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Governance Innovation



British Institute of
International and
Comparative Law

Brexit: The International Legal Implications | Paper No. 12 – February 2018

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Thomas Cottier

CIGI Masthead

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Table of Contents

vi	About the Series
vi	About the Author
vii	About the International Law Research Program
vii	Acronyms and Abbreviations
1	Executive Summary
1	Introduction: The New Bilateralism
4	The Facts of International Trade and the Predominance of Regulatory Issues
5	The Limits of Bilateralism in Regulatory Affairs and the Impact of Dominant Markets
7	The Importance of TTIP for Regulatory Convergence
8	Addressing the Real Concerns
9	Reworking Multilateral Trade Rules
10	Conclusion
14	About CIGI
14	À propos du CIGI
14	About BIICL

About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum vote and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

Thomas Cottier is a member of the advisory committee of the International Law Research Program at CIGI; professor emeritus of European and international economic law at the University of Bern; senior research fellow at the World Trade Institute; and adjunct professor at the University of Ottawa Faculty of Law. He was the founder and managing director of the World Trade Institute from 1999 to 2015 and the National Centre of Competence in Research on international trade regulation. Prior to that, he was legal adviser to the Swiss External Economic Affairs Department and deputy-director general of the Swiss Intellectual Property Office. He served on the Swiss negotiating team of the Uruguay Round and during European Economic Area negotiations. He has been a member and chair of numerous panels of the General Agreement on Tariffs and Trade and the World Trade Organization. He has published widely in international economic law and was also recently involved in training UK trade officials, following the Brexit referendum.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

BBIs	behind-the-border issues
CETA	Comprehensive Economic and Trade Agreement
EFTA	European Free Trade Association
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
IPRs	intellectual property rights
MFN	Most Favoured Nation
MRAs	mutual recognition agreements
NAFTA	North American Free Trade Agreement
PPMs	production and process methods
PTAs	preferential trade agreements
SDGs	Sustainable Development Goals
SPS	Sanitary and Phytosanitary
TBT	technical barriers to trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
WHO/FAO	World Health Organization/ UN Food and Agriculture Organization
WTO	World Trade Organization



Executive Summary

Both the United Kingdom and the United States have embarked on a new trade policy emphasizing the importance of bilateral trade agreements. While the current US administration resents multilateralism and plurilateralism, the UK trade policy remains firmly anchored in commitments to the multilateral trading system. Despite different underpinnings, the new bilateralism on both sides of the Atlantic will not be able to bring about appropriate regulatory cooperation and coherence in addressing global value chains and high levels of division of labour. Instead, future UK trade agreements will have to adjust to the rules of larger markets and thus oblige industry to produce in accordance with a multitude of different and costly standards. The new trade policy fails to recognize that the problems of a highly integrated world economy no longer can be successfully dealt with bilaterally. The paper emphasizes the need to address regulatory issues in multilateral or plurilateral fora. Should Britain leave the European Union and the Customs Union, efforts to bring about a transatlantic partnership succeeding Transatlantic Trade and Investment Partnership (TTIP) negotiations and including the European Union, United Kingdom, United States, Canada and the European Free Trade Association (EFTA) are particularly warranted.

Introduction: The New Bilateralism

In the wake of the Brexit vote of June 2016, the UK government announced its new trade policy in October 2017.¹ The new policy is based on the rules of the World Trade Organization (WTO), plurilateral agreements and a wide and new network of self-standing bilateral preferential agreements.² Upon

leaving the European Union, the United Kingdom plans to enter into preferential agreements with its main trading partners, next to a comprehensive bilateral agreement with the European Union. About 100 agreements would be needed to replace the existing framework under the common commercial policy of the European Union.³ Plans for a bilateral agreement with the United States (much welcomed by the new president), India (met with low interest and claims of labour market access), Australia, Canada, New Zealand and others (met with indifference), and Switzerland (met with interest) *inter alia* are contemplated. Rather than relying upon close integration within the European Union (which absorbs more than 44 percent of the United Kingdom's current international trade) and the European Union's global and growing network of currently 35 preferential trade agreements (PTAs), a vision to reassume an independent and leading role in trade policy carries the day in British politics.

While WTO membership and plurilateral agreements offer continuity, the plan to negotiate new bilateral agreements amounts to new territory for Britain in the twenty-first century. Other than the bilateral agreements concluded by Britain as a member of the European Union, the new generation of agreements no longer carry the weight of the largest global market. The plan exposes the United Kingdom to countries of diverging interests and different sizes and powers — some larger, some comparable and some smaller. It opens what may be called an era of new bilateralism.

With its foundations in WTO law, the new bilateralism of the United Kingdom does not entail a departure from traditional interests to preserve and foster free trade. It merely became a necessity due to the United Kingdom's leaving the EU common commercial policy and the need to find a replacement for the European Union's global relations. Trade policy has not been a main driver of Brexit. Rather, the challenge emerged after the vote. Brexit was mainly fuelled and motivated by issues of migration. But great hopes, on the one hand, were eventually created by hard-liners that the new bilateralism would be able to create jobs, mainly in the north of England, after long years of neo-liberal austerity. Critics and champions of a soft Brexit with close ties to the common

1 UK, Department for International Trade, "Preparing for our future UK trade policy" (9 October 2017), online: <www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy>.

2 *Ibid* at 29; See also "The six flavours of Brexit", *The Economist* (22 July 2017) at 25–27.

3 See Emily Lydgate, Jim Rollo & Rorden Wilkinson, "The UK Trade Landscape after Brexit" (2016) UK Trade Policy Observatory Briefing Paper 2, online: <<http://blogs.sussex.ac.uk/uktpo/files/2017/01/Briefing-paper-2.pdf>>.

market, on the other hand, argue in favour of staying in a Customs Union with the European Union and, thus, to continue to benefit from the common commercial policy. The issue has remained unresolved as of today. A resolution will depend strongly upon the terms of the divorce agreement.

The United Kingdom's trade policy is significantly different from that of the United States. While Donald Trump's presidency, inaugurated in January 2017, is equally built upon fears of migration, trade policy was — unlike in the United Kingdom — at the heart of the presidential campaign. It was motivated from the outset by fears of open markets and free trade, nurturing the promise and hope to bring industrial jobs back to the heartlands and rustbelts of the United States by abdicating plurilateral trade agreements, and possibly even the WTO. The multilateral system of the WTO and existing trade agreements are considered detrimental to US interests and are depicted as bad and unfair deals. The imbalance of trade in goods is deplored, without taking into account trade in services and the functions of the US dollar as the main currency in commodities. Remedying long-standing trade imbalances in industrial goods is at the centre of what the administration terms fair trade. The announced agenda places border taxes at its heart.⁴ It departs from the traditional leadership and support for multilateralism and a rules-based system.

The Trump administration immediately abandoned the recently negotiated Trans-Pacific Partnership Agreement⁵ with 10 Pacific countries.⁶ Instead, it seeks new bilateral negotiations, mainly with Japan.⁷ The administration first announced its intention to withdraw from and, then, to renegotiate the North American Free Trade

Agreement⁸ (NAFTA) with Canada and Mexico. Talks risk failing due to excessive demands being made, which would disturb regional value chains, in particular in the automotive sector. The fate of NAFTA remains unclear at this time. Work on the TTIP⁹ with the European Union has been suspended, and it remains unclear whether these negotiations will resume under this administration.¹⁰ Instead, a new generation of bilateral agreements, including with Great Britain, following Brexit is contemplated.

The motives behind the new bilateralism in the United States seek to address and remedy the effects of allegedly unfettered globalization under the neo-liberal premises that successfully prevailed since the inception of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT)¹¹ in 1986. The effort is essentially driven by job relocation and a long-standing trade deficit, in particular with China. The effort is based upon the idea of balanced trade in goods and should replace the existing framework in place.

In conclusion, it is important to note that the new bilateralism in the United Kingdom and United States significantly differ in foundations and motivations. While the United Kingdom continues to rely strongly upon the multilateral system of the WTO, the United States relies more strongly upon domestic trade policy and bilateral fair trade agreements. Yet, both seek a new generation of bilateralism, comparable to its inception in the Cobden-Chevalier agreement in the nineteenth century and the reciprocal trade agreements of the United States, established in the period from 1934 to 1942. These reciprocal agreements eventually formed the basis for the *Pax Americana*, which brought about twentieth-century multilateralism with the United Nations, the World Bank, the International

4 See e.g. "Trump reiterates border tax pledge in first post-election press conference", *Inside US Trade's World Trade Online* (13 January 2017), online: <<https://insidetrade.com/inside-us-trade/trump-reiterates-border-tax-pledge-first-post-election-press-conference>>.

5 *Trans-Pacific Partnership Agreement*, 4 February 2016, online: Global Affairs Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text+texte/toc-tdm.aspx?lang=eng>.

6 "Trump directs USTR to formally withdraw from TPP", *Inside US Trade's World Trade Online* (23 January 2017), online: <<https://insidetrade.com/content/trump-directs-ustr-formally-withdraw-tp>>.

7 "Report: Trump seeks early opportunity to talk with Abe about a bilateral deal", *Inside US Trade's World Trade Online* (27 January 2017), online: <<https://insidetrade.com/trade/report-trump-seeks-early-opportunity-talk-abe-about-bilateral-deal>>.

8 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, 605 (entered into force 1 January 1994).

9 *Transatlantic Trade and Investment Partnership [TTIP]*, online: European Commission <<http://ec.europa.eu/trade/policy/in-focus/ttip/>>.

10 Cf "Pro-trade House members reassure EU businesses of commitment to TTIP", *Inside US Trade's World Trade Online* (29 June 2017), online: <<https://insidetrade.com/daily-news/pro-trade-house-members-reassure-eu-businesses-commitment-ttip>>.

11 *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153 (entered into force 1 January 1995).

Monetary Fund (IMF) and the GATT. GATT 1947¹² substituted for the failed Havana Charter and the Multilateral Trade Organization at the time.¹³

It is clear that multilateral trade policy, traditionally led by the United States since the end of World War II and strongly supported by the European Union, including the United Kingdom, in the WTO, is today without US support and leadership. The multilateral system is being undermined. Crucial institutions — in particular the WTO dispute settlement system — are being weakened by the United States, as the US administration seeks to condition the standard appointment of appellate body members to institutional reform and, thus, undermining the operation of a body critical to the rule of law and the work of the WTO as an international organization.¹⁴ At the same time, China, strongly dependent on market access, increasingly assumes a leading role jointly with the European Union, Canada, Australia and other free-trading nations in a growing coalition of the willing and of friends of open trade.

The focus on bilateralism, of course, is not new. Ever since the breakdown of the Soviet Union in 1991, preferential agreements have mushroomed. There are more than 700 such agreements; those notified to the WTO only mark a fraction of the total.¹⁵ While these agreements share the goal of open markets and reciprocally improving market access, many are not fully compatible with WTO rules. Yet, they are all founded upon the operation of the WTO. They complement existing multilateral disciplines, mainly by reducing and eliminating tariffs in goods, adding additional disciplines on intellectual property and government procurement, and introducing new chapters, such as competition law, labour standards and investment protection. With the law of the WTO, they form what this

paper refers to as the common law of international trade.¹⁶ In crucial areas, such as food standards and technical barriers to trade (TBTs), they essentially refer to existing WTO rules. The same holds true for non-trade concerns and general exceptions. The 2017 Canada-EU Comprehensive Economic and Trade Agreement¹⁷ (CETA) is a prominent and recent example in point.¹⁸

Except for regional integration, the economic impact of many of these existing preferential agreements beyond the effects of WTO rules is questionable for a number of reasons.¹⁹ First, average bound tariffs in the WTO amount to not more than four percent, while PTAs operate on complex rules of origin in order to obtain zero-tariff treatment. The costs of obtaining certification often are higher than relying upon low Most Favoured Nation (MFN) tariffs. Second, these agreements often do not address non-tariff barriers beyond WTO rules, except for a few mutual recognition agreements in place. Third, liberalization and market access in services often do not extend beyond the General Agreement on Trade in Services²⁰ (GATS) standards. Some of them even limit and reverse existing commitments. Finally, dispute settlement in preferential agreements has remained weak. Countries prefer to use the WTO system.

The new generation of bilateral agreements to be concluded by the United Kingdom upon Brexit is likely to build upon this tradition of preferential trade.²¹ It is unclear to what extent this will also be true for the United States. Here, protectionist and mercantilist trade policies may produce substantial deviations from WTO obligations and result in violations of its rules.

The question is whether the new bilateralism in both the United States and the United Kingdom

12 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, TIAS 1700 (entered into force 1 January 1948).

13 For a historical account, see e.g. Thomas Cottier & Matthias Oesch, *International Trade Regulation: Law and Policy in the WTO, The European Union and Switzerland* (Bern, Switzerland & London, UK: Cameron May and Staempfli, 2005) at 9–32.

14 “Pressure on U.S. mounts as it maintains link between Appellate Body seats, WTO reform”, *Inside US Trade’s World Trade Online* (15 September 2017), online: <<https://insidetrade.com/daily-news/pressure-us-mounts-it-maintains-link-between-appellate-body-seats-wto-reform>>.

15 See “Design of Trade Agreements (DESTA) Database”, online: <www.designoftradeagreements.org/>; WTO, “Regional Trade Agreement Information System”, online: <<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>>.

16 Thomas Cottier, “The Common Law of International Trade and the Future of the World Trade Organization” (2015) 18 *J Intl Econ L* 3.

17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 29 February 2016 [CETA], online: <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>.

18 *Ibid*, c XX.

19 Cf WTO, *World Trade Report 2011, The WTO and preferential trade agreements: From co-existence to coherence*, online: <www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf>.

20 *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995).

21 UK, Department for International Trade, *supra* note 1.

is suitable and able to bring about the results promised in populist campaigning: reclaiming sovereignty and self-determination, lowering immigration and creating new jobs in neglected areas suffering from deindustrialization. Leaving the European Union or dismantling the WTO dispute settlement system would respond to claims to restore sovereignty. Others would be less straightforward. While migration is largely addressed independently of trade, job creation is inherently linked to the structure of international trade. It cannot ignore the growth patterns of division of labour, of global value chains and the focus on non-tariff barriers in current trade rules without risking substantial welfare losses. These risks exist because the new bilateralism ignores basic facts of contemporary trade.

The Facts of International Trade and the Predominance of Regulatory Issues

Contemporary international trade is essentially characterized by trade in components. More than 60 percent of goods cross borders at least twice before reaching final consumers.²² Complex products identifiable on a purely national basis are increasingly rare. Companies operate in 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.²³ We speak of “servicification” of goods and their production. Moreover, trade is increasingly entangled with intellectual property, foreign direct investment and a complex web of technical standards relating to products and to

modes of production. Trade increasingly depends upon close coordination of the 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 three-dimensional printing may cause repatriation and relocation to some extent.

Mercantilist trade policies fail to take these facts into account. The introduction of border measures and quantitative restrictions, advocated by the Trump administration, will harm consumers, in particular the lower income strata. Such measures will reduce trade in components and will 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 may seek to reduce or eliminate global value chains, but they are hardly able to bring back traditional structures and outsourced jobs, 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 Brexit campaigns.

The challenges 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.

22 In 2009, the total export share of final goods and services amounted to 34 percent (world) and 47 percent (China); Richard Baldwin & Javier Lopez-Gonzales, “Supply-Chain Trade: A Portrait of Global Patterns and Several Testable Hypotheses” (2013) National Bureau of Economic Research WP 18957 at 13, online: <www.nber.org/papers/w18957.pdf>.

23 See Deborah K Elms & Patrick Low, eds, *Global Value Chains in a Changing World* (Geneva, Switzerland: WTO Publications, 2013), online: <www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_e.pdf>.

Indeed, modern and waterfront trade policy today is mainly concerned with regulatory issues.²⁴ Except for trade in agriculture, where tariffs continue to play a dominant role, attention has mainly moved to non-tariff barriers, since the GATT Kennedy Round in the 1960s. It culminated in the Agreement on TBTs²⁵ (TBT agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures²⁶ (SPS agreement), the inclusion of services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights²⁷ (TRIPS agreement) and of government procurement in the GATT Uruguay Round. All pillars of the WTO today focus mainly on domestic regulation, rather than on border measures and customs.²⁸ It should be noted that the importance of product standards for goods and services will increase further 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.²⁹ Future topics of international trade negotiations will focus on competition law, investment protection and labour standards. They all address what we call behind-the-border issues (BBIs).

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 PPMs that

leave no traces in the final product. At the same time, removing such barriers is essential for cross-border trade, in particular for small and medium enterprises that do not operate in vertically integrated value chains and private standards.

The Limits of Bilateralism in Regulatory Affairs and the Impact of Dominant Markets

The WTO offers a robust and solid framework to address domestic regulations that limit market access without sufficient justification. GATT and the TBT agreement offer legal guidance to discern what is excessive and protectionist from legitimate domestic regulations.³⁰ But neither of them require mutual recognition or harmonization of domestic regulation. WTO law, generally, does not engage in prescribing recognition of foreign rules for market approval or in harmonizing domestic legal standards. An exception to this is the TRIPS agreement, which establishes minimum global standards for the protection of intellectual property rights (IPRs). Another exception is the SPS agreement for food standards, which operates in combination with binding World Health Organization/UN Food and Agriculture Organization (WHO/FAO) Codex Alimentarius standards, yet is subject to more restrictive domestic rules.³¹ Finally, joint regulations of services in the GATS are still in their infancy, mainly codifying domestic standards in members' schedules of commitment. The Trade in Services Agreement³² may bring some further progress to this effect.

It is important to note that most of the existing bilateral PTAs do not go much beyond multilateral

24 See WTO, *World Trade Report 2012, Trade and public policies: A closer look at non-tariff measures in the 21st century*, online: <www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf>.

25 WTO, *Agreement on Technical Barriers to Trade*, online: <www.wto.org/english/docs_e/legal_e/17-tbt_e.htm>.

26 WTO, *Agreement on the Application of Sanitary and Phytosanitary Measures*, online: <www.wto.org/english/tratop_e/sps_e/spsagr_e.htm>.

27 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 1869 UNTS 299, 33 ILM 1197 [TRIPS].

28 Thomas Cottier, "International Economic Law in Transition from Trade Liberalization to Trade Regulation" (2014) 17 J Intl Econ L 671.

29 See Kateryna Holzer, *Carbon-Related Border Adjustment and WTO Law* (Cheltenham, UK: Edward Elgar, 2014).

30 See generally Peter van der Bossche & Werner Zdoug, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 4th ed (Cambridge, UK: Cambridge University Press, 2017).

31 WHO/FAO, *Codex Alimentarius*, online: <www.fao.org/fao-who-codexalimentarius/en/>.

32 EC, Commission, *Trade in Services Agreement*, online: <<http://ec.europa.eu/trade/policy/in-focus/tisa/>>.

non-tariff rules and standards.³³ BBIs are merely partly addressed in PTAs. The agreements essentially rely upon WTO rules or build upon them, if at all. TBTs going beyond WTO TBT disciplines are typically addressed in mutual recognition agreements (MRAs). They reciprocally allow testing market conformity with export destinations by home institutions and, thus, facilitate conformity assessment and the reduction of costs. Additional provisions on intellectual property rely upon the TRIPS agreement.

The essential reliance of BBIs upon multilateral rules is not a coincidence. The bilateral harmonization of rules and the extension of mutual recognition is of limited advantage as they are only applicable to the parties to the PTA. They are not extended to third parties and, thus, merely add to the complexity of production standards of a country. Or, they must be extended, as in the case of IPRs, on the basis of MFN obligations, yet without the third party 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, BBIs are essentially addressed in non-reciprocal configurations of PTAs, which entail one large and dominant market to which others adjust. In particular, the European Union, the United States and, increasingly, China are in a position to impose and export their own domestic standards, due to market size and market power. While PTAs address non-tariff barriers and BBIs, they usually adopt the standards of the larger market. For example, Switzerland (and other EFTA members within the European Economic Area) largely align their rules to those of the European Union and ensure consistency with them in both preferential agreements and autonomous regulation.³⁴ Even in the absence of an obligation, a reliance on EU 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 NAFTA

talks,³⁵ it is likely to adjust to US standards in the end. The same would happen in the context of CETA, in relation to the European Union. In current preferential agreements, there is little genuine negotiation on new approaches to regulation and BBIs comparable to what was achieved, for example, in the TRIPS agreement's merging of European and American legal traditions. Instead, the PTAs normally follow a hub and spike approach. Compromise and new and innovative standards are the exception.

The new bilateralism stresses ideals of regulatory sovereignty ("America first" and, in the United Kingdom, release from the powers of the European Union and the European Court of Justice). In the case of the United States, it is, thus, rather a matter of imposing its own standards upon imports, rather than seeking mutual recognition or even common rules by means of partial or full harmonization in specific sectors. This is likely to deploy major disadvantages to those countries that are not in a position to impose their own standards as a hub. They will be forced to adjust to the different import regimes of different trading partners, which adds to costs and reduces competitiveness accordingly. Companies will need to produce in accordance with varied sets of standards for specific markets. This will amount to a particular problem of fragmentation for the United Kingdom upon leaving the European Union.

Britain will be able to maintain EU regulations and standards unilaterally and to adopt new rules unilaterally, an approach that, in Switzerland, is called "unilateral compliance."³⁶ Britain may be able to negotiate MRAs where reciprocity is required for recognition and market access. Given the relative size of the EU and UK economies, EU regulations and standards are likely to prevail.

The United Kingdom, upon Brexit, may also address BBIs in an agreement with the United States. Given the relative size of the economies, US regulations and standards are likely to prevail. Additional variants may result from additional bilateral agreements concluded with other trading partners around the world, in particular India and China,

33 See Ana Cristina Molina & Vira Khoroshavina, "TBT Provisions in Regional Trade Agreements: To what extent do they go beyond the WTO TBT Agreement?" (2015) WTO Staff Working Paper ERSD-2015-09, online: <www.wto.org/english/res_e/reser_e/ersd201509_e.pdf>.

34 See e.g. Thomas Cottier et al, *Die Rechtsbeziehungen der Schweiz und der Europäischen Union* (Bern, Switzerland: Staempfli, 2015).

35 "Canada pushing regulatory cooperation in second round of NAFTA talks", *Inside US Trade's World Trade Online* (3 September 2017), online: <<https://insidetrade.com/daily-news/canada-pushing-regulatory-cooperation-second-round-nafta-talks>>.

36 See Cottier et al, *supra* note 34 at 131–168 ("Integration durch autonomen Nachvollzug").

depending on market size and bargaining power. These countries alike need to avoid a proliferation of additional standards and will insist on their own rules. Others will refer to US or EU law. Canada, for example, will have to align to EU and/or US standards in dealing with the United Kingdom. Switzerland, in an agreement with the United Kingdom, will insist on adopted EU standards, avoiding duplications and conflict in domestic laws.

While the United States will be able to impose its own standards in the new bilateralism, the United Kingdom will very likely have to deal with diverging standards, aligning its standards to those of its larger and major trading partners. Different production standards will increase costs and, thus, render the United Kingdom less attractive as an industrial and financial location. The multitude of diverging standards, to which exports need to comply, will frustrate the creation of new jobs within the country.

It is here that the importance of TTIP for Britain, even after leaving the European Union, as well as for other NAFTA and EFTA states, becomes utterly clear.

The Importance of TTIP for Regulatory Convergence

The stalled TTIP is the most important contemporary project and effort in addressing BBIs, as the project covers approximately 30 percent of world trade and 46 percent of world GDP (2014).³⁷ The TTIP seeks to introduce enhanced regulatory cooperation between the European

Union and the United States.³⁸ While the agreement includes 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, the effort was reduced to cooperation, due to US skepticism.³⁹ 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 subfederal 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 pharmaceutical, strongly support 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 differ substantially between Europe and the United States, and agreement will depend upon the possibility of establishing and preserving mutual trust in regulatory cooperation.

While the fate of these proposals is unclear under the new bilateralism, 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. These standards are also of significant importance for non-parties.

TTIP regulations and standards would deploy significant global spill-over effects and pave the way for subsequent formal global standards in international organizations, including the WTO, in the process of multilateralizing major PTAs. Studies suggest that an ambitious TTIP would produce benefits for third parties that align to the new standards, either by the third parties joining the agreement or by means of unilateral

37 Gilberto Gambini, Radoslav Istatkov & Riina Kerner, "USA-EU – international trade and investment statistics: EU and US form the largest trade and investment relationship in the world" (2015) *Eurostat* (31 percent of world exports, 27 percent of world imports [2013]), online: <[http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU_-_international_trade_and_investment_statistics?>](http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU_-_international_trade_and_investment_statistics?); EC, Commission, *SIA in support of the negotiations on a Transatlantic Trade and Investment Partnership (TTIP): Final Report* (Brussels, Belgium: European Commission, 2017) at 15 (46 percent of world GDP), online: <http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155464.pdf>; see also EC, Commission, "European Union, Trade in goods with USA", online: <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf>.

38 See *TTIP*, *supra* note 9.

39 See EC, Commission, "EU negotiating texts in TTIP", online: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#institutions>>.

adjustment.⁴⁰ Producers in third countries, henceforth, would be able to manufacture or provide services based on transatlantic standards, avoiding duplications in production. For Britain, upon leaving the European Union, it will be essential that the TTIP succeeds in bridging the United States and the European Union, as much as this is important to EFTA and NAFTA states.

The new bilateralism of the United States and the United Kingdom ignores the importance of the TTIP. The Trump administration stalled negotiations on the TTIP. The United Kingdom, seeking bilateral agreements outside the EU commercial policy, ignores the importance of a common and balanced transatlantic framework, which a bilateral US-UK agreement will not be able to provide without the TTIP. Both countries seem to be informed by a past world of tariff concessions, trade remedies and domestic production, perfectly suitable for bilateral agreements of the twentieth century. As a result, the United States and the European Union will impose their own standards on the world. The United Kingdom will consequently fall into the trap of multiple production standards, further losing competitiveness vis-à-vis competitors who are able to produce under harmonized standards.

Addressing the Real Concerns

With hindsight, and taking into account the implications of the financial crisis and the great recession of 2007 to 2012, it is evident that liberal trade policy failed to take into account important concerns of domestic distributive justice. Populism has a point here. While WTO law contributed to a better balance between industrialized and developing countries (mainly thanks to China's growth) concerns of domestic inequality were left unattended. The benefits of trade liberalization do not necessarily trickle down at home. This much depends upon domestic

40 See Thomas Cottier & Joseph Francois, eds, *The Potential Impact of a EU-US Free Trade Agreement on the Swiss Economy and External Economic Relations* (Bern, Switzerland: World Trade Institute/Swiss State Secretariat for Economic Affairs, 2014), online: <www.news.admin.ch/newsd/message/attachments/35611.pdf>.

economic and welfare policies, which are largely left to self-determination in international law.

Fuelled by neo-liberal policies of favouring markets, trade liberalization in the United States and the United Kingdom failed to be accompanied by sufficient flanking measures supporting the livelihood of people negatively affected by the process of globalization. The main challenges caused by globalization today lie outside the realm of trade policy, properly speaking, but remain inextricably interwoven with it. In particular, reducing unemployment is essentially linked to the system of education and training. European countries operating a dual system with structured apprenticeship clearly show lower levels of youth unemployment.⁴¹ Unemployment benefits, trade adjustment programs and retraining for laid-off staff in regions highly affected offer temporary relief and the potential to re-enter the job market. Permanent education takes centre stage in the new age of automation and robotics. Improving the quality of basic education in rural areas will do more than protectionist measures.

The framework of the WTO has not paid attention to these concerns.⁴² Members failed to use existing policy spaces or governments hid behind existing rules; economists warned of increasing protectionism, irrespective of whether measures are lawful or not.⁴³

The new US trade policy and the new bilateralism have their origins in frustration with the relocation (off-shoring) of industries, the loss of jobs and the failure of the capitalist system to provide appropriate opportunities for those working in rural areas and in traditional (mature) industries. The political success of populism and the promise of a new trade policy based on autonomous measures

41 Virginia Hernandez & Juan F Jimeno, "Youth Unemployment in the EU" (2017) 18:2 CESifo Forum 3 ("A first group made up of Austria, Germany and Switzerland. These countries have been quite successful in keeping youth unemployment low, mostly because of their efficient use of vocational training and programmes targeted at disadvantaged youth. A second group includes France, Britain and Sweden. This group has been less successful, mainly due to employment protection and minimum wages, plus a partly dysfunctional education system" at 7), online: <www.econstor.eu/bitstream/10419/166711/1/cesifo-forum-v18-y2017-i2-p03-10.pdf>.

42 But see recent and current discussions within the WTO Public Forum 2016 and 2017, respectively: WTO, "Public Forum 2017 - 'Trade: Behind the Headlines'", online: <www.wto.org/english/forums_e/public_forum17_e/public_forum17_e.htm>.

43 Cf Global Trade Alert, "Independent Monitoring of Policies that Affect World Commerce", online: <www.globaltradealert.org/>.

and bilateral agreements is commensurate with this decline and the frustrations it causes. The surge of populism can only be explained by fatal omissions in past domestic and international policy, and it would be expected that these omissions will be proactively addressed by the new bilateralism.

Yet, no recent evidence could be found to this effect. In the United States, enhanced worker adjustment programs and more generous unemployment benefits (much lower than in Europe) do not form part of the presidential agenda, nor do reforms of the educational system, or preparing young people for a changing world. Today, workers need to be able to adjust constantly and engage in permanent education, while relying upon a broad education that provides the foundations needed to master constant changes imposed. Plans to introduce a dual educational system with training and schooled apprentices, next to college education, as contemplated by the Obama administration, no longer seem to exist. In the United Kingdom, the May Cabinet, after the Brexit referendum, announced it would pay more attention to distributive justice and promoting a caring society; yet, it seems that no specific educational measures have been contemplated so far to offset losses in international trade and improve competitiveness. The trade policy contemplated will make such reforms even more unlikely, as it likely will further erode Britain's industrial base, for reasons discussed above.

Reworking Multilateral Trade Rules

To what extent do trade rules need to be changed to accommodate policies aimed at reducing unemployment and favouring job creation? Issues relating to income inequality and distributive justice need to be considered and adjustments made to rules, to the extent necessary to accommodate the non-trade concerns mentioned above. Environmental concerns and regulations have influenced trade rules over the last years, rebalancing market access and non-trade concerns. The most progress on these issues was achieved in WTO case law, and the challenge of climate change will further

enhance the effort. Similar efforts need to be made in other areas. The 2015 to 2030 Sustainable Development Goals (SDGs) offer an important road map as to what should be achieved.⁴⁴ These goals apply to developing and industrialized countries alike. They include concerns that partly inspired the new mercantilist bilateralism and trade policy: the elimination of poverty, equality of opportunities in education, decent work and economic growth, reduction of inequalities and responsible cooperation. The SDGs provide an important yardstick for assessing to what extent the existing trade rules of the multilateral system need to be reviewed and examined and to what extent these rules are compatible with, and foster, the goals of sustainable development in industrialized and developing countries alike.

Enhanced regulatory cooperation among WTO members considering these challenges and goals will foster welfare and growth and, thus, help to generate the income to financially support appropriate flanking policies. The following areas may be briefly flagged in terms of examples: GATT and the TBT and SPS agreement rules should be reviewed and modified to foster multilateral cooperation and international standard setting. Rules relating to subsidies may need to be reviewed, as well as government procurement in terms of labour relations. Trade remedies need to accept more generous relief for restructuring, linked to development programs for affected regions. Intellectual property needs to bring about the true transfer of technology also to developing countries in need, implementing the goals of article 8 of the TRIPS agreement.⁴⁵ The production of sustainable energy in remote areas exposed to sun and wind will be able to generate sources of income, also in remote areas; transit rules and interconnection regimes need to be reviewed with a view to creating modern regional and even global grids.⁴⁶ GATS needs increasingly to address common regulation for services, rather than being limited to liberalization. Common disciplines

⁴⁴ *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015), online: <www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>; see also UN, "Sustainable Development Goals: 17 Goals to Transform our World", online: <www.un.org/sustainabledevelopment/development-agenda/>.

⁴⁵ *TRIPS*, *supra* note 27, art 8.

⁴⁶ See Thomas Cottier & Ilaria Espa, eds, *International Trade in Sustainable Electricity: Regulatory Challenges in International Economic Law* (Cambridge, UK: Cambridge University Press, 2017).

in competition law and policy are necessary to offset strong monopoly powers based upon IPRs, in particular in the digital economy. Stronger linkages to labour standards and human rights are important to temper the negative impacts of open markets and of fierce competition to combat excessive domestic inequality. For similar reasons, investment protection needs to move toward investment cooperation with a much stronger role for home states in assuming responsibility for the activities of their companies abroad.

It is important to note that the resolution of most of these regulatory issues briefly alluded to cannot be achieved on the basis of bilateral agreements. Most such agreements will not be able to address these issues and will largely remain limited to enhancing market access and some cooperation. Most of them will follow the model of hub and spikes, adjusting to the rules of dominant large markets. Rather, the resolution may be achieved by means of plurilateral, regional agreements. The TTIP or the Regional Comprehensive Economic Partnership, perhaps the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, given the size or number of countries involved, may deploy important effects due to market size. The effort of reform inherently needs to be undertaken in multilateral fora, and, thus, mainly in the WTO, the World Bank group, the IMF and the UN special agencies, perhaps including a new World Educational Organization, coordinating and supporting professional efforts to bring about a well-coordinated dual system of vocational training and colleges that enables the workforce to move nationally and internationally to where jobs can be found. Achieving the goals that were politically set forth to, and adopted by, electorates necessarily requires addressing these concerns in multilateral negotiations. It is tragic to note that the path and instruments chosen by populist governments will not be able to contribute to the achievement of such pressing and legitimate goals.

Finally, trade policy formulation needs to adjust to shifts in regulatory cooperation and become more inclusive in domestic policy making. Front-loading consultations on trade policy formulation to actively involve parliaments and stakeholders need to occur from the beginning. It is no longer sufficient to approve a treaty negotiated by the executive branch. With the shift toward regulation and cooperation, and away from classical border measures, alternative forms of consultations and

decision making need to be found. In the United States, Congress assumes these functions and can build upon the 1974 trade act.⁴⁷ In Europe, where trade policy traditionally has been a prerogative of the executive branch, it will be necessary to expand the role of parliaments and civil society.⁴⁸ In the United Kingdom, the Great Repeal Bill risked extensively increasing the powers of the executive branch, moving trade policy in a wrong direction.⁴⁹ No efforts have been made by the Cabinet to render trade policy formulation more inclusive. To the contrary, it was defeated on December 13, 2017, by a narrow margin of 309 to 305 votes in the House of Commons, seeking to prevent Parliament from ruling on the final Brexit agreement.⁵⁰ The focus on classical tools and the difficulty in addressing regulatory issues in a bilateral context will build further pressures for institutional reforms toward greater inclusiveness in trade policy formulation and decision making.

Conclusion

The focus of modern trade policy on non-tariff barriers and regulatory BBIs renders isolated bilateralism largely ineffective, as such problems are not suitable for bilateral harmonization, unless one of the parties unilaterally adjusts to the existing standards of larger trading partners. Upon Brexit, the United Kingdom will be faced with different domestic standards to be applied to different trading partners, adding to the costs of production and reducing the competitiveness of exported products. Canada, today, faces similar problems in EU and US relations in CETA and NAFTA, respectively (for example, with the protection of geographical indications).

The avenue of bilateral agreements will not be effective in addressing these issues for the benefit

⁴⁷ *Trade Act of 1974*, Pub L No 93-618, 88 Stat 1978 (codified at 19 USC 2101).

⁴⁸ See Thomas Cottier, "Front-Loading Trade Policy-Making in the European Union: Towards a Trade Act" (2017) *Eur YB Intl Econ L* 35.

⁴⁹ Bill 5, *European Union (Withdrawal) Bill* [HL], 2017–2019 sess (1st reading 13 July 2017).

⁵⁰ John Rentoul, "The Government defeat reveals the majority in the House of Commons for a soft Brexit", *Independent* (13 December 2017), online: <www.independent.co.uk/voices/brexit-amendment-7-dominic-grieve-eu-withdrawal-bill-vote-what-it-means-a8108666.html>.

of the UK economy, workers and consumers alike. Instead, Britain would be best served if it continued to strongly support the EU internal market harmonization, which amounts to some 44 percent of its exports. BBIs call for a multilateral approach. From the point of view of modern trade policy and the problem of BBIs, EU membership, avoiding Brexit in the first place, or at least a Customs Union with the European Union, including the TTIP, clearly offer the most advantageous solutions.

Taking up the challenges of non-tariff barriers and regulatory cooperation inherently requires plurilateral or multilateral settings. The project of the TTIP remains of paramount importance, irrespective of whether Great Britain remains in the European Union. Britain should seek membership of the TTIP as a third country and work toward a plurilateral transatlantic agreement. Creating, in the long run, common product and production standards between the European Union and the United States would create level playing fields, which would also benefit non-EU members, NAFTA members, EFTA partners and Britain, in case of Brexit, by means of autonomous adjustment or membership. The TTIP may thus be developed post-Brexit into a new plurilateral transatlantic agreement, including the European Union, the United States, Britain, other NAFTA members (Canada and Mexico) and the EFTA states (Iceland, Liechtenstein, Norway and Switzerland). In sum, the idea of a plurilateral transatlantic trade agreement, as suggested by Armand de Mestral,⁵¹ with the United States and the European Union at its heart will be necessary to address non-tariff and regulatory barriers. Such an agreement also offers the opportunity to draw lessons from past omission and to create favourable framework conditions for flanking policies needed to restore trust and confidence in the international trading system.

Foremost, Britain should proactively support and lead efforts to foster the harmonization of domestic standards in goods and services within the WTO and other international fora, independently of Brexit. The commitment made to support multilateralism by the UK government is of paramount importance. Within or outside the European Union, Britain shares an interest in multilateralizing a future TTIP and other plurilateral

and regional agreements to secure global market access on the basis of common product and production standards for goods and services. At the same time, flanking policies that are able to offset the negative effects of open markets need to be developed. Political pressures for multilateral trade negotiations will increase in coming years, once the new bilateralism and nationalist Trump trade policy have been shown to be ineffective and disappointing to those they promised to serve, simply because these policies ignore the problem of BBIs and of modern trade. Britain and the world should prepare for enhanced multilateralism today.

Author's Note

I am indebted to the anonymous reviewers for their critical comments and valuable suggestions and to the editors of this volume.

⁵¹ Armand de Mestral, "Squaring the Circle: The Search for an Accommodation between the European Union and the United Kingdom" in Oonagh E Fitzgerald & Eva Lein, eds, *Complexity's Embrace: The International Law Implications of Brexit* (Waterloo, ON: CIGI, 2018).

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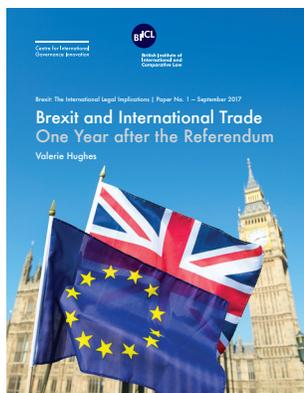
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