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International Economic Law and Disintegration: Beware the Schmittean Moment

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ABSTRACT

In his influential book, Straight Talk on Trade, Dani Rodrik provides a cogent critique of the existing international economic order and concludes as follows: 'So, I accept that nation-states are a source of disintegration for the global economy.' This article critically engages with the idea that the nation-state is a legitimate force of disintegration of the international economic order, with particular attention to trade and investment agreements. In times of raising authoritarianism, it is crucial to reflect on some of the limits of the nation-state and on the necessity to develop alternative paradigms for integrating economies and societies. Against this background, this article posits that we should beware of the risk of a 'Schmittean moment'. This term is used to refer to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic) order. Under such ideal, any international normative benchmark is brushed away by an allegedly more intellectually honest 'political' dimension, which can find its realization only in the decisionist state. To understand the risk of a 'Schmittean moment' it is important to recognize that the move toward more nation-state is partly animated by some legitimate concerns over the existing international legal order, such as those underpinning the analysis by Dani Rodrik. This article articulates a two-fold critique of the idea that an expansion of national sovereignty is going to achieve a better socio-economic world order per se. The first critique is internal, showing that the nation-state does not possess intrinsic characteristics to facilitate democracy, equality, and sustainability. The second is external and focuses on the necessity to look reflexively at the goals of the system of international economic law, to re-imagine it as capable to address questions of inequality and environmental degradation.

INTRODUCTION

There was a time when national sovereignty was out of fashion. In the nineties, international lawyers were engaged in imaging the global order beyond the nation-state.

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Theories to make this order possible were proliferating: from Global Administrative Law to global constitutionalism.[1] International Economic Law (IEL) played an important role in the journey toward the global order. Our markets could be integrated through an almost brand new organization, the World Trade Organization (WTO). The WTO was created and endowed with a powerful set of new agreements, promoting the harmonization of health and safety law—through the Sanitary and Phytosanitary (SPS) Agreement—and technical regulation—Technical Barriers to Trade (TBT) Agreement—and establishing (relatively uniform) Intellectual Property Rights regimes worldwide (the TRIPS Agreement). The WTO also included a brand new dispute settlement system, considered by many as a manifestation of the rule of law at the international level. Similarly, organizations such as the World Bank and the International Monetary Fund (IMF) were indirectly spreading (de-)regulatory policies throughout the developing world.[2] Globalization, nudged by a global technocratic elite, was alive and kicking, back then.

Today we face a crisis of the regime of international economic law and, more broadly, global economic governance. The system appears broken for its incapacity to face some of the most daunting challenges of our time: the widespread and dramatic process of environmental degradation and the unacceptable inequalities between poor and rich. On its face, the phenomenon of far-right populists, partly reflected in Brexit and Trump politics, and spreading across the Atlantic is shaking the system of international economic law, by hailing nationalist policies. The idea that the nation-state may be a desirable source of disintegration of the global (legal) order is gaining traction across the political spectrum. It appears clear that the answer to the legitimacy crisis of the system of international economic law and governance offered by progressives[3] resorts also to entrusting the nation state with more political space—a space that allegedly has been unduly constrained by the global economic order.

Not only politicians but also progressive academicians, such as Professor Dani Rodrik, have defended the importance of national sovereignty,[4] as one of the necessary paradigms to fix our broken world order. The gist of the reasoning is simple: global institutions went too far in eroding national sovereignty, which is the real basis for democratic liberal regimes. Without the nation-state, environmental, industrial, and

1 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', 68 (3–4) Law and Contemporary Problems 15 (2005); Sabino Cassese et al., *Global Admistrative Law: Cases, Materials and Issues* (Rome: Istituto di Ricerche sulla Pubblica Amministrazione, 2008); Jean Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

2 David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005); Jason Hickel, *The Divide: A Brief Guide to Global Inequality and Its Solutions*, 1st ed. (New York: Random House, 2017).

3 One example is the support of democratic senator Elisabeth Warren to Trump trade policy. See William Mauldin and Ted Mann, The Wall Street Journal, 11 March 2018. https://www.wsj.com/articles/gop-talks-of-bill-to-thwart-tariffs-while-democrat-warren-applauds-trump-1520792857.

4 Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton: Princeton University Press, 2018); see also Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: W.W. Norton, 2011).

redistributive policies cannot be realized. As Rodrik put it: 'So, I accept that nation-states are a source of *disintegration* for the global economy.'[5]

This article critically engages with the idea that the nation-state is a legitimate force of disintegration of the international economic order, with particular attention to trade and investment agreements. There are disparate circumstances, from the realm of food safety regulation to the regulation of capital flows,[6] in which it is arguably desirable that domestic institutions (re-)gain more power. Most importantly, the nation-state is today an important site of democracy and, only for that reason, it is worth defending. Yet, in times of raising authoritarianism, it is crucial to reflect on some of the limits of the nation-state and on the necessity to develop alternative paradigms for integrating economies and societies.

This article presents a two-fold critique of the idea that an expansion of national sovereignty is going to achieve a better socio-economic world order per se. The first critique is internal, showing that the nation-state does not possess intrinsic characteristics to facilitate democracy, equality, and sustainability. The second is external and focuses on the necessity to look reflexively at the goals of the system of international economic law, to re-imagine it as capable to address questions of inequality and environmental degradation.

In a more pragmatic fashion, this article posits that more nation-state may be a misleading and possibly dangerous response to today's daunting challenges. It is misleading in so far as it promises solutions that nation-states *alone* cannot deliver. It is dangerous in so far as the rhetoric of the nation-state paradoxically facilitates the turn toward an expansion of the 'rule of exception' and, eventually, authoritarianism. Above all, in advocating for disintegration through the nation-state, we need to reckon with our haunting past where economic autarchy has been deeply intertwined with the ascent of fascism and Nazism. If today the nation-state may appear as a beacon of democracy, the role of nationalism in generating the nemesis of democracy should not be neglected. In short, and at the risk of oversimplification, 'America first' echoes too closely fascist slogans.[7]

5 Ibid, Rodrik (2018), at 25.

6 See Rodrik (2018), at 213 for a discussion of the importance of controls of capital flows.

7 Mussolini used similar slogans in fascist Italy. As reported by a scholar in 1938: 'Preferite il prodotto italiano, "Buy Italian", became a slogan to be encountered everywhere, from the smallest village to the national's capital' see William G. Welk, *Fascist Economy Policy; An Analysis of Italy's Economic Experiment* (Cambridge: Harvard University Press, 1938) 175. This is not to say that protectionist trade policies are always and necessarily bound up with illiberalism and fascism. Yet, it is an important reminder of the salience of autarchy for the economic policy of fascist regimes. As put by Trotsky in 1934, 'Italian fascism has proclaimed national "sacred egoism" as the sole creative factor. After reducing the history of humanity to national history, German fascism proceeded to reduce nation to race, and race to blood. Moreover, in those countries which politically have not risen—or rather, descended—to fascism, the problems of economy are more and more being forced into national frameworks. Not all of them have the courage to inscribe "autarchy" openly upon their banners. But everywhere policy is being directed toward as hermetic a segregation as possible of national life away from world economy.' Leon Trotsky, 'Nationalism and Economic Life', 12 Foreign Affairs 395 (1934), at 395.

I. A PROGRESSIVE DEFENSE OF THE NATION-STATE AND THE RISK OF A 'SCHMITTEAN MOMENT'

Let me start by rehashing the two interconnected and equally formidable challenges we are facing today: the question of environmental degradation and the unacceptable level of inequalities whereby a large part of the population in the world lives in poverty (both in developing and developed countries, but still overwhelmingly concentrated in so-called developing countries) vis-à-vis a small elite enjoying incredible wealth. Economic integration that does not deal with these challenges is not only doomed to fail; it is a type of economic integration that we should not aspire to.

It is plausible that Brexit and the disintegrationist economic policy of Trump have been partly enabled by the growing inequalities in the Anglophone nations. It is no brainer that a large fraction of Brexiteers and Trump voters are the 'left behind.'[8] In wealthy countries, the working class often felt left behind by thriving globalization, which has benefited only the elites. The—often labelled—'populist turn' rests on the idea that the 'other', the 'foreigner' has stolen 'our' welfare and a more nationalistic policy is needed to protect the losers of the current state of affairs. This is evident from Trump's slogan 'Buy American, Hire American.' It is worrying how this type of nationalism is entrenched in racism and in the othering of the non-American.

However, as mentioned earlier, the case for more nation-state has also been made by 'progressive' politicians and intellectuals. Among progressive economists, Dani Rodrik stands out for having defended the nation-state with compelling arguments. Let me quote him at length: 'When it comes to providing the arrangements that markets rely on, the *nation-state* remains the only effective actor, *the only game in town*. Our elites' and technocrats' obsession with globalism weakens citizenship where it is most needed—at home—and makes it more difficult to achieve economic prosperity, financial stability, social inclusion, and other desirable objectives.'[9] Not only is the nation-state the only game in town, when it comes to issues of redistribution, social security and safety, the nation-state is also desirable because it can deliver *institutional diversity* which is needed to realize the social contract: 'Developing nations have different institutional requirements than rich nations. There are, in short, strong arguments against global institutional harmonization.'[10] The nation-states can meet different preferences, and '[i]nsufficient appreciation of the value of nation-states leads to dead ends.' Rodrik also concedes that international market liberalization is the offspring of well-functioning

8 James Wolcott, *Vanity Fair*, 7 September 2018. https://www.vanityfair.com/news/2018/09/the-left-behind-trump-voter-has-nothing-more-to-tell-us; Patrick Kingsley, *The New York Times,* 13 November 2018. https://www.nytimes.com/2018/11/13/world/europe/un-extreme-poverty-britain-austerity.html. To this it should be added that the marginalized are only a fraction of the Trump electorate or of the Brexiteers. As noted by Colin Crouch, supporters of xenophobic movements are often rich individuals living in small villages, aligning with these movements because of their identity politics, see Colin Crouch, *The Globalization Backlash* (Hoboken: John Wiley and Sons, 2018) particularly Chapter 3. It is also to be noted that important libertarian intellectuals, followers of Hayek, have also been involved in neo-nationalist far right-wing parties, see Quinn Slobodian, *Public Seminars*, 15 February 2018. https://publicseminar.org/2018/02/neoliberalisms-populist-bastards/.

9 Dani Rodrik, *Aeon*, 2 October 2017. https://aeon.co/essays/capitalists-need-the-nation-state-more-than-it-needs-them, Emphasis added. See also, Rodrik, Straight Talk, above n 4, at 223.

10 Ibid.

nation-states rather than international institutions: 'Domestic political bargains, more than GATT rules, sustained the openness that came to prevail.'[11] Against this background, Rodrik defends 'economic populism' in so far as it constitutes a form of resistance to 'liberal technocrats' imposing undue restraints on domestic economic policy.[12] The rigid focus on price stability in low-inflation environments is a clear example of global or EU-driven policies largely insensitive to the effects on employment and paradoxically even growth.[13]

Many of Rodrik's arguments are compelling, such as his critique of the economic profession's misleading analysis of trade and investment agreements. Some of his reform proposals, such as the strengthening of green industrial policy,[14] are arguably desirable. Most crucially, the nation-state may be at present one of the most developed sites of democracy, albeit an imperfect one. When global institutions constrain nation-state policies formed following democratic decision-making, this may legitimately be seen as a threat to democracy. Rodrik's work has had a wide echo in legal circles, as evidenced by the publication of a book with the goal of reimagining trade and investment law, [15] which is opened by several chapters all commenting—in overwhelmingly positive terms—on Rodrik's *Straight Talks on Trade*. The nation-state and, more generally, sovereignty is (re-)gaining traction also among progressive political theorists. In times of economic and existential uncertainties, sovereignty is there to offer protection 'from unfettered markets and from permanently incumbent austerity' and it constitutes a 'refusal of a "liquid society" and of its very solid ... inequalities.'[16] Some of the most lucid analyses of the current international economic order point at the dramatic consequences of an increase of capitalist power that has incapacitated states to act in defense of its own people.[17] The attention on sovereignty is also partly reflected in recently negotiated provisions of new trade and investment agreements, where states are explicitly endowed with a 'right to regulate.' Despite the unclear practical implications of such jargon, its symbolic value is unambiguously bearing witness to the shared view that states ought to maintain (or regain) political space. Against this background, Trump's claims to defend the Ohio steel workers by whatever trade measures it takes may appear more acceptable. Could we then read in this reinvigorated faith in sovereignty a 'Grotian moment'?[18]

11 Ibid. Also see Rodrik, above n 4.

12 Dani Rodrik, *Project Syndicate*, 9 January 2018.

13 Rodrik, above n 9, at 4.

14 See Rodrik, Straight Talk, above n 4, at 257–60.

15 Alvaro Santos, Chantal Thomas and David M. Trubek, *World Trade and Investment Law Reimagined: A Progressive Agenda for an Inclusive Globalization* (London: Anthem Press, 2019).

16 Carlo Galli, *Sovranità (Sovereignity)* (Bologna: il Mulino, 2019) 128. As translated by this author.

17 Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019); see also Katharina Pistor, 'From Territorial to Monetary Sovereignty', 18 Theoretical Inquiries 491 (2017); see also Wolfgang Streek, *Buying Time* (New York: Verson Books, 2014).

18 Antony Anghie refers to a Grotian moment as a 'situation where a monumental change has occurred in international relations'. See Antony Anghie, 'International Law in a Time of Change: Should International Law Lead or Follow', 26 Amsterdam University International Law Review 1315 (2011), at 1318, where he traces the term to Richard Falk.

Without indulging on this question, this article posits that we should beware the 'risk' of entering a 'Schmittean moment'.[19] This term is here used to refer to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic) order. Under such ideal, any international normative benchmark is brushed away by an allegedly more intellectually honest 'political' dimension, which can find its realization only in the decisionist state.[20] To understand the risk of a 'Schmittean moment', it is important to recognize that the move toward more nation-state is partly animated by the legitimate concerns over the existing international legal order; legitimate concerns, which have eloquently been articulated by Schmitt himself.

Carl Schmitt's work offers a lucid critique of the 'exclusionary character of liberal universalism.'[21] His critique exposes the hypocrisy underpinning many universalisms, most prominently the legal canon of 'just' war.[22] In fact, it is the very core of the contemporary international legal project that gets questioned: 'The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form, it is a specific vehicle of economic imperialism. Here, one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat.'[23] This argument has direct relevance for the domain of international economic law. In an endnote to this claim—discussing the extermination of Indians in North America—Schmitt explains the danger to use certain moral canons as exclusionary devices: 'As civilization progresses and morality rises, even less harmless things than devouring human flesh could perhaps qualify as deserving to be outlawed in such a manner. Maybe one day, it will be enough if people were unable to pay its debts.'[24] This consideration is of extreme actuality in relation to the current international legal order, which seems to have crystallized structures of annihilation of debt states, and their very peoples.[25] In decrying how the economical is rescinded by the political, Schmitt unveils the absent 'presence' of (mostly American) politics in the economy. In short, Schmitt's analysis cogently engages with the problem of depoliticization that the international liberal order yields.[26] It is at this juncture that the thoughts of Schmitt and Rodrik may intersect. In some sense, Schmitt's critique

19 One of the most relevant books by Carl Schmitt in relation to the field of international law is Carl Schmitt, *The Nomos of the Earth* (Candor: Telos Press Publishing, 2006).

20 In 'The Concept of the Political', Schmitt starts by denouncing the emptiness of conceptions of the state, to put forward his own decisionist view. 'In its literal sense and in its historical appearance, the state is a specific entity of a people. Vis-à-vis the many conceivable kinds of entities, it is in the decisive case, the ultimate authority.' See Carl Schmitt, *The Concept of the Political* (Expanded Edition, Chicago: University of Chicago Press, 2008) 19.

21 William E. Scheuerman, 'International Law as Historical Myth', 11 Constellation 537 (2004).

22 The analysis of Schmitt on this theme is acute and erudite, interweaving the thoughts of illustrious intellectuals of the past. In illustrating the problems underpinning the concept of just war, for example, he connects in the same page the thought of Erasmus (Cui non videtur causa sua justa? [Who does not see his own cause as just?]) to Gentile (Bellum juste geri utrumque [War justifies everything]). See Schmitt, above n 19, at 156.

23 See Schmitt, above n 20, at 54.

24 Ibid, at 54, in endnote 23.

25 See Streek, above n 17.

26 Martti Koskenniemi, 'International law as political theology: how to read Nomos der Erde?', 11 Constellations 492 (2004).

resonates with the critique of 'hyper-globalization' articulated by Rodrik:[27] 'one type of failure arose from pushing rule making onto supranational domains too far beyond the reach of political debate and control.'[28]

Before elaborating on this intersection, it is key to rehash some flaws of Schmitt's analysis. While he has certainly a point in showing how liberal universalism can be used to arbitrarily exert hegemonic power in the name of humanity (and has so been used in such way by the US and other predominantly Western countries), the alternative he implicitly propounds rests on a nostalgia for a mythical past—a golden age based on the *jus publicum Europaeum*. Regrettably, this age has been golden only for some; the *jus publicum Europaeum* for all its glory was made of colonial relations, exploitation, and violence. It has also been noted how Schmitt's historical analysis, which portrays the times of the *jus publicum Europaeum* as times where war gets domesticated by the modern state eclipses the fact that the 'development of the modern state apparatus . . . helped bring about unprecedented capacities for organized state violence, even if such violence was no longer typically unleashed against fellow Europeans.'[29] His conception of sovereignty, which finds essential realization only in the 'unlimited jurisdictional competence' normalizes the rule of exception. A related trouble with Schmitt's core normative ideas is the totalizing enemy-friendship antithesis: 'the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.'[30] This is particular fatal to an ideal of nonviolent international law, as it denies even the aspiration of solidarity beyond borders.[31] In other words, Schmitt conceptualization of the international legal order crystallizes nation-state borders in deeper existential structures, leaving no hope for common projects of different communities inhabiting the earth. In exposing the violence of allegedly humanitarian projects, Schmitt is de facto hollowing out the concept humanity, reducing its essence to violence *in potentia*: 'the entire life of a human being is a struggle and every human being symbolically a combatant. The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.'[32] In denouncing the hypocrisy of moralism, Schmitt seems to negate the possibility of morality altogether. The *Nomos* of the earth, starting with the act of appropriation—*nehmen* (take)—and continuing with dividing the land—*nemein* (divide)—does not

27 Hyperglobalization has been defined as 'the attempt to eliminate all transaction costs that hinder trade and capital flows' See Rodrik (2018), above n 4, at 28.

28 Ibid, at 28–29.

29 See Scheuerman, above n 21, at 543.

30 See Schmitt above, n 20, at 26. And further at 35, for the totalizing nature of the friend-enemy distinction: 'War as the most extreme political means discloses the possibility which underlies every political idea, namely, the distinction of friend and enemy.' Schmitt seems to implicitly moralize his distinction by arguing that the enemy is 'public' and, hence, does not need to be hated. He does that by drawing further distinctions: the public enemy is hostis and not inimicus. He also seems to 'excuse' himself by noting that the Christian 'Love your enemy' adage is originally formulated as 'diligite inimicos vestros;' apparently Jesus was not thinking of hostis but of inimicus. Besides this disputable Schmittean reading of the Gospel, it remains unconvincing how legitimating the destruction of the enemy, even if only hostis and not inmicus, could do any justice to the enemy.

31 For a discussion of the plausibility of cross-border solidarity see Crouch, above n 8.

32 See Schmitt, above n 20, at 33.

engage with the morality of the first act of appropriation nor with its division. And this is also what Hanna Arendt contests to Schmitt: 'to remove justice from the content of the law.'[33]

Schmitt's critique may leave us with a form of brutal and absolute sovereignty. The risk of a 'Schmittean moment' then translates into the danger of too easily reading into a (re-)empowerment of the nation-state the road to salvation, whereas in practice, it could yield 'hypersovereigns.' Anthony Anghie has used the term 'hyper-sovereign states' to refer to the possibility of states to dominate others in the name of democracy, with actions disregarding basic rules of international law, such as those pertaining to human rights and the use of force.[34] As well exemplified by the case of US foreign policy, the hypersovereign can transform democratic states into rogue states.[35] In this context, it is worth recalling that the work of Carl Schmitt has been associated to the one of Anthony Anghie.[36] True, both scholars have provided a lucid critique of international law, as a system enabling hegemonic power—the former even with some prescience of the years to come. Yet, it is crucial to distinguish the critical enterprises of these scholars. As noted by Benhabib, 'Schmitt critiques American behavior not to offer a new law of nations but rather to undermine it altogether.'[37] By contrast, for all its critical analysis of the past, the work of Anghie remains future-oriented, leaving us with the nonviolent and constructive question: 'Is it possible to imagine a nonimperial world?'[38] Anghie warns us against the hypersovereign, while Schmitt implicitly legitimizes its existence.[39]

Let us now go back to Rodrik's case for the nation-state. The work by Dani Rodrik has always been respectful of developing countries and nonwestern cultures. His rigorous and enlightening empirical work has in fact defended growth models of certain developing countries (particularly the Asian tigers), going against the grain of the golden standard of the west, i.e. the Washington consensus.[40] In this sense, Rodrik's analysis is

33 Hanna Arendt, Marginalia on The Nomos of the Earth, as cited and studied by Anna Jurkevics, 'Hannah Arendt reads Carl Schmitt's *The Nomos of the Earth:* A dialogue on law and geopolitics from the margins', 16 European Journal of Political Theory 345 (2017), at 350.

34 See Anghie, supra n 18, particularly at 1339–40.

35 Ibid, at 1341.

36 See, for example, René Urena, 'Deciding what is Humane: Towards a Critical Reading of Humanity as a Normative Standard in International Law', in Britta van Beers, Luigi Corrias and Wouter G. Wernerat (eds), *Humanity across International Law and Biolaw* (Cambridge UK: Cambridge University Press, 2014) 178. Anghie himself refers to the work of Schmitt, see for example, Anghie supra n 18, at 1357–58, fn 19 and 1367. See also, Martti Koskenniemi, presentation on 'Fascism and International Law: History, Technology and Representation' (Workshop at the Fascism and the International Conference held on 24, 26 May 2018 in Melbourne), available https://www.fascismandtheinternational.com/audio-visual; during this presentation, Martti Koskenniemi draws a parallel between the two scholars.

37 Seyla Benhabib, 'Carl Schmitt's Critique of Kant: Sovereignty and International Law', 40 Political Theory 688 (2012).

38 Antony Anghie, 'International Law in a Time of Change: Should International Law Lead or Follow', 26 American University International Law Review 1315 (2011), at 1367.

39 Anghie himself compares some of his arguments to those of Schmitt, particularly the critique of the concept of 'just war.' In making this link, Anghie distantiates himself from Schmitt noting that Schmitt resolves the critique by asserting 'that the soverign decides what is just and unjust.' See Anghie, supra n 38, at 1357, fn 119. More generally, see Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

40 Dani Rodrik, 'Trading in Illusions', 55 Foreign Affairs (2001).

miles away from Schmitt. Yet, the risks inherent in advocating for the nation-state as a source of disintegration should be carefully pondered.

Arguing for more nation-state or state sovereignty eludes the key questions of how to live together on earth and how to face the contingent challenges of inequalities and environmental degradation. Rodrik may be aware of this problem, when he engages in imaging new rules for the global economy. However, his analysis overlooks the latent risks of hypersovereignty. This neglect is particularly prominent in some of the 'common-sense solutions' he advances. For example, he proposes that 'nondemocratic countries cannot count on the same rights and privileges in the international economic order as democracies.'[41] Here he seems to fall back on a conception of 'democratic sovereignty', which can too easily lend legitimacy to the hypersovereign. In fact, hypersovereignty and hyperglobalization may appear as two sides of the same coin. By juxtaposing the nation-state to the global legal order, we dodge the questions of which goals, rules, and institutions are promoting global justice and a peaceful co-existence of different communities inhabiting the Earth. In eluding such questions, we run the risk of paving the way to new forms of hypersovereignty, while stifling transformative projects where law can be used for emancipatory purposes. In other words, redirecting efforts to disintegrating the global order and re-empowering the nation-state may miss the point of the difficult tasks ahead. The next sections aim at corroborating this statement by elaborating on the intrinsic limits of the nation-state and of absolute sovereignty as an ordering criterion for the international legal order.

II. THE INTRINSIC LIMITATIONS OF THE NATION-STATE AND THE LOOMING RISK OF HYPERSOVEREIGNTY

Let us now go back to the noble goals animating *Straight Talk on Trade*: economic prosperity, equity, and democracy. The first problem with advocating for more nation-state is that the nation-state as such is neither protecting equality nor democracy. The nation-state can do wonderful for its citizens, but it can also oppress them through violence, as Nazi Germany, Fascist Italy, and Spain did—to mention a few. By definition, authoritarian states are neither protecting democracy nor fostering pluralism. Arguably softer authoritarian regimes, such as contemporary China, are also far from fostering democracy and pluralism. Suffices to think of the Uighur, which for their different identity continue to be prosecuted in China today.[42] This point is trivial but worth being re-stated, to dispel the false dichotomy global/nondemocratic vs national/democratic.

One of the most powerful arguments by Rodrik is that re-empowering the nation-state is a way to enhance institutional diversity. While intuitive, this point fails to address the question that the nation-state rests on its own 'demiurgic universalism', aspiring to create a unity, which flattens out existing diversity.[43] It is no coincidence that 'the right

41 See Rodrik, *Straight Talk*, above n 4.

42 Roland Hughes, *BBC*, 8 November 2018. https://www.bbc.com/news/world-asia-china-45474279.

43 The expression 'demiurgic universalism' is borrowed from Peter Fitzpatrick (ed.) 1995, *Nationalism, Racism and the Rule of Law* (Farnham: Ashgate, 2008) xiv.

wing Weimer scholars, notably Carl Schmitt, opposed what they regard as the pluralistic party political system of parliamentary democracy.'[44]

When it comes to equality and redistribution, the nation-state does not fare better. Take the US, as a paradigmatic example of highly rich societies fraught with severe inequalities.[45] There is ample evidence that inequality has been growing exponentially in the past century in the US.[46] The key question here is whether the nation-state through its very domestic policies has had a role to play in it. Data about wealth distribution in the US seem to point at the responsibility of the nation-state.[47] US taxation policy of the past 30 years may be seen as the chief culprit. What lies at the core of regressive redistribution is domestic policy, whereby the richest strata of society have been de-taxed, causing shrinking public budgets and less capacity of establishing policies of solidarity. To one account, a redistribution from the richest to the poorer strata of society may greatly reduce inequality. A downward redistribution of income from the richest 1% to the bottom 40% of the income distribution would be sufficient to double the income of the latter.[48] The inequality has further increased with the tax cut initiated by President Reagan. Gregory Shaffer recounts that '[t]he two major tax cuts of the Reagan era dropped the top marginal income tax rate for the rich from 70 to 38.5%. These tax cuts tripled the national debt to 2.6 trillion dollars, leading to severe budget cuts that constrained the ability of the state to provide support for vulnerable citizens. They had significant adverse effects on state support, ranging from public education to health insurance, from child care to job training.' [49] As the US case exemplifies, the

44 David Dyzenhaus, 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought', 16 Theoretical Inquiries L. 337 (2015), at 340.

45 The US as rich country is a paradigmatic example, but by no means the only country displaying high levels of inequality. There is solid evidence that other countries and regions suffer from comparable inequalities. See Thomas Piketty, *Capital and Ideology* (Harvard University Press, 2020). As detailed by the quantitative study by Piketty, inequality within countries/regions has grown in some of the most important states/regions in the world; as he writes: 'Take, for example, India, the United States, Russia, China, and Europe. The share of the top decile in each of these five regions stood at around 25–35% in 1980 but by 2018 had risen to between 35 and 55%.' at 19, Fig. I.3. Piketty further shows how inequality within states/regions is virtually present all over the world. One potential justification for inequality could be that—seen from a dynamic perspective—it stimulates growth and ultimately benefits the poor. Piketty counters this reasoning by further observing that the growth in inequality is not associated with economic growth: 'Growth rates in both Europe and the United States were higher, for example, in the egalitarian period (1950–1980) than in the subsequent phase of rising inequality. This casts doubt on the argument that greater inequality is always socially useful.' Ibidem at 23.

46 Emmanuel Saez and Gabriel Zucman, 'Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data', 131 The Quarterly Journal of Economics 519 (2016). (The authors find that wealth concentration was high at the beginning of the 20th century, fell between 1929 and 1978 and has consistently risen since 1978.)

47 For the US, see Joseph Stiglitz, *The Price of Inequality* (New York: W.W. Norton & Company, 2013).

48 Dean Baker, *Rigged: How Globalization and the Rules of the Modern Economy Were Structured to Make the Rich Richer* (Washington, DC: Center for Economic and Policy Research, 2016), see in particular at p. 15 where he writes: 'the share of the 1% has more than doubled from its level during most of the period of the 1950–1980. Measured as a share of total income, this increase is roughly 10.0% points. This would be sufficient to increase the income of everyone in the bottom 90% of the income distribution by more than 20%. It would be almost enough to double the income of the bottom 40%. In short, this upward redistribution has had a substantial impact on the living standards of the rest of the population.'

49 Gregory Shaffer, 'Retooling Trade Agreements for Social Inclusion', 1 University of Illinois Law Review 17 (2019); internal references omitted. Shaffer also refers to the 'Republican party . . . assault on the estate tax

nation-state can have its own share of responsibility for growing inequalities. This is likely to be the case for other countries as well. For example, Philip Alston, the UN rapporteur on extreme poverty, when visiting Britain in 2018 is reported to have said: 'The UK was a world leader in social security after World War II, it was a world leader on privatization on a large scale and it is a world leader right now in *self-imposed austerity.*'[50]

If the above indicates that the nation-state has limitations in bringing about democracy and equality, there is another powerful argument suggesting care before advocating disintegration by the nation-state, namely the fragility of the nation-state in a world of geopolitics. This argument echoes the risk of hypersovereignty that underlies a 'return' to the nation-state, already mentioned in the previous section. The ongoing move of the US to weaken the multilateral order, by resorting to the rule of exception through invoking an implausible national security exception in defense of its trade measures, or by unapologetically killing the WTO Appellate Body, is the barest manifestations of the risk of a Schmittean moment. But these are by no means the only sites where the risk materializes.

Take, for example, the Sanitary and Phytosanitary (SPS) Agreement.[51] According to Rodrik, this Agreement embodies procedural rules 'pertaining to transparency, broad representation, accountability, and use of scientific/economic evidence' which could 'improve domestic decision-making.'[52] However, the SPS agreement contains provisions, which have attracted criticisms for their potential of eroding democracy and institutional diversity.[53] It is this Agreement, together with the TBT and the TRIPS Agreements that can be seen as the bastion of global technocracy. The SPS Agreement in a sense, encompasses contradictory tendencies: on the one hand, the emphasis on science has a strong potential to be turned into 'scientism' that is a 'discourse or

imposed on the wealthiest 0.1% of Americans. In 2017, they increased the exempted amount of wealth to $20 million (for couples), indexed for inflation, up from $675,000 in 2000, and they reduced the tax rate on these estates from a high of 77% from 1941–1977 to 40%.' See also Thomas Piketty, *Capital in the Twenty-first Century* (Cambridge: Harvard University Press, 2014). Piketty discusses the reduction in progressive income taxation in Britain. Interestingly both the US and Britain, who championed the attacks on social welfare state, mainly through Tatcherism and Reaganomics are now leading in the disintegration of the current system of international economic law.

50 See Kingsley, above n 8; Patrick Kingsley, *The New York Times,* 16 November 2018. Emphasis added. https://www.nytimes.com/2018/11/16/world/europe/uk-un-poverty-austerity.html. See also Rupert Neate, *The Guardian*, 3 December 2019. https://www.theguardian.com/news/2019/dec/03/uk-six-richest-people-control-as-much-wealth-as-poorest-13m-study.

51 Agreement on the Application of Sanitary and Phytosanitary Measures, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariffs and Trade, 15 April 1994 ('SPS Agreement'). Annex 1A.

52 Rodrik, *Straight Talk*, above n 4, at 226.

53 The precarious relation between science, democracy and regulatory law, as inscribed into trade law, has been discussed by L. Busch, R. Grove-White, S. Jasanoff, D. Winickoff and B. Wynne, 'Amicus Curiae Brief Submitted to the Dispute Settlement Panel of the WTO in the case of EC-Biotech' (WT/DS291, 292 and 293) (2004), re-published as a scholarly article, David E. Winickoff et al, 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law', 30 Yale Journal of International Law 81 (2005). See also David E. Winickoff and Douglas M. Bushey, 'Science and power in global food regulation: The rise of the Codex Alimentarius', 35 Science, Technology, & Human Values 356 (2010). For a relatively more optimistic view, see Robert Howse, 'Democracy, Science, and Free Trade: Risk Regulation Trial at the World Trade Organization', 98 Michigan Law Review 2329 (2000).

framework for discussion that excludes considerations of distributional and other social impact criteria in the determination by a regulatory agency that a product is or is not suitable for markets .... In its neoliberal form, scientism tends to restrict democratic participation and weakens the option for governments to regulate ....'[54] On the other hand, the Agreement offers space for a reading of the text respectful of democracy and plurality, and the Appellate Body has partly entrenched this reading into its body of jurisprudence.[55] The point here is that this imperfect multilateralism, thanks to its rhetoric (e.g. right to regulate jargon), some indeterminacy of the norms and a relatively transparent and symmetrical dispute settlement mechanism, could become a site to foster international regulatory dialectic and defy domination.[56]

It is telling that the US, in its recently negotiated US–China trade agreement, [57] has included clauses that would oblige China to import US hormone-treated beef and that would enhance the legal normativity of the Codex standards on ractopamine, despite key controversies on their adoption.[58] The nuances of the SPS Agreement, and its sophisticated reading by the Appellate Body, are wiped out with one stroke. The brutal face of the hypersovereign is looming behind the one of the neoliberal globalists.

54 Moore et al., 'Science and Neoliberal Globalization: A Political Sociological Approach', 40 Theory and Society 505 (2011), at 517.

55 See Alessandra Arcuri, 'Global food safety standards: The evolving regulatory epistemology at the intersection of the SPS Agreement and the Codex Alimentarius Commission', in Panagiotis Delimatsis (ed), '*The Law, Economics and Politics of International Standardisation*' (Cambridge: Cambridge University Press, 2015) 79–103; The case where the Appellate Body has shown the most sophisticated understanding of risk assessment provision is US—Continued Suspension; WTO Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, para 534.

56 For a similar argument, see Arcuri, Alessandra and Federica Violi, 'Reconfiguring Territoriality in International Economic Law', in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016* (Berlin: Springer, 2017) 175–215, particularly at 190–94.

57 Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China, 15 January 2020. https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf. For a first comment on the agreement see International Economic Law and Policy Blog, 'So Many Questions About the US China Trade Deal', https://ielp.worldtradelaw.net/2020/01/so-many-questions-about-the-us-china-trade-deal.html (visited 12 April 2020).

58 For the standards of Beef, see Annex 4(5) of Article 3.1 of the Agreement, which reads: 'Within one month of the date of entry into force of this Agreement, China shall adopt maximum residue limits (MRLs) for zeranol, trenbolone acetate, and melangesterol acetate for imported beef. For beef tissues for which Codex has established MRLs for these hormones, China shall adopt the Codex MRLs. For beef tissues for which Codex has not established MRLs for these hormones, China shall adopt its MRLs by following Codex standards and guidelines and referring to MRLs established by other countries that have performed science-based risk assessments.' For the standards on ractopamine see Annex 7(5) of the Agreement: 'In consultation with U.S. experts, China shall conduct a risk assessment for ractopamine in cattle and swine as soon as possible without undue delay, and in a manner consistent both with Codex and FAO/World Health Organization (WHO) Joint Expert Committee on Food Additives (JECFA) risk assessment guidance and with the risk assessment for ractopamine previously conducted by the FAO/WHO JECFA.' In the past, China has strongly opposed the adoption of standards for ractopamine, (i.e. Maximum Residue Levels, MRLs) at the Codex Alimentarius Commission. For analyses of the underpinning controversies, see Alberto Alemanno and Giuseppe Capodieci, 'Testing the Limits of Global Food Governance: The Case of Ractopamine', 3 European Journal of Risk Regulation 400 (2012); Ching Fu Lin, 'Scientification of Politics or Politicization of Science: Reassessing the Limits of the Codex Alimentarius Commission', 15 Columbia Science and Technology Law Review 1 (2013); and Alessandra Arcuri, supra n 55, at 79–103.

A similar parable is discernible in the dynamics by which Intellectual Property Rights have penetrated the trade regime and how they have been resisted. The TRIPS Agreement is possibly exhibit A for the inscription of neoliberal legality into the trade regime. It is hardly controversial to say that pharmaceutical corporations and big tech companies are the main sponsors and beneficiaries of the TRIPS Agreement. Even for self-professed trade liberalization advocates, 'TRIPs ... were like the introduction of cancer cells into a healthy body. For virtually the first time, the corporate lobbies in pharmaceuticals and software had deformed an important multilateral institution, turning it away from its trade mission and rationale and transforming it into a royalty collection agency.'[59] At the same time, this area of WTO law has undergone one of the most successful reforms. The TRIPS Agreement has been amended by the Decision of the General Council of 6 December 2005 on an Amendment of the TRIPS Agreement, which implements the 2001 Doha Declaration on the TRIPS agreement and public health.[60] The Doha declaration, especially where it asserts 'members' right to protect public health and, in particular, to promote access to medicines for all' can be read as an attempt to subject the protection of capital to the one of human beings.[61] What has been achieved at the multilateral level, however, risks to be undone on a bilateral level through the acceptance of TRIPS-plus provisions.[62] Also in this case, the latent hypersovereign may fast-forward the capitalist dream. Maybe prescient of the risk of a Schmittean moment, it was one of the harshest critics of globalization, to defend the multilateralism of the WTO: 'to call for its destruction is like calling for the dissolution of a corrupt parliament in favour of the monarchy. It is to choose unilateralism over multilateralism.'[63]

III. THE MYTH OF HYPER-GLOBALIZATION: AN INTERMEZZO BEYOND SEMANTICS

If the above arguments point at the dark side of the nation-state, and at the dark side of impoverished multilateral institutions, they do not detract from the main argument that hyperglobalization is implicated in inequality and environmental degradation. But what is 'hyper' about hyperglobalization? In fact, while trade and capital mobility have increased massively, people remain hostage of borders, walls, plane baggage's cargoes[64] and sinking ships. By relegating migration to the level of the domestic and elevating

59 Jagdish Bhagwati, *Defense of Globalization* (2004) 183.

60 See Decision of the General Council of 6 December 2005 on an Amendment of the TRIPS Agreement. http://www.wto.org/english/tratop_E/trips_e/wtl641_e.htm.

61 Abbott F.M., 'The Doha Declaration on the Trips Agreement and Public Health: Lighting a Dark Corner at the WTO', 5 Journal of International Economic Law 469 (2002), at 505.

62 Mittal and Sandeep, 'Effects of TRIPS Plus Provisions in International Trade Agreements Upon Access to Medicines in Developing Countries', 776 Journal of Intellectual Property Rights (JIPR) (2017) ISSN: 0975-1076 (Online); 0971-7544 (Print) JIPR Vol. 22(6) (2017) 295–302. Available at SSRN: https://ssrn.com/abstract=2975649 or http://dx.doi.org/10.2139/ssrn.2975649.

63 George Monbiot, *Universal Fair Trade*, 8 September 2003. http://www.monbiot.com/2003/09/08/universal-fair-trade/.

64 Nicole Chavez, *CNN*, 7 July 2019. https://edition.cnn.com/2019/07/06/us/airplane-stowaways/index.html and also Wikipedia, 'List of Wheel-well Stowaway Flights'. https://en.wikipedia.org/wiki/List_of_wheel-well_stowaway_flights.

commodity and capital at the level of the international, international economic treaties have normalized the erasure of the human. The annihilation of the human is well captured by the contrasting images 'of a ship filled with steel containers securely transporting goods across deep waters . . . [a]longside images of perilously overcrowded boats, transporting desperate migrants, all too often to their deaths.'[65] Criticizing the word hyperglobalization is not just a matter of semantics. It is a matter of acknowledging that globalization has never been hyper,[66] it has been neoliberal or 'ordoglobalist' at best.[67] It is true that neoliberals have often aimed at marginalizing the nation-state. From this vantage point, advocating for more nation-state could be a proxy for advocating for a less neoliberal global order. At the same time, this jargon may obscure the relationship of neoliberals or 'ordoglobalists' with the state and public powers.[68] As well documented in the book by Quinn Slobodian, *Globalist*, the ordoglobalist rejected the nation-state in so far as it threatened private property and the protection of capital, while invoked it to counter social movements, such as the labor unions.[69] The view of Mises, one of the founding fathers of neoliberalism, were tainted with racism and were condescending to the use of violence to repress democracy.[70] Even more, at times, the hyperglobalist has been a neoliberal nationalist in disguise.[71] The concrete neoliberal policies developed

65 Adelle Blackett, 'Transnational Futures of International Labor Law', 113 American Journal of International Law (2020), at 392. https://www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound-by-symposium/transnational-futures-of-international-labor-law.

66 It should be noted that Rodrik himself has pointed out at the contractions of not decreasing the barriers of labor mobility, see Dani Rodrik, *Foreign Policy*, 27 January 2017; see also Chantal Thomas, 'Irregular Migration and International Economic Asymmetry', in Alvaro Santos, Chantal Thomas and David M. Trubek (eds), '*World Trade and Investment Law Reimagined: a Progressive Agenda for an Inclusive Globalization*' (London: Anthem Press, 2019) 11 (arguing that trade liberalization of commodities, and more particularly NAFTA has cause increased migration).

67 Quinn Slobodian, *Globalists: The End of an Empire and the Birth of Neoliberalism* (Cambridge: Harvard University Press, 2018). Slobodian coins the word ordoglobalism to describe the focus on the global order of the ordoliberals at the Geneva School (see discussion at 12). For a critical analysis of the influence of ordoliberalism in international law, see Ntina Tzouvala, The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale in John D. Haskell and Akbar Rasulov (eds), '*European Yearbook on International Economic* Law' (Berlin: Springer, 2019).

68 See Slobodian supra n 67, where he writes: 'The core of ordoglobalism is its own version of what Polanyi called re-embedding the market. The crucial difference between him and the neoliberals is the ends to which the market is being re-embedded. For Polanyi, it was to restore a measure of humanity and social justice. For neoliberals, it was to prevent state projects of egalitarian redistribution and secure competition, alternatively defined as the optimal functioning of the price-signaling system.' Ibid, at 20.

69 'Foucault's attribution of "state-phobia" to Austrian neoliberals is a misunderstanding, especially considering Mises's career as an advocate for the use of government taxes to fund business interests. Mises would become a patron saint to American libertarians, but he not only worked professionally as a state-funded advisor to the government but also saw a strong role for the state in the protection of property and keeping of the peace. In a telling phrase from 1922, he called the state "a producer of security."' Ibid, at33.

70 Quinn Slobodian, 'Perfect Capitalism, Imperfect Humans: Race, Migration and the Limits of Ludwig von Mises's Globalism', Contemporary European Hystory (2019). See at 44 where Slobodian quotes the words of Mises to comment the violent repression by the police during the 1927 strike in Vienna, which killed about 100 people: 'Friday's putsch has cleansed the atmosphere like a thunderstorm. The social-democratic party has used all means of power and yet lost the game. The street fight ended in complete victory of the police . . . . All troops are loyal to the government.'

71 Sören Brandes, *Ephemera*, 'From neoliberal globalism to neoliberal nationalism: An interview with Quinn Slobodian'. http://www.ephemerajournal.org/contribution/neoliberal-globalism-neoliberal-nationalism-interview-quinn-slobodian; Quinn Slobodian, *Public Seminar,* 'Neoliberalism's Populist Bastards: A

in the nineties rested on similar contradictions, fostering liberalization of commodities trade, while reinforcing borders for human beings. While Rodrik is precise in defining hyperglobalization 'as the attempt to eliminate all transaction costs that hinder trade and capital flows',[72] using this term may collapse globalization with neoliberalism, foreclosing the possibility of imagining and working toward the realization of a different global order. 'Words are important.'[73]

If we take a closer look at the wide variety of critiques of the current global economic order, it is its produced inequalities, its anti-democratic tendencies and its perverse environmental consequences that are raising concerns. The problem is not the 'degree' of globalization but its skewed 'nature', privileging capital while marginalizing humanity. As humanity has been erased by the theories of Schmitt, so it has by the neoliberal globalists. It is neither the nation-state nor globalization the culprit. It is the elevation of capital above humanity.

IV. FROM DISINTEGRATION BY NATION-STATE TO NEW INTEGRATION FANTASIES

In the wake of the globalization backlash, several scholars have articulated reform proposals to enhance the legitimacy of international economic institutions. Gregory Shaffer, for example, has recently advanced a series of ambitious reforms for trade and investment agreements. In *Retooling Trade Agreements*, he proposes to include new sets of provisions in WTO, aimed at achieving social inclusion.[74] One way to address inequalities, he argued, is to condition trade liberalization to tax policy. This could be done by linking WTO law to international tax agreements, in a similar vein as already done in the context of the TBT and SPS Agreement. Constructive unilateralism is presented as a fallback option, which could eventually mobilize international coordination on this key area.[75] This proposal resounds with other previously articulated reforms by Tim Meyer, who pleaded for the inclusion of an Economic and Development Chapter that would mandate domestic re-distributional policies to offset the effects of liberalization in international trade agreements.[76]

On their face, these proposals may seem to corroborate the point that the nation-state is the unit to be emancipated in the international legal order. What these proposals do, however, is to reimagine the international economic order following a different aspiration than just protecting capital. It is neither the national nor the international

New Political Divide between National Economies', 15 February 2018. http://www.publicseminar.org/2018/02/neoliberalisms-populist-bastards/.

72 Rodrik, supra note 4, at 28.

73 This is a quote from an Italian cult film, Palombella Rossa by Nanni Moretti, in which the protagonist, Michele Apicella gets mad at the use of certain expressions by a journalist. In the film he says: 'Chi parla male, pensa male e vive male. Bisogna trovare le parole giuste. Le parole sono importanti.' 'Who talks bad, thinks bad and lives bad. We need to find the right words, Words are important.' See the relevant movie clip here: https://www.youtube.com/watch?v=dXrG-itgcho.

74 See above Shaffer, n 49.

75 Gregory Shaffer and Daniel Bodansky, 'Transnationalism, Unilateralism, and International Law', 1 Transnational Environmental Law 31 (2012).

76 Timothy Meyer, 'Saving the Political Consensus in Favor of Free Trade', 70 Vanderbilt Law Review 985 (2017).

but their renewed interaction that would be reinvigorated—an interaction driven by a purpose: enhance social inclusion. In other words, such reform proposals would create a common ground to foster social policy and mitigate the dramatic effects of tax heavens and other legal protections of transnational capital. The game changer is further integration (e.g. by embedding cooperative efforts on tax avoidance within the trade regime), rather than disintegration. Unilateralism would be acceptable only as a fallback option and within the boundaries of the shared purposes.

In this move, we can read an interlocking of sovereignties, rather than a disintegration by the nation-state. At this juncture, it is important to disentangle the normative from the descriptive. Descriptively, many scholars—including those who have theorized the emergence of a postnational order—agree that the nation-state continues to play a key role in global affairs.[77] In somewhat paradoxical terms, it is the nation-state that has contributed to its own transformation. The normative question is whether a disintegrationist move of the nation-state toward re-gaining more power and political space is desirable. Despite his claim, also Rodrik seems to struggle with the necessity of an interlocking moment. The normative hollow core of the nation-state as a salvific entity is revealed by Rodrik's own account, where he acknowledges that we need 'traffic rules'[78] and that WTO law should introduce standards of 'fair' trade. Against this observation, Rodrik's call for disintegration through the nation-state may be read more as a polemic against the blind neoliberalism underpinning certain dimensions of current economic globalization, than as a genuine call for a return of the nation-state.

Are we then back to universalism? The point here is that when advocating for the nation-state and the political, universalism may have been with us all the way. In some sense, it was there with Schmitt: his 'attack on the liberal humanists, the neutralizers and depoliticizers, is not based upon a rejection of universalism but on an unarticulated distinction between a "false" and a "genuine" universalism.'[79] And universalism may be with Rodrik and progressive critiques to the current international order, where democracy, egalitarianism and human development are among the universal values underpinning the analysis. The critique of Rodrik is 'straight' up to a point. It is straight and cogent in proving misguided (and empirically unfounded) the blind faith of the average economist in trade liberalization. The talk is somewhat more oblique when he advocates for more nation-state, while also winking at a progressive international legal order. While Rodrik does well in its polemic with the neoliberal faith in the market, we are left with the risk of obfuscating the role of a nonviolent international legal order. The call for rescuing the international comes straight from the present, when a Schmittean

77 See Gregory Shaffer, 'A Transnational Take on Krisch's Pluralist Postnational Law', 23 European Journal of International Economic Law 565 (2012), at 578; In this respect, see Sassen, as quoted in Shaffer: Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006) 3 ('The national is still the realm where formalization and institutionalization have all reached their highest level of development,' but 'the national is also often one of the key enablers and enactors of the emergent global scale'). See also Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

78 See Rodrik (2018) above n 4, at 225.

79 Koskenniemi, supra n 26, at 495.

rule of exception is increasingly elevated to the norm by powerful and less powerful world leaders alike (e.g. Trump, Bolsonaro, Orbán).

So, be it: the international, with its 'horizon of transcendence',[80] where sovereignty can be only sustainable if compatible with 'a principle of humanity',[81] is here to stay. Sovereignty, to be moral, is antinomy. It rests on its contrary: the limit. It is only in the interstitial space of the external limit, where different sovereign recognizes each other's and their incompleteness that international law can develop as a project of aspirational justice. And it is for this reason, that disintegration (through the nation-state) or continued integration are per se immaterial to such development—they can only be if related to their contribution to justice. The universalism underpinning a 'principle of humanity' should however be bound up with history and a need for continuous 'clarification' of where it comes from.[82] Several scholars clarified that 'war capitalism' has driven the emergence of the modern trade and investment regime, mobilizing lawyers and consultants to shape a particular universalism to sustain itself.[83] Thanks to those scholars, the 'epistemologies of power and emancipation'[84] constructed by policymakers, state actors and IOs can be better understood, resisted and, in some cases, subverted. From this vantage point, also the work by Rodrik is crucial as it evidences the responsibility of the economic profession for having fostered wilful ignorance on the limits of free trade and on questions of inequalities and environmental injustice plaguing our institutions.

New integration fantasies necessarily start with the consciousness of the injustice and misery brought about by the past and present international economic order. But they do not stop there. New integration fantasies can be imagined to gravitate around the 'demands of justice', as articulated by Linnarelli, Salomon, and Sornarajah.[85] These

80 Ibidem, at 511.

81 The term 'principle of humanity' is taken from Dezynehaus. In discussing theories of sovereignty, Dezynehaus writes: 'a principle of humanity . . . [that] is about the obligations that attend any exercise of sovereign power that affects important individual interests. A claim to exercise sovereign power is a claim to authority over the person affected by the exercise.' David Dyzenhaus, above n 44, at 343. This passage in turn is quoted by Benvenisti in his discussion of Sovereigns as Trustees of Humanity, see Eyal Benvenisti, 'The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks', 16 Theoretical Inquiries in Law 535 (2015).

82 The idea of the need of 'clarification' was inspired by the following consideration: 'Clarity is needed on what is taking place and to deconstruct to reconstruct—to think beyond the constraints imposed by existing institutions about international trade so that alternative architectures can be seen as realistic possibilities.' John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah, *Misery of International Law* (Oxford University Press, 2018) 110.

83 For a synthesis on how 'war capitalism' is related to the regulation of trade see Linarelli et al. above n 82; the dark history of trade and investment law has been told among others by Anthony Anghie, 'Finding the peripheries: Sovereignty and colonialism in nineteenth-century international law', 40 Harvard International Law Journal (1999); Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015) and Kate Miles, 'International Investments Law: Origins, Imperialism and Conceptualizing the Environment', 21 Colorado Journal of International Environmental Law and Policy 1 (2010).

84 Grégoire Mallard and Linsey McGoey, 'Strategic ignorance and global governance: an ecumenical approach to epistemologies of global power', 69 (4) The British Journal of Sociology 884 (2018).

85 See Linnarelli et al., supra n 82, at 42 et ss. The authors provide a cogent justification for this normative framework. It could also be argued that demands of justice are enshrined in positive law. The 2012 UN General Assembly Resolution (Declaration) on the rule of law, for example recognizes that 'that respect for and promotion of the rule of law and *justice* should guide all of their activities [of all States, international

could range from an 'anti-misery principle', a 'principle of equality' to a 'freedom from domination or anti-alienation principle.'[86] The latter principle would offer a normative framework to articulate instances and modalities to regulate the relation national-international. It would not be disintegration by the nation-state, but a form of *nondominant integration*. Other principles can also lead to less international law. For example, if a treaty threatens great misery, and it is unlikely to be radically reformed, exit may be the only solution to avoid misery. An example, where this could be relevant is the exit from the Energy Charter Treaty (ECT), which poses serious threats to climate action. In the short term, some disintegration may be socially desirable. The difference between disintegration by the nation-state and by demands of justice may be subtle as, in the end, there are cases in which more policy space for the nation-state is to be looked-for. Yet, within a paradigm of global justice, cross-border solidarity and future integration remain in the realm of the plausible.[87]

When driven by demands of justice, disintegration may also lead to new integration architectures. In moving forward with new integration projects, it is also key (re-) asserting that the positioning of human rights or the protection of the environment outside the realm of economics is analytically flawed.[88] It is worth reiterating the Greek etymology of the word 'economy': coming from *Öikos* (house) and *nomos/nemein* (yes, the same of the Schmittean Nomos). Economy is hence commonly referred to as the management of the house. And 'the house is on fire.'[89] With the overwhelming scientific consensus on the phenomenon of climate change, one should expect that this

organizations, including the United Nations and its principal organs] and accord predictability and *legitimacy* to their actions.' UNGA Res 67/1 (30 November 2012) UN Doc A/RES/67/1. Emphasis added. The quest for justice in trade regimes has been discussed by other scholarship as well. According to some, for instance, the following proposition is shared by opponent and advocates of so-called linkage: 'A very important factor in determining whether an institutional arrangement for the governance of the global economy should be viewed as superior to another is whether it improves the level of advantage of less advantaged persons in the world to a greater extent.' See Barry, Christian and Reddy, Sanjay G., International Trade and Labor Standards: A Proposal for Linkage. 39 Cornell International Law Journal 545, at 548.

86 Linarelli et al., above n 82, at 72 et ss.; the principles find a synthesis in the following statement: 'Ultimately the requirements for the moral acceptability of international law rests on the notion of whether international law supports the positive freedom of persons, which means a focus on whether international law contributes to or works toward eliminating poverty, alienation, exploitation, poor economic opportunities, deprivation, and other ills that are obstacles to human flourishing.'

87 Colin Crouch has rebutted arguments that cross-border solidarity is not meaningful. For example he writes: 'The problem with this kind of reasoning, sociologically sound though it is in many respects, is that it leads to a conservative resistance to any kind of change that tries to move democratic politics and feelings of human solidarity beyond the nation state, which then remains frozen in time.' See Crouch, above n 8.

88 For an analysis of the exclusionary implications of this distinction in the realm of investment law, see Alessandra Arcuri, 'On Boundaries of International Investment Law as Mechanisms to Exclude Human Rights and Sustainable Investment', paper presented at the Conference on 'Socially Responsible Foreign Investment under International Law', Católica Global School of Law, Lisbon, 24–25 October 2019 and at the Conference on 'The Legitimate Role for Investment Law and Arbitration in Protecting Human Rights', Monash University and the Minerva Centre for Human Rights at the Hebrew University of Jerusalem, Tøyen hovedgård, Oslo, 4–5 September 2019. The point of the untenable distinction of the economic from the noneconomic realm has been made by Linarelli et al. in various contexts. For international trade law, the authors argue: 'rules implementing nonmarket values are not exceptions to market rules or exceptional in their application to markets, but are constitutive of markets.' above n 82, at 128.

89 See speech by Greta Thunberg, Our House is on Fire, 2019 World Economic Forum (WEF) in Davos. https://www.fridaysforfuture.org/greta-speeches#greta_speech_jan25_2019.

would be the main preoccupation of institutions of economic governance. The artificial boundary drawn between the economic and the noneconomic to exclude human rights or environmental protection is analytically untenable and yet, this argument has often been made to insulate trade and investment law from the demands of justice. There is obviously no sane economy without healthy environments or the respect of human dignity. Despite the simplicity of these arguments, international law has taken the path of blind functionalism with the corollary that demands of justice are addressed in rather dysfunctional ways, too often stuck in fragmentation.

The above considerations could help re-direct reform efforts toward justice. Take for example the idea to include social dumping clauses in trade agreements, advanced by both Rodrik and Shaffer.[90] This reform proposal is said to aim at achieving 'fair' trade. The argument made is that exploitative working conditions, typically in developing countries, trigger a race to the bottom, which de facto transnationalize exploitation. This implies, however, that for the trade regime the exploitative working conditions in the Global South are irrelevant to the extent that they do not have negative consequences in the Global North. It could be countered that social dumping may eventually be beneficial for the people in the Global South (and East); however, legalizing social dumping does implicitly accept the normalcy of exploitative working conditions, to the extent that they do not affect 'us.' It is high time for the trade regime to recognize its implication in the exploitation of labor.[91] Introducing rules in trade regime regulating labor conditions could be seen as an important step in defying the economic/noneconomic boundary. In doing that, however, the demands of justice of all people should be considered and not only those of the Global North. Grounding reforms in nonxenophobic goals would not only be morally justified, but it would also limit the risk that so-called hyperglobalization morphs into hypersovereignty.

To be fair, the type of social dumping proposed by Shaffer is well thought-through and includes procedural norms, which are likely to minimize the risk of hypersovereignty. Most notably, the assessment of social dumping vis-à-vis ILO standards injects in the system fragments of morality and it may contain the hypersovereign ambitions of powerful states. On a pragmatic basis, the proposal could also be more politically feasible, as it is likely to be palatable to the white nationalist. Yet, as academics, we need to be clear on what would be a political compromise, improving the status quo, vis-à-vis a just reform.

90 For proposals on including social dumping in trade agreements, see Shaffer, supra n 49, at 33 et ss. and Rodrik, *Straight Talk*, above n 4, at 231; a similar idea to social dumping, but to be articulated under a new safeguard agreement has also been discussed in Rodrik, *Globalization Paradox*, above n 4, at 258 et ss.. Resorting to a notion of 'fair trade' without having agreed what is 'fair' remains the challenge of many reform projects. As put by Andrew Lang: 'While it would be naïve to imagine that a single, shared conception of what constitutes "fair" competition is achievable—or perhaps even desirable—it seems to me that developing a common and coherent language in which to debate questions of fair institutional competition between different market orders is one of the key challenges for the international trading order in the years and decades ahead.' Andrew Lang, 'Protectionism's Many Faces', Features Symposium: International Trade in the Trump Era, Yale Journal of International Law (2018), at 60.

91 For an illuminating discussion of this question see Barry and Reddy, above n 85

The bold normative core articulated by Linarelli, Salomon, and Sornarajah could provide the moral compass to orient transformative reforms for the international economic law system. One fertile avenue to rethink transformative change is to go back to the causes of the injustice, i.e. the partial hijack of global institutions of economic law by neoliberalism. If we agree with Slobodiann that 'neoliberalism at the global scale' is 'a project of insulating dominium from imperium', in a countermove we can open up strategies to mobilize 'human rights against dominium'[92] within the realm of international economic law. In the context of international investment law, for instance, scholars have argued that investment-affected communities should be entrusted with enforceable rights to challenge foreign investors.[93] Recent treaty reforms, which include investors' obligations (albeit not yet enforceable), may indicate that this transformation is not unthinkable. The burgeoning climate change litigation provides another source of inspiration for ways to mobilize (human) rights.[94] To become genuinely 'comprehensive', new international economic treaties should include enforceable rights for all people against both dominium and imperium (e.g. worker rights, right to a healthy environment, right to food).

While revising this article, the tragic coronavirus pandemic is unfolding. In all its urgency, the pandemic is bringing under the spotlight the drama of the risk of a Schmittean moment, amidst the necessity of curbing the excesses of a neoliberal global order. This is evidenced by the potential hypersovereign responses, from the export restrictions of medical products,[95] to the more worrying state of emergency

92 Quinn Slobodian, 'Human Rights Against Dominium', *Humanity Journal*, 4 October 2019. http://humanityjournal.org/blog/human-rights-against-dominium/. Referring to the work of Amy Kapczynski, in the context to right to medicines, Slobodian characterizes imperium and dominium in the following terms: 'In this framing, imperium is the world of states and sovereignty, dominium is the world of property and ownership.'

93 Alessandra Arcuri, Federica Violi and Francesco Montanaro, 'Proposal for a Human-Rights Compatible International Investment Agreement: Arbitration for All', UN Forum on Business and Human Rights (2018). https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx; Arcuri, Alessandra and Francesco Montanaro, Justice for All? Protecting the Public Interest in Investment Treaties, 59 Boston College Law Review 2791 (2018). https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/10.

94 Climate change litigation can be both against dominium and imperium. Examples of climate change litigation against dominium include: *Milieudefensie* et al. *v. Royal Dutch Shell plc.* (overview available at http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/), *ClientEarth v. Polska Grupa Energetyczna* (http://climatecasechart.com/non-us-case/clientearth-v-polska-grupa-energetyczna/), *Lliuya v. RWE AG* (overview available at http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/); the most notable example of climate change litigation against imperium is *Urgenda Foundation* v. *State of the Netherlands* and, *State of the Netherlands v. Urgenda*; for a recent reflection see André Nollkaemper and Laura Burgers, A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case, EJIL:Talk! Blog of the European Journal of International Law, January 6, 2020. https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/.

95 The problematic implications of export trade restrictions on medical goods have been discussed in a recent Tradetalks podcast, Peterson Institute For International Economics and Finance, 'Coronavirus and Trade Restrictions', podcast episode 125 aired on 15 March 2020 and featuring Sumaya Keynes and Chad Brown, available at https://www.tradetalkspodcast.com/podcast/125-coronavirus-and-trade-restrictions/. Background articles for these discussions are: Soumaya Keynes, *The Economist*, 11 March 2020; Chad P. Bown, *PIIE Trade and Investment Policy Watch*, 19 March 2020; Chad P. Bown, *PIIE Trade and Investment Policy Watch*, 13 March 2020; for an empirical study of the implications of export restrictions for food products

laws adopted by the Orbán government.[96] The hypersovereign responses co-exist with unfair global rules, such as those normalizing austerity and legalizing the lack of much needed capital controls.[97] A strong public health sector appears a necessary condition to deal with the public health risk posed by the virus. In turn, this entails the existence of well-funded public institutions. Likewise, managing the risk to the economy, and the very people making the economy, does arguably need a manifold response, ranging from capital controls to the establishment of unemployment benefits for all, the material realization of the right to food, etc. These institutions, most likely national (although they could also be imagined as transnational/international or very local), need to be complemented by multilateral arrangements, which would not simply tame the latent hypersovereign beast, but most importantly could stir essential international cooperation and justice. As put by Richard Kozul-Wright and Nelson Barbosa:

> 'A return to progressive tax structures, strategic industrial policies, the revival of public banks and a willingness to take on vested interests, including large pharmaceutical companies, will be required if economic recovery is to pave the way to a healthier, more inclusive and sustainable future. But, in our interdependent world, these measures will prove insufficient without a multilateral system that promotes and protects the wellbeing of all people above short-term financial gains and the needs of itinerant international firms.'[98]

V. CONCLUSIONS

The last magisterial movie by Ken Loach, *Sorry we missed you*, shows the brutality of the work environment of our contemporary deliverymen. The logic of this brutality is contained in a black box that imparts the order of the delivery: an algorithm realizing efficiency dreams. While the film might be read as a story of how technology is impoverishing us, this is just another story of how capital has been encased in a web of socio-legal protections in which technology plays only a facilitating function. The international economic law system can be faulted on similar grounds, for having too much relied on the same dehumanizing efficiency dream.

In focusing on the nation-state to fix the current order, we elude the question of the normative core of the international economic law system. This normative confusion can explain the paradox of right-wing conservatives advocating the same as left-wing progressives: disintegration through the nation-state. The civil society sees free trade mainly as a (neoliberal) project to keep at bay the regulatory state, which is the only unit to offer us protection. This can generally be said of the whole project of international economic governance, ranging from the controversial World Bank conditionality to the

see NadiaRocha, Paolo Giordani and Michele Ruta, 'Food Prices and the Multiplier Effect of Trade Policy', *Journal of International Economics* 101 (2016).

96 Elisabeth Zerofsky, *The New* Yorker, 9 April 2020.

97 See Critical Macro Finance, Open Letter: 'Developing and Emerging Countries Need Capital Controls to Prevent Financial Catastrophe'. https://criticalfinance.org/2020/03/24/developing-and-emerging-countries-need-capital-controls/ (visited 12 April 2020).

98 Richard Kosul-Wright and Nelson Barbosa, *Tribune*, 23 March 2020.

by-now infamous investor state arbitration. The retreat to the nation-state can be better understood from this vantage point.

Recent history, however, shows that it is the state itself that can choose market fundamentalism as one of its core normative principles and act in the interest of the few rather than the public at large. History has amply shown how the nation-state can marginalize minorities, foster racism, and contribute to inequalities. The spectre of Schmitt and the hypersovereign is with us. The nation, also called Patria/fatherland in Italian (from Latin, *pater*, father, wherefrom the word patriotism) remains problematic and it is hard to reduce our international political fantasy to this as the center of reforms for the system of international economic governance. In the words of an old Italian public intellectual: 'If you have the right to divide the world in Italians and foreigners, then I will say that I have no Fatherland/Nation as you mean it, and I claim my right to divide the world in dispossessed and oppressed on the one hand, privileged and oppressors on the other. The former are my Fatherland/Nation, the latter my foreigners.'[99] So while some proposals to endow the nation-state with more power are pragmatically remarkable for what they could potentially achieve, it is the nation-state, as their analytical/normative driver that remains troubling, with one caveat. The nation-state continues to be a site of democracy and global institutions of economic governance should come to terms with their relation and impact on democracy. In this respect, further articulation of the 'freedom from domination or anti-alienation principle' could help mediating this relation.

The other flaw in resorting to the nation-state, as the chief solution to our problems, is that it fosters and normalizes the idea by which international economic law has no responsibility for redistribution, social justice or the protection of the environment. It is the task of international economic lawyers to bring these responsibilities back to the center stage of the international law project. As Lang aptly put in the context of the legitimacy crisis of the WTO:

> 'this legitimacy crisis occurred not —or not just— because the WTO became over the course of the 1980s and 1990s more powerful and "intrusive", and developed a far broader scope of application to "behind the border" regulatory barriers to trade. . . . It was . . . the separation of the exercise of public power at the international level from the pursuit of collective public purpose, and the exercise of collective moral responsibility . . . which led to the WTO's legitimacy crisis.'[100]

In the background of a dreadful efficiency dream, the film *Sorry we missed you* also shows small acts of resistance: an old lady throwing a dish on the floor to 'steal' few more minutes with her loving caregiver and the caregiver relentlessly carving out moments of

99 Translated by the author. The original text reads: 'Se voi avete il diritto di dividere il mondo in italiani e stranieri, allora io dirò che, nel vostro senso, io non ho Patria e reclamo il diritto di dividere il mondo in diseredati e oppressi da un lato, privilegiati e oppressori dall'altro. Gli uni son la mia Patria, gli altri i miei stranieri.' Don Lorenzo Milani, esperienze pastorali (Pastoral Experiences), (Libreria Editrice Fiorentina, 1958).

100 Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011) 346.

humanity, otherwise proscribed by her efficient time-schedule. So is humanity resisting the efficiency dream of the international economic order: from the rooms of the Centre William Rappard in Geneva—where the right to health has (partly) won over IPRs—to the mushrooming of climate change litigation, where people are mobilizing human rights against both dominium and imperium. Possibly maybe, united we stand.