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Original Article

The Remains of the Day: The International Economic Order in the Era of Disintegration*

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ABSTRACT

The last two decades of the XX century have been marked by a vigorous acceleration of international economic integration both at a global and regional level. States accepted pervasive constraints on their national decision-making in the hope that stability and predictability would favor economic growth. This model of international economic integration, however, has recently shown worrying signs of 'disintegration'. Disintegration manifests itself both as disintegration *of* the international legal regimes which compose the international economic order; and disintegration *through* law, namely the social, economic and environmental disintegration phenomena, triggered or at least facilitated by these regimes. Relying on the paradox integration/disintegration as an analytical framework, this article draws a blueprint of the various disintegration phenomena, which are further analyzed in the individual contributions to this Special Issue. It seeks to identify a relationship between the two dimensions of disintegration and detect possible correlation patterns. Last, after engaging with the different normative alternatives put forward by the contributors, it concludes by calling for a rethinking of the traditional approach to international economic integration. This reconceptualization should be premised on the full realization that the current model entails a great deal of environmental and social 'hidden costs'.

INTRODUCTION

Over the last three decades, the word 'globalization' has taken center stage in the public debate. This buzzword resonated through the halls of parliaments and universities, the

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meeting rooms of cabinets and TV studios around the world. Despite or, probably, owing to its fuzzy and multifarious meaning, it added a further element of polarization to the political spectrum and even undermined inveterate ideological allegiances.[1] Although it is not possible to embark here on a thorough analysis of the meaning or meanings of this word, it is safe to say that the supranational legal framework governing, in its various forms, trade in goods and services as well as capital flows constitutes a paramount aspect of this phenomenon.

The system that emerged after World War II, particularly after the collapse of the Soviet Union, seemed unassailable and indestructible. This is due, at least to some extent, to the fact that international economic integration materialized as a legalistic project. International trade and investment protection rules, although through different legal techniques, seek to remove or at least curtail hindrances to international economic transactions by durably harnessing States' freedom of action.

However, this model of international economic integration has recently shown signs of distress. A series of events—such as climate change, Brexit and the WTO crisis—has called into doubt the very existence of the international economic order as we know it. Disintegration, understood in a broad sense, has affected its functioning over the last couple of years.

This article and the contributions included in this Special Issue seek to show that the *modus operandi* of the supranational economic rules and institutions has triggered disintegration trends on many levels. Our main claim is that disintegration, understood in a broad sense, is to a certain extent a reaction to international economic integration.

A cautionary note, however, is in order. By taking this perspective, this special issue does not aim to sound the death knell for all types of international economic integration. Nor does it wish to provide 'ammunitions to the barbarians' or stoke up the appetite for simplistic and chauvinist solutions. Rather, it seeks to chart the various manifestations of these disintegration phenomena. Disintegration, in our view, is a broad and two-faceted concept. On the one hand, disintegration is understood as the impact of international economic rules on socio-economic structures and the environment (disintegration *through* law). On the other hand, disintegration is also a phenomenon eroding international economic regimes[2] and institutions (disintegration *of* law).

Relying on the paradox integration/disintegration as an analytical framework, the authors of this Special Issue reflect on the current 'integrationist' model with the aim to: (1) provide a deeper understanding of the interaction between 'integrationist' international economic norms and disintegration patterns; (2) combine law, economics, and political sciences, in order to critically examine the conceptual underpinnings of international economic law and policy making; and (3) engage in a normative exercise to envision new models of integration.

1 Albena Azmanova, 'After the Left–Right (Dis)continuum: Globalization and the Remaking of Europe's Ideological Geography', 5 (4) International Political Sociology 384 (2011), at 385.

2 For the purposes of this contribution, we use the term 'regime' in its broadest understanding, without assigning any specific qualification to it.

As groundwork, this article sets the scene for the analysis of the specific manifestations of disintegration carried out in the various contributions to this Special Issue. In section 1, after briefly recounting the history of the international economic order from the end of World War II to nowadays, we argue that the post-Cold War 'neoliberal turn' of the international economic order sowed the seeds of disintegration. In section 2, we explore both dimension of disintegration, *of* law and *through* law, building on the insights of the contributors. Finally, in section 3, we conclude that such disintegration phenomena call for bold and imaginative action—and one that is not necessarily geared toward 'ever greater' economic integration.

I. UNPACKING THE DISINTEGRATION PARADOX

When looking at the evolution of the system of international economic relations that emerged at the end of World War II, one can clearly discern a pattern of increasing legalization[3] which goes hand in hand with an overall expansion of international law.[4]

This is certainly the case of the post-World War II trading system. As is well known, the Bretton Woods agreement included plans for an International Trade Organization.[5] Multilateral trade rules were deemed necessary to tame States' protectionist and mercantilist instincts which played a significant role in the outbreak of World War II.[6] By filling the institutional vacuum left by the failed International Trade Organization, GATT 1947 introduced some degree of legalization in international trade relations. Premised on the 'embedded liberalism' compromise, these rules granted to contracting States a margin of maneuvre to intervene in their economies and lessen adjustment costs.[7] Trade liberalization rules were coupled with a number of restraints and the dispute settlement mechanism 'was animated by a spirit of political compromise and discretion, which a more formalized legal machinery might discourage'.[8] In the end, this flexible approach to the liberalization of trade in goods was in turn congenial to

3 Legalization, however, is a dynamic concept. Its intensity may vary according to the 'bindingness' and the precision of the rules and the extent of power delegated by States to supranational authorities, including jurisdictional bodies. Deeper legalization generally results in the imposition of more pervasive constraints on states. See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of Legalization', 54 (3) International Organization 401 (2000), at 402–404.

4 Tullio Treves, 'The Expansion of International Law', 398 Recueil des Cours de l'Académie de Droit International (2015), at 219–261.

5 Richard Toye, 'The International Trade Organization', in Amrita Narlikar, Martin Daunton, Robert M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford-New York: OUP, 2012) 91.

6 Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Salem: Butterworth Legal Publishers, 1990) 5; Tony Judt, *Postwar: A History of Europe Since 1945* (London: Pimlico, 2007) 108.

7 John Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order' 36 International Organization 379 (1982), at 412; Andrew Lang, *World Trade Law after Neoliberalism* (Oxford-New York: OUP, 2011) 195. The concept of 'embedded liberalism' is revived and reinterpreted by Professor Petersmann in his contribution to this Issue, 'Economic disintegration? Political, Economic, and Legal Drivers and the Need for Greening Embedded Trade Liberalism'.

8 Lang, above n 7, at 200; see also Robert E., Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence', 4 (5) Journal of World Trade Law 615 (1970), at 665; Joseph H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomacy', 35 (2) Journal of World Trade (2001), at 192.

the pursuit of Keynesian' objectives, such as full employment and the rising of living standards at the domestic level.[9]

With the establishment of the World Trade Organization in 1994, however, the pendulum distinctly swung toward greater legalization and integration.[10] To begin with, the WTO agreements have a wider scope than GATT 1947. Consequently, contracting States are subject to trade disciplines in a wider range of fields, including trade in services, agriculture, and intellectual property rights. Another salient novelty introduced by the WTO was the institutional transformation of the dispute settlement system.[11] This differed from its predecessor in that it introduced, amongst others, compulsory adjudication, binding decisions adopted with the reverse consensus mechanism, and a system of appellate review.[12] The new institutional architecture, though with some difficulty, brought about a change in the attitude of the various players involved in the interpretation and application of international trade rules.[13] It has been noted that the WTO legal system was in 'line with the values associated with this new way of thinking about law: namely, the values of neutrality and objectivity, precision, effectiveness and strict enforceability, rapidity, expertise, and professionalism'.[14]

In the same period, the international law on the protection of foreign investment followed a similar pattern toward greater integration. For one thing, the number of bilateral investment treaties dramatically increased starting from 1989.[15] To appreciate the magnitude of this increase, it is worth noting that in the period 1959–1989 some 385 bilateral investment treaties were concluded, whilst within the decade from 1989 to1999 that figure more than quadrupled. The number of investment treaties further climbed in the next decades and today amounts to around 3000 treaties. But that pace has not been matched since. Furthermore, the 90s were also marked by the conclusion of the North American Free Trade Agreement and the Energy Charter Treaty, two multilateral trade agreements including specific chapters on investment. Interestingly, the rise in the number of such treaties coincided with the reinvigoration of the investor-state dispute settlement (ISDS) system, which had remained dormant until then. Investment arbitration clauses gained a central role in the protection of foreign investment owing to the emergence of the 'arbitration without privity' doctrine. Thanks to this legal device, arbitral tribunals, even in the absence of a manifestation of State's consent to submit to arbitration a specific dispute, could establish their jurisdiction by

9 Emmanuelle Tourme-Jouannet, *Le droit international libéral-providence: une histoire du droit international* (Brussels: Bruylant, 2011) 287.

10 Arie Reich, 'From Diplomacy to Law: The Juridicization of International Trade Relations', 17 Northwestern Journal of Int'l Law & Bus 775 (1996–1997), at 776.

11 Lang, above n 7, at 245.

12 Weiler, above n 8, at 200.

13 Ibid., at 197–199.

14 Lang, above n 7, at 245. Joost Pauwelyn has argued that the increasing legalization prompted a bidirectional interaction between law and politics. See Joost Pauwelyn, 'The Transformation of World Trade', 104 Michigan Law Review 1 (2005), at 24–29.

15 UNCTAD, 'Bilateral Investment Treaties 1959–1999' (United Nations, New York, 2000) 15, https://unctad.org/en/Docs/poiteiiad2.en.pdf.

relying on the dispute settlement provisions contained in bilateral investment treaties.[16] Consequently, a wide range of host States' regulatory measures became exposed to foreign investors challenges.[17]

Last, but not least, as the 20th century was drawing to a close, the project of European integration—which is in many respects the most advanced experiment of international economic integration and as such an emblematic case study—also underwent a significant acceleration.[18] Although the European Court of Justice had already made clear that the EEC/EC constituted a 'new legal order of international law'[19], the European construct had long qualified as an incomplete 'custom union plus'.[20]

However, the 1985 Commission White Paper catalyzed momentum for the relaunch of the European project.[21] Three major and interconnected developments lie at the heart of this transformation. First, the free movement of capital was brought into line with the other fundamental freedoms[22] through adoption of the directive 88/361/EEC and the subsequent amendment of the relevant primary EU law provisions.[23] Second, the creation of the EU citizenship and the Schengen agreement revitalized the free movement of persons within the Community. Last, with the establishment of the European Monetary Union, the EC/EU acquired exclusive competence over a matter that had been traditionally regarded as one of the hallmarks of State sovereignty.

Taken together, these developments ushered in a new phase in international economic relations. The post-war international economic order, premised on shallow economic integration and far-reaching State intervention in socioeconomic affairs, was transfigured by the advent of what has been defined 'hyperglobalization'.[24] In a manner that is somewhat reminiscent of the pre-World War II international economic

16 Muthucumaraswamy Sornarajah, *Resistance and Change in International Law on Foreign Investment* (Cambridge: CUP, 2015) 136–137. The first arbitral decision to espouse this doctrine was *AAPL v. Sri Lanka*. See *Asian Agricultural Products Ltd v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, 27 June 1990. The phrase 'arbitration without privity' was later coined by Jan Paulsonn. See Jan Paulsson, 'Arbitration without Privity', 10 (2) ICSID Review 232 (1995), at 232.

17 Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 36 University of Pennsylvania Journal of International Law 1 (2014), at 11.

18 Giandomenico Majone, *Rethinking the Union of Europe Post-crisis—Has Integration Gone Too Far?* (Cambridge: CUP, 2014) 91. It has been argued that this shift towards stronger integration sinks its ideological roots in the emergence of a 'neoliberal consensus' at the end of the 70s. See Edmondo Mostacci, 'Integrazione attraverso il Mercato e Declino dello Stato Democratico: appunti per un'indagine genealogica', 42 Diritto Pubblico Comparato ed Europeo online 371 (2020), at 388–389.

19 Case 26/62, *van Gend & Loos v Netherlands Inland Revenue Administrationen* (1963), ECR 3.

20 Jacques Pelkams, 'The Institutional Economics of European Integration', in Mauro Cappelleti, Monica Seccombe, Joseph H.H. Weiler (eds), *Integration Through Law: Europe and the American Federal Experience* (New York: W. de Gruyter, 1986) 354. See for a taxonomy of models of international economic integration Bela Balassa, *The Theory of Economic Integration* (London: Allen and Unwin, 1962) 2.

21 European Commission, 'Completing the Internal Market', White Paper from the Commission to the European Council, COM(85) 310 Final.

22 The free movement of capital had been until then the least developed of the five EU fundamental freedoms. See Jukka Snell, 'Free Movement of Capital: as a Non-linear Process', in Paul Craig, Grainne De Burca (eds), *The Evolution of EU* law (Oxford-New York: OUP, 2011) 551.

23 Article 73a of the Treaty of Maastricht, OJ C 191.

24 Dani Rodrik, *The Globalization Paradox* (New York-London: W.W. Norton & Company, 2011) 187–190; Dani Rodrik, 'Globalization's Wrong Turn: And How It Hurt America', 98 (4) Foreign Affairs 26 (2019), at 28. Fredric Jameson has read this new phase as 'the other side or face of that immense movement of

arrangements,[25] this new configuration of the international economic system impinged more powerfully on the States' autonomy and powers and went hand in hand with a huge concentration of wealth in few hands.[26]

The shift to 'hyperglobalization' is neither accidental nor abrupt. After being revived by a group of influential intellectuals, neoclassical economics principles gained momentum in large number of western States.[27] As the neoliberal consensus emerged, everywhere in the world the post-War Keynesian recipes were gradually ditched. The collapse of the Soviet Union was the last nail in the coffin. The breakdown of the first and most powerful socialist State was then regarded as the incontrovertible proof that there was no viable alternative to liberal democracy and capitalistic market economy.[28]

The new set of arrangements made—both for its critics and its advocates—the comparison between supranational economic rules and constitutional law even more plausible and attractive. The constitutional character of the EEC/EC/EU emerged as a result of the European Court of Justice's activism.[29] And the later expansion of its competences and powers has only strengthened the case for this parallel. International trade rules have also been described as part of a 'trade constitution,' which, along with domestic legislative and constitutional provisions, 'imposes different levels of constraint on the policy options available to public and private leaders'.[30] Likewise, investment protection standards have been likened to obligations in that they would tie the hands of the host State and shield the host State's economic policy from majoritarian politics.[31]

The general shift toward integration and legalization, or even 'constitutionalization,' in all these contexts has been justified on following grounds. First, international economic integration, in its various forms, has been traditionally considered as a driver

decolonization and liberation which took place all over the world in the 1960s'. See Fredric Jameson, 'The Aesthetics of Singularity', 92 New Left Review 101 (2015) at 129.

25 Rodrik, above n 24, at 27.

26 Thomas Piketty, *Capital et Idéologie* (Paris: Le Seuil, 2019) 553–556.

27 David Harvey, *A Brief History of Neoliberalism* (Oxford-New York: Oxford University Press, 2005) 19–22.

28 Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992) 42.

29 Joseph H.H. Weiler, 'The Transformation of Europe' 100 (8) Yale Law Journal 2405 (1991), at 2413–2417. For a critical account of the process of EU constitutionalization see Marco Dani and Agustín J. Menéndez, 'É ancora possible riconciliare costituzionalismo democratico-sociale e integrazione europea?' 1 Diritto Pubblico Comparato ed Europeo Online 289 (2020). The authors point out that the constitutionalization discourse in the EU context does not describe the set of democratic and social constitutional guarantees that are typical of national constitutions. It is in fact a much more ambiguous process, which ultimately conceals the neoliberal turn of the EU, at 309–321.

30 John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1997) 339–340. See also, Hannes L. Schloemann and Stefan Ohlhoff, 'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence', 93(2) American Journal of International Law 424 (1999), at 424. Some commentators, however, criticized the 'constitutionalization' of world trade law. See Robert Howse and Kalypso Nicolaides, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too far', in Roger B. Porter, Pierre Sauvé, Arvind Subramanian, Americo B. Zampetti (eds), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institution Press, 2001) 227; Joseph H.H. Weiler, 'Epilogue: Towards a Common Law of International Trade', in Joseph H.H. Weiler (ed), *The EU, the WTO and the Nafta. Towards a Common Law of International Trade* (Oxford-New York: OUP, 2001) 230.

31 David Schneidermann, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: CUP, 2008) 37–39.

of economic growth—a 'golden straitjacket'.[32] The removal of barriers to trade in goods and services and factor mobility would drive their prices down to 'the irreducible minima arising from spatial differentiation'.[33] This would in turn unleash economies of scale, fiercer competition, ensure a more efficient allocation of resources and, ultimately, enhance productivity.

Second, strengthening the economic interdependence between States has been considered as an indispensable instrument to durably establish peaceful relations between them.[34] States trading with each other are less prone to resort to force in case of disagreement between them. Peace through trade, as the phrase goes!

Third, the combination of deep economic integration and widespread legalization of international economic relations reconciles the public sphere (the world of States or 'imperium') with the private one (the world of property or 'dominium').[35] The world of property is 'encased' and thus shielded from undue interferences from the world of States.[36]

There is little doubt that purging the economic sphere from political interferences and perturbations favors international economic transactions. Yet, depoliticizing rules and procedures does not entail the obliteration of the political relevance of these matters. Thus, politics thrown out of the door came back through the window. In fact, as the power and competences of supranational economic institutions grew to include, e.g. health, intellectual property, and finance, so did the number of interferences with former purely internal matters as well as the number of stakeholders potentially affected by them. When it comes to economic matters, the *domaine réservé* of the States is virtually non-existent in the era of 'hyperglobalization'.

The 2007–2008 economic and financial meltdown, however, marked a breaking point after three decades of relentless expansion of the market system.[37] The trust in the free market system and, consequently, in the so-called neoliberal international economic order reached its nadir.[38] It became apparent that the functioning of the market mechanism was gripped by 'internal',[39] namely the unequal distribution of wealth and income, and 'external' limits, i.e. the limitedness of natural resources and the degradability of the natural environment.[40] The feeling that these rules and institutions were at least inadequate to address the daunting distributive and environmental challenges linked to the cross-border flow of goods, services, and capital became widespread. As the gold of the straitjacket turned into rust for many, the constraints stemming from

32 Thomas Friedman, *The Lexus and the Olive Tree* (New York: McMillan, 2000) 102–103.

33 Pelkmans, above n 20, at 319.

34 See Jacob Viner, *Essays on the Intellectual History of Economics* (Princeton: Princeton University Press, 1991) 42.

35 Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard: Harvard University Press, 2018) 10.

36 Ibid., at 24.

37 Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (New York: Viking, 2018) 81–84, 139–140.

38 Paul De Grauwe, *The Limits of the Market: The Pendulum Between Government and Market* (Oxford: OUP, 2017), 144.

39 Ibid., at 40–52.

40 Ibid., at 20–38.

supranational economic rules unsurprisingly came under fire. That is not to say that these institutions had been immune to criticism until then.

Critical legal thinking even in the heydays of 'hyperglobalization' described the international economic order as an imperialist construct serving the interests of powerful Western States and of transnational corporations headquartered in their territories.[41] Another stream of literature, instead, focused on the shaky democratic legitimacy of supranational economic institutions.[42] Outside of academic circles, the so-called anti- or alter-globalization movement voiced the discontent of the 'losers' of globalization in the streets of the cities hosting WTO Ministerial Conferences, G8 meetings and the World Economic Forum.

Yet, in the post-crisis context, the limits of the 'hyperglobalized' international economic order manifested themselves more clearly and widely.

II. THE POLYMORPHISM OF DISINTEGRATION: AN ANALYTICAL APPROACH AND ITS RAMIFICATION

In literal terms, disintegration refers to the phenomenon of being destroyed or breaking up into smaller parts; it implies 'loss of unity and integrity'.[43] While it might appear quite trivial, this definition is at the heart of our research endeavor. Our aim is to understand what lies behind these dynamics of disintegration and explore possible correlation patterns with the 'integrationist' architecture of the current international economic order. This means that we do not start by assigning a normative value to 'disintegrating' phenomena, we do not take a stance as to whether these are desirable or not. However, we do engage in our conclusions with the normative question of what is the way forward.

As already mentioned above, these disintegrating tendencies seem to materialize both as disintegration *of* law and disintegration *through*[44] law: the first referring to the visible crisis of the regimes of international economic law; the second indicating the downgrade of socio-economic and environmental systems purportedly brought about by these regimes. At this point, two caveats are in order. First, from a scoping perspective, when discussing disintegration of law, we do not use it as a synonym for 'fragmentation'. In fact, our understanding is broader, in that it goes beyond the

41 See, amongst others, B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' 15 (1) European Journal of International Law 1 (2004), at 4–6; See also Michael Hardt and Antonio Negri, *Empire* (Harvard, MA: Harvard University Press, 2000); Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994).

42 Eric Stein, 'International Integration and Democracy: No Love at First Sight' 95 (3) American Journal of International law 489 (2001), at 489–492; Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' 35 (1) Journal of World Trade 165 (2001), at 175–177; Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' 44(3) Journal of Common Market Studies 533 (2006), at 551–554.

43 *Cambridge Learner's Dictionary* (Cambridge: CUP, 2008).

44 We borrow this phrase from Enzo Cannizzaro, 'Disintegration Through Law', 1(1) European Papers 3 (2016). However, the author employs this phrase to indicate only disintegration of law through law. We expand it to include disintegration of socio-economic and environmental systems through law.

multiplication of 'self-contained' regimes and the conflictual relations among them.[45] We are interested in general attitudes of disengagement[46] from—and erosion of—economic integration regimes and the efforts of States to recalibrate these rules. The second caveat is that we do not consider these two tendencies as separate, but rather as iterative. In this sense, one might say that disintegration of law is a reaction to domestic social and environmental disruption generated by deep economic integration (disintegration *through* law).[47]

A. Disintegration through law

It has been cogently argued that deep economic integration has rewritten the relationship between the nation-state and international economic institutions.[48] The current architecture has articulated a specific model of economic governance horizontally (among States), but also vertically (within States). And it has done so by insulating and constraining domestic decision-making space—creating a sort of 'empty shell' effect. This inevitably altered domestic socio-economic relations, with a profound distributive impact.[49]

Indeed, it is now commonplace that the opening-up of domestic economies to foreign products and production factors creates 'winners' and 'losers'. Global value chains (GVCs), the backbone of the world trading system, have produced large efficiency gains and increased integration of trade, while spreading production processes over the globe.[50] The incontestable benefits stemming from this way of organizing production have long concealed its main weaknesses. Contravening the fundamental promise of prosperity and abundance undergirding international trade, GVCs did not prove to

45 See amongst others Andreas Fischer-Lescano and Gunther Teubner 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25 Michigan Journal of International Law 999 (2004); Bruno Simma and Dirk Pulkowski 'Of Planets and Universe: Self-contained Regimes in International Law' 17(3) European Journal of International Law 483 (2006).

46 James Crawford, 'The Current Political Discourse Concerning International Law', 81(1) Modern Law Review 1 (2018); Martina Buscemi and Loris Mariotti 'Obblighi procedurali e conseguenze del recesso dai trattati: quale rilevanza della convenzione di Vienna nella prassi recente?'4 Rivista di diritto internazionale 939 (2019).

47 The role of law as co-constitutive or at least as an enabler of certain phenomena, be they socio-economic or natural, has been developed at length in international economic law literature. Just recently, Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019); Anne Orford, 'International law and the social question', Annual T.M.C. Asser Lecture 2019, 28 November 2019. A summary of the main arguments articulated during the lecture can be found at Taylor Woodcock, Antoine Duval and Dimitri Van Den Meerssche, '"I Want to Put the Social Question Back on the Table"—An Interview with Anne Orford', Opinio Juris, 27 November 2019, http://opiniojuris.org/2019/11/27/i-want-to-put-the-social-question-back-on-the-table-an-interview-with-anne-orford/.

48 Ext. Rodrik above n 24, Gregory Shaffer, 'Retooling Trade Agreements for Social Inclusion', 2019 University of Illinois Law Review 1 (2019).

49 Gregory Shaffer, 'How Do We Get Along? International Economic Law and the Nation-State', 117(1) Michigan Law Review 1229 (2019). Admittedly, States were not simply bystanders in this process. Their consent has been the bedrock upon which the complex international economic order has been built. Yet, this does not obliterate the imbalances characterizing the international community. By piercing the cloak of formalism surrounding international relations, one would come to the realization that a large number of States have often been rule-takers.

50 Robert C. Feenstra, 'Integration of Trade and Disintegration of Production in the Global Economy', 12 (4) Journal of Economic Perspectives 31 (1998).

be resilient enough to avert shortage in medical appliances and personal protection equipment amid the outbreak of the Covid-19 pandemic.[51] More importantly, they presuppose, as the pro-trade narrative generally does, the prevalence of consumer welfare over the well-being of those who produce the goods.[52] In this respect, it has been aptly pointed out that while free-trade benefits are 'widespread and small for each individual, making them almost invisible to most people,' its losses 'are concentrated, are highly visible, and hit well-defined groups'.[53] For large sections of national societies, especially in developed countries, the competitive pressures unleashed by trade liberalization, if anything, have not only resulted in job losses but also in the uprooting of well-established collective identities.[54] Against this backdrop, States, not least because of their reduced fiscal capacity, have often failed to provide adequate compensation measures.[55] It is thus no surprise that, disgruntled and disenfranchised, 'producers' came back with a vengeance, which has shaken domestic social structures. In this respect, it has been persuasively shown that there is a strong correlation between import competition and the rise of nationalism and anti-immigration sentiments across the world.[56] Furthermore, anti-immigration policies, according to the analysis of Margaret Peters in this Issue,[57] have also gained support from businesses, especially in developed countries. In her view, this can be regarded as a side-effect of the lower demand for low-skill labor, which has decreased ensuing from the relocation of manufacturing activities toward developing countries. More widely, the combination of these factors has laid the groundwork for the (re)appearance of a 'Schmittean moment,' as Alessandra Arcuri christened it in her contribution.[58] An (unqualified) 'return' to the nation-state is often depicted as the way to fix distributive problems and democratic deficits. However plausible it may seem, this view disregards that national sovereignty is not necessarily

51 The topic has now been extensively discussed in various online fora, see among others Anthea Roberts and Nicolas Lamp 'Is the Virus Killing Globalization? There's No One Answer', Barron's, 15 March 2020, https://www.barrons.com/articles/is-the-virus-killing-globalization-theres-no-one-answer-51584209741; Tom Linton and Bindiya Vakil, 'Coronavirus Is Proving We Need More Resilient Supply Chains', Harvard Business Review, 5 March 2020, https://hbr.org/2020/03/coronavirus-is-proving-that-we-need-more-resilient-supply-chains.

52 Alan S. Blinder, 'Free Trade Paradox. The Bad Politics of a Good Idea' 98 Foreign Affairs 119 (2018), at 125.

53 Ibid.

54 Pierre Bourdieu defines neoliberalism as a 'methodical destruction of collectives', in 'The Essence of Neoliberalism', Le Monde Diplomatique, March 1998, https://mondediplo.com/1998/12/08bourdieu. Karl Polanyi had already warned of the risks of dis-embedding economic activities from society Karl Polanyi, *The Great Transformation* (New York: Farrar & Rinehart 1944).

55 Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics 1997) 54. See also Shaffer, above n 49, at 1233. According to the latter, while domestic distributive and social adjustments to (deeper) economic integration are called for, 'it [an "unqualified" support for trade agreements] fails to address how economic globalization implicates domestic politics and social relations, which affects states' ability and willingness to do so'. For a critical analysis of the U.S. Trade Adjustment Assistance, see Edward Alden, *Failure to Adjust: How Americans Got Left Behind in the Global Economy* (Lanhan: Rownman & Littlefiled) 107–126.

56 Italo Colantone and Pietro Stanig, 'The Trade Origins of Economic Nationalism: Import Competition and Voting Behavior in Western Europe', 62(4) American Journal of Political Science 936 (2018), at 937–939.

57 Margaret Peters, 'Integration and Disintegration: Trade and Labor Market Integration', in this Issue.

58 Alessandra Arcuri, 'International Economic Law and Disintegration: Beware the Schmittean Moment', in this Issue.

a site of democracy and redistribution, as the recent surge of authoritarianism and executive 'power-grab' during the Covid-19 pandemic have shown quite well. Besides the disintegration of domestic socio-economic structures, disintegration through law suitably describes the relationship between international economic rules and States' territories. Notably, the combined effect of the substantive content of certain investment contract arrangements between host States and investors, and the 'internationalized' protection of investors' rights via International Investment Agreements (IIAs) and ISDS enables the creation of 'legal enclaves'.[59] Investors gain extensive control over investment areas, which are removed from the territorial authority of the host country. Typically, such an enclave is deprived of the host State's regulatory powers and left to the discretion of the investors, producing 'structural holes in the tissue of national sovereign territory,'[60] and ultimately disarticulating territory from its normative meaning. Yet, the creation of a 'territorially circumscribed state of exception' has been often regarded as a precondition for the commodification and marketization of such resources.[61] This legal construct is instrumental for these resources to enter GVCs. With this in mind, one cannot but agree with the view expressed by Lorenzo Cotula in his contribution to this Issue,[62] that in this domain 'debates about integration and dis-integration are a function of perspective and positionality'. Put another way, the commodification of natural resources—via investment related governance—achieves an integration that is only partial and limited to sub-national areas where commercial value is concentrated, which in turn disintegrates social and legal regimes at the local level.

This is connected to the 'material' disintegration of territory, which can be understood as the irreversible deterioration of the natural environment and its ecosystems. That human economic activities produce a negative impact on the environment, ranging from rampant CO_2 emissions, to pollution of air and water, is now undisputed. That international (economic) arrangements have played a part—at least to a certain extent—in this process is highly probable. Interestingly, the beginning of the 'great acceleration', the period when the imprint of human activity on the environment intensified dramatically, coincided with the emergence of the post-war international economic order.[63]

59 Alessandra Arcuri and Federica Violi, 'Reconfiguring Territoriality in International Economic Law', 47 Netherlands Yearbook of International Law 175 (2017), at 199.

60 Saskia Sassen, 'Land Grabs Today: Feeding the disassembly', 10(1) Globalizations 25 (2013), at 26.

61 On this point see also Lorenzo Cotula, 'The State of Exception and the Law of the Global Economy: A Conceptual and Empirico-Legal Inquiry', 8(4) Transnational Legal Theory 424 (2017).

62 Lorenzo Cotula, '(Dis)integration in Global Resource Governance: Extractivism, Human Rights and Investment Treaties', in this Issue.

63 Will Steffen, Jacques Grinevald, Paul Crutzen and John Mcneill, 'The Anthropocene: Conceptual and Historical Perspectives' 369 Philosophical Transactions of the Royal Society (2011), at 842. As highlighted by the authors, rather than designating a uniform economic growth increase, the 'Great Acceleration' marks a qualitative change in the organization of consumption and production, and ultimately in the organization of economic relations, at 851–853. See also Christophe Bonneuil and Jean-Baptiste Fressoz, *L'Événement Anthropocène*, (Paris: Seuil, 2016) 269; Ellen Hey, 'International Law and the Anthropocene', 5(10) ESIL Reflections (2016), https://esil-sedi.eu/esil-reflection-international-law-and-the-anthropocene-2/; Jorge E. Viñuales, 'Law and the Anthropocene' C-EENRG Working Paper 2016–5 (2016), at 29.

At any rate, international economic law is one of the fields where the profound disconnect[64] between humans and their environment has more visibly emerged. Nature is perceived as 'external' and 'other' from humankind. Accordingly, nature is a resource[65] that can be 'owned,' controlled and accumulated by an owner or a sovereign. Consequently, degradation and overexploitation deriving from commercial transactions are addressed as externalities. This is to a certain extent due to the fact that neither environmental protection nor global warming were on the radar of the international community until the 1992 Rio Earth Summit.[66] International economic law, in other words, 'organizes production processes both domestically and internationally'[67] first, to only address at a second stage 'external' shocks disturbing the pre-established system, without in fact intervening at the source of the problem. This disconnect and its implications are visible at several levels.

Trade and investment rules are a case in point. Traditionally, both regimes treat environmental protection as an exception (at best). As is well known, old generation IIAs did not include any specific safeguard for the environment.[68] This pattern has progressively changed in the last years, with the inclusion of explicit exceptions in

64 Extensively tracing this disconnect in historiography, social sciences, and law, Viñuales above n 63. To see how this has played out in the spreading of Covid 19 see Ntina Tzouvala, 'COVID-19 Symposium: The Combined and Uneven Geography of COVID-19, or on Law, Capitalism and Disease', Opinio Juris, 2 April 2020, http://opiniojuris.org/2020/04/02/covid-19-symposium-the-combined-and-uneven-geography-of-covid-19-or-on-law-capitalism-and-disease/ and Leslie-Anne Duvic Pauli, 'COVID-19 Symposium: The COVID-19 Pandemic and the Limits of International Environmental Law', Opinio Juris, 30 March 2020, http://opiniojuris.org/2020/03/30/covid-19-symposium-the-covid-19-pandemic-and-the-limits-of-international-environmental-law/.

65 Such conceptual underpinning—nature as something to be 'owned' and controlled, that is—is deeply engrained in the modern and contemporary notions of both sovereignty and property, and intimately linked to the commodification (and accumulation) of natural resources and the fully-fledged incorporation thereof in GVCs. Extensively, for an excellent analysis of this understanding of nature and its foundation in state of nature, see Tom Sparks 'The Place of the Environment in State of Nature Discourses: Reassessing Nature, Property and Sovereignty in the Anthropocene', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020–10 (2020).

66 Contra Bonneuil and Fressoz above n 63, according to whom this awareness predates, at 95–96.

67 Jorge E. Viñuales, 'The Organisation of the Anthropocene: In Our Hands?' 1(1) International Legal Theory and Practice, 1 (2018), at 44. The author adds: 'We have lost sight of how idiosyncratic and culturally-situated the growth and efficiency-based legal organisation of society and its relations with nature are', at 28. This disconnect is also related to the neoclassical notion of economic (monetary) value as a foundation of 'equal exchange,' which hides severe instances of asymmetry in wealth flux and uneven distribution of resources, and further contributes to environmental degradation. This aspect has been lucidly captured by the idea of 'unequal exchange' and 'emergy'. Ecologically speaking, 'unequal exchange' indicates that the same monetary value of goods produced in the North against goods produced in the South implies a very different ecological footprint, with the latter goods utilizing much more (labor), energy and resources for the same amount of money. Structurally, this also depends on differences in the economic organization of countries, with global South countries relying heavily on extractive industries. See Viñuales above n 63, at 30. For a more recent discussion Oliver Schlaudt 'The Market as a 'Rigged Game'? Economic Value and the Challenge of Ecologically Unequal Exchange' Verfassungsblog, 4 March 2020, https://verfassungsblog.de/the-market-as-a-%ca%bbrigged-game%ca%bc-economic-value-and-the-challenge-of-ecologically-unequal-exchange/.

68 In the absence of a clear textual indication, arbitral tribunals have adopted a variety of approaches in dealing with environment related investment disputes. E.g. *Metalclad Corp. v Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005 and more recently *Burlington Resources Inc. v Republic of Ecuador* ICSID ARB 08/05, Decision on Ecuador's counterclaims, 7 February 2017.

the treaty text. As to the WTO, the Appellate Body, has built a consistent body of jurisprudence relying on GATT Article XX lett. (b) and (g),[69] that often strays from the script contained in the WTO Agreements.[70] Yet, the WTO-compatibility of a large number of climate change policies is still dubious, particularly vis-à-vis the subsidies disciplines.[71] And the notorious Appellate Body decision in *Canada-renewable energy*[72] also failed to dispel such doubts.[73] In fact, it shows the inadequacy of those rules more than anything else.[74]According to Ernst-Ulrich Petersmann in his contribution, while treaty reform is desirable in the long term, addressing the issue is undelayable. To this purpose, in his view, treaty reform is not necessary in the short term. A new and greener version of 'embedded liberalism' compromise can be established, amongst others, '[B]y interpreting and developing the WTO sustainable development objective in conformity with the universally agreed 17 SDGs and the Paris Agreement on climate change'.[75] Recent international treaty practice has seemingly devoted more attention to environmental concerns, moving beyond the traditional approach. Mega-regionals, like CETA, USMCA, and TPP, do include environmental content, typically in separate chapters. However, the regime they devise does not fully integrate environmental objectives with trade liberalization commitments. These agreements mostly leave the achievement of these objectives to rather softer cooperation and best efforts, or to obligations that are hardly enforceable, albeit with few notable exceptions.[76]

69 See Francesco Francioni, 'Environment, Human Rights and the Limits of Free Trade', in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (Oxford-Portland: Hart Publishing, 2001) 8–17. See also Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX', 25 Journal of World Trade 37 (1991), at 38–47.

70 Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', 27(1) European Journal of International Law 9 (2016), at 36. See for a different and less rosy take on this matter Joost Pauwelyn, 'The WTO 20 Years On: "Global Governance by Judiciary" or, Rather, Member-driven Settlement of (Some) Trade Disputes between (Some) WTO Members?' 27 (4) European Journal of International Law 1119 (2017), at 1121–1127.

71 See, amongst others, Bradly J. Condon and Tapen Sinha, *The Role of Climate Change in Global Economic Governance* (Oxford: OUP, 2013) 53–65.

72 WTO Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*—WT/DS412/AB/R WT/DS426/AB/R, adopted 24 May 2013, para 5.178.

73 Aaron Cosbey and Petros Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO', 17 Journal of International Economic Law 11 (2014), at 26–29.

74 For a detailed reform plan, see Ibid., at 42–46.

75 Petersmann, above n 7.

76 The most notable and stringent one being the prohibition of subsidies for fishing overfished stocks in both TPP (Art. 20.16.5 (a) and (b)) and USMCA (Art. 24.20.1). The issue is on the negotiating agenda of the WTO as well. As to the environmental chapters, it is interesting to note that, contrary to USMCA and TPP, the Trade and Sustainable Chapter (22) and Trade and Environment Chapter (24) of CETA are not subject to the State-to-State dispute settlement mechanism provided by the treaty. Furthermore, environmental measures are admittedly still subject to the GATT XX-like exception under Art. 28.3. See on this Sophia Paulini, 'Robust, Comprehensive and Binding?—A Critical Analysis of the Substantive Environmental Provisions in the Chapters on Trade and Sustainable Development of EU FTAs', in Federico Casolari and Lucia S. Rossi (eds), *Integrating FTAs into the EU Legal Order: Threatening or Mainstreaming the EU Constitutional Identity?* (Edward Elgar, forthcoming) (on file with the author); Phillip Paiement, 'Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute' 49 Georgetown Journal of International Law 675 (2018). A recent Franco-Dutch proposal attempts to strike a better balance between trade and environment in FTAs negotiated and concluded by the EU. At a first

Just as international economic law relegates environmental protection mainly to exceptions, international environmental law adopts market-based mechanisms and incentives to tackle climate change and 'internalize' externalities, *de facto* maintaining and reproducing the same disconnect. Multilateral environmental agreements have introduced a varied set of such incentives, such as the carbon credit system or the REDD+ mechanism to 'protect' forests. Climate change market and financial mechanisms have generally proved to be inefficient,[77] a perverse incentive to pollute more, especially in developing countries,[78] and generally ignore problems of distribution of power and resources.[79]

B. Disintegration of law

Next to disintegration through law, one can also discern a widespread disintegration of the existing international economic regimes. It is well-known that both the international trade and investment regimes are facing a widely documented backlash. The disintegration of the legal infrastructure materializes in a variety of manners, spanning the outright withdrawal from international treaties and less intense forms of disengagement and 'delegalization'.[80] For this reason, we adopt here a broad understanding of disintegration *of* law.

Given its magnitude and the variety of its manifestations, this phenomenon is potentially explainable by resorting to a wide array of factors, including contingent and sector-specific ones. To be sure, geopolitical and geo-economic[81] 'seismic shifts'

glance, it seems that the proposal makes trade liberalization commitments dependent upon the respect of sustainability obligations. Jim Brunsden and Victor Mallet 'France and Netherlands call for tougher EU trade conditions', Financial Times, 4 May 2020, https://www.ft.com/content/e14f082c-42e1-4bd8-ad68-54714b995dff.

77 See amongst others the failure of the EU Emission Trading System, which determined (at least at the beginning) a surplus of emission allowances, 'Market Stability', https://ec.europa.eu/clima/policies/ets/reform_en; most recently on the risk of the creation of a coal bubble Frédéric Simon, 'Coal bubble' Puts EU Carbon Market Under Threat, Watchdog Warns', Euractiv, 20 September 2019, https://www.euractiv.com/section/emissions-trading-scheme/news/fri-ready-coal-bubble-puts-eu-carbon-market-under-threat-watchdog-warns/; Annalisa Savaresi, 'Natural Resources Grabbing: The Case of Tropical Forests and REDD+', in Francesca Romanin Jacur, Angelica Bonfanti and Francesco Seatzu (eds), *Natural Resources Grabbing: an International Law Perspective* (Leiden-Boston: Brill-Martinus Nijhoff 2016), 159–180.

78 Jolene Lin, 'An Overview of the Clean Development Mechanism in Southeast Asia', in Kheng-Lian Koh, Lin Heng and Jolene Lin (eds), *Crucial Issues in Climate Change and the Kyoto Protocol. Asia and the World* (Singapore: World Scientific Publishing 2009) 99–126. The author shows how the problem lies in the production-based accounting of CO_2. This creates a pervert incentive for developing countries—which are bound to less restrictive commitments—to produce more and increase industrial production to export to the Global North.

79 Atieno Mboya, 'Human Rights and the Global Climate Change Regime', 58(1) Natural Resources Journal 51 (2018), at 59. See also Stephen Humphreys, 'Conceiving Justice: Articulating Common Causes in Distinct Regimes', in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge: CUP, 2010), 299–319. There is also growing literature on the effects of 'green growth' in terms of social and distributive impact. See Daniel W. O'Neill, 'Beyond Green Growth', 3 Nature Sustainability 260 (2020). According to the author 'green growth' policies might be counterproductive. A macroeconomic model incorporating distributive considerations from the outset should instead be preferred.

80 Crawford, above n 46, at 6; Buscemi and Mariotti, above n 46, at 944.

81 See Anthea Roberts, Henrique Choer Moraes, Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' 22(4) Journal of International Economic Law 655 (2019).

have always been fraught with consequences for the international economic order. The move toward a bi- (or tri-) polar world has been partly responsible for triggering this dynamic. This is in turn broadly reflected in the framing of trade relations in terms of security related issues,[82] but also in the generalized perception of the need to protect 'strategic' or 'critical' sectors. States have certainly become gradually more aware of vulnerabilities inherent to deeper economic interdependence.[83] Yet, as we show below, this shift is intimately connected to the disintegration *through* law phenomena analyzed in section II.A—namely the effects of international economic regimes on socio-economic structures and the environment—which we argue are to a certain extent generating the simultaneous deterioration of virtually all international economic law regimes. To make matters worse, the issue is further complicated by the fact that States have (perhaps unsurprisingly) reacted on a piecemeal basis, adopting attitudes of 'disengagement' consistent with their different understanding of economic integration and the interests attached to it.[84]

To begin with, disintegration *through* law offers a compelling explanation to the disintegration *of* international trade law. As is well-known, the World Trade Organization had shown signs of distress already at the beginning of the new millennium.[85] However, although the agonizing stalemate of the Doha round cast serious doubts on the prospect of advancement of the multilateral trading system, the day-to-day functioning of the WTO was not in peril. But the unthinkable became reality. Disintegration culminated in the United States' obstructing the appointment of Appellate Body members, to which the European Union has responded by promoting the establishment of an interim appeal facility.[86] Not to mention the attempt of the US at reading the national security clause[87] to include economic security; and the efforts at bi-lateralizing the relationship

82 Ibid.

83 This realization is for example reflected in the adoption of the EU investment screening guidelines and most recently the subject of a fervent video of the President of the EU Commission. Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) 2020/C 99 I/01, OJ C 99I. See the video message of the President of the Commission Ursula von der Leyen, 25 March 2020, https://www.youtube.com/watch?v=V2zi6UxZoHA.

84 See Petersmann, above n 7. The author identifies three such 'general attitudes': hegemonic nationalist mercantilist *à la* Trump; totalitarian state-capitalism *à la* China; ordo-liberal European constitutionalism.

85 On the WTO crisis cf. ext. the last Special Issue in this journal on 'Trade Wars', introduced by Anne van Aaken, Chad P. Bown and Andrew Lang, 22(4) Journal of International Economic Law (2019). See also Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' 22(3) Journal of International Economic Law, 297 (2019).

86 At present 21 WTO members have endorsed the EU's initiative. Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, 27 March 2020, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158685.pdf.

87 On the security exception see Geraldo Vidigal 'WTO Adjudication and The Security Exception: Something Old, Something New, Something Borrowed—Something Blue?' 46(3) Legal Issues of Economic Integration 203 (2019); Diane Desierto, 'Protean "National Security" in Global Trade Wars, Investment Walls, and Regulatory Controls: Can "National Security" Ever Be Unreviewable in International Economic Law?', EJIL: *Talk!*, 2 April 2018, https://www.ejiltalk.org/national-security-defenses-in-trade-wars-and-investment-walls-us-v-china-and-eu-v-us/; Viktoriia Lapa, 'The WTO Panel Report in Russia—Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?'69 QIL, Zoom-in 5 (2020).

with China.[88] While not resulting in a formal withdrawal, these moves are certainly able to stall the full functioning of the WTO. This dramatic turn, and the whole Trump trade agenda, can be regarded as a reaction to the inability of WTO disciplines to prevent China from enacting several measures, such as undervaluing its currency, setting the price of inputs and so on,[89] which gave her a sizeable—and, for many, unfair—competitive advantage. In sum, it is a response to the so-called 'China shock,' namely the colossal post-WTO accession China's trade expansion, which resulted in the decimation of manufacturing companies in several industrial districts of the United States[90] and generated the backlash of the disenfranchised 'losers' described above. Proposals to address this crisis are located somewhere within and outside the WTO system. An example is the proposal advanced by the Minister of Economy, Trade and Industry of Japan, the United States Trade Representative, the European Commissioner for Trade, which constitutes a concerted effort to address this issue.[91] Yet, however legitimate these concerns may be, one wonders whether such unilateral or plurilateral initiatives risk doing more harm than good. Robert Howse[92] argues in this Issue that the US-EU-Japan proposal, which further constrains active industrial policy, could not be untimelier in view of the resurgent role of the State as 'crisis manager'. More restrictive rules on subsidies and state enterprises could damage not only China, but also (quite ironically) their proponents. Howse advances a bilateral solution, which instead leaves to the States non-discriminatory general domestic policy choices.

Secondly, disintegration *through* law phenomena might also explain the disintegration *of* international investment law, which is currently enduring the full spectrum of disintegration tendencies. This is certainly sparked by the severe legitimacy crisis the system has undergone in the last ten years. It would be a repetitious exercise to elaborate on this backlash, widely documented in the literature,[93] which—as is well known—relates to the constraint that IIAs and ISDS impose on the host State's right to regulate and the related impact on human rights and the environment. In their

88 Economic and Trade Agreement between the Government of The United States Of America and the Government of The People's Republic Of China, signed on 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.

89 Ibid.

90 Paul Blustein, *Schism: China, America and the Fracturing of the Global Trading System* (Waterloo: Center for International Governance Innovation 2019) 27–28.

91 Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January 2020, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union.

92 Robert Howse, 'Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises' in this Issue.

93 The literature on the topic is extensive. See amongst others David Schneiderman, 'International Investment Law's Unending Legitimation Project' 49 Loyola University of Chicago Law Journal 229 (2017); Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge: CUP, 2011); Sornarajah, above n 16; Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Alphen aan den Rijn: Wolters Kluwer, 2010).

contribution, Lorenzo Pellegrini et al.[94] provide a disturbing yet exemplary account of the reasons which triggered this backlash. The insulation of investors' rights through a system of substantive and procedural protection is able to create structural barriers for the attainment of environmental justice, even in contexts of massive environmental damages and higher-than-normal morbidity and mortality rates.[95]

It thus comes as no surprise that international investment law has entered a phase of tumultuous change. On the one hand, States have unilaterally withdrawn from IIAS[96] and denounced the ICSID Convention (albeit more limited in numbers).[97] On the other hand, there is currently a plethora of reform proposals concerning both substantive standards and the ISDS mechanism, some possibly more transformative than others.[98] But the road to change is bumpy and tortuous. For one thing, even formal withdrawal from IIAs does not necessarily imply a complete disengagement from the current investment protection regime. Sunset clauses—at times long ones—delay the full and immediate effects of withdrawals. Furthermore, reforming the massive network of IIAs inevitably takes time. Finally, States and investors can still agree contractually to protection terms that do not differ much from the existing IIAs in terms of substance, and can offer contract-based arbitration, possibly within the same institutional setting as treaty-based arbitration.[99] In this respect, as argued by Muthucumaraswamy Sornarajah

94 Lorenzo Pellegrini, Murat Arsel, Martí Orta-Martínez and Carlos F. Mena, 'International Investment Agreements, Human Rights and Environmental Justice: The Texaco/Chevron Case from the Ecuadorian Amazon' in this Issue.

95 Ruggie, above n. 7; Andrew Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' 9(1) Journal of International Economic Law 81 (2006); Alexander Ebner, 'Transnational Markets and the Polanyi Problem', in Christian Joerges, Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford: Hart 2011) 19.

96 Notable examples include South Africa, India, Bolivia, Venezuela, but also Italy (denunciation of the treaty) and Russian Federation (termination of provisional application) from the Energy Charter Treaty. See UNCTAD, Recent developments in the international investment regime: Taking stock of phase 2 reform actions Note by the UNCTAD Secretariat, UN Doc. TD/B/C.II/42, 2 September 2019; UNCTAD, IIA Issue Note, Issue 3, June 2019 https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf.

97 Ibid.

98 Most notably the work of UNCITRAL Working Group III on Investor-State Dispute Settlement Reform and the proposals for the amendment of the ICSID Rules. On these proposals see a.o. Jane Kelsey, Gus Van Harten and David Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter' in Osgoode Legal Studies Research Paper, 2019 papers.ssrn.com/sol3/papers.cfm?abstract_id=3329332; Malcolm Langford, Anthea Roberts, 'UNCITRAL and ISDS Reforms: Hastening slowly', EJIL:*Talk!*, 29 April 2019, https://www.ejiltalk.org/uncitral-and-isds-reforms-hastening-slowly/; Anthea Roberts, Taylor St. John, 'UNCITRAL and ISDS Reform: Visualizing a Flexible Framework', EJIL: *Talk!*, 24 October 2019, https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/; Alessandra Arcuri and Francesco Montanaro, 'Justice for All? Protecting the Public Interest in Investment Treaties' 59 Boston College Law Review 2791 (2018); Alessandra Arcuri and Federica Violi 'Reimaging ISDS: from UNCITRAL WGIII to the European way and why we are missing out on sustainability' 13(3) Diritti Umani e Diritto Internazionale 579 (2019); Daria Davitti, Jean Ho, Paolo Vargiu and Anil Yilmaz Vastardis, 'COVID-19 and the Precarity of International Investment Law', The IEL Collective Series on Medium, 6 May 2020 https://medium.com/iel-collective/covid-19-and-the-precarity-of-international-investment-law-c9fc254b3878.

99 ICSID rules for example can also apply to contract-based arbitration.

in his contribution,[100] this change, albeit tumultuous, has not yet reached the tipping point. While these tendencies are unfolding because the interests of both (traditional) rule-taker and rule-makers are progressively matching, these are still not enough, and a more profound 'disintegration' of the previous order would be necessary for the public interest—in a broader sense—to be upheld.

Interestingly, the disintegration of the international investment regime occurs at the time when China is attempting to build its own web of investment relations. In this sense, a somewhat more informal method of disengagement (or 'differentiated' engagement) can be detected in the new 'decentralized' system implemented through the Belt and Road Initiative (BRI), which is mainly aimed at infrastructure development and investment.[101] This system relies heavily on a complex web of financing, legal, and economic relations mostly lightly regulated, via bilateral instruments such as Memoranda of Understanding (MoUs) and private contracts, which are typically removed from international scrutiny and managed via softer dispute settlement mechanisms. Arguably, similar more informal constructs were already in place and largely used in the context of development projects co-financed by multiple international and regional development banks and export credit agencies. The difference with the BRI, however, seems to lie in the sort of consensus conveyed through the latter operations. The BRI does not aim at achieving deep(er) economic integration, rather it is mostly limited to market access and seemingly seeking to create an alternative Chinese (world) economic order.[102] More generally, besides their substantive function, Memoranda of Understanding and other sorts of non-binding treaties are problematic from a taxonomic and structural perspective. These instruments tend to drive an institutional wedge of unclear nature and effects. This is all the more relevant, considering that MoUs are becoming increasingly common in other areas.[103] While non-binding treaties might be considered a more malleable instrument of harmonization and coordination among States, due to their 'agility' these can easily lend themselves to discretion and arbitrariness, and ultimately act as a disintegrating factor.[104]

100 Muthucumaraswamy Sornarajah, 'Disintegration and Change in the International Law on Foreign Investment' in this Issue.

101 Extensively Gregory Shaffer and Henry Gao, 'A New Chinese Economic Law Order?' School of Law University of California Irvine Legal Studies Research Paper Series No. 2019–21; Maria Adele Carrai, 'It is Not the End of History: The Financing Institutions of the BRI and the Bretton Woods System' 3 Transnational Dispute Settlement (2017); more generally on the BRI, Maria Adele Carrai, Jean-Christophe De Fraigne and Jan Wouters (eds), *The Belt and Road Initiative and Global Governance* (Cheltenham: Edward Elgar, 2020).

102 Shaffer and Gao, above n 101, at 40. Admittedly, at the moment this system coexists with the very extensive BIT network of China.

103 Notably, within the EU at various levels, featuring mostly in the EMU area. Cf. ext on this Anastasia Karatzia and Theodore Konstadinides, 'The Legal Nature and Character of Memoranda of Understanding as Instruments used by the European Central Bank' 44(4) European Law Review 447 (2019).

104 Professor Enzo Cannizzaro put forward this argument in the presentation, entitled 'The disintegrationist effect of non-binding political agreements in International and EU Law', given at the conference mentioned in the opening footnote.

Finally, even the European construct, which is by any measure the most advanced (and theorized)[105] example of international economic integration, is experiencing a wide range of visible disintegration phenomena, which also appear as an effect of disintegration *through* law phenomena. This proposition is very much in line with recent attempts to explain EU disintegration. Relying on Polanyi's idea of dis-embeddedness,[106] scholars have argued that the focus on the economic aspects of the EU has ignored political identity and community building, even when the 'European project transcended its economic origin'.[107] As such, the EU serves both as a laboratory and a magnifying glass to observe the integration/disintegration dynamics, and shows that integration is neither linear nor immutable. Within the broad notion of disintegration adopted by this study it is possible to include the recent—steadily more frequent—disregard for the rule of law principles enshrined in Article 2 of the Treaty of the European Union.[108] This is to a large extent due to the rise of nationalist and 'illiberal' governments in some Member States. But, as shown by Panicos Demetriades and Radosveta Vassileva,[109] the neglect of these values is not limited to such States. The enforcement of EU Anti-Money Laundering rules in Cyprus and Malta is a case in point. Relevant EU rules are admittedly insufficient to guarantee the independence of AML supervisors, which in turns generates a decay of the rule of law. Similarly, the recent withdrawal of the United Kingdom from the EU can be seen as another notable

105 There are now several studies looking at 'disintegration' of the EU, albeit from different perspectives. Legal studies have rather focused on 'differentiated' or 'multi-speed' integration, while international relations and economics have focused on the foundation and premises of the integration project. See amongst others Bruno de Witte (ed), *Between Flexibility and Disintegration. The Trajectory of Differentiation* (Cheltenham: Edward Elgar, 2017); Erik Jones 'Towards a Theory of Disintegration' 25(3) Journal of European Public Policy 440 (2018); Barbara Kunz, 'Integration, Disintegration and the International System. A Realist Perspective on Push and Pull Factors in European Integration', in Annegret Eppler and Henrik Scheller (eds), *Zur Konzeptionalisierung europäischer Desintegration*, (Baden-Baden: Nomos 2013) 71–86; Matthew C. Turk, 'Implications of European Disintegration for International Law' 17 Columbia Journal of European Law 1 (2010).

106 Liesbeth Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus', 39(1) British Journal of Political Science 1 (2009). Traditionally, European integration has been considered a creature of '(neo)functionalism,' which in the context of the EU could be synthesized as the idea that the integration of certain areas would create spill-over effects on other adjacent fields, ultimately conducing to an 'ever-closer' integration, an assumption originated with Monnet and to a certain extent maintained by Delors. Scholars have argued, however, that more than a normative theorization of integration, (neo)functionalism has in fact—at least for a certain period of time—described a development in the status quo. See Turk, above n 105, at 22.

107 More specifically, even if presented or perceived as a liberal process that would have disentangled domestic political interests from a supra-national project, it has failed to account for how certain arrangements actually perpetuate a division between national interests, very much exemplified by the recent turbulent reaction to Covid-19. Jones above n 105, at 441.

108 Since the establishment of the EU rule of law framework, both the preventive and corrective mechanisms under Article 7 TEU have been triggered on several occasions. See Dimitry Kochenov and Laurent Pech, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation', 54 (5) Journal of Common Market Studies 1062 (2016); Laurent Pech and Kim L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 Cambridge Yearbook of European Legal Studies 3 (2017).

109 Panicos Demetriades and Radosveta Vassileva, 'Money Laundering and Central Bank Governance in the European Union' in this Issue.

manifestation of that nationalist response to the flaws of deep international economic integration.[110]

The Economic and Monetary Union (EMU) is also treading on dangerous grounds since the outbreak of the 2007–2008 financial crisis. Considered as the jewel in the crown of European integration, it soon became the most frequent source of turbulence for the Union. As evidenced by Massimo D'Antoni,[111] the design flaws of the EMU, notably the absence of common fiscal capacity and the single mandate of the European Central Bank (ECB), have come home to roost. Instead of paving the way for full political integration, as anticipated by the promoters of this project, it has widened the cleavage between 'periphery'[112] and 'core' countries.[113] Caught in the grip of high unemployment and high public debt, periphery[114] (and not so periphery)[115] countries are growing disaffected with the EMU and, ultimately, with the EU—the withdrawal from the European Union is no longer taboo.[116] At the same time, the extraordinary monetary measures[117] adopted by the ECB, and backed by the Court of Justice, to make up for these flaws, have in turn elicited the reaction of national governments and national constitutional courts. A long and often uneasy dialogue[118] between the CJEU and the German constitutional court has recently culminated in a *Bundesverfassungsgericht* decision[119] that, defying the principle of primacy of EU law, casts doubts on the compatibility with both the German Constitution and the EU

110 Italo Colantone and Pietro Stanig above n 56, at 209–214; Thomas Sampson, 'Brexit: The Economics of International Disintegration', 31(4) Journal of Economic Perspectives 163 (2017), at 175–180.

111 Massimo D'Antoni, 'From Monetary to Fiscal to Political Union: a Progression to Integration or a Recipe for Failure?', in this Issue.

112 Southern European States, such as Spain, Italy, Greece, Portugal are often referred to as 'periphery' countries.

113 This term generally includes Germany and other northern European States, such as the Netherlands, Finland, and Austria.

114 See, e.g. Rosa Balfour and Lorenzo Robustelli, 'Why Did Italy Fall Out of Love with Europe?', IAI Commentaries, IAI Commentaries, 2019, https://www.iai.it/sites/default/files/iaicom1948.pdf.

115 The case of France is paradigmatic in this respect. See Michel Onfray, *Grandeur du petit peuple: Heurs et malheurs des Gilets jaunes* (Paris: Éditions Albin Michel, 2020).

116 The discontent toward the European Monetary Union is somewhat reminiscent of that against the Gold Standard in the late 19th Century in the US. See Jeffry A. Frieden, 'Monetary Populism in Nineteenth Century America: An Open Economy Interpretation', 57 (2) The Journal of Economic History 367 (1997); Hugh Rockoff, 'The Wizard of Oz as a Monetary Allegory', 98 (4) Journal of Political Economy 739 (1990).

117 Decision (EU) 2015/774, OJ 2015, L 121/20; ECB, 'Technical Features of Outright Monetary Transactions', 6 September 2012, https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

118 See, amongst others, Edmondo Mostacci, 'La sindrome di Francoforte: crisi del debito, costituzione finanziaria europea e torsioni del costituzionalismo democratico', 4 Politica del Diritto (2013), at 530–532; Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It', 15(2) German Law Journal 203 (2014), at 208–214; Mehrdad Payandeh, 'The OMT Judgment of the German Federal Constitutional Court Repositioning the Court within the European Constitutional Architecture', 13 European Constitutional Law Review 400 (2017).

119 BVerfG, Judgment of the Second Senate of 5 May 2020–2 BvR 859/15 -, paras (1–237). See Marco Dani, Joana Mendes, Agustin J. Menendez, Michael Wilkinson, Harm Schepel and Edoardo Chiti, 'At the End of the Law: A Moment of Truth for the Eurozone and the EU', 15 May 2020, https://verfassungsblog.de/at-the-end-of-the-law/; Marijn van der Sluis, 'Karlsruhe bites with a vengeance', 5 May 2002, https://eulawlive.com/analysis-karlsruhe-bites-with-a-vengeance-by-marijn-van-der-sluis/.

Treaties of the ECB's quantitative easing programme.[120] As argued above for the WTO, the combination of these disruptive events does not allow any further inaction. But the need for action brings with it the question of whether future reforms should go toward a deeper integration between EU States or lighter and diversified forms of integration. Menelaos Markakis[121] seems to opt for the former option, although he underlines the importance of the flexibilities set out in the EU Treaties. But, as the divergence between Member States increases, 'diversified integration' recipes might gain wider currency.[122]

C. Disintegration as an iterative process

Remaining truthful to our iterative understanding of disintegration *of* law and disintegration *through* law, we maintain that the divide existing between international economic governance and socio-economic and environmental issues is reflected and perpetuated in the very construction of legal categories. In other words, the isolation of the social[123] and environmental questions is enshrined in the current structure of international law and in the way certain matters are organized normatively. In this sense, the regulative separation between trade (or investment) values from non-trade values is almost automatic for international economic law scholars. This is very much reflected in the phenomenon of fragmentation, whereby different fields of law develop separately their own sets of rules only to interact when conflicting. Granted, law needs categories to be able to interpret facts and attach consequences.

However, here the risk is twofold. First, this separation has so far generated a lopsided structure of comparatively weaker international regimes on social and environmental issues. Second, this surgical division of categories becomes an unuseful taxonomic instrument, imposing artificial distinctions, which are unsustainable in the long term. Scholars have already articulated how the distinction between trade and non-trade values is reproduced and magnified in the fragmentation discourse. This discourse in fact normalizes the idea by which certain matters, environment, labor, human rights do not 'belong' to the international economic integration project, thus neglecting their interconnectedness and perpetuating the separation.[124] Fragmentation, albeit articulated as a critique, still forces us to look at the very same fact of life from a different set of perspectives and try to find solutions in harmonization techniques, which are

120 Decision (EU) 2015/774, above n 117.

121 Menelaos Markakis, 'Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles', in this Issue.

122 See, amongst others, Daniel Thym, 'Competing Models of Understanding Differentiated Integration', in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham-Northampton: Edward Elgar, 2017); Majone, above n 18, at 295–322.

123 Orford above n 47.

124 See the critique of the trade-linkage literature in Lang, above n 7, at 538; 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 on file with the author.

still a second best and not always viable.[125] Suffice to think of the same exact source of dispute litigated first as an investment case before an arbitral tribunal, and as a human right one before a HR court.[126] In other terms, while fragmentation takes this separation of categories as a given and acts from there, we argue that the disintegrating factor lies already at the conceptual level, in the way categories are created and constructed.

III. CONCLUSION: WHAT AWAITS US AFTER DISINTEGRATION?

A wide range of disintegration phenomena has crippled international economic integration over the last few years. We have argued that the current 'integrationist' architecture of the international economic order has spurred disintegration *through* law—namely socio-economic and environmental disintegration—which in turn triggers disintegration *of* law, undermining the very existence of international economic regimes. This Special Issue is devoted to investigating these interrelated phenomena.

Instances of both disintegration *of* law and *through* law did not (so far at least) materialize in a coherent and comprehensive articulation of alternative(s). Reactions have been sparse, and the way forward seems to be a trial and error path rather than an orderly plan. In other words, disintegration did not come with a 'manual of destruction' or a roadmap to navigate. 'Unqualified' disintegration generates a sort of *horror vacui* and leaves it to the caprice of power politics. The contributions to this Special Issue try to make sense of this remarkable series of events from a variety of perspectives, often reaching diametrically opposed conclusions. Some welcome disintegration as an opportunity for change, some acknowledge the need for change to avert disintegration. However, what all contributions have in common is the acknowledgement that the *status quo* is eroding quickly, and a direction needs to be taken to move forward. Hence, the encouragement is not to give in to what has been described as the deprivation of imagining alternatives.[127]

In an attempt to make sense of the normative preferences articulated in this Special Issue, we have identified (at the risk of over generalizing) five general propositions. The first is the idea of the 'repatriation' of competences, which is a 'return' to the State as the

125 See also Martti Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' 1 European Journal of Legal Studies 1 (2007).

126 A clear example here is the Sarayaku case before Inter-American Court of Human Rights, 'Pueblo Indígena Kichwa de Sarayaku v Republic of Ecuador. Case No. 12.465. Judgment on Merits and Reparations, 27 June 2012 and the parallel investor-State arbitration in the Texaco Chevron saga, specifically the parallel *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009–23 First Partial Award on Track I, 17 September 2013. No mention is to find in either of the decisions of the other proceeding. Other examples might be the simultaneous negotiations on ISDS reform and on a Business and Human Rights treaty, which are carried out separately; similar considerations can be articulated as to the surgical and asymmetrical separation between the regulation of movement of goods and capital, and the movement of persons, which has arguably contributed toward fuelling illegal migration, on this see Chantal Thomas, 'Migration and International Economic Asymmetry' in Alvaro Santos, Chantal Thomas and David Trubek (eds) *World Trade and Investment Law Reimagined A Progressive Agenda for an Inclusive Globalization* (London: Anthem Press, 2019), 241–256; Peters, above n 57.

127 Boaventura de Sousa Santos, 'Virus: All That Is Solid Melts into Air', Critical Legal Thinking, 19 March 2020, https://criticallegalthinking.com/2020/03/19/virus-all-that-is-solid-melts-into-air/.

main place of decision-making. The second is the conceptualization of a (re)embedded liberalism in a multilateral dimension, that is the idea of addressing certain compelling issues in existing multilateral frameworks. The third could be defined as progressive 'managed' integration, half-way between deep integration and reshoring, with more *ad hoc* solutions in the short-term and the possibility to extend them multilaterally at a later stage. The fourth one advances an inversion of scope with the regulation of the market being subservient to social and environmental issues, rather than 'embedding' these issues in market regulation. The last could be indicated as a 'participatory' approach, in that these solutions identify the site of democratic decision-making in the affected stakeholders at a subnational and transnational level, rather than in the nation-state.

All these solutions present advantages and disadvantages, both from a substantive and pragmatic perspective. The idea of the return to the State might conceal both the (now highly visible) risk of autocratic power grab, but also 'de-responsibilize' international economic law of its central role in the attainment of public purposes. On the other hand, a (re)-embedded multilateralism might still risk obliterating the 'perspective of the oppressed,' and maintaining the traditional divides between 'trade and non-trade issues'. Solutions that rest on bilateralism—albeit in the short-term—may advance more progressive agendas, such as a stronger active industrial policy and be more achievable, while risking to fragment the response.

Whatever position one may take on this issue, it should be admitted that the diffusion on a global scale of an unexpected and deadly disease, if anything, would impart acceleration to the 'wrecking ball' of disintegration. What has become immediately clear after the outbreak of Covid-19 is that the closely interdependent and fast-moving 'world of yesterday' has been put on hold and it is not clear what the 'world of tomorrow' will look like.[128] What is clear, instead, the slowing down of virtually all economic activities has plunged the world economy into a huge recession and brought unemployment to unprecedented levels around the world. The international economic order, in its various manifestations, should reinvent and adapt itself to this new state of things. Its reshaping should be premised on the full realization that economic integration entails a great deal of environmental and social 'hidden costs,'[129] which should guide the

128 Zachary Karabell, 'Will the Coronavirus Bring the End of Globalization? Don't Count on It', The Wall Street Journal, 20 March 2020; Adam J. White, 'Deregulate for the Coronavirus Recovery The Office of Information and Regulatory Affairs should think hard about which rules to enforce', WSJ Opinion, 3 May 2020; Carson Block, 'Bans on short selling are handouts to the "corporate socialists"' Financial Times, 26 March 2020; Adam Tooze, 'The Death of Globalisation has been Announced Many Times. But this is a Perfect Storm', The Guardian, 2 June 2020, https://www.theguardian.com/commentisfree/2020/jun/02/end-globalisation-covid-19-made-it-real.

129 More generally, Ricardo's theory of competitive advantage has somehow always excluded vital interests from the formula, and reduced them to 'hidden costs'. More recently, it has been argued that this theory allows for social inequalities to be reproduced for example in the labor market and in some ways it renders invisible 'the contribution that social reproductive, informal/informalized labor and environmental resources make to the transnational creation, extraction, and distribution of economic value', Donatella Alessandrini, 'Value-capture, Development and Social Reproduction in International Trade Law' Verfassungsblog, 4 March 2020. The notion of hidden costs is somehow related to the value of goods and services. For a summary of the debate between objective and subjectives conceptions of value, see Mariana Mazzuccato, The Value of Everything (London: Penguin, 2018) 58–71.

reconceptualization of the international economic order.[130] One may wonder whether the international economic order needs to fail spectacularly to unleash the forces of innovation and bold thinking.[131] Perhaps, but, if anything, history teaches us that spectacular failures should be avoided rather than awaited.

130 International law offers quite concrete examples of what a significant difference it makes to start from drastically different 'understandings' in the construction of legal regimes. While seemingly not relevant, thinking e.g. of the difference between the principle of common heritage of mankind and the freedom of high seas in Law of the Sea can help grasp concretely how compelling this issue is. Endorsing the first principle implies an abandonment of the market logic and a regulated (administered) access to resources, benefit, and burden sharing; the second implies instead freedom of access, to be regulated only to correct externalities. While the first implies distributive justice in its own conceptualization, the second is not per se concerned with it, if not in an adjustment phase. Endorsing one or the other has therefore significant and very concrete consequences at the operational level. This is not to say we should just import the common heritage of mankind in international economic law, it is rather to show how fundamental it is to focus on how we conceptualize regimes. See on this Ellen Hey, 'Conceptualizing Global Natural Resources: Global Public Goods Theory and International Legal Concepts', in Holger P. Hestermeyer, Doris König, Nele Matz-Lück, Volker Röben, Anja Seibert-Fohr, Peter-Tobias Stoll and Silja Vöneky (eds), *Coexistence, Cooperation and Solidarity. Liber Amicorum Rüdiger Wolfrum* (Leiden-Boston: Brill - Martinus Nijhoff, 2011). 881–899.

131 Paul Watzlawick, *Ultra-Solutions, or, How to Fail Most Successfully* (New York: W. W. Norton, 1988).