on multilevel governance of transnational PGs through international law and institutions protecting human rights across national frontiers, including the cosmopolitan right of “everybody . . . to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised” as recognised in the 1948 Universal Declaration of Human Rights (Article 28). Legal theory explains why consent by citizens and by democratic institutions to international rules enhances voluntary compliance with and decentralised implementation and enforcement of multilevel regulations of PGs; the democratic legitimacy of legal systems depends on constant interactions among the regulatory, justificatory and enforcement functions of legal systems. Sociological evidence confirms the importance of non-governmental ‘global citizen movements’ in mobilising civil society support for international ‘PGs treaties’ like the Rome Statute for the International Criminal Court, international trade and environmental treaties. Economics and ‘public choice’ theories explain why—just as economic market competition is enhanced by granting producers, traders, investors, and consumers actionable rights and judicial remedies for limiting abuses of power and other market failures—‘participatory democracy’ and accountability in ‘political markets’ can be enhanced by democratic and cosmopolitan rights of citizens. The more national rules and policies produce harmful ‘external effects’ beyond national frontiers, the more recognition of cosmopolitan rights of adversely affected traders, investors, workers, and consumers can set incentives for holding multilevel governance institutions accountable for ‘internalising’ such harmful ‘externalities’, for instance, through the WTO guarantees of judicial remedies at international and

domestic levels of trade governance.⁶⁷ Similar to India's successful promotion of 'private-public partnerships' in support of India's active participation in the WTO dispute settlement system, promoting civil society participation in support of Indian trade and investment policies could strengthen Indian leadership for defending transnational rule of law and protection of rights of citizens in the global division of labour.

2. Promoting the Global Public Good (Res Publica) of the World Trading System as a 'Republic of Citizens'?

Numerous WTO provisions recognize the 'systemic' nature of the WTO trading, legal and dispute settlement *systems*. Hence, WTO dispute settlement bodies have emphasised their powers to ensure 'due process of law' vis-à-vis all WTO members participating in WTO disputes, for example, if procedural problems arise (like requests for 'preliminary rulings' and for admission of *amici curiae* submissions) that are not specifically addressed in the incomplete WTO dispute settlement procedures. For instance, the *US — Section 301* Panel inferred from the explicit DSU objective of promoting "security and predictability of the multilateral trading system" (Article 3) that this treaty objective also requires protecting legal security of the market-place and its different operators: "DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it." By strengthening the 'multilevel' nature of the WTO legal and governance system and implementing the existing WTO obligations of protecting individual rights and judicial remedies against violations of WTO obligations more coherently, 'consistent interpretations', 'judicial dialogues', and 'judicial comity' among national, regional and WTO jurisdictions could be promoted. This could legitimise WTO jurisprudence in multilevel trade governance. For instance, the AB found that WTO dispute settlement panels are not "free to disregard the legal interpretations and the *ratio decidendi* contained in previous WTO Appellate Body reports that have been adopted by the DSB" and have "become part and parcel of the *acquis* of the WTO dispute settlement system";⁶⁸ similarly, the WTO legal requirement that "each Member ensure the conformity of its laws, regulations and administrative procedures with its obligations" under WTO law (Article XVI:4 of the WTO Agreement) justifies

⁶⁷ On the recognition of individual judicial remedies in GATT/WTO law and, at the request of trade diplomats, the prevention of individual rights to invoke WTO rules in domestic courts, see Petersmann, *supra* note 17, at 20ff, 194ff, 233ff.

⁶⁸ Appellate Body Report, *US — Stainless Steel (Mexico)*, ¶¶ 158, 160, WTO Doc. WT/DS344/AB/R (adopted on Apr. 30, 2008) ('security and predictability' in the WTO dispute settlement system implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case); ¶ 161 ("the relevance of a clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case").

multi-level judicial co-operation in promoting ‘consistent interpretations’ also in domestic implementation of WTO obligations. The human rights obligations accepted by all WTO members justify interpreting WTO legal obligations (e.g., on protecting individual judicial remedies) in conformity with the corresponding fundamental rights of citizens as ‘constituent powers’, ‘democratic principals’ of all governance agents, and main economic actors in international trade, even if such ‘constitutional interpretations’ protecting citizens inside democratic WTO members may be resisted by non-democratic rulers in other WTO member states. As a constitutional democracy and a federal state committed to protecting equal freedoms of citizens, India should exercise leadership for stronger protection of constitutional and human rights of citizens vis-à-vis abuses of intergovernmental power politics, thereby following the example of the EU and its member states committed to protecting rights of citizens and “strict observance of international law” (compare Articles 3 and 21 of the TEU) also in external relations and multilevel governance of international PGs.⁶⁹

The WTO dispute settlement system and India’s successful influence on WTO dispute settlement practices and jurisprudence illustrate the advantages of civil society participation. Most governments evaluate the WTO dispute settlement system—and celebrate it as the WTO’s ‘crown jewel’—from the perspective of its frequent use by governments (e.g., more than 565 requests for consultations under the WTO dispute settlement procedures and over 380 WTO dispute settlement decisions by September 2018), which is more frequent compared with other worldwide dispute settlement systems.⁷⁰ Yet, as discussed in Part I, the WTO dispute settlement system remains subject to power politics and delaying tactics.⁷¹

⁶⁹ While China seems to comply with WTO law and WTO dispute settlement rulings and has used WTO law for justifying domestic ‘rule of law-’ and judicial reforms inside China, it offers no effective judicial remedies for protecting human and constitutional rights; *Cf.* Petersmann, *supra* note 57. It has chosen a power-oriented approach disregarding China’s legal and judicial obligations under the UN Convention on the Law of the Sea (UNCLOS), as illustrated by its rejection of the arbitration award of July 12, 2016 under UNCLOS Annex VII concerning the Chinese claims to control more than 80% of the South China Sea without regard to UNCLOS obligations; see South China Sea Arbitration (Phil. v China), Case No.2013-19, (Perm. Ct. Arb. 2016). The award is published on the PCA website, www.pccases.com/web/view/7.

⁷⁰ For instance, only twenty-three cases and six verdicts issued by the International Criminal Court 2002-2017, and only twenty-five cases dealt with by the International Tribunal for the Law of the Sea 1995-2017.

⁷¹ For instance, more than 90% of the more than thirty-three ‘compliance panels’ pursuant to Article 21.5 of the DSU found that the WTO member concerned had not complied fully with the DSB ruling, triggering subsequent requests in twenty-one of these disputes for DSB authorisation of ‘suspension of concessions’ as countermeasures, notably against the USA and the EU.

From a citizen-perspective, it appears more reasonable to evaluate the WTO dispute settlement practices by using the benchmark of Article 3:2 of the DSU, which requires the “dispute settlement system of the WTO” to provide “security and predictability to the multilateral trading system”. Most trade and investment transactions among WTO members are driven by private consumer demand and supply of goods and services produced by non-governmental actors in response to international market competition. Numerous WTO agreements explicitly require all WTO members to protect individual access to legal and judicial remedies in domestic jurisdictions.⁷² Hence, the governmental perspective of evaluating the WTO dispute settlement system from the benchmark of its frequent use and comparatively speedy dispute settlement must be complemented by a citizen perspective focusing on protecting equal rights, consumer welfare, and legal ‘security and predictability’ of WTO practices for the benefit of citizens in WTO member countries. Such a ‘constitutional perspective’ argues for evaluating transnational trade regulation from the same perspective as domestic trade regulation, for instance, recognising equal rights of citizens as ‘first principle of justice’ and ‘equal opportunity’ and ‘social difference principles’ as ‘second principle of justice’ in constitutional democracies and ‘social market economies’.⁷³ The persistent neglect by WTO dispute settlement bodies of the customary law requirements of interpreting international treaties “in conformity with the principles of justice”, including also “human rights and fundamental freedoms for all”,⁷⁴ justifies additional criticism of the intergovernmental power politics in WTO practices, for instance, in view of the frequent failures of national governments to provide ‘security and predictability’ to non-governmental economic actors and the frequent neglect of the customary law requirement of interpreting treaties (like WTO commitments protecting movements of workers and global supply chains) in conformity with “human rights and fundamental freedoms for all”(e.g., ILO conventions adopted by WTO members).

Yet, human rights also protect individual and democratic diversity and popular sovereignty to decide which international agreements a country wishes to ratify. The need for limiting abuses of public and private power through ‘constitutionalising’ multilevel governance of PGs must respect the reality and legitimacy of ‘constitutional pluralism’ at national and international levels. It must

⁷² Compare Petersmann, *supra* note 64 and E.U. Petersmann, *International Dispute Settlement and the Position of Individuals under EU and International Law*, in THE EU AND INTERNATIONAL DISPUTE SETTLEMENT (Marise Cremona, Anne Thies & R.A. Wessel eds., 2017); ARMIN STEINBACH, EU LIABILITY AND INTERNATIONAL ECONOMIC LAW 213 (2017).

⁷³ For an explanation of these ‘principles of justice’ and of their relevance for modern IEL, see Petersmann, *supra* note 47, ch. II & III.

⁷⁴ Vienna Convention on the Law of Treaties, art. 31 & Preamble, May 23, 1969, 1155 U.N.T.S. 331. These treaty provisions are widely recognised as codifying customary international law.

learn from ‘comparative institutionalism’ by empirically exploring why certain ‘PGs regimes’ (e.g., the compulsory WTO dispute settlement system) have succeeded in protecting transnational PGs more effectively than other treaty regimes. The ‘executive dominance’ of intergovernmental rule-making has enabled the rational self-interests of diplomats to limit their legal, democratic and judicial accountability towards citizens. The ineffective parliamentary and judicial control of ‘disconnected UN/WTO governance’ confirms the need for constitutional reforms of multilevel governance of PGs; citizens and democratic parliaments must challenge intergovernmental power politics treating international PGs treaties—even if approved by parliaments for the benefit of citizens—as ‘breakable contracts’ that do not effectively protect rights and judicial remedies of citizens against harmful rule violations by their own governments.

3. Why are WTO Diplomats Wrong to Dismiss ‘Cosmopolitan Constitutionalism’ as a Utopia?

Cosmopolitan constitutionalism recognising transnational rights of ‘citizens of the world’ is increasingly becoming a regulatory paradigm not only in multilevel human rights law but also in other fields of international law like international criminal law, Internet law, sports law, regional market integration law, commercial, trade, investment and intellectual property law—also inside and among Asian democracies.⁷⁵ Non-democratic governments and diplomats often resist cosmopolitan ‘paradigm shifts’ to citizen-centred conceptions of international law based on the universal recognition of human rights, other cosmopolitan rights, and on the need for extending rights-based ‘republican constitutionalism’ to multilevel governance of transnational PGs. The rights-based jurisprudence of European courts (e.g., on protecting economic and privacy rights of citizens vis-à-vis multilevel economic regulation) illustrates the power-oriented one-sidedness of the intergovernmental prioritisation in WTO legal practices of rights of governments (e.g., in *China — Publications and Audiovisual Products* regarding ‘content control’ of electronic civil society communications) over rights of citizens (e.g., to governmental protection of freedom of opinion and privacy of citizens).

WTO diplomats often pursue self-interests in limiting their legal, democratic and judicial accountability in WTO legal practices affecting citizens. Hence, civil society, parliaments, and courts of justice have reasons to review whether intergovernmental neglect of rights of citizens risks undermining fundamental rights (e.g., of workers regulated by ‘GATS mode 4 commitments’ on international movements of workers, health rights of consumers of toxic tobacco products).

⁷⁵ Cf. E.U. Petersmann, *How to Reconcile Health Law and Economic Law with Human Rights?: Administration of Justice in Tobacco Control Disputes*, ASIAN J. WTO & HEALTH L. & POL’Y 11, 27-78 (2016).

The 2,500 years of political experiences with constitutionalism—since the democratic constitutionalism in ancient Athens and republican constitutionalism in ancient Rome—suggest that the effectiveness of multilevel governance of transnational PGs depends on empowering citizens to hold multilevel governance institutions legally, democratically and judicially accountable. Without such institutional separation and only limited delegation of democratic, legislative, executive and judicial powers, ‘public reason’ and the ‘democratic capacities’ of multilevel governance institutions cannot be institutionalised and protected against ‘populist abuses’. Economic constitutionalism limiting abuses of powers in economic markets, like democratic constitutionalism limiting abuses of power in ‘political markets’, empowers citizens to use their individual knowledge, autonomy, and responsibility in mutually beneficial ways which authoritative top-down governance disregarding human and constitutional rights can never realize.

In order to limit abuses of *foreign policy* powers, also multilevel governance of transnational PGs must be constitutionally restrained by embedding PGs treaties into domestic constitutional systems protecting human and constitutional rights, democracy and transnational rule of law for the benefit of citizens. As the largest democracy in the world, India should assume leadership for protecting the ‘constitutional trinity’ of human rights, democracy, and rule of law also in WTO governance of the world trading system for the benefit of citizens all over the world. Just as the eleven member states of the Trans-Pacific Partnership Agreement responded to President Trump’s withdrawal from this FTA by renegotiating and applying this Agreement among themselves (as from December 30, 2018) for the benefit of their citizens, all 163 WTO members should protect their citizens against the ‘trade wars’ and ‘aggressive unilateralism’ initiated by the US Trump administration by strengthening the WTO legal and dispute settlement system for ‘the willing world’, i.e., those citizens and democratic governments who are reasonable enough and ‘democratically capable’ of protecting and modernising the WTO trading and legal system as a global public good of existential importance for realizing the universally recognized ‘sustainable development goals’.⁷⁶

At the WTO General Council meeting on December 12, 2018, Australia, Canada, China, the EU, Iceland, India, Korea, Mexico, New Zealand, Norway, Singapore, and Switzerland presented, finally, joint proposals⁷⁷ for overcoming the current deadlock in the WTO AB by amendments of the DSU in order to respond to and accommodate the concerns expressed by the US, for instance, by negotiating new DSU rules:

⁷⁶ This is the basic policy recommendation from former US congressman and former WTO AB chairperson, James Bacchus. JAMES BACCHUS, *THE WILLING WORLD: SHAPING AND SHARING A SUSTAINABLE GLOBAL PROSPERITY* (2018).

⁷⁷ See document WT/GC/W/752 of 26 November, 2018.

- for outgoing AB members which make clear the cases in which they can stay on to complete the appeal proceedings they are working on;
- ensuring that appeal proceedings are finished on time in line with the ninety day timeframe set out in Article 17 of the DSU, unless the parties to the dispute agree otherwise;
- clarifying that the legal issues subject to appeal by the AB do not include the meaning of domestic legislation;
- indicating that the AB should only address issues necessary to resolve the dispute; and
- introducing annual meetings between WTO members and the AB to discuss in an open way systemic issues or trends in jurisprudence.

This communication mentions explicitly in a footnote that, “[i]f the amendment of the DSU proves to be impracticable to achieve this objective swiftly, we will consider other legal instruments appropriate for that purpose”. In an additional Communication from the EU, China and India to the General Council⁷⁸, these three largest WTO members propose additional DSU amendments to reinforce the AB’s independence and impartiality and to improve its efficiency, for instance by:

- providing for a single, longer term of AB members of six to eight years;
- increasing the number of members from seven to nine working full-time, to support the AB’s capacity to deliver; and
- ensuring that the selection process of AB members starts automatically when a post is vacant, and that there is an orderly transition with outgoing members.

As discussed in Part I, whether these proposals will succeed in protecting the reasonable interests of all WTO members in protecting the rules-based WTO legal and dispute settlement system against US power politics will largely depend on whether the US Trump administration will be willing to engage in good faith negotiations on the necessary WTO reforms, DSU amendments, and compliance with the existing WTO legal obligations. If the US chooses to continue its illegal ‘blocking’ of the filling of AB vacancies, the other WTO members must meet their legal obligations under Article IX.1 of the WTO Agreement to protect the AB by means of decisions “taken by a majority of the votes cast”, similar to the existing

⁷⁸ Cf. WT/GC/W/753 of 26 November, 2018.

WTO procedures for appointing the WTO Director-General through such a majority decision “where a decision cannot be arrived at by consensus”.⁷⁹

⁷⁹ *Cf.* Article IX.1 of the WTO Agreement and the WTO General Council Decision adopted 10 December 2002 on ‘Procedures for the Appointment of Directors-General’ (WT/L/509 dated 20 January 2003), which provides in para. 20: “Recourse to a vote for the appointment of a Director-General shall be understood to be an exceptional departure from the customary practice of decision-making by consensus, and shall not establish any precedent for such recourse in respect of any future decisions in the WTO.”