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The Regulatory Cooperation Chapter of the TTIP
Challenges and Opportunities

Abstract

The Transatlantic Trade and Investment Partnership (TTIP) has the potential to remake political and legal relationships between the EU and the US and pave the way to a new form of global economic governance based on international regulatory cooperation. In particular, TTIP presents a historic opportunity for the European Union and the United States to remove regulatory divergence – today's most prominent obstacle to trade exchanges – thereby increasing economic growth for the citizens of both polities. Yet the EU and the US have been attempting to reduce trade barriers since the 1970s. Despite decades of cooperation, EU and US policymakers too often fail to mutually understand each other's positions. As an international agreement predicted to contain a Horizontal Chapter – an innovative approach to international trade treaty-making containing a framework for future bilateral regulatory cooperation – TTIP has the potential to transform this impasse, if approached correctly. This article focuses on the structure, scope, discipline, institutional design, enforcement and implementation of the envisaged horizontal chapter, often defined as the Regulatory Cooperation Chapter. In so doing, it addresses some of the concerns currently raised by civil society, in particular, the fear of a "race to the bottom" that may stem from the operation of this chapter, and provides some recommendations.

1 Introduction

In the spring of 2013, the United States and the European Union announced the launch of negotiations aimed at creating the Transatlantic Trade and Investment Partnership (TTIP).[1] If these talks succeed, they will create the largest free trade zone in the world, encompassing 800 million citizens and two huge economies that together comprise nearly half of the world's Gross Domestic Product (GDP).[2] In addition to the commitment to eliminate tariffs – typical of any Free Trade Area agreement (FTA)[3] – what makes TTIP remarkable and noteworthy is both its size and its declared objective of eliminating or greatly reducing

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1 Final Report, High Level Working Group on Jobs and Growth, 11 February 2013; Office of US Trade Representative Fact Sheet: United States to Negotiate Transatlantic Trade and Investment Partnership with the European Union, available at http://www.ustr.gov/about-us/press-office/fact-sheets/2013/february/US-EU-TTIP.

2 See e.g. Congressional Research Service, Proposed Transatlantic Trade and Investment Partnership (TTIP): in Brief (11 June 2014) (hereinafter "CRS TTIP Report") at 3; Final Project Report: Reducing Transatlantic Barriers to Trade and Investments, An Economic Assessment, Study Commissioned by the European Commission to the Centre for Economic Policy Research (London, March 2013).

3 The United States currently has Free Trade Area agreements with Australia, Chile, Israel, Singapore, South Korea, Canada and Mexico, Morocco, Oman, Panama, Singapore, Jordan, Israel, Colombia, Chile, Peru, Republic of Panama and Bahrain. See CRS TTIP Report at 4; Free Trade Agreements List, available at http://www.ustr.gov/ttip; for an overview of the trade agreements concluded by the EU, see http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm.

regulatory barriers to trade across the Atlantic through ongoing and broad-ranging cooperation among US and EU regulators. The central tenet of TTIP is indeed represented by the Horizontal Chapter on Regulatory Coherence, an innovative approach to international regulatory cooperation (IRC).[4] As we have long known that with tariffs low and import quotas disappearing, non-tariff regulatory barriers now stand as the principal impediment to free trade,[5] TTIP seeks to go one step further by establishing a cooperation mechanism through which US and EU regulators talk to each other directly and regularly, in an effort to promote regulatory convergence. Its final aim is to enable policymakers to harmonise their regulations, or more likely, to mutually recognise their differing regulations as essentially "equivalent" to domestic requirements.

The premise of this innovative approach to regulatory cooperation is that the US and the EU share a strong commitment to protecting public health, safety, the environment and economic security, but that they have pursued this commitment through different approaches and regulatory outcomes.[6] Many of the diverging regulatory requirements that now apply to producers on either side of the Atlantic are the result of what may be called "island effects": requirements that have evolved differently in different places, largely for historic reasons, in a manner analogous to the different species of birds or worms that emerged in the isolated islands surveyed by Charles Darwin.[7]

Thus, for instance, the automobile industries in the US and the EU claim that divergent yet essentially equivalent regulations across the Atlantic required 100 unique parts, an additional $42 million in development costs, duplicative testing of 33 vehicle systems and 133 additional people – with no significant gain in safety. Similar regulatory issues and deadweight losses were reported in other industries, such as specialty toys, apparel and footwear.

Proponents of the TTIP regulatory cooperation chapter believe that it should be possible to increase trade by eliminating such regulatory distinctions without jeopardising the core health, safety, environmental or other legitimate objectives of either side. In fact, greater regulatory cooperation could enable US and EU policymakers to work together – on both existing or new initiatives – thereby enabling stronger regulation at lower cost.[8]

Analysts estimate that simply eliminating transatlantic regulatory divergence could yield economies of production worth $150 billion a year in the EU, and $117 billion a year in the US.[9] There are concerns, however, that these great potential gains from trade would come with a high price tag. TTIP would threaten regulatory autonomy and weaken protections of health, safety, the environment or financial security as it promotes trade.[10] In other words, there is concern that the process of regulatory convergence prompted by TTIP may lead policymakers to go well beyond

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4 See EU Proposal for a Chapter on Regulatory Cooperation, originally published on 10 February 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf as amended on 4 May 2015 and available at http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf (hereinafter the EU Proposal).

5 Since 1995, WTO signatories have used the WTO Agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPS) to seek to reduce these regulatory barriers by imposing external trade disciplines – backed by a dedicated dispute settlement system (DSS) – on the application of domestic regulatory restrictions to imported goods and services. See M. Trebilcock & R. Howse, The Regulation of International Trade 145 (Routledge 1999). See also G. Marceau & J. Trachtman, The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariff and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods, 36 J. World Trade 811-881 (2014).

6 For insightful, though partly divergent, accounts of transatlantic regulatory divergences, see e.g. D. Vogel, The Politics of Precaution 255 (Princeton Univ. Press 2012); J. Wiener et al., The Reality of Precaution (Routledge/RFF 2010).

7 Office of US Trade Representative Fact Sheet: United States to Negotiate Transatlantic Trade and Investment Partnership with the European Union, at 8 available at http://www.ustr.gov/about-us/press-office/fact-sheets/2013/february/US-EU-TTIP.

8 Bertelsman Stiftung, TTIP: Who Benefits from a Free Trade Deal (2013).

9 Final Project Report: Reducing Transatlantic Barriers to Trade and Investments, An Economic Assessment, Study Commissioned by the European Commission to the Centre for Economic Policy Research (London, March 2013).

10 For example, public interest groups on both sides of the Atlantic are already decrying the (leaked) negotiating text of the draft Chemicals Sector Agreement. These groups say the approach reflected in that leaked text will undermine the EU's regulatory autonomy with respect to chemical regulation (the EU is considerably more protective in its approach to chemical regulation than the US), thus weakening public protections against harmful chemical exposure throughout the European Union. See, e.g., Corporate Europe Observatory, Regulation – None of Our Business? (26 December 2013), at http://corporateeurope.org/trade/2013/12/regulation-none-our-business (hereafter, "CEO Report").

eliminating "island effects." In particular, it is feared that TTIP's regulatory convergence mechanisms would enable industry interests to further ossify the regulatory process through additional and onerous analytical requirements, which would in turn lead to a "race to the bottom" in the definition of the level of protection. In particular, on the EU side, there is widespread concern that US regulators would apply trade pressure in particular areas where the EU appears simply more precautionary or more protective of health, safety or the environment than the US. Promoting, or merely envisaging, harmonisation or mutual recognition approaches in these sectors could, as a result, undermine regulatory autonomy.

Although such concerns do not appear to be empirically well-founded, they should not be quickly dismissed in so far as the implications of the TTIP regulatory coherence chapter for the respective democratic systems are profound.

The horizontal component of TTIP would contain a framework for future cooperation in order to provide a "gateway" for handling sectoral regulatory issues between the EU and the US.[11] This would apply to all measures of general application, including both legislation and rules – regardless of the level at which these regulations are adopted and by whom – that have effects on transatlantic trade.[12] The development of such a framework for transatlantic regulatory cooperation – which is likely to be accompanied by the establishment of a Regulatory Cooperation Council (RCC) or, as recently relabelled by the EU, a Regulatory Cooperation Body (RCB), a mechanism that could ensure TTIP's operation – raises many important questions. This is particularly true in relation to the widespread concern that regulatory cooperation may compromise the principle of regulatory sovereignty and potentially result in fundamental accountability problems.[13]

What will be the scope of TTIP's horizontal regulatory cooperation chapter? What kind of requirements will it impose on EU and US regulators? How will this chapter be designed and operated, and by whom? Who may enforce it? How will the ensuing sectoral agreement be implemented in the respective legal orders? And, finally, what are the most immediate consequences stemming from the conclusion of TTIP in the respective legal orders?

In tackling this set of challenging questions, this paper provides a concise, possibly comprehensive, yet provisional, analysis of TTIP.

2 The structure of the horizontal chapter on regulatory coherence

The final report of the High Level Working Group on Jobs and Growth of 11 February 2013 foresees five basic components of TTIP provisions tackling regulatory issues:

1. the **SPS plus** would build upon the key principles of the WTO Sanitary and Phytosanitary Agreement and provide for improved dialogue and cooperation in addressing bilateral SPS issues;
2. the **TBT plus** component would build upon the principles enumerated by the WTO Technical Barriers to Trade as regards technical regulations, conformity assessment and standards;
3. **sectoral annexes** would contain commitments for specific goods and services sectors;
4. **cross-cutting disciplines on regulatory coherence and transparency** for the development and implementation of efficient, cost-effective and more compatible regulations for goods and services, including early consultations on significant regulations, the use of impact assessments, periodic review of existing measures and the application of good regulatory practices;
5. a **framework** for identifying opportunities for and guiding future regulatory cooperation, including provisions that provide an institutional basis for future progress.

While there is no guarantee that this structure will remain unchanged during the negotiations, it appears to have been followed closely during the first ten rounds of negotiation. Both the US and the EU proposals for a Chapter on Regulatory Cooperation focus on and operationalise the last two components: numbers 4) and 5).[14] Considering

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[11] Initial Position Paper, TTIP: Cross-cutting disciplines and institutional provisions, EU Commission, 20 June 2013.

[12] See infra section 3. Scope for more details.

[13] See, e.g. E.-U. Petersman, Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?, Journal of International Economic Law, Vol. 18, issue 3.

[14] While only the latter has been disclosed, the US authorities have publicly expressed their preferences within a horizontal chapter in TTIP.

that only the EU has disclosed its proposal,[15] this article predominantly discusses this document – as it has evolved since its original publication in February 2015 – and contrasts it with some ideas that were publicly put forward by the US. TTIP will require legislative approval on both sides of the Atlantic.[16] In the EU, it will most likely qualify as a "mixed agreement", thus requiring the votes of both the European Parliament and the national parliaments.[17]

3 Scope

This horizontal chapter is set to apply to all measures of general application, including both legislative and non-legislative measures[18] – regardless of the level at which they are adopted and by whom[19] – that have transatlantic trade impacts.

According to the EU proposal, the latter criterion, i.e. "significant impact on trade or investment between the Parties", would not be required for the application of the first component of the horizontal discipline, the "Good Regulatory Practices", but its existence would trigger the application of its second component, "Regulatory Cooperation".[20] This means that all "regulatory acts at central level" – understood as EU and US legislative and non-legislative acts – are subject to all "Good Regulatory Practices", such as Transparency (Early Information on planned acts and Stakeholder consultation) and Regulatory Policy Instruments, such as Analytical Tools (Impact Assessment).[21] But only regulatory acts at the central and non-central level having a "significant impact on trade and investment between the Parties" are subject to "Regulatory Cooperation". While no definition of "transatlantic impact on trade" has been provided thus far,[22] this notion seems to exclude purely domestic rules (such as emission limits for certain industrial plants in the EU or in the US), as well as all measures affecting the operation of an investment in the territory of a party. Thus, for instance, regulations such as those governing wages, etc. are not likely to fall under the scope of the horizontal chapter.

4 Discipline

In order to promote the compatibility of regulations across the Atlantic, TTIP provides an original cooperation mechanism that embeds, for the first time, the application of good regulatory policy instruments and practices (e.g. early warning, early regulatory cooperation, consultation, transparency, impact assessment, etc.) into a trade agreement[23] and requires the creation of an institutional mechanism to frame such an enhanced regulatory cooperation. Under TTIP, the distinct, often competing, worlds animated by regulators and trade representatives meet and coexist within an international agreement. At the same time, however, TTIP and its horizontal regulatory coherence mechanisms do not substantially alter the parties' respective ways of making legislation or rules. Indeed, the legislative and regulatory systems of the EU and the US will not be modified by TTIP.[24]

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15 A good analysis of some of the US ideas on regulatory cooperation can be inferred from P. Chase & J. Pelkmans, This Time It's Different: Turbo-charging Regulatory Cooperation in TTIP (CEPS 4 June 2015).

16 European Commission, Questions and Answers, TRADE, 20 December 2011, http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/.

17 See on this point, A. Alemanno, The Transatlantic Trade and Investment Partnership and Parliamentary Regulatory Co-operation, European Parliament, 2014.

18 On the EU side, this would include EU legislation (regulations and directives), as well as non-legislative acts (delegated acts and implementing measures). On the US side, this would include Congressional bills, as well as the rules enacted by the US federal executive and agencies.

19 The EU Proposal also refers to "regulatory acts at non central level", i.e. US state legislation and EU Member State legislation, but does not provide further indications on the applicability of the horizontal chapter to domestic initiatives. See Article 2 c) of the EU Proposal.

20 EU Proposal, Article 3.

21 The extension of Good Regulatory Practices, such as stakeholder consultation and impact assessment, to EU non-legislative acts is also foreseen in – and therefore appears in line with - the Better Regulation Package. See European Commission, Communication Better Regulation for Better Results, Strasbourg, 19 May 2015, COM(2015) 215 final.

22 See footnote 6 of the EU proposal (conferring this prerogative to the "regulators and competent authorities" at the central level of each Party). See also Article 9.1 of the EU Proposal. On the transatlantic impact of EU secondary law, see e.g. J. Scott, "From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction", (2009) 57 American Journal of Comparative Law, pp. 897-942.

23 While good regulatory practices also appear in other trade agreements, especially FTAs, such as the recently negotiated, but yet to be ratified, Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, TTIP is set to become the first one that ensures their respect through an enforcement mechanism.

24 For an initial analysis, see A. Alemanno, The Transatlantic Trade and Investment Partnership and Parliamentary Regulatory Co-operation, European Parliament, 2014.

However, this Agreement will inevitably entail some limitations on their respective regulatory autonomy. Importantly, the EU and the US are not limiting themselves to concluding a traditional FTA plus by agreeing on some additional procedural requirements. They are rather striving to come up with a new model of economic integration based on a permanent bilateral regulatory cooperation mechanism through horizontal provisions complemented by a number of specific commitments across sectors.[25] It remains unclear, however, how the horizontal provisions underpinning the regulatory cooperation mechanism will be integrated into their respective regulatory processes.[26]

Good Regulatory Practices

While both the EU and the US already implement a number of good regulatory practices, such as transparency, stakeholder consultations and impact assessment, TTIP is meant to strengthen those practices in order to build bridges between the two systems. The rationale behind this first section of the regulatory cooperation discipline is the belief that convergence upon procedures might induce convergence upon regulatory outcomes. This is especially true when it comes to regulatory cooperation in new areas. Thus, for example, the publication of regulatory agendas on both sides of the Atlantic could help regulators (as well as stakeholders) to identify areas of common interests. Similarly, sharing the *ex ante* and *ex post* analysis of regulatory outcomes might be beneficial for both sides.

Regulatory Cooperation

To promote regulatory convergence, TTIP does not limit its discipline to good regulatory practices. According to the model envisaged by the EU Commission,[27] each Party agrees to accommodate regulatory exchanges upon a reasoned request from the other side. This is a model of voluntary cooperation based on common interests. Thus, each Party will designate an office in its central administration to act as a Focal Point responsible for exchanging information about envisaged and existing regulatory acts. Upon the request of a Party made via the respective Focal Point, the Parties "shall" enter into a regulatory exchange on planned or existing regulatory acts.[28] This exchange may take the form of meetings, written exchanges or other forms of direct communication and is led by the regulators and competent authorities.[29]

Regulatory Exchanges

Regulatory exchanges undertaken under TTIP may lead, at a minimum, to a better mutual understanding of the other Party's regulatory approach on a given policy. This could in turn lead to mutual learning and possibly prevent the emergence of regulatory differences.[30] In other instances, instead, there might not be conditions for regulatory compatibility, as each side will follow a different path, depending on the political sensitivities or the consumer preferences of each policy.

Regulatory Compatibility

When a regulatory exchange has been initiated, with regard to a planned or existing regulatory act at the central level, a Party may propose to the other "a joint examination of possible means to promote regulatory compatibility".[31] This might lead to agreements entailing mutual recognition, harmonisation or simplification of regulatory acts. Thus, for instance, EU and US regulators could decide to work together and cooperate on the development of a common regulatory framework for hybrid cars or standards for electronic labelling (replacing conventional labels and stickers). Similar cooperation might take place, not at the level of substantive standards, but for procedural standards. Thus, for instance, EU and US regulators might develop common conformity assessment procedures for given sectors, such as textiles or electrical engineering. The substance would remain divergent, but the procedures for assessing the conformity to that standard would be the same. As a result, a US textile could be certified EU compliant before reaching the EU territory and vice versa.

Although a Party will formally prompt both the regulatory exchange and the joint examination, both activities are likely to be initially triggered by stakeholders. Those stakeholders may submit their "concrete proposals" any time

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25 As of today, the following nine sectors have been under discussion: automotive, chemicals, cosmetics, pharmaceuticals, information and communications technology (ICT), engineering, financial services, medical devices and textiles.

26 On the EU side, one may notice a lack of full sync between the EU Proposal for Regulatory Cooperation of 4 May, 2015 with the Better Regulation Package of 19 May 2015.

27 Article 8 of the EU Proposal.

28 Article 9.3 of the EU Proposal.

29 Article 9.4 of the EU Proposal.

30 J. Wiener & A. Alemanno, The Future of International Regulatory Cooperation: TTIP as a Step Toward a Global Regulatory Laboratory, Law & Contemporary Problems, forthcoming.

31 See, e.g., EU Proposal, Article 10.

to the relevant Party, *via* the Focal Points or the Regulatory Cooperation Body. The Party receiving a proposal for a joint examination is supposed to respond to the requesting side without undue delay and inform the latter of its decision. This should be substantiated.

The novelty of this mechanism is that it would open up a process that could lead to greater convergence without predetermining any regulatory outcome. This will, in principle, guarantee and preserve both the substantive and procedural autonomy of the regulators, who would engage only in areas where regulatory approaches are sufficiently similar, and therefore, likely to lead to convergence.

Although TTIP falls short of establishing an internal market between the two sides of the Atlantic (i.e. no joint decision-making power is foreseen), it is set to create the conditions for prompting a new awareness in the minds of the respective regulators: that of the extraterritorial impact of their existing and proposed regulations. Indeed, unlike any previous international regulatory cooperation mechanism, TTIP is set to create a permanent mechanism. TTIP will therefore emerge as a "living agreement" where new areas of cooperation can be identified without the need to re-open the initial international agreement[32] or to modify each other's institutional frameworks.[33] As will be discussed below, this feature of this new generation agreement is set to raise significant concerns when it comes to determining the modalities of this permanent negotiation dialogue.

While regulators do not always maximise, or the laws under which they operate do not allow them to maximise, opportunities to align regulatory approaches that achieve common objectives, a permanent framework, like the one currently envisaged by TTIP, may nudge regulators – upon stakeholders' requests or acting *sua sponte* – to discuss and confront their regulatory answers to the same problems.[34] This appears crucial, as governments may implicitly conduct such policy experiments all the time, but they too often neglect to structure the experiment carefully in order to compare treatment options, monitor performance and evaluate outcomes across the border. This horizontal discipline, by mandating principles and procedures on, inter alia, consultation, transparency and impact assessment,[35] will enable the regulators – generally upon the request of one of the two parties – to enter into a permanent dialogue. The EU and US authorities would explore possible avenues to attain compatible outcomes or coordinated approaches, both on existing regulation and new proposals, through a "joint examination of possible means to promote regulatory compatibility".[36] The methods followed can be:

- mutual recognition of equivalence of regulatory acts[37];
- harmonisation of regulatory acts through the application of existing international instruments or approximation of the rules on a bilateral basis; and,
- simplification of regulatory acts in line with shared legal or administrative principles and guidelines.

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32 This automatic update of an international treaty may circumvent the procedure for the adoption of international agreements, which typically foresees the signature and ratification of new texts. In the EU, this issue may be addressed by Article 218(7) TFEU, which states: "When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorization".

33 Recent suggestions of learning through the RCC include remarks by Karel de Gucht (EU Trade Commissioner) in his speech on 10 October 2013 (proposing an RCC to study US and EU regulations and recommend joint standards); André Sapir (comments in NY Times, 11 October 2013); and John Graham's testimony to the European Parliament, Committee on Trade, 14 October 2013.

34 C.S. Lester & I. Barbee, "Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership", Journal of International Economic Law, No 16(4), 2013, p. 865 (who argue that "if every regulation that has an impact on trade – i.e. just about all regulations – requires consideration of how the other side regulates the same issue, the role of bureaucracy in dealing with these issues could actually increase, and as a result this approach may actually raise more problems than it solves").

35 The impact assessment analysis should not be limited to domestic impact, but should extend to the impact of the proposed regulatory initiative on international, and in particular, transatlantic trade, in addition to other effects and take into account written comments from the other side on these aspects in their respective regulatory procedures.

36 Article 10.2 of the EU Proposal.

37 This language seems to encompass both mutual recognition of substantive standards and mutual recognition of the results of a conformity assessment.

Should the regulators identify areas for convergence (such as marketing authorisations for pharmaceuticals or technical standards for car headlights), their agreed commitment will become legally binding within a sectoral annex[38] and subject to an *ad hoc* enforcement mechanism.[39]

The in-built agenda

By the time the TTIP is concluded, one may expect that a number of agreements on sectors will have been reached and will have become part of the Agreement in the form of sectoral annexes, or other parts of the agreement. Some provisions are set to be implemented upon the entry into force of TTIP, and some at a later fixed date. The negotiations also aim at identifying other policy areas for future negotiation and agreement according to fixed objectives and timetables. This component of TTIP is generally referred to as its "in-built agenda". Moreover, the parties commit to identifying common priorities in the framework of the preparation of an Annual Regulatory Cooperation Programme.[40] On top of that, the agenda of TTIP permanent negotiations will also be driven by stakeholder demand.

5 Institutional design

Although the institutional design of TTIP has not yet been defined,[41] the basic structure of the agreement seems to have been sketched out by the negotiators, who envisage a light governance structure.[42] The key institution is likely to be a Regulatory Cooperation Body (RCB),[43] which will develop along the lines of the regulatory cooperation mechanism carrying this name established by the US with both Canada and Mexico.[44] However, a significant difference between the US RCC model and the TTIP RCB is that neither the US-Canada RCC nor the US-Mexico RCC are international treaties, so they did not require the approval of the US legislature, but merely involve the participation of regulators.

The RCB is set to monitor and facilitate the implementation of the regulatory cooperation chapter and report to the Joint Ministerial Body (the "body with decision-making power under TTIP").[45] It will likely gather senior representatives of both parties, including those at the non-central level. Its composition is likely to include regulators and Commission services, the Commission's Secretariat General and the US Office for Information and Regulatory Affairs (OIRA), as well as trade representatives from DG Trade and the US Trade Representative (USTR).[46] The tasks entrusted to this body will include inter alia: (a) the preparation and publication of a yearly Regulatory Programme of cooperation, outlining the planned and outgoing regulatory cooperation activities and objectives, as well as reporting on the implementation of sectoral agreements previously concluded; (b) the monitoring of the implementation of the provisions of the regulatory cooperation chapter and reporting to the Joint Ministerial Body on the progress achieved in agreed cooperation programmes; (c) the technical preparation of proposals for the update, modification or addition of sectoral or specific provisions; (d) the collection and examination of new initiatives received from either Party or its stakeholders, as well as requests on how to enhance compatibility for both future and existing regulation; (e) the preparation of joint initiatives or proposals for international regulatory instruments; and (f) ensuring transparency in regulatory cooperation between the parties.[47]

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38 While it appears undisputed that this will require these newly negotiated sectoral annexes to the original TTIP to be integrated into domestic law in both jurisdictions, it has not yet been defined how this will occur. See infra section 6. Enforcement.

39 General note number 4 of the EU Proposal seems to rule out the establishment of a dispute settlement mechanism and rather suggests the setting up of "alternative mechanisms" such as "regular monitoring and reporting, including to the political level" (Joint Ministerial Body).

40 See Article 8.2 and 14.2 a) of the EU Proposal.

41 The question arises of whether the virtually unlimited scope of TTIP may threaten the prerogatives of the EU member states and the individual US states.

42 References to a Regulatory Cooperation Council – or Body – as the privileged institutional model for monitoring TTIP include remarks by Karel de Gucht (former EU Trade Commissioner), in his speech on 10 October 2013 (proposing an RCC to run and monitor the discipline foreseen by TTIP); André Sapir (comments in NY Times, 11 October 2013); and John Graham's testimony to the European Parliament, Committee on Trade, 14 October 2013; EU Commission, TTIP: Cross-cutting disciplines and institutional provisions, Initial Paper, December 2013; C.S. Lester & I. Barbee, "The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership", Journal of International Economic Law, No 16(4), 2013, pp. 847- 867.

43 EU Proposal, Article 14.

44 Government of Canada, Regulatory Cooperation Council Joint Action Plan, 3, 2011, http://actionplan.gc.ca/sites/default/files/japlan_eng.pdf.

45 European Commission, TTIP: Cross-cutting disciplines and institutional provisions, Initial Position Paper, 20 June 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf. See also Article 14.2 b) of the EU Proposal.

46 The EU leaves this question rather open in Article 16 of its proposal.

47 EU Proposal, Article 14.

The RCB emerges as the guardian of both the horizontal and vertical disciplines of TTIP. Yet – despite this pivotal role – it is unlikely to be entrusted with the authority to adopt legal acts.[48] In discharging its duties, the RCB will be assisted by sectoral ad hoc working groups.[49] That is probably where the bulk of the regulatory dialogue's work will be done. Both the activities of the RCB and the ad hoc sectoral committees should be open to interested stakeholders, and where appropriate, public input.

The final adoption or amendment of a sectoral annex to the agreement would involve the intervention of a Joint Ministerial Body.[50] Yet as will be illustrated below, the final adoption of the ensuing agreements will remain in the hands of domestic authorities and will follow their democratic (legislative and administrative) processes.

We now turn to the modalities of the operation of the horizontal chapter, and in particular, to the enforcement, as well as to the integration, of the newly-agreed or amended sectoral annexes to TTIP in the EU legal order.

6 Enforcement

When it comes to the enforcement of the horizontal chapter, the EU proposal states that "…given that the provisions of this Chapter concern predominantly procedures for cooperation, they may not lend themselves to the application of dispute settlement rules. Alternative mechanisms for ensuring proper application could be explored, such as regular monitoring and reporting, including to the political level".[51] While this seems to leave open the possibility that regulatory cooperation initiatives might be subject to some sort of dispute settlement or enforcement mechanism, it also clearly expresses a preference for "alternative" dispute settlement mechanisms, which might involve the political level, i.e. the Joint Ministerial Body.[52] When it comes to the sectoral provisions of the TTIP regulatory cluster, the EU proposal states that "further reflection will be required as regards the most appropriate mechanisms of ensuring proper application".[53] The idea is that the Parties will be bound to the agreements reached within the bilateral cooperation mechanism. To understand how this might occur, one has to turn to the issue of the implementation of TTIP in the EU and US legal orders.

7 Implementation

Although it might appear premature today – in the midst of difficult negotiations – it appears crucial to also consider the operation of TTIP's regulatory cooperation chapter once this agreement is ratified. The overall operation of the horizontal chapter, including the roles of each legislature, as well as that of the public in it, will largely depend on each party's constitutional framework.[54] In particular, the implementation of the agreement, and of its horizontal regulatory mechanism, is likely to be contingent upon the modalities of the integration of TTIP, and more specifically, of its future sectoral annexes, into their respective legal orders. Once sectoral agreements are agreed upon (or amended) – in relation to either planned or existing regulatory acts – both the EU and the US will be expected to implement them in their respective legal orders. While the operation of TTIP, both with regard to existing and derived obligations, will normally involve the intervention of a "body with decision-making power to be established under TTIP",[55] there is a need to translate this commitment into the internal legal orders.

A first glance at the international regulatory cooperation model currently envisioned by TTIP – and in particular by the EU proposal – reveals an absence of direct participation and political control of the respective legislatures in its daily operation.[56] It seems to largely remain an *affaire* between regulators. Similar to what occurs within the U.S.-Canada Regulatory Cooperation Council – which is

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48 EU Proposal, Article 14.

49 EU Proposal, Article 14(4).

50 European Commission, TTIP: Cross-cutting disciplines and institutional provisions, Initial Position Paper, 20 June 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf.

51 EU Proposal, general notes, n. 5.

52 EU Proposal, general notes, n. 5.

53 In respect of cooperation on financial services, the EU has expressed the view that provisions should not be subject to dispute settlement. See EU Proposal general notes, n. 4.

54 In the US system, the role played by the US Congress in the operation of the Executive is limited and essentially consists of the oversight authority exercised by Congressional committees over the agencies falling under their remit.

55 European Commission, TTIP: Cross-cutting disciplines and institutional provisions, Initial Position Paper, 20 June 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf. See also Article 14.2 b) of the EU Proposal.

56 For a critical perspective, see E.-U. Petersman, Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?, Journal of International Economic Law, Vol. 18, issue 3.

the major source of inspiration for TTIP negotiators[57] – the leading institutional body within TTIP would bring together regulators, perhaps trade negotiators, but not parliamentarians,[58] from the EU and the US, to oversee the implementation of the regulatory provisions of the agreement.

Situation on the EU side

In the EU, it may reasonably be expected that any additional regulatory convergence agreement reached by EU and US authorities in relation to a given sector, under the horizontal chapter of TTIP, must be transposed into the EU legal order. There appears – at least on paper – to be two main avenues governing the integration of future sectoral annexes to TTIP into the EU legal order. First, Article 218(9) TFEU foresees that the Council may adopt a decision suspending the application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement when that body is called upon to adopt acts having legal effects. This legal basis has been widely used in the past to entrust authority to decision-making bodies established by international agreements, such as the Association Agreement between the European Community and Turkey,[59] and more recently, the EU-South Korea Free Trade Agreement.[60] In the latter, the implementation of the agreement is overseen by committees that report to a Joint Trade Committee chaired by the EU Commissioner for Trade and the Korean Minister for Trade. It may be observed that this provision does not foresee a role for the European Parliament, which remains outside of the decision-making process authorised by this legal basis.

Second, Article 218(7) TFEU allows the Council to authorise the negotiator to approve, on the Union's behalf, modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by this agreement. The same provision states that the Council may attach "specific conditions to such authorisation". Unlike the previous legal basis, this provision has seldom been used, and when it has been used, it has been relied upon only to authorise very limited modifications to an agreement. In any event, this provision, similarly to Article 218(9), does not foresee any parliamentary involvement in its operation. The question is therefore whether one may reasonably expect the Council to condition the authorisation it may provide to "a body set up" by TTIP upon some form of parliamentary oversight.

The overall impression is that, despite the efforts made by the Lisbon Treaty to enhance the EP's prerogatives – through the consent procedure – in the conclusion of international (trade) agreements, these two provisions have not been updated so as to take into account such a significant change. Thus, while Article 218(9) and Article 218(7) are both susceptible to be relied upon by the EU to ensure the integration of TTIP's future sectoral annexes into the EU legal order, neither of them directly foresees the EP's intervention. This might require the EU, and in particular the EU Commission as the "Union negotiator", to fill up such lacuna by elaborating a framework allowing some parliamentary involvement in the adoption of future additions to TTIP.

It may be envisaged that the act of ratification of TTIP, *rectius* the regulation governing its implementation – foresees a general delegation to the EU Commission – similarly to what it occurs under Article 290 TFEU – that enables it to transpose the new or amended sectoral agreements into the EU legal order. This would enable the Council and the Parliament to delegate to the EU Commission – notably the competent Directorate(s)-General – the authority to transpose the commitments adopted under TTIP's horizontal chapter.

Article 218(7) TFEU seems particularly apt to allow the EU to achieve such an objective. Thus, for instance, it may be envisaged that the authorisation granted by the Council to the decision-making body under TTIP may subject the adoption of its decisions to a parliamentary oversight analogous to that foreseen for delegated acts under Article

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57 The U.S. and Canada created the RCC in 2011. The purpose of the RCC is similar to TTIP: "to promote economic growth and job creation". The relevant executive branch agencies in the U.S. and Canada work together to decide if it is possible to approximate the regulations or to set up a mutual recognition agreement, and what will be required to do so. There is little to no role for the legislatures of either country to play. See www.trade.gov/rcc and http://www.whitehouse.gov/omb/oira_irc_north_america.

58 A. Alemanno, The Transatlantic Trade and Investment Partnership and Parliamentary Regulatory Co-operation, European Parliament, 2014.

59 64/732/EEC: Council Decision of 23 December 1963 on the conclusion of the Agreement establishing an Association between the European Economic Community and Turkey, OJ 217, 29/12/1964, pp. 3685-3686.

60 2011/265/EU: Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L127, 1 et seq.

290 TFEU.[61] The sectoral annex would be agreed by the decision-making body set up by TTIP, thus producing external effects, but would then be endorsed internally to produce its full effects within the EU.

But that's not all: The exact role that each legislature will be called to play within TTIP will also depend on the way the delegation of authority is granted to the respective regulators – gathered in RCB or within the sectoral committee – who are seeking regulatory convergence through possible agreements.[62] It appears important to ensure that regulators will enjoy the same authority when initiating the examination of equivalence, mutual recognition or other forms of regulatory compatibility within TTIP's regulatory dialogue. In the EU, this delegation of authority can sometimes be found directly in the secondary legislation that is the object of the regulatory dialogue,[63] or it may be granted ad hoc through the adoption of a basic act by the EU co-legislatures. In both instances, the European Parliament would be involved, and as such, it could exercise – in line with its authority under either the legislative or non-legislative procedures – its prerogatives. Therefore, once TTIP comes into force, it would be important in the adoption of future legislation to always ensure sufficient delegated powers for the regulators to be able to consider different forms of equivalence or other means of ensuring regulatory compatibility.

Situation on the US side

On the US side, the regulators work within the authority that Congress has delegated to them. They are therefore expected to engage in TTIP's regulatory dialogue with their EU counterparts and conclude "executive" agreements, not requiring as such any change in law or any Congressional input. The most immediate precedent to the integration of a new generation agreement into its legal order seems to be offered by the US-Canada RCC. However, this is not an international treaty, and therefore, is not directly comparable to TTIP. In this instance, once the agreement had been put in place, each nation's regulatory process worked largely as it had before. However, there is an important open question on the US side. This relates to how US authorities may ensure the integration of joint decisions, such as newly-developed sectoral annexes, into the US legal order. Given the dualistic nature of the US legal order *vis-à-vis* international law,[64] one may expect that US agencies will have to start rulemaking to allow the agreement to produce full effects. The challenge here would be how to ensure that rulemaking does not result in significant divergence from the approaches developed transatlantically.

President Obama issued an executive order addressed to his agencies – which, by the way, does not require Congressional approval – to look to international regulations before setting new measures, and to include an assessment of them with the required cost-benefit analysis that accompanies each new regulation.[65] By way of example, the Canada-US RCC sought and received public comments from stakeholders and government entities on which rules should become the object of the regulatory dialogue to be mutually recognised or assessed as equivalent.[66] For the rules they selected, they set up meetings between the relevant rulemakers in Canada and the U.S. to find a solution to the disparate requirements.[67] These meetings took place with agency leadership rather than with Congress.[68]

8 Challenges and opportunities of regulatory cooperation in TTIP

The United States and the European Union have been negotiating the Trans-Atlantic Trade and Investment Partnership over the last two years.[69] This might be defined as an innovative trade agreement establishing a permanent bilateral cooperation mechanism to promote regulatory compatibility across the Atlantic, whose operation will

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61 Under Article 290 (2), "the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act".

62 A significant constraint on the US side emerged from A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935), according to which "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested". However, only rarely has the Supreme Court invalidated laws as violations of the non-delegation doctrine.

63 This may be the case when the basic act already contains a delegation for the adoption of a delegated or implementing measure.

64 Dames & More v Regan, 453 US 654 (1981).

65 U.S. President Barack Obama, Executive Order 13609, 1 May 2012. http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf.

66 The White House, Joint Action Plan for the Canada-United States Regulatory Cooperation Council. http://actionplan.gc.ca/en/page/rcc-ccr/joint-action-plan-canada-united-states-regulatory.

67 International Trade Administration, U.S.-Canada Regulatory Cooperation Council. http://www.trade.gov/rcc/.

68 Ibid.

69 Final Report, High Level Working Group on Jobs and Growth, 11 February 2013.

largely be prompted by stakeholder requests. Ultimately, this mechanism should allow EU and US regulators to propose whether and how regulatory convergence should occur, without requiring either side to lower its preferred level of protection or to alter its basic administrative process.[70] Moreover, by embedding, for the first time, good regulatory practices into their respective systems, such as early information on planned regulatory acts and the identification of acts significant for the EU-US trade and investment relationship, they hope to increase the likelihood of convergence on both existing and new substantive regulatory standards.

Industry representatives seem correct when they argue, by relying on relevant studies, that large economies of scale could be achievable – without any loss of protection – by bringing US and EU regulators to explore more efficient and compatible means of promoting their joint, or separate, regulatory objectives. However, civil society organisations likewise have reason to fear that such a forum, if it is not carefully designed and thoughtfully crafted, may rather quickly turn into a plethora of additional advocacy avenues within the actual respective policymaking systems. Industry lobbies – rather than civic advocates – appear as the major beneficiaries of the mechanisms of regulatory cooperation discussed within TTIP. There is indeed a risk that those mechanisms may both ossify regulation with further analytical burdens and pressure regulators to question their appropriate level of protection. Such concerns are not myths – at least not those concerns – and should therefore not be easily dismissed by arguing – as the EU Trade Commissioner recently did in an *Op-Ed* – that TTIP and free trade are a "no-brainer".[71]

In particular, although TTIP is not set to alter existing regulations or to adopt joint standards, its horizontal coherence chapter – due to the commitment to the promotion of regulatory compatibility – may lead the regulators away from the previously agreed regulatory standards. In so doing, the innovative governance framework established by TTIP is inevitably set to "reopen" the legislative and rulemaking processes: Determining the equivalence of two separate sets of standards requires the regulator to go back to a previous internal decision. In other words, while an agreement reached within a regulatory dialogue – be it equivalence or mutual recognition – does not formally modify the domestic regulatory requirement – which remains unchanged *vis-à-vis* the domestic products or services, it implies a departure from it in relation to imported products or services.

It is thus imperative for TTIP negotiators to ensure, and for their respective publics to demand, that any process of cooperation among regulators built into the TTIP framework take into account each side's sovereign right to maintain the regulations necessary to uphold its own appropriate levels of protection, including its own desired level of precaution in the face of scientific uncertainty. More critically, the TTIP bilateral cooperation mechanism requires an inclusive, truly multi-stakeholder advisory process for both overall support and support for each sector in which active and substantial regulatory cooperation initiatives are undertaken. This process must include representatives of citizen, consumer and public interest groups who are nominated by these sectors through a public process. This will help not only to ensure that any changes to regulations aimed at promoting efficiency will not lead to a "race to the bottom", but also to guarantee the legitimacy and accountability of TTIP's bilateral cooperation mechanism.

The bilateral cooperation system led by a RCB, which is currently envisaged in TTIP, does not seem to be immediately irreconcilable with the existing mechanisms of democratic and political control. Rather, there appear to be promising avenues for connecting the incipient TTIP institutional framework with the existing consultation practices in both jurisdictions.[72] This appears all the more important when one considers the need – highlighted across the article – to enhance the level of political legitimacy and accountability of the horizontal coherence chapter envisioned by TTIP.

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[70] R. W. Parker & A. Alemanno, Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems, 88 Ceps Special Report (2014) at http://www.ceps.eu/publications/towards-effective-regulatory-cooperation-under-ttip-comparative-overview-eu-and-us.

[71] http://www.theguardian.com/commentisfree/2015/feb/16/ttip-transatlantic-trade-deal-businesses.

[72] This appears particularly true in the EU in the aftermath of the publication of the Better Regulation Package. This document, in particular, the Communication Better Regulation for Better Results, foresees the adoption of a set of actions enabling the EU Commission – and possibly the European Parliament and Council – to work more transparently and inclusively. See European Commission, Communication Better Regulaiton for Better Results, Strasbourg, 19.05.2015, COM(2015) 215 final.

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