



The Democratic Implications of the Transatlantic Trade and Investment Partnership

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In the current stage of European economic, social and political integration, very few subjects are capable of crossing the national borders and prompt a genuine pan-European public debate. Since the last EU parliamentary elections, the on-going negotiation of a Transatlantic Trade and Investment Partnership (TTIP) one of those happy exceptions. Given its ambition, novelty and potential disruptive nature on future global economic governance, this result is not a cause of surprise. Despite the mounting attention and degree of contestation elicited by this international agreement, the public debate surrounding its negotiations appears largely polarized. Supporters of TTIP – such as industry groups and some EU Member States – praise the economic benefits it could bring about to companies – notably SMEs – employers and consumers. Critics instead – essentially civil society organisations, trade unions but also some Member States – highlight the high social costs that might ensue from TTIP’s alleged lowering of regulatory standards. Unfortunately neither vision seems to do justice to the nature, ambition and realities of such an agreement. In turn, the media and the political class unwisely contribute to misinform and amplify concerns by focusing on some selected aspects – such as the transparency of the negotiations or the inclusion of an Investor-State Dispute Mechanism (ISDM) – that paradoxically might not be the most problematic of the agreement. To debunk some myths and possibly contribute to a more informed debate, a few fundamentals must therefore be asserted.

First, TTIP is not occurring in a vacuum. For decades the members of the World Trade Organisation have concluded selective agreements with other members aimed at more deeply integrating their economies. These schemes, generally referred to as Regional Trade Agreements (RTAs), vary in nature, scope and number of countries involved and range from Free Trade Agreements (such as Nafta) to Custom Unions (such as the Andean Community) to Common Markets (such as Mercosur). Today TTIP symbolizes the emergence of a ‘new generation’ of trade agreements, often referred to as “mega-regionals”, such as the Comprehensive Economic and Trade Agreement (CETA), recently concluded by Canada and the European Union, and the Trans-Pacific Partnership (TPP) signed by 12 countries in North America, Asia and the Pacific¹. These most recent efforts have been driven by the trade liberalization agenda, which views domestic regulatory action (also referred to as non-tariff barriers) as a factor impeding international trade. Given the rapidly shifting geopolitical landscape and the current inability of the WTO and other trade arrangements to effectively address nontariff barriers, an increasing number of countries, in particular economic superpowers, such as the EU and the US, are willing to go beyond traditional international treaty-making to explore new avenues of international regulatory cooperation. That is where TTIP comes from.

Second, TTIP is expected to deliver more than any previously established transatlantic free trade area. Unlike traditional trade agreements, its focus is on removing not only the barriers existing at the border, such as custom duties, but also those barriers to trade stemming from the existence of different regulatory frameworks, in areas as diverse as chemicals, environment and public health protection². What TTIP and other new generation trade agreements have therefore in common is

¹ Between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, Vietnam.

² See e.g. EU Proposal for a Chapter on Regulatory Cooperation, originally published on February 10, 2015 available at http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf as amended on May 4, 2015 and available at http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf. For the CETA Chapter on Regulatory Cooperation, see http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. For the TTP provisions devoted to regulatory coherence, see <https://medium.com/the-trans-pacific-partnership/regulatory-coherence-6672076f307a#sm60ici5q>

that, by building upon the WTO minimum requirements for trade liberalization, they coordinate the activity of the respective regulators in the exercise of their regulatory autonomy. In addition to the commitment to eliminate tariffs – typical of any Free Trade Agreement –, countries commit to follow a set of common procedures when adopting or revising domestic policies so as to reduce the risk of divergence. The final objective is to enable policymakers to harmonize their regulations or, more likely, mutually recognize their differing regulations as essentially ‘equivalent’ to domestic requirements. Thus, for instance, an imported product – be it a cosmetic, an organic fresh produce or an automotive component – from country A could be placed into the market of market B even though it does not comply with the regulatory requirements of country B (but only with A). The idea is to not only reduce regulatory barriers but also to improve regulatory coherence so as to increase trade flows among each other. As a result, TTIP can be seen as an innovative, permanent mechanism enabling the respective regulators to enter into ad hoc dialogues aimed not to jointly regulate but to determine whether their regulatory answers to the same problems may result compatible.

Third, unlike any previous trade arrangement, TTIP is set to become a ‘living agreement’, whose obligations will continuously be added without the need to re-open the initial international treaty nor to modify each others’ institutional frameworks. Thus, should the regulators identify areas for convergence (such as marketing authorizations for pharmaceuticals or technical standards for car headlights), their agreed commitments – be it in terms of mutual recognition, equivalence or best practices – will become legally binding through a sectoral annex to the agreement.

By epitomising the transformative nature of TTIP, its regulatory cooperation chapter should draw most of public opinion’s attention. Indeed, although TTIP is not supposed to alter existing regulations or lead to the adoption of joint, Transatlantic standards, its cooperation mechanism – due to the commitment to regulatory coherence – nudges the regulators away of the previously agreed regulatory standards. In so doing TTIP is inevitably set to reopen the legislative and rulemaking processes: determining the equivalence of two separate sets of standards requires going back to a previous internal political 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 product or service –, it implies a departure from it in relation to the imported products or services. This may prompt fundamental accountability problems as the operation of TTIP may result in regulatory processes that gradually appear detached from the previously agreed policy choice and therefore the policy preferences of the regulated.

As recently put by WTO former director general Pascal Lamy, the emergence of this new generation trade agreements signals the shift from an old world of trade where production systems were national and obstacles to trade consisted in sheltering them from foreign competition (through protectionism) to a new world of trade characterised by transnational production along global supply chains of goods and services in which obstacles to trade are about protecting consumers from risks³. In his view, this would explain why we are moving from the ‘administration of protection’ to the ‘administration of precaution, security, safety, health and environmental sustainability’. It is only by coordinating regulators’ activity that countries are able to overcome obstacles to trade. Yet, as we move away from the old divide between tariffs and non-tariff measures and we enter into this new, more complex world of trade, we stumble upon a potential clash between trade liberalization efforts and the exercise of sovereign power, in particular in relation to regulatory autonomy, i.e. the freedom to shape policies as they best fit each countries’ preferences.

³ Pascal Lamy, Looking Ahead: The New World of Trade, Jan Tumlir Lecture, ECIPE, Brussels, 9 March 2015.

The premise of this innovative approach to regulatory cooperation is that the contracting parties share a strong commitment to protecting public health, safety, the environment and economic security, but that they pursue this commitment through different approaches and regulatory outcomes.⁴ Yet the development of such a framework for regulatory cooperation raises many important questions, especially when is combined with investment protection. 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.⁵

Given the wider scope of policy areas covered by these trade agreements⁶ and their rather intrusive approach to domestic regulatory autonomy, the interests at stake are not only broader than in the past but also of constitutional significance, affecting third party States, private companies, civil society organisations or individual citizens. No surprise that when it comes to their negotiation, there is mounting demand that they will be conducted under greater transparency than conventional trade negotiations so as to guarantee an equal representation of the many interests involved. Similarly, at the level of implementation, it appears important that all contracting parties ensure transparency and integrity mechanisms when applying these agreements. The same is true at the level of their enforcement.

This calls for the need to reconsider the meaning, role and optimal level of democratic control in trade agreements and assess how that might be guaranteed. Against this backdrop, transparency in the negotiations of these agreements appears therefore essential to ensure that all voices are taken into account. This is true not only at the time of their negotiation but also when they will be implemented and enforced. Regulatory transparency and anti-corruption obligations are a pre-requisite not only for effective trade liberalization, the very goal of those trade agreements, but also for letting them deliver economic benefits to the whole society as opposed to few selected private interests. The more the new generation trade agreements address regulatory matters beyond only tariff barriers, the more important it is that they also set good governance standards, through regulatory transparency and anti-corruption provisions.

Most critically, to ensure democratic control of the agreement, it is crucial to foresee some societal and parliamentary oversight on the operation of TTIP that could be capable of satisfactorily address the legitimacy challenges raised by its operation. While there seems to be a case for building a role for the European Parliament and US Congress as well as the public, it is not clear whether the ongoing negotiations currently envision a mechanism requiring their involvement.

Contrary to current institutional and popular narratives accompanying its negotiations, the fate of TTIP will be played less on issues of fears of 'race-to-the-bottom' and more on its ability to ensure political control and societal input to guarantee its legitimacy and accountability once in operation. That is where we should all focus on when debating TTIP. It is about time that civil society organisations stop demonizing the agreement and valuably contribute to its shaping up.

⁴ For insightful, though partly divergent, accounts of transatlantic regulatory divergences, see e.g. David Vogel, *The Politics of Precaution* 255 (Princeton Univ. Press 2012); J. Wiener et al., *The Reality of Precaution*, Routledge/RFF, 2010.

⁵ See, e.g., A. Alemanno, *Aux Parlements de surveiller l'accord transatlantique*, *Le Monde*, 24 April 2014.

⁶ The TTIP for instances ranges from general provisions in trade in goods and services to more specific chapters on public procurement, rules of origin, technical barriers to trade, food safety and animal and plant health, chemicals, cosmetics, information and communication technology, pharmaceuticals, energy and raw minerals, intellectual property, etc. For a complete list, see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>