

3-1-2020

Anti-Enlightenment in International Business and Trade Laws: A U.S. - E.U. Comparison

Tamas Dezso Ziegler

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/jibl>



Part of the [Law Commons](#)

Recommended Citation

Ziegler, Tamas Dezso (2020) "Anti-Enlightenment in International Business and Trade Laws: A U.S. - E.U. Comparison," *Journal of International Business and Law*. Vol. 19: Iss. 2, Article 4.
Available at: <https://scholarlycommons.law.hofstra.edu/jibl/vol19/iss2/4>

This Legal & Business Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Journal of International Business and Law by an authorized editor of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. – E.U. COMPARISON

*Tamas Dezso Ziegler**

Preamble

After the inauguration of Donald Trump as president of the U.S. and the success of authoritarian, far-right leaders in certain countries in the E.U., the legal framework of international trade changed drastically. This article elaborates on this phenomenon by highlighting the effect of the Western anti-Enlightenment tradition, a tradition containing diffuse elements like ethnocentrism, overt nationalism and Social Darwinism on international business and trade rules in the U.S. and Europe. As many elements of this tradition work against international cooperation, it is the main drive for change, and it seems it will even strengthen in the future. This paper highlights connections that are otherwise hidden: ethnocentrism, racism, chauvinism, Social Darwinism and irrational emotionalism by analyzing their different components and using a broader, sub-legal framework. Each of these ideas are connected to each other, and affect market policies domestically and internationally. As lawmaking is not independent from its social environment, this also means that apart from legal answers, cultural–social answers must also be taken into consideration when trying to counter these tendencies.

*Associate professor, Eötvös Loránd University, research fellow, Hungarian Academy of Sciences. J.D. 2005 Pázmány Péter Catholic University, PhD 2011 Széchenyi István University, Dr. Habil. 2018 Eötvös Loránd University. The author would like to give thanks to Gabriele Nuzzo from Università degli Studi di Milano-Bicocca for his valuable input regarding the topic of the article, and to Giovanni Patti from NYU for his comments on the first version of the text.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE GENERAL FRAMEWORK
 - A. *The Enlightenment Versus Anti-Enlightenment Dichotomy in Western Legal Tradition*
 - B. *Why and How Does the Anti-Enlightenment Affect Business and Trade Law?*
 - C. *What Is and What Is Not Claimed in this Article*
- III. THE CHANGES TO SPECIAL FIELDS IN LAW AND POLITICS
 - A. *Disbelief in International Cooperation*
 - B. *Emotional Manipulation in Lawmaking*
 - C. *Chauvinism and the Discrimination of Foreign Goods and Companies*
 - D. *Favoritism and the Legal Background of Oligarchizing*
 - E. *The Authoritarian Attack Against Checks and Balances and the Portrayal of International Dispute Resolution as a Rigged Institution*
 - F. *The Denial of Egalitarianism and the Aggression and Distrust Against Foreign People*
- IV. CONCLUSIONS

*“Progress may not be continuous, history may advance in zigzags, but that does not mean that humankind must trust to chance, submit to the regime of the hour, and accept social evils as if they were natural phenomena and not the result of an abdication of reason.”*¹

I. INTRODUCTION

This article examines the effect of the Western anti-Enlightenment cultural tradition on the legal framework of business and trade law in the U.S. and E.U. It is based on two main assumptions. First, that our Western legal systems are rooted in a set of diffuse values, which form a centuries-old enlightened cultural tradition containing ideas like pluralism, individualism, equality and mutual respect of nations. These values have been transformed into legal rules in the course of history. Second, that adverse forces were and still are part of our legal cultures. This means that as the antithesis of Enlightenment, anti-Enlightened ideas are also present in our societies and they form part of our legal systems. Recently, we have seen a rise in legislation containing such dubious provisions.²

The topic is not only relevant from a theoretical perspective but is of great practical importance since identity politics³ and isolationist tendencies (“reactionary tribalism”)⁴ are gaining acceptance in mainstream politics on both sides of the Atlantic. This is causing changes in international business and economic law and is in line with the main assumption of social-constructivism. More specifically, that societies through public discourse create their own political and legal institutions, and the rules that set how people live together are strictly rooted in a country’s culture.⁵ Laws and legal systems form important aspects of this framework and cannot be separated from sociopolitical changes in our countries. That said, in order to counter negative tendencies, we must first reflect on the changes and challenges in our culture and society. Only after such action is taken is when understanding and reversing their legal effect could be done.⁶

This cultural interpretation of law also means that, especially after the inauguration of President Donald Trump, U.S. scholars can learn a lot from European legal history and present European tendencies like the authoritarian regime changes in Poland and Hungary. As a result of the emergence of an international society of interconnected and interdependent countries, many of the forces behind change in legal systems are similar in the Western world. If ideas flow freely, certain legal changes may be transferred as well.

¹ JAMES CUNO, *MUSEUMS MATTER: IN PRAISE OF THE ENCYCLOPEDIA MUSEUM* 28 (2011).

² See generally Shane J. Ralston, *American Enlightenment Thought*, INTERNET ENCYCLOPEDIA OF PHIL. (2020), <https://www.iep.utm.edu/amer-enl/#SHC1c>.

³ See Francis Fukuyama, *Against Identity Politics: The New Tribalism and the Crisis of Democracy*, FOREIGN AFFAIRS (Sept. 2018), <https://www.foreignaffairs.com/articles/americas/2018-08-14/against-identity-politics-tribalism-francis-fukuyama>.

⁴ See generally Robert J. Antonio, *After Postmodernism: Reactionary Tribalism*, 106 AM. J. SOCIOL. 40 (2000).

⁵ Jeffrey T. Checkel, *Constructivist approaches European integration*, ARENA CTR FOR EUR. STUD. (Feb. 2006), https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2006/wp06_06.pdf.

⁶ See generally Ronald Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harv. Kennedy Sch. Faculty Res. Working Paper Series No. 16-026, 2016), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401>.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

The topic “definition and materialization of Enlightenment” is interesting but challenging for scholars.⁷ Even though Enlightenment thinkers like Rousseau, Voltaire, Hegel, and Kant differed as to certain questions, their works and principles are becoming more identifiable in our societies.⁸ Harvard psychology professor Steven Pinker’s recent book discusses core themes in Enlightenment ideas like prevail of reason, science, humanism, and progress and analyzed their social impact.⁹

From a legal and political point of view we can add many other values. For example, the Enlightenment tradition is individualistic in that it believes in individual assessment of people rather than grouping them together based on ethnicity, wealth, gender, or other less relevant features.¹⁰ Enlightenment ideas support human rights, liberal-pluralist democracy, and intellectual pluralism.¹¹ Enlightenment ideas are permissive in nature and use intolerant legal measures only against aggressively intolerant political groups.¹²

Karl Popper summarized the core of this idea, “[w]e should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law.”¹³ Such measures include banning hate speech, banning fighting words or true threats¹⁴ that present clear and present danger, or the ban of Nazi parties in Europe.¹⁵ The Enlightenment-tradition also purports that the role of the state is only to enforce human rights, and the final source of these rights is the individual.¹⁶

Social-contract theories, which interpreted states as creations of their citizens, were also based on this idea.¹⁷ Thus, human rights are not given by the government, but belong to every individual and cannot be alienated. Moreover, most Enlightenment thinkers like John Locke, Charles-Louis de Secondat and Montesquieu were advocates of separation of powers, as they tried to block the rule of an omnipotent elite or emperor.¹⁸ Based on those ideas, Thomas Paine and the authors of the Federalist Papers advocated the principle of checks and balances

⁷ Franz Leander Fillafer, *The Enlightenment on Trial. Reinhart Koselleck's Interpretation of Aufklärung*, in MANY FACES OF CLIO. CROSS-CULTURAL APPROACHES TO HISTORIOGRAPHY 322-323 (Franz L. Fillafer & Edward Q. Wang eds., 2007).

⁸ Arthur M. Melzer, *The Origin of the Counter-Enlightenment: Rousseau and the New Religion of Sincerity*, 90 THE AM. POL. SCI. REV. 2 (June 1996).

⁹ STEVEN PINKER, ENLIGHTENMENT NOW 39 (Penguin Books Ltd., 2018).

¹⁰ See Mark Philip, *Thomas Paine*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 19, 2017), <https://plato.stanford.edu/entries/paine/#SoveLimi>.

¹¹ See Richard W. Krouse, *Some (Further) Dilemmas of Pluralist Democracy*, 2 YALE L. & POL'Y REV. 1, 167 (Fall 1983).

¹² See generally Press Release, *No Prohibition of the National Democratic Party of Germany as there are no indications that it will succeed in achieving its anti-constitutional aims*, BUNDESVERFASSUNGSGERICHT (Jan. 17, 2017), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html>.

¹³ KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 149 (1947).

¹⁴ KATHLEEN ANN RUANE, CONG. RES. SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (Sept. 8, 2014).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ CHARLES DE SECONDAT & BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIX (1748); see also Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 437-39 (2013).

to limit governmental power.¹⁹ They realized how dangerous it is to put power into the hand of one person or one distinct group.²⁰

This tradition bases itself on reason and rationality.²¹ Therefore, after careful analysis and sound scientific investigation, legal provisions should be adopted. At the international level, this tradition encourages cooperation of nations by enforcing individuals with universal rights to cooperate with and respect each other.²² In this sense, the theory of liberal international relations could be interpreted as a prime follow-up of this tradition, as it puts cooperation of nations at the center, instead of the realist ideas of stressing power, influence and national self-interest.²³

The antithetical cultural tradition of anti-Enlightenment should be imagined as a culture containing another diffuse set of ideas trying to counter these views.²⁴ Israeli historian Zeev Sternhell, traces its roots back more than two hundred years ago in European history.²⁵ He claims that this tradition was born at the dawn of the Enlightenment and works as its shadow culture or counter-Enlightenment.²⁶ Anti-Enlightenment does not accept equality of people and in its full-blown form supports white supremacy, racism, ethnicism, sexism and discrimination of minorities.²⁷ This tradition negatively effects international cooperation by claiming that members of certain nations are supreme while others are lesser.²⁸ As a result, societies of the “lesser” group can be seen as enemies unnecessary to respect.²⁹

The social Darwinist idea that certain nations develop more because they are supreme is a reoccurring rhetorical cliché in political discourse that stems from elements of the anti-Enlightenment tradition.³⁰ At its core, this tradition disapproves of humanist individualism and human dignity.³¹ It is nationalistic and stresses the importance of a political community based on uniform values.³² Disagreement is portrayed as dangerous, nonconformity is punished or at

¹⁹ THE FEDERALIST NO. 1 (Alexander Hamilton).

²⁰ See Philip, *supra* note 10.

²¹ *Separation of Powers*, NAT’L CTR. FOR CONST. STUD., <https://nccs.net/blogs/our-ageless-constitution/separation-of-powers> (last visited Feb. 15, 2020).

²² EUR. PARL. DOC. (SNPC06053).

²³ Helen Milner, *International Theories of Cooperation among Nations: Strengths and Weaknesses*, 44 WORLD POL. 3, 466 (Apr. 1992).

²⁴ See ISAJAH BERLIN, *FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY* (Henry Hardy ed., 2002); ISAJAH BERLIN, *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS 1* (1979); see also William A. Galston, *Moral Pluralism and Liberal Democracy: Isaiah Berlin’s Heterodox Liberalism*, 71 REV. POL. 85 (2009).

²⁵ Adam Kirsch, *Enlightenment, Yes!*, TABLET (Jan. 5, 2010), <https://www.tabletmag.com/jewish-arts-and-culture/books/23084/enlightenment-yes>.

²⁶ ISAJAH BERLIN, *THREE CRITICS OF THE ENLIGHTENMENT: VICO, HAMANN, HERDER* 346 (2000).

²⁷ Jeffrey Church, 72 THE REV. OF POL. 4, 732 (2010) (reviewing ZEEV STERNHELL, *THE ANTI-ENLIGHTENMENT TRADITION*, Trans David Maisel (2010)).

²⁸ *Id.*

²⁹ See Zeev Sternhell, *The Anti-Enlightenment Tradition*, Trans David Maisel (2010) (reviewed by Church, *supra* note 27, at 732).

³⁰ See John Louis Recchiuti, *Social Darwinism in the Gilded Age*, KHAN ACADEMY (last visited Feb. 18, 2020 at 10:55 am), <https://www.khanacademy.org/humanities/us-history/the-gilded-age/gilded-age/a/social-darwinism-in-the-gilded-age>.

³¹ See Church, *supra* note 27, at 732.

³² See *id.*

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

least there exists a desire to punish it.³³ Therefore, this tradition cannot value human rights, dignity, tolerance and pluralism. The anti-Enlightenment tradition reflects its ideological content through its application in politics; i.e., it prefers nationalistic tribalism over cooperation, its arguments are based on demagoguery, exaggerated emotions, and chauvinism,³⁴ and it spreads fake news.³⁵

Anti-Enlightenment ideals have gone through two major changes. First, its presence was established through the works of conservative thinkers like Edmund Burke and Joseph de Maistre, who harshly criticized the French Revolution.³⁶ Arthur de Gobineau, who is considered the godfather of modern racism,³⁷ also added important elements. Social Darwinists Herbert Spencer and Ernst Haeckel also influenced anti-Enlightenment ideals.³⁸ Oswald Spengler opined on the decline of the West, which helped to create a general milieu of fear, aggressive nationalism and anti-liberalism.³⁹ The first significant change took place when many of these ideological patterns appeared as intact cognitive systems, and when fascist regimes were formed throughout Europe in the twentieth century.⁴⁰ During this period, the Nazi Carl Schmitt created the scientific background of hate culture by separating society and international relations into friends and foes.⁴¹ Contemporaneously, Italian Giovanni Gentile worked on the Italian definition of fascism.⁴² The second change occurred when the catastrophic nature of this tradition was revealed and its tone was lowered after World War II.⁴³ During this time, the anti-Enlightenment tradition became compromised in the eyes of the masses.⁴⁴ As a result, it's

³³ See *id.*

³⁴ See Adam Kirsch, *Black and White*, THE NEW REPUBLIC (Jan. 18, 2010), <https://newrepublic.com/article/72487/black-and-white>.

³⁵ See LOI 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information [On The Fight Against The Manipulation Of Information] Journal Officiel de la République Française [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 22, 2018; see also Michael-Ross Fiorentino, *France Passes Controversial 'Fake News' Law*, EURONEWS (Nov. 12, 2018), <https://www.euronews.com/2018/11/22/france-passes-controversial-fake-news-law>.

³⁶ See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 20 (2009); see also Isaiah Berlin, FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY 142-168 (Henry Hardy ed., 2002); see generally Graeme Garrard, COUNTER-ENLIGHTENMENTS: FROM THE 18TH CENTURY TO THE PRESENT (2006).

³⁷ See generally Arthur de Gobineau: THE INEQUALITY OF THE HUMAN RACES (Adrian Collins, trans., 2006) (1853); see also Steven Kale, *Gobineau, Racism, And Legitimism: A Royalist Heretic In Nineteenth-Century France*, 7 MOD. INTELL. HIST. 33 (2010).

³⁸ See G.B. PAQUETTE, SOCIAL DARWINISM, ENCYCLOPEDIA OF WESTERN COLONIALISM SINCE 1450 (Thomas Benjamin, ed., 2007), https://faculty.uml.edu/sgallagher/social_darwinism.pdf; see also Daniel Gasman, THE SCIENTIFIC ORIGINS OF NATIONAL SOCIALISM: SOCIAL DARWINISM IN ERNST HAECKEL AND THE GERMAN MONIST LEAGUE 57-58 (1971).

³⁹ See generally Oswald Spengler, THE DECLINE OF THE WEST (Charles Francis Atkinson, trans., 1926) (2006); see also JASON STANLEY, HOW FASCISM WORKS: THE POLITICS OF US AND THEM 18 (2018).

⁴⁰ See generally, *id.*

⁴¹ See Ferenc Laczó, Timothy Snyder, Kacper Szulecki & Peter J. Verovšek, *Mapping the road to unfreedom*, EUROZINE (Jul. 24, 2018), <https://www.eurozine.com/mapping-road-unfreedom/>; see also Trevor J. Barnes & Claudio Minca, *Nazi Spatial Theory: The Dark Geographies of Carl Schmitt and Walter Christaller*, ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 1 (2010).

⁴² See GIOVANNI GENTILE & BENITO MUSSOLINI, THE DOCTRINE OF FASCISM (1932), <http://www.worldfuturefund.org/wffmaster/Reading/Germany/mussolini.htm>.

⁴³ See Federico Finchelstein, *Returning Populism to History*, 21 CONSTELLATIONS 467, 471 (2014).

⁴⁴ See *id.* at 470.

dictatorial and aggressive nature toned down, thereby creating ideological systems called “populist” by many scholars.⁴⁵ This means that present political personalities, like President Donald Trump, Hungarian Prime Minister Viktor Orbán and Italian Deputy Prime Minister Matteo Salvini, borrow ideological clichés from a historical tradition that has existed in the Western world.⁴⁶ Moreover, anti-Enlightenment patterns can also be traced to other political and social movements, such as the authoritarian far-left, moderate conservative parties, or religious fundamentalism.⁴⁷

This article first checks the Enlightenment and anti-Enlightenment patterns in our legal systems, with a focus on the U.S. and the E.U. Later, it selects some prime examples about the effect of the anti-Enlightenment tradition on international business and trade law.

II. THE GENERAL FRAMEWORK

A. The Enlightenment Versus Anti-Enlightenment Dichotomy in Western Legal Tradition

It is remarkable that U.S. federal and state law, as well as E.U. law and E.U. member states’ legal systems, contain legal provisions that belong either to the Enlightenment or the anti-Enlightenment tradition. These legal systems create an equilibrium of these respective patterns, even if the Enlightenment tradition more or less dominates.⁴⁸

The U.S.’ nuanced constitutional system and its historical development is one of the best examples of legislation deeply rooted in the Enlightenment; e.g., its principle of checks and balances, the architecture of Congress and the creation of federal and state level help to separate powers.⁴⁹ For Europeans, the idea that the Constitution and Bill of Rights have direct influence over their lives is also something to envy because provisions of E.U. member state

⁴⁵ See Federico Finchelstein, FROM FASCISM TO POPULISM IN HISTORY 64 (2018); see also Tamas Dezso Ziegler, *The Populist Hoax – Getting the Far Right and Post-Fascism Wrong*, SOCIAL EUROPE (Feb. 2, 2018), <https://www.socialeurope.eu/the-populist-hoax-getting-the-far-right-and-post-fascism-wrong>;

see generally, TIMOTHY SNYDER, THE ROAD TO UNFREEDOM (2018); see also STANLEY, *supra* note 39; see generally, MARGARET CANOVAN, DEMOCRACIES AND THE POPULIST CHALLENGE 25-44 (Yves Mény & Yves Surel eds., 2002); see also Marco D’Eramo, *Populism and the New Oligarchy*, 82 NEW LEFT REV. 5, 18-19 (2013); see generally, PIERRE ROSANVALLON, COUNTER-DEMOCRACY – POLITICS IN THE AGE OF DISTRUST 265-273 (2008); see also ERNESTO LACLAU, ON POPULIST REASON 182 (2005); see also Anton Jäger, *The Myth of “Populism”*, JACOBIN (March 1, 2018), <https://www.jacobinmag.com/2018/01/populism-douglas-hofstadter-donald-trump-democracy>; see also Anton Jäger, *The Semantic Drift: Images of Populism in Post-War American Historiography and Their Relevance for (European) Political Science*, 24 CONSTELLATIONS 310, 312 (2017); see also Andrea Mammone, *The Eternal Return? Faux Populism and Contemporarization of Neo-Fascism across Britain, France and Italy*, 17 J. OF CONTEMP. EUR. STUD. 171, 174 (2009); see also Mark Mazower, *Fascism and Democracy Today: What Use Is the Study of History in the Current Crisis?* 22 EUR. L. J. 375, 384-385 (2016); see also Nigel Copsey, *‘Fascism... But With An Open Mind’ – Reflections On The Contemporary Far Right In (Western) Europe*, 2 FASCISM 1, 17 (2013).

⁴⁶ See STANLEY, *supra* note 39, at 23, 48-9; see generally, Ronald Donadio, *The Populist Playbook*, THE ATLANTIC (Sep. 5, 2019), <https://www.theatlantic.com/international/archive/2019/09/matteo-salvini-italy-populist-playbook/597298>.

⁴⁷ See Pinker, *supra* note 9, at 410.

⁴⁸ See Jeremy Waldron, *Isaiah Berlin’s Neglect of Enlightenment Constitutionalism* 19-20 (New York Univ. Sch. of L., Pub. L. Research Paper No. 14-12, 2014).

⁴⁹ See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 76, 101-02, 189, 236 (Henry Reeve, trans., 2002) (1835).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

constitutions do not necessarily have such an influence.⁵⁰ The acceptance of Enlightenment values in U.S. society has been so strong that Italian scholar Emilio Gentile opined on a special civil religion, which functioned like a belief-system in the case of U.S. constitutionalism.⁵¹ In addition, the separation of religion and the state is much stricter in the U.S. than in many countries in Europe.⁵² For example, in Germany, states still collect taxes for religious communities, and one can only be exempt from payment if they notify the state that they do not belong to any of such communities.⁵³ In Italy, there is a law requiring crucifixes to be displayed in public classrooms, which would probably violate the separation of state and religion in the U.S.⁵⁴

Even though these examples illustrate enlightened constructs in the U.S., one can easily find elements of the anti-Enlightenment. Some of the best examples are be found in the history of the Civil Rights movement. Eric Foner describes how freedom had to be reinterpreted throughout U.S. history to include black people and other minorities, which eventually resulted in the formal abolishment of inequality and racism.⁵⁵ Another example is the case of U.S. exceptionalism.⁵⁶ As Srinivasan put it:

[o]ne of the enduring paradoxes of [U.S.] participation in international treaty regimes and acceptance of international law is that it has acted as an enforcer of norms and rules . . . while exempting itself from formal participation in the very same treaties that it helped to establish.⁵⁷

Michael Ignatieff adds that “exceptionalism also takes the form of signing on to international rights conventions and then failing to abide by their requirements.”⁵⁸ My colleagues and I tried to ascertain the possible reasons behind this attitude.⁵⁹

⁵⁰ See Sophie Robin-Olivier, *The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections*, 12 INT'L. J. CONST. L. 165, 166 (2014).

⁵¹ See EMILIO GENTILE: GOD'S DEMOCRACY: AMERICAN RELIGION AFTER SEPTEMBER 11, 64 (2008); EMILIO GENTILE, POLITICS AS RELIGION 17, 22 (2006).

⁵² See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002); see also Johnathan Fox & Shmuel Sandler, *Separation of Religion and State in the Twenty-First Century: Comparing the Middle East and Western Democracies*, 37 COMP. POL. 317 (2005).

⁵³ See GRUNDGESETZ [GG] [BASIC LAW], arts. 136(4), 137(6), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

⁵⁴ See CHARLES C. HAYNES & OLIVER THOMAS: FINDING COMMON GROUND: A FIRST AMENDMENT GUIDE TO RELIGION AND PUBLIC SCHOOLS 97-98 (2007); see also Lautsi and Others v. It., App. No. 30814/06 Eur. Ct. H.R. at 4 (2011); see also NYU Law News, *Crucifix In The Classroom: NYU Law's Joseph Weiler On Winning Side In Landmark Ruling On Religious Symbols By European Court Of Human Rights*, NYU LAW NEWS (March 24, 2011), www.law.nyu.edu/news/weiler_echr_ruling.

⁵⁵ See ERIC FONER: THE STORY OF AMERICAN FREEDOM 282, 284-86 (1999).

⁵⁶ See AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 3 (Michael Ignatieff ed., 2005).

⁵⁷ SRINIVASAN, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES 143 (2009).

⁵⁸ See Ignatieff, *supra* note 56, at 6.

⁵⁹ See Anna Unger, Tamas Dezso Ziegler & Stuart Wallace, *The Role of Human Rights in EU-US Bilateral Relations*, FRAME, 19 (Oct. 1, 2016), <https://doi.org/20.500.11825/112>.

We concluded that the international status of the U.S., its domestic constitutional structure, and the U.S. political system and culture are a complex, multicausal phenomenon.⁶⁰ However, this causes practical problems, especially when human rights violations occur. Such is the case when the U.S. “refus[es] to order stays of execution in compliance with the Vienna Treaty on Consular Obligations,”⁶¹ starts war without the approval of the international community,⁶² and possibly violates its citizens’ privacy through questionable surveillance tactics.⁶³

The architecture of the E.U. legal system may be a result of the Enlightenment, because the E.U. system advocates separation of powers, abolishes borders, and accepts other nations’ citizens as their own.⁶⁴ The E.U. is also a strong advocate of international human rights and rule of law. Most of the E.U.’s international-commercial treaties contain human rights and rule of law clauses.⁶⁵ For example, article 18 of the Treaty on the Functioning of the E.U. (T.F.E.U.) bans discrimination based on citizenship⁶⁶ and creates an E.U. citizenship.⁶⁷

However, anti-Enlightenment is also prevalent in the E.U.; in certain member states, such as, Hungary and Poland, a serious rule of law backsliding has occurred in recent years.⁶⁸ Hungary became the first only “partly free” E.U. member state in 2019⁶⁹ and may now be an electoral autocracy.⁷⁰ Anti-Enlightenment ideas also have the ability to transform a democracy into a hybrid regime.⁷¹ The structural changes in such countries’ constitutional checks and

⁶⁰ See *id.* at 22, 43 (the “following elements make the U.S. skeptical concerning international norms: 1) the fact that the country is geopolitically powerful; 2) it has a long tradition of stable democracy (even if interpretation of democracy has changed in history); 3) it has a very active and important conservative minority; and finally, that 4) as a result of historical development, it has decentralised and fragmented political institutions, with the principle of checks and balances”).

⁶¹ Ignatieff, *supra* note 56, at 6.

⁶² See John Gerard Ruggie, *American Exceptionalism, Exceptionalism and Global Governance* 28 (John F. Kennedy Sch. of Gov’t, Paper No. RWP04-006, 2004).

⁶³ See Unger et al., *supra* note 59, at 89-90.

⁶⁴ See Treaty on European Union, 7 February 1992, 1992 O.J. (C191) 12, 62.

⁶⁵ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); see also Laura Beke et al., *The Integration of Human Rights in EU Development and Trade Policies* (Leuven Ctr. For Glob. Governance Studies, Paper No. 9, 2014), <http://www.fp7-frame.eu/wp-content/uploads/2016/08/07-Deliverable-9.1.pdf>.

⁶⁶ Consolidated Version of the Treaty on the Functioning of European Union art. 20, Oct. 10, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

⁶⁷ *Id.* at art. 18; see also THE RECONCEPTUALIZATION OF EUROPEAN UNION CITIZENSHIP 2 (Elspeth Guild et. al. eds., 2014).

⁶⁸ See Kim Lane Scheppele, *Understanding Hungary’s Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 123-124 (Armin von Bogdandy & Pál Sonnevend eds., 2015).

⁶⁹ See Hungary, *Freedom in the World 2019*, FREEDOM HOUSE, <https://freedomhouse.org/country/hungary/freedom-world/2019> (last visited Mar. 6, 2020).

⁷⁰ See Tamas Dezso Ziegler, *The Links between Human Rights and the Single European Market: Discrimination and Systemic Infringement*, 7 COMP. L. REV. 2 (2016); see also ANDREAS SCHEDLER, THE POLITICS OF UNCERTAINTY: SUSTAINING AND SUBVERTING ELECTORAL AUTHORITARIANISM 394-95 (2013).

⁷¹ See STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 3-4 (2010); see also Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. OF DEMOCRACY 52-3 (2002).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U. COMPARISON

balances, judiciary, independent academia,⁷² or electoral laws⁷³ are direct results of parties and movements codifying elements of anti-Enlightenment ideals in legislation.⁷⁴ Autocratic legalism dislikes pluralism, tolerance and limitation of governance.⁷⁵ The E.U. is fighting back by setting procedures against these countries that enforce human rights and the rule of law.⁷⁶

Despite the fact that the E.U. is fighting back, anti-Enlightenment ideals are still present in its legislation. For example, certain E.U. laws discriminate against consumers based on habitual residence.⁷⁷ Even the adoption of a reform did not improve the original problem.⁷⁸ The anti-Enlightenment tradition also affects immigration law. There are different rules for family unification of E.U. citizens depending on if they live in their country of citizenship, they are EU citizens living in another country, or they are from third party countries.⁷⁹

The detrimental effect of nationalist fears can be easily tracked with respect to national identity as codified in Article 4, of the Treaty on European Union (T.E.U.), which opens the door for its abuse by member states.⁸⁰ One primary cause of this democratic deficit is that member states were afraid of creating a strong institutional structure and instead drafted the structure for an interim, non-perpetual period, which has yet to be updated.⁸¹ The democratic accountability of legislation is also limited. Private persons cannot start an annulment procedure against E.U. law provisions in most cases because of the narrow interpretation of direct and individual concern of the European Court of Justice (E.C.J.).⁸² The result is a situation where individuals have to adhere to certain laws, but cannot question the

⁷² See Tamas Dezso Ziegler, *Academic Freedom in the European Union: Why the Single European Market is Bad Reference Point*, MPIL RESEARCH PAPER SERIES NO. 2019-03, at 2-3 (Jan. 17, 2019).

⁷³ See *Electoral rules rig results of Hungarian elections*, warns Princeton's Kim Lane Scheppele, THE BUDAPEST BEACON (Mar. 19, 2018), <https://budapestbeacon.com/electoral-rules-rig-results-of-hungarian-elections-warns-princetons-kim-lane-scheppele/>.

⁷⁴ See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549-50 (2018).

⁷⁵ See *id.* at 563.

⁷⁶ See *Proposal Calling on the Council to Cetermine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union is Founded*, COM (2018) 620 final (July 4, 2018); see also *Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 835 final (Dec. 12, 2017); see also *European Parliament Resolution on the Commission's Secision to Activate Article 7(1) TEU as Regards the Situation in Poland*, COM (2018) 616 final (Feb. 2, 2018).

⁷⁷ See Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, 2018 O.J. (L 60) 1, 3, 9; see also Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, 2017 O.J. (L 345) 1, 12.

⁷⁸ See *id.*

⁷⁹ See Peter Van Elsuwegca & Dimitry Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 EUR. J. MIGRATION & L. 443 (2011).

⁸⁰ See Gábor Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law*, 43 REV. OF CENT. & E. EUR L. 23, 25, 34 (2018).

⁸¹ See Andreas Føllesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. OF COMMON MKT. STUD. 533, 534-35 (2006).

⁸² See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 491 (5th ed. 2011).

legal basis of these laws.⁸³ While the latest major reform of E.U. law, “the Lisbon Treaty,”⁸⁴ has made it easier for natural or legal persons to challenge non-legislative acts, the ability of those individuals wishing to challenge legislative acts has remained unchanged.”⁸⁵

B. Why and How Does the Anti-Enlightenment Tradition Affect Business and Trade Law?

Government policies have a direct relationship with business and trade law. They form complex policy-making strategies. If anti-Enlightenment tradition dominates governmental policies, then it can reshape domestic, and especially international business and trade law. When those policy-making strategies mix with anti-Enlightenment ideals, the resulting decisions can be harmful.

First, if such decisions are based on overt nationalism, then this may manifest in poor legislation. According to Sam Pryke, economic nationalism should be understood as a set of “practices to create, bolster and protect national economies in the context of world markets.”⁸⁶ This is not necessarily a harmful phenomenon, but the normal way of international business and trade cooperation should be based on a soft-rational analysis; Ernst B. Haas expressed that:

. . . social actors, in seeking to realize their value-derived interests, will choose whatever means are made available by the prevailing democratic order. If thwarted they will rethink their values, redefine their interests, and choose new means to realize them. The alleged primordial force of nationalism will be trumped by the utilitarian-instrumental human desire to better oneself in life, materially and in terms of status, as well as normative satisfaction.⁸⁷

The soft-rational analysis may change when people start to think about globalization and international economic cooperation as something completely harmful. Politics may not filter, but instead may even boost this simplified thinking. Such forces are not interested in comparative advantages and will use demagoguery, and hostility when interpreting globalization. Anti-Enlightenment idealists can do this by portraying connections with countries where there is a trade deficit as harmful relationships causing economic damage.⁸⁸ This is a simplified interpretation of economics and Ildikó Magyari argues that contrary to conventional wisdom, U.S. firms exposed to greater Chinese imports created more jobs than non-exposed firms.⁸⁹

⁸³ See *id.* at 491-94.

⁸⁴ See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art. 224a, Dec. 13, 2007, 2007 O.J. (C 306) 1.

⁸⁵ Magdalena Kucko, *The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon*, 2 LSE L. REV. 101 (2017).

⁸⁶ Sam Pryke, *Economic Nationalism: Theory, History and Prospects*, 3 GLOBAL POL’Y 281 (2012).

⁸⁷ ERNST B. HAAS, *THE UNITING OF EUROPE* XV (2004).

⁸⁸ See Austin Weinstein, *Why Trade Deficits Don’t Always Mean What Trump Says They Do*, BLOOMBERG BUSINESSWEEK (Aug. 20, 2018), <https://www.bloomberg.com/news/articles/2018-08-20/why-trade-deficits-aren-t-the-bogeyman-trump-thinks-quicktake>.

⁸⁹ Ildikó Magyari, *Firm Reorganization, Chinese Imports, and US Manufacturing Employment* 1 (Ctr. for Econ. Studies, U.S. Census Bureau, Working Paper No. 17-58, 2017), www.columbia.edu/~im2348/JMP_Magyari.pdf.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

However, some groups in the U.S., beside the free-market proponents, support paleo conservative ideas with an economic-tribalist agenda about international cooperation.⁹⁰ Similar phenomena can be seen in Europe where far-right leaders advocate for the closure of borders and exclusion of foreign investors.⁹¹ The result is protectionist legal provisions that can be harmful for the enacting country, as well as for international cooperation.⁹² As a side effect, oligarchization also becomes common.⁹³

Second, the anti-Enlightenment tradition uses heightened emotions instead of factual analysis.⁹⁴ In the field of international trade and business, scapegoating other nations for domestic problems and using simplistic socio-Darwinist ideas of a world where countries are enemies, are common themes in this tradition.⁹⁵ To heighten emotions one could also add the method to give simple demagogic answers to complex problems. In the nuanced, complicated world of international trade law, these can then backfire. This problem also has an effect on international migration: while some scholars like Jürgen Basedow state that the world has become a far more open place in the last century,⁹⁶ and no data prove that this has been harmful for countries' economic interests, there are powerful forces that portray it as a completely negative phenomenon.

Third, in many cases, in its extended form, the anti-Enlightenment tradition changes the broader constitutional framework, which then backfires on business law. As Guenter Reimann put it in his book, *The Vampire Economy – Doing Business Under Fascism*, regarding trade law back in 1939:

... the State-regimented foreign trader plays a dual role – he appears as a private businessman, signing contracts in the name of his “private” firm. But the fulfilment of his contracts, his buying and selling policies, depend neither on his own free will nor on the international customs and laws which were valid in a free competitive world economy. Whether fulfilment of contracts can be guaranteed or violation of contract can be prosecuted depends to a large extent on the government’s decision and on the political power of the State.⁹⁷

However, even if modern authoritarianism mostly creates autocracies instead of totalitarian states (a lighter form of oppression) many of the former historical tenets remain similar.

C. What Is and What Is Not Claimed in this Article

⁹⁰ See Antonio, *supra* note 4, at 64.

⁹¹ See *id.* at 57-9.

⁹² See Jonathan D. Ostry, *Why Protectionism Spells Trouble for Global Economic Growth*, *World Econ. F.* (Mar. 13, 2019), <https://www.weforum.org/agenda/2019/03/why-tariffs-spell-trouble-for-economic-growth/>.

⁹³ See Antonio, *supra* note 4, at 58.

⁹⁴ See ZEEV STERNHELL, *THE ANTI-ENLIGHTENMENT TRADITION* 142 (David Maisel trans., 2010).

⁹⁵ See Karen Gilchrist, *Trade has become the scapegoat for the world's problems: ITC*, CNBC (Jan. 20, 2017), <https://www.cnbc.com/2017/01/20/trade-has-become-the-scapegoat-for-the-worlds-problems-itc.html>.

⁹⁶ See JÜRGEN BASEDOW, *THE LAW OF OPEN SOCIETIES: PRIVATE ORDERING AND PUBLIC REGULATION IN THE CONFLICT OF LAWS* 34 (2015).

⁹⁷ GÜNTER REIMANN, *THE VAMPIRE ECONOMY: DOING BUSINESS UNDER FASCISM* 217 (1939).

Before going into details about the legal aspects of changes, it is important to stress what this article claims and what it does not. First of all, it makes no claim that all measures protecting a country from negative effects of international trade would necessarily belong to the anti-Enlightenment tradition. Both the E.U. and the U.S. maintain measures to protect their markets in international trade law; for example, they regularly introduce countervailing duties or other defense measures. This means that our markets are not completely open: in practice, different policies are competing with each other in our regulations. The U.S. and the E.U. both use a mixture of openness and closeness. If we analyze the scientific background of this, we find that even mainstream scholars can have very different views about “openness”: while Jagdish Bhagwati or many libertarians would advocate for free trade,⁹⁸ there is a growing number of scholars considering advancing the present legal framework of international trade into new, more socially just international cooperation. For example, while remaining supporters of free trade, Dani Rodrik and Joseph Stiglitz highlight the democratic and social problems associated with it; and especially, with policies they label “neoliberal”).⁹⁹ One could also add nationalist authors to them, which are in a number of cases not as irrational as their reputation would suggest; for example, if we carefully read one of the founding theorists of protectionism, Friedrich Liszt, we understand that he has a point in describing smaller or poorer countries’ vulnerable economic situation in relation to bigger ones.¹⁰⁰ For example, Norway is a part of the European Economic Area, but the country defends its market of agricultural products stemming from E.U. states: without such defensive measures, it would be unable to maintain agriculture, as the costs in the north would be too high to do so.

Scholars also stress that a certain kind of economic nationalism could be useful, even if it should be handled very carefully.¹⁰¹ Moreover, Jeffery Frieden and Ronald Rogowski claim that private producers for domestic markets can be losers of international trade liberalization: consequently, we should also take into consideration that the perception of these producers of international cooperation will be different than a neutral, scientific analysis.¹⁰² To this, one could add the different roles of states in world trade: countries in the center have different opportunities than countries on the periphery.¹⁰³ Furthermore, in a number of cases, regulating the markets is also intertwined with the social actions of a state – in Europe, social states would not exist without a certain level of state introduction.¹⁰⁴ To sum up: this article does not

⁹⁸ Jagdish Bhagwati, *How to demolish protectionist myths*, THE GUARDIAN (July 5, 2010), <https://www.theguardian.com/commentisfree/2010/jul/05/free-trade-protectionist-myths>.

⁹⁹ HEIKKI PATOMÄKI, *DISINTEGRATIVE TENDENCIES IN GLOBAL POLITICAL ECONOMY* 6, 7, 30 (Routledge 2018); see also DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* 69 (Institute For International Economics 1997); see generally DANI RODRIK, *THE GLOBALIZATION PARADOX* (Oxford University Press, 2011); see also JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS REVISITED: ANTI-GLOBALIZATION IN THE ERA OF TRUMP* xiii, xiv (W. W. Norton & Company 2002).

¹⁰⁰ See FRIEDRICH LIST, *THE NATIONAL SYSTEM OF POLITICAL ECONOMY* (Sampson S. Lloyd trans., 1841).

¹⁰¹ Ugo Pagano, *Can Economics Explain Nationalism?*, 1, 3, 6, 8-9, 15, 17, 20 (U. of Siena Dep’t of Eco., 1992), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=934273.

¹⁰² Jeffrey A. Frieden & Ronald Rogowski, *The Impact of the International Economy on National Policies: An Analytical Overview*, in *INTERNALIZATION AND DOMESTIC POLITICS* 25, 32 (Robert O. Keohane & Helen V. Milner eds., 1996); see also Føllesdal & Hix, *supra* note 81, at 543.

¹⁰³ Jon Naustdal, *A Multi-Level Approach to the Study of Center-Periphery Systems and Socio-Economic Change*, 14 J. OF PEACE RES. 203, 204-205 (1977).

¹⁰⁴ See generally JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING* 13, 27 (Doubleday 2008).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

necessarily accept a fundamentalist view of the market, and sees some space for market correction.

Second, it does not claim that all those who oppose certain ways of international cooperation or would support protectionism would necessarily belong to far right or fascist political streams. Isaiah Berlin claimed that there are two kinds of nationalism: “the first is not aggressive and stresses co-operation, solidarity and familiarity with fellow countrymen while the other is aggressive and stresses conflict, violence and hate for foreigners”.¹⁰⁵ However, even if someone is more skeptical regarding international cooperation, this fact does not necessarily mean that he or she has an aggressive, authoritarian worldview. As it is perfectly explained by Cameron Ballard-Rosa and her colleagues, U.S. trade policy always moved between openness and closeness, i.e. free trade and protectionism in the last hundred years, and there were periods when their dominance was changed.¹⁰⁶ Whatever position one supports, this does not necessarily make one belong to the groups mentioned above.

However, this article does claim that there exists an authoritarian, anti-Enlightenment tradition in Western democracies, which has the potential to create anti-democratic political systems, and this tradition can have a devastating effect on international relations, including international business and trade law. It also asserts that such policies are based on a complex worldview as analyzed before. It also states that many of the rules we take for granted could be questioned from this perspective, as proven above. At the center of this is the strong fear of other countries and their citizens, and a distorted thinking about the nation as an ethnic community.¹⁰⁷ This tradition uses identity politics, which also has an effect on rules on trade. It has already achieved popularity in recent years and was able to transform the dynamics of international cooperation relatively quickly. As Richard Ned Lebow put it, such forces:

... almost invariably assert the distinctiveness and superiority of a people or nation. Claims of superiority and justifications for privileges based on them are really appeals to the principle of fairness and to hierarchy at the expense of equality. Elites who propagate these identifications and claims invoke all kinds of sleights of hand in an attempt to square the two principles, but rarely credibly in the eyes of other actors.¹⁰⁸

This attitude then appears in international business and trade law as well, and restructures elements of exiting cooperation.

III. THE CHANGES TO SPECIAL FIELDS IN LAW AND POLITICS

A. Disbelief in International Cooperation

¹⁰⁵ Pagano, *supra* note 101, at 27.

¹⁰⁶ Cameron Ballard-Rosa et al., *Trade, Populism and Public Opinion*, THE FUTURE OF THE GLOBAL ORD. COLLOQUIUM 2 (2017).

¹⁰⁷ See BOB ALTEMAYER, THE AUTHORITARIANS 63, 72 (2006).

¹⁰⁸ RICHARD N. LEBOW, NATIONAL IDENTITIES AND INTERNATIONAL RELATIONS 6 (Cambridge Univ. Press 2016).

The long history of the anti-Enlightenment proves what a strong effect it has on international organizations and cooperation, including bilateral and multilateral economic relations. Before turning Europe into a war-torn area in the middle of the twentieth century, the League of Nations, the predecessor of the United Nations, was also gravely weakened by the representatives of this tradition; the German Nazis, Italian fascists, and similar political groups.¹⁰⁹ We face some similar tendencies today, of course, with some important distinctions: The aggressive nature of the tradition is somewhat lighter than before. However, as nations became more and more interdependent, the scale or material scope of their actions is also broader. As a result, supremacist-nationalist politics attack more international treaties in a more complex international network of countries than before.

For example, it has become common to scapegoat countries and portray international organizations as useless or harmful in politics. In his presidential campaign, Donald Trump called the U.N. ‘just a club for people to have a good time,’¹¹⁰ and said it is causing problems, not solving them.¹¹¹ In 2018, the U.S. withdrew from the United Nations Educational, Scientific and Cultural Organization (“U.N.E.S.C.O.”) and the U.N. Human Rights Council. In 2019, senior administration officials told the press about the President’s intention to withdraw the country from the North Atlantic Treaty Organization.¹¹² In 2017, the U.S. revoked its participation in the 2015 Paris Agreement on climate change.¹¹³ A formal withdrawal from the 1987 Intermediate-Range Nuclear Forces Treaty banning ground-launch nuclear missiles between ranges of 500 km and 5,500 km was announced in 2019,¹¹⁴ and new nuclear weapons are being produced.¹¹⁵ In the field of economics and trade, the changes are even more visible, as international trade and economic organizations and treaties are under attack.¹¹⁶ President Trump portrays the World Trade Organization as harmful for U.S. interests, even though the U.S. was one of its main proponents and beneficiaries in the history of the organization, and its predecessor, the General Agreement on Tariffs and Trade; 1947 & 1994).¹¹⁷

¹⁰⁹ Christianity & Crisis Magazine, *Why the League Failed: 13 Crippling Shortcomings*, PROVIDENCE (Jan. 26, 2018), <https://providencemag.com/2018/01/why-the-league-of-nations-failed/>.

¹¹⁰ Juliet Eilperin, *Trump Calls U.N. ‘just a club for people’ to ‘have a good time’*, THE WASH. POST (Dec. 27, 2016), https://www.washingtonpost.com/gdpr-consent/?destination=%2fnews%2fpost-politics%2fwfp%2f2016%2f12%2f26%2ftrump-calls-u-n-just-a-club-for-people-to-have-a-good-time%2f%3f&utm_term=.d5ca26631264.

¹¹¹ John Wagner, *Trump re-ups criticism of United Nations, saying it’s causing problems, not solving them*, THE WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/28/trump-re-ups-criticism-of-united-nations-saying-its-causing-problems-not-solving-them/?utm_term=.64d8673af271.

¹¹² Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. From NATO, Aids Say Amid New Concerns Over Russia*, THE N. Y. TIMES (Jan. 14, 2019), <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html>.

¹¹³ Kayla Clark, *The Paris Agreement: Its Role in International Law and American Jurisprudence*, 8 NOTRE DAME J. OF INT’L & COMP. L. 107, 108 (2018).

¹¹⁴ Julian Borger, *Donald Trump confirms US withdrawal from INF nuclear treaty*, THE GUARDIAN (Feb. 1, 2019), <https://www.theguardian.com/world/2019/feb/01/inf-donald-trump-confirms-us-withdrawal-nuclear-treaty>.

¹¹⁵ Geoff Brumfiel, *Trump Administration Begins Production Of A New Nuclear Weapon*, NPR (Jan. 28, 2019), <https://www.npr.org/2019/01/28/689510716/trump-administration-begins-production-of-a-new-nuclear-weapon?t=1548762617113>.

¹¹⁶ *Attacks on Multilateral System Threaten Global Peace and Security*, THE ELDERS (Dec. 3, 2019), <https://theelders.org/news/attacks-multilateral-system-threaten-global-peace-and-security>.

¹¹⁷ Susan A. Aaronson, *From GATT to WTO: The Evolution of an Obscure Agency to One Perceived as Obstructing Democracy*, ECON. HIST. ASS’N, <https://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an>

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

Trump claimed that the organization is unable to maintain and enforce its standards.¹¹⁸ The actions of the Trump administration have also affected other important international agreements for example, in 2017, it withdrew from the Trans-Pacific Partnership (“TPP”), a former high priority treaty of the Obama administration.¹¹⁹ Moreover, the talks on the Transatlantic Trade and Investment partnership between the E.U. and the U.S. were also stalled, and some basic bilateral conversation between Jean-Claude Juncker, President of the European Commission and Donald Trump was only started in 2018.¹²⁰ The North American Free Trade Agreement went through a major revision, resulting its parties recent signing of the United States–Mexico–Canada Agreement (“U.S.M.C.A.”).¹²¹ In December 2018, President Trump announced his plans to withdraw the U.S. from N.A.F.T.A., in order to force Democrats to accept the new agreement.¹²² Most of the provisions of U.S.M.C.A. are not problematic from the perspective of this article and interestingly enough, some of them even extend free trade, such as the provisions of dairy products. However, it also contains dubious measures. Some of these are protectionist, such as requiring automakers to produce 75–80 percent of a vehicle’s content in North America to qualify for zero tariffs,¹²³ or the fact that U.S. will also impose 25 percent tariffs on Canadian steel in the future.¹²⁴ Moreover, Article 32.10 of the agreement limits the contracting parties’ contractual freedom towards other countries.¹²⁵ This measure could limit Canada’s discretion to conclude a trade agreement with China.¹²⁶ Finally, a similar

obscure-agency-to-one-perceived-as-obstructing-democracy-2/; see also Adam Behsudi, *Trump Ramps Up Attack Against WTO*, POLITICO (July 26, 2019), <https://www.politico.com/story/2019/07/26/trump-world-trade-organization-1623192>.

¹¹⁸ See Alex Ward, *Read Trump’s Speech to the UN General Assembly*, VOX (Sept. 25, 2018) <https://www.vox.com/2018/9/25/17901082/trump-un-2018-speech-full-text>; see also David A. Wemer, *What is Wrong with the WTO?*, ATLANTIC COUNCIL (Jun. 14, 2019), <https://www.atlanticcouncil.org/blogs/new-atlanticist/what-is-wrong-with-the-wto/>.

¹¹⁹ See Adam Davidson, *What the Death of the T.P.P. Means for America*, THE NEW YORKER (Jan. 23, 2017), <https://www.newyorker.com/business/adam-davidson/what-the-death-of-the-t-p-p-means-for-america>; see also Press Release, The White House Office of the Press Secretary, The United States in the Trans-Pacific Partnership (Nov. 12, 2011) (on file with The White House Office of the Press Secretary).

¹²⁰ Federico Steinberg, *Juncker and Trump End the Trade War and Revive a Watered-Down Version of TTIP*, ELCANO (Feb. 10, 2018), www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/commentary-steinberg-juncker-trump-end-trade-war-revive-watered-down-ttip.

¹²¹ Agreement between the United States of America, the United Mexican States, and Canada (USMCA), U.S.-Can.-Mex., Nov. 30, 2018, U.S.T.R.

¹²² Glenn Thrush, *Trump says he plans to withdraw from NAFTA*, THE NEW YORK TIMES (Dec. 2, 2018), <https://www.nytimes.com/2018/12/02/us/politics/trump-withdraw-nafta.html>.

¹²³ *The USMCA: NAFTA’s Replacement*, BAKER & MCKENZIE (Oct. 2, 2018), <https://www.bakermckenzie.com/en/insight/publications/2018/10/the-usmca-naftas-replacement>.

¹²⁴ Ana Swanson, *White House to Impose Metal Tariffs on E.U., Canada and Mexico*, THE NEW YORK TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/politics/trump-aluminum-steel-tariffs.html>.

¹²⁵ USMCA, *supra* note 121, at art. 32.10.

¹²⁶ Josh Wingrove, *NAFTA’s China Clause Is Latest Blow to Trudeau’s Asia Ambitions*, BLOOMBERG (Oct. 4, 2018), <https://www.bloomberg.com/news/articles/2018-10-04/nafta-s-china-clause-is-latest-blow-to-trudeau-s-asia-ambitions>.

revision of the United States-Korea Free Trade Agreement (“K.O.R.U.S.”) was concluded in 2018 as well.¹²⁷

In Europe, some very similar tendencies are present. The prime example is Brexit, the exit of the United Kingdom from the E.U. As is well-known, the U.K. opted to leave the E.U. in a 2016 referendum.¹²⁸ The reason for the vote is rather complex: apart from using multicausal explanations,¹²⁹ some commentators tend to use economic reasoning.¹³⁰ On the other hand, at least, for the author of this article, those who analyze the question from a cultural perspective seem to be more convincing, as Brexit seems to be a result of a certain political culture in the U.K.¹³¹ This means that the features of the E.U. and its valid criticism played a rather minor role in the decision, and most of the campaign was dominated by the anti-Enlightenment tradition. For example, it had an ethnocentric focus serving xenophobia.¹³² It was based on an irrational disinterest in economic reasoning and receptivity towards simple but failed solutions.¹³³ The latent desire to control an empire also played a role in it.¹³⁴ About this latter, Paul Beaumont wrote that “when Brits learn they once ‘ruled the world,’ the European Union’s practices of compromise compare poorly: cooperation is easily presented as subordination. Brexit can thus be understood as a radical attempt to arrest Britain’s decline by setting sail for a future based on a nostalgic vision of the past.”¹³⁵ Beaumont calls this a “post-colonial delusion.”¹³⁶ The level of domestic political discourses was also rather low: U.K. politicians made many untrue statements, like claiming that the E.U. is responsible for immigration; member states have the competency to govern it; and that the U.K. cannot control its borders because of E.U. legislation.¹³⁷ All these showed the lack of a strong commitment to the E.U.¹³⁸ Thus, the “technocratic” features of the E.U., like transparent decision-making, lack of extended social legislation, had only secondary, if not negligible relevance, compared to domestic social emotions and political culture.

Regarding all of the above, I intentionally did not want to go into details about the beneficial and less beneficial aspects of international business and trade cooperation: one could probably find examples for both of them, even if most mainstream scholars claim protectionist

¹²⁷ Jim Tankersley, *Trump Signs Revised Korean Trade Deal*, THE NEW YORK TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/us/politics/south-korea-trump-trade-deal.html>.

¹²⁸ *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Feb. 17, 2020), <https://www.bbc.com/news/uk-politics-32810887> [hereinafter BBC News].

¹²⁹ Eleonora Alabrese, Sascha O. Becker, Thimo Fetzer & Dennis Novy, *Who Voted for Brexit? Individual and Regional Data Combined*, 56 EUR. J. POL. ECON. 132 (2019); see also BBC News, *supra* note 128.

¹³⁰ Agust Arnorsson & Gylfi Zoega, *On the Causes of Brexit 2* (Ctr. for Econ. Stud. & Info. Inst., Working Paper No. 6056, 2016), https://www.econstor.eu/bitstream/10419/147310/1/cesifo1_wp6056.pdf.

¹³¹ See Inglehart & Norris, *supra* note 6.

¹³² Josh Gabbatiss, *Brexit Strongly Linked to Xenophobia, Scientists Conclude*, INDEPENDENT (Nov. 27, 2017, 5:52 PM), <https://www.independent.co.uk/news/science/brexit-prejudice-scientists-link-foreigners-immigrants-racism-xenophobia-leave-eu-a8078586.html>.

¹³³ Matthew Goodwin, *Why Immigration was Key to Brexit Vote*, THE IRISH TIMES (May 15, 2017, 1:15 PM), <https://www.irishtimes.com/culture/books/why-immigration-was-key-to-brexit-vote-1.3083608>.

¹³⁴ Gabbatiss, *supra* note 132.

¹³⁵ Paul Beaumont, *Brexit, Retrotopia and the Perils of Post-Colonial Delusions*, 3 GLOBAL AFF. 379 (2017).

¹³⁶ See generally *id.*

¹³⁷ See STEFAN AUER, *Brexit, Sovereignty and the End of an Ever Closer Union*, in BREXIT: SOCIOLOGICAL RESPONSES 47 (William Outhwaite ed., 2017).

¹³⁸ Dora Kostakopoulou, *What Fractures Political Unions? Failed Federations, Brexit and the Importance of Political Commitment*, 42 EUR. L. REV. 339 (2017).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

actions are either useless or have the potential to pull the international community into deep recession.¹³⁹ My statement at this point is that these analyses are more or less irrelevant in the policymaking of leaders representing the anti-Enlightenment tradition. If political streams have problems with nearly all of the major international organizations, as well as with all of the major trade and investment partnerships, there is a high chance it is not the latter's fault. Such a situation occurs, because lawmaking and public policy is, in several instances, based on emotional manipulation and rough dominance instead of cooperation.¹⁴⁰ René Girard researched this topic back in the seventies: he thought about scapegoating as a technique for avoiding conflict in highly polarized societies.¹⁴¹ In social psychology, scholars believe there is a special personality of leaders, socially dominant persons, S.D.O.s, who are especially successful in manipulation and make authoritarians follow them.¹⁴² The relationship between such leaders and those led is also analyzed by social identity theorists.¹⁴³ They prove that authoritarian leaders represent many of the virtues their followers like.¹⁴⁴ This also means that if many of the followers are against international cooperation (or can be influenced to think this way), leaders will also advocate against such cooperation, and the features of this cooperation become irrelevant. This means that we do not need badly working E.U. institutions for many in the U.K. to dislike the E.U., because this domestic problem has less to do with the valid criticism of the E.U.¹⁴⁵ Furthermore, we do not need negative economic effects on the U.S. for many to hate international cooperation, China, Mexico, world trade, the U.N. or immigrants from Central and South America. Recent legislation only reflects these domestic social emotions, which have deep roots in the dark side of our domestic political cultures.

B. Emotional Manipulation in Lawmaking

Another example of the work of the anti-Enlightenment tradition in action is how it uses emotions to scapegoat countries or create irrational fear. In his new book about fascist techniques, Jason Stanley describes how such political forces use a national myth for their purpose.¹⁴⁶ This myth, among others, is built by well-known elements such as the victimhood of a nation or political group, the passionate greatness of a nation, a desire to a return to a never

¹³⁹ See Bhagwati, *supra* note 98; see also Robert C. Feenstra, *How Costly is Protectionism?*, 6 J. ECON. PERPS. 159, 159-160 (1992).

¹⁴⁰ Jidong Chen & Yiqing Xu, *Information Manipulation and Reform in Authoritarian Regimes*, *Political Science Research and Methods* (MIT Pol. Science Dept. Research Paper No. 2014-21, 2015).

¹⁴¹ RENÉ GIRARD, *THE SCAPEGOAT* 14 (1986).

¹⁴² BOB ALTEMEYER, *THE OTHER AUTHORITARIAN PERSONALITY* 47, 73 (1998).

¹⁴³ ALEXANDER HASLAM, STEPHEN D. REICHER & MICHAEL J. PLATOW, *THE NEW PSYCHOLOGY OF LEADERSHIP: IDENTITY, INFLUENCE AND POWER* 50 (2010).

¹⁴⁴ Stephen D. Reicher, Michael J. Platow & S. Alexander Haslam, *The New Psychology of Leadership*, *SCIENTIFIC AMERICAN* (Aug. 1, 2007), <https://www.scientificamerican.com/article/the-new-psychology-of-leadership-2007-08/>.

¹⁴⁵ See Paul Mason, *Poland is Rewriting History – and the Consequence is the Rise of Anti-Semitism A Visit to a Concentration Camp Reveals that an Illiberal Government is Reshaping the Reality of the Holocaust.*, *NEW STATESMAN* (June 13, 2018), <https://www.newstatesman.com/world/europe/2018/06/poland-rewriting-history-and-consequence-rise-anti-semitism>; see also Hank Reichmann, *Academic Freedom Threatened in Poland* *ACADEME BLOG* (Feb. 19, 2016), <https://academeblog.org/2016/02/19/academic-freedom-threatened-in-poland/>.

¹⁴⁶ See STANLEY, *supra* note 39, at 12-3.

existed period of greatness and high level of irrationality.¹⁴⁷ Many of these elements can be used in international relations to portray countries as enemies with damaged value-systems.¹⁴⁸

In the U.S., one of the primary examples could be the recent discursive construction of China as the new “Empire of Evil,” claiming it spreads the fake news that climate change exists,¹⁴⁹ manipulates its own currency, as is generally done by the countries in the world, whose foreign students studying in the U.S. are all spies,¹⁵⁰ and which country seeks the destruction of other countries because it is an evil socialist state.¹⁵¹ The great problem with such a communicative tool is that a similar, emotion-based framing makes profound, detailed and deeper analysis of a country’s complex political and economic actions impossible. As a result of its usage, separating valid claims from dangers and misinformation becomes impossible. A perfect example of its failure was shown regarding the invasion of Iraq in 2003, then, only a handful of journalists expressed their concerns about Iraqi weapons of mass destruction, and they were called unpatriotic by the critiques.¹⁵²

Of course, the U.S. and the international community have the right to criticize human rights violations in any country, if such occur, and China is no exception to this rule either. One could also argue that it is a moral duty to do so, and that such a critique conforms to the Enlightenment tradition, even if sometimes there are inconsistencies to which countries the critique is addressed.¹⁵³ It is also not claimed here that Western countries should not defend their markets if they feel their industry would be damaged by dumped goods, or intellectual property violations. A good example of this is the E.U.–China trade dispute on solar panels, which was related to anti-dumping duties imposed by the E.U. on cheap Chinese solar panels.¹⁵⁴ In this instance, after both countries turned to the W.T.O. dispute settlement process, and China also wanted to introduce extra duties on European wine, the E.U. gradually erased anti-dumping

¹⁴⁷ See generally *id.*

¹⁴⁸ See generally *id.*

¹⁴⁹ Louis Jacobson, *Yes, Donald Trump did call climate change a Chinese hoax*, POLITIFACT (June 3, 2016), <https://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/>.

¹⁵⁰ Annie Karni, *Trump rants behind closed doors with CEOs*, POLITICO (Aug. 08, 2018), <https://www.politico.com/story/2018/08/08/trump-executive-dinner-bedminster-china-766609>; see also Paul Basken, *US universities fall in behind China security warnings*, TIMES HIGHER EDUCATION (Febr. 5, 2019), <https://www.timeshighereducation.com/news/us-universities-fall-behind-china-security-warnings>.

¹⁵¹ Donald J. Trump, President of the United States, Remarks at the 73rd Session of the United Nations General Assembly (Sept. 25, 2018).

¹⁵² Amanda Coletta, *These journalists got the Iraq war right – even as colleagues called their stories ‘fake news’*, CTV NEWS (July 27, 2018), <https://www.ctvnews.ca/entertainment/these-journalists-got-the-iraq-war-right-even-as-colleagues-called-their-stories-fake-news-1.4030705>.

¹⁵³ See EUR. COMM’N., REPORT ON MAPPING, ANALYSING AND IMPLEMENTING FOREIGN POLICY INSTRUMENTS IN HUMAN RIGHTS PROMOTION (2015), https://bim.lbg.ac.at/sites/files/bim/attachments/deliverable-6.1_mapping_analysing_and_implementing_foreign_policy_instruments_in_human_rights_promotion.pdf; see also Ignatieff, *supra* note 56; see also Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT’L L. 649 (2011); see also Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 COM. M. L. REV. 1307, 1338 (2000).

¹⁵⁴ See Tancrède Voituriez & Xin Wang, *Real Challenges Behind the EU–China PV Trade Dispute Settlement*, 15 CLIMATE POL’Y 670 (2015); see also Coraline Goron, *Fighting Against Climate Change and for Fair Trade: Finding the EU’s Interest in the Solar Panels Dispute with China*, 6 CH.-E.U. L. J. 103 (2018).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U. COMPARISON

duties.¹⁵⁵ Furthermore, the E.U. also introduced rather high duties on Chinese steel, as a follow-up to Donald Trump's measures; E.U. duties are between 18.1 and 35.9 percent.¹⁵⁶ Moreover, it also uses defense measures against several other goods.¹⁵⁷ On the other hand, there are serious talks about a Comprehensive E.U.–China Investor Treaty as well: this means that the two parties handle each other as partners in their official communication.¹⁵⁸ Talking in an offensive, derogatory language would not serve European or international interests. Contrary to this, in U.S. foreign policy, an aggressive, nationalistic and emotional communicative framing has begun to be used recently in order to scapegoat countries and companies. Actions against China must be interpreted in this framework. Such actions are based on a tradition of emotions already present during the Cold War: they use fear of a great enemy as was done by McCarthyism, Ronald Reagan and the Chinese Exclusion Act of 1882, which limited the migration of Chinese until its repeal in 1943.¹⁵⁹

From this perspective, it seems rather obvious why the trade war between China and the U.S. escalated. More than \$360 billion USD worth of goods and certain sectors have been negatively affected in a relatively short period of time.¹⁶⁰ According to some experts, “[f]rom a legal perspective, a 45% tariff cannot be justified under the legal regime of the World Trade Organization as such a tariff runs afoul of the tightly regulated regime of authorized trade sanctions,”¹⁶¹ especially because the tariffs affect about 50% of imported Chinese goods. Use of the exceptional clauses set in Section 201 or 202 of the Trade Act of 1974 is not necessarily a violation of W.T.O. rules. This is especially true of the exceptions set in Art. 6, 16, 20 and 21 of GATT 1994. However, the overall sense and purpose of such actions seem to be rather dubious.¹⁶²

The actions against Huawei, and its executive Meng Wanzhou, also show how this framework operates. In this case, U.S. prosecutors accused Meng Wanzhou of violating U.S. sanctions against Iran. Accusations include, misleading banks required for money transfers and stealing trade secrets during a 2012 case involvement a settlement between Telecom and Huawei in 2017.¹⁶³ In 2018, President Trump signed a bill banning U.S. government officials from using Huawei and ZTE devices. This included a complete ban of ZTE products (another

¹⁵⁵ Philip Blenkinsop, *EU Ends Trade Controls on Chinese Solar Panels*, REUTERS (Aug 31, 2018), <https://www.reuters.com/article/us-eu-china-trade/eu-ends-trade-controls-on-chinese-solar-panels-idUSKCN1LGIQM>; see also Goron, *supra* note 154, at 111.

¹⁵⁶ European Commission Press Release IP/18/4563, *Trade: Commission Imposes Provisional Safeguard Measures on Imports of Steel Products* (Jul. 18, 2018); see also *EU ups import tariffs on China steel*, DW (Apr. 6, 2017), <https://www.dw.com/en/eu-ups-import-tariffs-on-china-steel/a-38321597>.

¹⁵⁷ *Trade defence*, EUR. COMM'N (Nov. 28, 2019), <http://trade.ec.europa.eu/tdi/>.

¹⁵⁸ Jim Brunsten, Michael Peel & Alan Beattie, *EU-China investment treaty talks in jeopardy*, FINANCIAL TIMES (Dec. 17, 2019), <https://www.ft.com/content/903220c0-20b9-11ea-92da-f0c92e957a96>.

¹⁵⁹ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); see also LON KURSASHIGE, *TWO FACES OF EXCLUSION: THE UNTOLD HISTORY OF ANTI-ASIAN RACISM IN THE UNITED STATES* (2016).

¹⁶⁰ See Chunding Li et al., *Economic Impacts of the Possible China–US Trade War*, 54 EMERGING MKTS., FIN. & TRADE 1557 (2018).

¹⁶¹ Daniel C.K. Chow et al., *A Legal and Economic Critique Of President Trump's China Trade Policies*, 79 UNIV. PITT. L. REV. 205 (2017).

¹⁶² See Trade Act of 1974, 19 U.S.C. 2101, §§ 201-202 (1975).

¹⁶³ See Shona Ghosh, *Huawei is accused of attempting to copycat a T-Mobile robot, and the charges read like a comical spy movie*, BUSINESS INSIDER (Jan. 29, 2019), <https://www.businessinsider.nl/us-indictment-against-huawei-t-mobile-reads-spy-movic-2019-1/?international=true&r=US>.

Chinese company) enforced for three months in 2018.¹⁶⁴ It is not claimed here that the U.S. should ignore violations of its laws, such as engagement in industrial espionage. However, further analysis of the portrayal of Huawei as an extreme national threat seems to constitute an overreaction. While it is possible for Chinese industrial espionage activity to take place in the U.S.,¹⁶⁵ it seems unlikely given inability of the 2012 House of Representatives Intelligence Committee Report on Huawei and ZTE to establish claims of widespread dangers.¹⁶⁶ There is a high chance that dangers would be discovered quickly because much of the electric equipment used in Europe and the U.S. is produced in China. This is also true regarding 5G technology. Recently, Germany and the UK allowed Huawei to stay in their markets. In contrast, New Zealand and Australia excluded the company from their 5G network development.¹⁶⁷ However, as Robert Hannigan, the former head of the UK Government Communications Headquarters' National Cyber Security Centre stated:

[t]here will need to be sensible restrictions on exactly where foreign technology is deployed [in network infrastructure] and a diversity of providers so that there is no single point of failure or potential leverage... But assertions that any Chinese technology in any part of a 5G network represents an unacceptable risk are nonsense.¹⁶⁸

Modern (industrial) espionage simply does not work this way. Consequently, the E.U. continues its 5G-Drive project, a research cooperation with China in the framework of its H2020 research programme.¹⁶⁹

Moreover, sanctioning the Huawei executive because of violations against sanctions on Iran seems ineffective due to the fact that many countries, including the E.U. member states, did not join the U.S. sanctions and continue to follow the 2015 Iran nuclear deal, known as the Joint Comprehensive Plan of Action ("J.C.P.O.A."). Europe focuses on creating a special payment vehicle to avoid U.S. interference in Iran-related business and to manage the transfer of financial assets without U.S. interference.¹⁷⁰ The E.U. also adopted a Blocking Statute

¹⁶⁴ See Jacob Kastrenakes, *Trump signs bill banning government use of Huawei and ZTE tech*, THE VERGE (July 13, 2018), <https://www.theverge.com/2018/7/13/17565450/zte-trade-ban-lifted-us-commerce-department-trump>; see also Jacob Kastrenakes, *US Lifts Trade Ban on ZTE in Controversial Deal with Chinese Phone Maker*, THE VERGE (July 13, 2018), <https://www.theverge.com/2018/7/13/17565450/zte-trade-ban-lifted-us-commerce-department-trump>.

¹⁶⁵ See *United States v. Dongfan Chung*, 633 F. Supp. 2d 1135 (C.D. Cal. 2009); see also THE IP COMMISSION REPORT 40 (Dennis C. Blair & Jon M. Huntsman eds., 2013).

¹⁶⁶ See CHAIRMAN MIKE ROGERS, 112TH CONG., INVESTIGATIVE REP. ON THE U.S. NAT'L SECURITY ISSUES POSED BY CHINESE TELECOMM. COMPANIES HUAWEI AND ZTE (2012).

¹⁶⁷ See Chloe Taylor, *Germany says it's not ready to block Huawei from its 5G network*, CNBC (Feb. 19, 2019), <https://www.cnbc.com/2019/02/19/germany-says-its-not-ready-to-bar-huawei-in-potential-us-snub.html>.

¹⁶⁸ Chua Kong Ho, *Former British Surveillance Head Says Calls to Freeze Chinese Companies Out of 5G Telecoms in Western Countries are 'Short on Technical Understanding'*, SOUTH CHINA MORNING POST (Feb. 13, 2019), <https://www.scmp.com/tech/article/2185916/former-uk-surveillance-head-says-calls-freeze-chinese-companies-out-telecoms>.

¹⁶⁹ See Keegan Elmer, *China-EU 5G research project to continue despite growing concerns about Huawei*, SOUTH CHINA MORNING POST (Feb. 10, 2019), <https://www.scmp.com/news/china/diplomacy/article/2185524/china-eu-5g-research-project-continue-despite-growing-concerns>.

¹⁷⁰ See Steven Erlanger, *As U.S. Sanctions on Iran Kick in, Europe Looks for a Workaround*, N.Y. TIMES (Nov 5, 2018), <https://www.nytimes.com/2018/11/05/world/europe/us-iran-sanctions-europe.html>.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

entered into on August 7, 2018. The purpose of this statute is to mitigate the impact of these sanctions on the interests of E.U. companies doing legitimate business in Iran".¹⁷¹

This means that there could be several reasons behind the U.S. actions against China such as stopping the economic growth of the greatest competitor of the U.S.,¹⁷² blocking Huawei from developing a 5G mobile-network in Canada,¹⁷³ protecting American companies' interests,¹⁷⁴ or forcing China to stabilize the Yuan exchange rate.¹⁷⁵ However, any ban or limitation of a company from the market of a country should be based on sound proof of the effective danger. It should be adopted in proper legal form and should not be part of an overall strategy against other countries.¹⁷⁶ Investor protection can be achieved with less aggressive measures.¹⁷⁷ The enlightened principle of individual treatment of persons, companies, and countries should not be neglected due to emotional reasons. Instead of scapegoating and coercion, cooperation and understanding should prevail.

In spite of U.S. cooperation, paranoia was still visible in Europe during the negotiations of the Transatlantic Trade and Investment Partnership (T.T.I.P.) leading to demagogue statements concerning the partnership's contents.¹⁷⁸ In 2006, a W.T.O. dispute settlement found that the E.U. ban on Genetically Modified Organism (G.M.O.) food was contrary to W.T.O. rules. This specifically contradicted Article 20 of the General Agreement on Tariffs and Trade (G.A.T.T.) on government actions protecting human, animal or plant life or health and several provisions of the W.T.O. Sanitary and Phytosanitary Measures Agreement.¹⁷⁹ It was contrary because the E.U. could not prove that G.M.O. food was harmful to human health.¹⁸⁰ In response the E.U. changed strategy. E.U. member states have

¹⁷¹ See Commission Regulation 2018/1101, 2018 O.J. (L 199).

¹⁷² See Michael T. Klare, *The United States Is Already at War With China*, THE NATION (Feb. 18, 2019), <https://www.thenation.com/article/the-us-is-already-at-war-with-china/>.

¹⁷³ See Robert Fife et al., *China Threatens Reprisals if Canada Bans Huawei from its 5G Networks*, THE GLOBE AND MAIL (Jan. 17, 2019), <https://www.theglobeandmail.com/politics/article-china-threatens-reprisals-if-canada-bans-huawei-from-its-5g-networks/>.

¹⁷⁴ See Samuel Gibbs, *Huawei Beats Apple to Become Second-largest Smartphone Maker*, THE GUARDIAN (Aug. 1, 2018), <https://www.theguardian.com/technology/2018/aug/01/huawei-beats-apple-smartphone-manufacturer-samsung-iphone>.

¹⁷⁵ See Karen Yeung, *Donald Trump's Demand for Stable Yuan to End US-China Trade War 'Acceptable' to Beijing*, SOUTH CHINA MORNING POST (Feb. 21, 2019), <https://www.scmp.com/economy/china-economy/article/2186954/donald-trumps-demand-stable-yuan-end-us-china-trade-war>.

¹⁷⁶ See *Huawei: U.S. Blacklist Will Harm Billions of Consumers*, BBC NEWS (May 29, 2019), <https://www.bbc.com/news/business-48441814>.

¹⁷⁷ See Wendy Wu & Keegan Elmer, *China Releases Details of New Law on Foreign Investment Ahead of Trade Talks with US*, SOUTH CHINA MORNING POST (Dec. 27, 2018), <https://www.scmp.com/news/china/article/2179723/china-releases-details-new-law-foreign-investment-ahead-trade-talks-us>.

¹⁷⁸ See Tamas Dezso Ziegler, *The TTIP and Its Public Criticism: Anti-Globalist Populism versus Valid Dangers*, 2 STUD. IN INT'L ECON. 19, 47 (2016).

¹⁷⁹ See Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Sept. 29, 2006).

¹⁸⁰ See Meredith Kolsky Lewis et al., *Environmental Protection or Veiled Protectionism?*, 35 MICHIGAN J. OF INT'L L. 580, 625 (2013-14).

been allowed to ban G.M.O. food¹⁸¹ and create an authorization system since 2010.¹⁸² This system probably does not conform to W.T.O. law, but the U.S. did not take action to fight the G.M.O. laws.¹⁸³ Even so, many Europeans feared that the U.S. would use the T.-T.I.P. negotiations to attack E.U. laws and break through the national G.M.O. regulations.¹⁸⁴

This fear could be a symbol of misunderstanding social threats. First, even at the beginning of negotiations, the parties expressed their views that G.M.O.s would not be covered by the agreement. Second, the competency to decide on such questions is in the hands of member state governments, and the E.U. could not change this as easily as portrayed.¹⁸⁵ Third, there is no sound scientific evidence that supports the ban of these goods: there is no proof that G.M.O.'s are harmful. In the light of the E.U.– U.S. beef hormone dispute, one could argue that some G.M.O. foods could be discovered to be harmful in the future.¹⁸⁶ However, the E.U. was unable to prove the detrimental effects of hormones to health, except one hormone was found problematic, the E.U. still maintains the import ban.¹⁸⁷ Moreover, the E.U. uses a libertarian paternalist approach regarding the labeling of G.M.O. products.¹⁸⁸ G.M.O. content must be displayed on the package of the product – and there is no intention to change this – to provide the consumers receive information about the content of their food.¹⁸⁹ Still, in public disputes, beside other unfounded arguments, American G.M.O.s became the bogeyman of transatlantic commerce and one reason why the conclusion of T.T.I.P. should be blocked.¹⁹⁰

It is not claimed here that opponents of G.M.O. imports do not have some valid points.¹⁹¹ What is claimed is that it is wrong to build policymaking on fear and high emotions in nearly hysteric disputes, and portray those who do not accept an opinion as promoters of foreign corporate interests. Whatever position we accept, we should analyze facts. Jason Stanley writes about conspiracy theories in his new book, citing Giulia Napolitano that:

Conspiracy theories function to denigrate and delegitimize their targets, by connecting them, mainly symbolically, to problematic acts. Conspiracy

¹⁸¹ See European Commission Press Release IP/10/921, GMOs: Member states to be given full responsibility on cultivation in their territory (Jul. 13, 2010).

¹⁸² See GMO AUTHORISATIONS FOR CULTIVATION, http://ec.europa.eu/food/plant/gmo/authorisation/cultivation/index_en.htm.

¹⁸³ See *Restrictions on Genetically Modified Organisms: United States*, LIBR. OF CONG., <https://www.loc.gov/law/help/restrictions-on-gmos/usa.php> (last visited Feb. 19, 2020).

¹⁸⁴ Bart Staes Mep & Maria Heubuch Mep, *US Using TTIP as Vehicle to Attack European GMO Laws*, THE GREENS-EUROPEAN FREE ALLIANCE, <http://ttip2016.eu/blog/GMOs%20TTIP%20EFSA.htm> (last visited Mar. 5, 2020).

¹⁸⁵ EUROPEAN COMMISSION, *The European Union: What it is and What it Does*, <https://op.europa.eu/webpub/com/cu-what-it-is/en/#chapter3> (last visited Feb. 19, 2020).

¹⁸⁶ CONG. RESEARCH SERV., R40449, THE U.S.-EU BEEF HORMONE DISPUTE 2-3 (2017).

¹⁸⁷ *Id.*

¹⁸⁸ Commission Regulation 1830/2003 of Sept. 22, 2003 (concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC, 2003 O.J. (L268) 24, 26).

¹⁸⁹ *Id.*

¹⁹⁰ See Alberto Alemanno & Jonathan B. Wiener, *The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory*, 78 L. & CONTEMP. PROBS. 103, 104 (2015).

¹⁹¹ See generally Million Belay & Ruth Nyambura, *GM Crops Won't Help African Farmers*, THE GUARDIAN (Jun. 24, 2013), <https://www.theguardian.com/global-development/poverty-matters/2013/jun/24/gm-crops-african-farmers> (G.M.O.s and their patents' can have negative effects on agriculture).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

theories do not function like ordinary information: they are, after all, often so outlandish that they can hardly be expected to be literally believed. Their function is rather to raise general suspicion about the credibility and the decency of their targets.¹⁹²

In this G.M.O. dispute we find some Europeans simply fearing hunger, disease, and the goal of preventing the collapse of E.U. agriculture. While demagogues, among others, push the narrative of an evil, corporate-dominated U.S. empire. This emotionally manipulative oversimplification by anti-Enlightenment thinkers make sound policy analysis impossible and decision-making irrational.

C. Chauvinism and the Discrimination of Foreign Goods and Companies

The politics of anti-Enlightenment has the potential to complicate international commerce for companies and traders. This is especially true regarding the foreign affiliates of these companies. The reason being that many anti-Enlightened ideas can be used to push foreign investors out of a country. For example, authoritarianism is good to introduce into a market without moral restraint or respect for democratic control and empathy towards those affected by legislation. Nationalism and chauvinism comes in handy to reason such policies and make people believe they are beneficial for the nation, or to put it another way, it is useful to hide the fact that in a number of cases nationalist measures are economically not viable, or not beneficial for consumers.¹⁹³ Moreover, an aggressive form of social-Darwinism applied to business helps to portray connections with foreign business actors as a war, where someone must win, and the other(s) shall lose. Finally, scapegoating foreign actors is useful in portraying them as selfish, and not caring about “the nation” – even if these companies pay tax or provide work for the workers. As a result, they must not be handled individually. Nations have tried to counter such actions by concluding international Business Investment Treaties (“B.I.T.s”) and there exist about three thousand of these treaties worldwide.¹⁹⁴ Around 1400 B.I.T.s were concluded by E.U. member states,¹⁹⁵ and around 120 were concluded by the U.S.¹⁹⁶ In the E.U., member states must terminate the B.I.T.s they concluded among themselves, and the recent

¹⁹² STANLEY, *supra* note 39, at 58.

¹⁹³ See GARRETT WORKMAN, ECONOMIC NATIONALISM: TRANSATLANTIC RESPONSES TO THE FINANCIAL CRISIS IN COMPARATIVE PERSPECTIVE 32 (Gary Marks et al. eds., 2009).

¹⁹⁴ See INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR, *United States of America—Bilateral Investment Treaties*, <https://investmentpolicyhub.unctad.org/> (last visited Feb. 20, 2020); see also US-CHINA BUS. COUNCIL, *Bilateral Investment Treaties: What They Are and Why They Matter*, <https://www.uschina.org/reports/bilateral-investment-treaties-what-they-are-and-why-they-matter> (last visited Feb. 20, 2020).

¹⁹⁵ See EUROPEAN COMMISSION, *Directorate-General for Trade*, <http://ec.europa.eu/trade/policy/accessing-markets/investment/> (last visited Feb. 18, 2020); see also Commission Regulation 1219/2012 of Dec. 12, 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2012 O.J. (L 351) 40.

¹⁹⁶ See INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR, *Bilateral Investment Treaties (BITS)*, <https://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu> (last visited Feb. 18, 2020).

case law, especially the Achmea case, also underline this aim and disregards the investor-dispute settlement clauses in such treaties.¹⁹⁷

In the U.S., interestingly, the tenets of this aspect of the anti-Enlightenment tradition seem to be somewhat lighter than in Europe. Probably, the reason for this is that in U.S. thinking, “economic freedom” is very closely connected to other “freedoms.” This means that whatever we think about these works, we can also think about Friedrich Hayek’s *Road to Serfdom*,¹⁹⁸ or Milton Friedman’s *Capitalism and Freedom*,¹⁹⁹ which both connect general freedom and economic freedom as works based very strictly on a U.S. cultural tradition connected to the market. For example, the journalist Edwin Lawrence Godkin (1831–1902), founder of *The Nation*, writes about freedom to conduct business in the nineteenth century, saying that “the market, not democratic politics, was the true realm of freedom.” liberty meant “the liberty to buy and sell, and mend and make, where, when and how we please, without interference by the state.”²⁰⁰ While social policies change in time, it seems that even today a radical introduction into the markets still has less political support in the U.S. than in many parts of Europe. This affects interstate and foreign commerce as well.

The federal regulation of interstate-commerce in the U.S. has a longer tradition than regulating E.U. member state commerce.²⁰¹ Article I, Section 8, Clause 3 of the Constitution says that the Congress shall have Power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁰² Probably, apart from the unified federal system, this is one reason why it is handled more effectively than in Europe. As Peter W. Hutchins and Patrick J. Kenniff put it:

Between 1877 and 1886 there were some fourteen cases in which state regulations of commerce were held invalid, most of them for the reason that the subject in question was national in character. Thus the Philadelphia and Reading Rail Road Case (1873)²⁰³ impaired states’ powers to tax interstate business activity by outlawing freight tonnage taxes on interstate shipments. The Pensacola Telegraph Case (1877)²⁰⁴ precluded states from granting telegraph monopolies while the Wabash Case (1886)²⁰⁵ effectively forbade the states to regulate interstate railroad rates... In 1890 the Congress passed the Sherman Act to protect trade and commerce against unlawful restraints and monopolies.²⁰⁶

¹⁹⁷ *Commission Provides Guidance on Protection of Cross-Border EU Investments—Questions and Answers*, at 9-10 (July 19, 2018), http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm; see also *Slowakische Republik v. Achmea BV*, [2018] Case C-284/16 (Ger.).

¹⁹⁸ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM WITH THE INTELLECTUALS AND SOCIALISM* 35 (1944).

¹⁹⁹ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 10 (Ralph Raico eds., 1961).

²⁰⁰ Foner, *supra* note 55, at 120.

²⁰¹ *Gonzales v. Raich*, 125 S.Ct. 2195, 2199 (2005).

²⁰² *Id.*

²⁰³ *Reading R.R. Co. v. Pennsylvania*, 82 U.S. 232 (1872).

²⁰⁴ *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1 (1877).

²⁰⁵ *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886).

²⁰⁶ Peter W. Hutchins & Patrick J. Kenniff, *The Concept of Interstate Commerce: A Case Study of Judicial Review in Canada, the United States and Australia*, 10 LES CAHIERS DE DROIT 714 (1969).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

Of course, we can apprehend different periods regarding the interpretation of the interstate commerce clause.²⁰⁷ However, discrimination of goods and companies in interstate relationships are still not an issue in the U.S. as it is in Europe, where states tend to introduce nationalistic policies.²⁰⁸ In the U.S., most of the disputes are about special questions that would belong to “public policy” problems under E.U. law.

Regarding foreign investors, the notion to help the situation of domestic producers has always been present, like the many “Buy American” programs that have been introduced in U.S. history. For example, in 1933, the Buy American Act²⁰⁹ set out that federal authorities may only buy national products in public procurements. Later, in 1979, the Trade Agreements Act²¹⁰ modified the exclusivist nature of the law so that it allowed trade agreements to rule differently. President Obama introduced similar measures: as part of his U.S. Stimulus and Economic Recovery Program, the American Recovery and Reinvestment Act²¹¹ “require[d] all public projects created under the package to use iron and steel produced in the United States.”²¹² In 2017, President Trump introduced the Executive Order Buy American and Hire American, and instructed the administration to analyze the effect of trade agreements on his policies.²¹³ As Section 2(a) states:

[i]n order to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases, it shall be the policy of the executive branch to maximize, consistent with law, through terms and conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States.²¹⁴

However, taking everything into consideration, apart from the protectionist measures mentioned earlier, these measures do not form a complete system of exclusion.

In contrast to them, in Europe, the anti-Enlightenment tradition produced some great examples of exclusivist market policies, especially in those countries where nationalistic lawmaking dominated. In the E.U., the basics of intra-E.U. commerce are set in the Treaty on the Functioning of the European Union (“TFEU”), which creates a framework for the single

²⁰⁷ Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 WM. & Mary Bill of Rts. J. 403, 403-04, 409, 415 (2002).

²⁰⁸ Andrew Fan, *Raich v. Gonzales: Ramifications on Future Commerce Clause Jurisprudence and Congressional Regulation*, 4 UCIL FORUM J. 69, 71 (2006) (exemplifying the internal US intrastate trade issues, which remains a jurisprudence question. However, the EU trade by or between member states is flatly prohibited and each member state designates the EU as its representative in international trade agreements); see also Swati Dhingra, *Trade Deals with Third Countries*, THE UK IN A CHANGING EUROPE (Sept. 19, 2017), <https://ukandeu.ac.uk/explainers/trade-deals-with-third-countries/#>.

²⁰⁹ Buy American Act, 41 U.S.C. §§ 8301-05 (2018).

²¹⁰ Trade Agreements Acts of 1979, 19 U.S.C. §§ 2501-81 (2018).

²¹¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1605, 123 Stat. 115 (2009).

²¹² See Okezie Chukwumerije, *Obama's Trade Policy: Trends, Prospects, and Portends*, 16 U.C. DAVIS J. OF INT'L L. & POL'Y 39, 50 (2009).

²¹³ Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017).

²¹⁴ *Id.*

European market of four freedoms.²¹⁵ According to the TFEU, goods, services, capital and persons may move freely, at least, in theory.²¹⁶ Moreover, Article 28 of the TFEU says that the E.U. shall comprise a customs union that shall cover all trade in goods. Furthermore, all discriminating taxes or quantitative restrictions on imports or exports and measures having equivalent effect shall be prohibited among member states.²¹⁷ The TFEU also prohibits states from limiting the freedom to establish nationals of other member states, meaning the member states may establish companies freely.²¹⁸ Article 54 of the TFEU states that such companies must be treated without discrimination, just as natural persons would be treated in the EU. The regulations are so strict that according to the *Buy Irish* case, if the government supports an advertisement campaign for domestic goods financially, the advertisement of those goods is prohibited.²¹⁹ In the E.U., there were occasional protests against these rules, as many of them have the potential to hurt the domestic interests of companies. For example, member states tried to discriminate in tax law,²²⁰ exploit regulatory rules to introduce latent discrimination,²²¹ and asked for extra documents regarding trade in goods.²²² In a number of cases, these conflicts led to physical attacks against importers. For example, in a case back in 1995, the European Court of Justice ruled that France failed to protect foreign fruit importers from attacks, which was a violation of its obligation set in primary legal sources of the European Economic Community ("EEC").²²³ Interestingly, similar attacks recently occurred in France recently.²²⁴

Some other actions were intended not to attack import goods, but to keep foreign investors out of certain sectors.²²⁵ Some of the most cited cases of E.U. law are the *Factorame* judgments from the 1990s in which the U.K. wanted to keep out Spanish fishing companies,²²⁶ as well as the golden shares cases where states wanted to maintain control over companies.²²⁷ However, in all of these cases, even with the heated debates surrounding them, the resistance against the European free market did not form an overreaching, intact system of legal exclusion

²¹⁵ See Consolidated Version of the Treaty on the Functioning of the European Union art. 26, Oct. 26, 2012, 2012 O.J. (C 326) 47, at art. 59 [hereinafter TFEU].

²¹⁶ See Fredrik Erixon & Rositsa Georgieva, *What is Wrong With the Single Market?* 2-3 (Five Freedoms Project at ECIPE, Working Paper No. 1/2016, 2016), <https://ecipe.org/publications/wrong-single-market/>.

²¹⁷ See TFEU, *supra* note 215, at art. 34-5.

²¹⁸ *Id.* at art. 49.

²¹⁹ See Case 249/81, *Comm'n v. Ireland*, 1982 E.C.R. 4005; see also Janja Hojnik, *Free Movements of Goods in a Labyrinth: Can Buy Irish Survive the Crises?*, 49 COMMON MKT. L. REV. 291, 304-05 (2012).

²²⁰ See Case 112/84, *Michel Humbolt v. Directeur des services fiscaux*, 1985 E.C.R. 1367.

²²¹ See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

²²² See Case 8-74, *Procureur du Roi v. Benoît and Gustave Dassonville*, 1974 E.C.R. 837.

²²³ See Case C-265/95, *Comm'n v. French Republic*, 1997 E.C.R. I-6959.

²²⁴ See *Spanish Agricultural Sector Demands Sanctions Against French Attacks*, FRESH PLAZA (July 8, 2014), <https://www.freshplaza.com/article/123244/Spanish-agricultural-sector-demands-sanctions-against-French-attacks/>.

²²⁵ See Belinda Robinson, *Macron Attacks Italy: EU Cracks Appear as French Leader Takes on Italians in Shipyard Row*, EXPRESS (July 28, 2017), <https://www.express.co.uk/news/world/833794/Emmanuel-Macron-angered-Italy-STX-France-shipyard-Atlantic-coast-Fincantieri-takeover>; see also Giulia Segreti, *Italy Court Confirms Suspension of Telecom Italia Fine Over Vivendi Control*, REUTERS (July 5, 2018), <https://www.reuters.com/article/us-telecom-italia-vivendi-fine/italy-court-confirms-suspension-of-telecom-italia-fine-over-vivendi-control-idUSKBN1JV0V0>.

²²⁶ See Case C-213/89, *The Queen v. Sec'y of State for Transp. ex parte Factorame Ltd.*, 1990 E.C.R. I-2433; see also Case C-221/89, *The Queen v. Sec'y of State for Transp. ex parte Factorame Ltd.*, 1991 E.C.R. I-3905.

²²⁷ See Carsten Gerner-Beuerle, *Shareholders Between the Market and the State. The VW Law and Other Interventions in the Market Economy*, 49 COMMON MKT. L. REV. 97, 97-109 (2012).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

regarding certain sectors in these states, and in most of the cases, after some negotiations, the countries adhered to the requirements of their E.U. membership.

In contrast, Hungary's recent changes in the agenda of policymaking show how strongly rule of law backsliding and attacks against democratic institutions can affect the market.²²⁸ No wonder the number of procedures in front of the International Centre for Settlement of Investment Disputes ("ICSID") against Hungary is high, especially compared to other states in Europe.²²⁹ Here, exaggerated nationalism and exclusion of foreign investors mixed with trade protectionism has become the new norm in certain sectors. As Lambert van Nistelrooij, a Member of the European Parliament:

Hungary's pending infringements amount to a grand total of 66. This is because Mr. Orbán's economic policies typically prescribe the deliberate targeting of sectors with foreign ownership with heavy-handed regulation and taxes, often leaving behind them a legal limbo in respect of Union law... Fundamental rights apply to all people, asylum seekers, employees, the media and investors alike.²³⁰

The two areas most affected are the banking and supermarket sectors. Interestingly, in other sectors (such as the automobile industry, where there is a strong German presence without Hungarian competitors), the state remains by far more welcoming, and even helps foreign investors with financial assets.²³¹ Regarding the banking sector, the Hungarian government and the Head of the National Bank expressed their desire to change the banking system, and to have most banks owned by domestic investors. Several steps were taken to align with this agenda. The Hungarian state bought banks and, in a number of cases, resold some of them to government-friendly businessmen.²³² In the supermarket sector, several measures were introduced to favor local supermarket chains. For example, a new tax system was introduced, which favored domestic, franchise-style supermarket chains instead of affiliates of foreign companies. The corporate tax was high on the latter and low on the former.²³³ After the E.U.

²²⁸ See TAMAS DEZSO ZIEGLER, *An Autocracy in the Single European Market—A Rationality Paradox?*, in THE INFLUENCE AND EFFECTS OF EU BUSINESS LAW IN THE WESTERN BALKANS—CONFERENCE PROCEEDINGS OF THE 1ST EU BUSINESS LAW FORUM 203, 204-06 (Judit Glavantis, Balázs Horváthy & László Knapp eds., 2018).

²²⁹ See Csongor István Nagy, *Hungarian Cases Before ICSID Tribunals: The Hungarian Experience with Investment Arbitration*, 58 HUNG. J. L. STUD. 291 (2017); see also ICSID, *The ICSID Caseload-Statistics (Special Focus—European Union)* 7 (World Bank, Working Paper No. 93628, 2014).

²³⁰ Lambert van Nistelrooij, *Problems with Hungary Affect EU Single Market Too*, EURACTIV (Apr. 27, 2017), <https://www.euractiv.com/section/justice-home-affairs/opinion/problems-with-hungary-affect-eu-single-market-too/>.

²³¹ See *Gov't Agrees with BMW to Support Debrecen Investment*, BUDAPEST BUS. J. (Sept. 24, 2018), https://bbj.hu/business/govt-agrees-with-bmw-to-support-debrecen-investment_155343.

²³² See György Matolcsy's Cousin, *Lieutenant Buy Shares on Credit in Bank Recapitalized at Taxpayer Expense*, BUDAPEST BEACON (May 6, 2017), <https://budapestbeacon.com/gyorgy-matolcsys-cousin-lieutenant-buy-shares-on-credit-in-bank-recapitalized-at-taxpayer-expense/>.

²³³ See 2014 O.J. (C 93) I, 10.

criticized the tax, it was abolished, and later reintroduced with a new name called the “food-chain inspection fee.”²³⁴ The E.U. started an infringement procedure in this case.²³⁵

Other chauvinist measures favoring domestic supermarkets included a ban on unprofitable supermarket chains spanning over any two-year period and a ban on the building of additional supermarkets or superstores.²³⁶ Both measures favored domestic supermarket chains and tried to stop foreign chains from entering the market of the member state. Lastly, a voucher system was introduced that assisted domestic companies. As some of the discriminated companies sued the state, there were E.U.²³⁷ and I.C.S.I.D. procedures.²³⁸ In the UP case and Sodexo case, the I.C.S.I.D. ordered the Hungarian state to pay compensation in the amounts of €23 million and €73 million, respectively.²³⁹ Even when these discriminative rules were first introduced, it was glaringly obvious to most experts that the Hungarian state was in breach of not only foreign investment rules, but also E.U. law.

In most of these cases, however, enforcing E.U. law resembles a kind of cat-and-mouse game between E.U. institutions and uncooperative member states. Knowing that European authorities historically take years to decide such cases, there is an opportunity for member state governments to exploit this blind spot by excluding foreign businesses from their markets. If years pass until a judgment is rendered, as we have seen in these cases, investors become exposed and face potential negative returns. As a result, even if their activity is not banned, they can be forced to leave the country. Many of these actions, at first glance, seem to be legal as they were adopted in proper legal procedures.²⁴⁰ However, if we analyze the systemic nature of the exclusion, we discover that they are illegal under E.U. law, which has supremacy above member state law in Europe, and they also breach B.I.T.s. If an E.U. law and member state law is in conflict, the member state law must be set aside, akin to how U.S. federal law preempts U.S. state laws. From this perspective, actions inconsistent with E.U. law can be part of a system of carefully planned legal chicanery. The lesson exemplified here is that it is all too common for political forces of the anti-Enlightenment to deliberately introduce measures moving between legal and illegal terrain, turning established rules upside down and undermining established rules of law for their own benefit. As a result, certain groups of

²³⁴ See Ziegler, *supra* note 70, at 13.

²³⁵ See European Commission Press Release IP/15/5375, State Aid: Commission Opens Two in-Depth Investigations into Hungary’s Food Chain Inspection Fee and Tax on Tobacco Sales (July 15, 2015).

²³⁶ See BALÁZS ÁRON KOVÁCS ET AL., HUNGARY – NATIONS IN TRANSIT 287 (2015); see also *Commission opens new infringement procedure against Hungary*, FREE HUNG. (Apr. 24, 2014 3:12 PM), <http://freehungary.hu/index.php/component/content/article/56-hirek/2832-commission-opens-new-infringement-procedure-against-hungary>.

²³⁷ See European Commission Press Release IP/13/578, Internal Market: The Commission has Brought Hungary Before the Court of Justice to Contest Restrictive Conditions on the Issue of Luncheon Vouchers and Other Benefits in Kind (June 20, 2013).

²³⁸ See Sarthak Malhotra, *ICSID tribunal finds Hungary in breach of expropriation clause in France–Hungary BIT*, INV. TREATY NEWS (Dec. 21, 2018), <https://www.iisd.org/itm/2018/12/21/icsid-tribunal-finds-hungary-in-breach-of-expropriation-clause-in-france-hungary-bit-sarthak-malhotra/>; see also Caroline Simson, *France’s Edenred Wins \$24M In Arbitration Against Hungary*, LAW360 (Dec. 16, 2016, 5:54 PM), <https://www.law360.com/articles/873879/france-s-edenred-wins-24m-in-arbitration-against-hungary>.

²³⁹ See Malhotra, *supra* note 238; see also *Hungary to pay Sodexo EUR 73 mln in arbitration ruling*, BUDAPEST BUS. J. (Feb. 6, 2019, 2:15 PM), https://bbj.hu/news/hungary-to-pay-sodexo-eur-73-mln-in-arbitration-ruling_161129.

²⁴⁰ See *Hungary’s Top Tax Auditor in Corruption Scandal*, ÁTLÁTSZÓ (Nov. 25, 2014), <https://english.atlatszo.hu/2014/11/25/hungarys-top-tax-auditor-in-corruption-scandal/>.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

domestic companies are put into monopoly positions, causing foreign companies to endure harm from this “illegal legality.”

D. Favoritism and the Legal Background of Oligarchization

Bertram Myron Gross published a noteworthy book in 1980, entitled *Friendly Fascism: The New Face of Power in America*, where in his dystopia he highlights the framework of an oppressive governmental system based upon corporate privilege.²⁴¹ In his system, on the one hand, there are highly influential corporations, like representatives of the arms industry, that distort politics, and, on the other hand, there is the consumerization of everyday people who are not interested in the broader perspectives of society. In this dystopia, while people are preoccupied in the consumer culture, corporations are free to dominate legislation. Regardless of our perceptions surrounding such a dark vision, the idea is remarkable in that a certain kind of oligarchization nearly always forms when forces of the anti-Enlightenment tradition gain power. With regard to the profits of companies having strong connections with the Nazis in Germany, Thomas Fergusson and Hans-Joachim Voth wrote that:

[b]y international standards, the value of connections with the Nazi party was unusually high. Comparison with the results of Faccio (2006)²⁴² suggests that in her sample of 47 countries from around the globe, only Third World countries with poor governance showed similarly high returns.²⁴³

In fascist Italy, similar tendencies were noticed in the well documented account corruption in its system.²⁴⁴ As Christopher Duggan put it:

[d]espite the regime’s claims to be forging new men and women and ridding the country of the vices that had bedeviled liberal Italy, corruption and clientelism proliferated on what appears to have been an unprecedented scale. The PNF [the fascist party] . . . became almost synonymous with malpractice, with unscrupulous local party officials using their positions to feather their own nests and favour relatives and friends. Nor was the party leadership in any way immune. Indeed it is hard to find a single senior figure who was not at some point the subject of allegations of serious misconduct.²⁴⁵

The prominent reason that likely underlies the connection between authoritarianism and corruption is the dynamics of dominance, which idolizes high corruption and

²⁴¹ See BERTRAM GROSS, *FRIENDLY FASCISM: THE NEW FACE OF POWER IN AMERICA* (S. End Press 1980).

²⁴² See Mara Faccio, *Politically Connected Firms*, 96 AM. ECON. REV. 369 (2006).

²⁴³ Thomas Fergusson & Hans-Joachim Voth, *Betting on Hitler—The Value of Political Connections in Nazi Germany*, 123 Q. J. OF ECON. 101, 134 (2008).

²⁴⁴ See Tiziana Foresti, Nadia Garbellini, & Ariel Luis Wirkierman, *The Value of Political Connections in Fascist Italy – Stock Market Returns and Corporate Networks*, INST. OF NEW ECON. THINKING 3, 10, 25 (Oct. 2017), <https://www.ineteconomics.org/research/research-papers/the-value-of-political-connections-in-fascist-italy>.

²⁴⁵ CHRISTOPHER DUGGAN, *FASCIST VOICES: AN INTIMATE HISTORY OF MUSSOLINI’S ITALY* 89, 158, 165, 188, 231 (Oxford Univ. Press, 2013).

oligarchization by arguing that they are necessary to keep other forces out of power. Similar tendencies are seen in modern autocracies in Russia and Hungary where government-friendly businessmen receive disproportionate pecuniary benefits based on their support of the policies favoring these autocracies.²⁴⁶ This means that, unlike some commentators suggest, exclusivist-nationalist changes do not necessarily share a connection with valid demands by the market, but are, sometimes instead, based on the deliberate dissection of the interests of certain businesses.²⁴⁷ As Ruth May put it:

[o]ligarchical capitalism destroys legitimate competition and eats away at the resources of a nation like a cancer. Any semblance of dynamic, healthy competition is strangled by fake competition based solely on firms' relationships with people in power. When a shrinking private sector is entirely owned by the oligarchical elites, this precludes ordinary citizens from having a stake in the real economy and increasing their personal wealth over time. As the nation's wealth becomes more concentrated in fewer hands, there is less incentive and fewer resources to resist the momentum of this disparity. The twenty or so oligarchs in Putin's Russia do not get access to powerful people in government because of their wealth, as is the case, say, with many billionaire political donors in America, but rather the reverse: Russian oligarchs get access to obscene amounts of wealth because of their affinity with those most powerful in government.²⁴⁸

This means that under the Enlightenment tradition, oligarchization creates a "new nobility," which acquires most of its assets from the "new king"; the autocrat. This favoritism undermines the logic of the market and creates hierarchical structures in which the new nobility usually does not need to have the creativity that would be normally necessary to be competitive in a free market environment. This is likely one reason why autocratic regimes are only seldom economically successful.²⁴⁹

Such tendencies almost always start by favoring certain well-connected personalities or companies over others. Recently, in the U.S., favoritism of U.S. steel producers is propelled by a deliberate policy choice as compared to soybean exporters that largely suffer from China's answer to U.S. tariffs.²⁵⁰ Each and every similar action raises a potential danger of a state favoring one group over another, thereby potentially driving a divide between businesses in the same sector. Put another way, while such measures could be chalked up to economic patriotism,

²⁴⁶ See KAREN DAWISHA, *PUTIN'S KLEPTOCRACY: WHO OWNS RUSSIA?* (Simon & Schuster Paperbacks 2014); see also DAVID E. HOFFMAN, *THE OLIGARCHS: WEALTH AND POWER IN THE NEW RUSSIA* (Public Affairs 2011); see also Neil Buckley & Andrew Byrne, *Viktor Orbán's Oligarchs: a new elite emerges in Hungary*, FIN. TIMES (Dec. 21, 2017), <https://www.ft.com/content/ecf6fb4e-d900-11e7-a039-c64b1c09b482>.

²⁴⁷ See Marton Varju & Mónika Papp, *The Crisis, National Economic Particularism and EU Law: What can we Learn from the Hungarian Case?*, 53 COMMON MKT. L. REV. 1647 (2016).

²⁴⁸ Ruth May, *Putin: From Oligarch to Kleptocrat*, N.Y. REV. (Feb. 1, 2018, 8:11 AM) <https://www.nybooks.com/daily/2018/02/01/putin-from-oligarch-to-kleptocrat/>.

²⁴⁹ See Art Carden & Harvey S. James Jr., *Time Under Authoritarian Rule and Economic Growth* 11 (Contracting and Orgs. Research Inst., Working Paper No. 2007-02, 2007), <https://dx.doi.org/10.2139/ssrn.1010748>.

²⁵⁰ See Chad P. Bown & Eva (Yiwen) Zhang, *First Tariffs, Then Subsidies: Soybeans Illustrate Trump's Wrongfooted Approach on Trade*, PIIE (July 30, 2018, 1:15 PM), <https://www.piie.com/blogs/trade-investment-policy-watch/first-tariffs-then-subsidies-soybeans-illustrate-trumps>.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

this favoritism nonetheless exists towards certain groups in policymaking. If kept balanced, similar actions do not necessarily destroy the complete framework of policymaking, avoiding the resemblance of a Russian-like oligarchization.

If kept in balance, similar actions do not necessarily destroy the complete framework of policy making, and they do not result in Russian-like oligarchization. On the other hand, knowing that around two hundred lobbyists received positions in the Trump administration, that regulatory lobbying also increased, and that White House visitor logs are hidden from the public, selecting companies over others is a rather worrying tendency.²⁵¹ Such actions can boost the influence of business on American politics: a connection that already has the capacity to distort the political system.²⁵²

In European autocracies, it is also common to create Government Organized Non-Governmental Organizations (“GoNGOs”). These pseudo-independent think-tanks, or finance political groups or party campaigns based mostly on the income realized as a result of policy changes and corruption, tend to push out others of the public political and intellectual discourses who do not have such means. This means that state capture and favoritism, or, to be more precise, companies established by members of the governments or their circles, a reverse phenomenon: company capture, go hand in hand with democratic problems, and the two issues can hardly be separated.²⁵³ Moreover, in such countries, the media is also transformed because of amendments to market policies. As Péter Bajomi-Lázár put it:

[P]arty colonization of the media may have negative impact on the level of media freedom in case of governments that are constituted by one party, whose internal decision-making structures are centralized, and which are headed by strong-hand leaders who personally do not tolerate media criticism, and have a strong ideological agenda.²⁵⁴

A good example of this is the case of the Hungarian businessman, Andy Vajna, who received a loan from a government-owned bank to buy a country-wide television channel called TV2 from its foreign owners. The channel immediately started to spread government

²⁵¹ See Michael Hiltzik, *Trump just picked another industry lobbyist to head a Cabinet agency*, L.A. TIMES (Feb. 5, 2019, 1:00 PM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-lobbyist-trump-20190205-story.html?utm_source=feedburner&utm_medium=feed; see also Zeke J. Miller, *The White House Will Keep Its Visitor Logs Secret*, TIME (Apr. 14, 2017), time.com/4740499/white-house-visitor-logs-public-record-trump/; see also Rachel Augustine Potter, *Regulatory lobbying has increased under the Trump administration, but the groups doing the lobbying may surprise you*, BROOKINGS (July 11, 2018), <https://www.brookings.edu/research/regulatory-lobbying-has-increased-under-the-trump-administration-but-the-groups-doing-the-lobbying-may-surprise-you/>; see also Fredreka Schouten, *Ex-lobbyists Swarm Trump Administration, Despite ‘Drain the Swamp’ Pledge*, USA TODAY (June 21, 2017, 4:59 PM), <https://eu.usatoday.com/story/news/politics/2017/06/21/president-donald-trump-lobbyists-hired/416749001/>.

²⁵² See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT* 5 (2011); see also STANLEY, *supra* note 39, at 122.

²⁵³ See Abby Innes, *The Political Economy of State Capture in Central Europe*, 52 J. COMMON MKT. STUD. 88, 88 (2013).

²⁵⁴ Aukšė Balčytienė et al., *Oligarchization, de-Westernization and vulnerability: media between democracy and authoritarianism in Central and Eastern Europe: A roundtable discussion*, 3 J. MEDIA, COGNITION AND COMM. 119, 127 (2015).

propaganda and hate speech against refugees to conform to governmental policies.²⁵⁵ In similar cases, pushing foreign investors and other competitors out of the market is a by-product of the system of favoritism, which is then covered by a nationalist communication.²⁵⁶

Besides the above-mentioned examples (and especially, apart from discriminating foreign investors), one of the most important fields where the anti-Enlightened legislation has the potential to break through sound policymaking is the case of state aid. In this field, apart from the W.T.O. Subsidies Agreement, in the E.U., Article 107 of the T.F.E.U. generally prohibits state aid, with some exceptions.²⁵⁷ It is no wonder there are great disputes regarding state-owned enterprises (“S.O.E.s”) in China as these rules are taken very seriously by Western countries.²⁵⁸ In the E.U., state aid is interpreted as “any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.”²⁵⁹

The E.U. and the U.S. have also had great disputes regarding this field including the Airbus and Boeing W.T.O. dispute settlement procedures.²⁶⁰ Furthermore, some recent U.S. laws, like the Tax Cuts and Jobs Act of 2017,²⁶¹ also contain suspicious provisions.²⁶² The typical case of state aid in Europe was aimed at helping established domestic companies, such as in the Italian Alitalia, the Hungarian Malév or the Cyprus Airways. All of these airlines received large amounts of state aid, and all of them had to pay it back after the E.U. forced them to do so.²⁶³ In a number of cases, member states support foreign companies illegally, as in the case of Apple and Ireland; Apple had to pay 13.1 billion euro in tax.²⁶⁴ While state aid can be justified in a number of cases, it can also serve as a tool to support companies either connected to, or owned by, the leading political power.

Among all of them, from a political point of view, one of the most interesting is the case of the Hungarian nuclear station, Paks II, which will be expanded through a loan by Russia. Surprisingly, the European Commission found the business to conform to E.U. law, and also did not find problematic the fact that there was no public procurement procedure (no public

²⁵⁵ See Sarah Repucci, *Media Freedom: A Downward Spiral*, FREEDOM HOUSE (2019), <https://freedomhouse.org/report/freedom-press/2015/hungary> (last visited Mar. 3, 2020); see also Zoltan Simon & Marek Strzelecki, *Hungary's Orbán Now Controls a Media Juggernaut*, BLOOMBERG (Nov. 29, 2018, 8:25 AM), <https://www.bloomberg.com/news/articles/2018-11-29/orban-creates-media-juggernaut-as-illiberals-seek-press-control>; see also Ágnes Vinkovits, *To Own or not; the Government and the Banks*, BUDAPEST BUS. J. (Mar. 10, 2017), https://bbj.hu/special-report/to-own-or-not;-the-government-and-the-banks_129779.

²⁵⁶ See European Commission Press Release IP/16/3606, State aid: Commission finds Hungarian advertisement tax in breach of EU rules (Nov. 4, 2016).

²⁵⁷ See Craig & De Búrca, *supra* note 82, at 1087-99.

²⁵⁸ See Ting-Wei Chiang, *Chinese State-Owned Enterprises and WTO's Anti-Subsidy Regime*, 49 GEO. J. INT'L L. 845, 845 (2018).

²⁵⁹ Consolidated Version of The Treaty on the Functioning of the European Union 26 Oct. 2012, art.107, 2012 O.J. (C 326) 47, 91.

²⁶⁰ See Simon Jack, *Exclusive: WTO rules Boeing's state subsidies illegal*, BBC NEWS (Nov. 28, 2016), <https://www.bbc.co.uk/news/business-38131611>; see also *EU paid Airbus billions in illegal subsidies, WTO rules*, BBC NEWS (May 15, 2018), <https://www.bbc.co.uk/news/business-44120525>.

²⁶¹ See Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054, 2213-16 (2017).

²⁶² See Reuven S. Avi-Yonah, *Does the United States Still Care About Complying with Its WTO Obligations?*, 9 COLUM. J. TAX. L. – TAX MATTERS 12, 12 (2018).

²⁶³ See European Commission Press Release IP/12/7, State aid: Commission orders Hungary to recover incompatible state aid from national air carrier Malév (Jan. 9, 2012).

²⁶⁴ See European Commission Press Release IP/16/2923, State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion (Aug. 30, 2016).

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

bid) announced in the case, which normally would have been required.²⁶⁵ Knowing that Russia supports far-right political parties all around Europe,²⁶⁶ it is hard not to draw parallels between this case and disputes around Russian activity in the U.S. It is important to mention that even apart from this case, and probably as a result of the upheaval of nationalism, the present state of E.U. law seems to be by far more acceptable towards state aid than before.²⁶⁷ As a result, certain countries, like Germany, also plan to introduce extensive, large-scale programs to help certain national companies with a great amount of state aid.²⁶⁸

E. The Authoritarian Attack Against Checks and Balances and the Portrayal of International Dispute Resolution as a Rigged Institution

The authoritarianism of anti-Enlightenment does not allow it to make compromises. This is also true at both micro and macro levels. Bob Altemeyer explains how authoritarians feel they are supreme compared to other groups in society.²⁶⁹ Consequently, compromises, and acceptance of opinions different than theirs would mean humiliation. The same is true regarding governance. As we have seen above, if there are decisions such governments or leaders do not favor, they attack international cooperation and international organizations. As the anti-Enlightenment tradition is against pluralism, in its authoritarian dynamics, it attacks the core of this principle and cannot understand the need for self-restraint. This has a very strong effect on checks and balances it is no surprise autocrats attack these relatively quickly after they seize power. As one of the main pillars of checks and balances, the judiciary is under a constant and direct threat by them.

One could cite many examples of this. Negative processes probably start with attacking judges verbally,²⁷⁰ and if such forces have a chance, they change the structure, system and composition of the courts. Probably, regarding international dispute resolution, the most plausible way to show how this works is by elaborating President Trump's relationship with the W.T.O. Dispute Settlement Body. Regarding the latter institution, the Trump administration is pushing the W.T.O. towards disintegration, as it blocks the appointment of judges in its Appellate Body.²⁷¹

²⁶⁵ See European Commission Press Release IP/17/464, State aid: Commission clears investment in construction of Paks II nuclear power plant in Hungary (Mar. 6, 2017).

²⁶⁶ See Matt Bradley, *Europe's Far-Right Enjoys Backing from Russia's Putin*, NBC (Feb. 13, 2017, 3:48 AM), <https://www.nbcnews.com/news/world/europe-s-far-right-enjoys-backing-russia-s-putin-n718926>.

²⁶⁷ See Mónika Papp, *EU State Aid Law and National Public Policy Choices*, UACES 45th Annual Conference Sept. 7th to 9th 2015, held at Duesto L. Sch., University of Duesto, in Bilbao, Spain, <https://hpops.tk.mta.hu/uploads/files/Papp.pdf>.

²⁶⁸ See Jakob Hanke Vela, *Germany's industrial plan signals Europe's protectionist lurch*, POLITICO (Apr. 30, 2019, 12:05 PM), <https://www.politico.eu/article/germany-industrial-plan-signals-europes-protectionist-lurch/>.

²⁶⁹ See Altemeyer, *supra* note 142, at 52.

²⁷⁰ See *In His Own Words: The President's Attack on the Courts*, BRENNAN CTR FOR JUST. (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts>.

²⁷¹ See John Brinkley, *Trump Is Close To Shutting Down The WTO's Appeals Court*, FORBES (Sept. 27, 2018), <https://www.forbes.com/sites/johnbrinkley/2018/09/27/trump-is-close-to-shutting-down-the-wtos-appeals-court/>.

The Trump administration is pushing the W.T.O. towards disintegration, as it blocks the appointment of judges in its Appellate Body.²⁷² This is because the arguments of the U.S. were not accepted in several cases.²⁷³ Moreover, the Trump administration also makes rather nonsensical claims, such as, “[t]he Appellate Body may not assert that its reports serve as precedent or provide authoritative interpretations.”²⁷⁴ Following this line of thinking, if the body of an international organization or court adopts decisions a country does not like it is because the body of the organization is biased, or extends its power so that the body should be annihilated, or at least, regularized. As a result, the principle of the neutrality of judges, which is also present in international dispute resolution and international investment law, as well as in international arbitration, becomes a hurdle the country must overcome before achieving its goals. This is a typical example of exceptionalist thinking, but does not mean that judgments should not be criticized. Further, it does not follow that the W.T.O. could not benefit from properly enforcing all of its rules against its members. However, we should not forget that this is no different regarding international human rights and we still have not abolished international courts or terminated major treaties.²⁷⁵ Disputes should be handled in a more progressive way, through institutional reforms such as those already discussed by the E.U. regarding changes to the Appellate Body in 2018.²⁷⁶ Universal organizations with many member state parties require great patience from their members and they can be less dominated by countries that had been considered influential earlier. Moreover, statistics regarding W.T.O. dispute settlement is also used manipulatively. As Daniel J. Ikenson put it:

World Bank research²⁷⁷ published in 2003... found that, of all the disputes requiring adjudication between 1995 and 2001, complainants won cases 88 percent of the time. In that period, the United States was mostly a complainant, and it won 76 percent of the time. Since then it has been mostly a defendant, and in keeping with the pro-complainant bias in WTO outcomes (which should make sense since members tend to bring cases they are reasonably certain to win), has lost almost every case.²⁷⁸

In his opinion, even if the system is not perfect, experts are still supportive. Finally, as Christina L. Davis put it in a careful analysis of adherence to W.T.O. rules:

²⁷² *Id.*

²⁷³ See Brady J. Condon, *Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA*, 52 J. OF WORLD TRADE 535, 545 (2018) (“The Appellate Body has ruled against the use of zeroing in US antidumping investigations on numerous occasions in different contexts...”).

²⁷⁴ Simon Lester, *The Appellate Body Crisis: What Needs to Happen Now?*, WORLD TRADE L.: INT’L ECON. L. POL’Y BLOG (Feb. 26, 2019, 4:52 PM), <https://worldtradelaw.typepad.com/ielpblog/2019/02/the-appellate-body-crisis-what-needs-to-happen-now.html>.

²⁷⁵ See ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 104 (Geoffrey R. Stone ed., Oxford University Press, 2014) (ebook) (“The evidence suggests that countries do not consistently cut aid to human rights violators, or otherwise put pressure on them.”).

²⁷⁶ *WTO Reform: EU Proposes Way Forward on the Functioning of the Appellate Body*, EUR. COMMISSION (Nov. 26, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1945>.

²⁷⁷ Peter Holmes, Jim Rollo & Alasdair R. Young, *Emerging Trends in WTO Dispute Settlement: Back to the GATT?* (The World Bank, Policy Research Working Paper No. 3133, 2003), <https://ideas.repec.org/p/wbk/wbrwps/3133.html>.

²⁷⁸ Daniel J. Ikenson & Robert E. Lighthizer, *Is the WTO Dispute Settlement System Fair?*, COUNCIL ON FOREIGN RELATIONS (Feb. 26, 2007), <https://www.cfr.org/article/wto-dispute-settlement-system-fair>.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U. COMPARISON

[L]ooking at observed disputes alone would miss the broader role of the system to prevent conflict. The expanding body of jurisprudence represents a major contribution of the institution... As each ruling clarifies ambiguities in the agreement, it may prevent future disputes on similar matters by removing uncertainty about what policies would be in compliance with the agreement. Deterrence represents another mechanism for preventing disputes. Beyond legal rulings, plaintiff activity demonstrates that states are likely to enforce the contract and increases the credibility of the rules-based system. In this sense, each dispute continues to matter long after the original problem has been resolved.²⁷⁹

In Europe, we see even graver, major problems regarding judiciary; certain countries like Hungary and Poland have seriously curtailed their independence. These countries sent many of their judges to their pension by lowering the age limit of judges and as a result, E.U. infringement procedures were started against them.²⁸⁰ In Hungary, many of the judges did not receive their jobs back after the E.U. action.²⁸¹ Moreover, both countries attacked their constitutional courts,²⁸² which have a very similar role to the U.S. Federal Supreme Court in maintaining checks and balances. As a result, in Hungary, the Constitutional Court nearly never questions the government's policies.²⁸³ Elsewhere, like in Romania in 2012, the Constitutional Court was attacked as well.²⁸⁴ As mentioned before, adherence to the decisions of the European Court of Justice or the European Court of Human Rights is also refused in some countries.²⁸⁵ In sum, there is a general milieu of nationalism and hostility towards international cooperation dominating in some countries, while elsewhere we find that far-right parties are receiving a relatively stable support, even if they cannot dominate domestic discourses.

The best example to show how this general milieu of nationalism and fear from foreign business affects international trade can be shown through the case of the T.T.I.P.'s Investor-State Dispute Settlement ("I.S.D.S.") system.²⁸⁶ There, the provisions received heavy critique; investor-state arbitration was portrayed by the protesters as the secret, private business

²⁷⁹ Christina L. Davis, *Deterring Disputes: WTO Dispute Settlement as a Tool for Conflict Management* 33 (Nov. 10, 2016), <https://scholar.harvard.edu/files/cldavis/files/davis2016.pdf>.

²⁸⁰ See Case C-286/12, *European Comm'n v. Hungary*, ECLI:EU:C:2012:687 (Nov. 6, 2012); see also Tamás Gyulavári & Nikolett Hös, *Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts*, 42 *INDUS. L. J.* 289, 292 (2013).

²⁸¹ GÁBOR HALMAI, *EARLY RETIREMENT AGE OF THE HUNGARIAN JUDGES*, in *EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE* 471, 480 (Fernanda Nicola & Bill Davies eds., 2017).

²⁸² See Christian Davies, *Hostile Takeover: How Law and Justice Captured Poland's Courts*, *FREEDOM HOUSE* (May, 2018), <https://freedomhouse.org/sites/default/files/poland%20brief%20final.pdf>.

²⁸³ *Analysis of the Performance of Hungary's "One-Party Elected" Constitutional Court Judges Between 2011 and 2014*, HUNGARIAN HELSINKI COMMITTEE (2015), http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf.

²⁸⁴ Ian Traynor, *Romanian PM Systematically Abusing Constitution, Says EU: EU Report Says Victor Ponta Government Has 'Threatened Judges, Illegally Removed Officials, and Tampered with Democratic System*, *THE GUARDIAN* (July 17, 2012 10:59 PM), <https://www.theguardian.com/world/2012/jul/17/romania-eu-report-constitution-abuse>.

²⁸⁵ See e.g. Aline Robert, *Hungary Prepares to Back Slovak Legal Challenge Against EU Refugee Deal*, *EURACTIV* (Nov. 6, 2015), <https://www.euractiv.com/section/europe-s-east/news/hungary-prepares-to-back-slovak-legal-challenge-against-eu-refugee-deal/>.

²⁸⁶ Peter H. Chase, *TTIP, Investor-State Dispute Settlement and the Rule of Law*, 14 *EUR. VIEW* 217, 217 (2015).

of multinational companies suing states before courts of judges who represent these companies' interests and who make it possible that companies acquire citizens' tax money for no service at all.²⁸⁷ The fact that the mandate of the E.U. delegation was not accessible to public in the initial period of negotiations also strengthened such feelings.²⁸⁸ Charles N. Brower and Sadie Blanchard collected many similar, rather demagogic arguments in a perfect analysis they wrote about investor-state disputes.²⁸⁹ Contrary to the critiques, the practice of investor-state tribunals is more complex than what an oversimplified picture would suggest; modern agreements on investor protection "usually contain specific I.S.D.S. provisions to provide a forum ensuring host states uphold public treaties with regard to international investments."²⁹⁰ I.C.S.I.D. statistics also prove that the claim that investors mostly win their cases is not true.²⁹¹ Moreover, even if it were different, this fact would not tell us too much about the content of the cases. Of course, one can find cases that raise serious questions.²⁹² However, this does not prove that investor-state dispute arbitration is flawed. The misunderstandings can be shown in the example of the Vattenfall I case; Germany, after finishing a contract to build a power plant with the Swedish firm Vattenfall, introduced a new law on the licensing of new coal-fired power plants.²⁹³ The Swedish company sued Germany, and after a while the case was settled because the state lowered its standards and agreed to a less stringent license.²⁹⁴ One interpretation is to claim that the foreign company forced the German state to abolish its standards. However, in law, we have a crucial rule; the *pacta sunt servanda* principle.²⁹⁵ Under this theory, if parties conclude a contract, they must also perform according to its content.²⁹⁶ This idea also serves the freedom of business; in modern democracies, the state is not an omnipotent regulator.

If the state harms legitimate interests set in contracts through changing the landscape of regulations, it should pay compensation. As an answer, some scholars asked for a renationalization of such tribunals. In this regard, Charles N. Brower and Sadie Blanchard are right when they claim that:

²⁸⁷ *Id.*

²⁸⁸ CONG. RESEARCH SERV., RS21372, THE EUROPEAN UNION: QUESTIONS AND ANSWERS (2019).

²⁸⁹ Charles N. Brower & Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement*, 55 HARV. INT'L L. J. ONLINE 45, 50 (2014).

²⁹⁰ Mark Weaver, *The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications*, 29 EMORY INT'L L. REV. 225, 228 (2014).

²⁹¹ See *ICSID Caseload-Statistics*, ICSID, <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> (last visited Mar. 6, 2020).

²⁹² See generally, *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Award, (Mar. 11, 2011); see also *Compañía Del Desarrollo De Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, (Feb. 17, 2000); see also *Metalclad v. The United Mexican States*, ICSID Case No. ARB/97/1, Final Award, (Aug. 30, 2000); see also Konstantina Georgaki, *The Decision on the Achmea Issue in Vattenfall v Germany or: How to Escape the Application of the CJEU's Decision in Achmea in Three Steps*, OBLB (Nov. 18, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/decision-achmea-issue-vattenfall-v-germany-or-how-escape-application>.

²⁹³ See *Vattenfall*, *supra* note 292.

²⁹⁴ Case C-142/16, *European Comm'n v. Federal Republic of Germany*, ECLI:EU:C:2017:301 (2017).

²⁹⁵ *Pacta Sunt Servanda*, INT'L JUDICIAL MONITOR, (Sept. 2008), http://www.judicialmonitor.org/archive_0908/generalprinciples.html.

²⁹⁶ *Id.*

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

[a]llowing States to interfere with arbitral decision making after a dispute arises would thus weaken the effectiveness of the system of foreign investor protection for stimulating international capital flows and promoting economic development. Moreover, the criticisms of investment treaties and arbitration that are invoked to justify politicization are based on emotion rather than on facts.²⁹⁷

This does not mean, of course, that investor-state dispute resolutions cannot be developed. For example, the Canada-E.U. Comprehensive Economic and Trade Agreement (“C.E.T.A.”) included stricter rules on the appointment of judges than its initial proposal. Nor does this mean that we would not find decisions which can be questioned from the point of overall justice. However, an arbitrary interpretation of justice can serve partisan interests, particularly when states break through independent institutions and try to enforce nationalist and oligarchic interests. This is what connects critics of the investor-state dispute settlement with those who attack courts; in a number of cases, the belief behind this idea is that we must occupy the judiciary to make it work properly, which is surely not true.²⁹⁸

F. The Denial of Egalitarianism: Aggression and Distrust Against Foreign People

In one of his recent books, Noam Chomsky claims that international migration should be interpreted as part of free market policies, as a market is not “free” if people cannot move freely within it.²⁹⁹ Chomsky has a point from the perspective of the neo-functional theory of international relations as well, in that if we interpret “free market” as an area or connected areas where companies may move freely or establish affiliates, the free movement of people is simply an effect—a kind of spillover—of this phenomenon. It seems rather obvious that if companies and goods are allowed to move freely among countries, people must also be allowed to do so. This is why in Europe, the free movement of people is one freedom out of four, which, together, form the single European market in the system of E.U. law, as mentioned above. This also makes disputes regarding Brexit especially interesting: according to the E.U.’s position, the U.K. cannot access the single market without allowing E.U. citizens into the country. From the point of Western countries, free movement of people also has a special relevance because of the colonial pasts—and later neocolonial activities—of many countries. It is no wonder the world systems theory also explains migration as an obvious follow-up of this phenomenon.³⁰⁰

This article takes the perspective that the strong anti-immigrant, anti-refugee sentiments in the Western world seem to be inspired by anti-Enlightenment tradition. Politicians who portray immigrants as dangerous criminals negate many of the Enlightenment’s values. First, this approach takes away the person’s right to him or herself: it abolishes our understanding of individualism. From Rousseau onwards, we treat people with some kind of dignity. This is because, in our Western understanding, no one can be made responsible for the acts of others. Every person is only responsible for his or her own deeds. In line with this

²⁹⁷ Brower & Blanchar, *supra* note 289, at 50.

²⁹⁸ Csongor István Nagy, *The Lesson of a Short-Lived Mutiny: The Rise and Fall of Hungary’s Controversial Arbitration Regime in Cases Involving National Assets*, 27 AM. REV. INT’L ARB. 239 (2016).

²⁹⁹ NOAM CHOMSKY, REQUIEM FOR THE AMERICAN DREAM 450-452 (Peter Hutchinson et al. eds., 2017).

³⁰⁰ Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV., 431, 432 (1993).

thinking, we do not judge people because of their culture, nationality, race, or social status. There is no new nobility, and no new Aryan race. In this sense, political correctness is about individualism. Its antithesis, political incorrectness, takes away the individual's right to be his or herself. Second, as a result, most of our legal systems are based on an egalitarian thinking. People are, at least formally, equal in front of the law, and equally deserving of justice.

Third, racist chauvinism is also irrational: while there are different views on the causes of migration among scholars,³⁰¹ most economists accept the claim of the dual labor market theory that there exists a "permanent demand for immigrant labor that is inherent to the economic structure of developed nations."³⁰² To this, as another irrational element, we could also cite Timothy Snyder's opinion that many nations wish to return to a non-existent stage of their history, as our nations never formed ethnically homogenous societies.³⁰³ The anti-Enlightenment's effect on U.S. policymaking regarding migration has recently become very strong. A perfect symbol of the changing policies is illustrated by President Trump's dehumanization of peoples coming from Central and South America, through the use of *Game of Thrones* memes like "the Wall is Coming."³⁰⁴ This is an implicit portrayal of arrivals as zombies. In fact, it portrays people as objects, dehumanizing them, taking away their individuality and human dignity.³⁰⁵ As a consequence, children can be taken away from their parents if they cross the border illegally: objectification removes the parents' basic rights—the right to stay with their children and protect them.

Knowing that the number of undocumented immigrants fell to a twelve-year low in the U.S. in 2018,³⁰⁶ this seems to be a typical example of agenda setting for fake problems. Xenophobia also has an effect on policymaking in other fields. What must be stressed here is the fact that this change not only affects illegal forms of entry, but also legal migration, like, for example, the ban of entry of certain countries' citizens—the "Muslim ban," as it was called in the press—which was well covered in mainstream media. While Executive Order 13769³⁰⁷ and Presidential Proclamation 9645³⁰⁸, which introduced the ban, were attacked in several lower courts in different cases,³⁰⁹ they were later deemed constitutional by the Supreme Court in *Trump v. Hawaii*.³¹⁰ President Trump's "Buy American, hire American" policies were also harmful to many who applied or asked for an extension of their H-1B visas.³¹¹ Surprisingly, the actions reached academia, where many policies are aimed at deterring foreign students from

³⁰¹ *Id.*

³⁰² *Id.* at 440.

³⁰³ TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, America* 75 (2018).

³⁰⁴ Stuart Heritage, *The wall is coming: Trump becomes world's worst Game of Thrones fan*, THE GUARDIAN (Jan. 9, 2019, 5:32 EST), <https://www.theguardian.com/tv-and-radio/2019/jan/09/the-wall-is-coming-how-donald-trump-became-the-worlds-worst-game-of-thrones-fan>.

³⁰⁵ *Id.*

³⁰⁶ Alan Gomez, *Number of undocumented immigrants in USA falls to 12-year low, researchers say*, USA TODAY (Nov. 27, 2018, 5:47 PM), <https://eu.usatoday.com/story/news/world/2018/11/27/undocumented-immigration-immigrants-donald-trump-border-security-pew-research-center-build-wall/2125005002/>.

³⁰⁷ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

³⁰⁸ Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

³⁰⁹ *Aziz v. Trump*, No. 1:17-cv-00116 (E.D.Va. 2017); see also *Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. 2017); see also *Louhghalam v. Trump*, No. 17-cv-10154 (D.Mass. 2017).

³¹⁰ *Trump v. Hawaii*, No. 17-965, 138 S. Ct. 2393 (2018).

³¹¹ Deborah D'Souza, *The Impact of Trump's H-1B Visa Crackdown in 5 Charts*, INVESTOPEDIA (Aug 1, 2018), <https://www.investopedia.com/news/impact-trumps-h1b-visa-crackdown-5-charts/>.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U. COMPARISON

studying in the U.S.³¹² As a result, there was a 2.2% drop in the number of undergraduate students, and a 5.5% drop in the number of graduate students in the U.S.³¹³ Even before, U.S. immigration rules had become far more stringent than they were a hundred years ago. For example, it is extremely complicated to receive a visa to search for jobs in the country. Moreover, the denaturalization procedures also seem to be the overcompensation of valid problems,³¹⁴ and the discriminative change on the Temporary Protected Status of certain countries' citizens is also unconstitutional.³¹⁵

Finally, the U.S. fails at its obligation to defend refugees, such as at the Mexican border, even though it is a party of the 1967 Protocol relating to the Status of Refugees, which is the supreme Law of the Land.³¹⁶ All of their actions have the potential of closing or creating a closed society, and as a spillover effect, they surely trigger unwanted ethnic conflicts inside the country as well.

In Europe, the best way to show how anti-Enlightened politics works is to explain how these politics transformed the E.U. rules on refugee law. Here, the politics of this tradition changed the current fundamental and humanistic principles, which resulted in unjust situations.³¹⁷ To mention just a few problems, the principle of *non-refoulement*; i.e. the principle which prohibits countries from sending refugees back to countries where they would be put in danger; is being actively ignored on a regular basis, even though judgments in cases such as *M.S.S. v. Belgium and Greece* of the European Court of Human Rights³¹⁸ or the N.S. judgment of the Court of Justice of the European Union, prohibit member states from doing so.³¹⁹ As a result, refugees are being sent back to the Balkans en masse, or even to Turkey, where they do not receive protective refugee status.³²⁰

Second, the E.U.-Turkey "deal" announced on March 18, 2016³²¹ breaches several provisions of E.U. law and international law.³²² Later, in the *NF, NG and NM v. European Council* case, the European Court of Justice claimed that it lacked the jurisdiction to hear and

³¹² Paul Basken, *Immigration rule changes undermine higher education in US*, THE TIMES HIGHER EDUCATION (Jan. 25, 2019), <https://www.timeshighereducation.com/news/immigration-rule-changes-undermine-higher-education-us>.

³¹³ Elizabeth Redden, *International Student Numbers Decline*, INSIDE HIGHER ED (Jan. 22, 2018), <https://www.insidehighered.com/news/2018/01/22/nsf-report-documents-declines-international-enrollments-after-years-growth>.

³¹⁴ Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html>.

³¹⁵ D'vera Cohn, Jeffrey S. Passel & Kristen Bialik, *Many immigrants with Temporary Protected Status face uncertain future in U.S.*, PEW RESEARCH (Nov. 27, 2019), www.pewresearch.org/fact-tank/2019/02/21/immigrants-temporary-protected-status-in-us/.

³¹⁶ See Protocol Relating to the Status of Refugees art. 5, Oct. 4, 1967, 606 U.N.T.S. 267.

³¹⁷ See *EU Policies Put Refugees at Risk*, HUMAN RIGHTS WATCH (Nov. 23, 2016, 12:01 AM), <https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk>.

³¹⁸ See *MSS v. Belgium & Greece*, 30696/09 Eur. Ct. H.R. 89, 89 (2011).

³¹⁹ See Case C-411/10 & C-493/10, *N.S. v. Sec'y of State for the Home Dep't*, 2011 E.C.R. I-33, 34.

³²⁰ *MSS v. Belgium & Greece*, 30696/09 Eur. Ct. H.R. 89, 89 (2011).

³²¹ See *EU-Turkey Statement: Questions and Answers*, EUROPEAN COMM'N (Mar. 19, 2016), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_963.

³²² See Kondylia Gogou, *The EU-Turkey Deal: Europe's Year of Shame*, AMNESTY INTERNATIONAL (Mar. 20, 2017, 10:20AM), <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>.

determine the related case, because the deal is not an E.U. document.³²³ However, this is a highly problematic understanding of E.U. legal sources, which puts the “deal” somewhere in the middle between legal and illegal measures, yet it is closer to illegal measures, which is followed by most member states.³²⁴ Suspicion went so far that a court asked the Court of Justice of the E.U. a preliminary question concerning what “psychological and physical [*sic!*] tools are available to prove that a refugee is homosexual.”³²⁵ In 2018, refugees could be detained and denied food for weeks without any serious consequences to member states.³²⁶ The stress on securitization also means a lack of support for those in trouble: 2,276 people died in the Mediterranean Sea in 2018, because the E.U. and member state authorities failed to save them.³²⁷ In summary, as demonstrated above, the cultural aspects of the anti-Enlightenment tradition have penetrated legislation on both sides of the Atlantic, and have drastically changed the legislative agendas.

IV. CONCLUSION

Above, we have seen how the anti-Enlightenment tradition has the potential to reshape the framework of international trade and business law. The aim of this article was to prove that many ideological elements of the anti-Enlightenment tradition have an effect on policymaking, and these ideological elements connect with each other. In order to explain possible answers to this phenomenon, apart from the legal aspects, it is also important to analyze the broader social environment of the phenomenon. Meaning that resistance against the introduction of anti-Enlightenment provisions must cover three areas; 1) answers from the law and legal culture, 2) political culture, and 3) politics itself. The answers from each of these fields are extremely different from each other.

Beginning with the perspective of the law and legal culture, we can ascertain that in many countries the traditional legal establishment, like judges and lawyers, are in a constant struggle to protect Enlightenment values, and in particular, pluralist constitutionalism. Recently, Harold H. Koh published an article, as well as a book, on the relationship between the Trump administration and international law.³²⁸ In Koh’s opinion, different circumstances, such as like institutions, legal practice, social resistance and external pressure from other countries, like Germany, were able to stop most of the unconstitutional and problematic actions of the administration.³²⁹ Koh gives a very detailed analysis of this procedure, for example in the case of the Muslim ban in which the ban ultimately approved by the Supreme Court is a

³²³ See European Union Press Release 19/17, The General Court Declares That It Lacks Jurisdiction to Hear And Determine The Actions Brought By Three Asylum Seekers Against The EU-Turkey Statement Which Seeks To Resolve The Migration Crisis (Feb. 28, 2017); see also Case C- 208/17, N.F. v. European Council, 2018 E.C.R. I – 1, 9, 13, 14.

³²⁴ See N.F. v. European Council, 2018 E.C.R. at 1.

³²⁵ See Case C-473/16, F. v. Bevándorlási és Állampolgársági Hivatal, 2018 E.C.R. I-1,7.

³²⁶ See *Hungary: Asylum Seekers Denied Food*, HUMAN RIGHTS WATCH (Aug. 22, 2018, 4:55PM), <https://www.hrw.org/news/2018/08/22/hungary-asylum-seekers-denied-food#>.

³²⁷ See John Henley, *Sharp Rise in Proportion of Migrants Dying in Mediterranean*, says UN, THE GUARDIAN (Sept. 3, 2018, 5:41 PM), <https://www.theguardian.com/world/2018/sep/03/sharp-rise-in-proportion-of-migrants-dying-in-mediterranean-says-un>.

³²⁸ See Harold H. Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413 (2017).

³²⁹ *Id.* at 426-28.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

lighter, modified version of the original, unconstitutional proposal.³³⁰ Koh also claims that “a president cannot implement a command that his subordinates will not obey.”³³¹

Contrary to Koh’s view, Timothy Snyder has written extensively about the dangers of the changes in policymaking worldwide, as well as in the U.S., as to how they transform laws and societies.³³² Furthermore, Paul Krugman also claimed that institutions will not save us, because, under the facade of republic and democracy, an oppressive system can be introduced more easily than many of us would think.³³³ As Krugman said, “Republican institutions don’t protect against tyranny when powerful people start defying political norms. And tyranny, when it comes, can flourish even while maintaining a republican facade.”³³⁴ When comparing the three opinions of Koh, Snyder and Krugman, there seems to be a contradiction between them, yet Koh seems to be more optimistic at first glance.

However, if we re-think their content, this contradiction is illusory. In fact, all of them accept that institutions, values and principles could be abandoned in a society. If there is an autopoiesis, as Niklas Luhmann wrote through by which law recreates itself through the actions of judiciary and law-abiding citizens, there could be a negative autopoiesis as well, in which, nations forget constitutional principles.³³⁵ This can then have an effect on different fields, including the framework of international law and businesses. Moreover, the authors mentioned above all stress the role of resistance and activity: according to Koh, the reason there are not more injustices in the U.S. is because there is some kind of defiance against oppressive actions,³³⁶ and probably, Snyder would also agree that U.S. legal activism helped to counter unconstitutional and inhuman actions.³³⁷

In summary, the job of lawyers is to maintain Enlightenment and constitutional principles, and they must be active in doing so. The judicial branch (especially the Supreme Court and state Supreme Courts in the U.S., the European Court of Justice, the European Court of Human Rights and domestic Constitutional Courts), as well other courts, lawyers and NGOs, have a special role in this. However, they cannot defend all of the values, as some if not majority of the actions are legal, from a formalistic point of view. This is especially true regarding international business and trade law, even if the contours of a U.S. president’s power to terminate international agreements is not as unequivocal as one would presume.³³⁸ The limits of legal tools show the importance of political culture and law, in itself, without a supportive social environment, has very serious limitations of defending basic enlightened principles. This also means that it is a mistake to overestimate the protection granted by institutions and legal

³³⁰ *Id.* at 426-28, 457.

³³¹ *Id.* at 434.

³³² See TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 84 (Crown Publishing Group eds., 2017).

³³³ See Paul Krugman, *How Republics End*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/opinion/how-republics-end.html>.

³³⁴ *See id.*

³³⁵ MICHAEL KING & CHRIS THORNHILL, NIKLAS LUHMANN’S THEORY OF POLITICS AND LAW 1, 32 (2003).

³³⁶ *See Koh, supra* note 308.

³³⁷ *See SNYDER, supra* note, 332.

³³⁸ Article II, Section 2, Clause 2 of the U.S. Constitution; see Harold H. Koh, *Presidential Power to Terminate International Agreements*, Y. L. J. FORUM (Nov. 12, 2018), https://www.yalelawjournal.org/pdf/Koh_r5kyrm5m.pdf; *see also* Goldwater v. Carter, 444 U.S. 996 (1979).

provisions and to underestimate the dangers of the cultural insurrection of the anti-Enlightenment tradition.

From a political culture perspective, we can ascertain in the last couple of years in the Western world, this insurrection of the anti-Enlightenment tradition reached legislation. Present processes have deep roots in our societies, and we should face the darker sides of our cultures. For example, in the U.S. a lot of work was done to create the intellectual system President Trump bases his rhetoric on: an excellent compendium of Ronald Story and Bruce Laurie explains its development, field by field, from the 1940s onwards, through topics like the gun laws and racial segregation, among others.³³⁹ Based on the research data, and especially on the high number of authoritarians, scientists like Bob Altemeyer had already predicted the rise of an American demagogue years prior to Trump's presidency.³⁴⁰ For example, regarding the Tea Party, Altemeyer selected patterns in thinking, such as the acceptance of authoritarian submission by leaders, constant fear, self-righteousness, hostility against certain groups and politicians, lack of critical thinking, the belief in "biggest problems," double standards, feeling empowered when in groups, dogmatism and ethnocentrism.³⁴¹

Karen Stenner also explained how such a thinking could form a normative worldview.³⁴² In Europe, intellectual panels of such a thinking also have strong history, and far-right parties use very similar discursive frameworks as their historical predecessors.³⁴³ This also means that to counter it, first we must treat this phenomenon as a cultural and social problem. As there is a politicization of policymaking taking place in all aspects of the Western societies, citizens defending Enlightenment values must be very active, and depoliticization is not a road that can be taken.³⁴⁴ Experts will not have the special decisive role they had before, as masses ask for a direct say in policymaking.³⁴⁵ A Swiss student, Flavia Kellner, explained perfectly how her grassroots movement was able to counter far-right, anti-immigration propaganda in Switzerland with intensive fieldwork.³⁴⁶ In the U.S., this kind of activity has great culture. Passivity means that authoritarians will be able to dominate, because they generally feel they have been "selected" to dominate, and usually are by far more active than everyday citizens.³⁴⁷ As Timothy Snyder put it:

³³⁹ RONALD STORY & BRUCE LAURIE, *THE RISE OF CONSERVATISM IN AMERICA, 1945–2000 – A BRIEF HISTORY WITH DOCUMENTS* (2008).

³⁴⁰ Apostle Of Carlin, *Bob Altemeyer has a new web site and a revised article on Donald Trump and Authoritarian Followers*, DAILY KOS (Aug. 5, 2016, 8:01 AM), <https://www.dailykos.com/stories/2016/8/5/1556975/-Bob-Altemeyer-has-a-new-web-site-and-a-revised-article-on-Donald-Trump->.

³⁴¹ Bob Altemeyer, *Comment on the Tea Party Movement*, (Apr. 20, 2010), <https://home.cc.umanitoba.ca/~altemey/drbbob/Comment%20on%20the%20Tea%20Party.pdf>.

³⁴² Karen Stenner, *Three Kinds of "Conservatism"*, 20 PSYCHOL. INQUIRY 142, 143 (2009).

³⁴³ Zeev Sternhell, *Faschismus ist Teil unserer Kultur* [Fascism is part of our culture], 20 DER SPIEGEL 128 (2014), <http://magazin.spiegel.de/EpubDelivery/spiegel/pdf/127985806>.

³⁴⁴ Pieter de Wilde & Michael Zürn, *Can the Politicization of European Integration be Reversed?*, 50 J. OF COMMON MKT. STUD. 137, 138, 140 (2012).

³⁴⁵ *Id.*

³⁴⁶ Flavia Kleiner, *Switzerland has been a lab for toxic rightwing politics. We took that on*, THE GUARDIAN (Nov. 18, 2018, 12:55 PM), <https://www.theguardian.com/commentisfree/2018/nov/15/switzerland-laboratory-far-right-politics>.

³⁴⁷ Altemeyer, *supra* note, 142 at 235.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

I also do not really like “checks and balances” because it makes government and democracy sound like Newtonian physics where there are rules which govern behavior and outcomes. I think that in a democracy the people are the real checks and balances. If we the people choose not to be active then the institutions will slowly – or perhaps even actually more quickly than we expect – fall apart.³⁴⁸

Apart from defending values, the teaching of tolerance, empathy and cooperation in schools can also be helpful to internalize the basics of our societies. Defending values of international cooperation, and especially more cooperative international trade and business law is an especially hard job. Probably, the reason behind this is that in Western societies, but also, in the scholarly community, the consensus behind the sense of international economic cooperation seems to start to erode. As part of the hostile attitude and irrational emotionalism of the anti-Enlightenment tradition, many people do not accept that international commerce is beneficial *at all*. For example, nobody explained to the French farmers that they cannot attack trucks filled with Spanish import fruit and receive support from the E.U. Common Agricultural Policy at the same time.³⁴⁹ You either accept that globalization can have negative effects on you, or try to exclude it, but mixing the two can mean unjust situations for foreigners, and probably trade conflicts for your country as well.

The nationalism of the anti-Enlightenment tradition strengthens such tendencies, and also tries to defend certain interests of major industries or groups. As Frank Garcia put it:

[e]ven the wealthiest countries struggle to deal not just with trade-related job losses, but with technological disruptions, climate change, and a gamut of social challenges. Creating oppressive, non-consensual economic relations don’t make it easier for us to meet those challenges, it intensifies them. We can’t protect our “corner” in a global economy where there aren’t any corners any more.³⁵⁰

However, there is a legitimate problem this contrary to this of people being on the losing side of international trade. This latter problem could be cured, but not necessarily by protectionist measures. As Dani Rodrik writes:

[p]opulists such as President Donald Trump have correctly identified the malaise with trade and have capitalized on it. But they greatly exaggerate the real-world significance of the “fairness” concern and seem determined to fix a surgical problem with a sledgehammer. Meanwhile, economists rightly point out that trade is only weakly implicated in the major economic

³⁴⁸ Chauncey Devega, *Timothy Snyder on the shutdown showdown: Donald Trump is the national emergency*, SALON (Jan. 13, 2019, 5:00 PM), <https://www.salon.com/2019/01/13/timothy-snyder-on-the-shutdown-showdown-donald-trump-is-the-national-emergency/>.

³⁴⁹ Caroline Henshaw & Inti Landauro, *French Farmers Attack Fruit Shipments From Spain*, WALL ST. J. (Jul. 28, 2011, 11:53 PM), <https://www.wsj.com/articles/SB10001424053111904800304576474143649345226>.

³⁵⁰ Frank Garcia, *Consent and Coercion in Trump’s Trade Policy*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Feb 26, 2019), <https://worldtradelaw.typepad.com/ielpblog/2019/02/guest-post-consent-and-coercion-in-trumps-trade-policy.html>.

problems of the day – deindustrialization and income inequality. They are correct that the distributional consequences of trade are better addressed with safety net programs and nontrade remedies. But they have systematically downplayed these consequences – especially when the requisite compensatory programs have remained on paper.³⁵¹

Finally, from a political perspective, the struggle against the anti-Enlightenment means that policymakers should resist elements of this tradition. This puts the stress specifically on the answers of conservatives and right-wing politicians, who tend to cooperate with representatives of the anti-Enlightenment either for temporary political advantages, or because they also support certain anti-Enlightenment ideas. As a result, they also tend to implement policies or rhetoric based on the fractions of tradition. This is not a new phenomenon. In Italy, it is well documented that many blue shirt conservatives marched together with black shirt fascists, and Zeev Sternhell even wrote a book about a similar symbiosis in France.³⁵²

Today, a perfect example for a similar symbiosis is the case of the European People's Party ("E.P.P."). The E.P.P. is the biggest group in the European Parliament containing right-wing parties in Europe, which recently cut the phrase "liberal democracy" out of its Helsinki resolution on values. The latter document was originally intended to strengthen the rule of law and democracy in the E.U. It tried to deflect the rule of law backsliding in Hungary and Poland, and was tellingly called "Emergency Resolution on Protecting E.U. Values and Safeguarding Democracy".³⁵³ It should be a great warning when a party cuts out such an innocent phrase in a document created to counter authoritarianism and its legal effect. Because the parties in the European People's Party cooperated with far-right parties and also used far-right rhetoric in several instances, some scholars, like Cas Mudde, claim the EPP left the consensus of liberal democracy behind.³⁵⁴

In the U.S., the tradition poses especially great danger to two institutions, the Congress and the Supreme Court, as they can be very strongly affected by it. This means that legislators should not implement anti-Enlightened patterns in their legislation. Thus, it would be the job of the Supreme Court to defend these values. A good sign is that we have seen some proper answers, which seem to give us some hope. For example, Republicans stripped Rep. Steve King of his committee assignments, and the House agreed to condemn him as a result of his statements defending racism.³⁵⁵ Similar strength would be needed to resist demagogic lawmaking, scapegoating countries, and international organizations. Supporting authoritarian measures, like introducing state of emergency where there is no valid ground for such an action, is highly problematic because it shows a triumph of the anti-Enlightenment tradition. The stability of the U.S. would also be important from a European point of view because loss of

³⁵¹ DANI RODRIK, STRAIGHT TALK ON TRADE 234, (2017).

³⁵² ZEEV STERNHELL, NEITHER LEFT NOR RIGHT: FASCIST IDEOLOGY IN FRANCE, (1995).

³⁵³ Emergency resolution adopted at the EPP Congress, Helsinki (Finland), (Nov. 8, 2018), https://helsinki2018.epp.eu/wp-content/uploads/2018/11/1-Emergency-Resolution_Protecting-EU-Values-and-Safeguarding-Democracy.pdf.

³⁵⁴ Cas Mudde, *The Central European University is the latest victim of the Trump era*, THE GUARDIAN (Dec. 4, 2018), <https://www.theguardian.com/commentisfree/2018/dec/04/central-european-university-latest-victim-trump>.

³⁵⁵ Melanie Zanona, *They Basically Have Nothing to do: Trio of Republicans Face Life in Exile*, POLITICO (Apr. 2, 2019), <https://www.politico.com/story/2019/02/04/congress-house-republicans-committee-assignments-stripped-1145320>.

ANTI-ENLIGHTENMENT IN INTERNATIONAL BUSINESS AND TRADE LAW: A U.S. - E.U.
COMPARISON

U.S. influence has the potential to destabilize Europe even more, and this could hit back on the U.S., as both sides have politicians ready to exploit international conflicts for their own partisan agenda.³⁵⁶

³⁵⁶ Barbara Kunz, *Integration, Disintegration and the International System. A Realist Perspective on Push and Pull Factors in European Integration*, in ZUR KONZEPTIONALISIERUNG EUROPÄISCHER DESINTEGRATION: ZUG- UND GEGENKRÄFTE IM EUROPÄISCHEN INTEGRATIONSPROZESS 71-88 (Annegret Eppler & Henrik Scheller eds., 2013).