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étude comparée des politiques commerciales américaine et européenne*

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What Role for Civil Society in Cross-Regional Mega-Deals? A Comparative Analysis of EU and US Trade Policies

Quel rôle pour la société civile dans les accords de libre-échange transrégionaux : étude comparée des politiques commerciales américaine et européenne

Jean-Baptiste Velut

- 1 The Transpacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) have been described as “next generation” agreements owing to their very broad geographic scope and the many policy spheres upon which they encroach. Indeed, not only do “behind-the-border issues” venture into new areas ranging from digital trade to supply chains and state-owned enterprises, but the economic weight and geographic scale of these potential free trade zones also mean that they are likely to create precedents for the global harmonization of trade rules. The fact that domestic laws concerning food safety or environmental standards – to name just two prominent examples – that were once the product of democratic processes are currently being renegotiated at the international level raises questions on the democratic governance of cross-regional free trade agreements. This is why many civil society groups (consumer associations, environmental organizations, labor unions etc.) have raised their voices to demand greater inclusiveness and transparency in trade negotiations, thereby echoing earlier debates surrounding previous forms of regionalism in Europe (e.g. the Maastricht Treaty) or North America (CUSFTA, NAFTA). In response to criticism and political mobilization, governments have attempted to develop a number of policy tools to open the trade policy process to civil society actors.¹ The impact of these measures on the ends and means of trade policy have, however, rarely come under academic scrutiny.
- 2 This article aims to assess governmental initiatives to include new trade policy stakeholders in “next-generation” FTA negotiations with the aim of developing a systematic approach to evaluate the inclusiveness and accountability of trade policy

making. To do so, it proceeds in three parts. The first part reviews the literature on free trade agreements to shed light on the paucity of studies concerned with the democratic governance of cross-regionalism. The second part attempts to remedy this problem through a theoretical discussion of civil society inclusion and participatory democracy in the trade policy sphere. The third part uses this methodological toolbox to analyze the respective experiences of the United States and the European Union within the context of TTIP and TPP. My ambition is less to provide an exhaustive analysis of these two complex sets of institutions and policies than to define a research agenda to assess the challenges and stakes of bringing new trade stakeholders in policymaking.

1. Cross-regional FTAs: new reality, old theory

- 3 From the transatlantic bridges of the Comprehensive Economic and Trade Agreement (CETA), the Transatlantic Trade and Investment Partnership (TTIP) or the Mexican-EU FTA, to competing free trade agreements in the Pacific like the Regional Comprehensive Economic Partnership (RCEP) and the TransPacific Partnership (TPP), the world economy has witnessed the proliferation of ambitious mega trade deals bringing several regional economies together. In one sense, these cross-regional alliances are only the latest phase of economic globalization, a logical step in the increasing interconnectedness of the global economy.
- 4 Yet, as we argue in a forthcoming book,² recent free trade agreements differ from earlier waves of regionalism in at least two important regards. First, the geographic scope and economic scale of so-called mega-deals – some of which aggregate 40% of world GDP – have the potential to create important precedents for the regulation or deregulation of markets worldwide. This is all the more notable since transcontinental trade negotiations can bring together economies with different regulatory models and cultural traditions. For instance, WTO disputes have revealed the tensions between Europe’s precautionary principle and America’s proclivity for scientific evidence. Asian regional integration tends to favor regulatory cooperation while the United States favors the enforcement of regulatory rights (Dent, cited in Deblock & Dagenais, 2015, p. 5).
- 5 These tensions and conflicts have renewed old debates on the essence of regionalism.³ Some continue to see cross-regional FTAs as the advent of a “gated globe” i.e. a reiteration of the famous “spaghetti bowl” argument whereby the global economy operates short of its full potential because of geo-economic rivalries and regulatory incoherence (Bhagwati, 2008; *The Economist*, 2013). According to this view, the new trade blocs may have contributed to derail multilateral trade negotiations under the Doha Round (Baldwin, 2006; Low & Baldwin, 2009).
- 6 Others see cross-regionalism as more flexible and, as a result, more scalable than narrower forms of regionalism. As Deblock and Dagenais (2015) suggest, cross-regional agreements are more concerned with “interconnection” than “integration.” In fact, under transcontinental trade deals, economic blocs have become so “fuzzy” (not as strictly delineated as before) and “leaky” (as they create canals between traditional regional blocs) that “spaghetti bowls” may become “building blocs on the path to global free trade” (Baldwin, 2006). This perspective is what makes the terms of cross-regional free trade agreements so important.

- 7 Second, the wide array of issue areas and “behind the border” provisions included in twenty-first century trade agreements means that the circle of policy stakeholders has dramatically expanded within the same country or set of countries.
- 8 Part of what makes so-called “free trade” agreements so controversial is the fact that they are neither truly “free” nor only about “trade”. On the one hand, they contain a number of provisions that either fail to level the playing field (e.g. agricultural subsidies) or may very well restrict trade and innovation (e.g. rules of origins, evergreening of patents under “TRIPS Plus” provisions).⁴ On the other, the regulatory scope of FTAs has ventured into policy spheres that go well beyond trade tariffs. In short, trade agreements have become international regulatory regimes in their own rights.
- 9 This was admittedly the case when GATT members began focusing on non-tariff barriers at the Tokyo Round. Another turning point in this institutionalizing process was the signature of NAFTA, whose provisions broke new ground in many issue areas, including investment protection, intellectual property rights, government procurement, and if less boldly, environmental protection and labor rights (Deblock, 2012; Velut, 2014).
- 10 Today’s next generation agreements like TPP or TTIP go even further, making new forays into the regulation of state-owned enterprises, public services, digital trade and data privacy, culture etc. Thus, the range of trade policy stakeholders has considerably expanded over the past two decades, which explains why a whole new set of actors – from human rights and environmental NGOs, consumer organizations and Internet advocacy groups – have felt the urge to express their grievances in a policy sphere long reserved to business trade associations. The recent controversies surrounding fast track authority and TPP in the United States and the transnational mobilization against TTIP (often renamed TAFTA) across Europe are only the most visible attempts of civil society organizations to influence trade policy debates.
- 11 Despite the rising prominence of civil society groups in trade debates, academic conceptualization of trade policy making has barely started to acknowledge the expanding circle of trade policy stakeholders.
- 12 Some strands of trade theory have never been equipped to capture this emerging phenomenon. System-level approaches focus on the distribution of economic power at the international level while state-level theories are generally more concerned with geo-economic rivalries, strategic trade and competitiveness policy.⁵ Both frameworks generally ignore or downplay the bottom-up political struggles underpinning trade policymaking.
- 13 More surprising is the insufficient attention that society-level or pluralist theories of trade policy have paid to the emergence of the new stakeholders of free trade agreements. Empirically, this neglect is partly due to the prevailing influence of business interests on trade policymaking. Theoretically, it stems from the persistence of old dichotomies that continue to structure both academic and political conceptualizing of international trade.
- 14 First, if recent free trade agreements are misconstrued regulatory regimes encroaching upon multiple policy spheres, trade policy outcomes cannot be confined to a Manichean view opposing free trade (good) to protectionism (bad). Yet, whether they focus on institutions of trade policy (Destler, 1986; Haggard, 1988; Goldstein, 1994; Dryden, 1995), interest group mobilization or voting determinants on trade laws (Baldwin & Magee, 2000; Karol, 2007), few analyses have questioned the relevance of this dichotomy. A good

example is regression analysis of factors influencing trade policy attitudes. On the one hand, trade scholars have developed complex models including a myriad independent variables to assess the impact of education, income levels, ideology, interest group mobilization, etc. on attitudes towards trade (in the public or decision-makers). On the other hand, dependent variables have often been reduced to binary representations of free trade and protectionism.

- 15 Additionally, increased capital mobility means that factor- or sector-specific trade theories are no longer as relevant as they were, when losers and winners of trade liberalization could be neatly divided between capital vs. labor (Stolper-Samuelson model) or import-competing vs. export-oriented groups (Ricardo-Viner)⁶. This means that there is a great need to understand the terms of trade agreements through a multi-stakeholder approach.
- 16 To be fair, not all studies of contemporary trade politics have ignored the participation and influence of civil society on decision-making. In the United States, these studies focused primarily on labor and environmental issues. Several studies examined the mobilization and achievements of labor unions (Shoch, 2001; Ross, 2000; French, 2002; Compa, 2001; Moody, 1997), the participation of environmental organizations (Esty, 1998; Audley, 1997; Vogel, 2000), while a few examined these stakes jointly (Destler & Balint, 1999; Dreiling, 2001). A few authors went beyond the scope of labor and environmental issues to analyze the linkage between trade and human rights (Aaronson & Zimmerman, 2008), consumer rights (MacDonald & Marshall, 2010; Hilton, 2009), while others looked at civil society at large (Aaronson, 2001; Brunelle, 2005; Brunelle et Dugas, 2009).
- 17 Likewise, studies of stakeholder processes in EU trade policymaking have been often concerned with the scope and enforcement of labor provisions in free trade agreements (Postnikov & Bastiaens, 2014; Oehri, 2014, Van den Putte, 2015) and more rarely, to civil society in general (Dür & De Bièvre, 2007).
- 18 This literature is a welcome departure from the free-trade-versus-protectionism prism that has confined the scope of trade theory. This article seeks to expand this emerging field in four respects: 1) by offering a methodological toolbox to gauge the level of participation of new stakeholders at various stages of the policy process; 2) by highlighting the specificities of cross-regional FTAs and their implications for civil society inclusion/exclusion; 3) by opening the discussion beyond labor and environmental issues; 4) by assessing the EU and US experiences from a comparative perspective in order to delineate shortcomings and best practices.

2. Participatory politics: Lessons from the bottom-up

- 19 Before exploring the ways in which one might assess the inclusion of civil society in trade policymaking, it is important to clarify the meaning of what is often an ill-defined concept.⁷ In this article, civil society is understood as the alternative voice to market and state actors. In the words of the World Bank, it refers to “non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil Society Organizations (CSOs) therefore refer to a wide array of organizations: community groups, non-governmental organizations (NGOs),

labor unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations” (World Bank, 2013).

- 20 If the notion of participatory democracy is rarely discussed within the trade policy sphere, the study of civil society inclusion in decision-making has a long academic tradition to which this article cannot do justice. My purpose is to draw insights from this rich literature to develop a theoretical framework that is congruent with the political economy of international trade. Indeed, one of the central arguments of this article is that despite the *international* or *supranational* essence of free trade agreements, there are many lessons that can be drawn from the theory and practice of participatory democracy at the *local* level.
- 21 As with local forms of public participation in urban governance, any assessment of the inclusion of civil society in trade policymaking requires asking three questions: 1) *Who* participates? 2) *How* do they participate? 3) *What impact* do they have on policymaking? Fung (2006)⁸ has operationalized these questions in three gradual dimensions designed to assess the ends and means of participatory mechanisms: 1) Participant or “stakeholder” selection;⁹ 2) Communication and decision; 3) Authority and power. Together, these qualitative variables serve as an insightful starting point to appraise the inclusiveness of public policy such as trade policymaking.

2.1 Stakeholder selection

- 22 Participant selection is a crucial concept for a subject as broad as civil society. Yet, advocates of civil society inclusion, in their enthusiasm for political openness often concentrate on how and to what effect policy stakeholders might participate rather than who might participate. This is particularly problematic since the pool of civil society participants may, from the start, illustrate power dynamics – through mechanisms of cooptation or exclusion – that are likely to have significant policy legacies. This means that there is a need to reflect on how to identify legitimate stakeholders before defining what role they might play in decision-making.
- 23 There are three common approaches to selecting policy stakeholders: 1) an actor-based approach defined by the economic or political status of participants (e.g. public vs. private actors, small vs. large companies, consumers vs. producers); 2) a sector-based approach that divides the economy between different markets; 3) a territorial approach that allocates representatives based on geographic criteria (Cabannes, 2015). These approaches are not mutually exclusive and are sometimes combined either deliberately – in order to favor political openness – or accidentally as a result of institutional layering. Relying principally on an actor-based model, Fung (2006) offers a spectrum that ranges from most inclusive process (involving e.g. the diffuse public sphere, self-selection or random selection of political participants) to most exclusive (from lay stakeholders, professional stakeholders, elected representatives to expert administrators).
- 24 This model of participatory democracy cannot be fully transplanted to trade policy making for two reasons. First, some provisions in trade laws (e.g. intellectual property rights, trade facilitation, etc.) have become so technical that they are not amenable to the random selection of participants. Second, the international level of decision-making provides fewer opportunities for participation than local participatory mechanisms, even if the power that can result from political access is obviously greater. Robert Dahl

describes this phenomenon as the “Chinese box” dilemma of participation and power in relation to the scale of government (Dahl, 1967, cited in Fainstein, 2010, p. 17).

- 25 Whether participatory mechanisms are actor-based or sector-based, issues of scale and territoriality and representativeness cannot be avoided. Do smaller civil society groups have access to the policy process? Whatever their negotiating mandates, do trade officials accurately represent the interests of all localities? As is often the case with business interests, aren't smaller civil society representatives more likely to be excluded from consultation and decision-making? This question is particularly apt when considering the “three-level game” of the European Union's trade policy making, where the positions defended by European trade negotiators at the international or cross-regional level (e.g. EU-Mexican negotiations) reflect a compromise negotiated first at the national level (within a European country) before being aggregated at the European level.¹⁰ Thus, the question of “who participates?” can have different answers whether one considers local groups, national organizations or transnational (European) associations.

2.2 Modes of participation

- 26 One important contribution of Fung's three-dimension model is to distinguish between the process of political participation and its outcomes. Admittedly, access to the policy process gives legitimacy to the cause of civil society groups and is therefore a first step on the path to state responsiveness (Burstein *et al.*, 1995). However, inclusion cannot be conflated with meaningful impact. Indeed, as Arnstein's (1969) seminal “ladder of participation” recognized, certain forms of participation are akin to tokenism. Thus, distinguishing processes from outcomes allows for a more in-depth inquiry into the multiple institutional configurations that civil society organizations might use to seek inclusion in policymaking, whether they have a real impact or not.¹¹
- 27 Conventional modes of participation range from public consultation to testimonies, negotiation and deliberation and technical expertise (Fung, 2006). To reflect a more comprehensive picture of the potentialities of political participation for the exercise of power, our understanding of the policy process must focus not only on what happens before and during trade negotiations, but also after agreements have been signed and ratified. In the trade policy sphere as in other issue areas, the involvement of civil society groups in enforcement and monitoring is crucial to hold political operatives accountable.
- 28 What must also be added to generic models of participatory democracy is acknowledgement that the cultural and institutional context may vary considerably from one case study to another. Indeed, while certain forms of participation may seem inherently more meaningful than others, studies in organizational theory and bureaucratic politics have long shown that each policy sphere has its own culture and logic. As a result, institutional arrangements that ensure influence in one realm may prove irrelevant in another.

2.3 Power and authority

- 29 The study of political power has been a central subject in political science and sociology, whether applied to state actors, interest groups or social movements. Here, power is understood in the classic Weberian sense, i.e. as “the probability that one actor within a

social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests” (Weber, 1978, cited in Piven).¹²

- 30 The forms of political participation discussed above – before, during and after trade negotiations – are often indicative of the nature of political influence. Assessing policy stakeholders’ influence requires a careful study of trade institutions and laws using process-tracing methods. This article is primarily concerned with measures of state responsiveness but does not exclude the idea that the power of civil society groups like environmentalists may also be conveyed outside government channels, i.e. through a change in business practices like new forms of corporate social responsibility.
- 31 My objective in the following sections is not only to analyze the processes and outcomes of civil society involvement in trade policymaking but also to identify institutional gaps where its presence is missing. As mentioned earlier, modes of communication are not sufficient to understand more elusive forms of political influence – which some scholars define as the “second face” of power. This implies greater focus on “non-decision making,” i.e. institutional rules, ideological representations that restrict what Schattschneider calls the “scope of conflict”, and as a result, the terms of political participation (Schattschneider, 1960, chapter 2; Bachrach & Baratz, 1962, p. 952).

3. Civil society participation in trade policymaking: A EU-US comparative analysis

- 32 As an avatar of new cross-regionalism, TTIP is an ideal case study for analyzing the inclusion of civil society groups in the trade policy process. Launched in 2013, international “trade” negotiations between the United States and the European Union are structured along three main axes. First, market access includes traditional trade issues like tariff barriers as well as issues with greater political implications like government procurement. Second, regulatory issues relate to non-tariff barriers which both trade partners intend to overcome through either mutual recognition or regulatory convergence. Finally, trade rules include a broad agenda ranging from the investment-dispute settlement system to geographic indications, environmental protection, labor rights etc. Given the broad scope of TTIP negotiations, many voices in Europe have called for greater inclusiveness, transparency and accountability in trade negotiations.
- 33 In the United States, consumer organizations, labor unions and environmentalists have raised similar criticism on the content of so-called “next generation” free trade agreements, but have done so primarily within the context of the TransPacific Partnership and the renewal of fast track authority in 2015. In many respects, the key features in TPP dovetail with TTIP’s blueprint and have been divided into five categories that illustrate its extensive scope: 1) ensuring comprehensive market access; 2) making TPP a fully regional agreement (e.g. with regard to supply chains); 3) solving cross-cutting trade issues (i.e. regulatory issues); 4) tackling new trade challenges (e.g. digital trade and green technologies); 5) creating a “living agreement” that can be updated as new issues arise (USTR, n.d.). Like TTIP, TPP’s reach “behind the borders” has raised concern from a variety of policy stakeholders. The next section analyzes how US and EU decision-makers have sought to incorporate these voices in trade policymaking.

3.1 Stakeholder selection in US and EU trade policymaking

3.1.3 US trade policymaking

- 34 The selection of civil society participants in American trade policy is the direct reflection of the byzantine nature of the decision-making process, which not only involves more than a dozen government departments and agencies, but is also a balancing act between the executive and legislative powers. As a result, stakeholder selection is a combination of different approaches.
- 35 Within the executive branch, the system of Trade Advisory Committees (TACs) provides information and advice to the President in three fields: 1) “the negotiating objectives before entering into a trade agreement”; 2) “the operation of trade agreements once entered into”; 3) “other matters arising in connection with the development, implementation, and administration of the trade policy” (Trade Act of 1974, subchapter I, part 3, §2155). TAC members have access to negotiating texts under strict confidentiality rules. The TAC pyramid is a three-tier system divided, mostly on a sectoral basis, among twenty-eight committees with a total membership that can include up to 700 advisors. The latter are appointed either by the President (for the top-tier Advisory Committee for Trade Policy and Negotiations (ACTPN)) or by Cabinet members.
- 36 Among all the seats (gathering up to 45 members) of ACTPN, the most influential committee, civil society has rarely held more than a handful of seats, generally reserved for labor unions. The current membership includes 22 delegates, only three of which are not from the private sector (two union representatives and one economist).¹³
- 37 Non-profit organizations have greater access to the second tier and are concentrated in two committees: the Labor Advisory Committee (LAC), where a vast majority of members are union representatives (currently twenty-five out of twenty-six), and the Trade and Environment Policy Advisory Committee (TEPAC), where environmentalists and consumer organizations can be well-represented: currently one consumer and eight environmental NGOs out of twenty-two members. For these two committees (especially LAC), the stakeholder selection process is primarily actor-based (as opposed to sector-based) to the extent that representatives are appointed as representatives of civil society, while other members are chosen for the sector in which they operate (e.g. solar sector for TEPAC).
- 38 Finally, the third tier of the TAC pyramid is made up of Industry Trade Advisory Committees (ITACs), which provide few opportunities for civil society inclusion. Even in sensitive sectors directly affected by offshoring like the auto or the textile sectors, workers are hardly ever represented. Likewise, environmental, consumer and digital rights advocates have traditionally had little voice in ITACs despite the implications that free trade agreements can have on environmental standards, consumer protection or Internet governance. For instance, it was only after undertaking legal action against the executive, that NGOs managed to obtain a few seats in sectors where environmental and health concerns are prominent (chemical industry, paper industry, lumber and wood industry) (Velut, 2009).
- 39 Despite the expanding regulatory scope of “next generation” FTAs, debates on civil society inclusion in US trade policymaking have often been geared towards labor and environmental issues as a legacy of the NAFTA debates. This has left few opportunities for

nonprofit organizations like human rights NGOs, public health advocates or digital rights advocacy groups, even though they have become increasingly vocal in trade debates given the expanding scope of free trade agreements. Thus, while TPP and TTIP negotiations have made new forays in digital trade – with potential impact on user privacy, net neutrality and encryption standards – the Industry Trade Advisory Committee on Information and Communications Technologies, Services, and Electronic Commerce (ITAC8) has only one representative from a nonprofit organization out of 16 members.

- 40 The Obama administration has long vowed to open up the policy process to new stakeholders and to increase the number of participants from the non-profit sphere in trade advisory committees (USTR, n.d.). To address concerns about the secrecy of TPP negotiations, in 2014, the US government announced the creation of a new Public Interest Trade Advisory Committee (PITAC) that would regroup “experts on issues such as public health, development, and consumer safety” (USTR, 2014). Yet, almost two years after the deadline for comments and initial nominations, PITAC has not been established, leaving the administration’s promise unfulfilled throughout the entire duration of TPP negotiations. As with TEPAC and LAC, the logic of stakeholder selection under PITAC would be actor-based and result in another form of seclusion of civil society organizations from the sector-based selection that characterizes other TACs.¹⁴
- 41 Beyond the TAC system, the Obama administration has undertaken a range of new stakeholder consultation initiatives within the context of TTIP. These measures include: an online public consultation on US negotiating objectives that received more than 300 submissions; another online public consultation session conducted by the U.S.-EU High Level Working Group on Jobs and Growth (HLWG) that received “dozens of submissions”; and a two-day hearing gathering 60 organizations, more than a third of which were nonprofit organizations (USTR, 2014). At first sight, these initiatives broadened the scope of participants that was traditionally confined by the restrictive nature of trade advisory committees – even though the connections of these initiatives with actual trade policymaking remained unclear.
- 42 If Congress is by definition more predisposed to territorial representation, stakeholder selection in congressional hearings is mostly sector-based, yet remains opened to nonprofit organizations that can file requests for testimonies. Most groups are national organizations, rather than local groups. No systematic study exists of the membership of trade-related congressional hearings over time, but unions are a regular participant, while environmentalists, consumer and public health advocates as well as human rights NGOs have also regularly participated in congressional hearings, depending on the specificities of trade law and/or the trade partner under consideration.

3.1.2 EU trade policymaking

- 43 While the US path to trade policy is sinuous, the European Union’s decision-making process is complicated by its supranational dimension. Although foreign policy remains a divisive issue among EU partners, the conduct of EU trade policy is generally associated with continuity and compromise. The EU Commission proposes a negotiating mandate to the EU’s Council of Ministers, which approves it by a qualified majority vote if necessary – although consensus is usually the norm (Baldwin *et al.* 2003, 29, 36). Admittedly, the layered institutional apparatus of the European Union is not immune to political

thrombosis, nor is trade politics free of tensions between EU members – agricultural subsidies being a traditional bone of contention. Yet, when compared to the fragmented and complex decision-making process of American trade policy – and more specifically its separation of powers – the EU’s negotiating mandate in the trade sphere seems on firmer grounds than one might expect.

- 44 The debate on civil society inclusion in EU policymaking has a long history, whose stakes are defined in the 2001 White Paper on Governance, as well as the Lisbon Treaty (2007). Surprisingly, the EU’s definition of civil society can be ambiguous to the extent that it generally, but not systematically includes representatives of the private sector (Peels, 2012).
- 45 Stakeholder selection occurs primarily at the initial consultation phase. The Directorate-General for Trade (DG Trade) explicitly says that it “want[s] to hear civil society’s views [and concerns] on trade issues” and has created a Civil Society Dialogue that holds regular thematic meetings open to civil society organizations upon registration (DG Trade, 2014; see also EU Commission, 2015). At the consultation phase, stakeholder selection is generally an open process that is both actor- and sector-based.
- 46 DG Trade understands “civil society” in a broad sense, which includes market actors like business and professional associations. Thus, the Civil Society Dialogue includes a majority of representatives from the business sector, either from European companies or professional associations. Nonprofit organizations are albeit well represented. A recent, well-attended meeting providing an update on TTIP negotiations included 135 participants, twenty of which came from a diverse pool of socially and environmentally oriented NGOs (development, public health, environmental protection, digital rights etc.).¹⁵ While several organizations were international federations, many were also national delegations sent to Brussels. This tends to show that stakeholder selection in the EU is not confined to the international level, even though smaller regional or local associations were not represented.¹⁶ At first sight, the EU’s regular consultation of civil society organizations in open fora seems more inclusive than the US TAC system (Aissi & Peels, forthcoming). On the other hand, stakeholder selection cannot be separated from the modalities of participation and their potential effects, to which the next section turns.

3.2 Modes of participation, power and authority

3.2.1 US trade policy

- 47 The above discussion on stakeholder consultation has outlined the ways in which civil society actors are selected to participate in the policy process. This section takes a closer look at the processes and outcomes of these participatory mechanisms in the United States and the European Union.
- 48 On the US side, civil society participation occurs primarily before and during trade negotiations through TACs, while congressional hearings provide opportunities of communication at various stages of the policy process depending on their objectives: before the conclusion of negotiations (if they aim to discuss the stakes of the agreement), after a trade agreement has been reached (before ratification in Congress) or, more rarely, when Congress deems it necessary to assess the impact of an agreement like NAFTA. In both cases, participation is reduced to expressing preferences, i.e. one of the least intense degrees of communication and decision (Fung, 2006; Arstein, 1969).

Aggregation and bargaining may take place in TACs like TEPAC, when members are fundamentally at odds with one another.¹⁷ However, as the previous section has shown, the structure of the TAC pyramid is designed to regroup civil society organizations in two committees (LAC and TEPAC). As a result, TACs are generally homogenous enough so that conflicts are neutralized.

- 49 Despite the regulatory stakes of both TPP and TTIP and the commitment of the Obama administration to open up the trade policy process (USTR, 2015), the channels of participation within the TAC framework has not undergone any dramatic transformation and has therefore only began to adapt to the ever-expanding trade agenda and the commensurate pool of stakeholders concerned by new cross-regionalism.
- 50 As a result, the input of civil society organizations in TPP negotiations was relatively circumscribed. This was perhaps less true in the environmental sphere than in others. TEPAC's TPP report begins by praising the diversity of opinions expressed within its committee and called the USTR to include civil society groups in other TACs (TEPAC, 2015, p. 4). Out of TEPAC's twenty members involved in the drafting of the TPP report, eight represented nonprofit organizations,¹⁸ nine were industry representatives or business advocacy groups, two were academic scholars and one was unaffiliated. As far as the content of TPP is concerned, the report states that "the TPP substantially achieves Congress's specific environmental negotiating objectives", noting that "a majority of TEPAC recognizes that the agreement makes great strides toward a number of critical environmental protections for the TPP region" (ibid). However, in both the report itself and its attachments, TEPAC members express concern over a number of shortcomings or uncertainties, and more specifically on the resources available for the enforcement of TPP's environmental provisions and the scope of the Investor-State-Dispute-Settlement (ISDS).¹⁹
- 51 The LAC Report on TPP is less equivocal and argues in its opening statement that the agreement fails to meet US negotiating objectives and as a result, "should not be submitted to Congress or, if it is, it should be quickly rejected" (LAC, 2015, p. 1). The report goes on to demonstrate how TPP falls short of a long list of LAC's objectives (from provisions on currency manipulation to rules of origins, labor standards etc.). Although the LAC's dissenting views have been a common feature of FTA negotiations since NAFTA, how to explain that a President who promised to give more voice to civil society organizations in trade policy received such a unanimous rejection of TPP? This example shows the complexity and challenges of civil society inclusion in policymaking. At first sight, the LAC is entirely composed of union representatives and members of professional associations (for a total of 19 members). Yet, unlike TEPAC's positive perspective on civil society inclusion, the LAC report denounces the limitations of the LAC process, and most notably its frustration with restrictions on information (e.g. bracketed text or tabled positions) as well as the USTR's failure to consult the LAC regarding the side labor agreements negotiated with Vietnam, Malaysia and Brunei.
- 52 A second form of civil society participation is one that takes place after trade agreements have been implemented, i.e. through monitoring and enforcement. One example was the participation of labor unions and environmentalists under NAFTA's North American Agreement on Environmental Cooperation (NAAEC) and North American Agreement on Labor Cooperation (NAALC). As many studies have revealed, this attempt to include civil society in the implementation phase of the trade policy process came short of meaningful impact owing to institutional weaknesses and budgetary constraints.²⁰ While TPP breaks

new ground in the environmental and labor spheres and creates opportunities for civil society inclusion *ex-post*, its labor and environmental chapters hardly give nonprofit actors a strong role in enforcement.

- 53 TPP's labor chapter creates mechanisms for public submission but establishes no formal institution for monitoring and enforcement except for the intergovernmental Labor Council, which is reserved for senior governmental officials. TPP consultation on labor issues is also confined to governmental channel.²¹ Similarly, TPP's environmental chapter encourages its trade partners to use consultative mechanisms such as domestic advisory groups to assist in the implementation of its environmental provisions.²² Yet, its Citizen Submission Process makes it difficult to challenge the non-enforcement of environmental standards, first by putting the burden on plaintiffs to demonstrate negative trade effects of such violation, and second, by directing submissions toward governments and not to an independent panel as is the case for the Investor-State Dispute System. Finally, as during the negotiating phase, civil society input in the implementation phase remains confined to the environmental and labor chapters, giving little scope to the participation of other stakeholders in enforcement.

3.2.2 EU trade policy

- 54 As mentioned earlier, the European Union has also encouraged civil society inclusion in trade policy debates through consultation. The Civil Society Dialogue (CSD) remains the central participatory mechanism used by the Commission. In fifteen years, DG Trade has organized a total of 165 meetings, with an average of 26 meetings per year since 2008. The wealth of information provided in the CSD are congruent with the EU's transparency objectives and have contributed to improve public access to information on EU trade policy.

- 55 Yet, in effect, DG Trade's stakeholder consultation efforts have had little impact on the trade policy process. This comes primarily from the disconnect between the EU's stakeholder consultation mechanism and the actual conduct of EU trade negotiations. In fact, the European Union's own assessment of the CSD emphasized the gap between process and outcomes inherent to EU trade policymaking (European Commission, 2014). The study stressed that "the CSD does not currently generate clear outputs to inform policy" and recorded significant levels of dissatisfaction among civil society participants (p. 8, 14). Perhaps even more indicting was the premise that the CSD did not have clearly established objectives beyond the goals of relaying information. This straight conclusion from an impact-assessment without any particular ideological proclivity for civil society inclusion in trade policymaking goes a long way in answering the question of potential power and authority of policy stakeholders through the CSD.

- 56 Other channels of direct participation have also been constrained. Thus, the European Council's Trade Policy Committee advising and assisting DG Trade in policymaking is reserved to Cabinet-level members of all EU member countries. This does not mean that civil society's voice is never conveyed by national trade officials. Yet, paradoxically, as one French Foreign Ministry official confessed in an interview with the author, the fact that trade policy has been delegated to the EU Commission means that the French government does not feel mandated to coordinate civil society outreach efforts on a national level. Thus, the three-level game of EU trade policymaking constrains civil

society input to well-organized groups that have enough information and material resources to act (whether on a temporary or permanent basis) in Brussels.

- 57 While civil society inclusion in EU trade policymaking does not extend to what Fung (2006) calls “aggregation and bargaining”, DG Trade has been developing initiatives to improve input from non-state actors in the implementation phase. The sustainable development chapter (13) of the EU-Korea agreement development included new measures for stakeholder participation at the implementation phase. Each party established a Domestic Advisory Group (DAG) on sustainable development composed of civil society organizations (including business interests) to advise government on the implementation of chapter 13. DAGs appoint representatives that take part in the annual meetings of the Civil Society Forum, which also plays an advisory role in the implementation of the EU-Korea FTA.²³ Not unlike the TPP labor and environmental provisions, evidence is scarce that these measures have had a tangible impact on the enforcement of the sustainable development chapter.²⁴
- 58 As of this writing it is too early to know whether these mechanisms will be incorporated in TTIP but given the stormy controversies surrounding the negotiations, it is hard to envision why TTIP would not build upon the EU’s new framework for civil society inclusion at both consultation and implementation phases.

4. Conclusion

- 59 This article has offered a framework to analyze the modalities and outcomes of civil society participation in trade policy throughout the decision-making process. It has shown that despite growing awareness on the broader implications of free trade agreements and new measures to open the trade policy process, the overall record of civil society inclusion has been mixed in both the US and the European Union. This stems from a number of institutional and political factors. First, both the US and EU have concentrated their efforts to include civil society organizations *before* trade negotiations as opposed to *during* or *after*. Indeed, evidence shows that stakeholder consultation processes have become more and more common in both TPP and TTIP negotiations. Yet, in America as in Europe, there is still little evidence that these processes have had a direct impact on the design of FTAs: the LAC’s rejection of TPP in the US and the dissatisfaction of European participants in stakeholder consultation are two examples of the shortcomings of current consultation processes.
- 60 Second, the impact of civil society organizations on the enforcement of FTA provisions has been hampered by the very design of monitoring institutions, and more specifically the advisory functions of civil society groups that has left government officials free from ignoring certain recommendations.
- 61 Third, discussions on civil society participation on both sides of the Atlantic have been primarily focused on environmental and labor issues, giving in effect much less space to other issue areas in which civil society organizations can play a key role such as public health or digital rights. In other words, when it comes to democratic governance, participatory mechanisms in so-called “next generation” agreements have remained stuck to the “previous generation” of FTAs in both the United States and the European Union.

- 62 In short, whether in Washington or Brussels, progress has not been commensurate with the political efforts undertaken to improve stakeholder participation initiatives. Thus, the democratization of trade policymaking continues to raise questions in the context of TPP and TTIP given the far-reaching scope of the negotiations in the context of new cross-regionalism.
- 63 Admittedly, the questions and claims raised in this short essay would require more systematic analysis of both the US and EU trade policy processes. Examples of issues that would require more attention are the evolution of the membership of stakeholder meetings over time, the resonance of political grievances or frames articulated by civil society groups, non-decision-making processes in both Washington and Brussels etc. In this sense, this paper is only a call for greater consideration of the democratic governance of EU and US trade policymaking, an urgent topic given the fast development of ambitious FTAs across the world.

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NOTES

1. The notion of civil society is defined in section 2.
2. Velut *et al.* (2016).
3. For a review of the debate, see Winters (1996), Panagyria (1999) and Baldwin & Seghezza (2010).
4. See Stiglitz (2004) and (2013).
5. For an overview, see Ikenberry *et al.* (1988), Odell (1994), Milner (1999), Deblock (2010) or Velut (2015).
6. For an attempt to bridge this divide, see Milner & Yoffie (1989) and Hiscox (2001).
7. For an extensive and insightful discussion of the notion of civil society, see Peels (2012, p. 9-11).
8. See also Aoki (2015).
9. The term of policy "stakeholder" is more common in the trade sphere and will therefore be preferred to Fung's "participant" for the rest of the article. Although it is often used to include market actors, its meaning in the present article will be restricted to civil society organizations.
10. The idea of "three-level game" (Patterson, 1997) builds upon Putnam's seminal conceptualization of international trade negotiations. For Putnam, international politics can be conceived as a two-level game: at the national level (Level II), domestic actors pursue their interests by pressuring the government while politicians seek political support by building

coalitions; at the international level (Level I), national governments strive to satisfy their domestic constituencies, while minimizing the adverse effects of foreign developments.

11. This does not mean that the two dimensions need to be discussed separately, as processes and outcomes are irretrievably interconnected. The next section will examine them jointly.

12. For a critical analysis of the concept of power, read Piven & Cloward (2005).

13. The current membership of major TACs is available at <https://ustr.gov/about-us/advisory-committees>

14. According to the Huffington Post, the idea of a dedicated non-profit TAC emanated from corporate interests that saw this institutional reform as a way to preserve TACs from criticism emanating from civil society organizations (Grim & Carter, 2014). For more information on the impact of the TAC system on policymaking, see Darves & Dreiling (2002); Stokes & Choate (2001) and Velut (2009).

15. The full list of participants is available at: <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11443#parts>

16. One should, however, bear in mind that given the different sizes of European countries, a national association coming from Denmark may be equivalent to what a regional association might look like in a larger European country like Germany.

17. This was the case for TEPAC's report on DR-CAFTA under the Bush administration (Velut, 2009).

18. Environmental NGOs included two organizations that had endorsed trade deals in the past: the World Wildlife Fund broke ranks with other environmental groups to support NAFTA in the early 1990s, while the Humane Society was an isolated supporter of DR-CAFTA in 2003-2004 (Velut, 2009). Despite its nonprofit status, the Competitive Enterprise Institute is here considered as a business advocacy group for its aversion to environmental regulation and its proclivity for market solutions.

19. For a critical analysis of TPP's environmental chapter, see Wold (2016).

20. For a review of NAFTA's labor agreement, see e.g. Compa (2001b) and Delp *et al.* (2004).

For a review of the literature on the NAAEC, see Allen (2012, p. 131-137).

21. See TPP's chapter 19 on labor: <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour.pdf>

Additionally, the Department of Labor (DOL)'s Bureau of International Labor Affairs also provides advice on how to implement the labor provisions of all FTAs yet has no enforcement power. For a discussion, see Van den Putte (2015).

22. See TPP's chapter 20 on the environment: <https://medium.com/the-trans-pacific-partnership/environment-a7f25cd180cb#.dtkd80cff>

23. The text of the EU-Korea FTA is available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ%3AL%3A2011%3A127%3ATOC>

24. For a discussion of civil society participation in the EU-Korea and KORUS FTAs, see Van den Putte (2015).

ABSTRACTS

The Transpacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) have been described as “next generation” agreements owing to their broad geographic

scope and the many regulatory spheres upon which they encroach. This article assesses governmental initiatives to include new trade policy stakeholders in the design of new cross-regional free trade agreements. The objective is to develop an analytical framework to evaluate the inclusiveness and accountability of trade policymaking. To do so, the paper proceeds in three parts. The first part reviews the literature on free trade agreements to shed light on the relative “paucity of studies concerned with the democratic governance of “new cross-regionalism.” The second part attempts to remedy this problem through a theoretical discussion of civil society inclusion and participatory democracy in the trade policy sphere. The third part uses this methodological toolbox to analyze the respective experiences of the United States and the European Union within the context of TTIP and TPP. My ambition is less to provide an exhaustive analysis of these two complex sets of institutions and policies than to define a research agenda to assess the challenges and stakes of bringing new trade stakeholders in trade policymaking.

Le Partenariat Trans-Pacifique (PTP) et le Partenariat Transatlantique de Commerce et d'Investissement (PTCI) ont été décrits comme des accords de « nouvelle génération » en vertu de leur portée géographique très vaste et des multiples sphères réglementaires concernées par les négociations. Le présent article évalue les initiatives gouvernementales visant à inclure de nouvelles parties prenantes de la politique commerciale dans la conception des nouveaux accords de libre-échange transrégionaux. L'objectif est de développer une grille d'analyse pour évaluer l'inclusivité et la comptabilité du processus décisionnel de la politique commerciale. L'article est divisé en trois parties. La première dresse un état de la littérature sur les accords de libre-échange en soulignant l'absence relative d'études portant sur la gouvernance démocratique du « nouveau transrégionalisme ». La deuxième partie tente de remédier à ce problème à travers une discussion théorique de l'inclusion de la société civile et de la démocratie participative dans la sphère commerciale. La troisième s'appuie sur ce cadre méthodologique pour analyser les expériences respectives des Etats-Unis et de l'Union Européenne dans le contexte du TPP et du PTCI. Mon ambition est moins de fournir une analyse exhaustive de ces deux ensembles d'institutions et de politiques que de définir un nouveau programme de recherche pour évaluer les défis et les enjeux de l'inclusion de nouvelles parties prenantes dans le processus décisionnel de la politique commerciale.

INDEX

Mots-clés: politique commerciale, société civile, nouveau transrégionalisme, Partenariat Trans-Pacifique, Partenariat Transatlantique de Commerce et d'Investissement

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