TTIP Regulatory Cooperation

Changes in Transnational Risk Regulation from WTO Law and WTO-Consistency

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I. Introduction

The leaked TTIP documents reveal that the EU and US are discussing the introduction of a detailed set of procedural requirements for the adoption of regulatory measures. Default provisions are set forth in the chapter on regulatory cooperation, applicable to goods and services.[1] More specific provisions are being negotiated in the chapters on technical barriers to trade and on sanitary and phytosanitary measures. If they conflict with the regulatory cooperation chapter, they prevail.[2]

This article analyses the regulatory cooperation chapter insofar as it pertains to trade in goods but to the exclusion of SPS matters and anything provided in the TBT chapter itself.[3] The questions this article examines are to what extent the TTIP proposals expand upon the obligations the two parties have already taken on under WTO law and to what extent the resulting regulatory coordination is consistent with WTO law. It will be shown that the US proposals on procedure may constrain substantive regulatory discretion beyond what applies under the GATT and TBT Agreement of the WTO. It will also be shown that the needs to conduct trade impact assessments and a detailed explanation of the necessity of measures anticipate a legal challenge to necessity and will provide information of much use to complainants in meeting their burden of proof. Transatlantic regulatory cooperation at EU level will remain largely an affair of regulators without significant parliamentary involvement. It is furthermore argued, that the envisaged regulatory cooperation and any MFN-violations stemming from it could be difficult to justify under the GATT exception for FTAs. Lastly, the US proposal on Article X.5 may create third-party rights in non-TTIP states that regulatory procedures be designed with the objective of ensuring consistency with trade and investment law obligations. As a result of the increasing internationalization of supply chains and foreign direct investment, EU and US companies would benefit from such third-party rights. Full domestic regulatory sovereignty increasingly seems to be challenged by a new paradigm of shared regulatory sovereignty to which WTO law is not fully receptive.

The second section reviews the obligations of the EU and US under the WTO's GATT and TBT Agreement in respect of their design of national regulatory procedures. The third section analyses whether the proposals by the EU and US on the design of national regulatory procedures and on regulatory cooperation significantly alter the way risk regulation will be conducted and expand on their WTO obligations. The fourth section examines whether regulatory cooperation would be consistent with WTO law. The fifth section concludes.

II. The WTO Obligations in Respect of the Design of National Regulatory Procedures

The GATT only imposes a very limited set of procedural obligations. Its Article X creates an obligation to publish regulations once they are adopted. Article III:4 on national treatment of like imported products through domestic laws, regulations and requirements cannot be interpreted as applying to procedures for making regulations. Its reference to laws,

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1 Greenpeace Netherlands, " Initial Provisions forCHAPTER [ ] [EU: REGULATORY COOPERATION] [US: REGULATORY COHERENCE,
TRANSPARENCY, AND OTHER GOOD REGULATORY PRACTICES]" [hereafter: Leaked, consolidated TTIP chapter on regulatory cooperation/good regulatory practices], available on the Internet at https://ttip-leaks.org/ (last accessed on 31 May 2016), Article X.3.

2 Ibid., Article X.4.

3 For an elaborate discussion of the SPS chapter, see Alan Matthew's "Food safety regulation in TTIP: much ado about nothing?" in this volume.

regulations and requirements being applied in paragraph 1 suggests that paragraph 4 only refers to the substantive requirements applicable to the product and not to procedures for making regulations. As per the Decision on Notification Procedures, quantitative restrictions, product bans but also technical regulations have to be notified to the WTO.

The requirements imposed by the TBT Agreement are more far-reaching. Its Article 2.1 does not contain any qualification that it only concerns the application of technical regulations. It speaks about treatment 'in respect of technical regulations', which could be interpreted to include procedures, especially if Article 2.2 is taken as interpretive context. Article 2.2 makes clear that it applies to the preparation and adoption of technical regulations in its introductory first sentence. The first sentence does not set forth level obligations but it is nevertheless relevant as context for the interpretation of the TBT Agreement. However, the following operative obligation stipulates that technical regulations may not be more trade-restrictive than necessary to fulfil a legitimate objective. Annex 1 defines technical regulations as mandatory requirements on product characteristics or their related processes and production methods and including applicable administrative provisions. The obligation of Article 2.2 therefore extends to substantive regulatory requirements and not to procedures for defining such requirements. This suggests that Article 2.2 does not impose independent obligations on the design of regulatory procedures and that a dependent complaint about preparation or adoption procedures could at best be made only if it has led to the adoption of technical regulations not meeting the operative legal provision.

Article 2.5 mandates WTO members to explain the justification of a technical regulation in terms of avoiding unnecessary obstacles to trade at the stage of preparation or adoption of a technical regulation but only upon the request of another WTO member. Article 2.9.2 imposes an obligation to notify proposed technical regulations not based on international standards or with significant effect on trade and to provide a *brief* indication of the rationale and objective of each one. Article 2.9.4 makes it mandatory for WTO members to allow other WTO members reasonable time to make comments in writing, discuss these and take the comments and discussions into account without discrimination. A shortcoming of Article 2.9.4 is that it does not require explicitly the comment procedure to precede the adoption of the measure and that it allows a WTO member to take account of the comments but also the discussion, suggesting that there is wide discretion of the WTO member in selecting the reasons upon which it bases its technical regulations.

Demonstrating substantive compliance with the provisions of the GATT and of TBT Agreement is therefore in essence deferred to the stage of dispute settlement, entailing legal risks and costs for a complainant. It is the complainant's burden to suggest that the regulating WTO member could have taken less-trade restrictive alternatives that would also achieve that WTO member's level of protection. The defending party's right to set the level of protection autonomously has been upheld in a number of cases.[4] Absent detailed information from the regulator, it will often be difficult for the complainant to meet its burden. TTIP could possibly change these difficulties by requiring the regulating party to undertake trade impact assessments and to explain a regulation in detail prior to its adoption.

III. Rights and Obligations in the Leaked, Consolidated TTIP Chapter on Regulatory Cooperation/Good Regulatory Practices

The chapter on regulatory cooperation begins with a proposed preamble by the EU, which indicates the objective to strike a balance between economic objectives and regulatory protection but without compromising each party's right to adopt its own level of protection.[5] This language goes further than the objectives of the GATT and TBT Agreement because the right to regulate extends to each party's regulatory framework and principles, thereby encompassing the EU precautionary principle, which is not explicitly mentioned in the GATT and TBT Agreement.

The US proposes an Article X.5 on good regulatory practices, which would require each party to put

4 *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WTO Doc. WT/DS161, 169/AB/R, 10 January 2001, para. 180, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WTO Doc. WT/DS135/AB/R, adopted 5 April 2001, paras. 168, 172-174.

5 Leaked, consolidated TTIP chapter on regulatory cooperation/good regulatory practices, *supra* note 1, Article X.1.

in place mechanisms of internal coordination, consultation and review of regulations being developed with the objective of, inter alia, complying with international trade and investment obligations. Amongst other things, these obligations require that a measure is necessary to achieve the regulatory objective because it promotes its attainment and uses effective measures least-restrictive of trade. It is noteworthy that the objective is not limited to inter se trade and investment obligations of the EU and US but to all their trade and investment law obligations.[6] The EU or US as complainant could hence argue that even procedures which fail to pursue trade or investment law obligations in treaties with third states violate Article X.5. Article X.5 suggests that legal claims could be made purely on the basis of procedural defects, regardless of whether they actually lead to the adoption of substantively illegal regulations. It should, however, be noted that legislatures will likely be outside of the scope of the regulatory cooperation chapter as per US Annex X.B(2) but that the definition of 'regulation' in Annex X.A applies to EU Regulations and Directives.

Recall that Article X.5 mentions compliance with trade and investment law obligations as the objective to be pursued. This raises the question whether regulatory procedures which pursue objectives in conflict with the objective of trade and investment law compliance would violate this provision. This question can become particularly relevant if a party foresees direct participation of the public in regulatory procedures for the sake of allowing democratic input into regulatory decision-making. If such participatory procedures allow for the disregard of scientific evidence or the choice of more trade-restrictive alternatives because the public demands it, they could violate Article X.5 just as procedures. Such a result would obtain especially if the terms of Article X.5 are interpreted without giving much weight to the countervailing affirmation of the right to regulate in the preamble, which may also not be adopted in the end. Another instance where the stipulation of trade and investment law compliance as the goal to be pursued through regulatory procedures could become significant is in respect of procedures which lead to frequent regulatory changes as such procedures might be inherently unsuitable to protect an investor's legitimate expectations pertaining to the stability of the regulatory environment, which is an element of the fair and equitable treatment obligation in international investment agreements. Article X.5 might thus interfere with a party's well-recognized right in the GATT and TBT to select its level of protection autonomously insofar as they occur in regulation. An interesting legal question pertaining to a possible loophole will be whether violations of Article X.5 are possible if legislative acts such as framework legislation mandate the inconsistencies of regulatory procedures with Article X.5 since it does not apply to legislatures.

As regards the development of regulations, Articles X.6 and X.7 proposed by the EU go beyond Article 2.9.4 of the TBT Agreement only insofar as they have the effect of extending its disciplines to non-TBT regulations. The proposed Article X.7 refers to taking account the results of public consultations in general, thereby encompassing contributions from US companies but also EU companies and citizens and therefore leave maximal discretion to the regulator to identify the reasons upon which it will base a regulation.

Article X.8 on domestic regulatory transparency would require the regulator to make public data, scientific and technical analyses and regulatory impact assessments it relied upon and an explanation of how the regulation is supported by this evidence. Additionally, the regulating party has to provide an explanation of the regulation, its objectives, how the regulation achieves them and any alternatives being considered. This provision evokes the necessity test in GATT Article XX. The first part of Article X.8 would require the regulator to explain the scientific basis of regulations already at the stage of regulatory decision-making rather than only at the stage of dispute settlement as is the case under WTO law. Although the reference to analyses and impact assessments relied upon suggests that this is voluntary, the US proposes to make regulatory impact assessments mandatory through its Article X.13.

The US' proposal on Article X.13 requires parties to have procedures that promote the consideration of a number of factors studied by the impact assessment, which include the need for the regulation, its costs and benefits and the availability of regulatory alternatives.[7] The EU's proposal notably is weaker

6 Ibid., Article X.5 (b).

7 Ibid., Article X.14(3) creates an obligation for post hoc follow up on the regulatory impact assessments' estimate of costs and benefits and possibilities for regulatory improvements.

because it states that parties affirm their intention to carry out regulatory impact assessments, which is not the same as stating that parties must carry out such impact assessments. The actual goal of the impact assessment pursuant to the EU's proposal would be to consider how options for proposed regulations relate to relevant international instruments and impact on international trade or investment and take account of the other party's measures. These obligations are relatively weak because they do not require regulators to study the legality of the proposed measures nor do they require the final measure to be based on the result of the impact assessment. If Article X.5 were also adopted, there would thus appear to be a mismatch between the EU's proposal which allows for disregarding the results of impact assessments and the obligation in Article X.5 to put in place procedures whose goal is to comply with trade and investment obligations.

Concerning evidence-based decision making, the US is merely proposing soft law according to which each party should adopt mechanisms to seek robust evidence but for final decisions, the party shall publicly explain the rationale for the regulation, its relationship with the evidence and the reason for selecting the measure chosen amongst alternatives.[8] This provision, together with proposed Article X.5 and X.13 is an interesting attempt to introduce more science-based decisions into non-SPS and non-TBT measures through the backdoor of non-binding language and the cumulative effect of several provisions. Recall that the purpose of the regulatory impact assessments for the US should be to reveal 'the need for a proposed regulation, including the nature and the significance of the problem the regulation is intended to address.' This can of course best be demonstrated by scientific evidence but once it is available, the duty to explain the link between the evidence and the measure, coupled with the need to maintain procedures that promote compliance with trade and investment law obligations will likely make it very difficult to disregard that evidence. At a minimum, the three articles together will considerably facilitate the task of a complainant to attack regulatory measures as unnecessary for the regulatory objective.

Article X.15 proposed by the US would require each party to provide for any interested person to petition for the introduction, amendment or repeal of a regulation if it has become ineffective at protecting health, welfare of safety, if it has become unnecessarily burdensome for trade, if it fails to take account of changed circumstances or if it relies on outdated or incorrect information. Note that this provision could be used to petition for the introduction of stricter regulations. Its broad reference to 'any interested person' seems to include ordinary citizens. It would thus significantly lower the hurdles for Citizens' Initiatives in the EU, which are the current instrument to petition the EU to introduce new regulations but which require at least one million people from seven Member States and do not oblige the Commission to propose legislation.[9] At first, this democratic strengthening of risk regulation through a trade agreement might seem odd. It may, however, be the case that US companies have an interest in upward regulatory change in the EU in certain cases because they already comply with stricter regulations at home.

The subsequent parts of the leaked consolidated TTIP chapter on regulatory cooperation/good regulatory practices concern bilateral regulatory cooperation.[10] The EU proposes a bilateral cooperation mechanism (BCM) to support regulatory cooperation, bilateral information and exchanges on planned regulatory acts between regulators and competent authorities.[11] These can lead to a joint examination of mutual recognition, simplification of regulatory acts or harmonization based on international standards or bilateral approximation of laws where mutual benefits can be realised, without, however, compromising the level of protection of public policies.[12] An interesting legal question is who is to be considered a 'competent authority responsible for the regulatory acts' in the case of the EU. The general definition of a competent authority at central level in Article X.2(b) refers only to the European Commission but not the Council and European Parliament. As principals, they must hence take care to constrain a mandate of the Commission adequately in the regulatory cooperation.

8 Ibid., Article X.14(1) and (2).

9 European Commission, "A New Right for EU Citizens. You can set the Agenda. Guide to the European citizens' initiative.", available on the Internet at <http://ec.europa.eu/citizens-initiative/public/welcome?lg=en> (last accessed 31 May 2016), pp. 3 and 26.

10 Leaked, consolidated TTIP chapter on regulatory cooperation/good regulatory practices, *supra* note 1, Article X.22(1).

11 Ibid., Article X.18(1) and X.19(2) and (3).

12 Ibid., Article X.21.

Lastly, the EU proposes the establishment of the Regulatory Cooperation Body (RCB) to monitor and facilitate the implementation of the regulatory cooperation chapter and of specific sectoral provisions.[13] The RCB will draw up a work plan and consider new initiates for regulatory cooperation based on input from the parties or stakeholders.[14] It will also engage in the technical preparation of proposals for the update, modification or addition of sectoral provisions but without enjoying the power to adopt legal acts.[15] In terms of transparency and participation, minutes of the RCB are to be made public and there is to be at least one annual meeting with stakeholders who have the right to make submissions to the RCB and receive replies.[16] The mechanism where the real work on regulatory cooperation will be done will hence be the BCM and the RCB's sectoral committees and it is significant that there is no public access to these mechanisms. The democratic concern Alemanno has expressed in a recent publication hence has potential merit.[17] The argument that neither mechanism has power to adopt legal acts and that the outcomes require transposition is not enough to fend off an argument for greater democratic embedding where the EU transposition provisions do not foresee parliamentary involvement.[18]

IV. Consistency of Regulatory Cooperation with WTO Law

It has been argued that regulatory cooperation under TTIP would either lead to highest common denominator harmonization or diversity but not a lowering of standards.[19] Harmonised requirements between the EU and US could violate the Most-Favoured Nation obligation in Article I:1 of the GATT if they produce disparate impacts on other WTO countries or if they are accompanied by recognition of each other's testing systems that is denied to other WTO members.[20] Inconsistencies with GATT obligations can be justified if compliance with Article I:1 were to prevent the formation of a free trade area or in respect of an interim agreement necessary for the formation of a free trade area, which has on the whole not imposed more restrictive regulations of commerce vis-à-vis the other WTO members than those which existed prior to the free trade agreement.[21]

It is unlikely that MFN violations would be constitutively necessary for the formation of TTIP since the trade liberalization achieved absent the MFN violation is likely sufficient to induce the parties to sign TTIP and keep it going.[22] If TTIP were considered as an interim agreement, it would have to be shown that TTIP is necessary for the formation of a free trade area but this does not imply that a possibility for regulatory harmonization it creates and the precise results thereof are also justified. Moreover, if TTIP leads to a systematic harmonization at the highest level of protection in some areas and otherwise preserves the status quo of regulatory diversity, it will impose greater restrictions on trade with non-members to TTIP.[23] If so, an Article XXIV defence might not be available to TTIP regulatory cooperation. If Article XXIV is unavailable common, harmonized standards between the EU and US would have to be justified under the general exceptions in GATT Article XX as being necessary to protect health or human lives, for instance. At least in respect of the TTIP party which converts to the more restrictive regulation as a result of harmonization, this required substantive justification in terms of risk may fail whenever no new evidence emerges about higher risks or lesser effectiveness of the laxer risk mitigation measures previously deemed suitable. To avoid this, the TTIP parties have every interest in producing convergent expert assessments confirming the necessity of more restrictive regulations in both parties.

Turning to the TBT Agreement, its Article 2.1 might encompass MFN discriminations through differences in regulatory procedures since it refers to

13 Ibid., Article X.23.

14 Ibid., Article X.23(2) (a) and (d).

15 Ibid., Article X.23(2)(c).

16 Ibid., Article X.23(5) and X.24.

17 Alberto Alemanno, "The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences", 18 *Journal of International Economic Law* (2015), pp. 624 et sqq, at pp. 627, 635-637.

18 Ibid., at 636.

19 Jonathan B. Wiener and Alberto Alemanno, "The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory", 78 *Law and Contemporary Problems* (2015), pp. 101 et sqq., at p. 102.

20 More advantageous procedures might violate Article 2.1.

21 GATT, Article XXIV:5.

22 For an explanation of this requirement in the WTO Turkey-Textiles case, see Robert Howse, "Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?", 78 *Law and Contemporary Problems* (2015), pp. 137 et sqq., at 142.

23 Ibid..

treatment in respect of technical regulations as opposed to treatment *through* technical regulations or their application. If distinctions or disparate impacts stem from legitimate regulatory distinctions, they would not violate Article 2.1. However, the TBT Agreement does not contain any exceptions for free trade areas or a reference to free trade areas as legitimate objectives. Howse has convincingly argued that discriminations imposed by free trade areas cannot be seen as being based on legitimacy regulatory distinctions through a careful contextual analysis of the TBT Agreement.[24] It is also unlikely that violations of Article 2.1 of the TBT Agreement on MFN grounds in the pursuit of a free trade agreement could find a justification through an application of GATT Article XXIV to the TBT Agreement.[25]

Relatedly, an interesting international law question emerges from the proposed obligation in Article X.5 to design regulatory procedures in pursuit of the objective of compliance with trade and investment obligations. Since this reference is not limited to obligations between the two parties, it might be read as a provision creating rights in third parties. The Vienna Convention on the Law of Treaties' Article 36(1) assumes these are assented to unless explicitly rejected.[26] It should also be noted that these rights would actually become judicially enforceable in front of the International Court of Justice in respect of measures of general applicability developed by agencies or ministries of those EU Member States that have accepted its compulsory jurisdiction as per Article 36(2) of the Statute of the International Court of Justice since certain national regulatory measures are within the scope of the TTIP regulatory cooperation/good regulatory practices chapter.[27] Only France, Croatia, the Czech Republic, Latvia and Slovenia have not accepted and neither has the EU itself. Note also that the US has not accepted the ICJ's compulsory jurisdiction and has therefore taken on a lesser obligation.

When it comes to the regulatory procedures for transposition of the outcomes of regulatory cooperation, the two parties might thus be under an obligation to design the procedures in such a way that the outcomes can be reviewed for their WTO-legality in terms of GATT Articles I:1, XXIV:5 and XX and the other Annex A1 Agreements and adjusted if they would be WTO-illegal. For regulatory acts by agencies or ministries at the level of EU Member States and conceivably also for their transposition of EU Directives, this obligation would even be judicially enforceable. Additionally, where harmonization results from a transposition of regulations previously enacted by one TTIP party to which the duty to conduct trade impact assessments already applied as per TTIP, its disciplines on the design of national regulatory procedures contribute to generating evidence for the GATT Article XXIV:5 assessment on whether restrictive regulations of commerce become higher than prior to the formation of TTIP. Ironically, the regulatory cooperation/good regulatory practices chapter thus carries the seeds of making the underenforced WTO disciplines on preferential free trade agreements more effective. The regulatory cooperation chapter should thus undoubtedly limit the potential for GATT MFN-violations at least in respect of regulatory acts at EU Member State level. This alone cannot make the outcomes of regulatory cooperation compliant with GATT Article XXIV:5(b), however, firstly because its obligations pertain to the substantive trade-effects of regulations and not their procedures of adoption and secondly because neither the US nor the EU itself are subject to the compulsory jurisdiction of the ICJ, which might prevent inconsistencies with GATT Article XXIV:5(b) through the shadow of enforcement.

V. Conclusion

The leaked document reveals the EU's emphasis on the right to regulate and its interest in regulatory cooperation while the US wants to be tougher on observing trade law disciplines including through cost-benefit analysis but also champions the right to petition for new or amended legislation. If the US proposals go through, the analysis of trade impacts in

24 Ibid., at pp. 143-148.

25 The fact that the Appellate Body crafted the legitimate regulatory distinctions test onto TBT Article 2.1 in *United States-Measures Affecting the Production and Sale of Clove Cigarettes*, Appellate Body Report, WTO Doc. WT/DS406/AB/R, 4 April 2012, paras. 175, 181-2 suggests that it does not consider that a TBT violation could be 'cured' through the application of GATT and in casu Article XX.

26 22 May 1969, in force 27 January 1980, United Nations Treaty Series 331.

27 The list of states which have recognised the compulsory jurisdiction of the ICJ is available at <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> (last accessed 31 May 2016). The scope of application of the TTIP regulatory cooperation chapter is defined in Annex X.A and X.B(1)(b)(ii).

regulation will acquire greater weight relative to other concerns[28] and necessity discipline in trade law will become much more justiciable. The democratic credentials of the BCM and RCB are of some concern. Lastly, regulatory harmonization between the EU and US could lead to MFN violations under WTO law, for which an Article XXIV defence and possibly an Article XX defence may not be available. It has also been suggested that Article X.5 might create rights for third states related to the design of EU and US regulatory procedures. Making TTIP's benefit non-exclusive might seem odd from a strategic perspective of enticing third states to join the 'TTIP club' later on. However, thanks to foreign direct investment in third states, the claimant whom such rights might actually benefit could be US or EU companies investing in third states. Additionally, thanks to the internationalization of supply chains and trade in tasks, US and EU domiciled companies might have an interest in getting market access for inputs from third states. This raises the interesting, more conceptual question whether the notion of domestic regulatory sovereignty still is much of a concept for the future or whether trade in tasks and investment flows inaugurate shared regulatory sovereignty[29] and how to assess WTO law constraints on regulatory cooperation in that respect *de lege ferenda*.

28 Similarly, Christiane Gerstetter, "Regulatory Cooperation under TTIP- A Risk for Democracy and National Regulation?", Heinrich Böll Stiftung TTIP Series, 2014, available on the Internet at <https://www.boell.de/sites/default/files/ttip_study_regulatory_cooperation_under_ttip_1.pdf> (last accessed 31 May 2016), pp. 2 and 32.

29 Bernard Hoekman, "Trade Agreements and International Regulatory Cooperation in a Supply Chain World", EUI Working Paper RSCAS 2015/04", available on the Internet at < http://cadmus.eui.eu/bitstream/handle/1814/34207/RSCAS%202015_04.pdf ?sequence=1> (last accessed 31 May 2016) pp. 6-8 argues shared sovereignty is needed because of the internationalization of supply chains.