Food Safety Regulation in TTIP: Much Ado About Nothing?

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I. Introduction

Disputes over food safety standards – what in the language of trade policy are called sanitary and phytosanitary standards (SPS) – have been at the heart of many transatlantic trade rows between the US and the EU. Examples include the EU bans on the import of hormone-treated beef, on pork treated with growth-promoting additives, or on poultry washed in antimicrobial rinses to reduce the amount of microbes on meat.[1] As a result, the potential impact of the ongoing negotiations to reach a Transatlantic Trade and Investment Partnership (TTIP) free trade agreement between the US and EU on EU food standards has, rightly, attracted a lot of attention and no little anxiety.[2] Opposition to "Chlorhühnchen" has become the rallying-call for anti-TTIP activists in many countries.

NGOs argue that "TTIP will sacrifice food safety for faster trade".[3] Critics highlight possible procedural rules requiring transparency of decision-making and early warning mechanisms which would give interested parties (including of course business firms and lobby groups) the opportunity to comment on planned rule-making which it is argued are likely to lead to 'regulatory chill'. Proposals for a joint committee of the competent regulatory authorities to exchange information and discuss SPS issues which the other side believes are a trade concern are viewed as tantamount to "transferring power from national authorities to a committee of experts, potentially including industry representatives".[4]

These claims are, unsurprisingly, rejected by the official side. The EU Commissioner for Trade Cecilia Malmström affirmed during her confirmation hearing before the European Parliament and many times since that TTIP "cannot be about lowering standards, but about avoiding extra costs – the costs entailed for example in the duplication of factory inspections and unnecessary divergences of approach."[5] Referring to criticism by Greenpeace following its leak of the consolidated texts of a number of chapters of the TTIP agreement under negotiation,[6] Commissioner Malmström reiterated, once again, that "No EU trade agreement will ever lower our level of protection of consumers, or food safety, or of the environment. Trade agreements will not change our laws on GMOs, or how to produce safe beef, or how to protect the environment."[7]

Nonetheless, the fears among consumers that TTIP will lead to changes in EU food safety standards to accommodate US export interests are understand-

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1 Timothy Josling and Stefan Tangermann, *Transatlantic Food and Agricultural Trade Policy: 50 Years of Conflict and Convergence* (Cheltenham, UK: Edward Elgar Publishing), 2015.

2 See, for example, BEUC, "Food and the Transatlantic Trade & Investment Partnership (TTIP)", 7 May 2014, available on the internet at http://www.beuc.eu/publications/beuc-x-2014-030_ipa_beuc_position_paper_ttip_food.pdf (last accessed 29 May 2016); Friends of the Earth Europe, "How TTIP undermines food safety and animal welfare", 4 February 2015, available on the internet at https://www.foeeurope.org/how-TTIP-undermines-food-safety-animal-welfare-040215 (last accessed 29 May 2016); GRAIN, "Food Safety in the EU-US Trade Agreement: going outside the box", 10 December 2013, available on the internet at https://www.grain.org/article/entries/4846-food-safety-in-the-eu-us-trade-agreement-going-outside-the-box (last accessed 29 May 2016).

3 James Crisp, "TTIP will sacrifice food safety for faster trade, warn NGOs", 28 August 2014, available on the internet at http://www.euractiv.com/section/health-consumers/news/ttip-will-sacrifice-food-safety-for-faster-trade-warn-ngos/ (last accessed 29 May 2016).

4 Friends of the Earth Europe supra, note 3.

5 European Parliament, "Highlights from the European Parliament Hearing of Cecilia Malmström European Commissioner for Trade", 29 September 2014, available on the internet at http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536417/EXPO_BRI(2014)536417_EN.pdf (last accessed 29 May 2016). See also the DG Trade Fact Sheet, "Food safety and animal and plant health in TTIP", 7 January 2015, available on the internet at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153004.3%20Food%20safety,%20a+p%20health%20%28SPS%29.pdf (last accessed 26 May 2016).

6 Greenpeace, "TTIP Leaks", 1 May 2016, available on the internet at https://ttip-leaks.org/ (last accessed 29 May 2016).

7 Cecilia Malmström, "Negotiating TTIP", 2 May 2016, available on the internet at https://ec.europa.eu/commission/2014-2019/malmstrom/blog/negotiating-ttip_en (last accessed 29 May 2016).

able in the light of the injudicious and over-ambitious early claims made by advocates for TTIP in their attempt to build political momentum behind an agreement. The claim that the negotiations would lead to a transatlantic internal market suggested, analogous to the EU single market, that US goods would have automatic access to the EU. The assertion that TTIP rules would be the gold standard for health, safety and environmental protection for trade for the world as a whole implied that TTIP negotiators would set harmonised rules across these areas. Nor did economists help by defining all regulatory differences in their economic modelling as 'non-tariff barriers' which should be swept away if the potential economic gains from an agreement were to be achieved.

The leak of the consolidated text of the SPS chapter provides an opportunity to examine these opposing viewpoints.[8] It is important to keep in mind that the consolidated text is not a negotiated outcome. A consolidated text simply arranges in a systematic way the negotiating positions of both Parties under each topic. Nonetheless, the text allows us to see what each side is demanding and how it is approaching the negotiations. It allows us to see the size of the gap that exists, but not necessarily where, and whether, that gap will be bridged.

While this viewpoint examines the rights and obligations that might be created by the TTIP SPS chapter, commitments made in this chapter must be read in the light of other chapters in a possible TTIP agreement, particularly the chapter on Regulatory Cooperation or Regulatory Coherence (RC) and the chapter on Dispute Settlement to the extent that it will cover commitments in the SPS chapter. The latter chapter mainly describes the institutional procedures to handle disputes and the approaches of both Parties are closely modelled on existing WTO procedures. As in the WTO, if there is a finding against a Party, it is expected to bring itself into compliance but there is no fully effective way to force it to do so. A trade panel cannot force a Party to change its regulations against its will, although as in the WTO an adverse finding allows the other Party to suspend concessions to an equivalent value in retaliation.

The main purpose of the proposed RC chapter is to affirm that both Parties will adhere to good regulatory practice.[9] This includes giving information on planned regulatory acts, providing opportunity for stakeholder consultation, undertaking an impact assessment, engaging in regulatory exchanges of information, encouraging the pursuit of regulatory compatibility where mutual benefits can be realised without compromising the achievement of legitimate public policy objectives, and promoting international regulatory cooperation. The US proposal on these matters is more detailed and prescriptive than the EU one, but as the EU's tactical assessment of the state of the negotiations in March 2016 notes: "it is safe to say that provisions tabled by both the EU and US are complementary in many respects and could form the basis for identifying common ground".[10]

II. The SPS chapter

The March 2016 consolidated text contains 22 articles plus an introduction setting out the objectives of the chapter which has been proposed by the EU. In addition, the EU has proposed an article on anti-microbial resistance within the SPS chapter which does not appear in the consolidated text.[11] A brief summary of the content of each article follows.

Objectives. The EU's proposal for chapter Objectives sets out its view that the purpose of the SPS chapter is to facilitate trade by removing unnecessary barriers "while preserving each Party's right to protect human, animal or plant life and health in its territory and respecting each Party's regulatory systems, risk assessment, risk management and policy development processes".

1. **Scope and coverage.** This article specifies that the chapter applies to all SPS measures between the parties while the EU wants animal welfare matters also to be covered.

2. **Affirms each Party's rights and obligations under the WTO SPS Agreement.** The EU wants to add

8 The consolidated texts leaked by Greenpeace Netherlands refer to the state of play in March 2016 prior to the 13th round of negotiations at the end of April 2016.

9 Alexia Herwig, "TTIP Regulatory Cooperation: Changes in Transnational Risk Regulation from WTO Law and WTO-Consistency", this volume, discusses the potential consequences of the RC chapter in detail.

10 Greenpeace, "Note – Tactical State of Play of the TTIP Negotiations – March 2016", 1 May 2016, available on the internet at https://ttip-leaks.org/ (last accessed 29 May 2016).

11 DG TRADE, "EU proposal to include an article on Anti-Microbial Resistance within the SPS Chapter of TTIP", 6 November 2015, available on the internet at http://trade.ec.europa.eu/doclib/html/153936.htm (last accessed 26 May 2016).

"Nothing in this Chapter shall limit the rights or obligations of the Parties under the Agreement established by the World Trade Organization and its Annexes." This could be read as making WTO law, and possibly also judicial interpretations of its agreements, applicable in TTIP.

3. **Competent Authorities.** This article commits each Party to notify the other of the competent authorities for SPS matters.

4. **Equivalence.** Both parties recognise that determining equivalence can facilitate trade. Both parties agree to an annex which would set out the procedures to be followed to determine equivalence (though the annex itself is not yet agreed). The EU, in addition, would like an annex setting out specific areas where agreement on equivalence has been reached. This annex would presumably contain the 1998 Veterinary Equivalency Agreement and the Organic Equivalency Agreement agreed in 2012, but is unlikely to contain more at this point in time,

5. **Science and risk.** This article is tabled by the US with the proviso that additional provisions aimed at improving the use of science in SPS decision-making will be considered. Because of the sensitivity of this issue, I discuss it in more detail later.

6. **Adaptation to regional conditions in case of a pest or disease outbreak.** In principle both Parties are in favour and seek to operationalise better how this should work in practice.

7. **Transparency.** This is mainly about notifying the status of SPS issues and communicating the results of SPS decisions to the other Party. The US side, in addition, proposes that the text of proposed SPS regulations should be made available for comment prior to adoption in line with its general approach to science and risk set out in Article 5.

8 and 9. **Elimination of redundant control measures and audits and inspections.** The EU proposes that each Party would accept that the other Party's competent authority is responsible for ensuring that products and establishments meet the SPS standards of the importing Party and would not require re-inspection, third party certification or additional guarantees. Of course, this could not be a carte blanche, and hence Article 9 provides for a system of audit and verification of the control systems implemented by these competent authorities.

10. **Export certificates.** This article deals with the matter of certificates that should accompany the export of an agri-food product (e.g. health certificates for live animals) and aims to ensure that certificates should be as simple as possible and only used when necessary.

11. **Trade facilitation.** This article proposed by the EU deals with trade facilitation procedures, or what happens to an agri-food consignment when it enters the importing country. Inspection and control procedures should be kept to a minimum. Specifically, the EU proposes that the Parties would adopt the tolerances and maximum residue levels adopted by the Codex Alimentarius Commission unless the importing Party has signalled a reservation in the Codex.

12. **Regulatory approvals for products of modern agricultural technology.** This article proposed by the US deals with GMOs (or what the article refers to as the products of modern agricultural technology). As fears that TTIP would overturn EU rules on GMOs are widespread, I also discuss this proposal in more detail later.

13. **Import checks and fees.** This article deals with the question of import checks, and sets out principles for the frequency rate, notification obligations and the level of fees that can be charged.

14. **Application of SPS measures.** This article proposed by the EU seeks to make clear that SPS decisions apply across the whole territory of each partner. The EU wants to avoid a situation where individual US states might introduce additional SPS restrictions.

15 and 16. **Joint SPS Committee and technical working groups.** These articles set out each Party's views of how a joint committee on SPS matters might function, with the US proposing (in Article 16) a number of additional technical working groups on specific issues (the EU also proposes technical working groups but in Article 15). The intention is that the Committee and/or its working groups would provide a forum where trade concerns arising from SPS measures could be discussed. The Committee would not be a decision-making body but it would be expected to trigger initiatives which would be taken up by the competent authorities of both Parties using their regular procedures.

17. **Technical consultation.** Alternative proposals are made by the EU and the US. Technical consultations are essentially the same idea as regulatory exchanges in the RC chapter although the obligations would go further for SPS exchanges. The article proposed by the EU proposes that the other Party can request technical consultations if "it has significant

concerns regarding food safety, plant health, or animal health, or regarding a measure proposed or implemented by the other Party". However, under the EU proposal not only is the Party required to give a response, but this should be made within 15 days. Also, there would be an obligation that "Each Party shall endeavour to provide all relevant information necessary to avoid unnecessary disruption to trade and to reach a mutually acceptable solution".

The US proposal is more prescriptive. Apart from a longer timeframe for consultations than in the EU proposal, it introduces the idea of a facilitator (an idea borrowed from the US process of negotiated rule-making).[12] This would be an expert brought in to help the parties to resolve the concerns expressed. However, this expert would be expressly forbidden from commenting on the consistency of the measure at issue with either the TTIP or WTO Agreements. The only obligation on a Party is to seek to resolve concerns over an SPS measure through technical consultations prior to initiating dispute settlement proceedings under the TTIP Agreement.

18. **Emergency measures.** Allows for provisional emergency measures necessary for the protection of human, animal or plant health.

19. **Animal welfare.** This is of course an EU proposal. It is a short article with three substantive obligations based on the recognition that animals are sentient beings. Parties would undertake to respect trade conditions for live animals and animal products that are aimed to protect their welfare. Parties would undertake to exchange information, expertise and experiences in the field of animal welfare with the aim to align regulatory standards related to breeding, holding, handling, transportation and slaughter of farm animals. And Parties would strengthen their research collaboration in animal welfare. Even if the US were to accept these objectives, it might still query whether the SPS chapter is the appropriate place in the agreement for this article.

20. **Collaboration in international fora.** This EU proposal commits the Parties to collaborate in international fora with a view to reaching mutually satisfactory outcomes.

Articles 21 and 22 are technical articles which terminate the Veterinary Agreement and set out definitions, respectively.

Anti-microbial resistance (AMR). Though not included in the consolidated text, the EU made a proposal on AMR at the end of 2015. This recognises the serious and transnational nature of AMR, and proposes a technical working group charged with a dedicated work plan on reduced use of antibiotics in animal production to combat antibiotic resistance.

III. Science and Risk

The US proposal on science and risk deals both with risk assessment (identifying the extent of any risk) and risk management (identifying the appropriate response to the risk). In the EU these responsibilities are divided between the European Food Safety Auhtoriy (EFSA) (responsible for risk assessment) and the Commission supervised by the member states and the European Parliament (responsible for risk management), together referred to as the competent authorities.

The US article would require the competent authorities (a) to take into account comments from interested parties (b) to discuss comments made by the other Party (c) and give reasons when making their decisions including why alternatives put forward by other parties were rejected. Note that there is no reference to eliminating the precautionary principle in the US proposal; indeed, there is no reference to the precautionary principle at all.

NGO critics are alarmed that this consultation requirement "would allow American firms to influence the content of EU laws". They fear that allowing US firms and lobby groups to submit comments to EFSA during its risk assessment process and requiring the EU Commission publicly to state the reasons for adopting one form of regulation rather than another will lead to a weakening of EU standards of food safety. While it would be naïve to dismiss the self-interest of US firms and their formidable lobbying capacity, the EU accepted obligations in the WTO SPS Agreement (e.g. Article 5.4 provides that when adopting SPS measures Members should take into account the objective of minimising negative trade effects, while Article 5.8 provides that a Member must provide an explanation where another Member disagrees with an SPS decision that it has made and re-

12 On negotiated rule-making in the US, see Richard Parker and Alberto Alemanno, Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems, Special Report No. 88, (Brussels, Centre for European Policy Studies), 2014.

quests it) without any evident diminution of food standards since 1995 (when these obligations took effect).[13]

If there is a fear that the EU risk analysis system (including risk assessment, risk management and risk communication) can be unduly influenced by industry lobbying, this surely applies to EU firms as much as US firms. The solution should be to strengthen the independence, integrity and democratic oversight of the EU risk analysis system where this is warranted, rather than to exclude particular viewpoints from the process *ex ante*. It also needs to be underlined that these obligations would be a two-way street. The provision (which at this stage is just a US proposal) would also give EU firms (and NGOs) the right to intervene in the US rule-making process which would be an important benefit from an agreement.

A rather intrusive proposal (paragraph 6 of this Article), in cases where "a regulatory authority of a Party submits a proposal for an SPS measure for approval by a committee comprising national representatives" (which is a clear reference to the EU comitology procedure for risk management), and the committee rejects or modifies the proposal, would require each individual member of the committee to give a public explanation of why it has rejected or modified the proposal. Although this is often the case at present, it should be sufficient for the regulatory authority itself to provide this explanation on behalf of the body as a whole.

IV. Regulation of GMOs

The US proposal is that each Party should make its risk assessments of GM traits publicly available (as is already the case in the EU) and to keep to the timeline set out for authorisation or approval (which in the EU process has been prone to arbitrary delays).[14] It also proposes a joint working group on products of modern agricultural technology made up of officials from the competent authorities including the regulatory agencies to discuss trade issues that might arise as well as to consult on future standard-setting efforts.

It is hard to make the case that these US proposals would overturn the existing EU GM regulatory regime or even significantly affect it. While maintaining the prescribed timeline for approvals would be a departure from current practice, in the case where this does not happen the draft US text merely requests that the other Party should provide an explanation for the delay and update the timeline for the remaining steps.

One potentially controversial element in this article is that the US proposes that each Party should participate in the Global Low Level Presence Initiative (GLLPI) to develop an approach to manage low-level presence in order to reduce unnecessary disruptions affecting trade. The GLLPI was initiated by Canada in 2012 and now has 14 member countries, with the EU currently participating as an observer. Low-level presence (LLP) refers to the unintentional or inadvertent mixing of a transgenic crop (for example, through dust or residues in a transport container) not approved in the importing country in a shipment that otherwise would be permitted. With a growing number of GM crop varieties being approved around the world, risks of LLP increase.

The EU currently has a zero-tolerance of LLP for GM varieties approved in other countries but not approved in the EU (technically, the threshold is set at 0.1% as the lowest amount that has to be reliably detected). Countries in the GLLPI are pushing for significantly higher thresholds, perhaps up to 5% under specified conditions. Whether the EU should take a more relaxed view of LLP in future is clearly a matter for the competent authorities in the EU. Obligating the EU to take part in GLLPI discussions on this issue might be seen as the thin end of the wedge by those opposed to any relaxation of the current zero-tolerance threshold, even if it does not in itself predetermine the outcome.

V. Concluding Thoughts

In discussing the significance of the SPS Chapter in the proposed TTIP Agreement for EU food safety standards, one cannot emphasise enough that all we

13 Herwig (supra, note 10) notes with respect to similar provisions in the RC chapter that the requirement to lay out the basis for a specific regulation could make it easier for a complainant to attack regulatory measures as unnecessary for the regulatory objective. Also, the WTO Article 5.8 is a soft law obligation which refers to "should" rather than "shall" which leaves room for other concerns to be taken into account.

14 Complaints about undue delays in the completion of the EC approval procedures were upheld by the WTO panel in the *EC-Biotech* case.

have at the moment is a consolidated text setting out the views of both Parties. We do not have a final negotiated outcome. In a final agreement there could be issues that are not yet flagged in the consolidated text. On the other hand, the positions in the consolidated texts are the initial starting points of both parties in the negotiations. We might expect the US position in the consolidated text to be even more demanding and extreme than what the EU might accept as part of the final outcome while, conversely, the EU may not succeed in having its proposals incorporated into the final text.

With these qualifications in mind, my initial response to reading the consolidated SPS chapter is how banal it all is compared to the fears expressed by anti-TTIP activists as well as the claims of TTIP advocates. It is not the case, as often alleged, that either the TTIP Agreement or trade officials in the future under a TTIP Agreement would make decisions on food safety standards. These will continue to be taken, as now, by the member states or the Commission taking into account the advice of the European Food Safety Agency (EFSA). What TTIP seeks to do is to agree common rules on how aspects of the standard-setting process in each Party might work in the future, particularly in terms of good regulatory practice, and to encourage regulatory exchange and cooperation to try to minimise unnecessary differences in standards in the future.

This is not to say that the process obligations would not have implications for EU decision-making on food safety. It is possible to see bogeymen behind every paragraph where particular obligations are mentioned, and this seems the preferred approach of anti-TTIP activists. The new procedures would provide for more information and regulatory exchange, more consultation and more reasoned evidence, but, in the language of the EU proposal, they would respect "each Party's regulatory systems, risk assessment, risk management and policy development processes".

On the other hand, a TTIP agreement holds out the opportunity to reduce some of the unnecessary costs from trade procedures that do nothing to enhance food safety on either side of the Atlantic. The provisions would help EU firms, for example, to challenge US rules which add additional costs to EU exports without contributing to improving food safety in the US. And for these benefits a balanced agreement is worth pursuing.