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# How Should WTO Members React to Their WTO Crises?

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**Abstract:** Since 2017, the United States (US) and other World Trade Organization (WTO) members have been violating their legal duties and democratic mandates given by national parliaments to maintain the WTO Appellate Body (AB) as legally prescribed in Article 17 of the WTO Dispute Understanding (DSU). Article 17 defines the AB as being 'composed of seven persons', with vacancies being 'filled as they arise'. Sections 2 and 3 explain why none of the reasons offered by the US for its blocking of the (re)appointment of AB candidates – on grounds unrelated to the personal qualifications of the candidates – can justify the illegal disruptions of the WTO legal and dispute settlement system. EU trade diplomats must exercise leadership using the existing legal powers and duties of the WTO Ministerial Conference and General Council under Article IX WTO – if necessary, based on 'a majority of the votes cast' – to complete the WTO selection procedures for filling AB vacancies and protect the AB as legally defined in Article 17 DSU. Sections 4 and 5 explain why the competition, social policy, and rule-of-law principles underlying European 'ordo-liberalism' offer coherent strategies for overcoming the WTO governance crises by limiting hegemonic abuses of both US neo-liberalism and Chinese state-capitalism.

## 1. Introduction

US President Trump's attack on the multilateral trading system has entailed the WTO's biggest 'governance crisis' since the entry into force of the 1994 Agreement establishing the WTO. The US' blocking, since spring 2017, of the process of filling AB vacancies continues to disrupt the WTO legal and dispute settlement system; as of December 2019 at the latest, the likely reduction of the AB to one single member (from China) will render the exercise of AB jurisdiction impossible and also undermine the adoption of WTO panel reports following

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their appeal.[1] This existential threat to the WTO legal and dispute settlement system is embedded into political WTO governance crises resulting, *inter alia*, from

- the failures of the Doha Development Round negotiations since 2001 to modernize and adapt the WTO system to the challenges of the twenty-first century;
- the protectionist trade mercantilism of the US Trump administration prioritizing 'bilateral deals' and illegal, discriminatory import restrictions over respect for multilateral trade agreements;
- the inconsistencies of China's authoritarian state-capitalism with the WTO objectives of non-discriminatory, market-driven trade competition;
- the geo-strategic dimensions of Chinese and US trade rivalries, as illustrated by the bilateral 'financial and trade conditionality' of China's 'Belt and Road cooperation' with more than 60 WTO members, or by the 'stop China' and 'national security-strategies' underlying the US 'tariff wars' initiated in 2018, and the arrest – in Canada in December 2018 – of the chief financial officer of the Chinese telecoms company Huawei;
- the increasing number of authoritarian 'populist regimes' undermining constitutional democracies and rules-based multilateralism (e.g. by means of 'Brexit' and populist disregard for other multilateral treaties protecting transnational public goods like climate change prevention).[2]

The 2018 American and Chinese 'tariff wars' and the AB crisis nourish fears that the WTO governance crises, the financial and sovereign debt crises since 2008, the evermore dangerous climate change situation, and the migration crises might repeat a slide into protectionism similar to the 1930s, when the Wall Street crash in 1929 and the US Smoot–Hawley tariff legislation of 1930 provoked a breakdown of the financial and trading system, a slump in output, mass unemployment, tit-for-tat protectionism, political conflicts, and wars. Sections 2 and 3 of this article argue that – even if WTO members cannot prevent the US Trump administration from unilaterally undermining multilateral treaties for multilevel governance of transnational public goods, such as a mutually beneficial world trading system, transnational rule of law, and climate change prevention – the EU and other WTO members remain legally required to protect the WTO legal and dispute settlement system as one of the most important global public goods, at least in relations

1 This risk of non-adoption follows from Article 16.4 WTO Dispute Settlement Understanding (DSU): 'Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal … If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.'

2 Cf. E. U. Petersmann, 'The 2018 American and Chinese Trade Wars Risk Undermining the World Trading System and Constitutional Democracies', EUI Working Paper Law 2018/17.

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among 'the willing world' ready to protect the reasonable self-interests of citizens.[3] Section 4 briefly addresses trade-related systemic questions raised by the failures of US constitutionalism and neo-liberalism to protect the rules-based world trading system as one of the legal foundations for multilateral protection of other, interrelated public goods like 'sustainable development', economic welfare, and poverty reduction. It asks whether the path-dependent WTO paradigm of 'member-driven governance' – and its neo-liberal 'paradox of liberty' (i.e. the risk of economic and political markets destroying themselves through abuses of public and private powers) – can be made consistent with the European paradigm of 'multilevel economic constitutionalism', which recognizes markets as legal constructs requiring systematic limitations of 'market failures' as well as of 'governance failures'? Can American neo-liberalism and European ordo-liberalism be reconciled with China's state capitalism without destroying the WTO legal and dispute settlement system? For example, could the WTO reconvene and request the WTO Working Group on the Interaction of Trade and Competition Policy (1997–2003) to recommend more precise WTO competition rules (e.g. limiting public and private distortions of trade competition through state-trading enterprises, government procurement practices, subsidies, limitation of intellectual property rights and disregard for private data protection) so as to enhance political WTO 'member control' over related WTO disputes on these often imprecise WTO legal disciplines?

## 2. The US attack on the WTO legal and dispute settlement system

The WTO dispute settlement system remains the only worldwide, multilevel, compulsory jurisdiction for impartial, independent third-party adjudication of international disputes that is accepted and frequently used by more than 100 states, including all five permanent members of the UN Security Council. Just as the US proposal and acceptance of the WTO AB jurisdiction in the early 1990s was due to the exceptional, geopolitical circumstances following the fall of the Berlin wall (1989), China and Russia also accepted this compulsory jurisdiction as unavoidable parts of their WTO accession agreements. If the US succeeds in destroying this historically unique 'constitutionalization' of intergovernmental power politics, authoritarian rulers might not consent to its recreation, thereby weakening also related, transnational public goods like the 2030 'sustainable development goals' adopted by all UN member states. US President Trump has repeatedly threatened to withdraw from what he perceives as 'the terrible WTO Agreements', *inter alia* based on his erroneous belief that the US loses

3 Cf. J. Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Properity* (Oxford University Press, 2018); E. U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law* (Hart, 2017).

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most WTO disputes – notwithstanding the fact that the US has won more than 75% of its WTO dispute settlement complaints and, also as a defendant, has been more successful than other WTO members.[4] US Trade Representative (USTR) Lighthizer and other members of the US government (like Security Adviser Bolton) are declared opponents of restraining the use of US hegemonic power by international courts.[5] As US trade diplomats have not revealed the final objective of their 'blocking strategy', many observers of US trade policies interpret the US blocking of AB vacancies as being aimed at unilaterally terminating the functioning of the AB and the related 'judicial restraints' on US trade protectionism, a strategy which previous US governments had already used in order to prevent NAFTA chapter 20 panel proceedings against the US. US trade diplomats at Geneva continue explaining their vetoing of the appointment of WTO AB members in deliberately ambiguous ways:

- the re-appointment of AB members from the US (like Merit Janow 2003–2007, Jennifer Hillman 2007–2011) was opposed by the USTR because their participation in AB rulings against US legal positions was criticized as 'unpatriotic'[6];
- trade law professors proposed by other WTO members (like Kenya in 2013) were ruled out almost immediately by the USTR, even if they had taught at US universities;
- in 2016, the re-appointment of the Korean AB member Chang Seung Wang was blocked by the USTR on grounds of alleged judicial 'over-reach';
- at the beginning of 2017, the US blocked the consensus in the WTO Dispute Settlement Body (DSB) for filling WTO AB vacancies for reasons related to the ongoing transition in the US political leadership;
- subsequently, the replacement of AB members Kim, Ramirez, and van den Bossche in 2017, and of AB member Servansing in 2018, was vetoed by the USTR on grounds of 'systemic' legal USTR concerns about 'Rule 15' of the AB

4 Cf. G. Shaffer, M. Elsig, and M. Pollack, *The Slow Killing of the WTO*, www.huffingtonpost.com (6 December 2017), refuting television statements by US President Trump ('The WTO … was set up for the benefit of everybody but us. They have taken advantage of this country like you wouldn't believe … As an example, we lose the lawsuits, almost all of the lawsuits in the WTO … Because we have fewer judges than other countries. It's set up as you can't win. In other words, the panels are set up so that we don't have majorities. It was set up for the benefit of taking advantage of the United States') as 'fake news'.

5 Cf. the references to various speeches by USTR Lighthizer in: Q. Slobodian, 'You Live in Robert Lighthizer's World Now', *Foreign Policy* (6 August 2018); J. Bacchus, 'Might Unmakes Right: The American Assault on the Rule of Law in World Trade', Centre for International Governance Innovation CIGI Papers No. 173 (May 2018); E. U. Petersmann, 'The Crown Jewel of the WTO has been stolen by US Trade Diplomats – and they have no Intention of Giving it Back', D. Prévost *et al.* (eds.), *Restoring Trust in Trade – Liber Amicorum for Peter Van den Bossche* (Hart, 2018), pp. 105–118.

6 Cf. J. L. Dunoff and M. A. Pollack, 'The Judicial Trilemma', *American Journal of International Law*, 111 (2017), 225, 267f.

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> Working Procedures as elaborated by the AB in conformity with Article 17.9 DSU and practiced in WTO dispute settlement practices since 1996.[7]

Such blocking of the filling of AB vacancies on grounds *not* related to the personal qualifications of proposed AB candidates violates the WTO legal obligations to comply with DSU rules in good faith (cf. Articles 3.10, 23 DSU) and protect the AB as legally prescribed in Article 17 DSU (e.g. as being 'composed of seven persons', with vacancies being 'filled as they arise' so that AB membership remains 'representative of membership in the WTO').[8]

The US continues to state 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 AB'.[9] Even though the AB Working Procedures had been adopted in 1996 in conformity with Article 17 DSU and had been applied in WTO practice for more than 20 years, the US reiterates that it 'remains resolute in its view that Members need to resolve that issue as a priority'. In some DSB meetings, the US also voiced other 'systemic concerns' relating to the functioning of the AB, such as 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.[10] These broader 'US concerns with WTO dispute settlement' and with 'the approach by the AB' have been summarized in the President's 2018 Trade Policy Agenda[11] by focusing on the following cross-cutting issues:

- *Disregard for the 90-day deadline for appeals*: The US criticizes 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 90 days.
- *Continued service by persons who are no longer AB members*: The US claims that, notwithstanding 'Rule 15′ of the AB Working Procedures and its consistent application in WTO dispute settlement practices to date, the AB 'does not have the

7 Cf. P. J. Kuijper, 'The US Attack on the WTO Appellate Body', *Legal Issues of Economic Integration*, 45 (2018), 1–11. Rule 15 authorizes the AB to permit its outgoing members to complete the disposition of pending appeals similar to the working procedures for many other international courts.

8 Notwithstanding the text of Article 17.2 ('The DSB shall …'), numerous DSU provisions make clear that obligations addressed to the DSB entail legal good faith obligations also for each DSB member.

9 Cf. J. Hillman, 'Three Approaches to Fixing the WTO's Appellate Body: The Good, the Bad and the Ugly?', Institute of International Economic Law, Georgetown University Law Center, December 2018, Annex (listing the concerns expressed by the US in DSB meetings since 2017).

10 On the legal inconsistency of this US criticism see H. Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes', *World Trade Review*, 17 (2018): 509–533, and G. Sacerdoti, 'A Comment on Henry Gao 'Dictum on Dicta: Obiter Dicta in WTO Disputes', *World Trade Review*, 17 (2018): 535–540.

11 https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf, at pp. 22–28.

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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 WTO 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 criticizes 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 US' 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 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 those disputes departed from the relevant WTO agreements as negotiated.

All these US concerns relate to long-standing AB legal interpretations[12] and judicial practices[13] that had been justified on the basis of (1) the customary rules of treaty interpretation and (2) the quasi-judicial mandates given by the DSU to WTO panels, the AB and to WTO arbitrators, and (3) had been accepted in the legal

12 E.g. of Article 3:2 DSU regarding treatment of AB case-law as precedent absent 'cogent reasons'; Article 17:5 DSU regarding the 90 days deadline; Article 17:6 regarding 'issues of law' and legal qualifications of facts; Article 17:12 DSU regarding *obiter dicta*.

13 E.g. elaboration of AB Working Procedures as prescribed in Article 17:9 DSU; judicial 'administration of justice' in applying the incomplete DSU rules to disputes over political disagreements on WTO rules.

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practices of the DSB, albeit subject to occasional expressions of concerns by the US. Notwithstanding the continuing DSU reform negotiations since 1998, all the (more than 140) AB reports since 1996 were consistently adopted by the DSB *without* 'politically agreed corrections' of this jurisprudence, as would have been legally possible through 'authoritative interpretations' (Article IX:2), amendments (Article X) of the WTO Agreement, or by overruling dispute settlement findings through DSB decisions. Moreover, some of the legal problems (like disregard for the 90 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 has been 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. more than 13 pending AB disputes in November 2018), which – *de facto* – render compliance with the 90 days deadline impossible without introducing radically new, politically agreed procedures (like 'summary judgments' prior to publication of the full AB report, publication of AB reports in the language of the dispute before translation into the other official WTO working languages).

The US has submitted *no evidence* for its political claims that the judicial AB interpretations have engaged in 'persistent over-reach',[14] for instance by violating:

- the customary rules of treaty interpretation (e.g. by arbitrarily misinterpreting 'the terms of the treaty', or by misapplying the duly interpreted treaty terms to the relevant facts established by the panel), or
- the quasi-judicial mandate of WTO dispute settlement bodies (e.g. by not addressing 'each of the issues raised in accordance with paragraph(s) 6' and 12 of Article 17 DSU).

This US insistence on its own 'hegemonic interpretation' of WTO rules – disregarding the multilateral (e.g. 'authoritative' or quasi-judicial) interpretation methods provided for in WTO law – reflects what participants in the Uruguay Round negotiations have criticized as 'bad lawyering' by US trade diplomats attempting to

14 DSB meeting of 21 November 2018 (summary reported on the WTO website). US Ambassador Shea's claim (e.g. during the WTO Public Forum session 111 on 4 October 2018) that the US does not recognize a 'judicial function' of the AB, illustrates that the US claim of 'AB over-reach' rests on very subjective DSU interpretations which are not shared by most AB and DSB members, just as the related US claim that one WTO member's rights or obligations may be clarified by a Panel without regard to the AB's clarification ('precedent') of the same rights or obligations in previous WTO disputes. The different 'institutional choice' perspectives (e.g. political vs judicial choices) affect the 'cognitive dimension' of legal interpretations – a fact which is often overlooked in the criticism of WTO dispute settlement findings by diplomats and economists.

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impose *domestic, US interpretation methods* (e.g. in Article 17.6(ii) Antidumping Agreement), notwithstanding their inconsistency with the customary methods of treaty interpretation.[15] It is, likewise, reflected in the insistence of US trade diplomats on the 'contractual nature' of WTO market access commitments, their denial of 'constitutional' (e.g. judicial) dimensions of WTO law, their disregard for the dynamic evolution of multilateral treaty systems through 'argumentative' and 'judicial practices' progressively clarifying and developing WTO rules and principles since 1995, and the refusal of the US to accept other, compulsory worldwide and regional jurisdictions like the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court or the Inter-American Court of Human Rights.[16] International lawyers inside and outside the WTO institutions have persistently celebrated the WTO jurisprudence as the 'crown-jewel' of WTO legal practices fulfilling the quasi-judicial mandate for 'prompt settlement' of WTO disputes, 'providing security and predictability to the multilateral trading system' through impartial, independent third-party adjudication, and clarifying 'the existing provisions of those (WTO) agreements in accordance with customary rules of interpretation of international law' (Article 3.2 DSU). These customary rules require application also of general rules and principles of international law 'applicable in the relations between the parties',[17] including 'due process of law', 'judicial administration of justice' in third-party adjudication of WTO disputes, and good-faith-compliance by all WTO members with DSU rules (cf. Article 3.10 DSU) and with dispute settlement rulings adopted by the DSB (cf. Article 23 DSU). The DSU avoids describing WTO dispute settlement panels, the AB and WTO arbitration as 'courts of justice' and WTO adjudicators as 'justices'. Yet, the DSU rules, WTO working procedures for panels and the AB, and WTO 'rules of conduct' prescribing impartiality and independence of WTO panelists, AB members and arbitrators have been persistently interpreted by WTO adjudicators and WTO members as providing for quasi-judicial mandates.[18] The US claims of 'judicial overreach' are also criticized

15 Cf. Kuijper, *supra* n. 7, at 6–7. .

16 On the longstanding reluctance of the US to limit US foreign policy powers by submitting to international courts, see: C. P. R. Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, 2009).

17 Cf. Article 31.3(c) of the Vienna Convention on the Law of Treaties (VCLT), which is widely recognized as codifying customary rules of international treaty interpretation, and the specification of applicable, universally recognized 'principles of justice' in the Preamble of the VCLT; cf. G. Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press, 2015).

18 WTO AB members have persistently characterized the AB as a judicial institution, for instance in their contributions (e.g. by WTO AB members J. Bacchus, C. D. Ehlermann, J. Hillman, M. Matsushita, and D. Unterhalter) to: G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press, 2015). See also P. van den Bossche, 'The Appellate Body of the WTO', G. De Beere and J. Wouters (eds.), *The Contribution of International and Supranational Courts to the Rule of Law* (Elgar, 2015), 176–202. The *Handbook on the WTO Dispute Settlement System*, prepared by the WTO legal services

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as being opportunistic: in many WTO disputes, the US itself suggested and welcomed 'creative interpretations' of indeterminate procedural WTO rules (e.g. on admission of *amicus curiae* briefs, making panel and AB meetings open to the public) as well as of substantive WTO rules (e.g. on recognizing living organisms as 'exhaustible natural resources' in terms of Article XX(g) GATT, interpreting a GATS prohibition of 'anti-competitive practices' as prohibiting price-fixing cartel agreements). As US trade diplomats have made no effort at demonstrating that the AB jurisprudence has disregarded its quasi-judicial mandate for 'prompt settlement' of WTO disputes by clarifying the disputed meaning of WTO provisions through use of the customary rules of treaty interpretation, no other DSB member has so far supported the politically motivated US blocking of the filling of AB vacancies.

American trade law experts – like former US Congressman and WTO AB chairman Bacchus – have interpreted US President Trump's blockage of the WTO AB system – and the discriminatory import tariffs imposed by the Trump administration in 2018 in violation of WTO law (e.g. GATT Articles I and II) – as an 'American assault on the rule of law in world trade'.[19] These legal assessments concord with academic and social media observations 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'.[20] In DSB deliberations, WTO members have persistently criticized the blocking of AB nominations by the US; the discriminatory US tariffs on the importation of steel and aluminium have been challenged in WTO dispute settlement proceedings by numerous WTO members – like Canada, China, the EU, India, Mexico, Norway, Russia, and Turkey – on the grounds that, *inter alia*, their legal inconsistencies with GATT Articles I and II could not be legally justified on national security grounds (Article XXI GATT) or as safeguard measures (Article XIX GATT).[21] Many adversely affected WTO members also adopted retaliatory suspensions of market access commitments *vis-à-vis* the USA, which some of

(Cambridge University Press, 2004) likewise describes WTO panels and the AB as 'quasi-judicial bodies, in a way tribunals, in charge of adjudicating disputes' (e.g. p. 21).

19 See Bacchus, *supra* 5.

20 Cited from: *Financial Times Free Trade*, FT@newsletters.ft.com of 10 September 2018: 'For Mr Lighthizer, as well as Peter Navarro, the chief trade hawk in the White House, the goal is not only to disentangle the US from its Chinese supply chains, and to shift production back home, but to do the same with the rest of America's traditional trading partners as well.'

21 Cf. WT/DS 544 (5 April), 547 (18 May), 548 (1 June), 550 (1 June), 551 (5 June), 552 (12 June), 554 (29 June), and 556 (9 July 2018). All these complaints convincingly challenge the US claim that 'economic security' is part of 'national security' and justifies violating all WTO rules without WTO jurisdiction for reviewing such unilateral invocations of Article XXI GATT in WTO dispute settlement proceedings aimed at protecting the non-discrimination and reciprocity obligations of WTO law without constraining national security policies. Contrary to the US concerns, Article XXI GATT only protects the reciprocity principles underlying GATT (e.g. Articles XIX, XXVIII) without limiting national security policies.

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these WTO members justified by invoking Article 8 of the WTO Agreement on Safeguards. As the US import tariffs on aluminium and steel had been introduced for economic rather than national security reasons,[22] and US imports of aluminium and steel had not increased over the past two years, the 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 in order to maintain the 'reciprocity principles' underlying WTO law. China criticized the discriminatory US import tariffs imposed under Section 301 as a 'trade war' violating WTO law (e.g. Articles I and II GATT, 23 DSU), without justifying China's retaliatory tariffs by invoking specific WTO rules. Even if the DSU reform negotiations since 1998 have so far failed to enable consensus on agreed DSU amendments, politically agreed reforms of the incomplete and imperfect DSU rules remain certainly desirable. Yet, the mere discontent of US trade diplomats with some adverse dispute settlement findings and with the AB does not legally justify the US blockage, which is widely criticized as a 'sinister distraction' from President Trump's political objective of unilaterally blocking WTO AB jurisdiction over US trade restrictions and judicial interpretations of WTO rules restraining US trade policy discretion.[23]

## 3. Rule of law or rule of power? How should WTO members respond to the US assault on the WTO legal system?

How should WTO members interested in realizing the DSU reform objective of preserving and further strengthening the WTO dispute settlement system respond to the US attempt at rendering the functioning of the WTO AB impossible by blocking the filling of AB vacancies? Section 2 concluded that – just as the US withdrawal from the 2015 Paris Agreement did not provoke other UN member states to abandon climate change prevention, and the 11 signatory 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 30 December 2018) in order to enhance their economic welfare – WTO members must comply with their legal obligations to maintain the WTO dispute settlement system for 'the willing world', i.e. those citizens and democratic governments who are reasonable enough and 'democratically capable' to protect and modernize the WTO trading and legal system as a global public good of existential importance for realizing the universally recognized 'sustainable development goals'. At the WTO General Council meeting on 12 December 2018, Australia, Canada, China, the EU, Iceland, India, Korea, Mexico, New Zealand, Norway, Singapore, and Switzerland presented joint proposals for overcoming the current

22 E.g. 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).

23 Cf. E. Luce, 'Donald Trump's Circus Act Is a Sinister Distraction', *Financial Times* (26 August 2018).

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deadlock in the WTO AB by amending the DSU in order to accommodate the concerns expressed by the US, notably by

- negotiating new DSU rules for outgoing AB members which make clear on which cases 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 90-day timeframe set out in Article 17 DSU, unless the parties in the dispute agree otherwise;
- clarifying that the legal issues subject to appeal by the AB do not include the meaning of domestic legislation;
- specifying 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.[24]

Three features of these DSU amendment proposals are characteristic:

- They respond to the concerns raised by the US Trump administration so as to strengthen member-control over the AB.
- They were coordinated and initiated without inclusion of the US delegation so as to avoid US obstruction.
- As US trade diplomats fail to indicate under which conditions they are willing to stop their illegal blocking of the filling of AB vacancies, the proposal includes 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 Council',[25] 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.

Again, also this communication was initiated and elaborated without US trade diplomats, as they no longer seem to support this objective of reinforcing the AB's independence, impartiality, and efficiency.

As both proposals were rejected by the US delegation at the General Council meeting on 12 December 2018 and the US Trump administration seems to be unwilling to engage in good faith negotiations on DSU amendments responding to the US concerns, the above-mentioned footnote in the first communication of

24 See document WT/GC/W/752 of 26 November 2018.
25 Cf. WT/GC/W/753 of 26 November 2018.

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26 November 2018 – and its reference to 'other legal instruments' available under WTO law for protecting the WTO legal and dispute settlement system – needs to be clarified. These 'other legal instruments' include, *inter alia*:

- Initiation and completion – 'by a majority of the votes cast' (Article IX:1 WTO Agreement) in the WTO General Council or WTO Ministerial Conference rather than in the DSB – of the WTO procedures for selection and timely appointment of vacant AB positions. This legally prescribed majority voting by the WTO Ministerial Conference or General Council is justified by the illegality of the US disregard for the collective WTO duties to maintain the AB as prescribed in Article 17 DSU.[26] The text of Article IX:1[27] confirms that the WTO Ministerial Conference and General Council are *legally required* ('shall') to overcome illegal 'blocking' in the DSB of the filling of AB vacancies by such majority decisions in order to meet the collective WTO legal duties to maintain the AB as prescribed in Article 17 DSU, similar to the existing WTO procedures for appointing the WTO Director-General through a majority decision 'where a decision cannot be arrived at by consensus'.[28]
- In order to pre-empt objections (e.g. by the US) to such a majority decision as mandated by Article IX.1 WTO, the WTO Ministerial Conference or General Council could also adopt an 'authoritative interpretation' based on 'a three-fourths majority of the Members' (Article IX:2 WTO) confirming their collective legal duties and existing WTO powers to fill 'vacancies … as they arise' (Article 17 DSU) through majority decisions, for instance in view of Article XVI.3 WTO Agreement.[29] This

26 Note 3 to Article IX:1 WTO ('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 majority decisions by the WTO Ministerial Conference or by the General Council deliberately *not* convening as DSB in order to meet the collective duties of WTO members to comply with Article 17 DSU. Such convening of the WTO General Council in order to overcome disagreements in the DSB has been practiced already in the past, for instance when WTO Members wanted to censure the AB for its handling of *amicus curiae* briefs (cf. WTO doc. WT/GC/M/60 and Kuijper, *supra* n. 7, at 10.

27 'The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting … Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the Multilateral Trade Agreements.' The 'exceptions' for consensus-based decision-making by the DSB (e.g. pursuant to Articles 2.4, 16.4, 17.14 DSU) do not prevent the Ministerial Conference or General Council from meeting collective WTO legal obligations by voting if 'a decision cannot be arrived at by consensus' in the DSB due to illegal blocking of consensus in the DSB.

28 Cf. 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.' The text of Article IX:1 confirms that the same 'exception' must be applied to illegal blocking of the appointment of AB members.

29 Article XVI.3 provides: 'In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provisions of this Agreement shall prevail to the extent of the conflict.' If the US should claim that Article 2.4 DSU ('Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus') protects a veto-

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'authoritative interpretation' could also confirm that such majority decisions on meeting collective legal obligations of all WTO members do not establish a precedent for WTO decision-making on discretionary trade policy issues.

- As such majority decisions of WTO bodies require diplomatic preparation in order to overcome resistance by US trade diplomats, WTO members might further confirm, and temporarily resort to, the availability of 'arbitration within the WTO as an alternative means of dispute settlement' (Article 25.1 DSU) – also for agreed appellate review of WTO panel reports. Yet, such mutually agreed use of arbitration under Article 25 DSU to ensure the availability of appeals entails numerous problems[30] that risk further undermining the WTO dispute settlement system.

## 4. Lessons from European 'ordo-liberalism' for reconciling American 'neo-liberalism' with Chinese state-capitalism?

Sections 2 and 3 criticized 'hegemonic, neo-liberal abuses' of 'market failures' (e.g. due to inadequate WTO competition rules) and 'governance failures' (e.g. due to illegal blocking of WTO AB nominations); they recommended 'ordo-liberal', rules-based responses using the existing WTO legal duties and decision-making procedures for protecting WTO third-party adjudication of disputes, its 'member-control', and impartial clarification of indeterminate WTO rules. This section briefly outlines why the 'constitutional principles' distinguishing European 'ordo-liberalism' from American 'neo-liberalism' may also offer coherent strategies for responding to the political 'governance crises' of the multilateral trading system as discussed in section 1.

The 1929 financial crisis on Wall Street prompted the US Congress to adopt the infamous 1930 Smoot–Hawley Tariff Act, which erected high tariff walls around the USA, provoked protectionist countermeasures from other trading countries, and deepened the 'Great Depression' in North America and Europe. US Secretary of State Cordell Hull's initiatives for the 1934 Reciprocal Trade Agreements Act, and the 1941 Atlantic Charter's commitment by US President Roosevelt and British Prime Minister Churchill 'to further the enjoyment by all

power of the US for indefinitely blocking the filling of AB vacancies and, thereby, *de facto* amending the DSU, the 'authoritative interpretation' could clarify that – according to its Article XVI.3 – the legal duties under Article IX.1 of the WTO Agreement must prevail and require overcoming any 'conflicting interpretations' of WTO rules so as to prevent illegal abuses of veto-powers and protect the collective WTO obligations of maintaining the AB as legally prescribed in Article 17 DSU. WTO members have no legal and democratic mandate to amend the DSU *de facto* by rendering the exercise of AB jurisdiction impossible.

30 On the problems of using Article 25 DSU as a bilaterally agreed substitute for AB review of WTO panel reports (such as non-adoption of the panel and arbitration reports by the DSB) see the analysis by former US congressman and former AB chairman J. Bacchus, *How to Solve the WTO Judicial Crisis*, in: CATO Institute 6 August 2018; S. Anderson *et al.*, 'Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals', CTEI Working Paper, Graduate Institute Geneva (2017–17).

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States, great or small, victor or vanquished, of access on equal terms to the trade and the raw materials of the world which are needed for their economic prosperity', laid the foundations for the post-war US leadership for a multilateral trade and financial system. The 1944 Bretton Woods Agreements establishing the International Monetary Fund and the World Bank, the 1945 United Nations (UN) Charter, the General Agreement on Tariffs and Trade (GATT 1947), its 'provisional application' since 1948 as a substitute for the stillborn 1948 Havana Charter for an International Trade Organization, 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. This post-war US leadership for multilevel governance of transnational public goods has ended with the US Trump administration's *de jure* or *de facto* withdrawal from multilateral 'public goods treaties' in favour of transactional 'bilateral bargains' and illegal trade sanctions exploiting asymmetric US power for advancing mercantilist, national interests ('America first'). The imposition of discriminatory US tariffs amounting to more than 260 billions of US dollars by executive orders – without congressional approval and effective judicial remedies of US citizens adversely affected by such 'taxation without democratic representation' – reveals deeper 'failures' of US constitutionalism and neo-liberalism. The ever-broader delegation of trade policy powers to tax and restrict domestic citizens by the US Congress – e.g. in Section 232 (as invoked by the Trump administration for justifying its discriminatory tariffs on steel and aluminium) and in Section 301 of the US Trade Act (as invoked as legal basis for discriminatory tariffs on imports from China) – and the business-driven abuses of US trade remedy laws in clear violation of WTO obligations as confirmed in WTO dispute settlement rulings[31], undermine US constitutional law principles of limited delegation, separation, and mutual 'checks and balances' of governance powers subject to constitutional rights and remedies of citizens and to democratic and judicial accountability.[32] In contrast to the compliance of US governments with US court decisions, the hegemonic US external policies tend to avoid limiting US foreign policy powers by compulsory jurisdiction of international courts or regional economic and

31 For a discussion of the, by now, about 20 WTO dispute settlement reports on 'zeroing' in US anti-dumping practices, see, e.g., D. Ahn and P. Messerlin, 'US–Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China: Never Ending Zeroing in the WTO?', 13 *World Trade Review* (2014), 267–279.

32 Cf. A. M. Wolff, 'Stressed in an Age of Populism: Recommendations for Changes in US Trade Law and Policy', Institute of International Economic Law IIEL Issue Brief 04/2017; Petersmann, *supra* n. 2; S. Levitsky and D. Ziblatt, *How Democracies Die* (New York: Crown, 2018), 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 … The 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'.

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human rights courts.[33] Also the limitation of US trade policy discretion by WTO adjudication is increasingly rejected by the US Trump administration, for instance because recourse to US economic power in the strategic 'trade wars' with China is preferred over recourse to US military power.[34]

The hegemonic domination of the development of GATT/WTO law by the USA since 1948 entailed that many problems of American democracy, neo-liberalism, and interest group politics undermined also GATT/WTO law and practices.[35] The US claims that 'economic security' is part of 'national security' justifying violations of all WTO rules without WTO jurisdiction for judicial review, illustrates the legal inconsistency of the 'neo-liberal' trade and security strategies of the Trump administration with the WTO legal system; they are convincingly challenged by numerous WTO members. The 2018 Trade Policy Agenda describes China's market distorting policies (e.g. regarding state-trading enterprises, subsidies, communication services, intellectual property rights, government procurement, competition, and monetary distortions) and its 'unreasonable and discriminatory efforts to obtain US technologies and intellectual property' as one of the biggest challenges to the US economy, US security, and the WTO system;[36] hence, the US 'Section 301 trade sanctions' *vis-à-vis* China were introduced unilaterally without compliance with WTO rules (e.g. GATT Articles I and II) and dispute settlement procedures (e.g. Article 23 DSU). This challenge of the WTO legal and dispute settlement system by US protectionism and by Chinese state-capitalism raises the question: Does the rules-based European 'ordo-liberalism' – e.g. its acknowledgment that non-discriminatory market competition requires systemic legal limitations of 'market failures' (e.g. by competition, environmental and social laws) and of 'governance failures' (e.g. by limited delegation, separation and institutional 'checks and balances' among legislative, executive and

33 See note 16 above and related text.

34 The 2018 US President's Trade Policy Agenda insists: 'The United States will not allow the WTO – or any other multilateral organization – to prevent us from taking actions that are essential to the economic well-being of the American people'; cf. note 11, at p. 2.

35 Examples include (1) protectionist abuses of trade remedy rules; (2) excessive, unilateral interpretations of 'national security' in US trade laws (e.g. Section 232); (3) hegemonic recourse to 'aggressive unilateralism' (e.g. Section 301); (4) disregard for the customary rules of treaty interpretation in favour of alleged historical intentions of US negotiators; (5) politicization of appointments of judges; (6) political interferences into third party adjudication disregarding the democratically defined separation of executive and judicial powers (e.g. of the AB); (7) abusive 'blocking' of the nomination of judges or (8) of the adoption of impartial dispute settlement rulings; and (9) non-implementation of legally binding dispute settlement rulings. The less US governments succeed in limiting such 'domestic governance failures', the more 'populist protectionists' inside the US (e.g. US steel lobbies and their former advocates like R.Lighthizer) call for adjusting WTO rules to US protectionism, for instance in the US Trade Policy Agenda of March 2018 signed by USTR Lighthizer (see *supra* note 11) and in the long-standing US calls for using Article 17.6 Antidumping Agreement as a legal restraint on WTO review of trade remedy measures (Article 17.6(ii) was inserted into the Antidumping Agreement at the request of the US in late 1993 in the US hope of incorporating the 'Chevron doctrine' in US constitutional law – prescribing judicial deference vis-à-vis regulatory agencies controlled by the US Congress – into WTO law).

36 Cf. note 11, at p.4.

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judicial powers and judicial remedies) – offer lessons for the necessary modernization of the WTO trading, legal and dispute settlement systems?

### *4.1 Lessons from the 'Geneva School' of ordo-liberalism?*

The American 'Chicago School of law and economics' and the 'Virginia School of public choice and constitutional economics', like the German 'Freiburg School of ordo-liberalism' and 'Cologne School of social market economy', focused on interactions of legal rules and economic principles in the regulation of *national economies*. The economists and lawyers cooperating in the 'Geneva School of multilevel ordo-liberalism'[37] were more attentive to questions of *international economic order* as a condition for empowering welfare states and limiting abuses of public and private powers through multilevel, legal, institutional, and judicial guarantees of non-discriminatory market competition. European advocates of 'multilevel ordo-constitutionalism' acknowledge that the EU's 'micro-economic common market constitution' (e.g. based on multilevel competition law, environmental and social law, common market rights, and judicial remedies) and 'macro-economic monetary constitution' among EU member states (e.g. based on multilevel fiscal, debt, monetary, financial and other economic disciplines and institutions protecting monetary stability and convertibility) go far beyond what may ever be acceptable and politically feasible in worldwide, multilevel governance of public goods among UN/WTO member states. Yet, some of the basic constitutional, competition, and social policy principles of 'ordo-liberalism' have influenced the progressive legal construction, social embedding, and political legitimation of the WTO legal and dispute settlement system, for instance in

- designing multilevel legal restraints of trade policy instruments according to their respective economic efficiency (as illustrated by Articles I–III, XI GATT);
- separating trade and monetary policy instruments (cf. Article XV GATT);
- interpreting GATT/WTO market access commitments as protecting non-discriminatory conditions of competition;
- protecting sovereign powers to regulate and protect non-economic public goods (cf. Articles XIX-XXI GATT);
- providing for legal accountability and multilevel judicial remedies limiting rule-violations and other abuses of power (e.g. in Articles X, XXIII GATT); and
- promoting progressive evolution of the incomplete GATT/WTO system through progressive legal and political clarifications and development of the often indeterminate GATT/WTO rules and underlying principles.[38]

37 For a discussion of the 'Geneva school of law and economics', and its comparison with other schools of 'law and economics', see Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), at pp. 7ff, 183ff, 208ff, 260ff. My – very critical –review of this innovative book has been published in the *Journal of International Economic Law*, 19 (2018) in December 2018.

38 On 'Geneva ordo-liberalism', its 'thinking in terms of interdependent orders' (as pioneered by W. Eucken, F. A. Hayek, and J. Tumlir), its emphasis on multilevel market regulations aimed at protecting transnational rule of law and non-discriminatory conditions of competition, and on the influence of ordo-

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Arguably, the 'Geneva ordo-liberalism' underlying the multilevel WTO dispute settlement system offers coherent constitutional and competition principles also for modernizing WTO rules on non-discriminatory conditions of trade competition, 'special and differential treatment' of less-developed economies, and transnational rule of law – i.e. the three main targets of US criticism of inadequate WTO rules and practices. De-escalating the 2018 'tariff wars' by progressively transforming the 1994 WTO Agreement into a 'WTO 2.0 fit for the 21st century' requires more coherent competition law principles (Section 4.2), social market economy principles (4.3), and multilevel judicial protection of transnational rule of law (4.4) aimed at further limiting market distortions and 'populist trade protectionism', promoting social acceptance of WTO rules (e.g. by protecting the 'losers' from trade competition, targeting 'special and differential treatment' in WTO rules more precisely), and protecting 'predictability and security for the multilateral trading system' (Article 3.2 DSU) as the de-centralized, legal foundation of the global division of labour. Such agreed WTO reforms could also redress the 'imbalance' between the very successful use of the WTO dispute settlement system for clarifying disputed interpretations of WTO rules and the much less successful, political negotiation- and legislative-functions of WTO members.

### *4.2 Need for additional WTO competition rules*

The WTO agreements on trade in goods, services, intellectual property rights, civil aircraft, and government procurement include numerous rules for protecting non-discriminatory conditions of competition and preventing anti-competitive abuses of public and private powers, like Article 8 TRIPS Agreement on 'abuses of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology'.[39] The WTO Working Group on the Interaction of Trade and Competition Policy (1997–2003) systematically explored the competition policy dimensions of WTO rules and the impact of anti-competitive practices of enterprises on international trade; its work promoted the, today, general acceptance among WTO members of the importance of mutual synergies between WTO rules and competition law principles (e.g. on non-discrimination, transparency,

liberalism on the design of many WTO rules, see Slobodian, *supra* 37, who describes the WTO as 'the paradigmatic product of Geneva School neoliberalism' (p. 25), and the 'creation of the WTO (as) a crowning victory of the neoliberal project of finding an extra-economic enforcer for the world economy in the twentieth century' (p. 23).

39 On the clarification of the TRIPS rules on 'unfair competition' in the recent WTO panel reports on *Australia–Plain-Packaging of Tobacco Products*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 28 June 2018, 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 2018/20, at 22ff.

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procedural fairness, prohibitions of price-fixing cartels, and discriminatory market-sharing agreements).[40] The Group suspended its work on proposals by some WTO members for a possible 'multilateral framework on competition policy' following the WTO Ministerial Conference decisions at Cancun in 2003. Yet, it could be re-convened whenever WTO members reached agreement on negotiating more precise competition disciplines in the WTO, for instance in view of the fact that about 135 WTO members (including all five BRICS economies) now have national competition laws. The inadequacy of WTO rules for restraining anti-competitive abuses of 'state-capitalism' (such as forced technology transfer), other trade distortions (e.g. in new sectors like electronic commerce, maintenance of competition in digital markets), and state-owned enterprises is increasingly recognized as one of the biggest regulatory challenges of WTO members. Recent analyses of competition policies emphasize that – also inside the US – antitrust policies are less and less effectively enforced *vis-à-vis* powerful market actors (like the FAANG: Facebook, Apple, Amazon, Netflix, and Google) in many economic and technology sectors.[41] Hence, all WTO members, including China, might find it in their national self-interests to de-escalate the US trade sanctions against alleged 'unfair competition', for instance by avoiding the 'over-load' of the WTO dispute settlement procedures with these disputes and mandating the WTO Working Group on the Interaction of Trade and Competition Policy with elaborating 'member-driven guidelines' for additional WTO competition disciplines in particular policy areas (like anticompetitive state-trading and intellectual property practices). Also US trade lawyers emphasize that President Trump's pursuit of 'bilateral deals' offers no substitute for using multilateral WTO negotiations and WTO dispute settlement procedures for clarifying general WTO legal disciplines for protecting non-discriminatory conditions of competition against the increasingly perceived risks of competitive distortions and 'unfair trade' undermining the legitimacy of the WTO system.[42]

### *4.3 Need for embedding trade competition into 'social market economies'*

President F.D.Roosevelt's 'New Deal' of the 1930s, the 'social market economy' progressively established in Germany since the 1960s, and the EU law commitments to a 'competitive social market economy' (Article 3 TEU) with evermore

40 Cf. R. D. Anderson *et al.*, 'Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection', WTO Staff Working Paper 2018–12, at 20ff.

41 Cf. T. Wu, 'The Curse of Bigness: Antitrust in the New Gilded Age', Colombia Global Reports (2018); J. Tepper and D. Hearn, *The Myth of Capitalism: Monopolies and the Death of Competition* (Wiley, 2018).

42 Cf. J. Bacchus, S. Lester, and H. Zhu, 'Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help to Make China More Market-Oriented', *Policy Analysis Cato Institute*, 856 (15 November 2018).

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guarantees of social rights structured around three priorities – equal opportunities for education, professional training, and access to labour markets; fair working conditions; and access to social protection and health care for all – offer three historical examples for successfully responding to economic and political crises and EU integration challenges by protecting social rights of workers, their families, and human rights. The more economic globalization and changes in technologies (like automation, robotics, and artificial intelligence) threaten economic security (e.g. for less skilled workers in import-competing sectors) and communitarian identities, the more citizens criticize political elites if they favour the powerful (e.g. through bailouts of banks following the financial crisis of 2008, insufficient banking regulations, tax reductions privileging capital owners), neglect the social adjustment challenges for workers and their families, and remain indifferent towards domestic inequality and social injustices. Economists argue that the economic causes of 'protectionist populism' (e.g. President Trump's conception of foreign policies as mercantilist business deals stripped of non-economic values like prevention of climate change and protection of refugees and immigrants) require stronger economic and social adjustment policies providing more compensation and safety nets for the 'losers in trade competition'.[43] The claim that European populism is less 'anti-trade' than populism in the US[44] suggests that the WTO legal system would also benefit from stronger protection of the social dimensions of world trade. For instance, 'special and differential treatment' of less-developed WTO member countries could be defined more precisely in terms of local 'capacity building' (e.g. as in the WTO Trade Facilitation Agreement), in conformity with the universally agreed 'sustainable development goals' in the UN 2015 Resolution on the 2030 Agenda for Sustainable Development.[45] WTO law does not prevent diverse, national welfare state policies, and social labour market interventions. Yet, populist and authoritarian disregard for global public goods (like climate change prevention, human and labour rights) and for 'social market economies' is bound to undermine social support for, and democratic legitimacy of, open trading systems if they are perceived by people as 'unfairly' privileging powerful interest groups and business elites. Meeting the 2019 deadline for a WTO agreement limiting fishery subsidies – as envisaged as an integral part of the

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

44 Cf. Rodrik, *supra* n. 43 and the commentary by B. Hoekman and D. R. Nelson, 'Reflecting on Populism and the Economics of Globalization', *Journal of International Business Policy* (2018).

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

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UN sustainable development goals – can, likewise, boost synergies between UN and WTO law by enhancing social recognition that the WTO is an indispensable part of worldwide governance of public goods far beyond promoting consumer welfare through non-discriminatory trade competition and transnational rule of law. The more the 'disconnect' between UN/WTO law and citizens undermines social and democratic support from citizens for public goods, the more important becomes the European ordo-liberal approach to applying trade and economic rules, not only as rights of governments, but also of citizens and non-governmental economic actors in order to promote legal, democratic, and judicial accountability of governance agents *vis-à-vis* citizens as their 'democratic principals'.

### *4.4 Limiting WTO power politics by multilevel judicial remedies*

Impartial and independent third-party adjudication of disputes is a much more ancient paradigm of 'constitutional justice' than modern 'constitutional democracies'. The less citizens with, today, universally recognized human rights can perceive economic, political and legal regimes as 'just'[46], the less they are likely to politically support international rules and comply with them voluntarily. The GATT/WTO trading system has helped countries to lift billions of people out of poverty. Yet, its legitimacy depends also on helping countries to protect the rule of law and other public goods demanded by citizens. President Trump's transactional, mercantilist approach to trade policy undermines WTO law, judicial administration of justice, and what the Preamble of the WTO Agreement describes as 'the basic principles underlying this multilateral trading system'. As US trade diplomats have made no effort at demonstrating that the AB has neglected the customary rules of treaty interpretation or the judicial AB mandate of 'prompt settlement' of WTO disputes over the interpretation of often indeterminate and incomplete WTO rules through judicial clarification of WTO law and dispute settlement procedures, other WTO members remain reluctant to support US reform proposals driven by US business interests' discontent with judicial limitations of US trade protectionism. Just as US withdrawal from the 2015 Paris Agreement has been no reason for other UN member states to abandon their climate change prevention policies, President Trump's disdain for the WTO legal and dispute settlement system offers no reason for other WTO members to no longer comply with their WTO legal obligations, as democratically prescribed by parliaments when they approved the WTO Agreement. European ordo-liberalism prioritizes a 'rule of law perspective'. Hence, European lawyers remain reluctant to support US proposals for rewarding the

46 Justice tends to be defined in terms of 'justification' by agreed procedural, constitutional, distributive, corrective and commutative principles of justice and equity, as they underly many GATT/WTO provisions like GATT Article XXIII.1 on 'violation complaints', 'non-violation complaints', and 'situation complaints'.

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US provocation of the 'AB crisis' by exempting trade remedies from the AB jurisdiction,[47] or by establishing a special AB division and AB secretariat for reviewing WTO panel reports on trade remedies.[48] It seems unrealistic that such DSU amendments will be supported by the necessary 'consensus' of WTO members, and that such DSU reforms will prompt President Trump to comply with what he denounces as 'the terrible WTO agreements'. Nor does it make sense to preclude more than 50% of WTO complaints from the AB jurisdiction. Yet, as the US concerns with the 'judicialization' of the WTO legal and dispute settlement system are primarily of a political nature, the establishment of an AB division specialized in trade remedies disputes, and supported by staff with special expertise in economics, could be part of a 'political compromise' on resolving the WTO AB crisis. Yet, such 'power politics' must remain subject to adequate legal safeguards (e.g. for protecting the independence and overall coherence of AB jurisprudence endorsed by different AB divisions). Giving in to US interest group politics[49] – without any coherent criticism of AB jurisprudence limiting abuses of trade remedy laws and defending compliance with WTO rules in conformity with the customary rules of treaty interpretation – not only disregards the reasonable interests of WTO members in maintaining non-discriminatory conditions of competition and rule of law; it also risks inviting similar power politics by other WTO members. For instance, as antidumping authorities often impose antidumping duties on grounds of 'injurious dumping' *without* empirically establishing competitive distortions caused by 'dumped imports', China and other WTO members might reject similar presumptions of market distortions in case of state-owned enterprises as 'public bodies' in the sense of the WTO subsidy and countervailing duty rules, or treating limitations of intellectual property rights as 'unfair competition'.

47 Cf. Hillman, *supra* n. 9, at 7f.

48 Hillman, *supra* n. 9, at 6. The US insistence, during the Uruguay Round negotiations, on creating a new 'Rules Division' in the GATT/WTO Secretariats with exclusive competence for serving GATT dispute settlement panels reviewing trade remedy measures, on staffing this Division with US trade remedy experts, and on preventing the GATT/WTO Legal Divisions from advising such trade remedy panels is often criticized by WTO lawyers as weakening the coherence of the WTO dispute settlement system; cf. G. Sacerdoti, 'The WTO Dispute Settlement System and the Challenges to Multilateralism : Consolidating a "Common Global Good"', Prévost, *supra* n. 5, 87ff, at 92.

49 US steel companies and their powerful lobbies remain the main users of US trade remedy laws. Already prior and during the Uruguay Round of GATT negotiations, they successfully lobbied the US government to negotiate 'voluntary export restraints', veto the adoption of GATT panel reports limiting abuses of antidumping laws, and politically interfere in GATT dispute settlement practices (e.g. by forcing GATT Director-General A.Dunkel to assign jurisdiction inside the GATT Secretariat for servicing GATT dispute settlement procedures involving trade remedy laws to a newly created 'Rules Division' staffed with US experts specialized in the administration of US antidumping laws). President Trump's 'aggressive unilateralism' is carried out by the same lawyers (like USTR R.Lighthizer) who worked for the US steel industries during the 1980s advocating similar, protectionist trade policies and power-oriented dispute settlement methods.

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## 5. Conclusion

This paper has recommended resolving the WTO AB crisis by defending the rule of law through use of the existing WTO rules on decision-making for the filling of vacant WTO positions (Articles IX.1 and 2 WTO Agreement) and for amending the DSU (Article X:8 WTO Agreement). The US objective of blocking the functioning of the AB, or proposals to overcome the AB crisis by resorting to general international law principles, offer no convincing alternatives.[50] Neither President Trump's trade protectionism nor the five BRICS economies offer coherent blueprints for realizing what the G20 Summit Declaration of 1 December 2018 described as 'necessary' modernization of WTO law and governance. Hence, this paper also recommended the competition law-, 'social market economy'- and rule-of law-principles of 'Geneva ordo-liberalism' as guidelines for resolving the broader WTO governance crises. The inability of WTO members to conclude their Doha Round negotiations, to adapt WTO law to modern regulatory challenges, and to adopt 'authoritative interpretations' responding to criticism of the dynamically evolving WTO jurisprudence confirms the – often lamented – 'imbalance' between the law-making and judicial functions of the WTO; this calls for institutional and legal reforms, such as the institutionalized dialogue between the DSB and the AB proposed by the EU. Power-oriented, diplomatic calls[51] for limiting judicial review of protectionist violations of agreed WTO rules approved by parliaments are rightly resisted by most WTO members. For instance, US threats of disregarding WTO panel and AB findings on the pending WTO disputes over 'national security justifications' of discriminatory trade sanctions, or on the 'market economy status' of China, are inconsistent with the DSU obligations of 'prompt compliance with recommendations or rulings of the DSB' (Article 21.1 DSU). The EU initiatives for responding to the US criticism by improving WTO rules through agreed amendments, annual meetings between the DSB and the AB, and, if necessary, majority decisions securing timely appointments of the AB – similar to the existing WTO procedures for timely appointment of the WTO Director-General – are to be welcomed. WTO members must de-escalate the 2018 'tariff wars', advance WTO modernization, and avoid 'over-loading'

50 One well-intentioned, yet impractical proposal has been to request the DSB Chair to 'declare consensus' – in spite of the US objections – on the ground that persistent abuse of such veto-powers in violation of DSU rules (e.g. Article 3.10, 17, 23) also violates general principles of international law like good faith and equity principles (e.g. that one cannot derive a legal claim from one's own breach of law). The 'neoliberalism' driving US trade policies has often prompted US trade diplomats to oppose claims by other GATT/WTO members that alleged 'gaps' in GATT/WTO rules (e.g. in case of claims for dispute settlement findings for 'reparation of injury' and reimbursement of illegal antidumping or countervailing duties) should be filled by interpreting indeterminate, or 'incomplete' GATT/WTO rules in conformity with general international law principles (e.g. on state responsibility and reparation of injury caused by illegal measures). This is illustrated also by the examples mentioned in footnotes 35 and 48.

51 Like some of the proposals of R. McDougall, 'Crisis in the WTO: Restoring the WTO Dispute Settlement Function', CIGI Papers No. 194 of October 2018.

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the WTO dispute settlement system with clarifying insufficiently precise WTO rules (e.g. on state-owned enterprises). These policy reforms could be facilitated by acknowledging the ordo-liberal need for elaborating more coherent competition rules limiting market failures, promoting social adjustment to import competition and related technology challenges, and protecting transnational rule of law and judicial remedies as legal and institutional restraints on 'governance failures'. 'Fast thinking'[52] in response to US power politics and to US discontent with AB rejections of US claims must remain checked by the 'slow reasoning' in democratic institutions, multilateral WTO negotiations, and in 'courts of justice'. The necessary accommodation of different perspectives and interests can be facilitated by recognizing that WTO law and governance have become important parts of modern welfare states protecting rule of law and economic and social welfare of their citizens. Without protecting rule of law and rules-based settlement of transnational trade disputes as prescribed in WTO law, and without resisting neo-liberal abuses of the inadequate WTO legal limitations of 'market failures' and 'governance failures', citizens and democratic parliaments will lose trust that WTO law should govern world trade and, thereby, all our lives.

The constitutional dimensions of ordo-liberal limitations of 'market failures' and 'governance failures' in European law and WTO law are often disregarded, such as the insight that anti-competitive abuses of public and private power are a perennial challenge of every economy (e.g. also of Chinese state capitalism and US market capitalism) that require constitutional restraints on abuses of public and private power and institutional 'checks and balances' protecting private 'market rights' and the enforceability of trade and competition disciplines.[53]

52 Cf. D. Kahneman, *Thinking, Fast and Slow* (Penguin, 2012).

53 Even though the ordo-liberal need for complementing welfare-increasing, voluntary agreements in economic markets, by 'social contracts' and 'constitutional contracts' among citizens in political markets, is also emphasized by US 'constitutional economists' (like Nobel Prize laureate J. Buchanan and his 'Virginia School' of public choice and constitutional economics), US trade and economic policies remain dominated by interest group politics resisting constitutional restraints (e.g. on the congressional delegation of almost unlimited trade policy powers to the US President and their protectionist abuses for the benefit of rent-seeking steel lobbies and other interest groups). Ordo-liberal constitutionalism could help China and market-driven WTO member states to limit their 'strategic dilemma' (as illustrated by US trade restrictions on Chinese IT companies and other Chinese suppliers of strategic US industries) that the unlimited powers of Chinese state-owned (or state-influenced) enterprises risk distorting not only economic competition, but also the 'balance of power' in international relations. Obviously, neither China nor the US nor most other WTO members are willing to respond to this 'constitutional challenge' by amending their national Constitutions. Yet, European ordo-liberalism demonstrates that multilateral trade agreements and third-party adjudication can serve 'constitutional functions' if agreed trade, competition, and legal disciplines are enforceable through multilevel judicial remedies like those characterizing the European and also the WTO dispute settlement systems. Unfortunately, notwithstanding their criticism of anti-competitive trade distortions in China and other WTO member countries, US advocates of using 'trade wars' as a means for imposing 'optimal tariffs' exploiting US market power, like protectionist US interest groups benefiting from redistributing domestic income through discriminatory import restrictions, oppose limiting trade policy powers and distortions of competition through stronger WTO legal and dispute settlement rules.

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