

Working title

Paternalistic constitutionalisation of EU's Trade Politics

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We are presently facing serious systemic failures of the EU's mercantilist growth economies (i.a. Galbraith 2014; Brandt 2009). It is a fact that the European capitalist welfare state got under pressure in recent years. The ongoing period of economic stagnation challenges their political stability which was built merely on the basis of 'output legitimacy' (Majone 1996,1998; Scharpf 1999; Moravcsik 2002, Kohler-Koch 2007). Instead of dealing with the limits of growth economies (e.g. Meadows et al. 1972; Jessop 2001, Hirsch 1995, Binswanger 2013) neoliberal strategies are well and truly back in the spotlight. We, so to say, currently face the third wave of neoliberalism in economics. It begun with the proclamation of the formula 'there is no alternative' by UK Prime Minister Margret Thatcher in the 1970s in challenging market regulations. Another boost came with the end of the bipolar world order and its socialist alternative in 1989. This further led to an increase of the globalisation of trade, production and value chains. In reaction to the global changes of the 1990s the World Trade Organisation (WTO) was founded in 1995 to establish an institutionalised dialogue on the regulation of world trade, targeting first of all the removal of trade barriers and the facilitation of the global exchange of goods, services and investments.

Currently the third wave of neoliberalism in global trade is underway. This is characterised by a huge re-bilateralisation and regionalisation of trade after the deadlock of the Doha Development Agenda DDA (2001-2008). Abandoning the multilateral approach of cooperation led to a transformation of international trade towards a competitive neoliberal playing field. Subsequently the leeway for national legislators concerning the articulation of domestic rules and regulations is seen as more and more limited (also see Gill 1998 „disciplinary neoliberalism“). According to macro-economic performances, a neoliberal approach of trade policies is treated as an inherent necessity ('embedded liberalism'). Political elites interpreted the new challenges by creating investor friendly economies following a shareholder value driven approach ('shareholder value chain'). Furthermore, the state itself is being perceived as a market player, which has to persist against the global competitive economies. This is implicitly manifested in the expansion of neoliberal measurements against state intervention in national economies.

‘Paternalistic constitutionalisation’ of trade politics in this regard refers to a widespread institutionalisation and juridification of international trade relations, whereas competences are shifted to technocratic circles which are supposed to act on behalf of the common good. Their legitimation, however, is based on the output of their policies. An output legitimation based on specific economic performance goals, such as GDP-growth, employment rates, low inflation and competitiveness. This approach widely relies on the concept of “new constitutionalism” by Stephen Gill (1998: 5). Political arenas instead get disciplined by international treaties and constitutionalised procedures of regulatory governance. According to the negotiation mandate (CoE 2013), the TTIP agreement will go far beyond the area of removing classical trade barriers. What draws our attention here is mainly the re-regulation of trade. It is envisaged to establish a Regulatory Cooperation Council (RCC) with huge competences on shaping standards and norms for goods and services at the expense of national legislators. The TTIP agreement will establish a widely depoliticised arena, whereas technocrats dominate the development of regulatory policies. NGFTAs such as the TTIP confirm this shift of competences and apply a re-regulatory agenda to facilitate trade which puts economic performance objectives above social and environmental goals (see ‘Lange Report’ of the EU-Parliament, EP-Resolution 2014/2228(INI). Advances in environmental regulation, workers’ rights and consumer standards as well as gains in many other areas are at stake. After all, transnational corporations (TNCs) will get a major say, as they will get consulted prior to legal changes (early warning mechanism, obligatory pre-assessment) and are able to raise their complaints when they feel discriminated by distinct standards and norms (investor state dispute settlement).

The article discusses the planned constitutionalisation of technocratic regulatory governance according to their objectives and underpins its shortcomings. The argumentation builds upon three specific repercussions of a ratified TTIP agreement, identified by the author as 1) disciplinary effect on states by an increasing pressure through global competition on standards and fiscal policies (e.g. Gill 1990); 2) de-politicisation of the EU’s trade politics; and, 3) spill-over effects on regulatory policies whereby more issues are being transformed into negotiable matters. The paper concludes with a postulation for the need to politicise trade politics, as it has major impact on a huge variety of policy issues. Moreover it will stress the necessity to establish international regulations for transnational businesses to guarantee fundamental rights along the complexity of global production and value chains.

Neoliberal re-organisation of the world trade order through regulatory competition

In the course of the economic stagnation since 2008 the re-organisation of the world trade order is advancing rapidly. The attempt to come up with a multilateral regulatory system with

the establishment of the WTO in 1995 – representing about 90 percentage of global trade – failed to meet the expectation as it got stuck in the implementation of the Doha Development Agenda DDA (2001-2008) due to the clash of interests of industrialist countries and that of emerging powers (BRICSS countries) and less developed countries (LDCs). The multilateral corset, characterised by the consensual decision making due to the unanimity principle throughout 161 member states, proved to be too ineffective to meet members' interest. What is missing is a shared mission by the member states towards an international trade regime on equal footing. Instead, the more prosperous countries tried to use the fora to push their agenda while ignoring the interests of the majority of the WTO member states of the global south. Especially the BRICSS countries demand a stronger say and challenge the dominance of the USA, the EU and Japan.

After the deadlock of negotiations on the DDA and hardly any progress on the planned *General Agreement on Trade in Services* (GATS) the USA and the EU shifted towards a re-bilateralisation within international trade. The re-bilateralisation of trade relations illustrate at best the consisting power asymmetries between trading partners and therefore serve the interests of the more powerful countries. The industrial states therefore attempt to retain their predominant role in global trade driving a wedge between the recently appearing South-South coalitions, like BRICS, G20+, G90-.

As stated in the EC report 'Global Europe' in 2006 (COM (2010/612), the report urges the need for a pro-active strategy by the EU to combat the changes evocated by the deadlock of the DDA: „*Changes in the global economic order today are as significant for the world economy and international relations as the end of the Cold War*” (ibid.:3). The EU urges to play a major role in the ongoing reorganisation of global trade by using its current 'power in trade' to define the rules of a future trade regime due to their inherent interest ('power through trade', see Meunier/Nicolaidis 2006:910).

At a glance industrialised states attempt to preserve their predominance built on the imbalances between industrialised economies and the so-called global south. By implementing this strategy, the western economies are going to continue their path of exploitation of the global south by using their trading power to create a trade regime which serves their interests in the long term. By doing so, the western economies will be able to prolong their capitalist welfare system for a while but will provoke new crisis on the global stage.

Power asymmetries are used to set new standards in trade relations by implementing new generation free trade agreements (NGFTAs). Economic power should be guaranteed by NGFTAs providing for: access to resources (paragraph 37 of the negotiation mandate from 13. June 2013; see also Niko Paech 2009 "External supply dependency"), participating from

economic growth in emerging markets¹, keeping the highest share of the value chain in the EU and guarantee the protection of investments (e.g. Venhaus 2013, Multilateral Agreement on Investments (MAI) by the OECD).

NGFTAs go far beyond classical FTAs and call merely for the removal of non-tariff measures (NTM) throughout regulatory cooperation and feasible investment protection. As in the previous centuries almost all tariffs got already diminished, Regulatory compatibility is poised to become the cornerstone of TTIP (COM 2013a). Therefore, studies figured out, that almost 80 percent of possible gains of a TTIP are referring to the removal of NTMs (Center for Economic Policy Research 2013: VII). Experts estimate, that with the current TTIP about 25-30 percent of NTMs are supposed to get eliminated (Raza et al. 2014:VIII).

The objectives of NGFTAs are merely to carry on dealing with the left-overs of previous WTO negotiations (see ‘Singapore issues’). At present more than 400 FTAs are already in place. bilateral (BITs) and intraregional and interregional agreements (RTAs) are all over the global village to regulate transnational trade. This creates a new complexity described already in 1995 by Jagdish Bhagwati as the ‘spaghetti bowl phenomeon’:

“By this, he [Bhagwati] was referring to the manner in which half-finished products and parts go around various FTA networks using tariff differentiation in an effort to export finished products to the consumer countries at the lowest price; he visualised this as crisscrossing lines and likened these strings of lines to strands of spaghetti tangled in a bowl” (Kotera 2006).

The USA established an institutionalised economic cooperation by implementing the North American Free Trade Agreement (NAFTA) since 1994, Asia-Pacific Economic Cooperation (APEC) since 1989 and Transatlantic Economic Council (TEC) since 2007. Beyond several BITs as well as RTAs are under negotiation or already ratified. The most important ones are the Transpacific Partnership Agreement (TPP) – with eleven Asia-Pacific countries representing 40 percentage of the global GDP and 26 percentage of the global trade – and the Transatlantic Trade and Investment Partnership (TTIP) with the EU – representing a common market with more than 850 Mio. consumers covering 45 percentage of world GDP and 44 percentage of the global trade in goods and services (WTO 2014).

The text for the TPP is finalised and got published in November 2015 and awaits its ratification until 2017. In contrarily the negotiations for the TTIP proceed only sluggishly. Eleven negotiation rounds have taken place since July 2013. Many obstacles are still on the agenda – e.g. investor-state-dispute-settlement (ISDS), social standards, public procurement, financial services and judicial culture on product authorisation (pre-cautionary

¹ According to the International Monetary Fund (IMF), about 90 percent of the future economic growth is gained outside the EU and one third of it in China (e.g. COM 2014; Venhaus 2013:59).

principal in the EU vs. evidence based approach in the USA) – which doesn't allow for serious prognosis on the finalisation of the agreement. Consequently the pressure on the EU is increasing, as the USA concluded its TPP and already set certain standards on the global stage.

In contrast to the USA's global approach towards trade policies the EU intensified its cooperation with its neighbouring countries (ENP, UfM/Euromed, PCA, DCFTAs) and the African Caribbean Pacific (ACP) states through Economic Partnership Agreements (EPA). As Bieling (2010) points out, the EU's trade policy pursues a comprehensive strategy towards neighbouring and ACP countries. This means that the EU uses its trade power (see 'power through trade' (Meunier/Nicolaidis 2006:910)) to call for reforms by bridging distinct issues (e.g. trade issues with energy, FDIs-regulation, good governance and so on) (ibid.:143). The applied mechanisms, according to the principal of conditionality, are similar to those of the enlargement process (see Trauner 2009).

Although the EU still proclaims the need to get global trade back into the multilateral arena of the WTO, several negotiations on NGFTAs are currently on the way: e.g. Japan, bilaterally with ASEAN states, MERCOSUR, DCFTAs with ENP countries; or already or almost in place as: the Comprehensive Economic and Trade Agreement (CETA) with Canada (2016); Ecuador (2016); Vietnam (2015), Singapore (2015), EU-CARIFORUM 2007; CAN-Multiparty-agreement with Peru and Columbia (2013); South Korea (2011); Chile (2003); Mexico (2000/2001); South Africa (2000); Tunisia (1998). With China, EU's third largest trading partner, the EU introduced an institutionalised dialogue within the Asia-Europe Meeting (ASEM) and currently negotiates on an Investment Agreement since 2013. According to a report of the EU Commission, EU Member States are parties to almost half of the total number of international investment agreements that are currently in force worldwide (roughly to 1400 out of 3000) (COM 2015:1).

The TTIP between the two main trading powers will have a strong influence on future global trade. In the 1990s both sides already had preliminary thoughts on such a comprehensive agreement called Transatlantic Free Trade Area (TAFTA). The attempt based on the globalisation of the world trade and the increasing relevance of emerging powers. In 2009, the German chancellor Angela Merkel stressed, in her speech in front of the US Congress, the importance of the re-organisation of world trade in order to restore the interests of the USA and Europa:

“If there is one lesson the world has learned from last year's financial crisis, it is that there is no alternative to a global framework for a globalized economy. [...] That also means not giving in to the temptation of protectionism. This is why the WTO Doha negotiations are so important. The success of the Doha Round would send a valuable

*message of the openness of the world economy, particularly in the current crisis. Equally, the Transatlantic Economic Council can also fulfil an important task. We can use it to prevent competing subsidies and give incentives to reduce trade barriers between Europe and America. I appeal to you: Let us jointly work towards a world economic order which is in the interests of both America and Europe!*²

As Marc Venhaus (2013) puts it: “[...] from a geo-economic perspective, TAFTA/TTIP is a reactionary move of the pressured West with the aim to turn the tables on the BRICS.” (ibid.:59). Also the former High Representative of the CFSP (1999-2009) and General Secretary of the NATO (1995-1999), Javier Solana, underlined the need of a transatlantic alliance in response to the prognoses of the report ‘Global trends 2030: alternative worlds’ by the US National Intelligence Council:

“[...] if current trends continue, Asia could soon surpass North America and Europe in global power. It will have a higher GDP, larger population, higher military spending, and more technological investment. In this geopolitical context, Europe and the US need each other more than ever, making greater transatlantic co-operation crucial” (Javier Solana 2013).

This new drive for BITs and RTAs again results in the establishment of interregional economic alliances in the long term. Currently the USA take the lead in this process and initiates transatlantic and transpacific trade agreements. Comprising the main economic powers, these treaties will create a ‘band-wagon effect’ on outsiders. Especially countries from the global south are now forced to accept the rules of an US-dominated trade regime as they failed to exert their influence at the WTO negotiations. Thus, clearly, the deadlock of the DDA leads to an increase of RTAs and BITs. In reaction to this re-bilateralisation of trade relations, regional integration projects and regional trade agreements (RTAs) are rising in importance and strength (see ‘hube-and-spoke’). The main regional alliances are MERCOSUR, SICA, UNASUR in Latin America; ECOWAS, SADC, SACU in Africa; and, ASEAN, CAFTA, RCEP, SAARC, RF-driven EAEU in ‘Eurasia’.

‘Regional trading powers’ themselves are going develop – with the help of alliances – to ‘mega-regionals’ which could lead to a new bipolarisation between the West (US-dominated) and East (China and India). A bipolarisation, which could leave the EU out of the game. An aspect which got highlighted by EU Trade Commissioner Cecilia Malmström in an interview in May 2015: *„How can we bring the opening agreed bilaterally back to the multilateral system? How can we make sure that the whole web of bilateral deals is properly implemented? And how do we make sure that we don’t lose out when others negotiate free*

² Spiegel Online 4. November 2009, Download on the 15. September 2015:
<http://www.spiegel.de/international/europe/angela-merkel-s-speech-we-have-no-time-to-lose-a-659196.html>

*trade deals?*³ Thus the EU sees itself forced to act pro-active and to succeed in implementing inherent objectives in the developing trade regime based on BITs and RTAs.

In summary, increasing regulatory competition along a neoliberal paradigm between regional trading powers is nascent. Transnational corporations (TNCs) are the beneficiaries of these competitive trade regimes. According to a study published by UNCTAD, TNCs account for some 80 per cent of global trade. Apart of that 1/3 of global trade takes already place within TNCs. This intrafirm-transfer could be named best as 'shareholder value chain':

“Global investment and trade are thoroughly entwined in international production networks. This is especially true of TNCs investing in productive assets worldwide, as they manage trading inputs and outputs in cross-border value chains that often are highly complex. Such value chains (intra-firm or inter-firm, regional or global, and commonly referred to as global value chains, or GVCs) shaped by TNCs account for some 80 per cent of global trade” (UNCTAD 2013:22f.)

As Stephen Gill (2014) notes, trade agreements as CETA, TTIP, TiSA and TPP guide the way into a global corporate power with substantial opportunities to use international treaties against national law for their interest and play regional powers off against each other. Considering a competitive trade regime, costs for regulations get targeted. Accordingly national legislators get under pressure and are being disciplined due to evolved rules on the transnational level. Advances in health and environmental protection, social rights and consumer standards as well as gains in many other areas are at stake (see 'Lange report', EP-Resolution 2014/2228(INI)). Cuts are definitely on the cards, and are set to come in the form of attacks on public interest legislation and curbs on the power of elected representatives. Instead of securing the European welfare state by trade agreements, core ideals and standards are offered on the global trade bazar in favor of neoliberal economic performance goals.

Consequently national regulatory competence is decreasing, whereas certain regulatory need is not covered on the international stage. Already existing rules, as e.g. ILO core labour standards, provisions to combat money laundering, chemical and waste conventions etc., are not respected by main trading powers such as the USA. Authorities on the international level responsible for their execution still await to be established.

The Democratic trap: De-politicisation of trade politics

The economic system should contribute to public welfare and so should trade. Therefore, trade politics should be in line with people's demands and interest. This further means a

³ Euractiv.com (2015): Commission to reframe 'geopolitical' trade strategy. 25. Mai 2015. Download am 14.10.2015: <http://www.euractiv.com/sections/trade-society/commission-reframe-geopolitical-trade-strategy-313207>

broad legitimisation of trade politics by the public. According to Michael Zürn (1996), democratic legitimisation is given if the following three conditions are met: people's sovereignty; transparency and accountability; and reversibility of previous decisions. These conditions have to be met on the national as well as the supranational or international level to reach legitimate governance. In the following paragraph, the paper exemplifies its hypothesis regarding an increasing de-politicisation of the EU's trade policies in the course of NGFTAs on the basis of the TTIP agreement. Thus, the analysis examines the aspect of legitimisation according to decision-making on clauses in the agreement, its implementation into national legislation and the right to object and legal revision of decisions made.

With the Treaty of Lisbon, the competences to negotiate international trade agreements are solely the exclusive competence of the EU. In compliance with Art. 218 AEUV, the procedure determine the need for a clear mandate given by the Council of Ministers (CoE) and the European Parliament (EP), an ongoing information of the CoE and EP on the progress and finally the approval of the agreement by the CoE, the EP and national parliaments in the case of 'mixed agreements'. As the TTIP will be a deep and comprehensive deal, the EC got a far-reaching mandate acting on behalf of EU member states. The respective negotiation mandate (CoE 2013) was given on the 17. June 2013 by the CoE and the EP according to Art. 207/Abs. 2 AEUV.

The twelfth negotiation round is scheduled for February 2016. The commission's negotiation team consists of approximately 150 experts. They are pledged to keep the committees on trade and agriculture within the CoE and the committee on trade at the EP informed about the progress made in the negotiations. Moreover, the commission has formed an Advisory Group from stakeholders in the areas of economy, environment, agriculture, trade unions and consumer rights for consultations before each negotiation round. But, in practice, only business groups (e.g. Transatlantic Business Dialogue TABD) have access to the consultation talks. Civil Society Organisations (CSOs) themselves complain about the lack of transparency of the negotiations and therefore are not able to react in time. Open debates would be needed as we face a huge range of changes to several policy areas. In fact, the EP has to be informed by the EC on the negotiations on a regularly basis and thus make the contents of the negotiations public. On that basis, the EP has the chance to react to the development of the negotiations as e.g. done with the resolution on the 'investor state dispute settlement' procedure on the 8. July 2015 (EP 2015).

The negotiations on TTIP clearly go beyond solely trade issues according to their aim of removing non-tariff measures (NTM). Another aspect concerns the accusation of the negotiation being a comprehensive agreement aiming to hide or outweigh negative clauses with positives ones ('Package deals'). Many of these issues are in the competence of the EU member states (MS) and therefore the TTIP agreement has the character of being a 'mixed

agreement' which also needs the approval of the national parliaments for entering into force. According to this, the EC should involve and consult the national parliaments from the early stage on to conclude an agreement in respect to public interests. Currently the national parliaments are not involved to the extent needed to influence the negotiations affecting their crucial competences.

The general secretary Monique Goyens of the umbrella organisation of the European consumer protection organisations BEUC thus stresses the need for a broad legitimisation by national parliaments:

“Trade can benefit consumers, but today’s trade agreements touch on areas way beyond tariff cuts and simplified customs rules. It is crucial that the European Parliament remains vigilant in telling negotiators that consumer safeguards are off-limits. [...] The time when trade agreements affecting our daily lives can be negotiated unnoticed by the public is over. The European Parliament has assumed its responsibility as the democratic watchdog for trade negotiations, and has set out what kind of deal it will accept” (European Consumer Organisation BEUC 2015).

Apart from the democratic deficits in the negotiation phase, we face an even more crucial shortcoming in the implementation phase of the trade agreement TTIP: there will remain a number of areas warranting further work, which will be either identified when the TTIP negotiations are finalised or subsequently ('inbuilt agenda'). Consequently the EU Commission stresses the need to:

“... provide regulators with the means and support they need to progressively move towards greater regulatory compatibility/convergence and make TTIP a dynamic, ‘living’ agreement sufficiently flexible to incorporate new areas over time. Regulators need to have clear authorization and motivation to make use of international cooperation in order to increase efficiency and effectiveness when fulfilling their domestic mandate and TTIP objectives” (COM 2013c:4).

According to both leaked and published proposals, the EU is betting on regulatory cooperation as the key to the removal of NTMs. For that reason the EU and the USA propose the creation of a joint EU-USA oversight body for the development of regulations in the two regions. The proposal attempts to establish a Regulatory Cooperation Council (RCC). Its task will be to monitor the implementation of commitments made and consider new priorities for regulatory cooperation, defined in the annual regulatory program (ARP). The former Trade Commissioner, Karel de Gucht, also notes that the RCC could even develop – together with regulators and standard bodies – regulations which would, *“then have a good chance of becoming international standards”* (in: COM 2013b:6).

As proposed, the RCC would consist of representatives of the main EU and US regulatory agencies. In their definition and proposed form, it is similar to the US Office of Information and Regulatory Affairs (OIRA). OIRA is under the direct responsibility of the White House and coordinates the regulatory framework which guarantees economic security and legal certainty. For the part of the EU, representatives of the EU commission and its agencies will carry out the regulatory cooperation on behalf of the EU and national regulatory bodies and in the interest of stakeholders. The proposal of the RCC includes comprehensive consultation ('Notice-and-comment system') and complaint procedures. This implies that the RCC is the point of contact for stakeholders, first of all TNCs.

Several mechanisms are named in the proposal, which give TNCs a crucial chance to shape the agenda at an early stage. TNCs are already joined together in the Transatlantic Business Dialogue (TABD) which gets an increasing role within the proposed regulatory cooperation. As Kenneth Haar (Corporate Europe Observatory) and Max Bank (LobbyControl) warn, *“regulatory cooperation under TTIP follows in the tracks of past experiments by expanding and strengthening an experiment that has gone on for years, and which has already shown it has teeth, providing a series of inroads for industry to dominate the regulatory agenda and possibly preventing regulation in the public interest from appearing on the political agenda in the first place”*.⁴

Apart from getting consulted to shape the agenda of the RCC, TNCs have to get informed by the so called 'early warning system', in the drafting phase of new legislation, which is supposed to affect their businesses. Therefore, the proposal provides a specific clause on impact pre-assessment of legal revisions before entering into force. Altogether the RCC risks of getting merely a forum for business interests of TNCs trying to dismantle existing NTMs to trade and prevent new ones from emerging.

Although the decisions of the RCC are not binding for legislators, it will have a major impact on the regulators in both regions. First of all, the RCC is dominating the regulatory cooperation as it has the leading role in the coordination, sets the agenda and possesses the information superiority in the regulatory processes. Secondly, The EP is not part of the RCC (Art. 14) and not involved in Information and Regulatory Exchange (Art. 9) or Promoting Regulatory Compatibility (Art. 11). Therefore, the RCC deserves a closer look as it stays in close contact with TNCs and their interests but has no democratic legitimation at all. This legitimation gap has to be closed before the RCC gets established according to current TTIP proposals on the table. Though full scale harmonisation of health, safety and environmental rules is difficult, free trade deals talk of mutual recognition of existing standards, avoiding

⁴ Article in Euractiv.com (18. Jan 2016): TTIP's regulatory cooperation has already begun attacking democracy. Accessed on 18. Jan 2016 on: <http://www.euractiv.com/sections/trade-society/ttips-regulatory-cooperation-has-already-begun-attacking-democracy-321060>

new regulation as the best and least trade-distorting option, and providing governments – often at the request of big corporations – with tools to hinder or delay the introduction of new standards by their trading partners.

Finally, another democratic shortcoming concerns the possibility to revise previous decisions and policies. As the TTIP agreement will be a treaty of international law, it is almost impossible for states to change it after it got ratified. This also applies to regulations agreed within the RCC and implemented by the legislators. The democratic shortcoming refers to the fact that RCC decision making would not, at any stage, be accessible to democratic decision making, neither on the supranational nor national level (see also Fischer-Lescano and Horst 2014).

De-regulatory spill-over: Opening the Pandora

As stressed in the section before, the TTIP agreement is supposed to set up institutions and procedures for regulatory cooperation to guarantee harmonization of standards and norms. Most of the outcomes in daily business are happening far beyond its ratification. The integration concept of ‘function follows forms’ by Ernst B. Haas (1958) describes best how the TTIP would affect regulatory policies in the EU and the USA. The established dialogue on regulatory cooperation, thus, is going to bring life into the agreement in the long term. That for, the EU and the USA are currently are going to agree on a ‘living agreement’, which relies on a specific framework and objectives (see also Soukup 2014). They are the basis for further implementation by the RCC.

So to say, the agreement will be rather vague and leave space for interpretation in the implementation and evolvement of the agreement. Therefore, a democratic legitimation of decisions made by the RCC is even more important. Certain characteristics of the proposed agreement implicate that the final TTIP agreement will tell us only half of the story. Apart from the ‘living’ character of the agreement other factors raise the impression that TTIP could enable a huge re-regulation and de-regulation throughout certain policy areas.

The author anticipates possible spill-over of policies and competences in the course of the implementation of the ‘living agreement’. First, in the course of the institutionalised cooperation within the RCC regulatory competences will be shifted from national legislators to the RCC and the EU commission (see also ‘mixed agreement’). Second, regulatory cooperation in certain policy areas are supposed to have an impact beyond and lead to further deregulation or reregulation in other policy areas.

Thirdly, both negotiation partners agreed on the ‘negative list approach’, which stipulates, that all policy areas, defined in the agreement, will be out of deal for regulatory cooperation. This implies major risks in contrary to a ‘positive list approach’, which defines the policy

areas that will be part of regulatory cooperation. It is incomprehensible why the EU should agree to the ‘negative list approach’ as it stays uncertain which issues are taken into account. This is best exemplified around the debates on whether TTIP’s deregulatory agenda will target public services and public goods or not. The author underlines the need for a clear definition before the finalisation of the TTIP agreement to have a transparent debate on its consequences and whether this will find public consent. Apart from that, an increasing number of people are calling for including a clause on the ‘right to regulate’ for specific areas as environmental and social protection. The EU commission included the ‘right to regulate’ clause into their latest reform proposal in May 2015 (COM 2015).

Thirdly, the proposed enhancement of investment protection is supposed to frustrate regulatory reforms (‘regulatory chill’) by an investor state dispute settlement procedure (ISDS), the obligation for national legislators to inform the RCC and obligatory pre-assessments of their proposals, before they change or impose new regulations. Especially national legislators see themselves confronted with a complex assessment procedure and the risk of legal proceedings. With the ISDS procedure TNCs will acquire the legal right to raise barriers against the democratic decisions of sovereign states or supranational associations, when they consider that such decisions jeopardise their profits. In the meanwhile, the EU Trade Commissioner, Cecilia Malmström announced a reform proposal, which indent to change from current ad hoc arbitration system ISDS to an Investment Court system (ICS) by arguing that “*The key challenge for the EU's reformed investment policy is the need to ensure that the goal of protecting and encouraging investment does not affect the ability of the EU and its Member States to continue to pursue public policy objectives*” (COM 2015).

Outlook – need for a re-politicisation of trade politics

The third wave of neoliberalisation is targeting the national regulatory policies throughout the global trade. Whereas national states claim to have the right to regulate whenever it is needed to serve at best people’s interest and act for the common good, NGFTAs exactly challenge this approach. One of the core functions of NGFTAs – as TTIP, TPP, CETA – is to interfere with this right of sovereign regulatory competence of national states in order to facilitate transnational business by regulatory compatibility and certainty for investments. The most important approach is that it prohibits governments from adopting regulations that discriminate against foreign goods, services, or investments based on their nationality. For that purpose the RCC is supposed to work as a contact point for TNCs and coordinate the removal of discriminating regulations. The previous sections examined the proposed changes of regulatory governance by the TTIP agreement. The following three consequences got identified in the text:

First of all, the fact finding concludes that the current proposals for the regulatory cooperation would increase the de-politicisation of trade politics. This phenomenon refers to the shift of regulatory competences from legitimated legislators towards technocratic procedures within the RCC according to agenda-setting and obligatory pre-consultation in case of regulatory reforms. This shift marks in any case a form of attacks on public interest legislation as it decreasing the leeway for national states for the articulation of domestic rules and regulations.

This fact goes also hand in hand with the following appraisal by Peter Katzenstein (2005) on an evolving: „*Global governance without and around government*“ (ibid.:20) characterised by „*governments now have less control over national affairs than they had in the past*“ (ibid.:20). While more and more regulatory competences are supposed to be restructured towards the RCC – appointed to serve the interest of a merely de-regulated trade and high protection for TNC-activities, we face a crucial risk of a lack in legitimacy. The lack of legitimacy is given, first of all, by the exclusion of the EP at the RCC (Art. 14), from Information and Regulatory Exchange (Art. 9) and from Promoting Regulatory Compatibility (Art. 11). Apart from that, crucial social and environmental rights come off badly on the global level as, respectively, an comprehensive and binding agreement (e.g. ILO core labour standards, chemical and waste conventions) and an executable law enforcement (as e.g. an International Trade Tribunal) are missing. By the way, the EU is by law obliged to guarantee that human rights are respected in their trade agreements (Art.3;21 AEUV). In this regard, an important step has been done by the EU Commission by including social standards, aligned to the ILO core labour standards, in their recent proposal.

Secondly, the author sheds light on the impact of an increasing competitive environment in global trade, due to a bilateralisation of trade agreements, which will have an disciplinary effect on legislators towards regulatory harmonization and de-regulatory measures (see also Gill 1990). As a consequence, regulations in distinct national states will undergo a race to the bottom according to be attractive for TNCs and their investments.

Thirdly, with the currently proposed clauses on regulatory cooperation, an increasing number of policies are being consequently at stake to be dealt by the RCC. This spill-over of competences for distinct policy issues refers to the vague wording of the agreement, the negative list approach, the regulatory chill effect and the fact that the TTIP will be a living-agreement in its nature.

To sum up, the current development of EU's trade politics can be best described as a process of 'paternalistic constitutionalisation'. The term refers to a system based on an increasing standardisation and juridification of regulatory governance whereas non-legitimated technocrats are supposed to get a widespread mandate to re-regulate

transatlantic trade. The term ‘paternalistic’ refers to the fact, that this governance approach is based solely on its output-legitimacy. As long as this system provides favourable economic performance data, political stability and the consent by the people will be granted. But, this system risks to loose public support at any time of economic crisis. Therefore, the EU should build its economic and trade governance on a comprehensive and deep consent given by the participation at any stage of the formulation of policies as well as the chance to revise legislation and regulation in place.

The paper concludes with a postulation for the need to politicise trade politics, as it has major impact on a huge variety of policy issues. Moreover it will stress the necessity to establish international regulations for transnational businesses to guarantee fundamental rights along the complexity of global production and value chains. It’s not the question about how much democracy should be brooked by the economy, instead it should be the question which form of economy facilitate a deliberative democracy. Therefore the author argues that economic and trade issues should be at any time accessible to public debates and agreed by democratic elected representatives.

„Globalisierung trennt Shareholder von Unternehmen, Unternehmen von Gesellschaften, Institutionen von Menschen [...] Wenn globale Institutionen über Standards internationalen Zusammenlebens hinaus in Wirtschaftsordnungen eingreifen, werden sie zur demokratischen Fata Morgana. Die Grenze zwischen globalem Miteinander und demokratischem Selbstorganisationsspielraum muss erkannt und gezogen werden“ (Scherr 2001).

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