

REFLECTIVE ESSAY

Frieder Rössler and ‘Geneva Ordoliberalism’: From William Rappard to Pascal Lamy and Beyond?

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As counsellor in the GATT Office of Legal Affairs (1983–1989), director of the GATT and WTO Legal Divisions (1989–1995), and first executive director of the Advisory Center for WTO Law (2001–2015), Frieder Rössler (1939–2024) is widely recognized as having contributed to the design and successful operation of the WTO dispute settlement system.¹ This tribute focuses on Rössler’s academic contributions to what has been described as ‘Geneva ordoliberalism’.² Section 1 briefly recalls the long-standing initiatives by ‘Geneva ordoliberals’ – since William Rappard’s founding of the Geneva Graduate Institute of International Studies (Institut de Hautes Etudes Internationales: IHEI) in 1927 – for promoting rules-based, multilateral trading systems based on close cooperation among the worldwide institutions at Geneva. Section 2 describes some of the legal, economic, and political justifications by GATT officials (such as GATT Director-General Arthur Dunkel, Rössler, and GATT’s former chief economist Jan Tumlir) for ‘ordoliberal’ (rather than ‘neoliberal’) conceptions of multilateral trade systems limiting ‘governance failures’. Section 3 concludes that the efforts of former WTO Director-General Pascal Lamy at promoting a ‘Geneva consensus’ for an inclusive ‘multilateral trading system beneficial for all’ – and the current WTO initiatives for the digital and green transformation of the ‘brown economy’ (driven by fossil fuels) into a ‘green economy’ (driven by renewable energies) – have failed to overcome the geopolitical divides between European ordoliberalism, Anglo-Saxon neoliberalism, and authoritarian state capitalism. Authoritarian power politics, ‘securitization’ of economies, and national protectionism disrupt the UN and WTO legal, political, and economic systems in ways Rössler’s ‘public choice’ methodology had predicted. Without effective UN and WTO legal constraints, ‘governance failures’ and ‘constitutional failures’ tend to increase; they undermine an ordoliberal ‘Geneva consensus’ on protecting human rights and sustainable development.

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¹See Guest Post, ‘A Tribute to Frieder Roessler from Ernst-Ulrich Petersmann, in the International Economic Law and Policy Blog, 3 September 2024, <https://ielp.worldtradelaw.net/2024/09/guest-post-a-tribute-to-frieder-roessler-from-ernst-ulrich-petersmann.html>.

²Cf. E.U. Petersmann (2022) *Transforming World Trade and Investment Law for Sustainable Development*. Oxford University Press, chapters 4–5.

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1. Geneva Ordoliberalism?

Switzerland has a long tradition of promoting multilateral trade liberalization inspired by the Confederation's domestic experiences with creating a common market among the 26 cantons. Since his founding of the IHEI, Rappard – who also represented Switzerland in many interwar conferences organized by the League of Nations – published numerous books and articles on international order and collective security as pursued by the League of Nations and the International Labor Organization at Geneva. Just as Switzerland's constitutional reforms of 1874 had strengthened constitutional freedoms and judicial remedies as restraints on cantonal trade protectionism, Rappard also emphasized the need for mutually beneficial liberalization of international trade to depoliticize economic relations by legal protection of equal freedoms, property rights, and respect for human dignity,³ promoting private commerce among open and just societies. As director of Geneva's IHEI, Rappard invited Austrian economists and lawyers (such as von Mises, Haberler, Hayek, Kelsen), German ordoliberals (such as Röpke), British liberals (such as Curzon), and other members of the Mount Pèlerin Society to teach at the IHEI on the need for promoting multilateral trade liberalization, rule-of-law, human rights, and labor laws and policies. Since IHEI Professor Olivier Long became GATT Director-General (1968–1980), the progressive transformation of the GATT 1947 through the 1979 Tokyo Round and 1994 Uruguay Round Agreements strengthened close cooperation of Swiss GATT Director-Generals (such as Dunkel), trade politicians, and other GATT officials with scholars at the IHEI.

At the 1938 Walter Lippmann conference in Paris, the economist Alexander Rüstow used the term 'neoliberalism' when exploring the normative foundations of a humane, liberal economic order, avoiding the past governance failures of *laissez-faire* liberalism, the 'social disembedding' and poverty in Germany during the 1920s, the great depression of the 1930s, mutually harmful protectionism (such as the 1930 US Smoot–Hawley Tariff Act), and totalitarian central planning in communist and socialist countries. In 1944, during World War II, the later Nobel Prize laureate Friedrich Hayek predicted that the future civilization of Europe could be decided by what happened in Germany after the war. The 'Freiburg School of ordoliberalism', with which Hayek cooperated (e.g. as co-editor of the *Ordo Yearbook* since 1948 and as professor of economics at the University of Freiburg from 1962–1969), and the 'Cologne School of social market economy' inspired the institutionalization of Germany's post-1945 'social market economy'. Even though the founding fathers of the 1957 Treaty establishing the European Economic Community avoided references to Germany's ordoliberalism (e.g. as promoted by German chancellor L.Ehrhard) in view of the diverse economic and social traditions in EC–EU member states, also the European Union's 'competitive social market economy' (as prescribed in Article 3 of the 2007 Lisbon Treaty) and the broader 'European Economic Area' with EFTA countries (with their EFTA Surveillance Authority and EFTA Court) were progressively 'constitutionalized' in conformity with ordoliberal principles.⁴ This evolution of the EU's multilevel democratic, economic,

³On Rappard's work as a member of the ILO Committee of Experts (1927–1958) supervising the implementation of ILO labor rights, see *Protecting Labor Rights as Human Rights*, edited by G.P. Politakis, ILO 2007, at 29ff. Rappard's 'normative individualism' was emphasized in his book *The Individual and the State in the Evolution of the Swiss Constitution* (Zürich, 1936).

⁴Cf. E.U. Petersmann, 'EU Crises Governance and "Evolutionary Constitutionalism" in a Multipolar World of "Permacrises"', EUI Law Working Papers 2024/19, <https://hdl.handle.net/1814/77476>. On the history of ordoliberalism, see T. Biebricher, W. Bonefeld, and P. Nedergaard (2022) *The Oxford Handbook of Ordoliberalism*. Oxford University Press and my critical review of this book in E.U. Petersmann (2023) 'Neoliberalism, Ordoliberalism and the Future of Economic Governance', *Journal of International Economic Law* 26, 836–842. On Europe's multilevel republican and cosmopolitan constitutionalism (e.g. protecting public goods such as the common market, the monetary union, and multilevel judicial protection of human rights and rule-of-law), supplementing and socially 'stabilizing' Europe's multilevel democratic constitutionalism (including parliamentary, participatory and deliberative democracy 'integrating the diverse national democracies inside the 27 EU member states'), see E.U. Petersmann (2017) *Multilevel Constitutionalism for Multilevel Governance of Public Goods*. Hart.

republican, and cosmopolitan constitutionalism also influenced GATT economists (such as Tumlrir⁵), GATT lawyers (such as Rössler), GATT/WTO jurisprudence (e.g. on GATT Article III), and the GATT/WTO practices of the EU responding to GATT/WTO governance failures by promoting ordoliberal reforms.

The ordoliberal principle of ‘normative and methodological individualism’ explains why ‘(t)he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ (Article 2 TEU), as specified in the EU Charter of Fundamental Rights. Ordoliberals derive values from voluntary, informed individual and democratic consent of citizens in open economic, democratic, social, and ‘legal markets’ protecting non-discriminatory conditions of competition through human and constitutional rights and equal opportunities for individual and democratic self-development (e.g. through economic competition, social contracts, democratic voting, ‘regulatory competition’ at different levels of governance). Even though GATT rules protect broad economic policy discretion and scope for diverse political systems, ordoliberals justify GATT rules less by state consent than by their promotion of citizen-driven ‘consumer welfare’ in economic market competition and general ‘citizen welfare’ in democratic governance, respecting rule-of-law (like the parliamentary ratification of the WTO Agreement).⁶

Ordoliberals and EU law emphasize that constituting, limiting, regulating, and justifying multilevel governance of public goods requires limiting market failures, governance failures, and constitutional failures across the interdependent social, economic, democratic and legal, national and transnational orders. This is reflected, *inter alia*, in the EU Treaty provisions for a ‘competitive social market economy’ and ‘sustainable development’ (e.g. in Article 3 TEU) as integral parts of a European ‘society, in which pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men prevail’, and which is characterized by ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’ (Article 2 TEU). The ordoliberal emphasis on the ‘interdependence of orders’ has become recognized also in the transformation of GATT 1947 and the Tokyo Round Agreements into the WTO Agreement as a ‘single undertaking’ committed to promoting ‘sustainable development’ and international rule-of-law through separation of legislative, executive, and judicial governance powers, and multilevel legal and judicial remedies limiting national power politics. It is also reflected in the WTO commitments to promoting cooperation of the WTO with UN institutions and interpreting WTO law in conformity with other international legal obligations of WTO members, as required by the customary rules of treaty interpretation.

The ordoliberal call for constitutional limitations of market failures, governance failures, and constitutional failures has led to multilevel democratic, republican, and cosmopolitan EU governance and constitutionalism protecting democratic input-legitimacy, republican output-legitimacy, and cosmopolitan, transnational rule-of-law for the benefit of citizens. The WTO’s multilevel governance, legal and dispute settlement systems prioritize multilevel protection of non-discriminatory conditions of competition, rule-of-law, and sustainable development with much less effective restraints on ‘market failures’ and ‘governance failures’ (such as restraints of competition, environmental pollution, public health problems, disregard for human and labor rights). The explicit EU and WTO commitments to ‘sustainable development’ acknowledge that citizen support for liberal trade competition may depend on assisting the losers in competition to adjust and enjoy social security. While the EU mandates for promoting a ‘social market economy’ and

⁵For a summary of Tumlrir’s work on ‘economic policy as a multilevel constitutional problem’, see the contributions by H. Hauser and E.U. Petersmann (1988); ORDO Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 39, 219–255 (in German with English summaries).

⁶Cf. J. Tumlrir (1986) ‘GATT Rules and Community Law’, *The European Community and GATT*, M. Hilf, F.G. Jacobs, and E.-U. Petersmann (eds.). Kluwer, 1–22.

‘sustainable development’, protecting human and social rights have promoted constructive EU responses to financial, environmental, public health, and geopolitical security crises, WTO governance increasingly fails to respond to the ‘poly-crises’ by protecting the universally agreed sustainable development goals.⁷

2. Rössler’s Conception of the ‘Constitutional Functions’ of GATT/WTO Law

In contrast to Chicago School recommendations for business-driven self-regulation (‘markets know best’) and the turn in British and US politics (notably since Prime Minister Thatcher and US President Reagan) to neoliberalism, Geneva School economists (such as Tumlin, Richard Blackhurst), trade diplomats (such as Dunkel, Lamy), and lawyers (such as Rössler) emphasized ordoliberal rather than utilitarian justifications of the rules-based multilateral trading system. According to Rössler,

- GATT does not prevent its contracting parties from attaining economic policy *goals*, but merely regulates the use of policy *instruments*’ (e.g. non-discriminatory internal taxes, product regulations, production subsidies, import tariffs, import quotas, VERs) by legally ranking them according to their economic efficiency and ‘to the constitutional principles of transparency and proportionality’.⁸
- Constitutional democracies can enforce such ‘constitutional functions’ of liberal trade rules more effectively through rights and judicial remedies of citizens inside countries (as inside the EU) than only through intergovernmental dispute settlement procedures.
- The economic and legal ranking in GATT law of policy instruments limits the political incentives for redistributing domestic income through non-transparent, discriminatory policy instruments by legal prohibitions (e.g. of discriminatory VERs and import quotas), thereby protecting trade politicians against domestic pressure groups.
- Hence, compliance with WTO law tends to strengthen rather than circumvent transparent, welfare-enhancing and democratic decision-making – without preventing redistributive social policies and other regulations of ‘market failures’, ‘governance failures’, or ‘constitutional failures’ (as in EU law and certain WTO rules, e.g. on allowing WTO membership of the EU and of sub-state ‘customs territories’ rather than only of states).⁹

Rössler criticized that the legal ranking of policy instruments in WTO law (e.g. concerning technical barriers to trade, intellectual property rights) was no longer fully justifiable by economic theories of optimal intervention. He emphasized that the customary rules of treaty interpretation require interpreting WTO rules in conformity with other international legal obligations of the states concerned; hence, he supported Lamy’s appeal that the UN and WTO institutions should promote mutually beneficial synergies in developing UN and WTO law and coherent practices for the benefit of all, including rules-based dispute settlement procedures as provided in the WTO Dispute Settlement Understanding.¹⁰ Rössler regretted that, due to interest group pressures mainly from the USA, the WTO legal remedies remained far less comprehensive than the general international law remedies (e.g. regarding retroactive remedies, financial compensation, and

⁷Cf. Petersmann, *supra* n. 2; and E.U. Petersmann (2024) ‘Multilevel Governance of Sustainable Development in the WTO’, EUI Law Working Paper, 11. The 2022 WTO Agreement on Fishery Subsidies remains, so far, the only trade-related environmental agreement concluded in the WTO.

⁸F. Rössler (1993) ‘The Constitutional Function of the Multilateral Trade Order’, in M. Hilf and E.U. Petersmann (eds.), *National Constitutions and International Economic Law*. Kluwer, 54ff.

⁹F. Rössler (2019) ‘Democracy, Redistribution and the WTO’, *World Trade Review* 18, 353–359.

¹⁰Cf. P. Lamy (2013) *The Geneva Consensus. Making Trade Work for All*. Cambridge University Press.

interim relief).¹¹ He was saddened to see the WTO dispute settlement system being progressively disrupted by rent-seeking, protectionist interest group politics, such as abuses of trade remedies and illegal US blocking of the appointment of Appellate Body judges. Rössler rejected neoliberal advocacy for liberalizing, privatizing, deregulating, and ‘financializing’ economies and business-driven (self)regulation without adequate regard to market failures and governance failures. He perceived insufficient WTO responses to the financial, environmental, global health, and geopolitical security crises as undermining ‘Geneva ordoliberalism’, for instance by provoking discriminatory industrial policies, disruptive security policies (such as US refusal to accept judicial review of US invocations of Article XXI GATT), and national protectionism.

3. Neoliberalism, Ordoliberalism, and Authoritarian ‘Regulatory Competition’

Rössler played a leading role in the legal transition from the GATT to the WTO. As legal systems dynamically evolve through interactions between legal rules, institutions, and legal practices, he defended the rule-of-law not only in view of the welfare-enhancing effects of WTO rules; the parliamentary ratification of the WTO agreements made compliance with WTO rules also a democratic imperative. Rössler regretted the Russian wars against WTO members (such as Ukraine), Chinese military aggression against WTO members (such as Taiwan and the Philippines), US countermeasures violating WTO rules and dispute settlement procedures¹², and ever more discriminatory trade distortions, which risk to irreversibly disintegrate the WTO trading, legal, and dispute settlement systems. The more authoritarian WTO members (such as China and Russia) suppress human and democratic rights and prioritize power monopolies distorting market competition, the less the ‘embedded liberalism’ and democratic constitutionalism of the founding countries justify maintaining GATT/WTO trade relations with dictatorships. The ‘constitutional approach’ to explaining international legal policies, which Rössler supported, suggests that authoritarian power monopolies (e.g. inside China and Russia), democratic nationalism (e.g. in democratic WTO member states) and Europe’s multilevel democratic, republican, and cosmopolitan constitutionalism will remain permanent facts increasing ‘regulatory competition’ and fragmentation of the WTO trading, legal and dispute settlement systems.¹³ The EU, for instance, uses free trade agreements, development assistance, emission trading, and carbon adjustment systems, human rights and environmental law for making access to the EU common market conditional on compliance with UN sustainable development standards.¹⁴ Rössler feared that a second US Presidency of Donald Trump could destroy the multilateral trading system as in the 1930s when the US Smoot–Hawley Tariff Act of 1930 worsened the great depression, the breakdown of the international monetary system, and ever more dictatorships ushering in World War II. Rössler criticized how illegal abuses of veto-powers and non-compliance with WTO decision-making procedures disrupted not only the WTO dispute settlement system, which he had helped to build; also the WTO sustainable development goals risked becoming a utopia if the permanent UN Security Council members no longer complied with their UN legal obligations.

Following his retirement from the Advisory Centre for WTO Law, the UN and WTO governance failures to protect the universally agreed sustainable development goals (such as climate change mitigation) and conclude the Doha Round negotiations made Frieder increasingly sceptical towards humanity’s capacity of protecting the UN and WTO legal systems. He was less

¹¹Cf. F. Rössler (2007) ‘The Responsibilities of a WTO Member Found to Have Violated WTO Law’, in Y. Taniguchi et al. (eds.), *The WTO in the 21st Century*. Cambridge University Press, 141–147.

¹²Cf. S. Charnovitz (2024) ‘Why the US Should Respond Honestly to China’s WTO Complaint’, IEL Blog of 4 September 2024.

¹³Cf. E.U. Petersmann (2024) ‘Transforming UN and WTO Legal Systems through International Legal Policy Competition and ‘Lawfare’, *EUI Law Working Papers*, 16.

¹⁴Cf. E.U. Petersmann (2024) ‘European Economic and Environmental Constitutionalism as Driver for UN and WTO Sustainable Development Reforms’, *Global Community Yearbook of International Law and Jurisprudence* 23, 69–102.

interested in exploring ‘second-best policies’ responding to systemic challenges such as China’s competitive distortions (e.g. by subsidies and carbon emissions exceeding those of all 38 industrialized OECD countries), Russia’s aggressive weaponization of energy and food supplies, ‘Belt & Road agreements’ with more than 100 countries avoiding references to human rights and to independent judicial protection of rule-of-law, and Russia’s ‘partnership without limits’ with China aiming at suppressing human and democratic rights (like self-determination of the people in Ukraine). Does the insufficient leadership for reforming UN and WTO law suggest that ‘Geneva ordoliberalism’ – as recently confirmed in the WTO’s 2024 World Trade Report on rendering the world trading system more inclusive to respond to social, digital, environmental, and developmental challenges – will be insufficient for maintaining the UN and WTO legal systems?

The evolution of complex economic, political, and legal systems remains driven by individuals. Hence, it is important to explore and understand the thinking and motives driving the ‘architects’ of legal systems. Rössler’s publications (e.g. on international monetary order) revealed a cosmopolitan citizen of the world in search for global justice. Shortly before his death in July 2024 at the age of 85, Rössler sent his family members personal reflections on his life, which concluded with a short ‘Socratic rhyme’ in his German native language: ‘Ich bin, ich weiß nicht, wer. Ich komme, ich weiß nicht woher. Ich gehe, ich weiß nicht wohin. Mich wundert, dass ich so fröhlich bin.’¹⁵ Rössler found his vital force and joy during his last years mainly in his love for his family and for the beautiful nature surrounding his life at the Lake of Geneva, not far away from the WTO’s Centre William Rappard and the *Perle du Lac* restaurant. During our many walks along the lake, Frieder enjoyed the inscription under the roof of the *Perle du Lac*: ‘Heureux celui qui sur ces bords peut longtemps se reposer. Heureux celui qui les revoit s’il a dû les quitter.’¹⁶

¹⁵An English translation is: ‘I am, I don’t know, who. I don’t know from where I come. Nor do I know where I am going to. I wonder what makes me so joyful.’

¹⁶An English translation is: ‘Happy is he who can rest long on these shores. Happy is he who sees them again if he has had to leave them’.