The Changing Structure of International Trade Law

Thomas Cottier*

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A. In Memoriam Werner Meng

Emerging challenges in international trade regulation were topics shared with Werner Meng over many years. The joint moot court seminars with students of the Europa Institute in Saarbrucken and the Institute of European and International Economic Law of the University of Bern remain fond memories. Meeting alternatively in Otzenhausen and Bern, and other more remote and romantic venues in Germany and Switzerland, students and staff debated impending issues of WTO law, working hard, but also enjoying time with like-minded people, and sharing a strong interest in multilateralism and the advancement of the rule of law in international economic relations. Werner Meng was a casual observer and intellectually inspiring partner. He closely followed the work of the WTO, panels and the Appellate Body. He commented in a farsighted manner. We miss him in current debates as we commemorate him and his

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work with the papers in this volume, following the conference held on *Current Developments in International Economic Law*, honouring him in Saarbrucken on April 20, 2018.

Werner Meng could have said much on the following topic addressing the changing structure of international trade law and its implications on international cooperation and inclusive policy and treaty-making. The paper, based upon the presentation made, expounds the evolution of post-World War II trade regulation, the impact of global value chains and the increasing importance of regulatory cooperation and convergence. The shift to what we call behind-the-border issues substantially alters the structure and operation of international economic law.

Current underlying changes are not less fundamental than the shifts towards the law of international cooperation following the foundation of the United Nations in 1944. Wolfgang Friedmann, in his seminal book *The Changing Structure of International Law* described the shifts from co-existence to cooperation in 1966. Ever since the law of cooperation has moved to the law of integration within the European Union. In global relations, the shift is much slower but equally shows in increasing demands for regulatory convergence due to enhanced division of labour and global value chains, next to co-existence and cooperation. At the same time, appropriate procedures to cope with the task are still largely missing, creating and explaining underlying tensions in trade policy. All these are signs of structural change in international economic law.

B. From Trade Liberalisation to Trade Regulation and Behind-the-Border-Issues

After World War II, international trade law evolved in different regulatory generations.[1] At the outset, the main task was to reduce high levels of inter-war tariffs, amounting on average to 40 % on industrial goods in 1945. The General Agreement on Tariffs and Trade (GATT) essentially focused on the process and law of tariff reductions, entailing non-discrimination and necessary flanking measures to secure the effectiveness of tariff reductions. While GATT was conceived as a provisional agreement pending the entry into force of the comprehensive economic Havana Charter, it became one of the most successful and effective international agreements. In eight trade rounds, the average level of industrial tariffs was reduced to some 4 % by 1995, greatly enhancing international trade and its share in GDP in particular of smaller and medium-sized countries. The emphasis, at the time, was on tariff reduction and elimination of quantitative restrictions.[2] It was a matter of deregulation, and it is here that the term free, or freer, trade was fully appropriate.

The successful reduction of tariffs under the Most Favoured Nations (MFN) principle shifted attention to non-tariff barriers to trade. A second generation of rules refined disciplines on dumping and subsidization and addressed increasingly emerging

1 See generally *Cottier/Oesch*, International Trade Regulation: The Law and Policy of the WTO, the European Union and Switzerland, 2005, in particular pp. 58-65.

2 See *Jackson*, World Trade and the Law of GATT: a Legal Analysis of the General Agreement on Tariffs and Trade, 1969.

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technical barriers to trade. The emphasis no longer was on de-regulation, but rather re-regulation: It was a matter of defining common disciplines and thresholds for domestic regulation in addressing differences in product regulation in order to avoid unnecessary trade barriers and thus to bring about trade facilitation. Increasingly, the process was accompanied by enhanced recognition of non-trade concerns, resulting in high non-discriminatory levels of protection and regulation, subject to the disciplines of WTO law.

A third generation finally turned to regulatory areas essentially unrelated to border issues but traditionally pertaining to domestic affairs and thus the prerogatives of parliament and government. Indeed, modern and water-front trade policy today is mainly concerned with regulatory issues.[3] Except for trade in agriculture where tariffs continue to play a dominant role, attention mainly moved to non-tariff barriers ever since the GATT Kennedy Round in the 1960s. It culminated in the TBT and SPS Agreements, the inclusion of services (GATS) and intellectual property (TRIPs) and of government procurement in the GATT Uruguay Round. All pillars of the WTO today mainly focus on domestic regulation rather than on border measures and customs.[4]

It should be noted that the importance of product standards for goods and services will further increase in the future. In the context of climate change mitigation and adaptation, production and process methods (PPMs) will take centre stage in distinguishing sustainably produced products from conventional like and substitutable products.[5] More and more, it will import how products are being made, rather than physical properties, in determining treatment in trade law.

Behind-the-Border Issues (BBIs) address regulatory barriers inside of jurisdictions, traditionally pertaining to domestic affairs. Politically, they are highly sensitive to concerns of sovereignty and self-determination, the prerogatives of parliament and the electorate. It is not a coincidence that international efforts to deal with these issues have been under attack by nationalist and populist movements for some time. These efforts impinge upon traditional perceptions of national sovereignty and independence. Modern standards also entail problems of extraterritorial effects to the extent that they address production and process methods (PPMs) that leave no traces in the final product. At the same time, removing such barriers is essential for cross-border trade, especially for SMEs which do not operate in vertically integrated value chains and private standards.

Most of the modern regulatory challenges lie within the realm of BBIs. The same holds true with virtually all the impending and future topics of trade negotiations, currently including electronic commerce, fisheries subsidies, and possibly extending including in future sectorial negotiations a return to the Singapore issues (dropped in

3 See WTO, World Trade Report 2012, Trade and public policies: A closer look at non-tariff measures in the 21st century, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf (23/10/2018).

4 *Cottier*, International Economic Law in Transition from Trade Liberalization to Trade Regulation, Journal of International Economic Law 17/2014, pp. 671-677.

5 See *Holzer*, Carbon-Related Border Adjustment and WTO Law 2014.

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2003 at the Cancun Ministerial meeting) on competition law and policy and investment protection. Equally, negotiations on private standards (food technology), climate change related topics (technology diffusion, reduction of fossil fuel subsidies, the interconnection of renewable energy production and grids), labour standards and human rights, financial regulations and monetary affairs all amount to essentially behind-the-border issues. Coming to terms with the ownership of electronic data and personality protection in cyberspace calls for common global rules, albeit the matter pertains to the domain of traditional legislation of nation states. True, the current trade war between the US and China plays out on tariffs. Yet, the underlying issue to be addressed relates to defining rules on state capitalism, state trading, subsidization and control of information technologies and property rights to big data – all are behind-the-border issues of a complex regulatory nature which no longer can be dealt with in isolation in domestic law.

The shift of traditional regulatory matters to the realm of international law is the prime significant structural change to be noted. The second one deploys significant effects upon the treaty system. Due to MFN obligations, but also the nature of regulation, additional disciplines negotiated in bilateral and plurilateral agreements and implemented in domestic law normally deploy general effects and equally affect trade with third countries. Other than tariffs, they are rarely preferential in effect. Whatever the source, domestic regulation is, in most instances, applied uniformly to all persons and nations alike. Regulation of non-tariff barriers agreed upon in agreements thus deploys significant spill-over effects in NTBs on third parties which are absent for exclusive, preferential tariffs. They lift the water for all boats alike and reduce discrimination. At the same time, they often refer to WTO law for reasons discussed below. The two cannot be separated. They are complementary and jointly form what I call the common law of international trade.[6]

C. The Facts of International Trade and the Limits of Bilateralism

Contemporary international trade is essentially characterised by trade in components. More than 60 % of goods cross borders at least twice before reaching the final consumers.[7] Complex products identifiable on a purely national basis are increasingly rare. Companies operate in regional or global value chains, and operations are increasingly mixing goods and services in the age of information technology; trade in goods and services can no longer be neatly separated.[8] We speak of 'servicification' of goods and their production. Moreover, trade is increasingly entangled with intellectual

6 *Cottier*, The Common Law of International Trade and the Future of the World Trade Organization, Journal of International Economic Law 18/2015, pp. 3-20.

7 In 2009, the total of export share of final goods and services amounted to 34 % (World) and 47 % (China), see: *Baldwin/Lopez-Gonzales*, Supply-Chain Trade: A Portrait of Global Patterns and Several Testable Hypothesis, National Bureau of Economic Research, WP 18957, 2013, p. 13, http://www.nber.org/papers/w18957.pdf (23/10/2018).

8 See *Elms/Low* (eds.), Global Value Chains in a Changing World, 2013, https://www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_e.pdf (23/10/2018).

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property and foreign direct investment and a complex web of technical standards relating to products and to modes of production. It increasingly depends upon close coordination of legal rules of different countries trading with each other.

These structures and interdependencies evolved over time and are essential to the process of globalization and the modern division of labour. They are both a cause and a foundation of enhanced global welfare but also of the accompanying problems and challenges addressed below. The structures are unlikely to return to previous patterns of domestic industrialization albeit the implications of robotics and 3-dimensional printing may cause repatriation and relocation to some extent.

Mercantilist trade policies witnessed in current US trade policy and the call for an independent trade policy by Brexiters in the UK fail to take these facts into account. The introduction of border measures and quantitative restrictions, advocated by President Trump's Administration, will harm consumers, in particular, the lower income strata. Such measures will reduce trade in components and privilege more expensive domestic products, reducing the purchasing power of domestic consumers. Border measures moreover will affect domestic jobs, as they hurt domestic industries dependent upon the export of incorporated imported components, as much as they harm companies exporting components, disrupting established value chains. Moreover, import restrictions do not take into account the importance and relevance of transnational services in running the supply chains. Restrictions on service providers will further disrupt value chains and modes of production.

Mercantilist trade policies thus may reduce or eliminate global value chains, but they are hardly able to bring back traditional structures and jobs outsourced as they may impair the creation of new jobs in new industries as access to competitive labour and components are restricted. Traditional trade policy instruments are largely unable to deliver the results promised in the US electoral and the Brexit campaigns. Consumers will face more expensive products and will find less on offer. Shareholders will see the value of their assets being reduced. Voters, finally, will turn away from mercantilism once they learn that it increases prices but does not bring back jobs promised.

As set out, the true challenges in international trade law are elsewhere. They mainly lie in the field of regulatory cooperation, which is of key importance for growth and job creation as production is based upon interdependent international markets and products. Such cooperation is inherently multilateral or plurilateral. It cannot be achieved bilaterally or unilaterally except in dominant markets.

The WTO offers a robust and solid framework to address domestic regulations that limit market access without sufficient justification. The GATT and the TBT Agreement offer legal guidance to discern what is excessive and protectionist from legitimate domestic regulations.[9] But the latter does not offer mutual recognition or harmonization of domestic regulation. WTO law generally does not engage in prescribing recognition of foreign rules for market approval or in harmonising domestic legal standards.

9 See generally *van der Bossche/Zdoug*, The Law and Policy of the World Trade Organization: Text, Cases and Materials, 4th edition, 2017.

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An exception to this is the TRIPS agreement which establishes global minimum standards for the protection of intellectual property rights (IPRs). Another exception is the SPS Agreement for binding food standards, in combination with WHO/FAO Codex Alimentarius standards, yet subject to more restrictive domestic rules. Finally, joint regulation of services in the GATS Agreement is still in its infant stage, mainly codifying domestic standards in members' schedules of commitment. TISA may bring some further progress to this effect.

It is important to note that most of the existing bilateral preferential trade agreements (PTAs) do not go much beyond multilateral non-tariff rules and standards.[10] Behind-the-border issues are merely partly addressed in PTAs. The agreements essentially rely upon WTO rules or build upon them, if at all. Technical barriers to trade going beyond WTO TBT disciplines are typically addressed in preferential Mutual Recognition Agreements (MRAs). They reciprocally allow testing market conformity with export destinations by home institutions and thus facilitate conformity assessment and reduce costs. Additional provisions on intellectual property rely upon the TRIPs Agreement.

Essential reliance of BBIs upon multilateral rules is not a coincidence. Bilateral harmonization of rules and extension of mutual recognition is of limited advantage as they formally are merely applicable to the parties to the PTA. They are not extended to third parties and thus merely add to the complexity of the production standards of a country. Or, they must be extended, as in the case of IPRs, on the basis of MFN, yet without obtaining privileges in return. Such limitations may be the prime reason why most bilateral agreements have remained of limited added value beyond WTO rules affecting BBIs.

Instead, behind-the-border issues are essentially addressed in non-reciprocal configurations of PTAs which entail one large and dominant market to which others adjust. In particular, the EU, the US, and increasingly China, are in a position to impose and export their own domestic standards due to market size and market power. To the extent that PTAs address non-tariff barriers and behind the border issues, they usually adopt the standards of the larger market. For example, Switzerland (and other EFTA Members within the EEA) largely align their rules to those of the European Union and ensure consistency with them both in preferential agreements and autonomous regulation.[11] Even in the absence of an obligation, reliance on European Union rules is chosen to avoid unnecessary trade barriers and burdens on production within the country. The same holds true for Canada in relation to the United States under NAFTA rules. When Canada calls for greater regulatory cooperation in

10 See *Molina/Khoreshvina* (WTO Secretariat), TBT Provisions in Regional Trade Agreements: To what extent do they go beyond the WTO TBT Agreement?, December 2015; https://www.wto.org/english/res_e/reser_e/ersd201509_e.pdf (23/10/2018).

11 See e.g. *Cottier et al.*, Die Rechtsbeziehungen der Schweiz und der Europäischen Union, 2015.

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NAFTA talks,[12] it is likely to adjust to US standards in the end. The same would happen in the context of CETA in relation to the EU. In current preferential agreements, there is little genuine negotiation on new approaches to regulation and behind-the-border issues, comparable to what was achieved for example in the TRIPs Agreement, merging European and American legal traditions. Instead, the preferential trade agreements normally follow a hub and spike approach. Compromise and new and innovative standards are the exceptions.

D. The Importance of TTIP for Regulatory Convergence

The stalled Transatlantic Trade and Investment Partnership (TTIP) so far is the most important contemporary project and effort in addressing behind-the-border issues as the project covers approximately 30 % of world trade and 46 % of world GDP (2014).[13] The TTIP agreement, formally bilateral but plurilateral in nature, seeks to introduce enhanced regulatory cooperation between the EU and the US.[14] While the drafts include traditional trade policy chapters from tariff reductions to non-tariff measures, services, intellectual property and investment protection, the most important innovation sought by the European Commission is enhanced regulatory cooperation. Originally proposing a standing transatlantic Regulatory Cooperation Body (RCB), the effort was reduced to cooperation due to US scepticism.[15] The framework is supposed to allow for incremental long-term approximation of divergent standards and regulatory practices on both sides of the Atlantic. The agreement also seeks to include regulations under sub-federal levels.

It is premature to say to what extent these provisions would be able to trigger mutual recognition, equivalence or even harmonization in different sectors of the respective economies. Some sectors, such as automotive and pharmaceuticals, strongly supported closer governmental cooperation as these industries are partly owned by the same multinational corporations operating on both sides of the Atlantic Ocean. But regulatory traditions substantially differ between Europe and the United States. An agreement will depend upon the possibility of establishing and preserving mutual trust in regulatory cooperation.

12 Canada pushing regulatory cooperation in second round of NAFTA talks, Inside US Trade, 03/09/2017; https://insidetrade.com/daily-news/canada-pushing-regulatory-cooperation-second-round-nafta-talks (23/10/2018).

13 Eurostat 2015, USA-EU International Trade Statistics (31 % World Exports, 27 % World imports (2013)), http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU_-_international_trade_and_investment_statistics (23/10/2018); *European Commission*, SIA in support of the negotiations on a Transatlantic Trade and Investment Partnership (TTIP), Final Report, March 2017, p. 15 (46 % World GDP), http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf (23/10/2018); cf. also DG Trade, European Union, Trade Goods with USA, http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf (23/10/2018).

14 See http://ec.europa.eu/trade/policy/in-focus/ttip/ (23/10/2018).

15 See for EU draft texts on regulatory cooperation http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#institutions (23/10/2018).

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While the fate of these proposals is unclear under the New Bilateralism of the US and the UK, they clearly show and reflect contemporary needs of coordination considering extensive value chains between the two trading blocks. Other than in unilateral adjustment to a hub and larger trading partner, EU-US standards would amount to new standards which are able to obtain worldwide recognition as exports to these large markets will need to comply with these standards. They are of significant importance also for non-parties.

TTIP regulations and standards would deploy significant global spill-over effects and path the way to subsequent formal global standards in international organizations, including the WTO, in the process of multilateralising major preferential trade agreements. Studies show that an ambitious TTIP produces benefits to third parties which align to the new standards, either by joining the agreement or by means of unilateral adjustment.[16] Producers in third countries henceforth will be able to manufacture or provide services based on transatlantic standards, avoiding duplications in production. For Britain, upon leaving the Union, it will be essential that TTIP succeeds in bridging the United States and the European Union, as much as this is important to EFTA and NAFTA States.

In addition, work needs to be taken up in the WTO. The experience of the TRIPS Agreement shows that, given the necessary geopolitical configurations, regulatory convergence can be achieved on a global scale. Future topics, in particular the legal framing of trade in big data and new rules on state trading, subsidies and technology transfer inherently need to include China. TTIP, if taken up again, will not be able to address all the pertinent issues. For some issues, the best place to negotiate and secure global public goods is the WTO, in cooperation with other international organizations.

E. How much Regulatory Cooperation?

The shift of regulatory powers to international law and the opposition it faces begs the question of how much regulatory convergence can and should be achieved. The issue is essentially related to the question of the division of labour and transnational value chains. On what level should matters best be addressed? On what level can public goods best be produced in order to fulfil its regulatory purposes? The experience of TTIP, even before it was stalled, and those with many other agreements shows that this controversial issue has been at the heart of trade policy debate. The same holds true for the experience made with the negotiations and adoption of CETA. These issues go to the heart of regulatory powers, self-determination, sovereignty and democracy.

Regulatory convergence greatly varies among different areas, from the absence of common rules (such as for electrical plugs still requiring travellers to use adapters) to

16 See *Cottier/Francois* (eds.), The Potential Impact of a EU-US Free Trade Agreement on the Swiss Economy and External Relations, 2014, https://www.newsd.admin.ch/newsd/message/attachments/35611.pdf (23/10/2018).

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full harmonization (such as interconnection and telecommunication). The OECD lists no less than 12 different stages, from the exchange of information to full harmonization. They comprise (1) regulatory dialogue, exchange of information, (2) soft law, guidelines, principles, (3) recognition of international standards, (4) domestic standards based upon international standards, (5), transnational networks, (6) intergovernmental organizations, (7) mutual recognition agreements, (8) regulatory partnerships between countries, (9) specific conventions and treaties, (9) mutual recognition (11) economic regionalism, and (12) harmonization.[17]

Mutual recognition and harmonisation are most developed in the European Union and federated States while much less frequently applied in international trade relations. They require a certain level of mutual confidence which is generally absent outside of customs unions. Yet, even within the European Union, and even within federated states, the allocation of regulatory powers amounts to one of the most controversial and constantly debated issues in politics and in constitutional law.[18]

There is a traditional presumption that the nation state is the most appropriate level to regulate in the contemporary world. It is here that democratic legitimacy is best developed in most countries. It is here that fiscal powers supporting policies are regularly allocated. Delegations of power to subsequent echelons (devolution) and to the realm of European and international law remain difficult because of that presumption. They face fierce resistance and opposition which are rooted in traditional perceptions of national sovereignty. It is time to review these perceptions in the public discourse and to rethink sovereignty with a view to bringing about a better allocation of public goods and thus enhance the welfare of societies.

F. Rethinking Sovereignty

Since the Westphalian Peace of 1648, the American Revolution and the process of decolonization in 19th Century Latin America and after World War II in the 20th Century, national sovereignty stands for the proposition of liberty, independence and self-determination. Principles of non-intervention and the prohibition of war and aggression are essentially built upon this trait and tradition. Sovereignty, in its beginning, however, was about enabling and preserving peace and security within states. It was not motivated by independence and self-determination. Jean Bodin was driven to write about sovereignty as the ultimate power of the State (rather than the emperor) by internal strife and religious wars in *Les six livres de la République*, published in

17 *OECD*, International Regulatory Cooperation – Better rules of Globalisation, http://www.oecd.org/gov/regulatory-policy/irc.htm (23/10/2018).

18 See *Anderson* (ed.), Internal Markets and Multi-level Governance. The Experience of the European Union, Australia, Canada, Switzerland, and the United States, 2012.

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1583.[19] Thomas Hobbes in *Leviathan*, published in 1651 in the midst of the English revolution, conceived the transfer of sovereign powers from a human to a central authority in order to keep peace at home and enabling society to fend-off foreign foes.[20] The purpose of appointing a sovereign is 'to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.'[21] Jean-Jacques Rousseau developed the idea of people's sovereignty as a means to enable democracy; sovereignty being the exercise of the *volonté génerale* created by social contract to defend the community. [22] All these theorists share in common that sovereignty serves the purpose of creating peaceful conditions and thus prosperity and welfare within society and subsequently serving the purpose of creating essential public goods. It is not an end in its own; neither is self-determination and independence. These are the means to an end: They are legitimate to the extent that they are able to create essential public goods. And where these public goods cannot be achieved independently, it follows, sovereignty inherently is bound to be shared and exercised jointly as cooperative sovereignty. Self-determination and public welfare goals need to be balanced properly. Modern theories relating to sovereignty thus stress the concept and idea of shared and cooperative sovereignty and the allocation of powers

19 « Or, si la vraie félicité d'une République et d'un homme seul est tout un, et que le souverain bien de la République en général, aussi bien que d'un chacun en particulier, gît [dans les] vertus intellectuelles et contemplatives, comme les mieux entendus ont résolu, il faut aussi accorder que ce peuple-là jouit du souverain bien, quand il a ce but devant les yeux, de s'exercer en la contemplation des choses naturelles, humaines, et divines, en rapportant la louange du tout au grand Prince de nature. Si donc nous confessons que cela est le but principal de la vie [p. 62] bienheureuse d'un chacun en particulier, nous concluons aussi que c'est la fin et félicité d'une République. », footnotes omitted, referring to Cicero and Aristotle; *Bodin*, Les six livres de la République: Un abrégé du texte de l'édition de Paris de 1583. Édition et présentation de Gérard Mairet. Paris: Librairie générale française, 1993, at p. 46, http://classiques.uqac.ca/classiques/bodin_jean/six_livres_republique/bodin_six_livres_republique.pdf (23/10/2018).

20 'The final Cause, End, or Designe of men (who naturally love Liberty, and Dominion over others,) in the introduction of that restraint upon themselves, (in which wee see them live in Common-wealths,) is the foresight of their own preservation, and of a more contended life thereby; that is to say, of getting themselves out from that miserable condition of Warre, which is necessarily consequent (as hath been shwen) to the naturell Passons of men, when there is no visible Power to keep them in awe, and tye them by feare of punishment to the performance of the Covenants, and observation of those Lawes of Nature set down in the fourtheenth and fiftheenth Chapters.', *Hobbes*, Leviathan, (reprinted from the edition of 1651, 1909) Chapter XVII, http://files.libertyfund.org/pll/pdf/Hobbes_0161_EBk_v7.0.pdf (23/10/2018).

21 Ibid. at p. 134.

22 « On voit par cette formule que l'acte d'association renferme un engagement réciproque du public avec les particuliers, & que chaque individu contractant, pour ainsi dire, avec lui-même, se trouve engagé sous un double rapport; savoir, comme membre du Souverain envers les particuliers, & comme membre de l'État envers le Souverain. », *Rousseau*, Du contrat social, ou principes du droit politiques, Chapter VII, 1780-89, https://www.rousseauonline.ch/pdf/rousseauonline-0004.pdf (23/10/2018).

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among different layers of government as the essence of modern sovereignty within an overall global legal system.[23]

There always remains room for reasonable disagreement[24] on the allocation of powers among different layers of government once the role and function of sovereignty are newly defined and perceived as an instrument to enhance public welfare rather than nationalism. There are always pro and cons. It is, therefore, a matter of defining appropriate procedures of decision-making. As in all areas of policy-making, it is essential to engage in processes of debate and deliberation which are inclusive and give voice to all which traditionally pertain to the process of domestic legislation: political parties, industry, non-governmental organisations and civil society.[25] Equally, all layers of domestic governance need to be properly included.

It is here that trade policymaking faces extraordinary challenges. It has to learn from the experience made with TTIP prior to the break down under the current US administration. As in CETA, much opposition in Europe was voiced due to insufficient inclusiveness in developing the agreements. We submit that lessons should be learned, and processes framed at the outset with a view to domestically front-loading policymaking in international economic law. Again, it is a matter of finding appropriate substance-structure pairings.[26] Procedures and processes must be adapted to the shift to BBIs in restructuring international economic law and corresponding domestic legal disciplines. They need to allow for a structured process of reasonable disagreement in the process of allocating regulatory powers to different layers of government.

G. Front-loading Trade Policy Making

I. The Quest for Inclusiveness

The shift from reducing tariffs to non-tariff measures in the late 1980s, and ever since the inclusion of services and intellectual property protection in the WTO, has not been accompanied by substantially more inclusive processes of policy-making in international law. Nothing has changed in the *modus operandi* of WTO talks ever since non-tariff barriers were firstly addressed in the Kennedy Round in 1964. They are essentially diplomatic and governmental, at the exclusion of civil society, at least in formal stages. More inclusive procedures all depend upon domestic reform and approaches. It is up to each of the Members of the WTO to define the impact of their parliaments,

23 See *Jackson*, Sovereignty, the WTO, and Changing Fundamentals of International Law, 2006; *Cottier/Hertig*, The Prospects of 21st Century Constitutionalism, in: Max Planck United Nations Yearbook 2003, pp. 261-328; *Cottier*, Towards a Five Storey House, in: Joerges/Petersmann (eds.), Constitutionalism, Multilevel Trade Governance and International Economic Lawm, 2011, pp. 495-532.

24 The theory of reasonable disagreement was developed by *Besson*, The Morality of Conflict: Reasonable Disagreement and the Law, 2005.

25 Cf. *Steiner/Jaramello/Rousiley/Mameli*, Deliberation across Deeply Devided Society, 2017.

26 See *Cottier*, Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings in the EFTA Experience, in: Hilf/Petersmann (eds.), National Constitutions and International Economic Law, 1993, pp. 409-442.

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business and of civil society in the preparatory phase of a negotiation, during and upon completion of the process.

There are no international standards on inclusiveness as international law is not concerned with the political process at home, except for transparency and the obligation to provide judicial review of trade-related administrative decisions. International law at this stage, and based upon the principle of sovereignty and self-determination, does not know a right to democracy and essentially has remained a black box open to all forms of government. Keeping peace among nations cannot afford to exclude authoritarian governments, even dictatorships, from the international community. The structure of contemporary international law is not inclusive and thus badly prepared to absorb the shift of fora in the wake of globalisation and the need to harness it.

Matters addressing non-tariff barriers and measures traditionally pertaining to domestic law thus today are addressed and settled by way of diplomatic negotiations, often perceived to be exclusive and not sufficiently transparent and accountable. This creates suspicion and resistance. The legitimacy of the WTO and of international agreements negotiated by governments has been increasingly challenged, ever since the 1999 Seattle Ministerial Conference.[27] The shift to preferential trade agreements ever since the end of the Cold War and the accession of China to the WTO in 2001 extended the issue of legitimacy to preferential trade agreements and plurilateral, critical mass agreements formally negotiated and concluded outside the WTO. The decline of the Doha Development agenda eased criticism of the WTO and turned criticism to agreements like CETA and TTIP. The public perception of these processes and projects, perhaps, is more important than the reality which lacks appropriate communication to the public. This is true for most countries alike, including the European Union.

In reality, diplomatic processes follow strict protocols. They operate on the basis of government instructions and reporting. They are much more rational and interest-driven and operating with variable coalitions than generally perceived by the public at large. Indirectly, negotiating tasks and directions in democracies are democratically legitimate as they are founded and supported by prevailing views in Parliament and the executive branch. Yet, these linkages often are not sufficiently visible to outsiders in the tradition of confidential negotiations behind closed doors.

Within the European Union, structures of decision-making in foreign affairs have not fundamentally changed up to now – despite the shift of fora described in the field on non-tariff measures. Democratic control in treaty-making mainly rests upon ex-post consent or refusal of negotiated results. The decision to take up negotiations is a matter for the Council, upon proposal by the Commission. Likewise, the Council adopts the negotiating mandate based upon which the Commission engages the negotiating process. The European Parliament is consulted but is not required to consent. During negotiations under an adopted mandate, the Member States and the European

27 See *Cottier*, The Legitimacy of WTO Law, in: Yueh (ed.), The Law and Economics of Globalisation. New Challenges for a World in Flux, 2009, pp. 11-48.

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Parliament may influence processes politically but cannot formally define directions. Adjustments to the negotiating mandates are taken by the Council alone. The European Parliament and National Parliaments of Member States are essentially limited to ex-post controls in the process of consent and ratification and implementation. Given this configuration, it is not astonishing that the Member States and their representatives – during ongoing negotiations – seek to informally use appropriate means of political communication and to advance their own interests in doing so. Objections made by civil society, national or regional parliaments, at the time of the WTO Agreements, and more recently to preferential trade agreements with Ukraine, Canada and likely the United States thus are not accidental, but inherent to a system which largely excludes these actors in conceptualising future agreements and in defining their scope and boundaries.

In this vacuum of appropriate structures of inclusive participation prior and during the negotiating phase, it is not astonishing that Governments of Member States insist on their treaty-making powers and thus upon the anomaly of mixed agreements within the European Union. Mixity remains the main instrument to influence new and emerging subjects under negotiations. Unless a model of unitary powers can be found and developed in practice which offers enhanced inclusiveness, mixed agreements indeed are likely to stay in trade policy and other areas of foreign affairs of the Union and its Member States.

With a view to front-loading the agenda of negotiations and major operational goals in general and with a view to preparing specific talks, it is interesting to draw attention to the US Trade Act as a potential model for European trade policy-making. The size of the European market implies substantial negotiating power allowing for such comparison with a model which emerged for domestic reasons when the United States still largely dominated international trade policy and was able to impose its domestic and legally defined objectives. While domestic concerns vary according to differences in constitutional law, the US and the EU share common goals in combining inclusive and effective treaty-making powers. It is an exercise of combining and interfacing democracy, predictability, reliance and trust. It may be added, though, that the model may also be of interest to other Members of the WTO facing comparable challenges in trade-policy making.

II. The US Trade Act

As international trade is a constitutional prerogative of Congress (Article I section 8 US Constitution), the President only engages in trade talks and negotiations to the extent the Administration is authorized by Congress. It may grant such authority, but also take it back. Short of appropriate legislation, the executive branch would essentially depend upon consent by two-thirds of the Senate and regular legislation controlled by the two Houses. In other words, the Presidency, despite extensive foreign policy powers and the title of Commander-in-chief, is not in a position to meet legitimate expectations of trading partners on its own. It depends upon close co-operation with Congress. Trade agreements in the US are thus concluded as so-called Congres-

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sional-executive agreements, involving both Houses of Congress and the President. [28]

The Trade Act of the United States, as regularly amended since its introduction in 1934 by the Roosevelt Administration under the name of Reciprocal Trade Agreements Act (RTAA),[29] establishing the authority of the President to negotiate reciprocal trade agreements and reversing protectionist tariffs, contains the main goals and conditions which treaties negotiated by the Administration need to pursue. The trade prerogatives of Congress – very different from European traditions of trade being a power of the executive branch – thus allow front-loading major and fairly detailed policy goals in the course of ordinary bicameral legislation, subject to the veto powers of the President. It is important to note, in particular from a European perspective, that the shift towards non-tariff measures and barriers and thus substantial intrusion into legislative tasks of Congress and of States called for a new model of co-operation and interaction between Congress and the President with the 1974 Trade Act, upon the failure to enact the agreements on non-tariff barriers by Congress[30] and the expiry of the 1962 Trade Expansion Act upon the conclusion of the Kennedy Round in 1967. The need for enhanced inclusiveness and new procedures showed with the advent of non-tariff barriers and beginning shift from trade liberalization and de-regulation to international trade regulation and re-regulation.[31]

III. Towards a European Trade Act

It is not a matter of transposing the US Trade Act, described in greater detail elsewhere[32] to the European Union. The constitutional frameworks differ substantially and cannot be readily compared. The differences between a federal state with comprehensive central foreign policy powers and the European confederation with enumerated central foreign policy powers looms large. However, the US model with its congressional prerogatives in trade policy encourages seeking appropriate ways and means of front-loading domestic trade policymaking and thinking about instruments on how this could be achieved under the TEU and TFEU. It is submitted that it will essentially work in two stages.

28 See generally *Jackson/Louis/Matsushita*, Implementing the Tokyo Round: National Constitutions and International Economic Rules, 1982, pp. 139-197, 1984; adapted in *Jackson*, The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations, 2000, p. 367; *Leebron*, Implementing of the Uruguay Round Results in the United States, in: Jackson/Sykes (eds.), Implementing the Uruguay Round, 1997, pp. 175-242; *Fergusson*, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy, Congressional Research Service 15 June 2015, https://fas.org/sgp/crs/misc/RL33743.pdf (23/10/2018).

29 An Act to Amend the Tariff Act of 1930, Part III, Pub. L. No. 316, 48 Stat. 943 (1934).

30 The Anti-dumping Agreement was subsequently implemented by through administrative action, *Leebron*, (fn. 28), p. 183, note 36.

31 *Cottier*, International Economic Law in Transition from Trade Liberalization to Trade Regulation, 17 Journal of International Economic Law, 2014, pp. 671-677.

32 *Cottier*, Front-loading Trade Policy-Making in the European Union: Towards a Trade Act, European Yearbook of International Economic Law, 2017, pp. 35-60.

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Based upon the broad precepts of primary law discussed above, it is submitted that the Union should enact general legislation (regulation) containing the contours, topics, objectives and principles of EU commercial policy, including trade and investment. Major issues such as the inclusion or exclusion of different sectors, such as audio-visuals, health, culture and education, or the parameters for engaging in negotiations on agricultural in line with domestic policies, would be broadly debated in the process of enacting an appropriate regulation. The act would specify whether certain issues apply to shared powers of the Union and thus to the domain of mixed agreements. Conditionalities to include items would be defined and hammered out. The act should not only define objectives and goals for negotiations but should also define appropriate goals for safety nets in terms of flanking policies, such as adjustment programmes. The Regulation could perhaps be termed International Trade, Investment and Cooperation Regulation (ITICR), or International Trade Regulation (ITR) or (informally) European Trade Act.[33] The essential point is that the process of elaborating and eventually amending ITICR follows standard procedures and thus also includes hearings and participation of industry and civil society, and also national and, and the case may be, of regional parliaments. It is subject to qualified majority approval by the Council and Parliament alike, thus clearly strengthening democratic representation in the field.

It will be objected and argued that a European Trade Act will unduly restrain the flexibility and treaty-making powers of the Union. It will be said that trade agreements evolve in negotiations, in a process of claims and responses. These cannot suitably prosper under a straitjacket of domestic regulation and objections fairly detailed in domestic law. These concerns are legitimate but can be taken into account in defining the appropriate regulatory density of the European Trade Act. Much can be learned from studying the US experience. It reflects that international trade is not, and cannot, be a matter exclusively of the executive branch in the European tradition where foreign affairs historically often were a matter of the crown and ministers. Rather it shows that interfacing the field with processes comparable to those in domestic law is possible as the boundaries between domestic and foreign policy wane. The same applies to the European Union. The rule of law is no longer limited to domestic affairs; it extends today to international economic relations. Fundamental powers need to rest with the law-making bodies and thus Parliaments while recognising that they themselves are not in a position to negotiate detailed agreements in due course.

VIII. Summary and Conclusions

Trade law has come a long way since the GATT was founded in 1947. Efforts moved from reducing and abolishing tariffs to regulatory affairs traditionally pertaining to

33 The proposal was first made under the heading of International Trade, Cooperation and Investment Regulation, *Cottier*, Gemischte Abkommen der Europäischen Union: Grundlagen und Alternativen: in: Bungenberg/Herrmann (eds.), Die gemeinsame Handelspolitik der Europäischen Union: Fünf Jahre nach Lissabon – Quo Vadis?, 2016, p. 38. For a detailed discussion see *Cottier*, (fn. 32).

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domestic law. The public trade policy debate still oscillates between free trade and protectionism. Both perceptions are wrong. Trade, today, is regulated trade, and trade policy increasingly has been a matter of approximating different regimes with a view to facilitating international trade and investment. Trade regulation also protects non-trade concerns, and combating protectionism is thus limited to combatting rent-seeking welfare reducing practices and benefits. It is important to stress these points. Building trust in the international trading system after the financial crisis of 2007-2012 and the Great Recession needs to emphasize that the policy is about regulation, not about deregulation and leaving people to raw market forces and on their own. It is important to stress that high levels of division of labour in an increasingly integrated world economy calls for common rules and standards. Most of the international trade today is the trade in components going back and forth and dependent upon common rules and standards.

Most of the contemporary issues depict behind-the-border issues (BBIs) which traditionally pertain to the domain of domestic law. Except for very large markets, they cannot be addressed unilaterally or bilaterally. They require multilateral or plurilateral solutions. The call for international law creates new tensions and new anxieties. Traditional perceptions of sovereignty – limited to ideals of independence and self-determination – defend a presumption for domestic regulation and are hostile to structural changes taking place. There is a temptation to reduce trade policy to unilateralism or bilateralism.

These perceptions need to be revisited. We need to recall that sovereignty essentially serves the purpose of securing peace, stability and welfare in society. It is not hostile to international cooperation and multilevel governance. It is not hostile to allocating powers where public goods can best be produced, if necessary, on the level of international law and international cooperation and integration.

Cooperative sovereignty does not amount to harmony. There will be ample and constant reasonable disagreement as to the proper allocation of powers. This is at the heart of politics and public debate. The point is that inclusive structures and procedures need to be designed which allow for open and robust debate and for legitimate decision-making. The shift to BBIs needs to be accompanied by appropriate substance-structure pairings. It is important to front-load basic decisions in international economic relations prior to the engagement of technical negotiations. The US Trade Act, based upon the prerogatives of Congress, shows that more inclusive structures and procedures exist in dealing with complex behind the border issues. It may inspire the European Union and other countries in their effort to bring about appropriate substance-structure pairings which are able to properly respond to the shift to behind-the-border issues in their own jurisdictions.

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