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Transatlantic Market Integration, Business and Regulation: Building on the WTO[1]

Abstract

Recent trade agreements such as the Comprehensive Economic and Trade Agreement between Canada and the EU and the ongoing negotiations on a Transatlantic Trade and Investment Partnership, TTIP, have the potential to significantly affect the world trading system. An important question is what in practice these agreements will be able to do to generate gains from trade and reduce transatlantic trade costs, and what they will mean for third parties. This policy brief reviews some of the recent analyses of the potential impacts of the TTIP, reflects on what has been/might be done as regards regulatory cooperation and discusses how TTIP could usefully draw on the experience in the World Trade Organization, WTO, to enhance transparency, and the scope for third parties to raise issues related to regulatory barriers to trade.

1 Introduction

Differences in regulatory requirements raise the costs of international trade and have become of increasing concern to businesses. Governments are responding by pursuing a variety of cooperative regulatory efforts. The ongoing negotiations on a Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US and the recently concluded Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU are important examples of such efforts. The goals of these initiatives are both straightforward and ambitious – to further integrate the transatlantic marketplace. One dimension of achieving this objective is to remove remaining tariffs on transatlantic trade and similar policy measures that discriminate in favour of domestic providers of goods and services. Another dimension, one that is much more central and is of greater interest to a large number of businesses on both sides of the Atlantic, is to reduce the market-segmenting (cost-raising) effects of differences in regulatory regimes and standards that apply to products and producers on different sides of the Atlantic.

This policy brief discusses the challenges that confront policymakers in seeking to achieve a reduction in regulatory differences across the Atlantic, new approaches that may be embedded into the new vintage trade agreements that are being pursued, what this might imply for countries that are not part of the discussions and what can be learned from the experience to date in the WTO regarding approaches and mechanisms that can be used to increase the transparency and effectiveness of efforts to cooperate on regulatory policies.

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1 This policy brief draws in part on previous work by the authors, including Francois, Hoekman and Nelson (2015) and Hoekman (2015).

2 The rise of regulation as a trade and investment concern

Since the 1960s there has been a steady process of reducing average import tariffs and removing quantitative restrictions and capital controls. The average level of tariffs, especially in the EU and the US, has fallen to the 3–4 per cent range; the corresponding number for major emerging economies like China and India is less than 10 per cent.[2] For high-income countries tariffs are often more of a 'nuisance' than a significant policy instrument – the costs associated with collecting the duties may not justify the revenue that is generated. Other forms of direct and indirect taxation today generate by far the greatest share of government income. In some sectors, however, tariffs continue to be significant. An implication is that if these tariffs are abolished for transatlantic trade, companies located in jurisdictions that do not have free-trade agreements or preferential access to the EU and US markets will confront more competition from EU (US) firms in the US (EU) markets and there will be trade diversion. Companies that already have duty-free, quota-free access to the EU or US markets will suffer preference erosion. Estimates of the magnitude of such effects suggest that these will not be large in aggregate – because average tariffs are low and many rest-of-the-world suppliers already have duty-free access to the EU and/or US markets.[3] While preferred suppliers will experience some preference erosion, and suppliers who confront most-favoured-nation (MFN) tariffs in the EU and US (that is, don't benefit from preferential access) will incur standard trade diversion losses, such effects will be concentrated in areas where tariffs in the EU and/or the US are currently relatively high. The main sectors where this is the case are clothing in the US and motor vehicles in the EU. Even then, estimates suggest that the effects on most low-income developing countries will be small because EU and US producers have specialized in the higher value end of the spectrum and moved production of lower quality, more unskilled labour-intensive categories offshore.[4]

It is relatively straightforward to assess the impacts of preferential tariff removal. The main source of uncertainty as to the possible impact of both the CETA and TTIP initiatives concerns what will be done to reduce the trade-impeding effects of *non*-tariff barriers (NTBs), and more generally, non-tariff measures (NTMs). Non-tariff barriers are policies that involve explicit discrimination against foreign products/producers; NTMs span both discriminatory NTBs and non-discriminatory domestic regulation that gives rise to additional costs for companies engaging in transatlantic trade. The policies that today restrict the flow of goods, services, knowledge and professionals across the Atlantic are mostly NTMs. Examples are product regulation (to achieve health, safety or security objectives), licensing requirements for providers of services, and certification and conformity assessment procedures for goods, services and production processes. Differences in standards and testing procedures imply that traded components as well as final products are subject to at least two regulatory regimes. Thus, a catalytic converter that complies with EU norms might not be accepted in Canada and vice versa. Such differences in regulatory regimes increase costs. For example, a US light-truck manufacturer that sought to sell a model in Europe was required to develop 100 new parts, spend an additional $42 million in design and development costs, and undertake incremental testing of 33 vehicle systems '…all without any performance differences in terms of safety or emissions'.[5] There are many such examples in the trade press and industry literature.[6]

3 Estimates of potential cost reductions

A multiplicity of regulatory policies across countries means that international trade costs are often much higher than domestic transaction costs. The potential welfare gains from reducing such costs are substantial. Research by the Oganisation for Economic Coperation and Development (OECD) concludes that regulatory convergence in the services sector could raise per capita GDP by 3 per cent in both the EU and the US, while the World Economic Forum estimates that the convergence of the world's trade-related NTMs with those of the most efficient countries would increase real global income by 5 per cent.[7] In contrast, estimates of the impact of the CETA suggest this may only increase the EU's real GDP by less than 0.1 per cent and Canada's by 0.2 to 0.4 per cent; similarly, the TTIP between the EU and the US has been projected to increase real aggregate income in the two partners by, at best, 0.5 per cent.[8]

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2 Hoekman (2015).
3 Francois et al. (2013).
4 CARIS (2013).
5 Akhtar and Jones (2013, p. 8).
6 See for example Kommerskollegium (2014).
7 OECD (2005) and WEF (2013).
8 European Commission and Government of Canada (2008) and Francois et al. (2013).

Research has been undertaken analyzing the potential scope for trade cost reductions under a TTIP that builds in part on empirical assessments of existing trade agreements involving the EU and US that address NTMs.[9] Table 1 reports estimates of *ad valorem* equivalents (AVEs) for trade cost savings obtained in other agreements involving the US and EU.[10] On average, trade cost reductions are around 6.2 per cent, or two to three times the level of prevailing transatlantic average tariffs. Agriculture, chemicals and pharmaceuticals, and motor vehicles are the sectors where NTM trade cost reductions, based on past agreements, are likely to be the largest.[11] Tariff reductions are important as well for some sectors – e.g. processed foods and motor vehicles in the EU.

Matters are much more uncertain when it comes to services. The second part of Table 1 provides summary information for services for the EU and the US. The first two columns provide estimated AVEs of market access restrictions in services on the basis of the World Bank services trade restrictiveness (STRI) database. These are NTBs, not NTMs: they capture only discriminatory market access restrictions. The second two columns provide information on the coverage of services market access commitments in

TABLE 1 POSSIBLE TRADE COST REDUCTIONS AS A RESULT OF TTIP

	NTM AVE % cost reductions		Elimination of tariffs	
	EU NTMs	**US NTMs**	**EU tariffs**	**US tariffs**
GOODS	6.2	6.2	2.1	1.3
Primary agriculture	23.2	23.2	3.3	2.2
Primary energy	0.0	0.0	0.0	0.1
Processed foods	6.4	6.4	15.8	5.0
Beverages and tobacco	22.6	22.6	5.9	0.8
Petrochemicals	0.0	0.0	1.8	1.6
Chemicals, pharmaceuticals	11.3	11.3	2.1	1.3
Metals, fabricated metals	0.0	0.0	1.8	1.2
Motor vehicles	19.7	19.7	7.9	1.1
Electrical machinery	0.0	0.0	0.6	0.3
Other machinery	7.8	7.8	1.2	0.7
Other manufactures	0.0	0.0	1.7	2.9
	AVE % cost reductions		**GATS, and best PTA**	
	EU NTBs	**US NTBs**	**EU**	**US**
SERVICES	9.9	6.7	55.3, 64.4	55.4, 55.4
Construction	4.6	2.5	70.8, 83.3	83.3, 83.3
Air transport	12.5	5.5	66.3, 72.5	5.0, 28.8
Maritime transport	0.9	6.5	47.6, 63.1	0.0, 44
Other transport	14.9	0.0	57.1, 71.4	42.9, 64.3
Distribution	0.7	0.0	71.9, 87.5	100, 100
Communications	0.6	1.8	75.0, 78.1	78.3, 78.3
Banking	0.0	0.0	42.7, 42.7	29.2, 33.3
Insurance	0.0	0.0	57.5, 57.5	40.0, 50.0
Professional and business	17.7	21.0	58.8, 62.5	57.5, 62.5
Personal, recreational	4.4	2.5	47.6, 50.9	91.5, 91.5
Public services	*	*	32.5, 36.7	19.2, 31.7

Source: Egger, Francois, Manchin and Nelson (2014).

[9] Egger et al. (2014).

[10] AVEs are estimates of the tariff that would be needed to have an impact on trade that is equivalent to that of the non-tariff policies concerned.

[11] Egger et al. (2014) attribute the AVE % cost reduction estimates to NTBs. We use the term NTM here because what they captured here in part involves product standards that are applied on a non-discriminatory basis.

the WTO General Agreement on Trade in Services (GATS) and the 'best' preferential trade agreement (PTA) concluded by the EU and the US, scored from 0 to 100, where 0 means no binding commitments have been made and 100 means all policies linked to market access have been bound for the sector concerned. The data reveal that governments retain substantial discretion to impose protection, that for some sectors – such as professional and business services – both the EU and US are highly protective, and that neither has done much in the way of fully tying their hands even in their 'best' PTAs. There is, therefore, great potential to liberalize trade in services but also great uncertainty as to whether this will be pursued. Based on past experience, neither the US nor the EU has shown a willingness to make binding commitments to open service sectors where protection actually matters.[12]

4 The challenge for negotiators

A major reason for the small predicted gains from the CETA and TTIP is that it is assumed that little can (will) be done to reduce regulatory trade costs. The extent to which the CETA and TTIP can do so depends on the effectiveness of regulatory cooperation initiatives. Thus, the design of regulatory cooperation matters because it is a precondition for realizing greater economic gains. The extent to which such cooperation is successfully pursued is also going to determine the impacts of these agreements on third countries. Third country effects depend both on the extent to which NTM-related cost reductions are realized and whether this is implemented in a discriminatory manner. Regulatory cooperation may benefit all firms, independent of where they are located, because in principle regulation should not aim to discriminate. Regulators have specific health, safety, consumer protection etc. objectives and pursue these independent of the origin of a product. If what matters is attaining the regulatory goal, there should be equal treatment of firms and products. Of course, in practice things are not so clear-cut – there are many documented cases of regulation being used to discriminate against foreign products for protectionist purposes.[13] But in many areas of regulation the problem from a market access perspective is not protectionist intent. Instead, the basic problem is that regulatory regimes differ across the Atlantic. Moreover, these differences often are not a reflection of significant divergence in the regulatory underlying objectives – to protect consumers, assure health and safety of products, etc.[14] The fact that Canada, the EU and the US are all high-income countries that have similar preferences with respect to health and safety of products and consumer protection creates the opportunity to use instruments like the CETA and TTIP to identify areas where transatlantic regulatory trade costs can be reduced.

The policy challenge for Canada, the EU and the US is how much of the explicit policy discrimination can be removed (NTBs) *and* how much can be done to reduce the cost-raising effects of differences in non-discriminatory regulatory requirements (NTMs). The 'traditional' approaches pursued in the EU context to address the market-segmenting effects of NTMs centre on harmonization and mutual recognition. There may be more harmonization as a result of the TTIP, but if so, it will only pertain to new (future) regulations, not to the existing stock of norms and standards. In practice, the focus of attention in the TTIP context revolves around mutual recognition and a less known concept: 'equivalence'.[15] This involves each party formally accepting that the regulatory regime that prevails in a partner country pursues very similar objectives, and regulators agree that the process through which regulatory objectives are pursued in the other country are equivalent in effect to their own. A necessary condition for 'equivalence' to be feasible is trust: there must be a prior process of mutual assessment and evaluation of both the goals and the effectiveness of the regulatory enforcement regime.

Trade agreements are not designed to minimize regulations but to reduce explicit discrimination against foreign suppliers of goods and services through a process of reciprocal

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[12] It is important to note that these services policy data differ from the estimates of the AVEs of NTMs for goods in that they only involve discriminatory barriers. In practice, as is the case for trade in goods, the level of trade restrictiveness created by services policy will be higher than that suggested by the STRI data because of differences in domestic regulation that increase trade costs.

[13] A classic example is a Japanese product standard adopted in 1986 by the Consumer Product Safety Association for skis sold in Japan. The Association argued that American or European standards for skis were not appropriate for Japan because snow in Japan was 'wetter' and that Japan had unique geothermal activity (Vogel, 1992).

[14] Of course, this is not the case for NTBs, which are protectionist by design. When it comes to NTMs, protectionist intent depends on the type of activity that is regulated. In the case of professional services, for example, regulation is often based in part on what the industry deems to be appropriate, and there is significant scope (and incentive) for incumbents to design qualification and licensing requirements in a way that deliberately increases costs for foreign suppliers to enter the market and may simply exclude them altogether (e.g. by imposing a nationality requirement).

[15] See Hoekman and Mavroidis (2015a) for a discussion and references to the literature.

exchange of commitments. Regulations, in contrast, are (supposed to be) applied equally to domestic and foreign goods and services. The source of regulatory trade costs lies in differences in regulations across jurisdictions and the need to comply with the requirements of multiple regulatory bodies in different countries. Reducing the market-segmenting effects of differences in regulations is difficult because of concerns that it would compromise countries' regulatory objectives and hinder the execution of regulatory agencies' legal mandates and obligations.

5 Barriers to regulatory convergence

Key obstacles to regulatory cooperation include (1) mandate gaps between trade negotiators and domestic regulators; (2) coordination gaps within government and between government and business; and (3) informational gaps within and among countries (government agencies; polities) (Hoekman, 2015). Addressing these obstacles requires institutions and processes that foster learning and build trust through regular communications and repeated interaction, both among countries and among the agencies within countries that set and enforce regulations. In federal states with many regulatory jurisdictions, such as Canada and the United States, the difficulty of such cooperation is compounded.[16]

Regulators, moreover, often have a limited appreciation of the trade and business implications of what they do, even though they are the 'owners' of many of the policies that affect trade opportunities. Rather, they generally focus attention on a specific regulatory mandate, with little recognition of measures that might have been applied in other parts of the value chain in other countries that aim to achieve similar outcomes.[17] If regulators are to consider the cross-border economic implications of their work, they need incentives to do so. This raises issues related not just to regulators' legal mandates, but also to the design of institutional mechanisms that facilitate a better understanding of the overall impact of regulatory norms.

Effective regulatory cooperation requires going beyond legally binding, and thus enforceable, commitments to cooperate on policy measures. Binding commitments to do or not to do something – the bread and butter of trade agreements – often simply are not feasible with respect to regulation. The nature of regulation is often very technical and dynamic, involving many actors with different degrees of autonomy and decentralization; moreover, regulators will respond to differences in local circumstances and changes in knowledge over time. As mentioned, regulatory cooperation must be premised on mutual trust, which, in turn, requires mutual assessment of regulatory regimes.

6 The Comprehensive Economic Trade Agreement

The CETA is the first deep transatlantic free-trade agreement and is likely to be a model for what the EU and the US might agree to in a TTIP. It includes different approaches to reduce the costs of differences in regulatory requirements and processes, including mechanisms to enhance communications and information flow, mutual recognition agreements and efforts to converge on future regulation, all with a view of improving the competitiveness and efficiency of industry (DFATD 2014, chap. 26, article X.3d). Only two CETA chapters deal with reductions in import tariffs and the removal of discrimination in government procurement – two areas where there are direct restrictions on the ability of foreign companies to access the market. The majority of the substantive chapters of the agreement deal with such issues as technical barriers to trade, sanitary and phytosanitary (SPS) measures, customs and trade facilitation procedures, policies affecting specific service sectors, mutual recognition of professional qualifications, domestic regulation more generally, procedures for regulatory cooperation and dialogue, as well as protocols on the mutual acceptance of the results of the conformity assessment of good manufacturing practices for pharmaceutical products.

Whether and to what extent the CETA and TTIP will be effective with respect to reducing regulatory market segmentation will depend on how well the agreements incentivize government agencies and regulators to consider the trade effects of their activities. Progress has been achieved in some important areas, including the introduction of mechanisms through which regulatory authorities in specific areas from different countries interact – e.g. consultation and information exchange/notification systems for proposals for new regulations. This is also a key element of the operation of the WTO committees on technical barriers to trade and SPS measures, reflecting an understanding that regulatory cooperation should involve

[16] In the EU, another complicating factor is that its 28 member states continue to have significant autonomy in the implementation of regulation in many areas.

[17] Hoekman (2015).

interaction 'upstream' to avoid new standards becoming a trade irritant and a source of dispute.[18]

Article 2 of the CETA chapter on regulatory cooperation commits both parties to developing their regulatory cooperation to prevent and eliminate unnecessary barriers to trade and investment; enhancing the climate for competitiveness and innovation, including through pursuing regulatory compatibility, recognition of equivalence and convergence; and adopting transparent, efficient and effective regulatory processes that better support public policy objectives and fulfil the mandates of regulatory bodies. Article 3 mentions such objectives of regulatory cooperation as:

- building trust;
- deepening mutual understanding of regulatory governance and obtaining from each other the benefit of expertise and perspective to improve regulatory proposals;
- promoting the transparency, predictability and efficacy of regulations;
- identifying alternative instruments;
- recognizing the associated effects of regulations; and
- improving regulatory implementation and compliance.

Another objective is to facilitate bilateral trade and investment by reducing unnecessary differences in regulation and identifying new ways of cooperating in specific sectors. In a similar vein, the agreement mentions the complementary goal of enhancing the competitiveness of industry by looking for ways to reduce administrative costs and duplicative regulatory requirements, and 'pursuing compatible regulatory approaches including, if possible and appropriate, through:

a. the application of regulatory approaches, which are technology-neutral, and
b. the recognition of equivalence or the promotion of convergence'.[19]

The effectiveness of such instruments depends, of course, on practice and not on statutory language. To give an example, within the EU there is an obligation to consult and coordinate on macroeconomic policies, and yet this is the one provision that has almost never been respected, even when major policy shifts occurred (e.g. the 'Hartz reforms' in Germany[20]).

Language on – and examples of – regulatory equivalence embodied in the CETA include the chapter on SPS measures, which requires each signatory to accept the measures of the exporting party as equivalent to its own if the exporting party 'objectively demonstrates that its measure achieves the importing Party's appropriate level of protection'.[21] Principles and guidelines for the determination of equivalence are set out in Annex IV to the SPS chapter, while Annex V lists areas where the parties have agreed there is equivalence. One function of the CETA Joint Management Committee for SPS Measures is to prepare and maintain a document detailing the state of discussions between the parties on their work on recognizing the equivalence of specific SPS measures. A Protocol on the Mutual Recognition of the Compliance and Enforcement Programme regarding Good Manufacturing Practices for Pharmaceutical Products provides for the determination of the equivalence of regulatory authorities that certify compliance with these practices. Annex II (on medicinal products or drugs) of the protocol lists products for which the parties have agreed that their requirements and compliance programmes are equivalent.[22]

The CETA chapter on regulatory cooperation creates an entry point with respect to greater use of regulatory equivalence among like-minded countries, but puts little emphasis on the use of equivalence as a way to reduce regulatory differences and costs. Indeed, the chapter, while laying out a rather long illustrative list of possible cooperation activities, does not mention 'equivalence' in articles X.4, X.5

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18 The type of regulatory cooperation involved in the CETA (and presumably will be part of the TTIP) is a much more ambitious endeavour than that found in the WTO, as the former focuses on regulatory systems and regimes, while the latter deals with product-specific technical requirements.

19 DFATD 2014, chap. 26, 'Regulatory Cooperation', article X.3(d)(iii).

20 The Hartz reforms involved a set of major changes to German labour market policies implemented during the mid 2000s. They were named after Peter Hartz, the chairman of the Commission that recommended the various reforms in 2002.

21 DFATD 2014, chap. 7, 'Sanitary and Phytosanitary Measures', article 7.1.

22 See http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/28.aspx?lang=eng. Some mention of regulatory equivalence also occurs in the chapter on financial services. The chapter permits Canadian institutions to provide portfolio management services to EU professional clients on a cross-border basis (that is, without having to be established in the EU) once the European Commission has adopted the equivalence decision related to portfolio management (EU prudential requirements will still apply).

and X.7. Article X.4.18 does call for identifying approaches to reduce the adverse effects of existing regulatory differences on trade, including 'when appropriate, through greater convergence, mutual recognition, minimizing the use of trade distorting regulatory instruments, and use of international standards', but the activities listed in these articles focus on transparency and data and information sharing.

7 Third countries

If success can be achieved on regulatory convergence, recognition and establishing equivalence, for third country parties the question will be whether they can participate in (benefit from) whatever processes are put in place. A key necessary condition for participation will be that the jurisdictions concerned do indeed pursue equivalent objectives and have implementing procedures and institutions that are credible. In principle, there is no reason why third-party regulatory bodies should be excluded from processes used to establish equivalency, or mechanisms that result in mutual recognition. Indeed, restricting participation to only entities that are located in jurisdictions that are party to the transatlantic agreements would undermine the credibility of the claim that one of the objectives of these agreements is to identify approaches that can be used to cooperate on regulatory matters that are not addressed in the WTO. If cooperation is open to third country firms, they would be able to focus on just one set of requirements. In practice, therefore, what matters is whether the EU and the US will be willing to apply transatlantic cooperation mechanisms to third countries that have adopted equivalent regulatory mechanisms and norms. Thus, from the perspective of third countries the key is recognition – there is not a big difference in the effects of harmonization, mutual recognition or mutual equivalence. In all these cases what matters is whether third country parties can be recognized as having the same or equivalent norms.

8 Enforcement and the private sector

In trade agreements, enforcement involves signatory governments taking action to ensure that their counterparts abide by the terms of the negotiated contract. In practice, it is difficult to envisage how formal state-to-state dispute settlement along the lines of what is found in the WTO could work when it comes to regulatory cooperation. Many of the regulatory policies that impact on international supply chains and production networks will not be judiciable. Since one goal of cooperation is to increase the prospects of having regulatory systems advance together, and since regulatory equivalence is highly dependent on trust and learning, formal litigation of disputes would probably have an adverse effect on the willingness of agencies to engage in cooperation. Instead, effective implementation will have to rely in significant part on high-level political commitment and engagement to empower and incentivize regulatory cooperation.

Arguably, however, a mechanism should be considered through which business and other stakeholders can raise awareness of policies that negatively affect supply chain trade, including policies that cannot be addressed through regulatory cooperation, either because the measures concerned are not regulatory in nature or because the source of the excess costs cannot be addressed through international cooperation but requires domestic reform. An example might be market access restrictions that are not yet the subject of explicit commitments in a trade agreement but that nonetheless have a negative impact on supply chain trade,[23] including entry barriers that are the result of government action, such as restrictions on the ability of companies or consumers to obtain certain types of services from foreign suppliers, digital trade barriers and data localization requirements.

The CETA does not confer rights or impose obligations on persons other than those created between the parties under public international law, and states explicitly that the provisions of the agreement cannot be directly invoked in the domestic legal systems of the parties. Moreover, Canada and the EU may not provide for a right of action under domestic law against the other party on the ground that a measure of the other party is inconsistent with the CETA.[24] Thus, there is no possibility for a firm or a citizen of Canada or the EU to invoke the CETA before a tribunal or court unless this is expressly foreseen in a CETA provision. Firms must go through their governments to contest actions (or inaction) by trading partners, and their governments are free to refuse to raise the issue with the other government(s).

In this regard the CETA differs from the Agreement on Internal Trade (AIT), which aims to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investment *within* Canada (Canada 2012). The AIT was required because the provinces have significant autonomy in setting and enforcing rules and regulations that affect the ability of providers in some

[23] In WTO parlance, this would be akin to a so-called non-violation case.
[24] DFATD 2014, chap. 33, 'Dispute Settlement', article 14.16.

service sectors to operate across provinces and of businesses to bid on government procurement contracts. The AIT's dispute settlement system is open to resident natural persons and enterprises with a 'substantial connection' to a province (labour unions also have standing). Private parties first need to request that their relevant provincial government launch dispute proceedings against another province. If this petition is refused, they may initiate proceedings on their own, conditional on approval by a 'screener' aimed at eliminating frivolous complaints and ensuring that the issue is economically meaningful in the sense that there is a reasonable case of injury or denial of benefit and that the party has standing.[25]

In the WTO context, contrary to what is generally held to be the case – that enforcement mechanisms are only state-to-state – there are also specific provisions that call on governments to provide foreign private parties (companies) with opportunities and facilities through which they can raise instances where they perceive governments do not abide by their commitments in *domestic* fora. [26] Art. X:3 GATT on Domestic Transparency calls on WTO members to provide traders with a forum to litigate grievances regarding the administration of customs matters. These constitute administrative action, and cover a broad range of possible measures as they span both acts of 'general application' (which must be published) as well as 'individual' acts.[27] The latter did not need to be published since they are not of 'general application', but can nonetheless be contested. The Appellate Body has found the obligation in this provision is limited to first-instance courts only. The upshot is that traders can litigate before domestic courts on a matter arising from customs-related administrative action. There has been wide use of this instrument in practice.[28]

Another mechanism embodied in a WTO instrument that gives foreign private parties the opportunity to contest actions by government entities that they perceive to violate commitments, is so-called 'challenge procedures' under the Government Procurement Agreement (GPA). Articles. XVIII:1 and XVIII:4 GPA require signatories to provide timely, effective, transparent and non-discriminatory administrative or judicial review procedures through which a supplier may challenge a breach of the agreement or a failure to comply with the GPA. Art. XVIII.7 GPA specifies that challenge procedures shall provide for rapid interim measures to preserve the supplier's opportunity to participate in the procurement. These may result in suspension of the procurement process, and, if there is a breach or a failure, corrective action or compensation for the loss or damages suffered.

9 Transparency: A Precondition for Greater Accountability

These examples illustrate that there are precedents for governments to put in place specific mechanisms permitting foreign firms to take governments 'to court' for non-compliance with trade agreements. Incorporating similar mechanisms into the TTIP to allow companies to raise instances where public entities are not implementing whatever is agreed as regards regulatory cooperation would help increase the credibility of commitments on this front. This need not entail formal dispute settlement (binding arbitration). Indeed, this may well be counterproductive, given the need for trust and to maintain the 'policy space' for regulatory bodies to take actions that may have trade-impeding effects in order to attain regulatory objectives. But such actions should be contestable in principle and in practice, so as to ensure that there is accountability, in the process increasing the information flow and reducing the probability of regulatory capture and actions that unnecessarily impede/raise the costs of trade.

Here again there are lessons that can be drawn from the WTO experience. Mavroidis and Wijkström (2013) discuss the most advanced 'transparency regime' in the WTO, the TBT (Technical Barriers to Trade) Agreement. This requires WTO members to notify the WTO of proposed measures and provide sufficient time to collect reactions between adoption and the entry into force of the new measures. The agreement requires members to establish enquiry points – 'one stop shops' where traders (and other interested parties) can have access to and request information on product regulation. The GATS includes a similar provision, as does the new WTO Trade Facilitation Agreement.

Such requirements facilitate the necessary process of learning about relevant 'behind the border' regulatory measures, and

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[25] Since its establishment in 1995, 55 disputes have been brought under the AIT; 13 of these went to a panel, 4 of which were brought by a private petitioner. See http://www.ait-aci.ca/index_en/dispute.htm.

[26] The WTO does not deal with the relationship between a government and its citizens, i.e. the extent to which persons of a country can invoke the treaty against the behaviour of their government. This is a concern for domestic constitutional laws.

[27] As the term suggests, acts of general application are not specific to a given idiosyncratic transaction or case.

[28] Hoekman and Mavroidis (2009).

ensure that traders can comply with prevailing requirements in order to access export markets. Information acquisition is costly and publication requirements à la Art. X GATT and the different enquiry point obligations are ways in which the WTO seeks to reduce trade costs for firms. Other initiatives to enhance transparency include the TBT Information Management System,[29] which provides information on measures notified to the TBT Committee and conformity assessment procedures, and an Integrated Trade Intelligence Portal, which aims to provide a single entry point for information compiled by the WTO on all trade policy measures, both tariffs and NTMs affecting trade in goods and services, government procurement, preferential trade agreements and the accession commitments of WTO members.

An important feature of WTO processes when it comes to product standards is the use of the SPS and TBT Committees as fora to raise 'specific trade concerns'. These are both a form of information exchange and a dispute settlement avoidance mechanism: the process allows a WTO member to question a new or proposed regulation of another member as being unnecessarily trade restrictive or otherwise not conforming to the requirements of the relevant WTO agreement. The process is very effective in flagging to a country that other parties have worries about what is being done or proposed, and providing incentives to reassess the substance of the product regulation that has been identified as a source of concern and determine whether alternative approaches that are less trade restrictive could be applied while not affecting the attainment of the underlying regulatory goal.

Building analogues of such processes into the CETA and TTIP, and going beyond them to permit the foreign private sector to not only go through their respective governments to challenge domestic regulation but to have direct access to an independent entity that would consider the necessity that a regulation restricts trade, unnecessarily raises costs, etc., would help ensure that regulatory cooperation is sustained and the objective of reducing needless duplication and excess compliance-cum-certification costs is pursued in a consistent manner.

10 Conclusion

Today's trade policy agenda increasingly involves domestic regulatory policies, with differences in regulation across countries creating additional costs for businesses that affect their competitiveness. At this point in time it is simply not possible to know to what extent the CETA and TTIP will reduce the costs of differences in domestic regulation and to what extent new initiatives that do so will be applied on a discriminatory basis. Even in instances where discrimination is explicit, it may not have much bite in the sense of detrimentally affecting third country parties because companies can choose to establish a commercial presence in the EU and/or the US and thus ensure they will benefit from regulatory initiatives that reduce their operating costs. Of course, this may well imply 'investment diversion' and be of concern to governments who confront the prospects or reality of investors relocating or deciding to place new facilities within the transatlantic area.

Regulators and government agencies in Canada, the EU and the United States may not be fully aware of the trade- and investment-impeding effects of differences in regulatory approaches to pursuing what are often very similar goals. To date, trade agreements have done little to minimize negative regulatory spillovers. International cooperation to reduce the market-segmenting effects of differences in regulation confronts concerns that this might impede the realization of regulatory objectives and the execution of the legal mandates of regulatory agencies. Obstacles to achieving regulatory cooperation include mandate gaps between trade negotiators and domestic regulators; coordination gaps within government and between government and business; and informational gaps within and across countries. Addressing these gaps requires institutions and processes that foster learning and trust building through regular communication and repeated interaction, and mechanisms that help identify areas where there is scope for and a high payoff to pursuing regulatory cooperation.

In principle, efforts to reduce the costs of differences in regulatory regimes and systems should be multilateral, because value chains and international production are global. Greater use of plurilateral forms of cooperation under the WTO umbrella can be a means to expand the reach of transatlantic regulatory cooperation over time and to attenuate the potentially trade-diverting effects of a multitude of overlapping preferential trade agreements that deal with similar issues in different and possibly inconsistent ways (see Hoekman and Mavroidis 2015b). One area where the TTIP and CETA could make a contribution in this regard is as a learning or discovery device: a means to identify specific policy areas where multilateral cooperation in the form of a plurilateral agreement is feasible and desirable. Elements of bilateral preferential schemes could thus be transformed into plurilateral agreements. There is

[29] Available at http://tbtims.wto.org.

nothing odd about this construction. Indeed, in principle, regulatory initiatives under both the TTIP and CETA must observe the most-favoured-nation rule. Opening up the possibility for third countries to participate would go a long way towards addressing the concerns of non-participants.

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