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THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND PARLIAMENTARY REGULATORY COOPERATION

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STUDY

THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND PARLIAMENTARY REGULATORY COOPERATION

Abstract

The Transatlantic Trade and Investment Partnership (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 policies. Yet, with great promises come challenges too. The EU and the US have been attempting to reduce trade barriers since the 1970s, and parliamentarians from both sides of the Atlantic have since the 1990s been working to institutionalise these efforts through a variety of dialogues and committees, as epitomised by the Transatlantic Legislators' Dialogue (TLD). While this report reviews these efforts in detail, the general conclusion regarding past attempts at regulatory convergence is an overall lack of success: regulatory differences remain as neither side has the incentives to consider the extraterritorial effects of its regulations. As an international agreement predicted to contain a Horizontal Chapter – an innovative approach to international trade treaty-making containing a framework for future regulatory cooperation – TTIP has the potential to transform this impasse, if approached correctly. The Horizontal Chapter would provide a 'gateway' for handling sectoral regulatory issues between the EU and the US, including by addressing both legislation and non-legislative acts, regardless of the level at which they are adopted and by whom. 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), a mechanism that could ensure TTIP's operation – raises many important questions in relation to its interactions with the parties' respective legislatures, the European Parliament and the US Congress. This report examines the potential parliamentary roles, and their implications for the EU legal order – including issues of transparency, democracy, and accountability – in detail. It concludes with recommendations designed to identify the most appropriate avenues to ensure parliamentarian involvement and connect transatlantic parliamentary cooperation with the institutional operation of TTIP.

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EXECUTIVE SUMMARY

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. Consultations between the European Parliament and the US Congress are nothing new; they date back to the 1970s when delegations of their members met informally for the first time, and have become more institutionalized over time. Yet, despite decades of co-operation both at governmental and legislative levels, EU and US policymakers too often fail to mutually understand each other's positions, giving rise to "regulatory differences" ([1]). As the EU and the US strive to promote regulatory convergence through the conclusion of an ambitious Transatlantic Trade and Investment Partnership (TTIP), a pertinent question is what role – if any – the EP and the US Congress might play within this forthcoming agreement. While the existing institutional parliamentary co-operation mechanisms, as epitomised by the Transatlantic Legislators' Dialogue (TLD), combined with the more informal initiatives aimed at strengthening the TLD are likely to be maintained, they may need to be enhanced – and possibly made more interconnected – in order play a meaningful and necessary role within TTIP. This appears especially true for the actual committee-to-committee cooperation.

In the post-Lisbon world, it appears particularly relevant to involve the EP in any effort aimed at promoting regulatory convergence across the Atlantic. This is true not only because the vote of the EP is required for the adoption of TTIP – or any other international trade agreement signed by the EU –, but also because any efforts at international regulatory cooperation may compromise the principle of regulatory sovereignty. Although more respectful of regulatory autonomy than other previous attempts at regulatory convergence, the Horizontal Chapter on Regulatory Coherence foreseen for TTIP may raise in some accountability concerns. The processes envisioned by TTIP may lead to regulatory procedures that gradually appear detached from the policy preferences of those regulated, or, in the case of existing regulations, from the previously agreed policy choices.

In these newly created circumstances, it is crucial to foresee parliamentary input into the operation of TTIP. While there seems to be a case for building a role for both the EP and Congress, it is not clear whether the ongoing negotiations currently envision a mechanism requiring their involvement and that would connect their existing parliamentary cooperation with TTIP. The parliamentarian involvement into TTIP will largely be contingent upon the modalities of integration of the agreement in the EU and US legal order respectively and will thus reflect their constitutional and policymaking systems.

This report identifies and discusses three possible levels of involvement of the EP and Congress within TTIP: (i) the negotiation and conclusion of the agreement; (ii) the individual contribution of each legislator in the daily operation of TTIP; and, finally, (iii) the joint contribution that both legislators may provide to the objectives pursued by the agreement through the existing parliamentary cooperation.

With regard to (i), given the newly acquired power of consent by the EP and the recent precedent in the Anti-Counterfeiting Trade Agreement (ACTA), it appears in the interest of all stakeholders to not only keep the EP informed – as foreseen by the Lisbon Treaty – but also be receptive to its concerns and those expressed by the national parliaments.

([1]) Final Report, High Level Working Group on Jobs and Growth, 11 February 2013.

This report identifies several potential contributions that both individual legislators and their parliamentary regulatory cooperation mechanisms may provide to the envisaged TTIP's Horizontal Chapter on Regulatory Coherence.

Concerning individual contribution, regardless of the specific modalities of integration of TTIP within the respective legal orders, there seems to be a role for both US and EU legislators at the stage of adoption of the decisions agreed under TTIP. Given that TTIP is expected to be a 'living agreement', to which additional sectoral annexes may be added in the future, it is appropriate to envisage a mechanism guaranteeing the possibility for parliamentary oversight so as to ensure that the EP and the US Congress are informed, and that they can initiate and shape the regulatory dialogue foreseen by TTIP. This is not to suggest that the legislators should become involved in the negotiations foreseen in the regulatory dialogue around issues such as equivalence or mutual recognition assessment. These should be left to the regulators. It is rather to say that regulators' decisions, such as a newly-agreed sectoral annexes, should be subject to parliamentary scrutiny before producing their effects.

Once it has been determined what the individual parliamentarian involvement could be in TTIP, it must be decided what contribution existing parliamentary cooperation may provide to TTIP and how to interconnect the two cooperation systems.

Despite the limited results thus far attained by transatlantic parliamentary cooperation, its potential in contributing to the operation of TTIP remains critical for the agreement's success. This seems particularly true in relation to the need to create a forum that will channel the demand for and identification of relevant policy areas susceptible to have a transatlantic impact and, as a result, become objects of the regulatory dialogue. The TLD – acting in co-operation with the Conference of the Committee Chairs – appears to emerge as one of the potential candidates to interconnect the TTIP's incipient institutional mechanism and the existing transatlantic parliamentarian cooperation. This structure would not only confer an active role to the existing parliamentary cooperation into TTIP – especially that existing at committee-to-committee level – but would also enhance the legitimacy of the exercise of transatlantic regulatory cooperation foreseen by this agreement. This is true in relation to both existing and future regulatory standards. Moreover, together with other EU-US dialogues, such as the Transatlantic Consumer Dialogue (TACD) and Transatlantic Business Dialogue (TABD), the TLD appears potentially well placed to identify the relevant policy areas susceptible to be discussed into regulatory dialogue. However, in order to take up this new role, this body would need to receive an institutional upgrade from both sides, and to enhance its committee-to-committee cooperation.

If well handled, the innovative mechanism of international cooperation envisioned in TTIP carries the potential to establish a transatlantic regulatory laboratory across the Atlantic. As demonstrated by this report, its success will largely be determined by its ability to connect this mechanism to the existing regulatory cooperation and ensure parliamentary input into its operation so as to guarantee TTIP's legitimacy and accountability.

FOREWORD

I am grateful to the many MEPs, especially Dr Christian Ehler, Chair of the US Delegation, and Mr Elmar Brok, Chair of the AFET Committee, EU officials and CENELEC representatives as well as to several US officials for generously sharing their personal thoughts on some of the issues discussed in this report. This policy report has also greatly benefited from numerous meetings I attended on the two sides of the Atlantic over the last months as well as from informal discussions with several members of the EU and US delegations negotiating the TTIP. I also would like to thank my colleagues Richard Parker (University of Connecticut School of Law) and Jonathan Wiener (Duke School of Law) for inspiring discussions over the last months. I thank Jessica Corsi (Cambridge University) for comments on a previous draft and for providing great support during the preparation of this report as well as to my clinical students from the HEC-NYU EU Regulatory Policy Clinic, Wonjoo Choe, Hannah Junkerman and Charlotte Spaulding Slaiman, for excellent research assistance. Also Cliff Wirajendi's research and editing assistance is appreciated. All errors and omissions remain the sole responsibility of the authors.

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INTRODUCTION

In recent decades, governments across the world – including the European Union and the United States – have cooperated to harmonize and coordinate policies "behind the borders" through a variety of efforts at the multilateral (WTO), regional (EU, NAFTA), and bilateral levels (FTAs). These efforts have been driven by the trade liberalization agenda, which views domestic regulatory action as a factor impeding international trade. While the World Trade Organization (WTO) has been largely successful in removing barriers to trade at the border, it is proving less effective in the behind the borders fight against nontariff barriers (NTBs) – emerging from regulatory differences across countries –, making NTBs today's most prominent obstacle to trade exchanges.

Given the current inability of the WTO and other trade arrangements to effectively address such concerns, the EU and the US seem willing to go beyond traditional international treaty-making to explore new avenues of international regulatory cooperation. This new trade relationship could be achieved through the conclusion of a Transatlantic Trade and Investment Partnership (TTIP). In addition to the commitment to eliminate tariffs, the central tenet of TTIP is represented by the Horizontal Chapter on Regulatory Coherence, an innovative approach to international regulatory cooperation (IRC). This 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 ([2]). This would apply to all measures of general applications, including both legislation and rules – regardless of the level at which these regulations are adopted and by whom – that have effects on transatlantic trade ([3]). The

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

(3) On the EU side, this would include EU legislation (regulations and directives) as well as non-legislative acts (delegated acts and implementing measures). See infra Chapter III, section 1.1.

development of such a framework for transatlantic regulatory cooperation – which is likely to be accompanied by the establishment of a Regulatory Cooperation Council (RCC), a mechanism that could ensure TTIP's operation – raises many important questions in relation to its interactions with the parties' respective legislatures, the European Parliament (EP) and the US Congress (Congress). 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. What role does TTIP envision for the EP and Congress? What is the impact that TTIP could have on the existing transatlantic parliamentary regulatory cooperation? At what stage of its operation – if at any – will the legislatures be involved? Will they be represented in the RCC or in other institutional arrangements contemplated by TTIP?

To address these questions and to provide a concise and comprehensive overview of TTIP and its impact on the parliamentary dimension of transatlantic regulatory cooperation, this report is organized as follows.

Chapter I provides a brief **comparative overview of the EU and US constitutional frameworks**, by focusing in particular on the different legislative and rule making systems as well as on their major actors, including the EP and US Congress. This analysis also includes a brief assessment and comparison of the US and EU's divergent institutional and procedural approaches to standardisation. As TTIP does not intend to amend the EU and US constitutional systems – but merely to ensure their dialogue –, it appears necessary to promote an understanding of their respective major features and differences.

Chapter II discusses **non-tariff barriers (NTBs) as the major source of transatlantic trade frictions** and identifies their main *raisons d'être*. It also provides an analysis of previous attempts at promoting regulatory cooperation across the Atlantic, by focusing inter alia on the well-established parliamentary cooperation institutional mechanisms. Moreover, it briefly presents the major regulatory cooperation tools, such as a harmonisation, mutual recognition and equivalence, generally used in international regulatory cooperation across the Atlantic and beyond. Finally it offers some illustrations of the major achievements and failures of transatlantic regulatory cooperation.

Chapter III explores the **parliamentary dimension of TTIP**, by examining the level of involvement of the legislatures into this agreement and how these may valuably contribute to its functioning. In particular, it focuses on the incipient Horizontal Chapter on Regulatory Coherence negotiated within TTIP and examines its impact on transatlantic parliamentary regulatory cooperation. After providing an overview of the various components of this chapter, its discipline, rationale and institutional design, it discusses how the EP and Congress as well as the existing mechanisms of parliamentary cooperation may contribute to its operation.

Finally, the last section concludes by formulating **a set of recommendations** on how the respective legislatures and their major transatlantic parliamentary cooperation mechanism, the Transatlantic Legislators' Dialogue (TLD), could promote more effective cooperation at the different stages of both legislating and rulemaking in order to enhance the compatibility and interoperability of EU and US regulations.

CHAPTER I: COMPARATIVE OVERVIEW OF EU AND US LEGISLATIVE AND REGULATORY PROCESSES

This chapter provides a brief comparative overview of the EU and US constitutional frameworks, by focusing in particular on the different legislative and rule making systems as well as their major actors – including the EP and US Congress.

Although the EU and US share common features, including a concern with promoting public transparency and participation and a commitment to notifying stakeholders of emerging legislation and regulations that may affect them, their constitutional systems as well as their legislative and regulatory systems differ in many respects.

Any effort aimed at promoting regulatory compatibility between these two jurisdictions requires therefore a good understanding of their major features of their legal systems. The main steps in the legislative and regulatory process on both sides are illustrated side-by-side in a schematic form in Annex 1.

Similar to what occurs in the United States ([4]), the EU wields only the powers assigned to them by the EU Member States through the EU Treaties ([5]). Moreover, whereas the US Constitution gives Congress – through the 'Commerce Clause' – plenary authority to regulate all activities involved in "interstate and foreign commerce" – an authority which encompasses most activities of interest to TTIP negotiators – the EU Treaties enumerate legislative authority sector by sector. Essentially, the EU treaties enumerate four general categories of EU competences to enact binding legislation: Exclusive competences in areas where only the EU may act, shared competences in areas where both the EU and the Member States may act, coordinating competences in areas where the EU may frame national action, and complementary competence, which is yet to be defined precisely. For instance, agriculture (Article 38 of the Treaty on the Functioning of the European Union (TFEU)), transport (Article 91), worker's protection (Article 153), consumer protection (Article 169) represent shared competences, whereas commercial policy (Article 207) belongs to the exclusive competences of the EU. Thus unlike the US, where Congress's powers within the Constitution are broad and their limits are frequently determined by major court decisions, many of the EP's powers are clearly defined within, and circumscribed by, the founding Treaties as belonging to specific sectors.

1. COMPARING THE EU AND THE US LEGISLATIVE PROCESSES

Under both systems, the legislative process divides into two main phases: (1) the preparatory phase, in which ideas for legislation are developed in concept and embodied in draft proposals, and (2) the deliberative phase, in which the proposal is amended, debated and voted into law.

In the US, only Members of Congress can introduce legislation. They may derive the idea for their legislation from outside sources, including the executive branch or lobbyists. In the EU, only the EU Commission can propose legislation to the Parliament and the Council, though the Commission may derive the inspiration for such legislation from any number of sources. In the EU, the nature of the institutions is driven by the 'supranational' character of the Union, meaning that the Commission represents the interests of the Union, the Council represents the interests of Member States, and the

([4]) Article I, Section 1 of the US Constitution: 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'

([5]) Article 5(2) of the TEU: 'Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

European Parliament is the only institution whose members have been elected by direct universal suffrage. The way the EU legislative and regulatory processes are designed strikes a balance not between three branches of power but – according to the principle of institutional balance – rather between the Union as a supranational entity *per se*, the Member States as sovereign nations, and the European Parliament representing democratic legitimacy in the process.

1.1 The Preparatory Phase

The EU pre-legislative process typically offers significant opportunities for consultation with relevant stakeholders (as guided by the EU's 'minimum standards for consultation'). Major legislation that goes from the EU Commission to the European Parliament and Council is the product of an elaborate administrative process that generally will include early warnings in the form of public Commission Roadmaps, extensive stakeholder consultations, full-fledged Impact Assessment (IA), Impact Assessment Board (IAB) review, Inter-Service Consultation (ISC), and final adoption by the EU College of Commissioners. According to the 2009 Commission Impact Assessment Guidelines (currently under revision) ([6]), IAs are necessary for the most important Commission initiatives and those which will have the most far-reaching impacts. This will be the case for all legislative proposals of the Commission's Legislative and Work Programme (CLWP) and for all non-CLWP legislative proposals that have clearly identifiable economic, social and environmental impacts (with the exception of routine implementing legislation) ([7]) All impact assessments undergo quality scrutiny by the Impact Assessment Board that reports to the President ([8]).

In the US, by contrast, draft legislation *may* in rare cases be fully considered and developed in an inter-agency process culminating in a proposed bill that is then submitted by the Administration to a friendly Member for introduction and sponsorship in Congress. But this is the exception rather than the rule. In fact, any Member of either the House of Representatives or the Senate can propose legislation that may be drafted by his or her staff, possibly with the help of outside interests and/or each House of Congress's Office of Legislative Counsel. Unlike the EU Commission's preparatory stage, there is no Impact Assessment of draft legislative proposals, and no required process of stakeholder consultation prior to introducing the proposal. As a result, the process used to develop legislation for introduction in either the House or the Senate is usually quite opaque to the public.

([6]) European Commission Impact Assessment Guidelines SEC(2009).

([7]) Final Impact Assessments (IAs) accompany the Commission proposals. While some additional analysis can be done at the legislative stage by the Commission itself, EP, Council or Member States, the IA itself is not updated during the legislative stage.

([8]) The IAB is a nine-member board of representatives from DG Enterprise and Industry, DG Markt, DG Environment, DG Climate Action, DG Employment, Social Affairs and Inclusion, DG Economic and Financial Affairs, DG Home Affairs, DG Taxation and Customs Union, and chaired by the Deputy Secretary-General. Its members are appointed by the Secretary General subject to approval of the President on the basis of their professional expertise and act independently of the interests of their home departments. The IAB operates in a composition of 5 members where four members rotate and its chair presides. For an initial analysis of the IAB, see Alemanno, A. '*Quis Custodet Custodes* dans le cadre de l'initiative Mieux Légiférer? Une analyse des mécanismes de surveillance réglementaire au sein de la Commission et la création du Comité d'évaluation des études d'impact', (2008) 1 *Revue du droit de l'Union européenne*, pp. 43-86.

1.2 The Deliberative Phase

In the US, all bills introduced in either house of Congress (the House of Representatives and the Senate) are published online, and the Library of Congress maintains a website named "Thomas" ([9]) that compiles these bills in full text form. A bill introduced in the US Congress normally (though not necessarily) goes through a semi-public hearing and "mark-up" or amendment process in one or more relevant committees in each chamber. Once a bill is reported out of Committee it goes to the "floor" of the House or Senate, where once again there is a public debate and amendment process.

In order for a bill to become law in the United States, an identical proposed text must be approved by both the House and the Senate and sent to the President, who signs it as well. If the President vetoes a bill, it can nevertheless be enacted by a two-thirds vote of each House, though this rarely happens. If the House and Senate initially enact different bills, they must either exchange amended bills between chambers ([10]) until they reach agreement, or they must convene a conference committee to negotiate a compromise package that then wins majority assent in each chamber.

In the EU, debates in the European Parliament are likewise public, as are proposed amendments to draft legislation. The Council and the Parliament engage in a deliberative interaction that is roughly analogous to that of the US House of Representatives and Senate, with the Parliament considering the Commission proposal and sending the (possibly amended) proposal – if passed by majority vote – to the Council. While in US Congress only members of relevant committees have the right to table amendments herewith discussed, in the EU any MEP can propose amendments to any dossier discussed in any committee. Moreover, in the EU, reports and amendments are all public and amendment deadlines tend to be longer than in the US. And finally in the EU Parliament there is always a possibility for plenary amendments by groups and those proposed by at least 40 members. This is not the case in the US House of Representatives where the Rules Committee decides how the bill goes to the floor, and some of the options available may exclude amendments or limit considerably the amount of amendments.

Council and Parliament may exchange amended proposals back and forth through two rounds of exchange until at last, if no final agreement is reached to either accept or reject the measure, a Conciliation Committee ([11]) is convened to try to craft a mutually agreeable compromise. If the Conciliation Committee succeeds in reaching agreement on common draft text, it will forward that text to the Council and Parliament for review and vote. Once the legislative proposal is pending before the EP and the Council, the Commission can be asked to express its position on amendments, and has the possibility to withdraw the proposal – until it is adopted by the Council and the EP[12].

In both the US and EU systems, a legislative proposal becomes a law only if the text is approved in identical form by two separate bodies – by the Parliament and the Council in the EU, and by the House and the Senate in the US – and is then signed by the Presidents of the European Parliament and Council, respectively (in the European Union) or by the US President (in the United States). However, signature by the Presidents of the European Parliament and Council is largely ceremonial, whereas the US President's signature requires a discretionary decision. Despite the similarities between the two legislative processes, there are some major differences that are worth underscoring.

([9]) Named after Thomas Jefferson.
([10]) This requires a majority vote in support of each amended bill.
([11]) Its US counterpart is the US Congress' conference committees.
([12]) In reality, the question until which moment the EU Commission may exercise its right of withdrawal is far from settled.

2. COMPARING US AND EU REGULATORY PROCESSES

Rulemaking in the US and EU regulatory systems takes place from different starting points. US agencies and the EU Commission are delegated rather different kinds of power by their respective legislatures. In the US, agencies have no power to modify congressionally-enacted legislation. They can only implement it. In the EU, by contrast, non-legislative acts promulgated by the Commission divide into two categories: *delegated acts* can modify primary legislation in "non-essential" ways, while *implementing measures* merely enable implementation of basic legislation where uniform conditions for implementation are needed. While both forms of delegation foresee the EU Commission as the recipient of authority, the two regimes differ significantly in the control mechanisms placed on the exercise of this authority and exercised by the EU co-legislators: the EP and the Council ([13]).

By the same token, federal rule-making is in the exclusive remit of regulators in the US and thus is done in its entirety by non-elected public officials. The Congress cannot amend or veto regulations duly enacted by agencies except through the passage of new statute *de novo*[14], a cumbersome process that requires passing the identical bill in each chamber and securing the signature of the President.

In the EU, by contrast, the Commission drafts delegated acts subject to the oversight (review with veto power) of the European Parliament and Council, each of which has 2 months (extendable upon request to another 2 months) after adoption of a delegated act by the Commission to review the act in question ([15]). Either the Parliament or the Council can reject the delegated act (for example, on grounds that it is *ultra vires*, or was adopted in breach of procedural requirements) by a Qualified Majority Vote taken within the 2-4 month period.

Unlike the adoption of delegated acts, the adoption of implementing measures requires the Commission to chair and consult committees made of Member States' representatives ([16]). Thus, with reference to the adoption of these acts, the terms 'comitology,' referring to rulemaking via committee, is still in use. The committee's members come from the Permanent Representatives of the EU Member States and are a mix of national diplomats and officials coming from the relevant Ministries specialising in one or more policy areas. They assure that the interest of their Member States is represented during the discussion leading to the adoption of an implementing measure ([17]).

The EP and the Council do not have a direct role in controlling the EU Commission's exercise of its delegated powers through implementing measures. The EP and the Council are entitled to inform the

([13]) The literature on non-legislative acts is rich. See e.g. Peers, S. and Costas, M., 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', (2012) 18 *European Law Journal*, p. 427 et sqq.; Craig, P., 'Delegated Acts, Implementing Acts and the New Comitology Regulation', (2011) 36 *European Law Review*, p. 671 et sqq.; Driessen, B., 'Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU', (2010) 35 *European Law Review*, p. 837 et sqq; Craig, P., *The Lisbon Treaty, Law, Politics and Treaty Reform*, Oxford University Press, Oxford, 2010, Ch. 2, 7; Schütze, R., ' "Delegated" Legislation in the (new) European Union: A Constitutional Analysis', (2011) 74(5) *The Modern Law Review*, pp. 661-693; Hofmann, H., 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', (2009) 15 *European Law Journal*, p. 482 et sqq.

([14]) US Congress scan however influence the regulatory agency through its power of pursue and through its Congressional oversight committee.

([15]) Common Understanding on Delegated Acts, Council 8753/11.

([16]) The adoption of these measures is governed by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

([17]) While the default procedure for implementing rules is the so-called examination procedure, there is another one– which applies only to non-controversial measures such as grant and funding proposals – known as the advisory procedure (Art. 4). This rarely-used procedure provides for Examination Committee review by simple majority vote (rather than QMV) and results in a decision which the Commission is required to "take utmost account of" but is not strictly obliged to follow.

Commission of their belief that its draft measure exceeds the implementing powers provided for in the legislative act. Although the Commission is subject to a duty to review its text by 'taking account the positions expressed', it is not obliged to amend its proposed measure according to the EP and the Council's suggestions. As a final resort, the EP may challenge the Commission's measures before the EU Courts to have them repealed on grounds of lack of competence.

In the advisory procedure, the Commission only consults the Committee before it adopts the implementing act. In the more common examination procedure a qualified majority vote against its draft stops the Commission from adopting it. In sensitive policy areas and in cases where the basic legislation provides so, the Commission can only adopt its draft with the active concurrence (via affirmative Qualified Majority Vote). If blocked, the Commission can submit the draft (also with amendments) to an Appeal Committee made up of more senior Member State representatives. It can then adopt its draft unless the Appeal Committee stops it with a qualified majority vote against the draft implementing act.

Like the legislative process, the rulemaking process can be conveniently divided into two stages: (1) the preparatory phase, and (2) the deliberative phase of the proposed non-legislative act.

2.1 The Preparatory phase

In the preparatory phase of rulemaking – the stage at which a proposed rule is being drafted and initially analysed and weighed against alternatives – the situation in practice in the EU and the US is broadly similar in terms of transparency and public participation. While US agencies *may* choose to consult advisory boards and stakeholder groups, hold public hearings, and issue early questionnaires and notices that signal their current thinking, nothing in the law *requires* them to do so. There are no formal restrictions on *ex parte* contacts between stakeholders and the agency staff, at this stage, but by the same token there is no requirement that a record be made or published or communications between stakeholders and the agency in this stage. The situation is rather similar, at this stage, on the European side of the Atlantic.

2.2 The Deliberative phase

After publication of the Notice of Proposed Rulemaking (NPRM) the US notice-and-comment process becomes a bit more open than its EU counterpart. The US Administrative Procedure Act (APA) ([18]) requires that all agency rules that carry the force and effect of law must go through a notice and comment process, which involves:

([18]) In the United States, the Administrative Procedure Act (APA) applies to virtually all federal regulatory agencies and provides a common legal and policy framework for the conduct of rulemaking and enforcement across many agencies. However, the APA is itself a broad framework that allows for significant variations of practice among agencies implementing the APA. Likewise, there are considerable variations across sectors in the processes followed in the EU. This being the case, the needs of brevity in this report will not permit exploration of agency- and sector-specific variations in depth here. Rather, this report focuses on the broad contours of the regulatory process on each side, leaving the detailed variations to be explored at a later time, perhaps in the context of sector-specific TTIP negotiations. The Administrative Procedure Act (APA), Pub.L. 79–404, 60 Stat. 237, enacted June 11, 1946.

- Publishing a draft regulation
- Inviting comment for a specified period
- Reviewing the comments that come in
- Revising the draft rule as needed to reflect the comments, and
- Issuing a final rule supported by detailed responses to comments and an explanation of why the agency adopted the overall rule and each significant provision within it, as opposed to alternatives (including the option of no regulation) that the agency considered and rejected.

The US system features a dedicated agency – the White House Office of Information and Regulatory Affairs (OIRA) – which is empowered to review all 'significant' rules – defined as rules expected to impose more than $100 million in direct or indirect compliance costs or which raise novel and significant issues of law or policy. A Regulatory Impact Assessment (RIA) must accompany these rules. RIA is prepared by the promulgating agency and explains why regulation is needed, examines the costs and benefits – quantitative and qualitative – of the proposed regulation along with the costs and benefits of salient alternatives, and explains why the chosen alternative was selected. If OIRA determines that the regulation is not consistent with applicable law and the President's policy priorities – or if OIRA finds that the measure will conflict with the policies and actions of another agency – OIRA may return the measure to the promulgating agency for re-consideration ([19]).

While Impact Assessment and public consultation is not routinely carried out in the EU for all delegated or implementing acts, individual directorates may choose, or may be directed by the Secretariat General (SG) or by the basic act, to undertake Impact Assessment, and may seek public comment on proposed delegated acts and implementing measures in individual cases where there are potentially significant impacts. Generally an IA is performed when the basic act requires it, but in principle it should take place when these acts are expected to have significant economic, environmental or social impacts ([20]). In principle, in cases where an Impact Assessment is prepared, a positive opinion from the Impact Assessment Board (IAB) is needed before a proposal can be put forward for Commission (College) decision. The main role of the IAB is to provide central quality control and support function for the IAs. It does not review legislative proposals. The functions of coordinating policy initiatives are performed by the SG and independent quality control of the impact assessments is performed by the IAB – these roles are separated in the Commission.

([19]) Ellig J, McLaughlin PA & Morrall III JF (2013), Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis across US Administrations, Regulation & Governance, 7(2): 153-173.

([20]) A. Alemanno and A. Meuwese, Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link of 'New', European Law Journal, Vol. 19, No. 1, January 2013.

3. COMPARING THE EU AND US STANDARDISATION PROCESSES

Both the EU and US authorities use standards for products and services ([21]), that they generally incorporate into their legislation by reference ([22]). Incorporating standards by reference into regulations has significant benefits for regulators ([23]). However, the framework for using standards in support of legislation and policies differ greatly across the Atlantic. As illustrated below, there exist institutional differences (for example, a centralised, public EU system vs. a decentralised, private US system) as well as substantive differences (notions of international standard setting bodies and international standards) in their standard development systems. These divergences represent a considerable source of concern for manufacturers and traders operating across the Atlantic.

3.1 The EU approach to standardization

According to the so called 'New Approach', the European Union directives, known as the 'New Approach Directives', lay down a minimum number of 'essential requirements' with which a product or a service must comply, generally expressed in terms of performance of the products ([24]). Products must meet these requirements in order to be placed on the European market and manufacturers have the choice of how to fulfil these requirements. However, they benefit from a presumption of compliance should they adopt the standards developed – generally on demand by the EU Commission – by the three European Standards Organizations: CEN (European Committee for Standardization), CENELEC (European Committee for Electrotechnical Standardization) ([25]) and ETSI (European Telecommunications Standards Institute). This benefits not only industry but also other stakeholders, in particular the consumers. Indeed, if industries follow harmonized standards, they benefit from a presumption of conformity to the essential requirements set in the directives ([26]).

The EU approach combines the need for regulation by public authorities with flexibility for economic operators as to the means to comply with regulation. Thus, for instance, manufacturers of special or 'niche' products, for which available standards are not adequate, are entitled to argue (and carry the burden of proof) that their products nevertheless meet the requirements laid down in the EU

([21]) Standardisation encompasses a broad range of considerations – from the actual development of a standard to its promulgation, acceptance, and implementation. Also included are the methods of evaluating conformance to a standard – issues such as laboratory accreditation; certification of products, processes, systems, services and personnel; metrology and measurement; testing and sampling, and more. Standardisation has become the key to market access and is inherently essential to a sound national economy and to the facilitation of global commerce.

([22]) Incorporation by reference is the act of including a second document, generally a privately-developed standard - within another document – generally a legislative or regulatory act – by only mentioning the second document. This act, if properly done, makes the entire second document a part of the main document. Incorporation by reference is often done in creating regulatory requirements.

([23]) However, there exist drawbacks to this process, as recently highlighted by the 2011 ACUS recommendation on incorporation by reference. According to this document, agencies face four primary issues when incorporating by reference: 1) ensuring that incorporated standards are "reasonably available" to the public; 2) keeping incorporating regulations up to date as new versions of standards or other materials become available; 3) complying with procedural requirements for incorporating by reference; and 4) avoiding common pitfalls in drafting regulations that incorporate by reference. Available at http://www.acus.gov/recommendation/incorporation-reference

([24]) Pelkmans, J., 'The New Approach to Technical Harmonisation and Standardisation', (1987) 25 *Journal of Common Market Studies*, pp. 249-269.

([25]) Examples of Directives for which CENELEC has developed work: LVD - Low Voltage Directive (2006/95/EC); EMC - Electromagnetic Compatibility (2004/108/EC); R&TTE - Radio and Telecommunications Terminal Equipment (1999/5/EC); MD - Machinery Directive (2006/42/EC) and MDD - Medical Devices Directive (93/42/EEC).

([26]) Thanks to this feature of the EU standardisation system, companies access 33 countries and reach over 500 million consumers who can benefit from safe and environment-friendly products and services.

regulation. If EU technical regulations became more prescriptive and detailed, this possibility would not exist.

The genesis and rationale of the EU standardization system is found in the need to consolidate the Single Market and the imperative to strengthen the competitiveness of European companies. While a majority of European Standards are initiated by business and developed in partnership with other stakeholders, around 30% of all European standards are adopted following a request by the Commission to support EU legislation. The European Standardization System is unique in the world. After the publication of a European Standard, each national standards body or committee is obliged to withdraw any national standard which conflicts with the new European Standard. Hence, one European Standard becomes the national standard in all the 33 member countries of CEN and/or CENELEC([27]).

3.2 The US approach to standardization

The US faces a similar dilemma on how to strike a balance between the need to regulate and the need to ensure some flexibility to the industry. Its approach to standardization, and in particular its standard development system, is significantly different than the EU ([28]) but equally constrained by a regulatory framework ([29]). US standardization is a *decentralized* system that is naturally partitioned into industrial sectors and supported by independent, private sector standards developing organizations (SDOs) that typically compete – unlike the European ones – among themselves. It is a *demand-driven* system in which standards are developed in response to specific concerns and needs expressed by industry, government, and consumers. And, it is a *voluntary* system in which both standards development and implementation are driven by stakeholder needs rather than mandated by government.

The use of a standard by a federal agency varies depending on the statute under which the rulemaking is proceeding. But it is also conditioned by the nature of the public comments received and often by the costs, benefits and cost-effectiveness of the various approaches to such usage.

Depending on the regulatory context and the type of standard used, regulatory incorporation by reference in the US may require the regulated parties to take different kinds of action. When the US Congress codifies a standard via a statute, the result is often the requirement that a federal agency use that particular standard in its regulations. A good example is the Consumer Product Safety Improvement Act of 2008, which effectively required the Consumer Product Safety Commission to use a Consumer Safety Specification for Toy Safety in its regulations ([30]). The effect is different when it is an agency that incorporates a standard by reference into a regulation. Such action makes the standard mandatory for regulated parties because, as a legal matter, the standard is treated as if it were reprinted in full in the text of the regulation. The relevant manufacturers may be called on to produce goods that conform to technical specifications, test the safety of products using standardized testing methods or purchase equipment that meets specified standards. For example, to comply with the Occupational

([27]) Position Paper on EU-US Transatlantic Trade and Investment Partnership (TTIP) – Technical Barriers to Trade – Initial EU Position Paper by CENELEC, September 2013.

([28]) For an overview, see Report on the Use of Voluntary Standards in Support of Regulation in the United States, US-EU High-Level Regulatory Cooperation, October 2009.

([29]) The Administrative Procedure Act (APA), the Trade Agreement Act of 1979 (TAA), Executive Orders and other official guidance, such as Circualr A-119 provide a framework for regulatory agencies in relation to the development and implementation of regulations that may use privately-developed standards. In particular, the National Technological Transfer and Advancement Act (NTTA) of March 1996 directs federal agencies to use standards developed by voluntary consensus standards bodies to achieve public policy. The TAA prohibits federal agencies from engaging in any standard-related activity that creates unnecessary obstacles to trade and requires federal agencies to take into consideration international standards.

([30]) ASTM International F963-07.

Safety and Health Administration's head protection regulations, employers are required to provide employees with equipment that conforms to certain ANSI standards incorporated by reference into 29 CFR § 1926.100.

In any event, unlike the situation in the EU, there is no obligation to have a single standard: any standard is available for referencing as long as certain process requirements are fulfilled ([31]). US agencies typically incorporate by reference standards that are already ubiquitously used by industry. In the US system, business operators are generally not free to use standards other than those referenced in US regulation to prove that their products comply with the technical requirements of the rule.

4. COMPARING THE TWO SYSTEMS: CONCLUSIONS

Given its complex institutional framework, EU policymaking appears quite intricate and impenetrable from the outside. To address this concern the EU has been striving towards more transparency and involvement of stakeholders during the preparation and adoption of its proposals. As illustrated above, EU legislative policymaking tends to be more open and evidence-based than EU regulatory processes – though the frequent use of *trilogues* to draft policies tends to diminish the transparency of the EU legislative process. Still, the EU legislative process appears significantly more transparent, rigorous, and inclusive of stakeholders, especially at its preparatory stage, than the US legislative process. However, rulemaking procedures in the EU – despite the commitment of the EU Commission and co-legislators in recent years to expanding the use of public consultation and impact assessment for non-legislative measures ([32]) – remain rather opaque overall, compared to their US counterparts. Moreover, it must be observed that for the purposes of this report that – when it comes to the regulatory process – the role of the legislature seems more significant in the EU than in the US, where US Congress does not enjoy the authority to intervene into the exercise of delegated authority by amending or blocking a proposed rule.

Overall, while more flexible, the US approach to standardisation is also more complex and, as such, less predictable than that within the EU. Unlike what it occurs in the EU, the US government is not a driver of the standardisation process, but one of its stakeholders. Moreover, the US standard system is primarily voluntarily, private sector and marketplace-driven, with competing standard-setting bodies developing coexisting standards. As such, it appears difficult to reconcile with the EU centralised standard development system, within which the link between European legislation and European standards appears not only clearer but also more predictable. Standards supporting EU policies are developed in a way that enable all interested parties the opportunity to anticipate future standardization activity; to make an informed decision about their need to participate in CEN, CENELEC or ETSI activities; and, whenever possible, to participate in ISO and IEC work. Such a level of predictability and the resulting possibility for all interested parties to be informed prior to the standardization process cannot be found in the US. Indeed, in the US system, in the event that a relevant standard is not available, no transparent process is foreseen to connect the development of future standards and the regulatory work. Moreover, the typical coexistence of various domestic standards makes the life of the foreign manufacturers and importers very difficult. Even more critically, the definition of who is an international standardisation

([31]) Under the EU New Approach, there is an obligation to adopt the European Standard and withdraw all existing national standards.

([32]) This is however set to change given the increasing number of non-legislative acts mandating the Commission the preparation of an impact assessment accompanied by a consultation upon the exercise of the delegation authority conferred by the basic acts.

body ([33]) and what is an international standard differ significantly between the two systems ([34]). The difference in interpretation emerges clearly when EU legislation refers to international standards, such as ISO and IEC, and corresponding US legislation refers instead to domestically developed standards by standard developing organisations claiming to be international. At the same time, one has to remind that for the purposes of TTIP, the only relevant issue is what happens when standards and government regulations intersect.

At their meeting in Dublin in February 2013, the European Standards Organisations (CEN, CENELEC and ETSI) and the American National Standards Institute (ANSI) agreed that they will maintain and intensify their collaboration with a view to aligning their standards, which is necessary in order to facilitate trade in both goods and services between Europe and the USA. The arrangements under discussion to be discussed between ANSI, CEN, CENELEC and ETSI will set out a clear approach to address any remaining differences between American and European standards in a number of sectors. It also encourages a common approach, preferably at the global level, including a process to come to rapid common solutions, for instance on arrangements to align standards.

Joint efforts are already underway in in specific sectors, such as 'Smart Grids' for the transmission of electrical power, and electric vehicles, and there appears willingness to consider new topics such as cloud computing, machine-to-machine (M2M) communication and 'Smart Cities'. Discussions are currently ongoing regarding the alignment of the technical requirements of the main global standards concerning lifts/elevators, which stem originally from CEN and ASME. An action plan will now be taken forward to intensify collaboration on aligning standards, with the aim of reducing costs and enlarging markets for manufacturers.

As divergence between standards presents serious barriers to trade, promoting and facilitating collaborations between ANSI and ESOs regarding standards will be crucial in the framework of the negotiations on a Transatlantic Trade and Investment Partnership.

([33]) According to the explanatory note to Annex 1 of the TBT Agreement, an international body or system is a 'body or system whose membership is open to the relevant bodies of at least *all* Members'.

([34]) The only exception being the ICT sector in which the definition of what is an international standard is equivalent for both EU and US.

CHAPTER II — REGULATORY DIVERGENCE AS THE MAJOR SOURCE OF TRANSATLANTIC FRICTION

Following Chapter I's brief examination of the main features of the EU and US policymaking systems, Chapter II discusses regulatory divergence as the major source of transatlantic trade frictions and identifies their main *raisons d'être*. Given that the EU and the US are amongst the two most integrated and interconnected regions in the world, their respective regulations have the potential to systematically affect both economies as well as the rest of the world. Chapter II also provides an analysis of previous attempts at promoting regulatory cooperation across the Atlantic, by reviewing well-established cooperative institutional mechanisms, both at the executive and parliamentary levels, and how these interact with their respective policymaking systems. In so doing, it provides several illustrations of both achievement and failures of transatlantic cooperation. It is only by building upon previous experiences of cooperation that the EU and the US regulatory systems can become more compatible.

1. PROBLEM DESCRIPTION: REGULATORY DIVERGENCE AS THE MAJOR SOURCE OF TRANSATLANTIC FRICTION

Following the remarkable success achieved by the world trading system (notably, the General Agreement on Tariffs and Trade [GATT] ([35])) in removing barriers to trade at the border, such as tariffs and quotas, the principal area of opportunity for improving the EU-US economic relationship has remained over the last 15-20 years the elimination of nontariff barriers (NTBs) to international trade ([36]). Regulatory barriers have long been recognised as the most significant impediment to trade and investment between the EU and the US ([37]). NTBs consist of national regulatory measures that had previously not been subject to international scrutiny and that often aim at pursuing legitimate objectives, such as the protection of the environment and the health and safety of citizens ([38]). In the agricultural sector, NTBs are the result of differing standards for foodstuffs. In the industrial sector, NTBs generally derive from different technical standards set in the EU and the US – often by reference to private standards –, amongst which one may find requirements to carry out specific testing regarding electromagnetic compatibility of a product, specific requirements for the recyclability of a product (such as different environmental standards, certification and approval requirements, or CO2 ceilings for emissions from cars). When one country's regulatory standard is higher – or merely different – than that of another, it acts as an NTB by making the importation of products or services from the other country costly. Worse yet, states may sometimes deliberately adopt standards for protectionist reasons, that is,

([35]) The WTO, established on 1 January 1995, has subsumed and expanded upon the General Agreement on Tariffs and Trade, an international agreement that had regulated international trade since 1947.

([36]) For a detailed history of the evolution of GATT rules on domestic regulations, see Baldwin, R.E., *Non-Tariff Distortions of International Trade*, Brookings, Washington D.C., 1970; Sykes, A.O., *Products Standards for Internationally Integrated Goods Markets*, Brookings, Washington D.C., 1995; Mavroidis, P., *Trade in Goods*, Oxford University Press, New York, 2007; Sacerdoti, G. 'Standards of Treatment, Harmonisation and Mutual Recognition: A Comparison between Regional Areas and the Global Trading System', in Demaret, P., Bellis, J-F., and Garcia Jimenez, G., *Regionalism and Multilateralism after the Uruguay Round*, Peter Lang, Liège-Bruxelles, 1997;

([37]) For a detailed study of transatlantic regulatory cooperation, see Bermann G.A., Herdegen M., and Lindseth P., *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects*, Oxford University Press, 2000.

([38]) It has been observed that democracies more typically create NTBs. In particular, it has been argued that democracies induce politicians to replace transparent risk barriers with less transparent ones. See Kono, D.Y., 'Optimal Obfuscation: Democracy and Trade Policy Transparency, (2006) 100 *American Political Science Review*, pp. 369-384.

to shield domestic industries from foreign imports ([39]). Regardless of intent, the mere existence of those measures, by generating regulatory divergence, translates into barriers to trade ([40]). In sum, regulatory divergence obstructs imports and exports, creates inefficiencies, and increases costs for international business, which in turn impedes international trade and, other things being equal, slows global prosperity.

Moreover, the relative significance of nontariff measures that occur "behind the border" has grown exponentially in the context of increasingly globalized markets. Today, the US and the EU combine to account for over half of global GDP and over a third of world trade. In that context, differences in regulatory policies could – and according to many studies do – constitute significant barriers to trade. Given that the joint contribution to world GDP by the EU and the US equals 47% as well as accounting for one third of global trade flows, the Commission suggests that the elimination of NTBs could add a 0,5% to the EU's annual economic output ([41]).

As the breadth and depth of the external impact of domestic regulation tends to be amplified in today's free markets ([42]), a troubling gap is emerging between "regulatory jurisdiction" and "regulatory impact" ([43]).

Comparative regulatory research identifies a wide, often conflicting, range of explanatory variables for the growing phenomenon of regulatory divergence across countries. As most of this literature focuses on root causes of transatlantic regulatory divergence, this will be briefly discussed in section 1.1. Given the inability of the WTO framework to effectively mitigate the negative trade effects stemming from regulatory divergence, the EU and the US have been actively seeking innovative solutions to maintain the gains achieved through the multilateral trade system and possibly obtain more. In so doing, the EU and the US have a long history of attempted regulatory cooperation that will be illustrated in section 2.

1.1 Explaining transatlantic regulatory divergence

Transatlantic regulatory research identifies a wide, often conflicting, range of explanatory variables for the continued existence of regulatory differences between the United States and Europe[(44)]. However, it often neglects to discuss and analyse the most obvious one: national regulators tend to disregard what happens outside of their jurisdiction as they often fall victim of a 'tunnel vision' when discharging their mandate to keep their own people and environment safe. Indeed, the acceleration of technological innovation and the emergence of greater openness of markets continuously require the EU and the US to be responsive to the political demands and concerns of public opinion. As a result, "the modern regulatory state inevitably produces burdens on trade, if only because of the unavoidable lack of regulatory uniformity" ([45]). Indeed, governments around the world are confronted on a daily basis with

([39]) Surprisingly, international law lacks an operational definition of protectionism. Hence, as illustrated below, recourse to proxies is inevitable in the WTO (national treatment; scientific justification; necessity test; etc.).
([40]) Unlike regular trade barriers, NTBs' impact on trade is mainly indirect. It consists of both additional cost of compliance for manufacturers/traders and impact on production functions and consumption decisions.
([41]) Francois, J., Manchin, M., Norberg, H., et al., 'Reducing Trans-Atlantic Barriers to Trade and Investment', Centre for Economic Policy Research on behalf of the European Commission, 2013.
([42]) Scott, J., *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary*. Oxford University Press, New York, 2007.
([43]) Keohane, R. O., 'Global Governance and Democratic Accountability', in Held, D. and Koenig-Archibugi, M., *Taming Globalization: Frontiers of Governance*, Polity Press, Cambridge, 2003.
([44]) See, e.g., Bierbrauer, E. and Bendini, R., 'The HLWG report on a future EU-US trade and investment agreement – A short comment', Policy Briefing, European Parliament, 2013/83.
([45]) Farber, D. A. and Hudec, R.E., 'Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause', (1994) 47 *Vanderbilt Law Review*, pp. 1401–40.

decisions concerning risks to human, animal or plant health or life posed by tradable products and their manufacturing processes. In response they tend to adopt, generally without paying attention to the extra-territorial impact of their initiatives, measures that hinder the trade of products. While the adoption of these measures may indeed be necessary for the protection of legitimate interests, their implementation may also be totally disrespectful of the impact it may have across its borders or – what it is worse – be motivated by a desire to shield domestic industries from imports coming from foreign countries. It is indeed tempting for some States to compensate for the reduction in traditional barriers to trade, which has been induced by the GATT/WTO framework, by introducing non-tariff barriers grounded in health concerns ([46]). However, to determine whether a national measure is genuinely motivated or pursues another intent is not an easy task. But what determines and explain the major regulatory divergences across the Atlantic?

In broad strokes, transatlantic regulatory divergence might find some explanations in: (1.1.1) different societal preferences regarding regulation and tolerance of risk; (1.1.2) interest driven politics; and (1.1.3) differing institutional capacity for reform.

1.1.1 Societal preferences and risk tolerance

The significant differences between the US and the EU have often been ascribed to different cultures of risk, such as the familiar yet simplistic stereotypes of Americans being risk-takers and Europeans being more risk-averse, especially towards new technologies. According to this position, over the past 30 years or so, the United States has moved towards decreased federal regulation, whereas the EU has increased the regulatory demand placed on Member States ([47]). Moreover, in the EU, regulations would tend to be passed before problems arise, whereas the United States public would demonstrate a higher tolerance of risk, waiting for problems to surface before regulations respond to them. An example of this difference could be found in a sector that demonstrates a significant divergence of policy and public opinion between the US and the EU: phytosanitary safety and genetically modified food (GMOs). In Europe, there is significant concern about the use of GMOs in food, both societally and institutionally. As a result, there is a strict regulatory regime regarding the cultivation and marketing of GMOs and the labelling of products that contain them ([48]). In contrast, the United States has no equivalent regime and no such labelling requirements for GMOs ([49]). This is an example of an area where the source of divergence is however not regulatory in nature (the EU regulatory regime - although precautionary - is based on a rigorous scientific process) but appears rather ingrained in European societal preferences. The EU remains split over the issue of GMO cultivation and given the systematic abstention of Germany from GM-related votes, there has been no qualified majority to adopt any decision on authorisation. The Commission, following the recent judgment of the European Court of Justice granting a victory to

([46]) For a detailed history of the evolution of GATT rules on domestic regulations, see Sykes, A.O., op. cit., pp. 63-68.

([47]) Ahearn, R. J., *Transatlantic Regulatory Cooperation: Background and Analysis, Report for Congress*, Congressional Research Service, Washington D.C., 2009.

([48]) Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ L 268, 18.10.2003, p. 1); Regulation (EC) No. 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC (OJ L 268, 18.10.2003, p. 24); Regulation (EC) No. 1946/2003, which regulates intentional and unintentional movements GMOs between member states of the EU and non-EU countries. As a result of this regime, a total of three GM maize lines (Bt176, MON810 and T25) were authorized in 1997–98 for cultivation in the EU; however, only MON810 is relevant to agricultural production.

([49]) For a detailed description of the comprehensive federal regulatory policy for ensuring the safety of biotechnology research and products, see the Coordinated Framework for Regulation of Biotechnology, published in the Federal Register, 31 December 1984 (49 Fed. Reg. 50856).

Dupont Pioneer – a GMO producer – ([50]), is likely to authorise cultivation of their GM-maize even though 19 of the 28 member states voted against it, along with a vast majority of MEPs ([51]).

However, this comparative examination of EU and US risk regulations may appear too selective to lend itself to useful generalizations. Characterizations of US and EU regulatory systems as sharply divergent (e.g. a precautionary Europe vs. a reactive America) are often exaggerated, because the reality of US and EU risk regulation is typically parity, punctuated by occasional disagreements ([52]). Even if Europe has shifted to provide more protective regulations than in the United States in some areas ([53]), this is not a universal phenomenon but is a function of particular features of individual cases on each side of the Atlantic. Indeed, regulations are by definition dynamic: they change and adapt over time. More generally, America and Europe are more alike than stereotypes imply ([54]). Still, their different societal and institutional attitudes towards risk may indeed prompt different regulatory answers and explain many transatlantic divergences over time.

1.1.2 Interest driven politics

According to some authors, the regulative behaviour of a state may also be influenced by the role of the election system ([55]). In particular, the European proportional representation would provide greater opportunity for coalition governments that often include also green parties. The influence of this political presence in the EU political landscape could explain many of the precautionary-inspired regulatory measures adopted over the years in Europe. In parallel, given the increasing polarisation between Democrats and Republicans combined with the growing influence of the conservative wing of the latter party, would have prevented the adoption of precautionary measures ([56]). Moreover, it has also been argued that European officials would be more prone to address consumer concerns than their US counterparts ([57]). It must however be observed that the codification of the precautionary principle within the EU Treaties seems to suggest a bipartisan support to this regulatory approach to risk governance. Thus ascribing the precautionary stance developed over time in the EU largely appears as an oversimplification that does not necessarily reflects the reality of EU politics.

([50]) Case T‑164/10, Pioneer Hi-Bred International, Inc. Vs European Commission, judgment of September 2013, ECR not yet reported.

([51]) See Keating, D. 'Greece seeks greater flexibility ahead of crop debate on GM crops', *European Voice*, February 27, 2014, p. 4.

([52]) Wiener, J.B., 'The Real Pattern of Precaution', in Wiener, J.B., Rogers, M.D., Hammitt, J.K, and Sand, P.H. (eds.), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe,* RFF Press/Earthscan, Washington D.C., 2011, pp. 519-565.

([53]) As illustrated by many authors, this is largely due to the relative absence of EU regulatory framework for safety, health and the environment before the establishment of the EU internal market in 1992. See, e.g., Christoforou T., 'The Precautionary Principle, Risk Assessment, and the Comparative Role of Science in the European Community and the US Legal Systems', in Vig, N. J. and Faure, M.G. (eds.), *Green Giants? Environmental Policies of the United States and the European Union*, Cambridge, MIT Press, 2004, pp. 31 et sqq; Vogel, D., 'The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe', (2002) 33 *British Journal of Political Science*, pp. 557-580; Vogel, D., *The Politics of Precaution*.

([54]) Hood C., Rothstein H. and Baldwin R., *The Government of Risk: Understanding Risk Regulation Regimes*, OUP, 2004.

([55]) Majone, G., 'Political Institutions and the Principle of Precaution', in Wiener, Rogers, Hammitt, and Sand (eds.), *The Reality of Precaution*, pp. 411-433.

([56]) Vogel, *The Politics of Precaution*.

([57]) Ziegler, O., *EU Regulatory Decision Making and the Role of the United States*, Springer, Wiesbaden, 2012.

1.1.3 Constitutional frameworks and institutional capacity

Non-tariff barriers are also the result of different constitutional frameworks and institutional capacity in the US and the EU regarding coordination and cooperation. While neither the EU nor the US systematically assess the extraterritorial effect of their regulations, the European Union's institutional framework seems more amenable to integrate this dimension.

In the US, regulatory agencies are primarily focused on domestic issues. As a result, they fail to routinely consider the transatlantic trading implications of their decisions. Further complicating any efforts at coordination is the federal structure of the US government. Although federal agencies have significant power, regulation in some sectors, such as insurance, is decentralized and left to individual states. The result is that regulations in the US are largely domestically-focused. It is to address this concern that President Obama issued Executive Order 13609 on 1 May, 2012. EO 13609 calls on **all US federal agencies** to "reduce, eliminate, or prevent unnecessary differences in regulatory requirements" (new and existing) that may pose barriers to trade; to identify which forthcoming regulations may have significant international impacts; and to consider approaches taken in foreign regulations as part of the work plan of a regulatory cooperation council (RCC)[58]. The EO asks the Regulatory Working Group created in EO 12866 (1993), chaired by the OIRA Administrator, to oversee this effort.

In contrast, the EU appears more capable of coordinating at an institutional level. The structure of the EU is designed to facilitate coordination on trade both within member states and on transatlantic issues. The result is that it is much easier to institute an institution-wide policy of considering transatlantic trade implications for EU regulations than it is in the US.

1.1.4 Conclusions

Although the literature on the topic provides many intriguing explanations for regulatory divergences in the EU and the US, no overarching theory seems capable of providing a satisfactory answer to the problem of transatlantic regulatory variation.

Many of the identified variables are not only different but also very often interconnected. It appears indeed clear that no factor alone may suffice to explain regulatory choices. At the same time, no research ascribes regulatory divergence to cultural factors alone, nor focuses solely on national political cultures or families of law. It appears generally accepted today that regulatory styles – assuming they exist – may vary over time and across policy fields. A better understanding of the origin of regulatory variation in relation to similar policy challenges could be crucial for enhancing regulatory convergence across the Atlantic. An improved mutual understanding of each other regulatory framework could be conducive to this result ([59]).

([58]) This EO extends also to independent agencies over which however OIRA has no formal authority.

([59]) Bergkamp, L. and Kogan, L., 'The Precautionary Principle and Post-Modern Regulatory Process: Why the TTIP Negotiations Should Openly Engage the Fundamentals EU-US Differences', (2013) 4 *European Journal of Risk Regulation*, pp. 493-507.

2. CURRENT STATE OF PLAY

Regulatory barriers in transatlantic trade and investments have long been recognized and have been placed at the centre of transatlantic institutional and economic cooperation efforts since their inception. As a result regulators differences between the EU and US have been addressed through a set of dialogues and cooperation mechanisms that became institutionalized at both at the executive and parliamentary level in the mid-1990s ([60]).

2.1 Transatlantic regulatory cooperation

In this section, we examine previous attempts at promoting regulatory cooperation across the Atlantic, by reviewing well-established cooperative institutional mechanisms, both at the executive and parliamentary levels, and illustrate how these interact with their respective policymaking systems. In so doing, we provide several illustrations of both achievement and failures of transatlantic cooperation.

2.1.1 Transatlantic Declaration on EC-US Relations

Within the framework of US President George Bush's New World Order, in 1990 Secretary of State James Baker called for the adoption of the Transatlantic Declaration on EC-US Relations. According to the Declaration, mutual information and cooperation on important political and economic matters of economic interest had to be achieved through several channels: (a) bi-annual consultations between the Presidents of the European Council and the Commission, on the one hand, and the US President, on the other (EU-US summits); (b) bi-annual consultations between the foreign affairs ministers of the Member States and the Commission, on the one hand, and the US Secretary of State, on the other; (c) *ad hoc* consultations between the foreign affairs minister of the EU Member State holding the Presidency and the US Secretary of State; (d) bi-annual consultations between the Commission and the US Government at the Cabinet level; (e) briefings by the EU Presidency to the US Representatives on CFSP at the ministerial level as well as (f) through cooperation between the legislators.

2.1.2 New Transatlantic Agenda (NTA)

These initial institutional arrangements were further enhanced – and reached another political level – by the signature of the New Transatlantic Agenda (NTA) during the second bi-annual EU-US Summit in 1995 ([61]). The drafters of the NTA intended to move the transatlantic relationship from one of consultation, as originally foreseen in the Transatlantic Declaration, to one of joint action ([62]). As a result, this initiative has been recognized as "the most systematic effort at genuine bilateral governance in the history of the transatlantic partnership...by linking the institutions of the EU and the United States at the intergovernmental, transgovernmental and transnational levels" ([63]). In the NTA, the US and the EU

([60]) The literature on the history of the economic relations between the European Union and the United States is vast. See, e.g., Pollack, M., 'The New Transatlantic Agenda at Ten : Reflections on an experiment in international governance', (2005) 43 Journal of Common Market Studies, pp. 899-919 ; Pollack, M. and Shaffer, G.C., 'Transatlantic governance in historical and theoretical perspective', in Pollack, M. and Shaffer, G.C. (eds.), *Transatlantic Governance in the Global Economy*, Rowman and Littlefield, Lanham, pp. 287-305 ; Vogel, *The Politics of Precaution*; Wiener, Rogers, Hammitt, and Sand (eds.), *The Reality of Precaution*.

([61]) See e.g. Krenzler, H.G. and Schomaker, A., 'A New Transatlantic Agenda', (1996) 1 *European Foreign Affairs Review*, pp. 9-28; van Oudenaren, J., 'The New Transatlantic Agenda', (1996) 51 *Internationale Politik*, pp. 49-52; Gardner, A.L., *A New Era in US-EU Relations? The Clinton Administration and the New Transatlantic Agenda*, Avesbury, Aldershot, 1997.

([62]) Archick, K. and Morelli, V. 'The US Congress and the European Parliament: Evolving Transatlantic Legislative Cooperation', *Report for Congress no. R41552*, Washington DC: Congressional Research Service, 2011, p. 5.

([63]) Pollack, M., 'The New Transatlantic Agenda at Ten', p. 900.

agreed to further cooperation based on four broad principles: "promoting peace and stability, democracy and development around the world; responding to global challenges; contributing to the expansion of world trade and closer economic relations; and building bridges Across the Atlantic." As a result, this Agenda actually laid out a blueprint for future EU-US relations in a variety of areas of common concern, covering the political, social, security and economic realms.

For the first time, the NTA connected EU and US officials at all levels of government through, *inter alia,* a proliferation of committees; formalizing regulatory cooperation agreements in virtually all areas of economic regulation through a Joint EU-US Action Plan outlining over 150 specific areas of cooperation; calling for 'enhanced parliamentary links' between Members of the European Parliament (MEPs) and the US House of Representatives; and, last but not least, setting a series of civil society dialogues between groups in business, labour, and environmental and consumer groups.

The dialogues that were initiated by the NTA and developed over time between the EU and the US are many and include: the Transatlantic Business Dialogue (TABD) ([64]), the Transatlantic Consumer Dialogue (TACD) ([65]), the Transatlantic Environment Dialogue (TAED) (inaugurated in 1999), the Transatlantic Legislators' Dialogue (TLD) (launched in 1999), and the Transatlantic Labour Dialogue (TALD) ([66]), the EU-US Financial Markets Regulatory Dialogue ([67]), the EU-US Development Dialogue ([68]), the EU-US Education Policy Forum ([69]), the EU-US Energy Council ([70]), the EU-US Task Force on Biotechnology Research ([71]), the EU-US Insurance Regulatory Dialogue ([72]). NTA generated also a range of unofficial dialogues that are not government sponsored, such as the Transatlantic Policy Network, the Transatlantic Dialogue on Sustainable Development, the Transatlantic Dialogue of Aviation and Climate Change and the Transatlantic Donors Dialogue ([73]).

Under the NTA Action Plan's section on standards, certification and regulatory issues, the US and the EU were encouraged to 'strengthen regulatory cooperation, in particular by encouraging regulatory agencies to give a high priority to cooperation with their respective transatlantic counterparts, so as to

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([64]) Established in 1995. It merged with the European-American Business Council and now is referred to as Transatlantic Business Council.

([65]) Established in 1998. See: www.tacd.org

([66]) Established in 2001. See, e.g., Knauss, J. and Trubek, D. 'The Transatlantic Labour Dialogue: Minimal Action in a Weak Structure', in Pollack and Shaffer (eds.), *Transatlantic Governance in the Global Economy*, pp. 235-254.

([67]) Established in 2012. See more in: Hellwig, H-J., 'The Transatlantic Financial Markets Regulatory Dialogue', in Hopt, K.J. et al. (eds.), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US*, Oxford University Press, Oxford, 2005, pp. 363-379. This author underlines that although EU-US cooperation in this field is conducted between the respective executive branches, the European Parliament and the US House of Representatives are "internally included" in this Dialogue through their respective committees (p. 374).

([68]) Re-launched in 2009. See, e.g., Gaus, A. and Hoxtell, W., 'The EU-US Development Dialogue: Past, Present and Future', *Working Paper*, Berlin: Global Public Policy Institute, 2013, available at http://www.gppi.net/fileadmin/media/pub-/2013/gaus-hoxtell_2013_TCSD-working-paper_backgrounder.pdf, accessed on 7 October 2013.

([69]) Established in 2009. See e.g. Kriebernegg, U. *The Transatlantic Dialogue on Higher Education: An Analysis of Cultural Narratives*, Logos Verlag, Berlin, 2011.

([70]) Established in 2009. See the EU-US Summit document on its creation: http://eeas.europa.eu/us/sum11_09/docs/-energy_en.pdf, accessed on 7 October 2013.

([71]) Established in 1990. See: http://ec.europa.eu/research/biotechnology/eu-us-task-force/index_en.cfm, accessed on 7 October 2013.

([72]) Established in 2012. See its five-year programme in: "EU-U.S. Dialogue Project: The Way Forward Objectives and Initiatives for the Future", available at https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/protocols/EU_US_Dialogue_Project_The_Way_Forward_December_2012.pdf, accessed on 7 October 2013.

([73]) See more on the unofficial dialogues in: Bignami, F. and Charnovitz, S., 'Transatlantic Civil Society Dialogues', in Pollack and Shaffer (eds.), *Transatlantic Governance in the Global Economy*, Rowman & Littlefield Publishers, 2001, pp. 274-275.

address technical and other non-tariff barriers to trade resulting from divergent regulatory processes' and to 'encourage a collaborative approach between the EU and the U.S. in testing and certification procedures by promoting greater compatibility of standards and health and safety related measures'.

Although widely regarded as an overall genuine attempt at broadening the scope and depth of transatlantic regulatory cooperation and raising the profile of the EU and its institutions in Washington, the NTA has been heavily criticised for not delivering more substantial results. In particular, it has been claimed that the 'laundry list' of 'deliverables' for each EU-US summit was not only overly bureaucratic, but also failed to address and solve the major trade disputes that affect overall transatlantic relations ([74]).

2.1.3 The Transatlantic Economic Partnership (TEP)

In order to address these shortcomings and amid the emergence of a few economic disputes (such as US sanctions legislation; trade disputes), the two parties established, following the EU-US Summit of 18 May 1998, the Transatlantic Economic Partnership (TEP). This initiative called for the creation of 'a New Transatlantic Marketplace by progressively reducing or eliminating barriers that hinder the flow of goods, services and capital' between the United States and the European Union ([75]). It was the first time the ambitious, yet ambiguous, concept of a New Transatlantic Marketplace (NTM) was introduced within a summit document. The idea was to intensify regulatory cooperation in order to overcome regulatory obstacles, mainly technical barriers to trade, the regulation of biotechnology and sanitary and phytosanitary regulation through the conclusion of mutual recognition agreements (MRAs), scientific and regulatory dialogue, and a higher degree of transparency and consultation ([76]).

A further instrument for regulatory cooperation was added at the 1999 EU-US Summit in Berlin, which introduced the Transatlantic Early Warning System, which remains pivotal in the ongoing discussions surrounding the Horizontal Regulatory Coherence Chapter of TTIP. Under this system each side ensured that it would 'take the other side's interest into account at an early stage when formulating policy, legislative or regulatory decisions' ([77]). According to both EU and US officials, this mechanism would have prevented the escalation of a dispute such as regarding *hush kits*. This revolved around the EU legislation banning the use of hush-kit outfitted aircraft in the EU, thus reducing the value of the mostly American used airplanes so equipped and hurting the profits of American hush kit manufacturers. By the time the US authorities and relevant industries became aware of the potential trade consequences stemming from such a proposal, the text was already in second reading in the European Parliament ([78]). Although the EU and the US invited the different dialogues to contribute to this effort by identifying problems and offering proposals for resolution, only TABD followed that invitation. When the two TABD Chairmen, using the framework of the warning mechanism, brought eight issues to the heads of states at the annual EU-US Summits – six of them triggered by EU environmental and consumer regulations –

([74]) Pollack, 'The New Transatlantic Agenda at Ten', p. 899.

([75]) Communication from the Commission to the Council and the European Parliament, New Transatlantic Marketplace, Brussels, 11. 03.1998, COM(1998) 125 final.

([76]) The NTM provided for action in four key areas: (a) the Widespread removal of technical barriers to trade through increased mutual product recognition and/or harmonisation; (b) a political commitment to eliminate all industrial tariffs by 2010, as long as a critical mass of other trading partners also agree to do so; (c) the creation of a free trade area in services; (d) and further liberalisation of investment, public procurement and intellectual property.

([77]) US-EU Summit Declaration, 1999. http://europa.eu/rapid/press-release_MEMO-11-842_en.htm

([78]) Abbott, K.W. 'U.S.-EU Disputes Over Technical Barriers to Trade and the "Hushkit" Dispute, in Petersmann, E.U. and Pollack, M.A. (eds.), *Transatlantic Economic Disputes*, Oxford University Press, Oxford, 2004, pp. 247-280.

the EU came under pressure to act. The ensuing politicization of the process questioned the viability of the mechanism.

2.1.4 Guidelines and Roadmaps for Regulatory Cooperation and Transparency

In the meantime, an EU-US Summit in Washington, D.C. produced a set of Guidelines for Regulatory Cooperation and Transparency. These were followed by the publication of a Roadmap for EU-US Regulatory Cooperation and Transparency in 2004 and a second Roadmap for closer co-operation. The Administrator of the US Office of Information and Regulatory Affairs (OIRA) and its European Commission counterparts then launched the US-European Commission 'High-Level Regulatory Cooperation Forum' (HLRCF) in 2005, which engages EU and US administrations, regulatory authorities as well as stakeholders on both sides ([79]). The HLRCF meets approximately annually and conducts a variety of bilateral activities to share information and ideas on better regulatory approaches, methods of regulatory analysis, and priorities for reform. The HLRCF played a role in sharing the ideas on regulatory impact assessment and oversight that led the European Commission to issue its Impact Assessment Guidelines (2005, 2006, and 2009) and to create its Impact Assessment Board (IAB) in 2006 ([80]).

The establishment of the HLRCF has sanctioned the emergence of the phenomenon of "horizontal regulatory cooperation" ([81]) involving regulatory cooperation on crosscutting issues such as risk assessment, impact assessment, and cost-benefit analysis ([82]). This innovative form of international cooperation is "horizontal" because it refers to the general analytical basis of regulation as opposed to "sector-specific" regulatory cooperation.

([79]) See http://www.whitehouse.gov/omb/oira_irc_europe

([80]) Wiener, J.B., and Alemanno, A., 'Comparing Regulatory Oversight Bodies across the Atlantic: The Office of Information and Regulatory Affairs in the U.S. and the Impact Assessment Board in the EU', in Rose-Ackerman, S. and Lindseth, P. (eds.), *Comparative Administrative Law*, Edward Elgar, Cheltenham, 2010, pp. 309-335 (who argue that the IAB is now generally perceived – together with the EU Commission Secretariat General – the EU counterpart to US OIRA (created in 1980)). See also Alemanno, A. '*Quis Custodet Custodes* dans le cadre de l'initiative "Mieux légiférer"?', p. 43.

([81]) For an initial analysis of this phenomenon, see Meuwese, A, 'EU-US Horizontal RegulatoryCooperation: Mutual Recognition of Impact Assessment?', in Vogel, D. and Swinnen, J. (eds.), *Transatlantic Regulatory Cooperation: The Shifting Roles of the EU, the US and California*, Edward Elgar, Cheltenham, pp. 249-272; and Allio, L. and Jacobzone, S., 'Regulatory Policy at the Crossroads: the Role of the OECD in Mapping an Agenda for the Future', in Alemanno, A., den Butter, F., Nijsen, A., and Torriti, J., *Better Business Regulation in a Risk Society*, Springer, New York, 2012.

([82]) These established principles are often referred to as "meta-regulation"; see, e.g., Morgan, B., 'The Economization of Politics: Meta-regulation as a Form of Nonjudicial Legality', (2003) 12 *Social and Legal Studies*, pp. 489–523; and Radaelli, C. M, 'Whither Better Regulation for the Lisbon Agenda?', (2007) 14 *Journal of European Public Policy*, pp. 190–207.

2.1.5 Transatlantic Economic Council (TEC)

In order to monitor and facilitate progress in these areas and in taking stock of the limits of previous regulatory cooperation efforts ([83]), the EU-US Summit of 30 April 2007 established a new institution, the Transatlantic Economic Council (TEC), to oversee, support and accelerate the accomplishment of common economic goals of the EU and the US in a variety of sectors ([84]). This institution, an eminent political body, was created within the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union (FATEI) ([85]). While all the agreements issued at EU-US summits since the adoption of the New Transatlantic Agenda in 1995 have essentially aimed at the identification and elimination of all non-tariff barriers to trade through a building-block approach – aiming at advancing on various fronts simultaneously, but independently –, FATEI complemented this building-block strategy with a new approach. This aimed at injecting much needed political momentum into the project, and at linking the various building blocks together under a new institutional superstructure – the Transatlantic Economic Council.

The TEC is composed of ministerial-level appointees who carry the political responsibility for the policy areas covered by the FATEI. Currently, the TEC is chaired by European Commissioner Karel De Gucht and Michael Froman, U.S. Trade Representative (USTR). However, since former TEC Co-Chair Mike Froman became USTR, no new co-chair has been appointed on the US side. The co-chairs jointly developed a set of working arrangements[86]. According to those, permanent Members of the TEC include the European Commissioners for External Relations, for Trade and for Internal Market and Services and the U.S. Secretaries of the Treasury and Commerce. TEC is assisted by a Group of Advisers, which is composed of the co-chairs of the three main transatlantic dialogues: the Transatlantic Business Dialogue, the Transatlantic Consumers' Dialogue, and the Transatlantic Legislators' Dialogue. The inclusion of the TLD on the advisory board might have raised the profile of the TLD but has failed to strengthen the ability of legislators to shape transatlantic economic arrangements.

Similar to many of the other initiatives that have been pursued since the early 1990s to advance the goal of achieving a barrier-free transatlantic market and deepen economic cooperation, TEC has received some results regarding EU-US regulatory cooperation in selected areas (including in the area of electric cars, ICT services, investment, mutual recognition of organic labelled products and of our respective trusted traders programmes AEO and C-TPAT, the common understanding on regulatory principles and best practices and the standards bridge building documents, reinforced cooperation in emerging areas such as nanotechnology and e-health). But results have clearly stayed below expectations ([87]), above all, due to insufficient political will on both sides of the Atlantic.

([83]) Commission of the European Communities, Review of the Framework for Relations between the European Union and the United States, An Independent Study commissioned by the European Commission, 2005, available on the Internet: http://www.statewatch.org/news/2007/dec/eu-us-relations-study.pdf

([84]) EU-US Summit, Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union, Section IV. Available at http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf, accessed on 30 August 2013.

([85]) Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union, April 2007, http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf

[86] Working Arrangements for the Transatlantic Economic Council, available at http://ec.europa.eu-/enterprise/policies/international/files/tec_working_arrangements_en.pdf

([87]) See, e.g., Commission of the European Communities, Review of the Framework for Relations between the European Union and the United States, An Independent Study commissioned by the European Commission, 2005, available on the Internet: http://www.statewatch.org/news/2007/dec/eu-us-relations-study.pdf

It is against this backdrop that, following the publication of the final report of the High Level Working Group on Jobs and Growth of 11 February 2013, negotiations on an EU-US international agreement aimed at creating a free trade area between the two polities, commonly referred to as the Transatlantic Trade and Investment Partnership (TTIP), were initiated in July 2013 ([88]).

2.2 The toolbox of transatlantic regulatory cooperation

Transatlantic regulatory efforts have been work-in-progress since the 1990s. Because substantive harmonization is a slow and complex process that requires the authority to jointly regulate, other alternative forms of regulatory convergence have been developed over time. Generally speaking, harmonization makes the regulatory requirements of different jurisdictions more similar, if not identical. Although states may have incentives to cooperate towards full harmonization, this often implies relinquishing the sovereign power to promulgate regulations ([89]). This explains why states agreed, when addressing the challenge of regulatory diversity within the WTO, to be subject to mere 'procedural harmonization' as opposed to 'substantive harmonization' ([90]). By defining the limits of legitimate diversity through a set of procedural requirements promoting harmonization of procedures and methodologies rather than substantive standards, the former is more respectful of national sovereignty, yet less effective in the fight against regulatory divergence.

Procedural harmonization relies on the assumption that it is possible to harmonize decisional outcomes without imposing a predefined set of policies to which all WTO members must subscribe, by instead constraining the discretion exercised by states in the adoption of domestic technical measures. As a result, under the Sanitary and Phytosanitary Agreement (SPS) and the Technical Barriers to Trade Agreement (TBT), which were set up at the end of the GATT Uruguay Round of negotiations leading to the establishment of the WTO ([91]), member states are required to base their measures 'on international standards, guidelines or recommendations, where they exist' ([92]). When they do so, member countries

([88]) See, e.g., Felbermayr, G. et al, 'Transatlantic Trade and Investment Partnership (TTIP): Who Benefits from a Free Trade Deal?', *Bertelsmann Stiftung* (2013); Felbermayr, G. and Larch, M., 'The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives', (2012) 14 *CESifo Forum*, pp. 49-60.

([89]) The literature on harmonisation of regulatory standards is vast. See e.g. Leeborn, D.N.L., 'Lying Down with Procrustes: An Analysis of Harmonisation Claims', in Bhagwati, J., and Hudec, R. (eds.), *Fair Trade and Harmonisation: Prerequisites for Free Trade*, MIT Press, Cambridge, 1996, pp. 42 et sqq ; Sykes, A., 'The (limited) role of regulatory harmonisation in international goods and services markets', (1999) *Journal of International Economic Law*, pp. 49 et sqq ; Esty, D., and Géradin, D., 'Regulatory Competition', in Esty, D. and Géradin, D. (eds.), *Regulatory Competition and Economic Integration*, Oxford University Press, Oxford, 2001, Ch. 2.

([90]) Majone, G., 'The Internationalization of Regulation: Implications for Developing Countries', in Minogue, M. and Carion, L. (eds.), *Regulatory Governance in Developing Countries*, Edward Elgar, Cheltenham, Edward Elgar.

([91]) Since the 1979 Tokyo Round, some countries have feared that the lowering of border measures would be circumvented by disguised protectionist measures in the form of technical regulations, notably sanitary and phytosanitary regulations. For this reason, a Plurilateral Agreement was adopted on Technical Barriers to Trade, also called the 'Standards Code'. See Trebilcock and Howse, R. *The Regulation of International Trade*, Routledge, New York, 1999. See also Marceau, G. and Trachtman, J, 'The Techincal Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade', (2002) 35 *Journal of World Trade*, pp. 811-881. The operation of the Standards Code is generally perceived as a failure; see Victor, D. G., 'The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years', (2000) 32 *New York University Journal of International Law and Policy, pp.* 865–937.

([92]) WTO Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1165 (1994), Art. 3 (hereinafter SPS); and WTO Agreement on Technical Barriers to Trade Agreement (1994), Art. 2.4 (hereinafter TBT).

benefit from a presumption of full compliance with WTO law ([93]). If they do not follow international standards (either because these do not exist or because states want to follow a different level of protection), states need to either provide scientific justification ([94]) or prove the 'necessity' ([95]) of the adopted measures ([96]). Both requirements, scientific justification and necessity, serve as proxies to detect whether a WTO member is pursuing legitimate objectives and whether the adopted measure is the least trade restrictive to achieve such objectives ([97]). As exemplified by the large number of remaining regulatory differences and the abundant and sensitive SPS/TBT dispute records, this 'procedural harmonization' approach falls short in addressing intrinsic negative trade effects ([98]).

Mutual recognition ([99]) has emerged as the privileged instrument capable of bringing the greatest substantive results in the short term. However, mutual recognition - as it has been used in EU-USA relations - does not go as far as the mutual acceptance of products in the Internal Market of the EU ([100]). Rather, this concept aims to create the conditions for goods legally produced and marketed in the territory of one side to be traded across the Atlantic without facing further formalities or duplicative requirements. Thus mutual recognition might have as its object either the substantive standards or the results of the conformity assessment procedures. It is useful to begin with an examination of substantive mutual recognition. The mutual recognition of technical regulations requires first an analysis and comparison of the regulatory requirements applicable to a given product or service. Second, it calls for a judgment on whether the two sets of requirements are equally apt to reach the

([93]) All international standards are presumed necessary to achieve a legitimate objective. See SPS, *supra* note 81, at Art. 3 and TBT, *supra* note 81, at Art. 2.5.

([94]) SPS, *supra* note 81.

([95]) Under the "necessity test," a measure can only be found "too restrictive to trade" when there is an alternative measure that is not only less trade restrictive but also achieves the same level of protection as the measure adopted. TBT, *supra* note 10, at Art. 2.3.

([96]) SPS, *supra* note 81, at Arts. 2.2, 5.1; TBT, *supra* note 81, at Art. 2.2.

([97]) Alemanno, A., *Trade in Food – Regulatory and Judicial Approaches in the EU and WTO*, Cameron May, Oxford, 2007.

(98) On the limits of the 'procedural harmonisation' approach to tackle NTBs, see e.g. Roberts, D., 'Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations', (1998) 1 JIEL, p. 382; Christoforou, T., 'Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainity', (2000) 3 N.Y.U. Environmental Law Journal, pp. 624-625 ; Marceau, G. and Trachtman, J.P., 'The Technical Barriers to Trade, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A Map of the World Trade Organisation Law of Domestic Regulation of Goods', p. 815.

([99]) On the genesis, rationale and application of the principle of mutual recognition, see e.g. Mattera, A., 'L'article 30 du Traité CE, la jurisprudence Cassis et le principe de la reconnaissance mutuelle', (1992) 4 *Revue du Marché Unique Européen*; Mattera, A., 'Le principe de la reconnaissance mutuelle et le respect des identités et des traditions nationales, régionales et locales', in *Mélanges Jean-Victor Louis*, Bruylant, Bruxelles, 2004, p. 302 and Gardenes Santiago, M., *La Aplication de la Regla de Reconocimiento Mutuo y su Incidencia en el Comercio de Mercancias y Servicios en el Ambito Comunitario y Internacional*, Eurolex, Madrid, 1999.

([100]) On the application of the mutual recognition principle in international trade, see e.g. Nicolaidis, K., 'Mutual Recognition of Regulatory Regimes', OCDE Trade Committee Symposium on Regulatory Reform and International Market Openness, Novembre 1996, Paris ; Nicolaidis, K., 'Mutual Recognition of Regulatory Regimes: Some lessons and Prospects', (1997) 7 *Harvard Jean Monnet Working Paper*; Mathis, J.H., 'Mutual Recognition Agreements: Transatlantic Parties and the Limits to Non-tariff Barrier Regionalism in the WTO', (1998) 32 *Journal of World Trade*; Stephenson, S.M., Mutual Recognition and its Role in Trade Facilitation, (1999) 33 *Journal of World Trade*, p. 141 et sqq; Horng, D.C., 'The Principle of Mutual Recognition, The European Union's Practice and Development', (1999) 22 *World Competition*; Weiler, J.H.H., 'Epilogue: Towards a Common Law of International Trade', in Weiler, J.H.H., *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, Oxford University Press, Oxford, 2000, pp. 229-231 ; Shaffer, G., 'Managing U.S.-EU Trade Relations Through Mutual Recognition and Safe Harbor Agreements: "New" and "Global" Approaches to Transatlantic Economic Governance?', (2002) 9 *Columbia Journal of European Law*, pp. 29-77; Alemanno, A., 'Gli accordi di reciproco riconoscimento di conformità dei prodotti tra regole OMC ed esperienza europea', (2003) 2-3 *Diritto del Commercio Internazionale*; Alemanno, A., 'Le principe de la reconnaissance mutuelle au delà du marché intérieur. Phénomène d'exportation normative ou stratégie de "colonialisme" règlementaire?', (2006) 2 *Revue du droit de l'Union européenne*.

intended result in terms of product safety, product quality or protection of public health and environment. It is often said that an agreement of mutual recognition presupposes the 'functional equivalence' between the technical requirements for the purpose of fulfilling the objectives of the regulation itself. However, the notion of mutual recognition and equivalence do not overlap. While the former is the process by which regulators recognize the validity of a technical regulation issued by a foreign country for the fulfilment of domestic objectives, equivalence focuses on the technical content of the regulation. As a result, the latter, but not the former, also applies to private standards.

The traditional Mutual Recognition Agreements (MRAs) concluded by the EU with other trading partners – including the US ([101]) – focus on the results of conformity assessment procedures and presupposes the equivalence between the respective regulatory standards. In other words, governments agree to recognize the results of each other's testing, inspections, or other procedures. This typology of agreements enable Conformity Assessment Bodies (CABs) nominated by one Party to certify products for access to the other Party's market, according to the other Party's technical legislation. They provide for the mutual recognition between trading partners of mandatory test results and certificates for certain industrial products. Under bilateral MRAs, each country agrees to accept product inspection, testing, or certification results performed by the other country.

Without an MRA, many EU manufacturers selling in the US market first have their products tested in Europe, in order to meet EU standards. They then have the products tested and certified for approval again by US authorities. This duplication demonstrates how government regulators can conserve resources via MRAs. By way of example, the FDA performs inspections in European drug factories before allowing these pharmaceuticals into the United States. The manufacturer's plant also undergoes inspections by host government authorities. Thus, for instance, each Good Manufacturing Practices (GMP) pharmaceutical plant inspection that the FDA performs costs the agency $100,000, and 150 such inspections are performed in the EU each year. If regulatory agencies in Europe perform equivalent inspections accepted by the FDA under the MRA, the FDA funds formerly used for inspections in Europe can be put to good use elsewhere in ensuring the highest levels of health and safety for the American consumers. It is important to note that no regulatory convergence is implied by a traditional MRA. In other words, there is no implication that the regulations imposed on products by the Parties are to be brought into alignment at any stage.

2.3 Achievements and failures in transatlantic regulatory cooperation

Transatlantic regulatory efforts have been work-in-progress since the 1990s and have produced both achievements and failures. Some notable achievements include:

2.3.1 Mutual recognition of certificates of conformity for Marine Equipment

In the case of the MRA on Marine Equipment ([102]), this agreement allows a manufacturer to reach multiple markets on the basis of compliance with one set of regulatory requirements instead of multiple ones, as would the case without the MRA. This can lead directly to a reduction of costs for the manufacturer in terms of testing and certification. The initial MRA product scope includes 43 products in 3 main categories: life saving appliances (e.g. visual distress signals, marine evacuation systems); fire

([101]) The 1998 MRAs concluded by the EU and the US authorities cover six sectors :telecomunications equipments, electromagnetic compatibility, electric safety, recreational craft, pharmaceutical Good Manufacturing Practices (GMPs) and medical devices. As separate MRA on Marine Equipement was negotiated in 2004 and is dicussed below. For a detailed analysis of these agreements, see Alemanno, A., 'Le principe de la reconnaissance mutuelle au delà du marché intérieur'.
([102]) Council Decision 2004/425/EC of 21st April 2004.

protection equipment (e.g. fire door installations) and navigational equipment (e.g. compass, GPS equipment, and echo sounding equipment).

2.3.2 EU-US Bilateral Agreement on cooperation on the regulation of civil aircraft

The purpose of this agreement is to enable the reciprocal acceptance of findings of compliance and approvals, promote a high degree of safety in air transport, ensure regulatory cooperation and harmonization between the U.S. and the EU as regards airworthiness approvals and monitoring of civil aeronautical products, environmental testing and approvals of such products, and approvals and monitoring of maintenance facilities. This is not an MRA, but an arrangement that promotes reciprocal acceptance of findings and approvals in relation to airworthiness and environmental certification and maintenance by technical agents and safety authorities. It is based on systems that produce equivalent results, though processes and procedures may be different.

2.3.3 EU-US Organic Equivalence Arrangement

According to this 2012 equivalence arrangement, products certified to the USDA organic or European Union (EU) organic standards may be sold, labelled, and represented as organic in both countries. As long as the operation is certified by a USDA- or EU-accredited certifying agent, this arrangement eliminates the need for U.S. organic operations to have a separate certification to the EU standards and vice versa. Although there are small differences between the U.S. and European Union organic standards, both parties agreed that their programs were equivalent except for the prohibition on the use of antibiotics. The USDA organic regulations prohibit the use of antibiotics except to control invasive bacterial infections (fire blight) in organic apple and pear orchards. The European Union organic regulations allow antibiotics only to treat infected animals. Therefore, for all products traded under this partnership, certifying agents must verify that antibiotics were not used for any reason. In addition, all products traded under the partnership must be shipped with an organic export certificate. This document will show the production location, identify the organisation that certified the organic product, verify that prohibited substances and methods weren't used, certify that the terms of the partnership were met, and allow traded products to be tracked. This partnership between the two largest organic-producers in the world is set to establish a strong foundation from which to promote organic agriculture, benefiting the growing organic industry and supporting jobs and businesses on a global scale. The organics sector in the EU and the United States and European Union is valued at more than $50 billion combined, and rising every year. This agreement brings a double added value. On the one hand, organic farmers and food producers will benefit from easier access, with less bureaucracy and less costs, to both the U.S. and the EU markets, strengthening the competitiveness of this sector. In addition, it improves transparency on organic standards, and enhances consumers' confidence and recognition of EU and US organic food and products.

2.3.4 Mutual recognition of the EU and U.S. air cargo security regime

Since 1 June 2012, the EU and the United States recognise each other's air cargo security regime, which positively affects the speed and efficiency of transatlantic cargo operations to the benefit of shippers and customers. Air carriers transporting cargo from EU airports to the U.S. no longer need to apply additional U.S. measures as they comply with the EU requirements. Also, cargo or mail shipments from the U.S. to the EU may transfer at EU airports to further destinations without additional controls. This recognition will substantially cut cargo operators' costs and save time.

Previously, air cargo flown into the U.S. had to be submitted to controls defined in security programmes issued by the US Transportation Security Administration (TSA). This did not take into consideration the extensive controls already applied at EU airports and therefore duplicated controls. This MRA, given the significant compliance costs related to security measures, may save several tens of millions of euros per year in the EU alone, without any negative impact on security.

While the previous illustrations show the potential of enhanced transatlantic regulatory cooperation, they belie a larger number of sectors in which cooperation did not work or has not yet been attempted.

2.3.5 Hormone-treated beef, GMOs and Poultry

The EU and the US have had little success in agreeing upon the regulatory standards that should apply to food products. More specifically, there is on-going disagreement regarding genetically modified (GMO) foods ([103]) and hormone treated meat ([104]), the latter of which has been a source of friction for over twenty years ([105]). The US has brought action regarding the regulation of these goods to the World Trade Organisation (WTO) in an attempt to progress these issues ([106]). However, the rulings thus far issued by the WTO's Appellate Body (WTO AB) have not resolved the disagreement. For example, when the WTO found against the EU in the Hormones case, the EU chose to persist in their ban of hormone-treated beef and to receive retaliatory measures rather than comply with the decision ([107]). The EU continues to adopt a precautionary stance in its implementation of the GMO regulatory regime on the

([103]) See European Communities — Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/AB/R

([104]) See e.g. Lester, S. and Barbee, I., 'Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership', (2013) 16 Journal of International Economic Law, p. 850-51,

([105]) See, "USTR Announces Agreement With European Union in Beef Hormones Dispute", May 2009.

([106]) The Biotech dispute took place between the US, Canada, Argentina and the European Community in relation to the European alleged general moratoria (the product-specific moratoria and the national bans) on the importation of GMOs. See EC-Measures Affecting the Approval and Marketing of Biotech Products, Panel Report, 2006. The Hormones dispute involved a complaint by the United States and Canada against an EU regulatory regime prohibiting the administration of growth hormones (such as oestrogen, progesterone and testosterone) to cattle. This prohibition not only addressed the use of these hormones domestically, but also banned the production and importation of meat derived from animals treated with non-therapeutic growth hormones. See Appellate Body Report, European Communities-Measures Concerning Meat and Meat Products, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998; Panel Report, European Communities - Measures Concerning Meat and Meat Products, WT/DS26/R/USA (Aug. 18, 1997). For a detailed reconstruction and insightful analysis of the dispute, see Christoforou, T., 'Science, Law and Precaution in Dispute Resolution on Health and Environmental Protection: What Role for Scientific Experts?', in Bourrinet, J. and Maljean-Dubois, S. (eds.), Le Commerce International des Organismes Génétiquement Modifiés, Documentation Francaise, Paris, 2003, p. 239; Wüger, D., 'The Implementation Phase in the Dispute Between the EC and the United States on Hormone-Treated Beef', (2002) 33 Law & Pol'y Int'l Bus., p. 777 et sqq and Alemanno, A., Trade in Food – Regulatory and Judicial Approaches in the EU and WTO, Cameron May, Oxford, 2007.

([107]) Principle EU-US Trade disputes, Library Briefing, Library of the European Parliament, 22/04/13, p. 2, available at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130518/LDM_BRI(2013)130518_REV1_EN.pdf.

basis of consumer preference ([108]), giving more weight to its citizens' requests on this topic than the decisions of the WTO AB. Outside of the WTO, the EU and US reached an intermediary agreement by signing a temporary Memorandum of Understanding regarding hormone-free beef, which allowed for time and quantity limited importation of US beef into the EU market ([109]). However, the underlying divergence in health and safety standards at the heart of the beef hormones disagreement remains ([110]).

At the core of this and related disagreements, such as the poultry dispute ([111]), is a significant divergence between how the EU and US interpret the science-based regulatory framework provided by the WTO Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures ([112]). Under this Agreement, science has been chosen as the privileged tool to determine the lawfulness of Member States' regulatory autonomy when governing food matters ([113]). Yet, as illustrated by several food safety disputes litigated in recent years under this Agreement, occasionally consumers may perceive some kind of risks that cannot be proven by available scientific knowledge. In particular, consumers may develop fears about some foods developed by new technologies ([114]), such as animal cloning, genetic engineering and nanotechnologies, and reject them even though they have been scientifically tested and been proven 'safe', i.e. equivalent to their conventional counterpart ([115]).

Public perceptions, by weakening consumer confidence in a given food product, often mature into public concerns which, in turn, inform national risk decision-making and eventually crystalize into regulations ([116]). Given that public perceptions are culturally determined ([117]), it is not surprising that the ensuing regulations differ among countries and, as such, result in obstacles to trade. Albeit scientifically

([108]) Principle EU-US Trade disputes, Library Briefing, Library of the European Parliament, 22/04/13, p. 2, available at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130518/LDM_BRI(2013)130518_REV1_EN.pdf.

([109]) See, "USTR Announces Agreement With European Union in Beef Hormones Dispute", May 2009, available at http://www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones-.

([110]) For some possible ways forward, Alemanno, A., 'How to Get Out of the Transatlantic Regulatory Deadlock over GMOs? Time for Regulatory Cooperation', in Swinnen, J. and Vogel, D. (eds.), *Cooperating in Managing Biosafety and Biodiversity: California, the United States and the European Union*, Edward Elgar, Cheltenham, 2010.

([111]) See Johnson, R., U.S.-EU Poultry Dispute, Dec. 9, 2010, available at. http://www.fas.org/sgp/crs/row/R40199.pdf. This dispute concerned the EU's ban on the importation of US poultry that had been treated with treated with antimicrobial rinses.

([112]) See, e.g., Alemanno, A. *Trade in Food* and Principle EU-US Trade disputes, Library Briefing, Library of the European Parliament, 22/04/13, p. 1, available at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130518/LDM_BRI(2013)130518_REV1_EN.pdf.

([113]) Since the 1979 Tokyo Round some countries feared that the lowering of border measures would be circumvented by disguised protectionist measures in the form of technical regulations, notably sanitary and phytosanitary regulations. For this reason, already on that occasion, a Plurilateral Agreement was adopted on Technical Barriers to Trade, also called 'Standards Code'. See Trebilcock, M. and Howse, R., *The Regulation of International Trade*, Routledge, London-New York, 1999, p. 145.

([114]) Baruch Fischoff, one of the pioneers in risk perception studies, recognises that '*technological risks can evoke the deepest feelings*'. Fischoff, B, 'Managing Risk Perceptions', (1985) 2 *Issues Science & Technology*, p. 83.

([115]) According to most of the regulatory legal frameworks dealing with these substances, the notion of 'safety' related to their scientific equivalence to the conventional product.

([116]) In international trade law jargon, the term 'public perception', or more in general, 'public opinion', is used to refer to fears unsupported by scientific evidence and as such are opposed to scientifically based facts or measures. See, e.g., Fraiberg, J.D. and Trebilcock, M.J., 'Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform', (1998) 43 *McGill Law Journal*, pp. 836-88, at p. 841.

([117]) See, e.g., Douglas, M., *Risk Acceptability According to the Social Sciences*, Russell Sage Foundation, 1985 ; and Weber, E. and Ancker, J., 'Risk Perceptions and Risk Attitudes in the US and Europe', in Wiener, Rogers, Hamitt and Sand, *Comparing Risk Regulation in the United States and Europe*, p. 480.

unsubstantiated, the resulting regulations do not necessarily imply a protectionist intent or discriminatory effect, and reflect societal preferences in a given historical moment.

Recognising the limits of the SPS Agreement and the competing interpretation of its regime by the EU and US authorities, the EU-US High Level Working Group suggested that TTIP expand upon the SPS to include "[a]n ambitious 'SPS-plus' chapter, including establishing an on-going mechanism for improved dialogue and cooperation on addressing bilateral sanitary and phytosanitary (SPS) issues" ([118]). Like the WTO SPS Agreement, this chapter would address regulations designed to protect human, animal, and plant health. However, because the EU and US have not shifted their positions on scientifically proven risk or whether the precautionary principle or cost benefit analysis approach should prevail, it is unclear how the TTIP could be more successful than the recent inconclusive disputes brought under the WTO SPS Agreement. Thus, without a common basis of scientific understanding and with continued EU deference to consumer preference ([119]), the food sector is likely to remain an area of regulatory divergence.

2.4 Transatlantic Parliamentary regulatory cooperation

Although transatlantic trade negotiations have largely been in the purview of the executive branches of the US and the EU, there has been a long tradition of parliamentary cooperation. While this is a multifaceted and loaded concept, parliamentary cooperation belongs to the broader notion of 'parliamentary diplomacy' ([120]). This refers to a large variety of international activities, including regulatory cooperation, carried out by various parliamentary actors, be they individual parliamentarians or political parties, at different levels, such as intra-state, inter-state, regional or international ([121]).

Transatlantic cooperation, also referred to as transatlantic parliamentarianism, originally initiated in 1972, when a delegation of the US Congress first visited the European Parliament to share their views on agricultural subsidies and general trade-related issues ([122]). These initial parliamentary contacts became know as the US-European Community Interparliamentary Group and, with few exceptions, have taken place twice a year, and have provided the opportunity for sustained dialogue. The transatlantic cooperation is the oldest and widely considered the most prestigious of the EP's interparliamentary dialogues ([123]).

The 1990 Transatlantic Declaration and the 1995 New Transatlantic Agenda both recognised, built upon, and encouraged the bi-annual meetings of this group. While the Transatlantic Business Dialogue (TBD) started to operate through regular meetings already in 1995, the consultation between the

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([118]) Final Report, High Level Working Group on Jobs and Growth (11 February 2013), http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

([119]) For example, the Council concluded in June 2012 that a political agreement on GMOs was not possible. Proposal for a Regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory—Progress report, 6 June 2012, p. 6, http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2010883%202012%20REV%201&r=http%3A%2F%2Fregister.consilium.europa.eu%2Fpd%2Fen%2F12%2Fst10%2Fst10883-re01.en12.pdf

([120]) See, e.g., Rusk, D., 'Parliamentary Diplomacy – Debate vs. Negotiation', (1955) 26 *World Affairs Interpreter*, pp. 121-122.

(121) See, e.g., Jancic, D., 'The European Parliament and EU-US Relations: Revamping Institutional Cooperation?', in Curtin, D. and Fahey, E., A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders, Cambridge University Press, Cambridge, forthcoming (who defines it as 'a collection of parliamentary activities catalysing, facilitating and strengthening the existing constitutional functions of parliaments through dialogues between peers on countless open policy questions across continents and levels of governance').

([122]) Archick, K. and Morelli, V., 'The US Congress and the European Parliament: Evolving Transatlantic Legislative Cooperation', *Report for Congress no. R41552*, Washington DC: Congressional Research Service, 2011, p. 1.

([123]) See Archick, K., 'The European Parliament', *Report for Congress no. RS21998*, Washington DC: Congressional Research Service, 2013, p. 14.

legislatures remained on *ad hoc* basis for several years. This changed in 1999 at the 50th meeting of the Interparliamentary Group when the parliamentary delegations decided to formalise their institutional contacts and rename their group to Transatlantic Legislators' Dialogue (TLD). This was conceived as 'a formal response of the European Parliament and the US Congress to the commitment in the New Transatlantic Agenda to enhanced parliamentary ties between the European Union and the United States' ([124]).

2.4.1 Transatlantic Legislators' Dialogue (TLD)

The Transatlantic Legislators' Dialogue (TLD) is therefore the EP and US Congress's response to the 1995 New Transatlantic Agenda (NTA). In furtherance of the NTA's goal, the TLD was established in 1999 to encourage communication specifically between the EP and the US Congress. While the declared objective was indeed to bring together the EU and US parliamentary delegations to discuss trade and economic issues as well as political, social, security and environmental issues, the TLD's objective was more profound. It was expected to 'add a new level of democratic oversight to the expanding transatlantic relationship' ([125]).

While the US Congressional delegation is generally composed of Members of the House of Representatives (Senators typically don't attend) ([126]), the EP representation in the TLD is drawn from the EP Delegation for Relations with the United States ([127]), with the largest EP delegation currently counting 53 members. In the EP, a chairman leads the TLD, assisted by two vice-chairs, whereas in Congress, the TLD is headed by a chair of the majority and vice-chair of the minority party.

To ensure an adequate level of coordination between relevant congressional and parliamentary committees on initiatives having a transatlantic impact, the European Parliament has created a Steering Committee. This is co-chaired by the chairman of the Delegation for Relations with the US and of the Committee on Foreign Affairs and gathers the members of the Bureau of the US Delegation, the chairman of the EP's conference on Committee Chairmen and the chairmen of a wide selection of EP's committees ([128]).

These elements illustrate the different roles play by the TLD in the two parliamentary systems. In the EP, the TLD has already acquired the status of an oversight body gathering the representatives of all key sectoral committees. In the US Congress, due to the limited representativeness of its delegation within TLD, the committees seem to privilege a direct contact with their counterparts at the EP.

([124]) Joint Statement of the delegations of the US Congress and the European Parliament, 16 January 1999.

([125]) Transatlantic Legislators' Dialogue, Joint Statement of the 50th Interparliamentary Meeting, Strasbourg, 15-16 January 1999.

([126]) Archick, K. and Morelli, V., 'The US Congress and the European Parliament', p. 10 (stating that there are no provisions other than the appointment of its chait and vice chairs by the Heads of the House Foreign Affairs Representatives).

([127]) Over the years, the European Parliament has formed 40 delegations: delegations to parliamentary assemblies; delegations to joint parliamentary committees; delegations to parliamentary cooperation committees and delegations for relations with third countries and entities. Their members are elected by the EP itself on a proposal from the Conference of Presidents following the re-election of Parliament for the duration of the parliamentary term. Delegations ensure a fair representation of the Member States and political views. See Rule 198(1) of the Rules of Procedure of the European Parliament.

([128]) These are the Committee on Foreign Affairs; the Committee on Industry, External Trade, Research and Energy; the Committee on Agriculture and Rural Development; Committee on Civil Liberties, Justice and Home Affairs; the Committee on International Trade; the Committee on Economic and Monetary Affairs; the Committee on the Environment, Public Health and Food Safety; the Committee on the Internal Market and Consumer Protection; the Committee on Transport and Tourism; and the Committee on Culture and Education.

The TLD meets at bi-annual meetings focused on specific topics, and outside of these meetings, its members remain in frequent contact, also via and direct committee-to-committee exchanges of views. On the EU side, parliamentary services appoint committee liaison persons to keep each other updated of legislative developments at the committee level and facilitate early intervention.

The TLD is also represented in the Transatlantic Economic Council (TEC), via its co-chairs, together with the TABD and TACD.

2.4.2 European Parliament Liaison Office (EPLO)

To provide further support to transatlantic cooperation, the EP opened the European Parliament Liaison Office in Washington D.C., the first EP representation overseas ([129]). The mission of this office is to maintain regular contact with US lawmakers on matters of transatlantic interest and to ensure that the voice of MEPs is heard on Capitol Hill.

In particular, its official mandate entrusts the Liaison Office to: (a) promote joint legislative planning and a joint legislative early warning system; (b) identify issues of mutual interest, monitor US legislative activity and relay information about it between the two sides; (c) assist visits by MEPs; and (d) reinforce cooperation with the EU Delegation in Washington DC so as to aid information exchange and transatlantic policy making ([130]). Given the importance of information exchange and timing in transatlantic regulatory cooperation – as already highlighted by previous initiatives such as the Transatlantic Early Warning – this office may potentially contribute to and enhance parliamentary cooperation. It remains to be seen whether the U.S. Congress will follow up on the invitation made by the European Parliament to establish a similar congressional liaison office in Brussels ([131]). Overall, the EP appears generally in favour of enhancing cooperation with the U.S. Congress further. In March 2009, the EP adopted a resolution, which among other measures, asserted that the U.S. Congress and the EP should promote closer ties between legislative committees (direct committee-to-committee contact) and should create a reciprocal legislative "early warning" system to identify potential legislative activities that could affect relations between the United States and the EU ([132]). The TLD, committee-to-committee contacts and EPLO are all part of the 'early warning system' on the EP side. Finally, it remains to be seen how the EPLO can develop its own 'know how' and expertise in Washington D.C.. It faces a dual challenge: gaining the credibility of its US actors on the Hill and in the Executive administration, and attracting the interest of the MEPs in Brussels.

2.4.3 The limits of Parliamentary cooperation

On top of the illustrations previously provided of attempted parliamentary cooperation on SWIFT, PNR and ACTA, three recent examples reveal some of the limits of the current EU-US parliamentary cooperation.

(a) The case of the Emission Trading Scheme (ETS)

Since 2005, the EU introduced an Emission Trading Scheme (ETS) to limit emission of carbon dioxide (CO_2) from power plants, a wide range of energy-intensive industry sectors as well as emissions of

([129]) Martin, G., 'European Parliament Inaugurates Its Own Liaison Office in Washington', (2010) *European Affairs*, available at http://www.europeaninstitute.org/April-May-2010/european-parliament-inaugurates-its-own-liaison-office-in-washington.html.
([130]) See: http://www.europarl.europa.eu/us/en/Resources.html, accessed on 4 March 2014.
([131]) European Parliament resolution A6-0114/2009, adopted March 26, 2009.
([132]) Ibid.

perfluorocarbons from aluminium production in order to combat climate change ([133]). Through this system the EU ETS has put a price on carbon and shown that it is possible to trade in greenhouse gas emissions. Since this scheme was about to be extended to the emissions from international aviation, ie. to aircraft operators whose flights land at or depart from European airports, this Scheme was debated in the US House of Representatives on 27 July 2007 ([134]) as well as in the Senate ([135]). Similar to what occurs to industrial installations covered by the EU ETS, airlines would receive tradable allowances covering a certain level of CO_2 emissions from their flights per year. The EU Directorate-General for Climate Action was offered the opportunity to submit written testimony at the Senate's hearing. On this occasion he claimed that this initiative was not only unanimously sustained by the Member States but also massively supported by the EP ([136]). As a result, the US Congress enacted the EU Emissions Trading Scheme Prohibition Act that inhibits US civil aircraft from abiding by the scheme. Moreover, even before this enactment, the scheme was challenged in front of the European Court of Justice ([137]). In April 2013 the EU decided to temporarily suspend enforcement of the EU ETS requirements for flights operated in 2010, 2011, and 2012 from or to non-European countries, while continuing to apply the legislation to flights within and between countries in Europe ([138]).

In this particular instance, the EU-US cooperation – despite its potential role in finding a common ground - did not seem to have worked as expected and illustrates many of the major limits of both governmental and parliamentary cooperation.

(b) US Travel Promotion Act and the ESTA fee

Another occasion in which a US legislative proposal has raised serious concerns amongst the European Parliament's members was the signature of the US Travel Promotion Act of 2009. This act established the Corporation for Travel Promotion, a public-private partnership entrusted with promoting tourism in the US. To fund the Corporation's activities, the Act provides for a fee of $10 for use of the Electronic System for Travel Authorization (ESTA) on travellers entering the US territory under the US visa waiver programme. Additionally, the Act authorizes a further charge to recover the costs of providing and administrating the ESTA. Since January, EU citizens from Member States that are part of the US Visa Waiver programme have to pay 14 dollars to travel to the US.

([133]) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC. This Directive was amended in 2004, 2008 and 2009.

([134]) US House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Aviation, Hearing of 27 July 2011, available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg67582/pdf/CHRG-112hhrg67582.pdf.

([135]) US Senate, Committee on Commerce, Science and Transportation, Hearing of 6 June 2012.

([136]) Written testimony by Jos Delbeke to the US Senate hearing on the EU's Emissions Trading Scheme, p. 10. He stated: "There is no prospect of suspending the EU legislation. The legislation to include aviation in the EU ETS has been adopted after three years of intensive public debate and negotiation. It has been adopted unanimously by the 27 Member States that are represented in the Council of Ministers and with a more than 90 per cent majority in the European Parliament".

([137]) Judgement of 21 December 2011 in Case C-366/10: *Air Transport Association of America and others* v. *Secretary of State for Energy and Climate Change* [2011] ECR. On this judgment, see e.g. Denza, E., 'International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case', (2012) 37 *European Law Review*, pp. 314-326; Mayer, B., 'Case Note C-366/10', (2012) 49 *Common Market Law Review*, pp. 1113-1140; Bogojevic, S., 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme', (2012) 24 *Journal of Environmental Law*, pp. 345–356; de Baere, G. and Ryngaert, C., 'The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy', (2013) 18 *European Foreign Affairs Review*, pp. 389–410.

([138]) The EU took this initiative to allow time for the International Civil Aviation Organization (ICAO) Assembly in autumn 2013 to reach a global agreement to tackle aviation emissions – something Europe has been seeking for more than 15 years.

MEPs expressed "serious concern" at the US Travel Promotion Act "and its discriminatory effect in applying only to travellers under the US visa waiver programme, as well as data protection concerns that it can only be paid with one of the four major credit cards, whose companies are all based inside the US" ([139]). A former EU Ambassador to the US even threatened to subject Americans to pay the same fees for travel to Europe ([140]).

This case clearly provides an illustration of a piece of legislation whose substance and procedural adoption contravened not only the function and purpose of a TLD but also its spirit.

(c) The case of scanning requirements for maritime cargo containers

Since its adoption in 2007, the United States legislation mandating the scanning at foreign ports of all US bound maritime containers has triggered an international debate and drawn strong reservations from the business community, national governments and security specialists worldwide. The Implementing Recommendations of the 9/11 Commission Act of 2007 introduced, *inter alia*, a 100% scanning requirement for US-bound maritime cargo at export. This was bound to be implement by July 2012.

After recognizing that strengthening the security of the supply chain via effective security measures is a major European Union priority, the EU carried out three separate impact assessment of the potential impact of the 100% scanning requirement on European trade, transport and customs security. The EU IAs pointed out that, if 100% scanning at export was implemented in European ports, it would not only be unilateral, excessively costly and trade disruptive, but it would also be unlikely to improve global security. This was sent to US Customs Border Protection (CBP) and included in the report of the Department of Homeland Security to the US Congress in June 2008 ([141]). Facing growing pressure from all over the world (not only Europe), the US administration was forced to step away from its proposed requirement of 100% screening of cargo containers. US Secretary of Homeland security Janet Napolitano declared: "We believe the so-called 100 percent requirement is probably not the best way to go" ([142]).

This case illustrates that the tension prompted by this proposal could have been avoided by greater transatlantic consultation and cooperation first at the level of US Congress and European Parliament and second at the level of regulatory. But it also shows how reliance on common regulatory tools, such as impact assessment, and greater attention for the extraterritorial impact – as currently envisioned by TTIP – might prevent regulatory disputes from arising.

([139]) European Parliament, Press Release, Parliament signals its priorities for EU-US summit, 11 November 2010.

([140]) Baker, T. and McBride, M., 'Beyond the. Handshake: Rethinking Cooperation between the. US Congress and the European Parliament', Bertelsmann Foundation, April 2010, p. 5.

([141]) U.S. Customs and Border Protection Report to Congress on Integrated Scanning System Pilots (Security and Accountability for Every Port Act of 2006, Section 231).

([142]) News agency, AFP, Full container screening 'not best' move: US security chief, Jun 22, 2011.

2.5 Concluding remarks on regulatory divergence as major source of transatlantic friction

In parallel with the growing burden to trade imposed by regulatory differences to their trade exchanges, transatlantic regulatory efforts between the EU and the US authorities have intensified over the last twenty years. As illustrated above, this has occurred at different levels of government, between different actors and according to different instruments, such as MRAs.

However, for the vast majority of initiatives that have been pursued since the early 1990s to advance the goal of achieving a barrier-free transatlantic market and deepen economic cooperation, the results have at best been mixed[143]. Above all, insufficient political will on both sides of the Atlantic has frustrated initial expectations. Despite some achievements in specific sectors, the regulators have not been capable of attaining their declared objectives. Additionally, parliamentary cooperation does not seem to have delivered what it originally pursued, being not involved into the Summit process[144].

Despite the established tradition of EU-US parliamentary cooperation, there is little evidence showing that these efforts have borne fruit. Due to the inherent difficulty in determining whether direct consultation between the legislators may actually affect the outcome of the respective policymaking processes, it remains challenging to quantify the return on investment of parliamentary cooperation ([145]). According to some authors, the TLD would be the least successful component of the New Transatlantic Agenda ([146]). While this may appear a severe judgment that does not take duly into account the inherent informal character of parliamentary diplomacy, there exist several reasons that might explain the limited results of decades of EU-US parliamentary cooperation. None of the inter-parliamentarian mechanisms – including the TLD – of cooperation enjoy formal recognition in the EU Treaties, nor does their output produce legally relevant effects ([147]). The TLD enjoys limited prerogatives and its current committee-to-committee contacts are too limited. Yet, as often argued in the literature, regular consultations among the chairs of the related committees in Washington and Brussels could play a significant role in raising awareness about how connected the work of the two assemblies is connected one to another ([148]). Yet given the different roles played by the two legislators within each constitutional framework one cannot assume the interests of their parliamentarians always to be aligned: no MEP enjoys the prerogative to propose legislation. Moreover, when discussing about parliamentary regulatory cooperation, it must be observed that there appears to be a tension between the role of parliamentarians as representatives of the domestic interests of their local constituencies and the global ambitions of international regulatory cooperation. In these circumstances, the incentives for parliamentarian cooperation appear very limited. As a result, too often the EP and US Congress – similarly to their respective regulators – seem not to worry about the transatlantic impact of their respective initiatives and stances on sensitive dossiers ([149]). Indeed, several of the most contentious

([143]) See, e.g., Commission of the European Communities, Review of the Framework for Relations between the European Union and the United States, An Independent Study commissioned by the European Commission, 2005, available on the Internet: http://www.statewatch.org/news/2007/dec/eu-us-relations-study.pdf

([144]) See on this point, e.g., Statement by James Elles, MEP on the State of the Transatlantic Dialogue, 16 May 2001.

([145]) On the difficulty to assess the effects of transatlantic cooperation, see Jancic, D., 'The European Parliament and EU-US Relations'.

([146]) Pollack, M., 'The New Transatlantic Agenda at Ten: Reflections on an Experiment in International Governance', (2005) 43 *Journal of Common Market Studies*, p. 915.

([147]) Slaughter, A.-M., *A New World Order*, Princeton University Press, Princeton, 2004, p. 122.

([148]) Baker, T. and McBride, M., 'Beyond the. Handshake'; Archick, K. and Morelli, V., 'The US Congress and the European Parliament'; Burwell, F., 'The Lisbon Treaty : an Evolutionary Revolution in US-EU Relations', (2010) *AICGS Policy Report*, The John Hopkins University, pp. 7-21.

([149]) Chase P., Dynamics have to change to deliver EU-US Trade deal, Euractiv, 13 June 2013.

regulatory divergences across the Atlantic have been generated by their respective legislators, including the stances adopted vis-à-vis hormone-treated beef and GMO products, the Buy American legislation and the Johns Act.

It is against this backdrop that the EU and US authorities have decided to revamp their transatlantic regulatory cooperation efforts with the conclusion of an ambitious Transatlantic Trade and Investment Partnership. This seems to provide an historic opportunity for both sides of the Atlantic to substantially enhance regulatory cooperation, while maintaining policies and measures ensuring a high level of environmental, health, safety, consumer and labour protection. Indeed, as will be illustrated below, the envisaged transatlantic system of regulatory cooperation does not aim at modifying the existing constitutional frameworks nor at laying down common regulatory frameworks. Rather, it consists of privileged and permanent channel of communication enabling the respective regulators to be informed about each other proposed initiatives having a transatlantic impact and possibly enter into a dialogue aimed at pursuing compatible outcomes.

While some scepticism exists in relation to this initiative, especially in the light of the previous modest results attained, one must observe that the economic and geopolitical circumstances surrounding the negotiations of this agreement largely differ from those characterizing the previous efforts at transatlantic regulatory cooperation.

CHAPTER III — FUTURE SCENARIOS FOR PARLIAMENTARY COOPERATION IN TTIP

This chapter explores the parliamentary dimension of TTIP, by examining the level of involvement of the legislatures into this agreement. In particular, it focuses on how TTIP may affect existing transatlantic regulatory cooperation and how the latter may valuably contribute to the functioning of TTIP's regulatory dialogue. In particular, it focuses on the incipient Horizontal Chapter on Regulatory Coherence negotiated within TTIP in order to examine how transatlantic parliamentary regulatory cooperation may play a role within the agreement. After providing an overview of the various components of this chapter, its discipline, institutional design and rationale, it discusses what kind of role the EP and US Congress may contribute to the operation of TTIP. The last section provides a set of recommendation on how TTIP may build upon previous existing mechanisms of transatlantic regulatory cooperation and assign them a new role.

1. 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 on addressing bilateral SPS issues;
2. the **TBT plus** component would build upon the principles enumerated by the WTO Technical Barriers to Trade as regards to 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, use of impact assessments, periodic review of existing measures and 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 four rounds of negotiation.

1.1 Discipline

This horizontal chapter would apply to all measures of general application, including both legislative and non-legislative measures ([150]) – regardless at which level they are adopted and by whom – that have transatlantic trade impacts ([151]). Therefore the criterion triggering the application of this horizontal chapter is set to be the significant impact (potential or actual) of covered regulation on international, in

([150]) 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.

([151]) On the transatlantic impact of EU secondary law, see e.g. Scott, J., '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.

particular transatlantic, trade flows ([152]). In particular, components 3 and 5 of the horizontal chapter of TTIP are relevant for the Horizontal Chapter to provide a 'gateway' for handling sectoral regulatory issues between the EU and the US ([153]).

This horizontal discipline, by mandating principles and procedures on inter alia consultation, transparency, impact assessment ([154]), 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 approach, either on pre-existing regulation or new proposals, through the conclusion of inter alia mutual recognition (of substantive standards or the results of conformity assessment) agreements or best manufacturing practices. Should the regulators identify areas for convergence (such as marketing authorizations for pharmaceuticals or technical standards for car headlights), their agreed commitment will become legally binding within a sectoral annex (see component 3 above) ([155]) and subject to an *ad hoc* enforcement mechanism.

By the time the TTIP will be concluded, one may expect that a number of agreements on sectors will have been reached and 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 entry into force of TTIP, some at a later fixed date. The negotiations also aim identifying other policy areas for future negotiation and agreement according to fixed objectives and timetables. This component of TTIP is generally referred to as 'in-built agenda'. On top of that, the agenda of TTIP permanent negotiations will also be driven by stakeholder demand.

As for future regulations, the good regulatory practices remain applicable as a horizontal and residual regime with the aim of achieving regulatory compatibility. This ability of TTIP to provide regulators a permanent platform enabling them to continuously strive for enhanced compatibility makes it a 'living' agreement, meaning that it will be sufficiently flexible to incorporate new areas over time.

1.2 Rationale

In order to promote compatibility of regulations across the Atlantic, TTIP provides an original cooperation mechanism that embeds for the first time the application of good regulatory practices (e.g. early warning, early regulatory cooperation, consultation, transparency, impact assessment, etc.) into a trade agreement([156]). At the same time however it does not substantially alter the parties' respective ways of making legislation or rules. Indeed, the EU and US legislative and regulatory systems that we have examined above will not be modified by TTIP.

However, this Agreement will inevitably entail some limitations of the respective regulatory autonomy. Importantly, the EU and the US are not limiting themselves to concluding a traditional FTA plus, by agreeing on some additional requirements, but they are striving to come up with a new model of

([152]) While no definition of 'transatlantic impact on trade' has been provided thus far, this notion seems to exclude all measures affecting the operation of an investment in the territory of a party. Thus, regulations such as those governing wages, etc. are not likely to fall under the scope of horizontal chapter.

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

([154]) The impact assessment analysis should not be limited to domestic impact but extend to the impacts of the proposed regulatory initiative in 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. See

([155]) 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 Chapter III, section 2.2 The individual legislators' contribution in the operation of TTIP.

([156]) While good regulatory practices appear also in other trade agreements, TTIP is set to become the first one that ensure their respect through an enforcement mechanism.

economic integration based on a permanent international regulatory cooperation mechanism. 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 – sometimes referred to as the "Regulatory Cooperation Council" (RCC). 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 ([157]) nor to modify each others' institutional frameworks ([158]).

While regulators do not always maximize, or the laws under which they operate do not allow them to maximize, opportunities to align regulatory approaches that achieve common objectives, a permanent framework like the one currently envisaged by TTIP may nudge regulators to discuss and confront their regulatory answers to the same problems ([159]). 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.

1.3 Institutional design

Although the functioning and institutional designs of TTIP have not been defined yet ([160]), the basic structure of the agreement seems to have been sketched out by the negotiators who envisage a light governance structure ([161]). The major institution is likely to be a Regulatory Cooperation Council, which will develop along the lines the regulatory cooperation mechanisms established – and carrying this name – by the US with both Canada and Mexico ([162]). However, a significant difference between the US RCC model and TTIP is that neither the US-Canada RCC nor US-Mexico RCC are international treaties, so

([157]) This automatic update of an international treaty may circumvent the procedure for the adoption of international agreements that typically foresees the signature and ratification of new texts. In the EU, this issue may be addressed by Article 218(7) TFEU that 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".

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

([159]) Contra, Lester, S. and Barbee, I., 'Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership', 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').

([160]) The question arises whether the virtually unlimited scope of TTIP may threaten the prerogatives of the EU member states and individual US states.

([161]) References to the RCC as the privileged institutional model for monitoring TTIP include remarks by Karel de Gucht (EU Trade Commissioner), in his speech on October 10, 2013 (proposing an RCC to run and monitor the discipline foreseen by TTIP); André Sapir (comments in NY Times, Oct. 11, 2013); and John Graham testimony to the European Parliament, Committee on Trade, Oct. 14, 2013; EU Commission, TTIP: Cross-cutting disciplines and institutional provisions, Initial Paper, December 2013; Lester, S. and Barbee, I., '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.

([162]) Government of Canada, Regulatory Cooperation Council Joint Action Plan, 3, 2011, <http://actionplan.gc.ca/sites/default/files/japlan_eng.pdf>.

they did not require the approval of the US legislature. TTIP negotiators have said that TTIP will require legislative approval ([163]), so it will be agreed to as an international agreement.

A Regulatory Cooperation Council (RCC) will be established and gather senior representatives of regulators and Commission services, the Commission' Secretariat General and the US Office for Information and Regulatory Affairs (OIRA) as well as representatives from DG Trade and US Trade Representative (USTR). 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) collection and examination of submissions received from EU and US stakeholders as well as requests from either party on how to enhance compatibility for both future and existing regulation; (c) examine – with the help of sectoral regulatory cooperation working groups where appropriate – concrete proposals on how to enhance greater compatibility and convergence, including through recognition of equivalence of regulations, mutual recognition, best practices, etc. (d) make recommendations to the "body with decision-making power under TTIP" ([164]).

In discharging its duties, the RCC could be assisted by sectoral ad how working groups. That is probably where the bulk of the regulatory dialogue's work will be done. Both the activities of the RCC and the ad hoc sectoral committees should be open to interested stakeholders and where appropriate public input.. The final adoption of a sectoral annex to the agreement would involve the intervention of a "body with decision-making power under TTIP" ([165]).

2. THE PARLIAMENTARY DIMENSION OF TTIP

This brief analysis of the discipline foreseen in TTIP as well as of its rationale and institutional design raises many important questions in relation to its interactions with the parties' respective legislatures, and in particular with the existing mechanisms of transatlantic regulatory cooperation. What role will TTIP envision for the EP and Congress? How might TTIP affect the existing transatlantic parliamentary regulatory cooperation? At what stage of its operation – if at any – will the legislatures be involved? Will they be represented in the RCC or in other institutional arrangements envisioned by TTIP?

To address these queries it seems appropriate to distinguish three possible level of involvement of the EP and Congress: (2.1) the negotiation and conclusion of the agreement; and, once the agreement would adopted, (2.2) the individual contribution of each legislator in the daily operation of TTIP; and, finally, (2.3) the joint contribution that both legislators may provide to the objectives pursued by the agreement through the existing parliamentary cooperation.

2.1 The legislators' role in the negotiation and conclusion of TTIP

While the level of involvement of the two legislators in the negotiation of TTIP varies across the Atlantic, they are both expected to provide – although under different modalities – their consent to its conclusion.

Congress has to approve any trade deal, whether through a majority in both Houses (an "agreement") or through two-thirds of the United States Senate (a "treaty"). And both Houses will have to write and

([163]) European Commission, Questions and Answers, TRADE, Dec. 20, 2011, <http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/>.

([164]) 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

([165]) 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

pass implementing legislation wherever the agreements (or treaties) require changes in U.S. law. As this system may limit the ability of the US to negotiate trade agreements in good faith because negotiating partners could not rely on the President's signature, it was created "fast track authority" in 1974 ([166]). The President promises to keep Congress informed throughout trade negotiations ([167]) and Congress pledges a vote, up or down without amendment, on trade agreements and treaties. While fast track authority does engage Congress as to implementing legislation, trading partners remain assured that Congress would not change the text of the agreement itself after the President had signed it.

The European Parliament's role in the conclusion of EU international agreements has traditionally been considerably more limited ([168]). Yet, following the entry into force of the Lisbon Treaty, its role appears not too dissimilar from the one played by US Congress both at the stage the negotiations and conclusion of an international agreement. The major point of divergence is that in the EU a 'fast-track authority' is embedded into the system ([169]): while the Parliament's consent is required before the Council of Ministers is able to conclude a trade agreement, consent is given in a single vote by a majority of the votes cast ([170]). In other words, no amendments to the text of the agreement are allowed.

With regard to the negotiation of an international trade agreement[171], the Lisbon Treaty has enhanced the EP's prerogatives, especially in terms of information gathering[172]. The Commission is obliged to immediately report to the European Parliament on the progress of international trade negotiations ([173]). Under a combined reading of the Lisbon Treaty and the 2010 Framework Agreement between Parliament and Commission ([174]), the Commission is obliged to share with the Parliament the same

([166]) President George W. Bush renamed 'fast track' 'trade promotion authority' ('TPA').

([167]) See, e.g., Obama Administration Notifies Congress of Intent to Negotiate Transatlantic Trade and Investment Partnership, http://www.ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.PDF

([168]) See, e.g., Article 113(3) of the EEC Treaty. On the absence of Parliament in the formal process of conclusion of trade agreements before the Lisbon Treaty, the literature is vast. See, e.g., Maresceau, M., 'The Concept "Common Commercial Policy" and the Difficult Road to Maastricht, in Maresceau, M. (ed.), *The European Community's Commercial Policy After 1992 : The Legal Dimension*, Springer, Berlin, 1993, p. 9 et sqq.; de Baere G., *Constitutional Principles of EU External Actions*, Oxford University Press, 2008, p. 192 et sqq. and Devuyst, Y., 'European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements', (2013) 12 *Journal of International Business & Law*, pp. 259-280.

([169]) Article 218(6) TFEU stipulates that the Council shall adopt the decision concluding an international agreement after obtaining the consent of the European Parliament in the following cases : (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. For other international agreement, the EP must simply be consulted before their conclusions.

([170]) EP Rules of Procedure, 0J 2011 L116, 1, 90(7) and (90) 9.

[171] It must be observed that neither consent by nor consultation of the European Parliament is required when the international agreement relates exclusively to the Common Foreign and Security Policy. See Article 218 (10) TFEU.

[172] See Article 207(3) and Article 218(10) TFEU. On these provisions, see e.g. R. Bendini, The European Union's trade policy, five years after the entry into force of the Lisbon Treaty, European Parliament Policy Department, March 2014, DG EXPO/B/PolDep/Note/2014_76; de Baere G., *Constitutional Principles of EU External Actions*, Oxford University Press, 2008, p. 140 et sqq.

([173]) Article 207(3) TFEU and Article 218(10) TFEU.

([174]) According to the 2010 Framework Agreement between Parliament and Commission 'In the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled. The Commission shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible

degree of information related to negotiations that it provides to the Council. Such information (including confidential documents) is provided to the Parliament through the INTA Committee ([175]), which is the committee responsible for following international trade negotiations. The Commission's chief negotiator in TTIP, Mr Ignacio Garcia Bercero, regularly briefs the INTA Monitoring Group for US (*in camera*) before and after each negotiating round. INTA has extended the invitation to these meetings also to the Chairs and specific rapporteurs of eleven other committees (AGRI, LIBE, CULT, ECON, EMPL, ENVI, AFET, ITRE, IMCO, JURI, TRAN), as well as to the Chair of the US delegation ([176]). Moreover, on top of these briefings and exchanges during the negotiations, MEPs are also provided opportunities for more horizontal information sharing. Thus, INTA organises a structured dialogue with the EU Trade Commissioner with the intention of having the EP contribute to the Commission's identification of key priorities in international trade matters. Similarly, INTA also holds in camera briefings with the Commission's Director General for Trade that offer a further opportunity to MEPs to remain informed about the pending negotiations of bilateral and multilateral agreements. However, it must be observed that information provided by the Commission on ongoing negotiations, when it is of classified nature, is made accessible only to a limited number of MEPs, in accordance with the provisions about the treatment of confidential information that are annexed to the Framework Agreement ([177]).

The duty to inform the EP during the negotiations does not mean that the EP has the right to exercise its influence on the substance of the agreement[178]. However, by leveraging on its consent authority, the EP has developed a tradition of adopting recommendations, on the basis of a report from the Committee responsible, which must be taken into account before the conclusion of the international agreement under consideration ([179]). Thus, although the EP eventually gave its consent to the "SWIFT" agreement regarding US access to EU financial data as part of a counter-terrorism effort[180] and to an agreement on the mutual sharing of Passenger Name Records (PNR) as part of an airline safety and anti-terrorism effort[181], it demanded and obtained modifications as well as additional assurances from both the Council and the European Commission before its final vote.

These episodes – which in the case of SWIFT even involved a negative vote on the first draft of the agreement – provided an important lesson for future negotiations: although the EP may not be directly involved in negotiating terms of an agreement, it will withhold its consent if not satisfied with the

parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account'. Framework Agreement, European Parliament and Commission, 2010, OJ L304 61.

([175]) The Parliament's Committee on International Trade (INTA), one of the EP's smallest committee (31 members), has overall responsibility for matters relating to the establishment and implementation of the Common Commercial Policy (CCP) and its external economic relations. It prepares the positions and decisions on the negotiation and conclusion of trade agreements to be adopted in plenary session. See EP Rules of Procedure, 0J 2011 L116, 1, 90, Annex VII (III).

([176]) Framework Agreement, European Parliament and Commission, 2010, OJ L304 61.

([177]) Framework Agreement, European Parliament and Commission, 2010, OJ L304 61, p. 24, annex II.

([178]) For a critique of this lack of parliamentary involvement, see Committee on Civil Liberties, Justice and Home Affairs, European Parliament, Recommendation 05305/1/2010REV, February 5 2010, by Jeanine Hennis-Plasschaert, p. 10.

([179]) EP Rules of Procedure, 0J 2011 L116, 1, 90(4).

([180])The Parliament initially rejected the agreement by a vote of 378 to 196 by citing concerns about data protection of individuals. In July 2010, a renegotiated agreement that factored in the concerns raised by the EP was successfully passed. See Archick, K., 'The European Parliament'.

([181]) After the EP voiced some concerns about data protection and collection, the Obama Administration agreed to a renegotiation of some of the terms of the agreement. Negotiations proceeded during 2011 and in April 2012, the EP passed the renegotiated PNR agreement. See Archick, K. 'The European Parliament'. Moreover, the EP successfully challenged a previous version of the agreement in front of the European Court of Justice. See Judgment of 30 May 2006 in Joined cases C-317/04 and C-318/04: *European Parliament vs Council and Commission* [2006] ECR I-4721.

results ([182]). This appears particularly true when what is at stake is the defence of EU values, such as human rights, labour rights and environment protection in the Union's trade policy. Early communication between Commission negotiators and the EP can ensure that the terms of an agreement are acceptable, making it more likely that the EP will ultimately give its consent.

Despite the improvements brought about by the Lisbon Treaty and this emerging practice, doubts have been expressed about the adequacy of the European Parliament's role in the conclusion of EU international trade agreements. One cannot but notice that the European Parliament remains at an institutional disadvantage compared to the Commission and the Council ([183]). However, this concern seems to have been partly addressed. Some authors have indeed observed that, thanks to the existence of the consent requirement, "the European Parliament will in practice to be involved by the Commission and the Council at earlier stages" ([184]). Yet this might not necessarily translate into a more powerful Parliament. Indeed, both the SWIFT and PNR episodes have largely been interpreted as instances in which the role of the Parliament has been of 'norm-taker' as opposed to 'norm-maker' ([185]). There seems indeed to be further room for parliamentary involvement in international trade treaty-making.

On the whole, given the "significant issues of legitimacy and democracy" ([186]) raised by the current role played by the EP in the negotiation and conclusion of international agreements, one may rightly speak of a parliamentary deficit in supranational decision making in EU external relations ([187]).

2.2 The individual legislators' contribution in the operation of TTIP

This section explores what role the EP and Congress may be expected to play within TTIP once upon its conclusion. A first glance at the international regulatory cooperation model as currently envisioned by TTIP reveals an absence of direct participation of the respective legislators and existing parliamentary cooperation mechanisms in its daily operation. Similar to what occurs within the U.S.-Canada Regulatory Cooperation Council – which remains the major source of inspiration for TTIP negotiators – ([188]), the leading institutional body within TTIP would bring together regulators, but not

([182]) On the PNR saga, see e.g. Tukdi, I., 'Transatlantic Turbulence: The Passenger Name Record Conflict', (2008) 45 *Houston Law Review*, p. 620 ; Fahey, E., 'Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program', (2013) 32 *Yearbook of European Law*, pp. 4-5; Suda, Y., 'Transatlantic Politics of Data Transfer : Extraterritoriality, Counter-extraterritoriality and Counter-terrorism', (2013) 51 *Journal of Common Market Studies*, p. 779 et sqq. On the SWIFT saga, see e.g. Fuster, G., 'SWIFT and the Vulnerability of Transatlantic Data Transfers', (2008) 22 *International Review of Law, Computers and Technology*, p. 191-202 ; Monar, J., 'Rejection of the EU-US SWIFT Interim Agreement by the European Parliament : A Historic Vote and Its Implications', (2010) 15 *European Foreign Affairs Review*, pp. 145 ss.

([183]) Jancic, D., 'The European Parliament and EU-US Relations : Revamping Institutional Cooperation?'.

([184]) Cremona, M., 'Justice and Home Affairs in a Globalised World: Ambitions and Reality in the Tale of the EU-US SWIFT Agreement', *Working Paper no. 04/2011* (Austrian Academy of Social Sciences, Institute for European Integration Research, 2011), p. 25. See also R. Bendini, The European Union's trade policy, five years after the entry into force of the Lisbon Treaty, European Parliament Policy Department, March 2014, DG EXPO/B/PolDep/Note/2014_76.

([185]) Argomaniz, J. 'When the EU is the "Norm-Taker": The Passenger Name Records Agreement and the EU's Internalisation of US Border Security Norms', (2009) 31 *Journal of European Integration*, pp. 119-136; Servent, A.R., and Mackenzie, A., 'The European Parliament as a "Norm Taker"? EU-US Relations After the SWIFT Agreement', (2012) 17 *European Foreign Affairs Review*, pp. 71-86.

([186]) Eeckhout, P., *EU External Relations Law*, Oxford University Press, Oxford, 2011, p. 194. This appears particularly true in the field of CFSP, in which MEPs enjoy no rights of genuine participation.
See also Lester, S. and Barbee, I., 'Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership'.

([187]) Thym, D., 'Foreign Affairs', in von Bogdandy, A. and Bast, J. (eds.), *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2010, p. 323 et sqq.

(188) 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

parliamentarians, from the EU and US to oversee the implementation of the regulatory provisions of the agreement. Therefore, in these circumstances, the exact involvement of each legislator in the regular operation of the horizontal coherence chapter of the agreement will largely depend on each party's constitutional framework ([189]). In particular, this is likely to be contingent upon the modalities of integration of TTIP and, more specifically, of its future sectoral annexes in their respective legal orders.

2.2.1 Situation on the EU side

In the EU, it may be expected that the overall level of parliamentary involvement within TTIP's operation reflect the role the EP generally plays in the adoption of legislative and non-legislative acts. Thus, in relation to the transposition in EU law of newly developed measures under the horizontal chapter on regulatory coherence of TTIP, the role of the EP will depend on the procedure followed by the EU for the adoption of that given act. Thus, for instance, if the new measure developed under TTIP requires for its adoption under EU law the ordinary procedure, the EP is expected to be involved. Similarly, should the legal basis for the adoption of another new measure be contained in a basic act providing for delegation of authority to the Commission, that measure may be adopted as a delegated act or implementing measure and, as a result, the EP's involvement may vary considerably.

The operation of TTIP both with regard existing and derived obligations will normally involve the intervention of a "body with decision-making power to be established under TTIP" with representatives of both parties' administrations. How can decisions be taken in such a body on the EU side without a change of the overall treaty? There appear – at least on paper – 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 ([190]) and more recently the EU-South Korea Free Trade Agreement concluded[191]. In the latter, the implementation of the agreement is overseen by committees which 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 that remains outside of the decision-making process authorised by this legal basis.

Second, Article 218(7) TFEU allows that the Council may authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by 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 the case, it has been relied upon only to authorise very limited

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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.

([189]) In the US system, the role played by the US Congress in the operation of the Executive is limited and essentially consist of the oversight authority exercised by Congressional committees over the agencies falling under their remit.

([190]) 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.

[191] 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 sqq.

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 to some forms 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 as 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, none 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. 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 290 TFEU. The sectoral annex would be agreed by the decision-making body set up by TTIP, thus producing external effect, but would then be endorsed internally to produce its full effects within the EU.

But that's not all: the exact role that each legislator will be called to play within TTIP will also depend on the way the delegation of authority will be granted to the respective regulators – gathered in RCC or within the sectoral committee – who are seeking regulatory convergence through possible agreements ([192]). 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 ([193]) or it may be granted ad hoc through the adoption of a basic act by the EU co-legislators. In both instances, the EP 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 will come 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.

2.2.2 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 into TTIP's regulatory dialogue with their EU counterparts and conclude 'executive' agreements, not requiring as such any change in law nor a 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

([192]) 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 nondelegation doctrine.

([193]) This may be the case when the basic act already contains a delegation for the adoption of a delegated or implementing measure.

order vis-à-vis international law[194], 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 ([195]). By way of example, the Canada-US RCC sought and received public comments from stakeholders and government entities on which rules should become object of the regulatory dialogue to be mutually recognized or assessed as equivalent[196]. 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 ([197]). These meetings took place with agency leadership rather than Congress ([198]).

2.2.3 Interim conclusions

The lack of involvement of legislators in either the RCC or in the sectoral committees of TTIP might appear prima facie problematic. However, given the technical and very detailed work required when assessing the equivalence of the respective regulatory standards, some parliamentary involvement does not seem appropriate at this stage. What instead appears necessary is to ensure some parliamentary input before and after these evaluations about pre-existing legislations (or regulations) have been undertaken.

This is due not only to reasons of political opportunity but also of fundamental democratic principle. First, without an early involvement of the legislators, the detection of early legislative initiatives will result impossible. This is especially true for the US Congress whose members initiate hundreds of bills every year, but considerably less for the EP as its members cannot propose legislation per se ([199]). Second, although TTIP is not set to alter existing regulations or adopt joint standards, its horizontal coherence chapter – due to the commitment to regulatory coherence – may lead the regulators away from the previously agree 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 set 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.

This immediately highlights the need for the establishment of some parliamentary scrutiny on the operation of TTIP that could be capable of satisfactorily addressing the legitimacy and challenges raised

([194]) *Dames & More v Regan*, 453 US 654 (1981).
([195]) U.S. President Barack Obama, Executive Order 13609, May 1, 2012, <http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf>.
([196]) 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>.
([197]) International Trade Administration, U.S.-Canada Regulatory Cooperation Council <http://www.trade.gov/rcc/>.
([198]) Ibid.
([199]) It is envisaged that the horizontal coherence chapter, and in particular, the duty to provide information about upcoming initiatives in the pipeline be extended also to the legislators. However, to facilitate the exchange and to accommodate the differences existing across the two systems it is foreseen that each party should share this information with stakeholders through a single access point.

by the operation of its horizontal coherence chapter ([200]). This oversight could be either enshrined in the procedure to adopt decisions under TTIP (but the Treaty on the Functioning of the European Union does not explicitly foresee a role for the Parliament in that respect), or embedded within existing and future legislative acts in relation to the scope and principles applicable to international cooperation in specific sectors.

Once the regulators make the final decision, it will still need to be approved on each side by their respective decision-making processes and according to modalities that remain to be determined. Each side may be concerned that the other side's government will not succeed in getting the new rule or the newly-agreed sectoral annex approved, and this may lead them to delay approval on their side, thus leading to a stalemate where no progress can be made. In order to address this concern, both sides may consider setting up a fast track authority, whereby rules decided at the regulatory level may receive special treatment in the approval process. Yet, the development of a similar mechanism may raise further legitimacy and accountability concerns that call for additional safeguards at the decision-making level, such as stakeholder input requirements and parliamentary involvement.

In other words, this analysis demonstrates that, by creating a new, additional avenue of regulatory cooperation through TTIP, the implementation of this agreement must ensure that the legislatures will have a role to play in it by exercising parliamentary oversight. This is not to suggest that the legislators become involved in the negotiations foreseen in the regulatory dialogue around issues such as equivalence or mutual recognition assessment. These should be left to the regulators. Rather that regulators' decisions, such as a newly-agreed sectoral annexes, must be subject to parliamentary scrutiny when they enter into the EU legal order.

Therefore, the institutional design of TTIP should find a way to accommodate some parliamentary involvement. Possibly this should occur before and after a political decision has ben taken, so as to ensure that the EP and the US Congress are informed, and that they can initiate and shape the regulatory dialogue foreseen by TTIP[201].

2.3 The role of parliamentarian cooperation in TTIP

Once it has been determined what the legislators' involvement could be in TTIP, it must determined what is the contribution that existing parliamentary cooperation may provide to TTIP and then how to interconnect the two cooperation systems one to another. As demonstrated above, the negotiation and future implementation of TTIP is unlikely to occur in a vacuum. The EU and US authorities have been cooperating – at different levels of government –and established over the years an imposing institutional framework and administrative practice. In particular, the parliamentary cooperation initiated back in the 1970s and today epitomised by the TLD has established the conditions for a direct exchange of views among the members of the respective legislatures, in particular at the committee-to-committee level. This raises the question of how the envisaged discipline and institutional design of TTIP may affect transatlantic parliamentary cooperation and what the latter may offer to the former.

([200]) Similar concerns exist in relation to any form of international regulatory cooperation, see e.g. Howse R., Transatlantic regulatory cooperation and the problem of democracy, in Bermann G.A., Herdegen M., and Lindseth P., *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects*, Oxford University Press, 2000, pp. 469-480; Lazer, D., 'Regulatory interdependence and international governance', (2001) 8 *Journal of European Public Policy*, pp. 474-492. For a reconstruction of the literature on this point, see Organisation for Economic Cooperation and Development (OECD), *Stocktaking Paper on International Regulatory Cooperation* GOV/RPC(2012), p. 8; Organisation for Economic Cooperation and Development (OECD), International Regulatory Cooperation – Addressing Global Challenges, 2013.

([201]) On the US side, however, in *INS v Chadha*, 462 U.S. 919 (1983), the US Supreme Court seems to preclude the US Congress from exercising an active oversight role on the executive in similar circumstances.

In this context, there appear to be promising avenues for connecting the incipient TTIP institutional framework with the existing US-US parliamentary cooperation. This seems all the more true should one consider the need, previously highlighted, to enhance the level of political legitimacy and accountability of the horizontal coherence chapter envisioned by TTIP.

Below are some potential contributions that parliamentary regulatory cooperation may provide to the envisaged TTIP's regulatory coherence chapter.

2.3.1 Early-warning

At the preparatory level of new or revised legislation, TTIP entrusts the regulators with the duty to inform about pending legislative proposals. Under this procedural duty, the EU and US administrations would be expected to keep each other informed about new legislative initiatives.

However, without an early involvement of the legislators, the detection of early legislative initiatives will result impossible. It is submitted therefore that any information mechanism between the administrations should be complemented – and possibly synchronised – with the existing mechanism of early warning. This is especially true for the US Congress whose members initiate hundreds of bills every years, but considerably less for the EP as its members cannot propose legislation per se ([202]). This task belongs today to the Transatlantic Legislators' Dialogue. However, given the lack of permanent mechanism ensuring the prompt communication and a systematic exchange of information between the legislators, the EU Parliament itself entrusted this task to its European Parliament Liaison Office in Washington DC ([203]). A similar mechanism does not exist on the US side as the US authorities decided not to establish a similar mechanism within the European Parliament, leaving this task to the US Mission of the EU, which however does not represent the US Congress but the US State Department.

This is an area in which the input of transatlantic interparliamentarism may be further developed within TTIP and the existing mechanisms better systematised to avoid duplications. In particular, the TLD, although currently acting at an informal level, appears as one of the potential candidates to ensure that the EU and the US single access points will gather and share the relevant information. In particular the existing, yet underdeveloped, committee-to-committee dialogue – if backed up by the Conference of Committee Chairs – could feed and channel this flow of information towards the TLD. On the US side, TTIP is expected to oblige the executive branch to inform the EU whenever a legislative initiative measurs enters the hearing stage. As administration testimony and statements of administration positions (SAPs) are actually coordinated through the Office of Management and Budget, these could be shared through the EU Commission Delegation in the US and EPLO.

As it clearly appears from the illustrations provided above, the legislators are particularly well positioned – especially those parliamentarians involved into the relevant trade committees – to identify the legislative initiative susceptible to have a transatlantic impact. While the interests of the EU and US parliamentarians are not exactly aligned, due to differences between their respective constitutional systems (the MEPs – unlike the members of Congress – cannot propose legislation), they should both pursue – in line with the spirit of the TLD – the objective of a constant and institutionalised exchange of information.

([202]) It is envisaged that the horizontal coherence chapter, and in particular, the duty to provide information about upcoming initiatives in the pipeline be extended also to the legislators. However, to facilitate the exchange and to accommodate the differences existing across the two systems it is foreseen that each party should share this information with stakeholders through a single access point.

([203]) Martin, G., 'European Parliament Inaugurates Its Own Liaison Office in Washington'.

2.3.2 Regulatory dialogue

Under the regulatory coherence chapter of TTIP, both the EU and US regulators are expected to offer to enter into a dialogue aimed at exploring concrete means to achieve compatible or coordinated approaches, such as mutual recognition or equivalence of their regulatory standards, in relation to pre-existing legislation. Although no specific role is foreseen for legislators, it is not inconceivable that both the EP and the US Congress, and their existing cooperation framework, may contribute to this regulatory dialogue. However, as it will be demonstrated below, it appears more appropriate that this occurs at the level of identification of the relevant policy area for dialogue than at the level of substantive negotiation.

Therefore it may be envisaged that also parliamentarian input could prompt a regulatory dialogue. The TLD – acting in co-operation with the Conference of Committee Chairs – seems potentially well placed to play this role. Upon previous internal discussions and exchanges with the Conference of Committee Chairs, it may act – as any other stakeholder – in order to solicit the launch of a regulatory dialogue in any given area of preference. Moreover, apart from this ad hoc input to the initiation of a regulatory dialogue, its contribution could also be more systematic. As the regulatory cooperation work in TTIP is likely to follow – similarly to what occurs in the US-Canada RCC framework – a Yearly Regulatory Programme, the TLD could periodically submit – acting in co-operation with the Conference of Committee Chairs – its input for inclusion into that programme. It appears instead less plausible the possibility to accommodate a direct parliamentary role into the actual assessment of different regulations between the authorities on both sides. Given the highly technical nature of the exercise, it might be more reasonable to conceive a role for the legislators upon the completion of the assessment exercise. Depending on the modalities of the integration of this agreement into the two legal orders the parliamentary involvement may differ. Yet given the need for the exercise of some political oversight of the regulatory dialogue it is submitted that some form of parliamentary involvement should be provided.

In any event, on the basis of the previous analysis, the TLD – acting in co-operation with the Conference of Committee Chairs – appears to emerge as one of the potential candidates capable to facilitate the preparation and inception of TTIP's regulatory dialogue. This role would not only confer an active role to the existing parliamentary cooperation into TTIP but would also enhance the legitimacy of the exercise of transatlantic regulatory cooperation as such. This is true in relation to both existing and new regulatory standards. Moreover, being liaised with other EU-US dialogues, such as TABD and TACD, the TLD appears potentially well-placed to channel the demand for and identification of relevant policy areas susceptible to become object of the regulatory dialogue.

CONCLUSIONS: TOWARDS A PARLIAMENTARY OVERSIGHT OF TTIP

Proposals for transatlantic integration are not new ([204]). Nor are the efforts, be it at governmental or at legislative level, to achieve this objective. What is new this time is, amid the urgency to increase EU-US trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness, the novelty, ambition and potentially disrupting character of the instrument identified to attain these results. When compared to pre-existing mechanism of transatlantic cooperation, TTIP promises to deliver greater results. Yet, with great promises come challenges too.

The central tenet of TTIP – the **Horizontal Chapter on Regulatory Coherence** – carries the potential to lay down a new form of international regulatory cooperation whose potential use extends well beyond the EU and the US. It would consists of a sophisticated and permanent regulatory mechanism enabling the respective regulators to enter into ad hoc dialogues aimed not to jointly regulate but to determine whether regulatory choices that achieve common objectives – be they pre-existing or new – may result in compatible regulatory outcomes. Ultimately this mechanism would allow its members to propose whether and how convergence should occur, without modifying their respective constitutional and institutional frameworks.

Yet, although more respectful of regulatory autonomy than other previous attempts at regulatory convergence, also this framework, similar to any other international regulatory cooperation mechanism, may result in **fundamental accountability problems**. As illustrated above, this is due to the fact that the mechanism envisioned by TTIP may result in regulatory processes that gradually appear detached from the policy preferences of the regulated, or from the agreed policy choice, in the case of existing regulations. That's where the parliamentary dimension of TTIP may be called upon to play its role.

For the time being, negotiations on TTIP are at an early stage. Any agreement on institutional structures will depend on the substantive commitments and it is too early to speculate about the final setting. At the same time, it is probably fair to say that TTIP is unlikely to foresee any direct participation of the respective legislators nor of their parliamentary cooperation mechanisms in its daily operation. At the same time, this study identified some promising avenues for connecting the incipient TTIP institutional framework with the existing parliamentary regulatory cooperation and possibly coordinating these two parallels avenues of cooperation. At the same time, as illustrated above, the RCC model envisioned in TTIP does not seem to be immediately irreconcilable with the existing mechanisms of parliamentary cooperation. Rather there appear promising avenues for connecting the incipient TTIP institutional framework with the existing parliamentary regulatory cooperation and possibly coordinating these two parallel avenues of cooperation. This appears all the more important should one consider the need, previously highlighted, to enhance the level of political legitimacy and accountability of the horizontal coherence chapter envisioned by TTIP.

This report identified and discussed **three possible levels of involvement of the EP and Congress within TTIP**:

(i) the negotiation and conclusion of the agreement;

(ii) the individual contribution of each legislator in the daily operation of TTIP; and, finally,

(iii) the joint contribution that both legislators may provide to the objectives pursued by the agreement through the existing parliamentary cooperation.

([204]) See, e.g., Streit, C.K., *Union Now: A Proposal for a Federal Union of the Democracies of the North Atlantic*, Harper & Brothers Publishers, New York and London, 1939; See A Brief History, History of the Streit Council, Streit Council: http://www.streitcouncil.org/content/about us/History/brief history.html.

Although this report is more interested in the latter two, it also briefly discussed the first form of parliamentary involvement. This choice was mainly conditioned by the absence of a signed agreement and the salience of the ongoing negotiations in 2014. Given the newly acquired power of consent by the EP and the recent precedent in ACTA, it appears in the interest of all stakeholders to not only keep the European Parliament informed – as foreseen by the Lisbon Treaty ([205]) – but also be receptive to its concerns as well as to those expressed by the national parliaments.

In examining the role that the EP and Congress may be called upon to play within TTIP once it is adopted, the report strived to distinguish between their individual role within TTIP's daily operation and their joint contribution via the existing parliamentary cooperation.

Concerning individual contribution, regardless of the specific modalities of integration of TTIP within the respective legal orders, there seems to be a role for both US and EU legislators at the stage of adoption of the decisions agreed under TTIP. As TTIP is expected to be a 'living agreement', to which additional sectoral annexes may be added in the future, it is appropriate to envisage a mechanism guaranteeing the possibility for parliamentary oversight so as to ensure that the EP and the US Congress are informed, and that they can initiate and shape the regulatory dialogue foreseen by TTIP. This is not to suggest that the legislators should become involved in the negotiations foreseen in the regulatory dialogue around issues such as equivalence or mutual recognition assessment. These should be left to the regulators. It is rather to say that **regulators' decisions**, such as a newly-agreed sectoral annexes, **should be subject to parliamentary scrutiny**.

Also the existing parliamentary cooperation mechanisms may contribute to TTIP. But there is a **need to interconnect the two cooperation systems** to one another. Despite the limited results attained by transatlantic parliamentary cooperation, its potential in contributing to the operation of TTIP remains critical. This seems particular true in relation to the need to create **a forum to channel the demand for and identification of relevant policy areas** susceptible to have a transatlantic impact and, as a result, become objects of the regulatory dialogue. The TLD – acting in co-operation with the Conference of the Committee Chairs – appears to emerge as one of the candidates capable of interconnecting the TTIP incipient institutional mechanism with existing transatlantic parliamentarian cooperation. This role would not only confer an active role to the existing parliamentary cooperation into TTIP but would also enhance the legitimacy of the exercise of transatlantic regulatory cooperation foreseen by this agreement. This is true in relation to both existing and new regulatory standards. Moreover, together with other EU-US dialogues, such as TABD and TACD, the Transatlantic Legislators' Dialogue appears particularly well-placed – especially if acting in co-operation with the Conference of the Committee Chairs – to identify the relevant policy areas susceptible to be discussed into regulatory dialogue. However in order to take up this new role this body needs to receive an **institutional upgrade** from both sides and to be better develop its **committee-to-committee cooperation**. This appears indeed necessary in the light of the limited record of TLD's first years of operation. This has often been ascribed to its tendency to focus on high-level foreign policies matters rather than on regulatory issues.

In the light of the above, it is recommendable that the EU and US authorities foresee – in the conception and implementation of TTIP – a parliamentary involvement capable of guaranteeing the possibility **for the legislators to provide input into the regulatory dialogue** - via contributions to the yearly regulatory programme - and also offering **political oversight on its output**.

([205]) Article 207(3) TFEU.

If well handled, the innovative mechanism of international cooperation envisioned in TTIP carries the potential to establish a **transatlantic regulatory laboratory** across the Atlantic ([206]). As demonstrated by this report, TTIP's success will largely be determined by its ability to ensure parliamentary input to guarantee its legitimacy and accountability.

([206]) Wiener, J. and Alemanno, A., 'The Future of International Regulatory Cooperation: TTIP as a Step Toward a Global Regulatory Laboratory', *Law and Contemporary Problems*, forthcoming.

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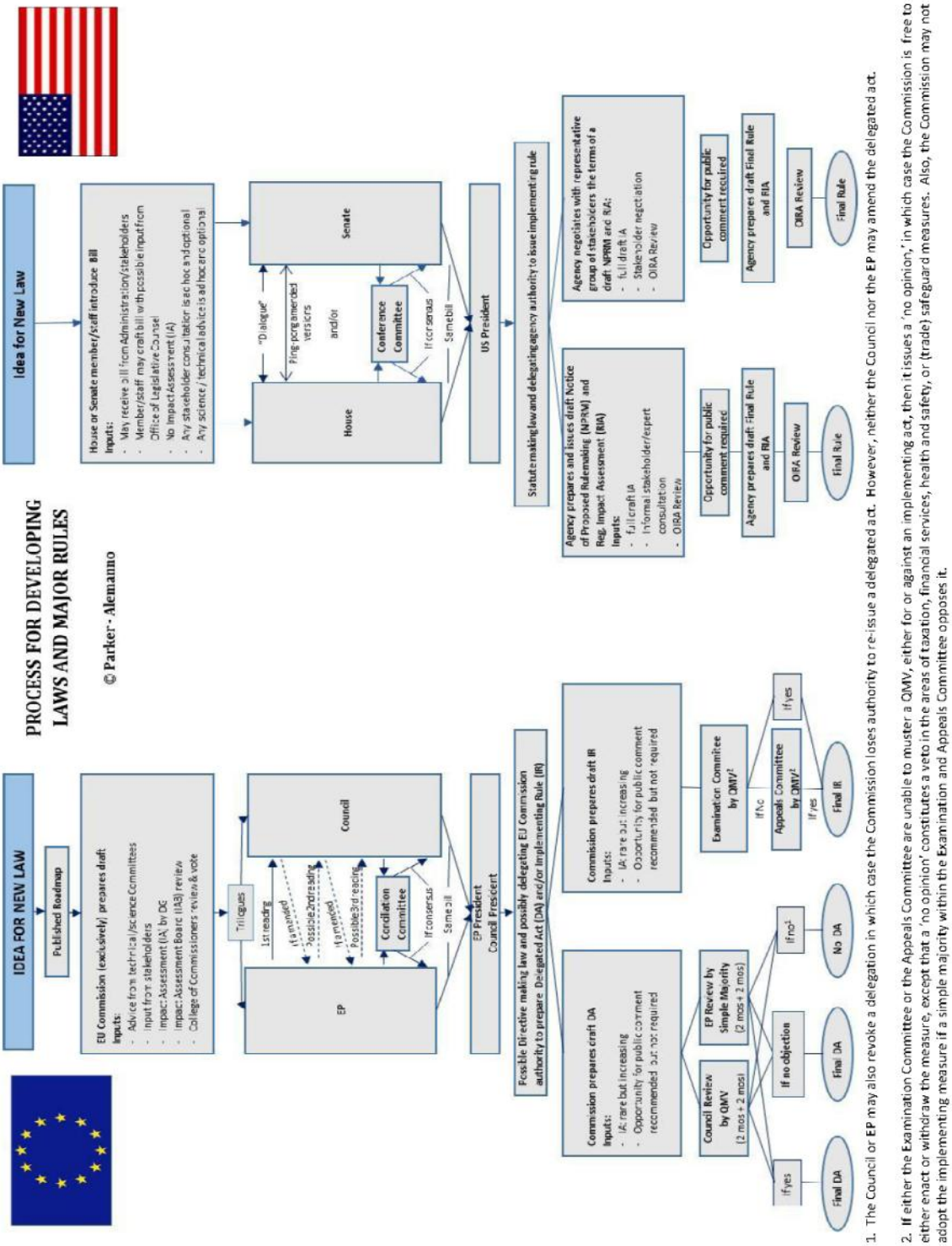
ANNEX 1 – PROCESS FOR DEVELOPING LAWS AND MAJOR RULES IN THE EU AND THE EU



1. The Council or **EP** may also revoke a delegation in which case the Commission loses authority to re-issue a delegated act. However, neither the Council nor the **EP** may amend the delegated act.

2. **If** either the **Examination** Committee or the Appeals Committee are unable to muster a QMV, either for or against an implementing act, then it issues a 'no opinion,' in which case the Commission is free to either enact or withdraw the measure, except that a 'no opinion' constitutes a veto in the areas of taxation, financial services, health and safety, or (trade) safeguard measures. Also, the Commission may not adopt the implementing measure if a simple majority within the **Examination** and Appeals Committee opposes it.

ANNEX 2 – UNITED STATES AND EUROPEAN COUNTERPART AGENCIES RELEVANT FOR TTIP

US Agencies	Acronym	Location/Website	EU Agencies	Acronym	Location/Website
Safety Regulation					
Consumer Product Safety Commission	CPSC	U.S. Consumer Product Safety Commission- Bethesda, MD National Product Testing and Evaluation Center – Rockville, MD http://www.cpsc.gov/	Directorate-General for Health & Consumers	SANCO	http://ec.europa.eu/dgs/health_consumer/index_en.htm
Food and Drug Administration	FDA	White Oak, MD http://www.fda.gov	Directorate-General for Health & Consumers	SANCO	http://ec.europa.eu/dgs/health_consumer/index_en.htm
Center for Food Safety and Applied Nutrition *(The CFSAN is the branch of the FDA that regulates food, dietary supplements, and cosmetics)*	CFSAN	College Park, MD http://www.fda.gov/Food/	European Food Safety Authority *(The EFSA's mandate includes all matters related to food and food safety)*	EFSA	Parma, Italy http://www.efsa.europa.eu/
Federal Aviation Administration *(Established within the Department of Transportation in 1958, the FAA oversees civil aviation in the US)*	FAA	Washington, DC http://www.faa.gov/	European Aviation Safety Agency *(Established in 2003, the EASA Monitors civil aviation airlines safety in Europe)*	EASA	Cologne, Germany http://easa.europa.eu/

US Agencies	Acronym	Location/Website	EU Agencies	Acronym	Location/Website
Environmental Regulation					
Environmental Protection Agency *(The EPA was established in 1970 and, although not a cabinet department, the director is appointed by the President and is customarily accorded cabinet-level rank in the executive branch.)*	EPA	Washington, DC http://www.epa.gov/	Directorate-General on Environment	ENV	Brussels, Belgium http://ec.europa.eu/environment/index_en.htm
			Directorate-General on Climate Action	CLIMA	Brussels, Belgium http://ec.europa.eu/clima/index_en.htm
			European Environment Agency	EEA	Copenhagen, Denmark http://www.eea.europa.eu/
Animal and Plant Health Inspection Service *(The APHIS was established within the Department of Agriculture in 1972 and is responsible for protecting plant and animal health and welfare)*	APHIS	http://www.aphis.usda.gov/	Community Plant Variety Office	CPVO	Angers, France. http://www.cpvo.europa.eu/
			European Food Safety Authority *(The EFSA's mandate includes all matters related to food and food safety, including animal and plant health)*	EFSA	Parma, Italy http://www.efsa.europa.eu/
			European Food Safety Authority *(The EFSA's mandate includes all matters related to food and food safety, including animal and plant health)*	EFSA	Parma, Italy http://www.efsa.europa.eu/

US Agencies	Acronym	Location/Website	EU Agencies	Acronym	Location/Website
United States Fish and Wildlife Service	FWS	Washington, DC http://www.fws.gov/	Directorate-General for Maritime Affairs and Fisheries	MARE	Brussels, Belgium http://ec.europa.eu/dgs/maritimeaffairs_fisheries/index_en.htm
			European Fisheries Control Agency	EFCA	Vigo, Spain http://cfca.europa.eu/pages/home/home.htm
Financial Regulation					
Securities and Exchange Commission	SEC	Washington, DC http://www.sec.gov/	Directorate-General of Internal Market and Services	MARKT	Brussels, Belgium http://ec.europa.eu/dgs/internal_market/index_en.htm
			European Security and Markets Authority *(The EBA is one of the European Supervisory Authorities (ESAs) established in 2011 and regulates securities and credit-rating agencies)*	ESMA	Paris, France http://www.esma.europa.eu/

US Agencies	Acronym	Location/Website	EU Agencies	Acronym	Location/Website
Federal Reserve Board of Governors *(The Federal Reserve Board of Governors, an independent federal government agency, is the governing body of the Federal Reserve System ("the Fed"))*	"The Fed"	Washington, DC http://www.federalreserve.gov/	European Security and Markets Authority *(The EBA is one of the European Supervisory Authorities (ESAs) established in 2011 and regulates securities and credit-rating agencies)*	ESMA	Paris, France http://www.esma.europa.eu/
			European Central Bank *(As the administrator of monetary policy in the Eurozone, the ECB does some of the work of the Federal Reserve Board of Governors, although it is not an EU agency nor does it have the same degree of centralized power as "the Fed")*	ECB	Frankfurt, Germany http://www.ecb.europa.eu/home/html/index.en.html
			European Systematic Risk Board *(Established in 2010 as part of the European System of Financial Supervision (ESFS), in response to the global financial crisis, the ESRB oversees risk to the financial system as a whole)*	ESRB	Frankfurt, Germany http://www.esrb.europa.eu/home/html/index.en.html
			European Banking Authority *(The EBA is one of the European Supervisory Authorities (ESAs) established in 2011 and oversees financial stability of European Banks)*	EBA	London, United Kingdom http://www.eba.europa.eu/

US Agencies	Acronym	Location/Website	EU Agencies	Acronym	Location/Website
Trade Regulation					
Office of the United States Trade Representative *(Established in 1962, the USTR negotiates trade agreements, including TTIP, with foreign countries and participates in global trade policy organizations)*	USTR	Washington, DC http://www.ustr.gov/	Directorate-General for Trade *(The Directorate-General for Trade is responsible for a common trade policy in the EU and negotiation with the US over TTIP)*	TRADE	Brussels, Belgium http://ec.europa.eu/trade/index_en.htm
International Trade Commission *(Established in 1916, the USITC is a quasi-judicial agency that provide trade expertise, including on the impact of imports on domestic industries)*	USITC	Washington, DC http://www.usitc.gov/			
International Trade Administration *(Established within the Department of Commerce in 1980, the ITA promotes fair trade and the competitiveness of US industry by overseeing the export of non-agricultural services and goods)*	ITA	Washington, DC http://www.trade.gov/index.asp			

US Agencies	Acronym	Location/Website	EU Agencies	Acronym	Location/Website
Federal Trade Commission *(The FTC was established in 1941 to protect consumers and prevent anticompetitive business practices.)*	FTC	Washington DC, http://www.ftc.gov/	Directorate-General for Competition *(The COMP is responsible for preventing anticompetitive practices in Europe)*	COMP	Saint-Josse-ten-Noode, Belgium http://ec.europa.eu/dgs/competition/index_en.htm
Surface Transportation Board *(Established in 1996, superseded the Interstates Commerce Commission. The STB is housed in the Department of Transportation)*	STB	Washington, DC http://www.stb.dot.gov/stb/index.html	Directorate-General for Mobility and Transport	MOVE	Brussels, Belgium http://ec.europa.eu/transport/index_en.htm
			European Railway Agency	ERA	Valenciennes and Lille, France http://www.era.europa.eu/Pages/Home.aspx
			Innovation & Networks Executive Agency *(This executive agency is the successor to the Trans-European Network Executive Agency (TEN-T EA) and currently manages multiple EU infrastructure, energy, and innovation projects)*	INEA	Brussels, Belgium http://inea.ec.europa.eu/en/home/
United States Patent and Trademark Office	USPTO	Alexandria, VA http://www.uspto.gov/	Office for Harmonization in the Internal Market *(Established in 1994, OHIM is responsible for coordinating the trade mark and design registry for the EU)*	OHIM	Alicante, Spain

US Agencies	Acronym	Location/Website	EU Agencies	Acronym	Location/Website
Labor and Employment Regulation					
Occupational Safety and Health Administration	OSHA	Washington, DC https://www.osha.gov/	Directorate-General Employment, Social Affairs & Inclusion	EMPL	Brussels, Belgium http://ec.europa.eu/social/home.jsp?langId=en
			European Agency for Safety and Health at Work *(Established 1996)*	EU-OSHA	Bilbao, Spain https://osha.europa.eu/en
National Labor Relations Board *(Established in 1935, the NLRB investigates and prevents unfair labor practices)*	NLRB	Washington, DC http://www.nlrb.gov/	Directorate-General of Employment, Social Affairs & Inclusion	EMPL	Brussels, Belgium http://ec.europa.eu/social/home.jsp?langId=en
Energy Regulation					
Nuclear Regulatory Commission	NRC	Washington, DC http://www.nrc.gov/	Directorate-General for Energy	ENER	Brussels, Belgium http://ec.europa.eu/dgs/energy/index_en.htm
Security Regulation					
National Security Agency	NSA	Washington, DC http://www.nsa.gov/	Directorate-General for Home Affairs	HOME	Brussels, Belgium http://ec.europa.eu/dgs/home-affairs/index_en.htm
Office of Cybersecurity and Communications *(Established within the Department of Homeland Security, the CS&C assures the safety and reliability of the US cyber network)*	CS&C	Washington, DC http://www.dhs.gov/office-cybersecurity-and-communications	European Network and Information Safety Agency *(Established in 2005, ENISA is responsible for cyber security in Europe)*	ENISA	Heraklion, Greece http://www.enisa.europa.eu/

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