The Constitutionalism of International Economic Law

*Thomas Cottier**

A. The Structure and Nature of Economic Law

Economic law, as a branch of law, emerged from the traditions of commercial law, private and administrative law, in response to the regulatory needs of the post-World-War-II mixed economies and the welfare state.[1] Next to human rights and constitutional law, which predominantly shaped post-war legal orders, economic law amounts to a prime and precious public good upon which the human rights, welfare and prosperity of millions of people critically depend. It essentially defines the scope of opportunities for individuals and of distributive justice in a given society. Much ink has been used in attempts to define its scope and nature more precisely – to no avail.[2] The field entails a wide range of subjects, encompassing rules on companies, business transactions, taxation, competition, government procurement, investment, intellectual property, regulation of trade and finance, securities and monetary law, protection of health and the environment and labour relations. It deals with a wide range of actors: companies, producers, consumers, workers, and citizens. Horizontally, it cuts across the classical divide of private and public law. Core areas of private law, in particular contracts and torts, are of key importance to economic law. Likewise, constitutional law and administrative law deeply inform the shape and operation of economic law. Education and health care, and thus prime areas of governmental and para-statal activities in most countries are an essential prerequisite to the successful operation of economic law. In fact, almost any field of law, including penal law, is of relevance to economic relations.[3] Vertically, economic law entails regulations on all layers of governance: local, national, regional and international. It has been at the forefront of the globalization and regionalization of law, the centre of which was formerly within the nation state. European Community law emerged first and foremost as economic law. Most areas of domestic economic law today find partial correlations in international law which, in turn, feeds back into domestic law. International trade law,

* Professor of Law, University of Bern. I am grateful to lic. iur. *Lena Schneller*, research fellow at the Department of Economic Law, for support, comments, suggestions and careful amendments.

1 Andreas Kellerhals, *Wirtschaftsrecht und europäische Integration* (Zürich, Nomos/Schulthess, 2006) 29 et seq.

2 Kellerhals (n. 1 above), 29; Schluep e.g. defined economic law as "law of the economy", see Walter R. Schluep, *Was ist Wirtschaftsrecht?*, in Riccardo Jagmetti and Walter R. Schluep (eds.), *Festschrift für Walther Hug zum 70. Geburtstag* (Bern, Stämpfli Publishers, 1968) 25-95; see also Andreas Kellerhals, *Wirtschaftsrecht als Recht der Wirtschaft*, in Andreas Kellerhals (ed.), *Aktuelle Fragen zum Wirtschaftsrecht: zur Emeritierung von Walter R. Schluep* (Zürich, Schulthess Polygraphischer Verlag, 1995) 5-30.

3 Karl M. Meessen, *Wirtschaftsrecht im Wettbewerb der Systeme* (Tübingen, Mohr Siebeck, 2005) 14 et seq.

albeit considered marginal for a long time, has moved centre stage with the World Trade Organization (WTO) in addressing and harnessing globalization. Economic law thus stands for a complex phenomenon of principles, rules and regulations dealing in a very broad sense with the legal structures and procedures relating to the production, trade and consumption of goods and services, both domestic and international. It employs a wide range of regulatory approaches, which will be discussed shortly.

There is no point in seeking to define the subject matter of economic law more precisely. New areas may be added as policy makers so decide. No inferences can be drawn from notions defined in the operation of the law. It is sufficient to recall the diversity and breadth of topics to be considered. This, of course, renders the task of this paper rather difficult, if not impossible. An assessment of the impact of economic law, even though limited to international economic law, on state and society is impossible to achieve in specific terms. Such work requires the detailed analysis of distinct and widely divergent regulatory areas. Given these constraints, the paper thus seeks to focus on a number of structural issues in order to assess their impact on state and society. It first turns to the dichotomy of harmonization and regulatory competition. The second part then elaborates the constitutional functions of international economic law. In the third part, it addresses the impact and implications of basic principles of non-discrimination on structures of governance such as state sovereignty. In doing so, it mainly focuses on the law of the World Trade Organization. Part five turns to the impact on society especially the problems of international distributive justice, as one of the main challenges, and asks how the problem could be addressed in terms of structure and procedures both on the international and domestic levels of governance. The paper concludes with an overview of some of the challenges ahead.

B. Regulatory Competition versus Harmonization

The nation state has been built upon the idea of harmonization of law, creating equal conditions of competition for all actors within its jurisdiction. Economic law emerged after the period of the great civil law codifications, and its rules are scattered in a great variety of different instruments and sources. Fragmented as it is, it nevertheless seeks to bring about harmonization within states. Internationally, nation states largely operate under the doctrine of regulatory competition. While it is questionable to depict nations competing in economic terms, nation states define conditions of competition for their operators relevant for domestic and export markets. They protect domestic industries and consumers in the mercantilist tradition of the emerging nation state and they promote exports. Or, they expose producers, to the benefit of consumers, to foreign competition by reducing or eliminating trade barriers. Mixed regulatory forms can be observed within federal states. On the one hand, they centralize and harmonize and on the other hand, they operate under decentralized regulatory competition, for example in taxation. Constitutional principles, such as economic freedom, or the interstate commerce clause, arbitrate between the two approaches and seek to render them compatible, channelling regulatory competition.

The same pattern can be observed in international economic law. The structure of EC-law follows the logic of mixing regulatory competition and harmonization of law. The four freedoms channel domestic law, combating discrimination and regulations that are

excessively restrictive to the extent that they serve protectionist purposes which cannot be justified by legitimate policy goals and competing legal principles, in particular human rights. Regulatory approaches range from full harmonization in ordinances and exclusive central competence, to partial harmonization in directives, to the principles of equivalence, mutual recognition and home-state rule (Cassis-de-Dijon) and, finally, to classical forms of international reciprocity and cooperation. On the global level, the law of the WTO shows similar patterns. The principles of non-discrimination, which will be discussed shortly, channel domestic law with a view to creating equal conditions of competition for domestic and foreign products alike.[4] WTO law partly harmonises the law, such as rules on trade remedies or intellectual property protection in terms of minimal standards. To a large degree, however, it operates on the principle of progressive liberalization, defining market access in individualized schedules, taking into account levels of social and economic development. This is true both for tariffs and services. Equivalence and mutual recognition are much less present as the global system cannot be compared to the high levels of integration witnessed within nations and within the European Union. On an international level, mutual recognition agreements are typically concluded on either a bilateral or a regional basis. Since the Uruguay round, the WTO has developed from mere negative integration to some basic approaches of positive integration for example in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Beyond formal harmonization and regulation, economic law of large market powers exerts considerable influence in bringing about *de facto* harmonization and rapprochement. In this field, the traditions of comparative law loom large. Switzerland is a case in point. Situated at the crossroads of Latin and Germanic cultures, its laws have always been strongly influenced by both cultures. More recently, EC-law – often amalgamating these traditions, including Anglo-Saxon law and the traditions of Nordic law – is being adopted unilaterally under so-called policies of eurocompatibility, notwithstanding that Switzerland is not formally a member of the Union. In addition to bilateral agreements, formally importing EC-law under the guise of equivalence and in the form of mainly static international agreements to preserve formal sovereignty and independence, EC-law has thus become a major reference point in Swiss legal developments, bringing about substantial *de facto* harmonization with community law.[5] Exemptions exist only in sensitive areas and niches, such as banking regulations and taxation. In turn, deviations and off-shore policies are under increasing pressure to the extent that they harm Member States of the Union. Many countries around the world seeking access to the large and prosperous EU market face similar challenges and as a result they adopt policies comparable to those of the EU. These informal influences are not limited to small and medium-sized countries

4 For more on the principles of non-discrimination see Thomas Cottier and Matthias Oesch, *International Trade Regulation* (Bern/London, Cameron May, 2005) 346 et seq.

5 Thomas Cottier, Daniel Dzamko and Erik Evtimov, *Die europakompatible Auslegung des schweizerischen Rechts*, in Astrid Epiney, Sarah Theuerkauf and Florence Rivière (eds.), *Schweizerisches Jahrbuch für Europarecht 2003* (Bern, Staempfli Publishers, 2004), 357-392; Thomas Cottier and Matthias Oesch, *Die sektoriellen Abkommen Schweiz – EG – Ausgewählte Fragen zur Rezeption und Umsetzung der Verträge vom 21. Juni 1999 im schweizerischen Recht* (Bern: Staempfli Publishers, 2002); Thomas Cottier and Erik Evtimov, *Die sektoriellen Abkommen der Schweiz mit der EG: Anwendung und Rechtsschutz*, in 139/2 Zeitschrift des Bernischen Juristenvereins (2003), 77-120.

strongly dependent upon access to larger markets. For example, European companies operating in the United States stock markets are bound to respect new accounting standards under the Sarbanes-Oxley Act, exerting considerable structural influences on such companies incorporated under European domestic law. It remains to be seen to what extent the Act will exert long-term effects on European regulations and competitiveness. It is unclear at this stage whether the Act will lead to efforts at harmonization or whether it will reinforce the traditions of regulatory competition in the field of company law.

Formal and informal pressures to adjust to rules and regulations of major markets thus amount to an important feature of today's economic law. It may be the modern tool and form for building empires. International economic law, formally linking different regulations and jurisdictions, is perhaps no more than the tip of an iceberg within the universe of economic law. It begs the question of how these processes influence allocation of powers in real terms. Evidently, they profoundly challenge the traditional perceptions of national sovereignty and independence of states. Hence, the question arises of how the international system as a whole should respond to them in terms of allocating formal decision-making powers. The problem thus turns into one of constitutional law. It goes way beyond how it has traditionally been perceived as constituting the sovereign nation state under the Westphalian system. Economic law, however defined, profoundly challenges traditional patterns. It calls for a new doctrine of constitutionalism. At the same time, international economic law exerts a profound influence on societies at large. Globalization and regionalization shape the workplace, lifestyles, opportunities, and costs alike. The complexity of the law leaves many people puzzled and destabilized. Largely unknown to the public at large, it is often subject to populist movements calling for enhanced protection and revival of national virtues. These concerns, in return, feed back into the realm of constitutional structures. They need to be taken into account in shaping new doctrines of governance able to cope with the challenge of globalization.[6]

C. Constitutional Functions of International Economic Law

Within the myriad rules and regulations of international economic law, a few fundamental rules stand out. They amount to basic principles of law, deriving from the principle of equality and they are of a constitutional nature, establishing the very foundations upon which a particular regime is based.[7] For the WTO, these principles relate to non-discrimination in its different forms. They include principles of transparency and access to legal protection, all seeking to bring about equal conditions of competition for foreign and domestic products alike. They are fundamental in addressing and avoiding rent-seeking protectionism by nation states. In EC-law, these principles are embodied in the Four Freedoms – free movement of goods, of services, of capital, and free movement of

6 Thomas Cottier, *The Impact from Without: International Law and the Structure of Federal Government in Switzerland*, in Peter Knoepfel and Wolf Linder (eds.), *Verwaltung, Regierung und Verfassung im Wandel. Gedächtnisschrift für Raimund E. Germann/Administration, gouvernement et constitution en transformation. Hommage en mémoire de Raimund E. Germann* (Basel, Helbing & Lichtenhahn, 2000) 213-230.

7 Daniel Thürer, *Kosmopolitische Verfassungsentwicklungen*, in Daniel Thürer (ed.), *Kosmopolitisches Staatsrecht* (Zürich, Schulthess, 2005) 3-39.

persons and establishment. While the substantive principles of the WTO are essentially limited to non-discrimination, the Four Freedoms also include the principle of proportionality of a regulation, transgressing *de jure* and *de facto* discrimination. In WTO law, proportionality applies in effect in assessing restrictions imposed on non-discrimination in the pursuit of other legitimate policy goals, in particular public health and environmental protection. Overall, however, WTO-law does not amount to levels of protection and integration comparable to those of EU-law or domestic constitutional law. The basic functions of the fundamental rules, however, are comparable. Importantly, they share structural traits with established principles of domestic constitutional law.

Principles of non-discrimination as well as market freedoms have important horizontal and vertical effects. The principle of most-favoured-nation (MFN) treatment, an expression and variation of the principle of non-discrimination, ensures that all benefits granted to a third party are immediately and unconditionally extended to all members of the WTO agreements. MFN, in other words, ensures equal conditions for all imported like products on a particular market.[8] Lawful exemptions exist, but need to comply with a number of criteria seeking to reduce trade distortions. The principle of national treatment, the other important expression of non-discrimination, compares foreign and domestic products. It requires that competing foreign products are not treated less favourably than like or substitutable domestic products. Again, important exemptions exist, and they also need to meet certain criteria and requirements. Both these principles thus operate as a check on domestic policies and law. Likewise, the principles of transparency, in particular those relating to the publicity of rules and regulations, and the right to seek judicial review of domestic determinations in trade policy, have structural effects in domestic law, as they require and prescribe minimal procedural standards which Members need to meet.[9] Other prescriptive rules of international economic law have similar effects. But more than anything else, non-discrimination and transparency exert a structural impact on domestic law which applies across the board. They establish a vertical relationship between the principles of international economic law and domestic law. Such a relationship, it is submitted, is comparable to the structural effects found in constitutional law. The freedom of economic activity (*Wirtschaftsfreiheit*) in the European constitutional tradition, or the right to establishment, offer comparable checks not only on federal law, but also, and perhaps most importantly on the law of sub-federal entities. In that respect, they are comparable to the function of the Interstate Commerce Clause in the US-Constitution and the due process clauses, requiring sub-federal units to meet certain procedural standards.

A functional comparison of these principles allows them to be considered as part of an overall and mutually supportive constitutional structure.[10] They have comparable functions in relation to different layers of governance. We may refer to this as a five-storey house, with local, cantonal, national, regional and international or global layers of law. States may not distinguish different layers within their jurisdiction. They may not be part

8 Cottier/Oesch (n. 4 above), 346 et seq.

9 See e.g. Background Note on Provisions on Procedural Fairness in Existing WTO Agreements (WT/WGTCP/W/231), available at http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm (last visited June 19, 2008).

10 Thomas Cottier and Maya Hertig, *The Prospects of 21st Century Constitutionalism*, in Armin von Bogdandy und Rüdiger Wolfrum (eds.), in 7 Max Planck Yearbook of United Nations Law (2002), 261-322.

of regional integration, but there are at least the two layers of domestic and international law which interact in the same vein.

D. Multilayered Governance and the Impact on State Sovereignty

The principles of non-discrimination, much like the four freedoms in EC law, operate as a check on nation states and the sub-federal levels. In doing so, an additional layer of governance is established on the international level.[11] Such governance is exercised in and by the application of constitutional principles, adjudication and dispute settlement and the authority granted to enforce rights by means of trade sanctions and the withdrawal of market access rights of the infringing party. This layer also entails legislative work in and by treaty negotiations. Rules further elaborate the principles of non-discrimination and transparency. They go beyond those basic principles and have entered into legal harmonization. These rules are based upon authority delegated by Member States by means of international agreements. At heart, they essentially seek to prevent and remedy failures that have arisen within nation states, the political process of which inherently privileges domestic producers and tends to neglect interests relating to imported products which are much less well represented in the political process of domestic decision-making operating under democratic majority rule or strong executive powers. Economists have called this the lock-in effect of international economic law,[12] binding governments to comply with existing commitments and therefore being more successful in fending off protectionist claims. From the point of view of constitutional law, the functions are similar to those of constitutional rights which operate as a check not only on national legislation, but also on the courses of action taken at the sub-federal levels. Similarly, these rights lock-in these levels of governance and balance majority-based national and sub-federal laws and policies which may be in violation of these rights and principles. It is very important to recognize the compensatory function of WTO-principles and rules. They are profound emanations of the rule of law and the protection of legitimate expectations. By dividing political power among different levels of action and among different actors, they provide checks and balances on a vertical level.[13] In doing so, they contribute to the overall legitimacy of the system of multilayered governance, even though they may cut against majority ruling and thus seemingly be at odds with democratic principles. They are a public good of profound and critical importance.

Equating domestic and international law in terms of constitutional law is highly controversial. Constitutional scholars insist that that constitutional law is inherently limited to the nation state and the prerequisite of a homogeneous society.[14] It cannot be

11 Cottier/Hertig (n. 10 above), 299 et seq.

12 Thomas Cottier, *From Progressive Liberalization to Progressive Regulation in WTO Law*, in 9 Journal of International Economic Law (2006), 779-821, 805.

13 Anne Peters, *The Globalization of State Constitutions*, in Janne Nijman and André Nollkaemper, *New Perspectives on the Divide Between National and International Law* (Oxford, Oxford University Press, 2007) 251-308, 273.

14 For Swiss authors see e.g. Andreas Auer, Giorgio Malinverni and Michel Hottelier, *Droit constitutionnel suisse* Vol. I (Bern, Stämpfli Publishers, 2006), 1. See also Cottier/Hertig (n. 10 above), 276 with further references.

extended to the realm of international law and a world highly fragmented and short of shared values and culture. Moreover, WTO law is frequently challenged from the point of view of democratic legitimacy.[15] It is argued that the diplomatic process, followed in rule making and even legal harmonization, is not sufficiently inclusive and deliberative in relation to stakeholders, in particular non-governmental organizations defending the global commons. Similar arguments of democratic deficiencies are made in relation to the European Union.[16] It is argued that the enhanced role of the European Parliament in legislation under the treaties following Maastricht, in particular the Reform or Lisbon Treaty, still fails to remedy the deficit in light of a lack of homogeneity in the European society and public at large comparable to the nation state.

The doctrine of multilayered governance, on the other hand, seeks to understand the overall regime in comprehensive constitutional terms. It seeks to interface different layers of governance and to bring about greater coherence. The effort is not meant to challenge traditional perceptions of constitutional law. Rather, it seeks to bring about an overall regime which is able to preserve and protect the very values post-war constitutionalism sought in the age of globalization.[17] While profound differences remain between different layers of governance in terms of decision-making, it is submitted that all layers share common features and principles as they are all human endeavours, responding to comparable problems of human interaction. They all share common principles and traits many of which emerged in economic and international economic law. An overall and comprehensive understanding of constitutionalism also allows the identification of complementary and compensatory functions and areas where further work and rapprochement of different layers is needed in terms of decision-making processes. Thus, efforts to enhance inclusiveness can and should be made, in particular where the law is led into harmonization and exceeds the operation of constitutional principles. The legitimacy of the WTO principles of non-discrimination and transparency, however, is firmly based upon the idea of rule of law and equality. They are inherently legitimate and do not need additional support by means of democratic processes of decision-making.[18] Their operation makes an important contribution to fair relations among nations and to

15 For an overview of the debate on the legitimacy of WTO law see e.g. Manfred Elsig, *The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?*, in 41 Journal of World Trade (2007), 75-98; Daniel Esty, *The World Trade Organization's legitimacy crisis*, in 1 World Trade Review (2002), 7-22; Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 Journal of World Trade (2001), 167-186; Eric Stein, *International Integration and Democracy: No Love at First Sight*, in 95/3 American Journal of International Law (2001), 489-534.

16 Andreas Føllesdal and Simon Hix, *Why there is a democratic deficit in the European Union. A Response to Majone and Moravcsik*, in European Governance Papers No. C-05-02 (2005), available at http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-02.pdf (last visited June 19, 2008); Christophe Crombez, *The Democratic Deficit in the European Union: Much Ado about Nothing?*, in 4 European Union Politics (2003), 101-120; Winfried Kluth, *Die demokratische Legitimation der EU. Eine Analyse der These vom Demokratiedefizit der Europäischen Union aus gemeineuropäischer Verfassungsperspektive* (Berlin, Duncker und Humblot, 1995).

17 Cottier/Hertig (n. 10 above), 299 et seq.

18 Anne Peters, *Die Strukturähnlichkeit der Diskriminierungsverbote im Menschenrechtsbereich und im Welthandelsrecht*, in Stephan Breitenmoser *et al.* (eds.), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Zürich/Baden-Baden. Dike, 2007) 551-593.

the protection of minorities not sufficiently represented in domestic political processes. They are important ingredients in keeping the peace among nations – a key ingredient and task of international law.[19] Per se, by their very operation, and based upon past experience, they contribute to enhancing the welfare of nations. Just as much as fundamental constitutional rights, they are inherent to democracy and good governance. They stand for the rule of law, and in many countries, the principles of international economic law in fact operate as a surrogate for domestic constitutional structures and make up for the lack of transparent political processes and an independent judicial branch. They shape the political process, but may at times oppose majority ruling in defence of individuals. Like fundamental rights, they primarily rely upon on due process and fair judicial avenues and enforcement. In the case of the WTO, principles of non-discrimination are essentially enforced by the dispute settlement mechanism. The Dispute Settlement Understanding with its two-tier system of panels and Appellate Body review offers the most advanced and successful system of dispute settlement in international law. The fact that most rulings are swiftly implemented by governments[20] provides evidence of high levels of acceptance and thus the legitimacy of the system.

The law of the WTO thus exerts a profound influence on domestic processes and structures. It limits the regulatory freedom of governments in the pursuit of particular interests of nations. Like EU law, WTO law has a strong impact on traditional patterns of state sovereignty. Indeed, the perception of multi-layered governance in international economic law requires new perceptions of sovereignty.[21] While EU Members clearly find themselves in an era of post-nation states, strongly embedded in economic law of the Union, it is less clear to what extent WTO law, in principle, exerts comparable effects, albeit to a lesser degree.

Principles of international economic law are largely treaty-based. From a formal point of view, the sovereignty of nations is not affected as they have consented to the application and enforcement of these rules, entailing limitations to the exercise of political discretion on domestic affairs. It is a matter of calculated transfer of sovereignty and not – as some politicians, especially from the national conservative perspective argue – a loss of sovereignty. On substance, however, the principles and the body of WTO law have profound implications on the structure of domestic governance. The emerging system of multilayered governance brings about important changes in the allocation of powers, without changing a word of the domestic constitutions. This is also true for informal influences on domestic policies, such as the unilateral modification of national law to achieve harmonization with the law of other, larger market economies.[22]

Firstly, the operation of the WTO essentially enhances the role of the executive branch of government. Negotiations are led by administrations and diplomats, primarily responsible to the executive branch. The know-how to lead negotiations is vested in these bodies. In the design of new legal regimes relating to international economic law, the role of legislators is reduced as a corollary. Except for in the United States, for

[19] Thomas Cottier and Alexandra Dengg, *Der Beitrag des freien Handels zum Weltfrieden*, in 81 Basler Schriften zur europäischen Integration (2007), 41-70.

[20] William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, in 8 Journal of International Economic Law (2005), 17-50.

[21] John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge, Cambridge University Press, 2006).

[22] See above page 4.

decades parliaments have not been much interested, or involved, in the formation of international economic law.[23] As the subject mainly dealt with issues of co-existence and cooperation among states, domestic law was not substantially affected. The focus on non-tariff barriers has inherently led treaty-making to deal with matters of domestic concern, ranging from domestic support in agriculture to intellectual property rights and regulatory regimes of services. Rules have increasingly affected other policy areas and limited the powers of legislators to adopt regimes of their liking. More and more, the main structural elements of a regime are predetermined by international rules and principles. They leave parliaments and legislators dependent upon solutions agreed to by the executive branch on international layers of governance. As a result, the power allocation between the executive branch and legislators shifts further, in addition to important domestic functions of administrations in preparing legislation. The power to consent to important agreements remains. However, as such agreements cannot be unilaterally changed, and often come as part of a package-deal, parliaments are left with the option either to take or leave the matter – the latter often being linked to substantial political costs. The development of international economic law has thus been at the forefront in increasing the role and powers of parliaments in the process of preparing treaties, and during the treaty-making process. Procedures of informal consultation and participation in delegations emerged commensurate with the particularities of different constitutional settings. Except for the United States Congress, democratic control of international trade policy and law has not been substantially reinforced in most countries, and much work still lies ahead as international economic law grows further in the process of globalization.

Secondly, international economic law potentially enhances the role of courts.[24] The traditional reluctance to deal with foreign affairs and instead to leave them to the executive branch as a matter of international relations, is no longer acceptable. Moreover, traditional restraints to reviewing domestic economic legislation in the field of administrative law, limiting control to *ultra vires* and excess of discretionary powers, no longer match the detailed review of legislation and decisions which takes place under the Dispute Settlement Understanding of the WTO. It results in what we have called a paradox of judicial review. Courts therefore are bound to expand substantive review and to develop adequate standards of review which are compatible with the overall system of multilayered governance. In this context, there is significant controversy over the extent to which they should turn towards giving principles and rules of international economic law direct effect, beyond the doctrine of consistent interpretation.[25] WTO law does not oblige Members to impose direct effect in their domestic legal systems. In the United States, courts are barred by legislation from giving direct effect to WTO law. The European Court of Justice, essentially adopting a judicial policy of reciprocity, has ruled likewise; furthermore it excluded direct effect of adopted WTO decisions as a

[23] For Switzerland see e.g. Matthias Oesch, *Gewaltenteilung und Rechtsschutz im Schweizerischen Aussenwirtschaftsrecht*, in 105 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBl) 2004, 285-321.

[24] Thomas Cottier, *The Judge in International Economic Relations*, in Mario Monti *et al.* (eds.), *Economic Law and Justice in Times of Globalisation – Wirtschaftsrecht und Justiz in Zeiten der Globalisierung, Festschrift for Carl Baudenbacher* (Baden-Baden, Nomos, 2007) 99-122.

[25] Thomas Cottier, *A Theory of Direct Effect in Global Law*, in Armin von Bogdandy *et al.* (eds.), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (The Hague, Kluwer Law International, 2002) 99-123.

foundation for claims to compensation and state responsibility. The issue of direct effect is often dealt with as a technical issue of treaty interpretation. Traditional standards applied elsewhere, essentially rely upon an assessment as to whether the rule in question is sufficiently clear and precise. Research shows that the assessment should be based upon the concept of justiciability.[26] Courts should assess whether an issue is suitable to be decided by courts and judicial proceedings. Answers do not inherently depend upon the formulation of principles and rules. Rather, the question is whether the subject matter falls within the constitutional provinces of the court and whether courts are best suited to assess the matter. This implies an analysis in terms of separation of powers and checks and balances under a given constitutional system. It entails determination of judicial policies in terms of restraint and activism. It also entails issues of excluding direct effect on the basis of a political questions doctrine. Importantly, the approach allows more nuanced replies to be given than the current wholesale exclusion of direct effect which we find in US and EC law. While direct effect will be given in some constellations, it will be refused in others, leaving implementation to the legislator or the executive branch. Issues having major policy and financial implications in international economic law will be left to these bodies. Others, the implications of which are contained or related to procedural issues, may well fall within the province of the courts commensurate with their respective positions in a given constitutional system. A new generation of judges will have to leave past hands-off approaches behind them and find their proper and coherent role in multilayered governance.[27]

These repercussions indicate that international economic law has not remained without substantial impact on the structure of states, in particular the allocation of powers among the different branches of government. However, these shifts do not affect the strong position of states on the whole. It is often argued that globalization and the shift of law making to international bodies substantially reduces the scope and power of states. The evidence does not support this assertion. States remain in control of international law making; the WTO like the other international organizations outside the European Union lacks supranational powers. The process in these international organizations is still member-driven and decisions essentially depend upon consensus of powerful states. While the US and the EU were able to control the process up to the conclusion of the Uruguay Round in 1993, subsequent negotiations under the Doha Development Agenda have included emerging economies, in particular Brazil, India, and China as additional critical players. The world of international economic relations again is multipolar. Yet, the critical role is not limited to these leaders. The activities of all states have been growing; they are assuming more responsibilities, rather than fewer – despite the rhetoric of neo-liberalism. The process of liberalization calls for adequate and strong safety nets, protecting citizens during the processes of economic transformation and adjustment. Liberalization of markets has to go hand in hand with welfare policies. Where they fail or are nonexistent, liberalization and division of labour are bound to be rejected in the political process. Moreover, international economic law depends upon implementation and enforcement by states. Within a system of multilayered governance, the bulk of powers and work is bound to remain with democratically elected governments and thus

[26] Daniel Wüger, *Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht: Grundlagen, Methoden und Kriterien*, Diss. (Bern, Stämpfli Publishers, 2005); Thomas Cottier (ed.), *Der Staatsvertrag im schweizerischen Verfassungsrecht* (Bern, Stämpfli Publishers, 2001).

[27] Cottier (n. 24 above), 122.

the State. Other layers of governance, including the EU, continue to depend largely upon Member States for the purpose of implementation of law and realization of policies. International economic law, however, induces a review of the traditional patterns of allocation of powers. Much of this will be a matter of practical experience, of trial and error, rather than formal changes to the charters of national constitutions. Some procedural requirements may be induced by international economic law itself. We shall return to this below in the examination of the structural impact of international economic law on society.

E. The Impact on Society

Societies show widely diverging levels of economic and social development. Moreover, they have varying attitudes to law and to compliance with it. As for states, it is therefore impossible to assess the impact of international economic law except in very general terms, and from a structural perspective. WTO law is not an end in itself. It serves the purpose of enhancing human welfare and sustainable development and growth while preserving and protecting the environment and the exhaustible natural resources of the globe.[28] Within WTO law, these goals are pursued by means of progressive liberalization and regulation of international trade in goods and services and thus a philosophy of welfare-enhancing international division of labour. Ever since the GATT entered into force in 1947, tariffs on industrial goods have been reduced from an average of 40% to some 4% in eight trade rounds.[29] Non-tariff barriers have been addressed and reduced, contributing to ever increasing levels of world trade. The progressive creation of equal conditions of competition has greatly enhanced global welfare in industrialized and service-based economies.[30] International trade has made a critical contribution to the wealth of nations and people since World War II. Societies have prospered and changed to an unprecedented degree – at the price of hard work and enhanced competition. Pressures to specialize and to reallocate labour have increased. In addition, the success of an open trading and investment system in creating overall growth and welfare has gone hand in hand with enhanced exploitation and depletion of natural resources, culminating in climate change. Environmental protection emerged as an area of vital importance and will increasingly influence and shape trade policy instruments.

While benefits are taken for granted, the need to adjust and restructure vulnerable sectors of the economy and the environment has called for protection and often translates into opposition to freer trade and open markets. While societies prosper, they suffer at the same time from losses of political control and self-determination as a result of opening of markets and exposure to structural changes. This "sense of vulnerability", or economic insecurity, has increased as the growing integration of states all over the world

[28] Preamble of the Marrakesh Agreement Establishing the World Trade Organization, available at www.wto.org (last visited June 19, 2008).

[29] BBl 1994 IV 134, the chart is reprinted in Cottier/Oesch (n. 4 above), 74.

[30] World Trade Organization, *World Trade Report 2007: Six decades of multilateral trade cooperation: What have we learnt?*, available at http://www.wto.org (last visited June 19, 2008); World Bank, *World Development Indicators 2007*, available at http://web.worldbank.org (last visited June 19, 2008).

into the international economic system has intensified competitive pressures.[31] Most people worldwide are still uncertain about the impact of the international economic integration on their personal life. As surveys from 2002 until today show, citizens believe that globalization will worsen environmental problems and poverty in the world.[32] Furthermore a majority fears that economic globalization reduces the number of jobs in their own country[33] and they claim that international economic integration is happening too quickly. These feelings are easily exploited in a populist manner and turned into conservative and even nationalist political capital. Despite this sense of vulnerability, the same polls indicate that most people expect that more economic globalization will be positive for themselves and their families. One can assume that the incertitude of most people about the impact of international economic law on their personal life corresponds with the lack of transparency and the incomprehensibility of international economic relations. Even though the work of the WTO has become more transparent, more has to be done to assure sufficient information and education.

Another, progressive line of thought calls for enhanced protection of human rights and labour standards abroad in order to preserve fair conditions of competition.[34] Since the People's Republic of China entered the WTO in 2001, these anxieties have increased. They also extend to developing countries.[35] Ailing industries' call for enhanced protection, and outsourcing in what is an increasingly flat world is opposed in order to protect jobs at home. Particular challenges exist in relation to agriculture, the primary and most conservative sector which also enshrines traditional values in most societies. For decades, this sector in industrialized countries has remained highly protected and sheltered from competition and global markets – creating profound imbalances, largely to the detriment of developing countries dependent upon exports in the primary sector. Today, the sector faces painful adjustment, being forced to leave traditions held dear in societies behind. The transition adds to the tensions and anxieties caused by the globalization of economic law and may widen divisions in societal structures.

Similar anxieties and tensions exist in developing countries,[36] even though negative sentiments about "economic globalization" are more prevalent in the rich countries of the North.[37] For decades, until the conclusion of the Uruguay Round and the entry into force of the WTO in 1995, they essentially did not have to make strong commitments under GATT. They generally remained sceptical about trade liberalization, supporting import substitution and calling for extended special and differential treatment which reduces obligations under WTO law. Eventually, and successfully, they called for lib-

31 Jagdish Bhagwati, *In Defense of Globalization* (Oxford, Oxford University Press, 2004) 12.

32 The polls are carried out by the Canadian polling firm Globescan (until 2006: Environics International). The results of the surveys can be found at http://www.globescan.com/news_center.htm (last visited June 19, 2008).

33 Joseph Stiglitz, *Making Globalization Work* (London, Penguin Books, 2007) 67 et seq.

34 For more on this matter see the contributions in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds.), *Human Rights and International Trade* (Oxford, Oxford University Press, 2005).

35 Thomas L. Friedman, *The World is Flat* (London, Penguin Books, 2007).

36 The effects on developing countries are described in an impressive way in Friedman (n. 35 above), especially in chapter 10: The Virgin of Guadalupe.

37 This was a finding of an extensive poll on global public opinion on globalization in 2004. The press summary is available at http://www.globescan.com/news_archives/GlobeScan_pr_06-04-04.pdf (last visited June 19, 2008).

eralization of textiles and agriculture. They still are reluctant to liberalize services in return, fearing competition and loss of sovereign control over key sectors. Equally, and in their own way, they are confronted with painful adjustments. Current talks under the Doha Development agenda have faced obstacles to progress since 2001 due to conflicting interests in liberalizing agriculture in industrialized countries and services in developing countries.

In these processes, in industrialized and developing countries alike, international economic law not only faces the challenge of inducing growth and structural adjustment, but also the problem that it does not bring about *per se* fair distribution of income and wealth within countries.[38] Indeed, WTO law by and large treats Members as a black box. It does not ensure that benefits trickle down to all people alike. It is merely concerned with macro-economic growth of economies. It does not engage in domestic distributive operations. This task is left to domestic law and policy in industrialized and developing countries alike. While international economic law is a prerequisite for justice, fair distribution depends upon domestic constitutional structures of governance and values in society. Democracies tend to bring such distribution about; the wealthy are accepted as long as all strata of society gain from an open trading system. In many countries, however, income disparities have increased due to a lack of the middle classes and democratic governance. Increasing imbalances are politically attributed to international economic law and undermine its acceptance and legitimacy. The question thus arises of the extent to which international economic law should become more prescriptive and interventionist in domestic political processes. For example, it is striking to compare international levels of protection of intellectual property with the absence of international disciplines when it comes to real property.[39] International law is limited to investment protection and compensation in matters of expropriation and takings. It neither prescribes nor supports in law the creation of fair conditions in real property and land ownership. Many countries still do not have land registration in place, and property cannot be used as collateral for investment much needed in rural areas. International economic law could do more to support these foundations of prosperity and of fairness at home.[40]

In terms of impact on society, issues of legitimacy of WTO-rules therefore predominantly relate to the fate of populations in developing and least-developed countries. While welfare enhancing effects among industrialized countries are well established and widely recognized and negative effects can be absorbed by developed social policies,

38 See e.g. Darrel Moellendorf, *The World Trade Organization and Egalitarian Justice*, in 36 Metaphilosophy (2005), 145; Thomas Pogge, *World poverty and human rights: cosmopolitan responsibilities and reforms* (Cambridge: Polity Press, 2003); Peter Singer, *One World: The Ethics of Globalization* (New Haven, Yale University Press, 2002) chapter 3; Stiglitz (n. 33 above), 61-101.

39 Thomas Cottier, *Geistiges Eigentum, Handel und nachhaltige Entwicklung. Erfahrungen und Perspektiven im Nord-Süd Verhältnis*, in *Das internationale Recht im Nord-Süd-Verhältnis: Referate und Thesen von Werner Meng et al.*, Berichte der Deutschen Gesellschaft für Völkerrecht Vol. 41 (Heidelberg, C.F. Müller, 2005) 237-274.

40 One approach to counteract these imbalances is offered by the cosmopolitan theory; see e.g. Simon Caney, *Justice Beyond Borders. A Global Political Theory* (Oxford, Oxford University Press, 2005); Ernst-Ulrich Petersmann, *European and International Constitutional Law: Time for Promoting "Cosmopolitan Democracy" in the WTO*, in Gráinne De Búrca and Joanne Scott (eds.), *The EU and the WTO. Legal and Constitutional Issues* (Oxford/Portland, Hart Publishing, 2001) 81-110.

serious doubts still persist in relation to developing and least-developed countries and thus a large group of some 100 countries. However, developing countries and transitional economies do better than often thought. Recent trends and statistics show that growth in exports of merchandise from developing and least-developed countries has outperformed that of rich countries (EU and US). As a consequence, in 2006, the export share of developing countries exceeded one third of total world exports.[41] Importantly, least-developed countries have been growing rapidly, mainly due to high mineral and petrol prices, but they started from such low levels that their share is still minor. Exports from least-developed countries still represent less than 1% of world trade.

Overall, the true weaknesses of the world trading system therefore lie in an inability to substantially stimulate growth and trade for least-developed countries. Although the WTO tries to differentiate between developed and developing countries with "special and differential treatment" provisions,[42] the system only takes effect once countries reach a certain level of development. The fact, for example, that there was a poverty reduction by more than 260 million people over 1990-2004 is mainly based on massive poverty reduction in China.[43] In many countries, inequality has increased. Countries therefore have to take off on their own. They obtain little support for doing so from international economic law. International trade law, based upon equal conditions of competition, reflects a liberal approach and fails to deal appropriately with those left out in the first place. Current developments which focus on preferential trade agreements among industrialized and emerging economies further reinforce such tendencies. The long-term legitimacy of the system therefore will depend upon enhanced capacities to fight poverty and to bring about substantial and effective aid for trade.[44] An open trading system is beneficial to all, provided that it brings about flanking policies for supporting least-developed countries in the process of diversification, product development and building international marketing skills. It cannot afford to leave issues of distributive justice within societies unheeded in the coming years and decades.[45]

F. The Challenges Ahead

The main challenges lie within countries and members of the international trading system. Domestic reform, capacity building and education need to prepare them for globalization. Yet, we are faced with the challenge of how best international economic law may support these efforts – beyond classical forms of concessionary aid. To what extent are rules of international law able to support the process?

Firstly, international economic law needs to reflect widely diverging levels of social and economic development. The principles of progressive liberalization in goods and

41 World Trade Organization, *World Trade Report 2007: Six decades of multilateral trade cooperation: What have we learnt?*, available at http://www.wto.org; World Bank, *World Development Indicators 2007*, available at http://web.worldbank.org/(last visited June 19, 2008).

42 See e.g. http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited June 19, 2008).

43 World Bank, *World Development Indicators 2007*, 4 (n. 41 above).

44 See also Stiglitz (n. 33 above), 61-101.

45 Stiglitz (n. 33 above), 61-101.

services allow for individualization, but fail to apply in areas of standard setting and harmonization such as in the TRIPs agreement. Past and current philosophies of special and differential treatment for developing countries have largely failed,[46] with the exception of the unilateral concessions granted by industrialized countries under the Enabling Clause. These preferences are important, albeit they fail to cover all items of importance to developing countries. Although developing countries continue to seek enhancement and further exemptions, many of them (except emerging economies) have been left in a state of inferior and not fully integrated membership of the WTO, often in a less good position to combat domestic economic protectionism and rent-seeking due to the lack of international obligations in the field. The initiative of the EU to include everything but arms and the effort to multilateralize the approach are steps in the right direction.[47] Alternatives to special and differential treatment which reflect factual differences in the operation of the law much more effectively need to be found. International law has failed to establish operational and objective criteria to assess the status of countries under the doctrine of sovereign equality. The transitions between industrialized, emerging, transitional and developing countries are smooth and are not suitable to provide a foundation for making appropriate legal distinctions. Modalities of graduation should be found which allow taking economic factors and indicators into account in the process of applying and implementing rules of international economic law.[48] Wherever suitable, rules should be framed in a manner which allows such differences to be taken into account. Examples to this effect already exist in WTO law.[49] Future rules should build upon this model. A single set of rules, taking such factors into account, will allow automatic graduation to be brought about. In addition, recourse to scheduling and thus individualization may also offer alternative avenues in the field of non-tariff barriers. No longer will it be necessary to distinguish developed and developing countries, with the exception of least-developed countries which are legally defined by the United Nations. As Members develop, they should automatically graduate into fuller applications of WTO rules, securing fair competition on world markets. Prior to reaching the appropriate levels, they would be largely exempted from burdensome rules, such as advanced standards of intellectual property protection. They could focus on investment critical to sustainable development, such as education and nutrition.

Secondly, efforts need to be made to strengthen democratic rules, both on a national and international level, in order to bring about equitable distribution of growth and benefits. What would be the role for international economic law? Democracy begins at home. Members are bound to develop democratic structures, to adjust to globalizing economic structures in their own right and way.[50] International law is built upon the premises of national sovereignty and non-intervention. Yet, these concepts do not mean that states

46 T. N. Srinivasan, *Nondiscrimination in GATT/WTO: was there anything to begin with and is there anything left?*, in 4 World Trade Review (2005), 69-95; Stiglitz (n. 33 above), 61-101.

47 Council Regulation 416/2001, *Amending Regulation (EC) No 2820/98 Applying a Multiannual Scheme of Generalised Tariff Preferences for the Period 1 July 1999 to 31 December 2001 so as to Extend Duty-Free Access Without any Quantitative Restrictions to Products Originating in the Least Developed Countries*, 2001 O.J. (L 60).

48 Cottier (n. 12 above), 779-821.

49 See the examples in Cottier (n. 12 above), 797 et seq.

50 For the debate on a possible "right to democracy" see e.g. Thomas Franck, *The Emerging Right to Democratic Governance*, in 86 American Journal of International Law (1992), 46-91; Gregory

and societies need to be dealt with in terms of black boxes. The world has moved into a system of legal and *de facto* multilayered governance which entails shared and enhanced cosmopolitan responsibilities. International law has come a long way in the field of human rights. No longer, and rightly so, is this a purely domestic affair since human rights violations not only violate fundamental values of human dignity, they also destabilize international relations and peace in the long run. The process of constitutionalization of international law is conceptually most advanced in this field, albeit it falls short of making available efficient mechanisms of enforcement. International economic law still follows the traditions of diplomatic protection and is limited to defending interests of foreign exporters and investors. It does not entitle domestic producers and consumers in a purely domestic context. Rules of transparency and judicial protection are limited to the protection of foreigners, although they may have important spill-over effects to the benefit of domestic traders alike. We need to think how the path of supporting domestic producers and consumers may be expanded in international economic law. Efforts to support the democratic processes in the field of economic regulations should therefore be made.[51] WTO law should be supplemented in terms of transparency to secure and bring about deliberate modes of trade policy formulation in Member States. It should give a voice to all those affected and thus reduce anxieties and feelings of being left out. Minimal standards as to hearing interested groups, and the formation of trade associations and labour unions in civil society should be created. Monitoring of compliance should be introduced. Trade policy reviews should also focus on domestic processes. Rights to participation may eventually lead to a mechanism of enforcement under the dispute settlement system of the WTO. Within the WTO, the creation of a parliamentary assembly has been discussed by the Inter Parliamentary Union.[52] It was endorsed by the International Law Association. In the process of reforming the structures of the WTO, rendering them more suitable for enhanced regulation as opposed to progressive liberalization in a globalized economy, a parliamentary assembly will be able to create important networks and linkages to national parliaments. It will assist a process in all countries alike of enhancing the knowledge and skills of Members or parliament to engage in competent and meaningful dialogue and debate with the executive branch of government. In modest terms, international economic law, focusing on domestic and international procedures, could thereby assist in the process of democratization upon which the legitimacy of international economic law has to be built to the extent that it goes into standard setting harmonization and beyond the inherent principles of non-discrimination, transparency and progressive liberalization.

H. Fox, *The Right to Political Participation in International Law*, 17 Yale Journal of International Law (1992) 539-607; Petersmann (n. 40 above).

51 Petersmann (n. 40 above), 94 et seq.

52 http://www.ipu.org/splz-e/trade03.htm (last visited June 19, 2008); see also Erika Mann, *A Parliamentary Dimension to the WTO – More than just a Vision?*, in 7 Journal of International Economic Law (2004), 659-665.

G. Conclusions

The impact of international economic law on state and society is profound. There is hardly an area in the vast field of economic law dealing with production and trade in goods and services which remains untouched by corresponding disciplines of international law, both on the regional and global levels. Its principles are at the heart of an emerging system and doctrine of multilayered governance, seeking to see governance on different layers in an integrated and better coordinated manner. They exert important checks and balances. They restrain protectionism, unfair conditions of competition and thus state failures, often induced by statal structures and domestic processes of decision-making and politics. They exert considerable de facto influence on statal and constitutional structures. Often, they amount to constitutional guarantees, enforceable in international dispute settlement. These principles and rules are public goods of the greatest importance in a globalizing world. They have stood the test of time for more than fifty years. At the same time, they show weaknesses which need to be addressed. International standards increasingly develop and shape domestic legislation, undermining the role of traditional legislation by challenging traditional patterns of governance and national sovereignty, without offering, at this stage, appropriate answers as to how these challenges could best be met in structural and procedural terms. While the field has been growing and expanding in recent decades, constitutional structures continue to operate under premises shaped for essentially autonomous, domestic and coherent societies. The dynamics of international economic law, responding to the needs of an internationalized and global economy, leaves us with major structural challenges. Peoples feel a loss of control and self-determination. Domestically, power shifts to the executive branch and leave us with the challenge of developing compensatory mechanisms in support of democratic legitimacy. Courts face the challenge of finding appropriate standards of review, leaving traditions of restraint in foreign and economic affairs behind with a view to overcoming what currently amounts to a paradox of stricter review on the international than on the domestic level.

While suitable to bring about growth and prosperity in industrialized and emerging economies, international economic law fails to be sufficiently inclusive for least-developed countries. A purely liberal model of creating equal conditions of competition is no longer sustainable. Without an effort to offer better opportunities and support to least-developed countries, the system leaves them marginalized and will fail to stand the test of morality and long-term legitimacy. Different avenues should be contemplated. Effective graduation is one of them. A second trait – applicable to all Members alike – reinforces deliberate democracy at home, building upon the traditions of transparency. More emphasis should be put on minimal procedural rules of democracy to be applied at home, and subject to monitoring and possibly dispute settlement in the WTO. These rules will assist in bringing about fair distribution of welfare at home. Finally, in restructuring international organizations, parliamentary assemblies should serve to support domestic processes and thus enhance democratic accountability and legitimacy of international economic law in the age of globalization. International economic law is too important a public good to be complacent about. It calls for reform in order to preserve achievements and to address deficiencies.