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NORMS AND INSTITUTIONS OF INTERNATIONAL ECONOMIC RELATIONS IN THE INDO-PACIFIC. AN EPITAPH FOR INTERNATIONAL ECONOMIC LAW?

The report of my death was an exaggeration¹

Mark Twain

Abstract: The paper presents the conclusions of an analysis of the challenges globally facing the liberal economy. The author examines the internal (its contestation in “Western” countries) and external (abuse of the law and trust by WTO members not respecting the goals and principles of the organization) challenges. Regarding external challenges, the focus here is on the initiative to build a new order in the Indo-Pacific region. The thesis that as a consequence of the “West’s” assessment that the international economic legal regime is an ineffective tool for regulating the LIEO and its willingness to sustain the LIEO, the West decided to replace the legal regime with another one, and was positively verified. The study closes with a forecast of the evolution of the regional economic order and its links to the world economy.

Keywords: Liberal International Economic Order (LIEO), WTO, Indo-Pacific, Indo-Pacific Economic Framework, AUKUS, Quad, Democratic Security Diamond (DSD)

¹ „Reports of Mark Twain’s quip about his death are greatly misquoted...”, accessed November 22, 2022. <http://www.thisdayinquotes.com/2010/06/reports-of-my-death-are-greatly.html>.

1. Introduction

The regime of international economic law is confronted with two challenges: the first – “internal” – is the contestation of the liberal economy in Western countries. Those who criticize the LIEO (and indeed the free-market economy) state that – contrary to its promise – “A rising tide did not lift all boats.”² This is not true; however, it has indeed lifted them, but unequally. The challengers want to establish a new, illiberal economic order. They reject the “pessimistic” view, a paraphrase of Churchill’s *bon mot* that a “liberal economy (democracy) is the worst system, except for all the other systems”. The economy will meet this challenge only after another failure of the illiberal order, and it will meet it only for a while because those who dream of a new, better world will quickly forget about the failure and will not reject the dream. And to the instruments of repelling this challenge the author devotes this part of the deliberations, in which the author indicates the possibilities of victorious confrontation with the second – “external” – challenge.

The US initiated the creation of an Indo-Pacific by-pass (of the WTO order) in the form of the Liberal International Economic Order (LIEO) regulated in international relations by political norms. The author judge as a failure of universalization the state in which the strategic rivals of the West (China and Russia) systematically and systemically commit abuses of international economic law. These states have been allowed to participate fully in international economic relations as equal partners, admitted to the WTO, and they take full advantage of the benefits of membership not only by failing – in good faith – to fulfil their obligations but also by violating the law. The universal legal regime of international economic law, the WTO regime, is “powerless” against these practices, just as the UN regime is “powerless” against violations of the principles and norms of the UN Charter by these countries. The international legal regime of universal international organizations is – for political reasons – powerless against state(s) that do not fulfil their obligation to “perform” their membership obligations.

In this situation, Western states have decided to build a parallel order. They have abandoned the alternative of seeking to exclude China and Russia

2 The view-promise that “a rising tide lifts all boats” by President John F. Kennedy and it is - by both supporters and opponents of the free-market economy - considered the primary social argument in its favor. “Remarks in Heber Springs, Arkansas, at the Dedication of Greers Ferry Dam.” *The American Presidency Project*, accessed November 2022.

(and other ‘like-minded countries’) from the WTO, a political decision for which the author does not discuss the reasons or the opportunities and risks.

Building a parallel system allows participants to benefit from the LIEO without “letting the fox in the henhouse”. At the same time, it keeps the counter-system states connected to the international economic system; it allows them to return by reducing the costs of their ‘full’ presence on the one hand and their ‘full’ exclusion on the other.

The scientific objective of the study is to analyze the functioning of international economic relations in the regime of international economic law. The result of the analysis is the verification of the thesis that as a consequence of the assessment by the main actors of international economic relations (the countries belonging to the ‘West’), the regime of international economic law is an ineffective tool for regulating the LIEO and at the same time the actors of the international economic order want to sustain the LIEO and they decided to replace the regime of law with another regime.

The positive verification of the thesis allowed us to formulate a short-term forecast. The forecast takes the form of a scenario of the evolution of the regional economic order and its links with the world economy.

In the study, the author used a constructivist approach (holistic constructivism), i.e. the author gives special importance to normative and material structures. The author studies practice abstracting from (grand) theories. The choice of research approach stems from the adoption of two equally important initial assumptions, namely the author rejects the thesis that states are guided solely by self-interest combined with the recognition that Western states form a community of values.

The aim of the study beyond the (literal) scientific goal is to continue Professor Janusz Gilas’ studies on international economic law. Professor Gilas co-created mainstream international economic law research in Poland and made a significant contribution to the development of the (world) doctrine of international economic law. The author was also inspired by the choice of research approach by the research perspective of Professor Gilas.

2. Mark Twain

The death of international orders has often been stated and predicted and, most often, the diagnosis turns out to be premature. The author does not rule out that the same applies to the diagnosis made about the end of a universal international economic order governed by international economic law.

The potential unreliability of forecasts is illustrated by the case of the international monetary system. When in August 1971, the US suspended the convertibility of the dollar into gold, only the Bretton Woods system collapsed. Since 1973 the era of managing floating exchange rates began and no disaster ensued; the new system was confirmed by the Jamaica Agreement in 1976. Of course, a legal formalist might have a basis – in law – to call the existing order the “international monetary non-system,” however even such a lawyer would agree that a functioning non-system is better than a non-functioning system

It may be possible for a similar system to arise in trade, that is, an order of “spontaneous emergence of free trade”. It has been proven that free trade benefits every First World country,³ the only condition being that the countries choose the rules of the cooperative game (experience favors this choice). One can say that in a world where dishonesty is on the rise, honesty is the best policy for everyone (even with dishonest traders). Therefore, the author allows for the possibility that this epitaph is premature.

3. Sources of Threats, or just China and Russia?

Honestly presenting the state of affairs: the challenges to the LIEO, the creeping of the LIEO regulated by international economic law, it is not rational to stop assigning sole blame for this situation to the counter-system states. Also, the ‘West’ has committed grave sins against the LIEO, and such practices continue. This sin is the departure from the liberal economy, the ‘hands-on’ management of the economy.

China and Russia violate the principles and norms of the LIEO, but they want – and this is not a paradox – to maintain the LIEO, liberalism in international economic relations, in relations with the ‘West’ because they benefit from it. These countries reject liberalism in internal relations, their political regimes are authoritarian kleptocracies and the economy is not, *de facto*, market.⁴

³ The author does not verify this claim as it reflects consensus views within mainstream research within international economics.

⁴ For a comprehensive and multi-perspective analysis of Russia see *Understanding Authoritarianism and Kleptocracy in Russia*.

117th Congress (2021-2022). Committee: House Foreign Affairs. 05/27/2021 <https://www.congress.gov/event/117th-congress/houseevent/112696?q=%7B%22search%22%3A%5B%22%5C%22Foreign>

The ‘West’ is liberal within, it respects the principles and norms of the LIEO, but contests the foundation of the LIEO, which is economic liberalism. The rationality on which Western civilization is based recognizes, points out that, following Locke, “there is no freedom without property”⁵ but the same rationality points out the nonsense of challenging faith (e.g., in socio-economic utopia) by appealing to rational arguments; faith is not based on rationality and is not subject to rational verification. These immanent features of faith do not imply its critique. It can be said that in the ‘West’, the search for the ‘philosopher’s stone’ continues uninterrupted. Alchemists (the authors of the concept of reform) want to preserve freedom (which can only exist in feedback with property) and neutralize inequality (which is only possible through redistribution of the property of others).

The contestation of liberalism in economics stems from a desire to raise the level of realization of compensatory justice.⁶ Despite the elaborate system of redistribution of benefits, many people in the West believe that inequality is ‘unjust’ and they believe that this can be changed by realizing once again the “great utopia” of establishing equality.⁷ This assault on the LIEO is, in the author’s opinion, more dangerous to the LIEO than ‘aggression’ by counter-system states because it comes from within the system. However, the author observes this assault calmly, because if utopia can be achieved the world will be good, and if – again – it cannot be achieved, the world will still be better as the liberal economy will overcome this challenge.

In a world where, on the one hand, the global market is a reality and, on the other hand, there are borders between states/groupings of states,

%5C%5C%22%2C%22Affairs%5C%22%22%5D%67D&s=1&r=80. In the case of China, the classification is not clear-cut. There is a consensus in the assessment of the government as authoritarian however, differences in the perception/assessment of the regime as a kleptocracy. An argument against China’s designation as a kleptocracy is the successive, ineffective campaigns against corruption. The paradox in pointing out – in this regard – the difference between Russia and China is that in Russia also the regime announces successive campaigns against corruption. These differences in perception may be due to the fact that the corruption of Putin and his immediate entourage is widely known and well documented while the information blockade protecting China’s sissy leadership is tighter; see: *China (like Russia) ‘trapped in authoritarian feedback loop’*. National Endowment for Democracy April 13, 2022 <https://www.demdigest.org/china-trapped-in-authoritarian-feedback-loop/>; Sibley, “Now is the Time to Expose Chinese Corruption”, *Wedeman*, 86-95 (According to the Author, corruption is pervasive in China, however, China is not a kleptocracy, it is another example of a corrupt state.).

5 Locke indicated three “inalienable” natural rights: Life, liberty, and property; Locke, *Second Treatise of Government*.

6 Gilas, „*Sprawiedliwość międzynarodowa gospodarcza*”, 981.

7 Piketty, *Le Capital au XXIe siècle*; Piketty, *Capital et idéologie*.

and where political power interferes in the terms of trade of goods and services by setting tariffs and non-tariff measures, there is a lack of both universal rules governing the behavior of the participants in this market and an overseer – an honest referee upholding norms. The international economic order,⁸ laboriously constructed since WW2, is shaky. It was built by states, both using the forum of international organizations⁹ and by institutionalizing cooperation according to the G-20 formula, led by the USA.¹⁰ The process has not been linear (at present it is regressing, or at best stagnating): the USA supported *de facto* free trade after 1981 in response to the conclusion of preferential agreements under the umbrella of GATT, and since 1990 the US has supported the fragmentation of the multilateral trading system (this process was not stopped – at most it was briefly slowed – by the creation of the WTO). The path to widespread trade liberalization through preferences has been blocked by European integration (from the EEC to the EU), resulting in the creation of a protectionist bloc (space). The nature of the EU, the organization of economic integration means – in practice – the abandonment of the universal status of the norms that constitute and regulate free trade. The non-linearity of the process was manifested, among other things, in clearly delineated stages. In the period 1945-1990 the boundaries of its scope were marked by the Iron Curtain separating market economies and liberal societies¹¹ from the space where economies

8 The internationality of the LIEO was an order organized; (“Through it, we can trace not only the termination of the idea that the ‘international’ constitutes a separate zone of political life with its own rules, norms, and institutions, but alongside it the idea that this zone of politics was in some sense *governable*, and governable not by God, nor through nature, but by men”) Mazower, *Governing the World: The History of an Idea*, 15.

9 This was the practice of coordinating national policies in groups of states; Keohane, “Multilateralism: An Agenda for Research”, 731. This institutionalization was based on the institutionalization of universal cooperation based on consensus in values.

10 The weakness of this strategy (of President H. Truman) was the lack of domestic support. Ambassador W.A. Harriman summed up the postwar desires of Americans: “wanted to settle all of our differences with Russia and then go to the movies and drink Coke”. The vehicle by which it was possible to create a consensus in the United States around the idea was to package it with the slogan of fighting the Soviets. LIEO, along with the US military presence in the world, was put in place to protect US interests.

11 Key participants in the process were, in addition to Canada, Australia, New Zealand, Western Europe and Japan.

were not market-based,¹² states were neither democratic¹³ nor law-governed and people did not enjoy freedom.

In the last decade of the 20th century, however, the differences between the systems diminished, especially in the economic sphere. Some former Eastern bloc countries transformed themselves by building market economies (and democratic states under the rule of law), some post-communist countries participate in global trade respecting its rules only when and insofar as it is beneficial for them or when Western market participants force them to do so.

However, the global economic order is faltering; in fact, the normative-institutional order¹⁴ that has been in place since the WW2 may be said to be turning into its contradiction and a kind of non-system¹⁵ is emerging. *Laissez-faire* in itself (because that is what a non-system is) is not bad, provided, however, that its introduction and maintenance are the results of a conscious choice and that respect for its rules is supervised. However, we are not (currently) dealing with either of these elements.

This order is referred to as the LIEO.¹⁶ It was based on the free market,¹⁷ international institutions, and liberal democracy and was based on *US-leadership*¹⁸ (formally the US was only *primus inter pares*). The (American) LIEO, also known as the IEO, was established based on

12 The term used to describe it was “centrally planned economy”, a term that did not describe reality but was the word in the *newspeak*.

13 The term “socialist democracy” was used to describe it, being an oxymoron analogous to the current term “illiberal democracy”.

14 It was an order that dealt with norms produced by states internationally and institutions (set up by those states) to implement the norms; “persistent and connected sets of rules, formal and informal, that prescribe behavioral roles, constrain activity, and shape expectations.” Keohane, *ibidem*, 732.

15 By the term non-system, the author refers to the terminology and analysis of Corden, *Economic Policy, Exchange Rates and the International System*, 165.

16 It has also been referred to as a norm-based order.

17 After WWII this policy fell within the formula of American open-door policy (as defined by Ch. Layne). This policy, presented and recognized by many as an American contribution to universal justice, peace and prosperity, was consistent with American national interests (Layne, *The Peace of Illusions: American Grand Strategy from 1940 the Present*, 29-36). This policy, implemented over decades, has sometimes been the subject of (often extremely harsh) fundamentalist criticism, e.g. Williams saw it as “America’s version of the liberal policy of informal empire or free trade imperialism”; Williams, *The Tragedy of American Diplomacy*.

18 At the same time, the USA paid a high price for the prominence assigned to it and accepted by Western countries. This price was to satisfy the need of members of the free world community for “public goods” such as peace or development, or at least for club goods. This order, then, was an order for the realization of Aristotle’s *koine sympheron* (common good).

the 19th-century British initiative to establish a universal order.¹⁹ Under the British concept, the order was to be based on five pillars: free trade;²⁰ freedom of movement of labor; *laissez-faire*; the gold standard and freedom of movement of capital;²¹ protection of property.²² The post-war LIEO was trimmed by labor mobility and *laissez-faire*²³ and enriched with institutions. This LIEO is gradually eroding; it was initiated by the suspension (in August 1971) of the convertibility of the dollar into gold. It is important to point out the promoters of free trade because it was the promoters of order (the UK and later the US) who guarded its implementation in the face of the challenges of protectionist policies of many countries. At the same time, the LIEO was a failed order, as the established regime was not comprehensive. The LIEO did not regulate all areas to a comparable extent and scope despite the actual feedback between them. Agreements concluded with regard to financial relations and payments would not implement the principles (considered optimal) as they were implemented by agreements relating to trade in goods and services. Such asymmetry of regulation (and proposals for regulation) persists to this day, and this despite the perception of its negative effects in the form of socio-economic turbulence, among other things.²⁴ LIEO is wobbling²⁵ not only because of the Chinese attack but mainly because the USA failed to support it²⁶ (a significant influence is also the rejection

19 An important element of the British concept, sustained until the Trump era, was multilateralism (found in opposition to bilateralism); Ruggie, “The Multilateralism: The Anatomy of an Institution”, 568.

20 At the time, the USA was opposed to free trade, supported protectionism (the instrument was the extreme protectionist Smoot-Hawley Act of 1930), and treated trade as a zero-sum game (in the win-loss formula).

21 The USA violated this freedom with the Blue Sky Law (Securities Act 1933), which prohibited US banks from lending to foreign governments. The combined effect of the Smoot-Hawley Act, the Blue Sky Law, and the replacement of the gold standard with a foreign exchange-gold regime of the IMF was the definitive end of the British LIEO. More widely Gruszczyński, Menkes, Nowak, *International Economic Law*, 151-153.

22 Trade in goods, to a lesser extent in services, is regulated by international agreements, weaker and incomplete regulations for finance and investment are effective through international governance. Lal, “The Threat to Economic Liberty from International Organizations”, 503.

23 It fell victim to the combined action of the doctrine of economic interventionism in Europe (at the turn of the 20th century) and the New Deal in the United States.

24 Lal, “A Liberal International Economic Order: the International Monetary System and Economic Development”.

25 Wright, “The return to great-power rivalry was inevitable”.

26 This is a reaction to the cost of leadership; Kagan, *The Jungle Grows Back*.

of (liberal) democracy by many countries.²⁷ Perhaps the (current) crisis of the LIEO²⁸ is the effect of success, the pace of expansion of order after the collapse of the Eastern bloc, or perhaps the return of the superpowers to politics based on national interest (realpolitik instead of liberal idealism).

4. International Economy

It is a truism to say that the market economy needs norms that regulate the behavior of entities operating in it and an institution that supervises the observance of norms. They are needed by producers, sellers, and buyers. Without norms and institutions, the market will cease to be free and, above all, fair. Without norms and institutions, the market will become its negation according to a black-market formula, and the ‘market game’, instead of a transaction involving honest participants, will become a gangster fight. The norms regulating the behavior of market participants may belong to different normative systems and come from different sources; their set is not and does not have to be homogenous. The case of the supervisor is different; the market needs a judge who is independent of its participants and fair. Even though such a normative-institutional order sets a necessary standard, the practice often deviates from the desired pattern. Such undesirable practice is created both by active market participants guided by short- or medium-term self-interest, and, which is much more dangerous for the market, by ‘judges’. The former market stakeholders hope to profit from the abuse and exit the market before suffering the negative consequences of rule violation. Hopes are sometimes false, but temptations are strong; the facts supporting this view are well known. More dangerous and heterogeneous are the behaviors of a judge in the market attributing superpower to himself or stepping out of his role. The judge’s attribution of superpower to himself stems from a belief in the special qualities of the ruler. Edward the Confessor and Philip I of France and later their successors not only ruled but also healed. Often, both the judge and the market stakeholders give the impression that they believe that the ‘problems’ on the market can be cured by chosen ones with miraculous power through ‘touching’. Unfortunately, reality negatively verifies this variation of belief in superpower. The omnipotent judge who

27 Both: EU members (Hungary, Poland); NATO (Turkey); and important cooperating democracies (Russia, Philippines, China).

28 It is a fact; Ikenberry, “The end of liberal order”, 7.

was supposed to cure the market and stakeholders of ‘scrofula’ turns out to be the Mad Hatter. Bad experiences, however, do not stop the judge from stepping into a dual role on the market. In the relatively recent past, that is, after the end of WW2, states either nationalized or did not reverse their decisions to nationalize the companies they managed for war production. The argument for the state playing the role of referee and stakeholder on the market was the need for reconstruction after the war. The additional cost of this state activity – compared to leaving this task to non-state actors in the market – is unknown. A comparison, in the 1980s, of the effects of the state’s reduction in the West to the role of arbiter and the state’s self-confidence in the East indicates that the unnecessary cost was high. It was the failure of the state – in the East – in its dual role that co-determined that states – in the West – ‘limited themselves’, returned to the role of judge. However, the states and significant social groups have forgotten the lesson of the race lost by the East. Again, the miraculous antidote to ‘scrofula’ such as the climate crisis or wealth disparity is to be the touching of the state. The state knows not only how things should be, but also how to achieve them. Today’s politicians are smarter and more cautious than their predecessors (from the post-WW2 era) and this time they do not want to manage things directly. Knowing that the results of management are measurable, they choose a safe position for themselves as a backseat driver. From here they are responsible for nothing and can do everything. From the USA to China, protectionism flourishes. The US is pursuing an agenda of soft protectionism, industrial subsidies, and righteous regulations. In the EU an industrial policy is being implemented which is supposed to lead to “strategic autonomy”.

A similar path is craved by countries as different as India and Mexico. In China, the “Common Prosperity” program aims to bring business under the control of the authoritarian ruler. It is even difficult to accuse the rulers of this because the same thing is demanded of them by the voters in democratic countries. Many voters do not believe in their chances of fair competition on the free market. It is impossible to deny them completely. The claim that your success is the result of your work (a ‘winner-takes-all-society’), and losers ‘worked’ for their own failure, is weak. Both success (individual and collective) and failure can be the result of the co-occurrence of many factors, not all of which are dependent on the actor, and in many cases they have their roots in the past and are part of a long sequence of events. Weak not only because of political correctness, but also because of rule violations. On what basis can one defend the income disparity of Ivy League graduates with the less educated, if in the recruitment to University,

candidates from rich families swindle the system at every stage. Only their parents are willing to fight,²⁹ they can finance the extreme expenses of preparing for the entrance exams both at the earlier stages of recruitment³⁰ and preparing for the exams,³¹ it is with the money of their parents that SAT paper writers are paid for by weak students, and finally – when even this is not enough – a place at an Ivy League college is bought with cash.³² The effect of Operation Varsity Blues was to establish a criminal conspiracy to influence undergraduate admissions decisions at several top American universities.³³ It turns out that ‘even’ in the USA there is a category of people who were born with a silver spoon in their mouths, that Article 4 of the Virginia Declaration of Rights (“None of mankind is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.”), just as Section 9 of the US Constitution (“No Title of Nobility shall be granted by the United States.”) is not sufficiently protected.³⁴

In the context of this scandal, US Senator Elizabeth Warren said: “just one more example of how the rich and powerful know how to take care of their own.” The author is not surprised by those who do not believe in the ‘level playing field’ and seek refuge under the umbrella of the welfare state.

They prefer to take refuge under the umbrella of the state, believing that for an ‘inexpensive’ sum in the form of restrictions on freedom – convinced as they are by the large corporations – they will gain security. What they do not know, what they do not remember, is that this is an illusion; experience shows that the restrictions on freedom will be significant and will grow in size, as opposed to security, which will be small and systematically reduced.

29 Chua, *Battle Hymn of the Tiger Mother*.

30 The tuition at schools like Dalton or Exter is \$35,000 a year.

31 In 30 years, a massive, multi-million dollar industry has been built from zero: companies that prepare for tests.

32 A rich developer paid Harvard \$2.5 million to admit a son devoid of any skills. Unz, “Corruption of Ivy League Admissions”.

33 United States Department of Justice. The United States Attorney’s Office. District of Massachusetts. “Investigations of College Admissions and Testing Bribery Scheme.” United <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme> last modified November 22, 2022.

34 Similarly Article I Declaration of the Rights of Man and of the Citizen “Human Beings are born and remain free and equal in rights. Social distinctions can be founded only on the common good.”

Voters have forgotten; they never knew that under capitalism affluence was unfairly distributed (bad under socialism misery). Paradoxically, the only ones who remember this are the heads of state and they are the ones who fear a return to the times when state-public ownership showed its immanent inefficiency. Governments have released streams of money that are expected to result in increased production of semiconductors in the US, batteries in the EU, and self-sufficiency in semiconductors in China. States cease to be judges and become central planners. Of course, all these actions are taken by good people, guided by good reasons. The actions are to protect the safety of the planet, the people, the state. The sky is the limit of state interference. Every action is justified by strategic interest, but every 'matter' is strategic: not only military products and technology but also energy, vaccines, medical ingredients, and minerals are strategic.

The antitrust agency in the US has not only safeguarded consumers but also small businesses. In addition to paying taxes Alibaba (in China) has been obliged to make "voluntary donations" to Common Prosperity. Central banks and pension funds should "voluntarily" give up the securities of bad firms. The impact of interference on the economy goes off the scale. "ESG" investing codes force companies to consider the interests of biodiversity, local people, etc. Prime Minister Margaret Thatcher's slogan that a company belongs only to its owners is becoming a thing of the past.

For now, the game is on and we are not yet all feeling the ill effects of this confusion of roles. However, the involvement of business in the manipulation of power, e.g. in the electoral process, is noticeable. Companies do it not for power but money, because power distributes money. Perhaps this time it will be different than before and the symbiosis of power and capital will bring progress;³⁵ however, the author is concerned that only a global range will get the *bon mot* ex-Prime Minister of Russia Viktor Chernomyrdin used: "We wanted the best but it turned out like it always does".

5. Why ('Fair Trade' in a non-legal Regime)?

The argument for subjecting LIEO to normative regulations not limited to legal norms and especially WTO law is, in the author's opinion, a fact that

³⁵ Welcome to the era of the bossy state. Countries around the world want to bend companies to their will. The Economist Jan 15th, 2022.

important WTO system participants violate WTO rules and norms is systemic and systematic. The author does not verify the veracity of this fact in this paper. The author treats this practice as proven, and the evidence as widely known.³⁶ However, by way of illustration, the author will cite examples of practice and dissent. The EU launched a legal challenge against China at the WTO, arguing that Chinese courts were preventing European companies from protecting their telecom technology patents.³⁷ The EU has also consulted the US and Japan, whose standard-essential patent holders face similar challenges, and which want to be setting global tech standards. The EU said it had raised the issue on many occasions with China, without resolution. The bloc believes China is violating the WTO's agreement on trade-related aspects of intellectual property rights. The EU, in consultation with the UK and US, launched a case against Beijing at the World Trade Organization (WTO) for targeting Lithuania over its stance on Taiwan.³⁸

36 List of disputes EU versus China/Russia in WTO: WT/DS407 – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union – China; WT/DS 372 – China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers – China; WT/DS611 – China – Enforcement of intellectual property rights – China; WT/DS549 – China – Certain Measures on the Transfer of Technology – China; WT/DS460 – China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union – China; WT/DS432 – China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – China; WT/DS425 – Definitive anti-dumping duties on x-ray security inspection equipment from the EU – China – China; WT/DS395 – China – Measures Related to the Exportation of Various Raw Materials – China; WT/DS339 – Measures affecting imports of automobile parts – China; WT/DS462 – Russian Federation – Recycling fee on motor vehicles – Russian Federation; WT/DS475 – Russian Federation – Measures on the importation of live pigs, pork and other pig products from the EU – Russian Federation; WT/DS608 – Russian Federation – Measures Concerning the Exportation of Wood Products – Russian Federation; WT/DS604 – Russian Federation – Measures on procurements by State-related entities and other entities in charge of investment projects with State support - Russian Federation; WT/DS479 – Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy – Russian Federation. Full information on anti-dumping proceedings is contained in the Global Anti-Dumping Database (GAD). GAD contains information on all cases filed in 33 countries between 1978 and 2015. In addition to all relevant dates for anti-dumping investigations (e.g., initiation of investigation, imposition of anti-dumping duties, revocation dates) and outcomes (e.g., duties, revocations), GAD provides detailed 6-digit HS codes for each product listed in the legal documentation of each anti-dumping case. In addition, GAD reports on all domestic companies that have filed an anti-dumping case and all foreign companies accused in anti-dumping investigations.

37 Rames, “*Request for Consultations by the European Union*,” 18 February 2022 https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160051.pdf

38 World Trade Organization, “*Request for Consultations by the European Union*,” 31 January 2022 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:WT/DS/610-1.pdf&Open=True>

16 February 2022, The Office of the United States Trade Representative released its annual “2021 Report to Congress on China’s WTO Compliance,” laying out an assessment of China’s membership in the World Trade Organization.³⁹ The US has accused China of causing “serious harm” to workers and firms around the world with its trade policies. The latest Report includes the statement that “China’s embrace of a state-led, non-market approach to the economy and trade has increased rather than decreased over time, and the mercantilism that it generates has harmed and disadvantaged US companies and workers, often severely.”⁴⁰ In support of the US assessment, they cite the fact that the US has won all 27 cases it has brought against China at the WTO, but “meaningful reforms by China remain elusive.” In the US assessment, the experience of membership with China in the WTO is unequivocally negative and prompts “semi-official” promotion of the establishment by democratic countries of a parallel system to the WTO with the exclusion of countries that do not respect the values on which “free and fair trade” is based. The USTR Report points to the need for new strategies to deal with “the many problems posed by China’s state-led, non-market approach to the economy and trade, including solutions independent of the WTO (bold - J.M.)”⁴¹

6. US Initiative to Establish “Indo-Pacific Economic Framework”

Gina Raimondo, U.S Commerce Secretary, announced the US administration’s plan to establish an “Indo-Pacific Economic Framework.”⁴² Flexible, open, and evolving cooperation it was planned to be launched in 2022, according to US plans. The “Indo-Pacific Economic Framework” would delineate a free

39 United States Trade Representative, „2021 Report to Congress On China’s WTO Compliance,” February 2022. <https://ustr.gov/sites/default/files/enforcement/WTO/2021%20USTR%20Report%20to%20Congress%20on%20China%27s%20WTO%20Compliance.pdf>

40 USTR, 2021 Report to Congress on China’s WTO Compliance. February 2022 <https://ustr.gov/sites/default/files/files/Press/Reports/2021USTR%20ReportCongressChinaWTO.pdf>

41 USTR, 2021 Report to Congress on China’s WTO Compliance. February 2022 <https://ustr.gov/sites/default/files/files/Press/Reports/2021USTR%20ReportCongressChinaWTO.pdf>

42 See Latiff, Lee, *The USA says new Indo-Pacific economic framework not typical trade deal*, <https://www.reuters.com/world/asia-pacific/us-malaysia-agree-transparency-semiconductor-manufacturing-supplychains-2021-11-18/>; Guoyou, *US Indo-Pacific economic framework to be judged on action*, <https://www.globaltimes.cn/page/202111/1239326.shtml>.

trade area. It would cover, among other things: the digital economy, supply chain resilience, infrastructure, export controls, and clean energy.

Participants in the free trade area would be regional allies of the US. Although their list has not been announced, the participation would probably include that of Australia (AUKUS, + Quad, Democratic Security Diamond), India, Japan (Quad, DSD), and New Zealand, Republic of Korea, Malaysia...⁴³ and other Major non-NATO ally. It is equally obvious that outside the free trade area will be China, the strategic rival of the US and its allies.

The new free trade area, if it becomes operational, will change not only economic relations in the region and the world, but international economic law. The change in the law is because the new free trade area will be established without a free trade agreement. The reasons why President Biden's administration does not want to sign the FTA are obvious. The system from fears of obstruction by Congress and protests by opponents of free trade. This could be another step toward the proliferation of international governance.

So, the administration has learned from the failure of the TPP and TTIP. The real benefits of the 'classic' FTA are small. For industrial goods, tariff barriers are low and have no significant impact on trade. Non-tariff barriers have a real impact on trade in industrial goods, but their removal (lowering) is at the discretion of national enforcement authorities and can be done based on intergovernmental commitments. A free trade area (*de facto*) can thus be established by administrative decisions, by reducing administrative requirements for industrial goods in imports.

A reasonable expectation would be to equalize intellectual and industrial property protection in the area, on which there is consensus. The US, and the other participants, are undoubtedly interested in protecting foreign investment/investors. However, they are not – in this potential grouping – interested in either ISDS or reform of the WTO regime. This is determined by several factors, including the fear of public protests against international arbitration and the controversial experience of arbitration under NAFTA. Also, such a desirable change in practice does not require an FTA.

That leaves trade in agricultural goods, but it is clear that there are many, many barriers to free trade in agricultural goods, and starting

⁴³ See Kuźnar (ed.), Bobkowski, Drelich-Skulska, Falkowski, Menkes, *Demokratyczny Diament Bezpieczeństwa – budowa nowego ładu pacyficznego*.

to negotiate an FTA in agricultural goods promises long negotiations, strong controversy, and very little chance of success. Is the plan viable to set up such a ‘framework’? Yes. It is in the interests of the participants and there are no significant barriers to its implementation. The G7’s experience in regulating international financial relations co-creating global governance also speaks for itself.

If this *modus operandi* is successful, we can expect the establishment of an “Atlantic economic framework”. Then, after a pause for Donald Trump’s presidency, relations between the allies of the Atlantic and Indo-Pacific regions will return to a familiar path. Is this a good thing? From the perspective of free trade advocates, yes. From the perspective of proponents of strengthening political and defense cooperation among the democratic states of the Indo-Pacific region with an economic component, yes. It is only a pity for international law and democracy.

From the perspective of international law: the establishment of a free trade area without FTAs will result in non-fulfilment of the GATT Article XXIV notification requirement. This will be another blow to the multilateral trading system. Cooperation within the system is not only ‘frozen’ (Doha Round) but also undermined (WTO dispute settlement system). This will reinforce the trend of liberalizing trade outside the multilateral system.

From a democratic perspective (out of state – in the international system), establishing an area will reinforce the trend of liberalizing trade outside the multilateral system.

From a democratic perspective (in state – in internal system), establishing an area without an international agreement weakens the power of legislatures. This course of action is part of a sequence of moves.

The US Administration is not alone in this course of action. The EU has divided the new generation of trade and investment agreements into two separate ones. The conclusion of politically controversial trade agreements is an exclusive competence of the EU. The EU, together with the Member States, exercises competence regarding investment agreements. However, investment agreements are not controversial. Perhaps such tricks are a way of defending democracy against the abuse of democracy by populists. Perhaps the price is worth paying. We shall discover the answer to this, and other questions.

7. *Modus operandii* of Establishing an “Indo-Pacific Economic Framework”

The Plan above is not located in the realm of political fiction. The USA has taken and is taking (new) actions to implement it and is ‘inscribing’ its institutions within the framework of the strategy outlined in it.

The Indo-Pacific Economic Framework under the US administration’s plan is to be a broadened and deepened regional free trade area (FTA) *de facto*. In this zone, trade barriers will be significantly reduced. The USA has not presented a coherent and clear blueprint for the zone, nor has it indicated a target point or a road map. The construction of the zone seems to be the result of ‘small steps’. Currently, it can be said that the zone is being built by reducing or removing non-tariff barriers to trade. An economic evaluation of the effects of such actions is difficult. Most economists calculate the benefits of removing barriers to trade using the GTAP Model (associated with general equilibrium theory) and leaving aside the controversy surrounding this, the important difference between calculating the effects of reducing tariffs from removing non-tariff barriers is that the effects of non-tariff barriers are estimated.

Thus, the zone is not built (for now?) on the ‘royal road,’ i.e., because of agreeing to reduce tariffs or remove import quotas. The reasons for the change in the *modus operandi* are many and varied. These reasons are political, i.e., difficulties with the ratification of agreements in the face of concerns about free trade (from the perspective of threats to domestic producers and consumers). The economic reasons, on the other hand, include the relatively limited effect of tariff elimination where there are low tariff barriers on industrial goods. Mixed, high tariff and non-tariff barriers protect agri-food producers. However, their producers and consumers are protected by a political umbrella and agreements liberalizing trade in these goods either face insurmountable obstacles (Doha Round) or the reductions are spread over many, many years.⁴⁴

44 See EU agreements with Japan (Economic Partnership Agreement between the European Union and Japan; Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part.) and Vietnam (Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam; Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part.), for example.

New Indo-Pacific FTA begins to function.⁴⁵ The move from paper to digital customs lowers costs for businesses of the zone changing the terms of trade for businesses from countries outside the zone. The real-world effects are evident, being an increase in trade by Single Window participants,⁴⁶ a decrease in trade by non-Single Window participants.

President Biden announced additional support for the Single Window. This fits in with US efforts to make supply chains – linking participants in the zone – more secure, more resilient, and consequently build a ‘firewall’ against participation in supply chains by non-Single Window participants.

Trade-oriented Asian countries are advanced in implementing the Single Window system.⁴⁷ The ASEAN Single Window initiative,⁴⁸ calls for the integration of the National Single Window of the 10 ASEAN member economies. This call encourages those who are addressed to build their Single Windows. In recent years, there has been a marked increase in Single Window development in the region. Indonesia, Thailand, Brunei, and the Philippines essentially called for Single Window requirements to be integrated with the existing customs system. Is an increasing trend for countries to include centralized risk management in their Single Window projects? New Zealand’s Trade Single Window is part of a broader Joint Border Management System that includes requirements for an integrated intelligence and risk management that supports customs and other agencies risk management needs. Likewise,

45 See Blinken, Secretary of State, A Free and Open Pacific. Speech Jakarta Indonesia Dec 14, 2021 <https://www.state.gov/a-free-and-open-indo-pacific/>). An important element of the zone is the ASEAN Single Window (https://asw-asean-org.translate.google/?_x_tr_sl=en&_x_tr_tl=pl&_x_tr_hl=pl&_x_tr_pto=sc) a single automated system for clearing customs across the region (Protocol to Establish and Implement the ASEAN Single Window; https://www.jus.uio.no/english/services/library/treaties/09/9-04/asean_protocol_single_window.xml).

46 “A single window is defined as a facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfill all import, export, and transit-related regulatory requirements. If information is electronic then individual data elements should only be submitted once.”; *The Single Window Concept*. The World Customs Organization’s Perspective <https://web.archive.org/web/20070317164545/http://www.wcoomd.org/ie/wto/Single%20Window%20Conceptpdf>; United Nations Economic Commission for Europe Recommendation on Establishing a Single Window (Recommendation 33, ECE/TRADE/352). (http://www.unece.org/cefact/recommendations/rec33/rec33_ecetrd352_e.pdf).

47 Among the ASEAN countries are Singapore (January 1989), Hong Kong (January 1997), Japan (January 2003), South Korea (December 2003), Indonesia (December 2007), Malaysia (November 2009).

48 The ASEAN was the first regional economic community to come up with a Regional Single Window. The EU is working on the project.

Pakistan's initiative, the Automated Commercial Community System (PACCS), has also included a Risk Management System.

The catalogue of potential benefits of the Single Window includes:

For the government as a whole: increase in government revenue, enhanced compliance with rules, improved efficiency in resource allocation, better trade statistics; For economic operators, such as traders: faster clearance times, a more transparent and predictable process and less bureaucracy; For an administration such as Customs: improved staff productivity through the upgraded infrastructure, increase in customs revenue, a more structured and controlled working environment, and enhanced professionalism; For the national economy as a whole: improved transparency and governance and reduced corruption, due to fewer opportunities for physical interaction.⁴⁹

However, from the perspective analyzed, the key advantage is the “unilateral action” and the non-treaty implementation regime.

The Indo-Pacific economic framework's status as a *de facto* FTA is the result of two factors. First, the countries participating in this FTA have not (for the reasons indicated above) agreed to establish a free trade area and have not concluded a Free Trade Agreement. Secondly, and this is the consequence of not agreeing, they have not fulfilled their obligation under GATT Article XXIV.⁵⁰ This obligation is to notify the WTO Secretariat of the conclusion of the agreement on the establishment of the zone. The establishment of the zone deprives third countries of the benefits arising from granting a *Most-Favored-Nation Clause* to each WTO member. The zone is (allowed by WTO law) a derogation to the MFN for each WTO member. Of course, it can be considered that it is not possible to notify the WTO Secretariat of a non-existent agreement; thus, there is no default on the part of a WTO member. At the same time, WTO law does not contain a provision prescribing the notification of a fact. Undoubtedly, such a case has not been regulated in WTO law, and the countries forming FTAs are not, *de iure*, acting *contra legem* but – at most – *praeter legem*.

However, it is precisely such conduct that the author considers tricky. The prospect of resolving doubts through legal means seems doubtful in this

49 Trade Facilitation Implementation Guide, “The Single Window concept” <https://tfig.unece.org/contents/single-window-for-trade.htm> accessed November 22, 2022.

50 Special privileges obviously violate the MFN, however, the WTO allows the conclusion of FTAs, the establishment of free trade zones.

case for two reasons. First, it is unclear whether, in the event of a dispute, an allegation that participants in the zone violated their obligations as a WTO member, the panel would decide to exercise jurisdiction. Second, the activity of the WTO's Dispute Settlement System is blocked.⁵¹

The establishment of the Indo-Pacific Economic Framework is part of a broader process, the freezing of the WTO, a desuetude of WTO rules and norms.

One can see in the USA action, legitimately, a response by the USA and allies to the abuse of the law by countries such as China and Russia. Assessing the validity of the allegations, however, is beyond the scope of this paper. What the author finds is a weakening of international law and the institutions established on its foundation. The limited effectiveness of international law against states that violate international law leads dissatisfied states to abandon international law. The temptation to regulate international relations on a *do ut des* basis seems attractive given the risk of default by some states. However, such a formula significantly raises the level of instability in an already unstable world which may cause medium-term harm to be higher than the short-term benefits.

8. Conclusions

The only chance to maintain LIEO ('free and fair trade') in the international economy is to exempt it from the operation of international economic law. This is both necessary and possible.⁵² However, the analysis in this regard goes beyond the domain of an international lawyer, which prompts us to resort to the research of specialists in international relations and international economics.

This is necessary because the system of international economic law, as well as general international law, is not equipped with effective tools to respond to the systemic and systematic practices of non-performance in good faith of international obligations; to defend the law against enemies

⁵¹ Steward, WTO Dispute Settlement Body meeting of February 22, 2021: panels authorized in two matters; impasse on Appellate Body remains. February 23, 2021, <https://currentthoughtsontrade.com/2021/02/23/wto-dispute-settlement-body-meeting-of-february-22-2021-panels-authorized-in-two-matters-impasse-on-appellate-body-remains/>, accessed November 22, 2022.

⁵² Ikenberry, "Why the Liberal World Order Will Survive", 17-29.

of the law, who in addition to their unlawful practices protect themselves under the umbrella of the law.⁵³ Actors benefit unilaterally from ‘free trade’ without respecting ‘fair trade’ rules. The common denominator of these countries is that their economies, narrowly perceived, are only partially ‘market economy’ and their socio-political relations determine that they are a ‘non-democratic country’.

Possibly because currently deepening and increasing the effectiveness of LIEOs does not require lowering tariff barriers, i.e., which has restricted trade and requires international agreements. The current barriers to the expansion of free trade are primarily new types of non-tariff barriers. The catalogue of these barriers is extensive and not codified in international regulations. The catalogue includes the previously mentioned administrative barriers. These barriers are specific to each country, and it is not possible to create self-executing agreements (agreements under international law) that would allow the removal of these barriers.⁵⁴ The only way to reduce or eliminate them leads through ‘unilateral’ actions of each state in the sphere of internal authority. Through such actions, states fulfil political obligations that determine the effect of actions. Verification is possible in a (positive) ‘tit for tat’ formula. Further barriers are related to the widely understood measures to ensure a ‘fair playing field’. In this respect, the practice of international agreements manifests itself in their “conditionality”.⁵⁵ The conditions covered by them generally concern one party to the agreement. The effect of the contract is to make the addressee of the conditions equal to the author of the conditions. The execution of these obligations is also within the sphere of state authority. The verification of their execution is *de facto* not possible with the instruments of international law and in these cases also the ‘tit for tat’⁵⁶ procedure can be used.

To sum up, international economic law does not provide adequate norms and instruments for LIEO regulation. This does not necessarily mean the decline of the LIEO. LIEO cannot only survive but can also be developed using regimes other than legal.

53 Fearon, “Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs”, 68-90.

54 Gilas, „Bariery w handlu międzynarodowym w świetle prawa międzynarodowego”, 15-35.

55 Kuźnar, Menkes, “New conditionality” in the EU’s ‘new generations’ Agreements with Asian Countries”, 67-84.

56 Maoz, Felsenthal, “Self-Binding Commitments, the Inducement of Trust, Social, Choice, and the Theory of International Cooperation”, 177-200.

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