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**Working Paper No 2014/08| June 2014**

# Toward Alignment of Carbon Standards under the Transatlantic Trade and Investment Partnership

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With its wide coverage of economic spheres and the variety of trade and investment measures currently under negotiation, the Transatlantic Trade and Investment Partnership (TTIP) opens windows of opportunity for climate change mitigation and adaptation. The paper examines the possible avenues and the WTO law implications for the alignment of emissions standards between the European Union (EU) and United States of America (US). Looking particularly at the automobile sector, it argues that TTIP negotiators should strive for the mutual recognition of equivalence of EU and US car emissions standards, while pursuing full harmonisation in the long term. It concludes that the preferential trade agreement (PTA) status of TTIP would not be able to exempt measures taken for regulatory convergence from compliance with applicable WTO rules, particularly the rules of the WTO's Agreement on Technical Barriers to Trade (TBT). Furthermore, the EU and the US would not be able to ignore requests for the recognition of equivalence of third countries' standards and would need to provide the grounds upon which they assess third countries' standards as not adequately fulfilling the objectives of their own regulations and therefore rejecting them.

Research for this paper was funded by the Swiss National Science Foundation under a grant to the National Centre of Competence in Research on Trade Regulation, based at the World Trade Institute of the University of Bern, Switzerland.



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## 1. Introduction

The European Union (EU) and the United States of America (US) are presently negotiating the Transatlantic Trade and Investment Partnership (TTIP), a bilateral preferential trade agreement (PTA) with a high level of ambition for the liberalisation of trade and the promotion of investment between two of the world's most powerful political and economic players. Accounting for 47% of the world's gross domestic product (GDP) (2009) and 30% of the world's trade,[1] the TTIP belongs to the family of mega-regionals currently being negotiated outside the multilateral trade forum of the World Trade Organization (WTO).[2] The negotiations cover a wide range of areas of transatlantic economic relations, including trade in goods, trade in services, government procurement, intellectual property rights and investment protection.[3] Through the conclusion of a PTA, the EU and the US are striving to remove all the remaining tariffs and to reduce behind-the-border trade-restrictive measures in their bilateral trade. They also aim to facilitate investments in one another's economy by achieving a higher level of investment protection. Economic benefits from the agreement are expected to be mutual and significant: an impact assessment study conducted by the Centre for Economic Policy Research in London suggests the EU economy could benefit by €119 billion a year and the US economy could gain an extra €95 billion a year.[4]

Although tariffs between the EU and US are already low, on average 4%, the combined size of the EU and US economies and their markets means that removing these remaining tariffs would still significantly increase export revenues for EU and US firms.[5] However, most of the economic benefits of the TTIP would come from the reduced costs of bureaucracy and regulations, and from liberalised trade in services and government procurement. Non-tariff barriers, such as regulations on the US and EU markets, add the equivalent of tariffs of 10–20% to the price of goods.[6] There are a number of US products that are entirely banned from entering the EU market and a number of EU products that cannot be sold in the US market because of significant differences in sanitary and phytosanitary (SPS) regulations between the countries.[7] The same is true of the access to the public procurement sector.

[1] http://www.cecimo.eu/site/publications/magazine0/ttip/.
[2] In parallel, the US is leading negotiations on the Trans-Pacific Partnership (TPP), a mega-PTA between the countries of the Pacific Rim.
[3] http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/.
[4] http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf.
[5] For instance, the US tariff for pickup trucks and commercial vans is 25%. Eliminating this tariff could reanimate the compact-pickup segment and open the door to imported trucks in the US. A similar situation is seen regarding access to the EU automobile market. The current EU tariff for cars is 10%. See http://www.caranddriver.com/features/free-trade-cars-why-a-useurope-free-trade-agreement-is-a-good-idea-feature.
[6] http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152204.pdf.
[7] In agriculture, for example, the US's plant health regulations ban European apples, while their food safety rules make it illegal to import many European cheeses. The EU, for its part, restricts imports of US meat treated with hormones and products with genetically modified organisms (GMOs).

Reaching a bilateral agreement on opening up markets would therefore considerably benefit businesses and consumers on both sides of the Atlantic.

Besides economic gains, the TTIP presents an opportunity for furthering US–EU cooperation on sustainable development.[8] More specifically, with its wide coverage of economic spheres and the variety of trade and investment measures currently under negotiation, the TTIP opens windows of opportunity for climate change mitigation and adaptation. While the main objective of trade agreements has little to do with climate protection, and climate change concerns may not be a central point of the TTIP negotiations, some of the measures contemplated under the TTIP will have an impact on the carbon content of EU–US trade, thereby supporting the transition to a low-carbon economy. One such measure is regulatory convergence in emissions standards. This paper looks into the climate change relevance of the TTIP's regulatory convergence and examines possible avenues for the alignment of emissions standards for cars of the EU and US in accordance with the objectives of TTIP, WTO rules and climate policy goals.

The paper is structured as follows. After providing an update on the TTIP negotiations in section 2 and discussing the climate change relevance of the negotiations in section 3, the paper proceeds with the analysis of challenges in section 4, and in section 5 examines possible options for regulatory convergence between the EU and the US in the area of carbon standards with a focus on regulations on car emissions. The analysis of options for the alignment of carbon standards under the TTIP is then supplemented in section 6 with the examination of applicable WTO rules and of the legal issues that arise and, in section 7, with the perspectives for multilateralisation of agreed outcomes. Conclusions are drawn in Section 8.

## 2. State of play of the TTIP negotiations

Negotiations on the TTIP are proceeding relatively quickly, so that they could be concluded within a few years.[9] Between the launch of these negotiations in spring 2013 and June 2014, there have been five rounds of negotiations led by the EU Trade Commissioner and the US Trade Representative. The negotiations are split into three blocks: market access, regulation and rules. Under the market access block, negotiators discuss three issues – tariffs, trade in services and public procurement. On tariffs, the parties have had an initial exchange of offers. On services and on public procurement, negotiators are examining the possibility of exchanging offers.[10] In the context of regulation, negotiators consider how to increase regulatory compatibility and coherence, looking particularly at five key industries: pharmaceuticals, cosmetics, medical devices, automotive, and chemicals. They have already made written

[8] See Leal-Arcas, R & Wilmarth, C. ‚Strengthening Sustainable Development through Preferential Trade Agreements', in Wouters, J. & Marx, A. (ed.) *Ensuring Good Global Governance through Trade* (Edward Elgar forthcoming).

[9] Initially, it was planned to conclude negotiations by late 2014. Now this seems unrealistic. Experts consider mid-2016 to be a more feasible deadline. See http://www.euractiv.com/trade/ttip-deadline-2016-experts-news-533668.

[10] EU-US trade negotiators explore ways to help SMEs take advantage of TTIP, as fourth round of talks ends in Brussels, Press release, EU Commission, Brussels, 14 March 2014.

proposals on technical barriers to trade (TBT) and are preparing the ground for proposals on sanitary and phytosanitary (SPS) measures.[11] Negotiations on rules entail discussions in three areas: sustainable development, labour and the environment; trade in energy and raw materials; customs and trade facilitation. While negotiations of provisions on labour rights and environmental protection will most likely be based on the standard environmental and sustainable development chapters of US and EU PTAs, negotiations on energy and raw materials may result in a legal framework for trade in energy and raw materials that has never existed before.[12] The inclusion of provisions on energy and raw materials in the TTIP is particularly being pushed by the EU, which is striving not only to adopt rules for energy trade that can become global but is also seeking to launch supplies of natural gas from the US to decrease its dependency on energy from the Russian Federation.[13]

### 3. The climate change relevance of the TTIP

Synergies between trade and climate change policies exist or can be achieved within each of the TTIP's negotiating blocks. The impact of TTIP on climate change would primarily be indirect, as in most cases PTAs impact the environment indirectly.[14] This means that the TTIP would decrease the negative effects on the environment not because of the environmental provisions it would contain, but because of the increase in income that would result from the liberalization of bilateral trade and would become available for climate change and other environmental programmes. Trade liberalisation can also generate financial resources for investment in low carbon technologies.

At the same time, the TTIP may cause adverse effects on the climate. The economic growth driven by trade liberalisation could result in increased consumption of non-renewable resources and in environmental degradation,[15] all the more so as the EU and US are discussing the liberalisation of the US energy export regime in order to launch US exports of gas to the EU.[16] Such an agreement between the EU and the US would lead to an increase in the US's production of shale gas. This is associated with environmental risks and may discourage investments in carbon-free renewable energy in the EU.[17]

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[11] Ibid.

[12] See *Raw material and energy*. Initial EU position paper. June 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151624.pdf.

[13] U.S., EU Move To Consolidate Text Proposals In Seven Areas Of TTIP Talks, *Inside US Trade*, Vol. 32, No. 22 - May 30, 2014, p. 2 and Carter Z & Sheppard K, Read The Secret Trade Memo Calling For More Fracking and Offshore Drilling, 19.05.2014, available at http://www.huffingtonpost.com/2014/05/19/trade-fracking_n_5340420.html.

[14] Ghosh S and Yamarik S, 'Do Regional Trading Arrangements Harm the Environment? An Analysis of 162 Countries in 1990' (2006) 6(2) Applied Econometrics and International Development 15, p. 28.

[15] Meltzer J., "The Trans-Pacific Partnership Agreement, the environment and climate change", in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2014), p. 207.

[16] See the EU non-paper on the TTIP chapter on energy and raw materials, which was leaked on 19 May 2014 and published by the Huffington Post.

[17] http://www.huffingtonpost.com/2014/05/19/trade-fracking_n_5340420.html. It should be noted that those are assumptions. A definite conclusion requires a proper study.

Moreover, regulatory convergence pursued under the TTIP may lead to a race to the bottom in the area of emissions standards and climate laws. EU green parties and environmental non-governmental organizations (NGOs) have expressed concerns that the TTIP might become a pathway for the transmission of weaker climate policies and carbon standards from the US to the EU.[18] These concerns arise because, unlike the EU, the US did not ratify the Kyoto Protocol with mandatory emissions reduction targets and so far has failed to enact climate change legislation at the federal level. Yet, in response to these concerns, EU negotiators officially stated that there would be no compromise whatsoever on environmental protection, so much so as there would be no compromise on consumer protection, product safety, intellectual property rights (e.g. geographical indications) and cultural heritage (e.g. the audio-visual sector).[19] The US and the EU would both keep the right to protect their public policy interests at the level they consider necessary.[20]

The TTIP also has the potential to directly contribute to achieving climate change policy objectives if it contains provisions that specifically regulate the carbon content of bilateral trade, promote trade in renewable energy and low carbon technologies and stimulate bilateral cooperation on climate change.[21] One such measure is the dismantling of trade barriers on environmental goods and services (EGS). The elimination of tariffs, which is planned under the TTIP across the board, would be a small step toward the achievement of this goal. Dismantling of non-tariff barriers to EGS is a more important and undoubtedly a harder task.[22] The bilateral trade negotiations also present an opportunity to develop a binding legal framework for reducing fossil fuel

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[18] They warn that TTIP risks challenging existing EU emissions standards, including energy efficiency standards. They also warn that some of the EU's important environmental regulations can be challenged in courts under TTIP's investment protection clauses. This particularly relates to laws affecting fossil fuel exploration and regulations that shorten the lifetime or curtail the profitability of carbon-intensive assets or activities, such as coal-fired power plants. Consequently, there is vehement opposition in the EU to the inclusion of investor–state dispute settlement in the TTIP. See, e.g., Lovells H. et al. (2014), Germany reverses its support for investor-state dispute settlement in the Transatlantic Trade and Investment Partnership (TTIP), available at http://www.lexology.com/library/detail.aspx?g=4530af50-6483-467a-9842-2ec939ae0953 See also Gerstetter Ch. & Meyer-Ohlendorf N. (2013), Investor-state dispute settlement under TTIP – a risk for environmental regulation? Available at http://www.ecologic.eu/sites/files/publication/2014/investor-state-dispute-settlement-under-ttip-hbs.pdf.

[19] http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/#what-is-ttip

[20] It is worth mentioning that even though the EU has stricter environmental and consumer protection standards in its internal market, the US is ahead of the EU in promoting sustainable trade through PTAs. The US subjects environmental provisions of its PTAs to enforceable dispute settlement under PTAs, just as it subjects to enforceable dispute settlement PTAs' commercial provisions, whereas the EU excludes the applicability of the general dispute settlement procedures set out under its PTAs for any matter arising under environmental chapters of PTAs. See OECD (2010), Workshop on implementation and assessing impacts, Report, para. 37, and OECD (2007), Environment and Regional Trade Agreements, pp. 124–125.

[21] At present, it is hard to say whether and to what extent these topics are being taken up by TTIP negotiators because the negotiations are confidential.

[22] Negotiations on dismantling trade barriers on EGS in the WTO and other PTA forums stumble over the definition and classification of EGS.

subsidies and protecting renewable energy subsidies – a task that so far has not been achieved in other fora.[23] Energy subsidies could be part of the negotiations of rules on trade in energy and raw materials. Moreover, the TTIP could include provisions on EU–US cooperation in areas related to the United Nations Framework Convention on Climate Change (UNFCCC) agenda, the functioning of market-based mechanisms of emissions reduction (e.g. ETS) and development and deployment of green technologies, including carbon capture and storage, electro- and fossil cell vehicles, the fourth generation of nuclear reactors etc. Finally, the TTIP could contribute to climate change policy goals by reaching agreements on the alignment of carbon regulations and standards. Harmonisation of the carbon laws and standards of the EU with those of the US, at the level of the party with stricter carbon restrictions in the sector, would contribute to the global reduction of emissions. It would reduce emissions from domestic production in the sector of the PTA party that had the lower carbon standards before the conclusion of the TTIP, and reduce transatlantic carbon leakage. It would decrease the carbon footprint of imports to the EU and US from third countries. And it is likely to stimulate the adoption of TTIP's higher carbon standards by third countries, paving the way for the setting of global carbon standards and a global price on emissions. The following sections consider the feasibility and legal implications of different options for regulatory convergence on carbon standards under the TTIP.

## 4. Challenges to regulatory convergence on carbon standards between the EU and the US

Regulatory barriers to trade are generally much more difficult to remove than tariffs because they aim to achieve public policy objectives, such as the protection of the environment and public health. The US and the EU are both highly developed economies with practically equal negotiating power, which means that neither will be able to impose its own conditions on the other.[24] The achievement of regulatory convergence between the EU and US is complicated by existing transatlantic differences in fossil fuel resources, energy policy priorities and approaches to standard-setting.

### *4.1. Differences in energy policies*

The EU economy is heavily dependent on energy imports.[25] As a result, for many years, the main concern of the EU has been energy efficiency, an area

[23] The G20's commitment of 2009, to phase out fossil fuel subsidies, has had little effect because of the lack of enforcement. The WTO has an enforcement mechanism but lacks rules on elimination of fossil fuel subsidies and promotion of green energy subsidies. As a result, the WTO dispute settlement mechanism has so far been used to challenge renewable energy programmes rather than fossil fuel subsidies. See Porterfield M. & Stumberg R. (2014), "Using the Transatlantic Trade and Investment Partnership to Limit Fossil Fuel Subsidies", Discussion paper prepared for the Greens Group by the Harrison Institute for Public Law, Georgetown Law, p. 1.

[24] In addition, the EU is not a homogeneous entity: it is formed by 28 countries with different regulatory cultures and levels of economic development.

[25] The EU imports about 55% of its energy supply – approximately 84% of its oil and 64% of its natural gas. See Ratner M. et al. (2013), "Europe's Energy Security: Options and Challenges to Natural Gas Supply Diversification", Congressional Research Service, p.5, available at http://www.fas.org/sgp/crs/row/R42405.pdf.

where it has achieved a remarkable progress.[26] The US depends much less on energy imports than the EU: it is not only a major energy consumer and importer but also a world's major energy producer. Recently, the US has discovered huge reserves of shale gas, which are sufficient not only for domestic needs but also for export.[27] The US energy reserves allow the US production to be more energy-intensive. Although in the past decade the US has made some progress towards greater energy efficiency, it lags behind all but three of the world's twelve largest economies in overall energy efficiency, and in the transportation sector it occupies the bottom (twelfth) position in energy efficiency.[28] Furthermore, the US energy mix is more carbon-intensive than that of the EU. Half of the electricity generation in the US is based on coal combustion.[29] Consequently, the electricity sector is a major source of carbon emissions in the US.[30] By contrast, in the EU, the share of coal in the energy mix has been steadily declining over the years, and the recent increase in coal consumption in some EU countries is likely to be temporary.[31] Moreover, many EU member states have announced a phase-out of nuclear energy, banning the construction of new reactors, whereas the US, despite a constant reduction of nuclear energy generation every year, continues to render support for nuclear power stations.[32]

*4.2. Differences in approaches to standard-setting*

A regulatory convergence under the TTIP is further complicated by the differences in approaches to standard-setting. Although both the EU and the US have well developed systems for ensuring safety and providing consumer and environmental protection, they often adopt different approaches to achieving the same goal. The fundamental difference is the reliance on the precautionary principle in the EU and on the cost–benefit analysis in the US. The exact legal content of the precautionary principle is unclear and highly disputable.[33] Yet, generally, it can be interpreted that where there is uncertainty as to the existence of risks (e.g. to human health), the government can take protective measures without having to wait until the reality of those risks becomes apparent.

The cost–benefit analysis employed in the setting of standards in the US takes a practical approach. It is based on the risk assessment and it looks at the

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[26] Despite economic growth, energy consumption, for instance, in Germany in 2006, was not higher than in 1990. See Müller F. (2007), "How to secure reliable energy sources in Germany" in US and German Approaches to the Energy Challenge, AICGS policy report no. 29, p. 27.

[27] See "Saudi America", *The Economist*, 15 February 2014, available at http://www.economist.com/news/united-states/21596553-benefits-shale-oil-are-bigger-many-americans-realise-policy-has-yet-catch.

[28] David Butcher, 'The world's most energy-efficient countries', IMT, 12 July 2012, available at http://news.thomasnet.com/IMT/2012/07/19/the-worlds-most-energy-efficient-countries/

[29] Kohl, W. (2007), "United States Energy Policy and Future Energy Security", in W. Kohl and F. Müller, *US and German Approaches to the Energy Challenge*, AICGS Policy Report no. 29, p. 8.

[30] http://www.globalccsinstitute.com/location/united-states.

[31] http://energy.sia-partners.com/20130724/the-future-of-coal-in-europe/.

[32] Kohl, W. (2007), "United States Energy Policy and Future Energy Security", in W. Kohl and F. Müller, *US and German Approaches to the Energy Challenge*, AICGS Policy Report no. 29, pp. 15–16.

[33] Bergkamp, L. and Kogan, L. (2013), "Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership", *EJRR*, issue 4, p. 499.

balance between the regulatory benefits of the regulation and its costs, including the costs of restriction on competition and trade.[34] In general terms, the US relies more on quantitative data and science whereas the EU follows a qualitative, value-driven approach.[35]

Given that the precautionary approach is enshrined in the EU Lisbon Treaty[36] and that the cost–benefit analysis is supported by US jurisprudence,[37] it is unlikely that either the EU or the US will give up their approaches to standard-setting. However, despite the regulatory differences between the EU and US, experts believe that the alignment of standards in a number of areas is possible based on a robust science-based procedure.[38]

## 5. Possible outcomes of regulatory convergence on carbon standards under the TTIP

### *5.1. From mutual recognition of conformity assessment procedures to recognition of equivalence and complete harmonisation of standards*

The outcomes of the regulatory convergence between the US and EU can be different in different sectors and for different products. In the area of carbon-related standards, regulatory convergence in its shallow form may lead to better coordination and greater transparency in the standardisation process between the EU and US and to mutual recognition of results of conformity assessment procedures.[39] In its deeper form, regulatory convergence may

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[34] Trachtman, J. (2002), "Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT", Background paper, p. 2, available at http://www.wto.org/english/tratop_e/region_e/sem_april02_e/joel_trachtman.pdf

[35] Bergkamp, L. and Kogan, L. (2013), "Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership", *EJRR*, issue 4, p. 505.

[36] Para. 2 of Art. 191 of the Lisbon Treaty (Treaty on the Functioning of the European Union) states:

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
>
> In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

[37] For instance, a decision of the US Supreme Court in the 1980 AFL-CIO v. American Petroleum Institute Case requires US federal regulatory agencies to base their standards on reliable scientific evidence and undertake economic cost–benefit analysis. See Bergkamp, L. and Kogan, L. (2013), "Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership", *EJRR*, issue 4, p. 497.

[38] Bergkamp, L. and Kogan, L. (2013), "Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership", *EJRR*, issue 4, p. 507.

[39] For instance, TBT-plus commitments under PTAs may encourage cooperation among standard-setting bodies of PTA parties leading to the development of common approaches to issues such as energy efficiency and the methodology for determining the greenhouse gas (GHG) lifecycle of products. See Meltzer J., "The Trans-Pacific Partnership Agreement, the environment and climate change", in Tania Voon (ed), *Trade Liberalisation and International Co-*

result in the recognition of equivalence of EU and US standards or even full harmonisation of some standards.

It should be noted that regulatory convergence in product standards between two or more countries does not need to occur in PTAs, and in most cases takes place outside PTAs. Countries may agree to convert their different standards into the same ones to achieve full harmonization of their standards. However, while strongly supported by business and industries, the process of standard harmonization is very slow and is not easily attainable because of differences in institutions, conditions and interests of countries. Faced with high costs of compliance with different standards in different markets and the difficulties of achieving harmonization of standards, countries may enter into mutual recognition agreements (MRAs) reciprocally recognizing the equivalence of each other's standards and/or the results of conformity assessment procedures in certain sectors. Recognition of equivalence of standards means that the pertinent standards remain different in the two countries but, in their bilateral trade, these countries agree to treat each other's standards as if they were equivalent. One of the most prominent mutual recognition systems was developed within the single market of the EU after it became clear that the harmonization of standards among EC members was unrealistic. The EU's mutual recognition system is based on the Cassis de Dijon principle, according to which if a product meets the standards of any one EU member state, it can be sold throughout the Union.[40]

A necessary supplement to both the harmonization and the recognition of equivalence of standards is the recognition of conformity assessment procedures.[41] The mutual recognition of conformity assessment procedures is the first step towards alignment of standards between countries and the main subject of MRAs. The recognition of conformity assessment procedures entails the recognition and acceptance by the importing country of the results of product testing performed by the conformity assessment bodies (CABs) of the exporting country. The basis of the recognition is the use of the importing country's tests and standards. Instead of inspecting the exporting country's manufacturers or products themselves, the CABs of the importing country accept the inspection reports issued by the exporting country's CABs, including authorized private ones, as being sufficient to demonstrate conformity with the standards of the importing country.[42] Consequently, the mutual recognition of the results of conformity assessment procedures reduces

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*operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2014), p. 224.

[40] See Devereaux, C., Lawrence, R., and Watkins, M. (2006), *Case Studies in US Trade Negotiation Volume 1: Making the Rules. Chapter 7. The US-EU Mutual Recognition Agreements* (Peterson Institute for International Economics), p. 303. The Cassis de Dijon principle stems from a 1979 decision by the Court of Justice of the European Communities in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (also known as the Cassis de Dijon case). In that case, the EC court found the restriction of the free circulation within the EC of products (liqueur), which meet different standards of EC countries (percentage alcohol content for liqueurs), unlawful.

[41] Conformity assessment is the process by which products are measured against the various safety, environmental and quality standards set by governments.

[42] Nicolaidis, K. and Shaffer, G. (2005), "Transnational mutual recognition regimes: Governance without global government", *Law and Contemporary Problems*, vol. 68, p. 273.

costs by avoiding the need to duplicate testing of products in the other party's market.[43]

*5.2 Prospects for the expansion of the 1998 EU–US MRA*

In 1998, the EU and the US signed an MRA that covers six product areas: telecommunications equipment, electromagnetic compatibility, electrical safety, recreational craft, good manufacturing practices for pharmaceuticals, and medical devices. [44] It is a traditional MRA that does not provide for recognition of standards but merely designates the CABs from both parties and obliges the importing country to recognize the certification procedures followed by these bodies, and their outcomes, in the territory of the exporting country. Mutual recognition of standards proved to be unattainable in view of the existing regulatory differences between the US and the EU, particularly as concerns the institutional basis of certification and testing procedures. Concerns were raised, for instance, that an agreement on mutual recognition of standards would have radically altered the role of regulators in the US relying on a more rigorous and taxing approval system than in the EU.[45] Consequently, the agreements on mere recognition of testing, certification and inspection procedures in the specified sectors took four years to negotiate, and many terms appeared to be non-operational at the implementation stage. Problems in implementing the agreements arose in the sectors of medical devices, pharmaceuticals and electrical safety. These problems were mainly caused by the reluctance of the US regulatory agencies (Food and Drug Administration, Occupational Safety and Health Administration etc.) to acknowledge EU inspection and testing procedures as equivalent to those of its own procedures.[46] Consequently, in 2003, when it became clear that the European producers of electrical appliances essentially gained nothing from the MRA, the EU withdrew from participation in the MRA on electrical safety.

Despite the challenges facing the implementation of the 1998 EU–US MRAs, the TTIP negotiations on regulatory convergence can build on these agreements and strive for the extension of sectoral scope. The mutual recognition of the results of conformity assessment procedures could also be supplemented with the recognition of equivalence of standards for certain products, and in some cases could possibly lead to harmonization of EU–US

[43] Devereaux, C., Lawrence, R., and Watkins, M. (2006), *Case Studies in US Trade Negotiation Volume 1: Making the Rules. Chapter 7. The US-EU Mutual Recognition Agreements* (Peterson Institute for International Economics), p. 307, available at http://www.piie.com/publications/chapters_preview/392/07iie3624.pdf

[44] Council Decision 1999/78/EC of 22 June 1998 on the conclusion of an Agreement on Mutual Recognition between the European Community and the United States of America (OJ L 31, 4.02.1999, p.1), as amended by Council Decision 2002/803/EC of 8.10.2002 (OJ L 278, 16.10.2002, p.22). Entered into force in December 1998.To view the text of the Agreement: http://ec.europa.eu/enterprise/policies/single-market-goods/international-aspects/mutual-recognition-agreement/usa/index_en.htm
For a complete list of the designated CABs under the MRA with the United States, see the Commission's Websites: http://ec.europa.eu/enterprise/policies/single-market-goods/international-aspects/mutual-recognition-agreement/usa/index_en.htm

[45] Devereaux, C., Lawrence, R., and Watkins, M. (2006), *Case Studies in US Trade Negotiation Volume 1: Making the Rules. Chapter 7. The US-EU Mutual Recognition Agreements* (Peterson Institute for International Economics), p. 305.

[46] Ibid., pp. 345–347.

standards. As the recognition of standards and their harmonization is proving to be a long process, the TTIP negotiations may end up with a framework agreement, which would set conditions and a timeline for mutual recognition and harmonization of standards to be implemented within, say, five to seven years after the conclusion of TTIP. As experience with the 1998 EU–US MRA shows, achieving sectoral MRAs is not possible without direct involvement of industry representatives who are familiar with actual business practices and who know what concessions their industry could offer to its foreign counterpart.[47]

At the same time, it is important that the alignment of standards between the EU and US does not lead to a race to the bottom. Higher carbon standards should not be substituted with lower carbon standards in pursuit of trade facilitation goals. Thus, the higher standards should serve as the basis for harmonisation.

*5.3 A case study of car emissions standards*

Concern about the increasing emissions in the automobile sector led the EU to introduce a comprehensive legal framework to reduce carbon dioxide ($CO_2$) emissions from new light-duty vehicles (cars and vans).[48] The adoption of the legislation on car emissions standards was part of the EU's efforts to ensure the achievement of emissions reduction targets under the Kyoto Protocol and beyond.[49] The legislation sets binding emission targets for new car and van fleets. For cars, the car producer's new car fleet must not emit more than an average of 130 g $CO_2$ per kilometre (km) by 2015 and 95 g $CO_2$/km by 2020.[50] Translated into fuel consumption norms, the 2015 standard is equivalent to 5.6 litres (l) per 100 km of gasoline or 4.9 l/100 km of diesel. The 2020 norm corresponds to 4.1 l/100 km of gasoline or 3.6 l/100 km of diesel. For vans, the producer's new fleet is permitted to emit on average 175 g $CO_2$/km by 2017 and 147 g $CO_2$/km by 2020.[51] Translated into fuel consumption norms, the 2017 target corresponds to 7.5 l/100 km of gasoline or 6.6 l/100 km of diesel. The 2020 target is equal to 6.3 l/100 km of gasoline or 5.5 l/100 km of diesel.

The US takes a different approach to limiting carbon emissions from cars. Emissions standards for cars in the US are based on the Corporate Average Fuel Economy (CAFE) standards. CAFE standards are set in miles per gallon

[47] A major breakthrough in the EU–US MRA negotiations in the pharmaceutical sector was reported to be due to the participation of the CEOs of EU pharmaceutical companies, who knew better than representatives of the European Commission what conditions the EU pharmaceutical industry could concede to, including public disclosure of plant inspection reports. See Devereaux, C., Lawrence, R., and Watkins, M. (2006), *Case Studies in US Trade Negotiation Volume 1: Making the Rules*. *Chapter 7. The US-EU Mutual Recognition Agreements* (Peterson Institute for International Economics), p. 335.

[48] $CO_2$ emissions from passenger cars constitute over 12% of EU's emissions of $CO_2$. In 2006, they were 29% higher than in 1990. See Patrick ten Brink, "Mitigating CO2 Emissions from Cars in the EU (Regulation (EC) No 443/2009)", in S. Oberthür & Marc Pallemaerts (eds.), *The New Climate Policies of the European Union: Internal Legislation & Climate Diplomacy*, VUBPRESS, 2010, p. 179.

[49] For the preparation and adoption of EC Regulation No 443/2009 on car emissions standards, see Patrick ten Brink, "Mitigating CO2 Emissions from Cars in the EU (Regulation (EC) No 443/2009)", in S. Oberthür & Marc Pallemaerts (eds.), *The New Climate Policies of the European Union: Internal Legislation & Climate Diplomacy*, VUBPRESS, 2010, pp. 193–200.

[50] http://ec.europa.eu/clima/policies/transport/vehicles/cars/index_en.htm.

[51] http://ec.europa.eu/clima/policies/transport/vehicles/vans/index_en.htm.

(mpg) and depend on the vehicle's "footprint", which is the size of a vehicle determined by multiplying the vehicle's wheelbase by its average track width. The CAFE footprint requirements are progressive: a vehicle with a larger footprint has a lower fuel economy norm than a vehicle with a smaller footprint. Enacted in 1975, the CAFE standards were initially intended to increase the fuel economy of US cars in the wake of the Arab Oil Embargo.[52] Nowadays, they also pursue the objectives of emissions reduction.[53]

Non-compliance with a CAFE standard entails a fine for every 0.1 mpg below the standard multiplied by the total production volumes of the car producer. Additionally, the Gas Guzzler Tax is levied on individual passenger car models (but not trucks, vans, minivans, or sport utility vehicles) that do not meet CAFE standards. CAFE standards have been tightening over the years and will reach 54.5 mpg (4.32 l/100 km) in 2025.[54] Stricter CAFE standards are beneficial both for the environment and for the economy. While stricter CAFE standards are opposed by car manufactures, car buyers will save an average of US$8000 per car in reduced costs of fuel in 2025.[55] Moreover, stricter CAFE standards are beneficial for producers of car components as new technologies and additional components are needed to make cars more fuel efficient.

Efforts to harmonize US and EU car regulations, including emissions standards, have been made for many years. Designing a single car that would satisfy the two separate sets of standards of the EU and US markets is an immense, expensive challenge for car producers. As seen in Table 1, although a gradual alignment of the car emissions standards of the EU and the US is taking place, differences between them remain.

*Table 1. Comparison of EU and US emissions standards for passenger cars*[56]

| | EU | US |
|---|---|---|
| 2015 | 130 g $CO_2$/km or **5.6** l/100 km | 36.4 mpg or **6.5** l/100 km |
| 2021 | 95 g $CO_2$/km or **4.1** l/100 km | 46.1 mpg or **5.1** l/100 km |

The TTIP negotiations offer an opportunity for further alignment of these standards. While harmonisation of car emissions standards would be desirable for facilitating transatlantic trade in automobiles and should indeed be the ultimate goal of negotiations on regulatory convergence in this sector, it will be a long process given the differences in regulatory approaches between the US and the EU and the need for complex legislative changes on both sides of the Atlantic.[57] What the TTIP negotiations should thus strive for is the mutual

[52] http://www.c2es.org/federal/executive/vehicle-standards.
[53] http://www.epa.gov/otaq/climate/documents/420f12051.pdf.
[54] http://www.c2es.org/federal/executive/vehicle-standards.
[55] http://www.epa.gov/otaq/climate/documents/420f12051.pdf.
[56] The table is compiled based on the data of the Centre for Climate and Energy Solutions, http://www.c2es.org/federal/executive/vehicle-standards#ldv_2012_to_2025, and the European Commission, http://ec.europa.eu/clima/policies/transport/vehicles/cars/index_en.htm
[57] This is also the view of carmakers: "The level of minutiae that would have to be agreed upon is apparently too daunting for either party to consider, and a likely stumbling block to reform. Instead, Ford suggested "mutual recognition", which would ostensibly be some kind of reciprocity agreement

recognition of equivalence of EU and US car emissions standards with the fixed goal of full convergence of standards at a specified date in the future.

## 6. The WTO rules applicable to regulatory convergence under the TTIP

The scope of negotiations on the alignment of standards and mutual recognition of conformity assessment procedures is defined by the disciplines of WTO law, including WTO rules on technical barriers to trade (TBT). Furthermore, if taken under the TTIP, the measures may additionally be subject to the WTO rules on the formation of PTAs for trade in goods set out in GATT Article XXIV.[58] These two sets of rules would apply cumulatively.[59]

### *6.1. WTO rules generally applicable to regulatory convergence processes*

The WTO Agreement does not oblige WTO members to harmonize product standards. However, it supports harmonization of technical regulations[60] through the provision that encourages the use of international standards. Art. 2.5 of the TBT Agreement states that, if based on a relevant international standard, a technical regulation is rebuttably presumed to be in compliance with the necessity test for trade restrictiveness under TBT Art. 2.2. Furthermore, the TBT Agreement contains provisions on unilateral recognition of equivalence of standards of WTO members and unilateral recognition of results of conformity assessment procedures. For instance, TBT Art. 2.7 requires that "members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations". Yet, the legal status of these provisions is not clear. In particular, it is not clear if the words 'WTO members shall give positive consideration to' in TBT Art. 2.7 are to be interpreted as an obligation or an encouragement. Even if this wording could be interpreted as being close to a requirement,[61] this requirement is weakened

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whereby the US and EU would accept vehicle's built to either standard." See http://www.thetruthaboutcars.com/2013/03/ford-calls-for-harmonized-us-eu-standards/.

[58] GATT Art. XXIV authorises reciprocal liberalisation of trade in goods on a non-MFN basis in the form of customs union or free trade agreements – both called PTAs – between WTO members. It sets however strict conditions for such liberalisation. It should be noted that the conclusion of PTAs for trade in services is regulated by the provisions of Art. V of the WTO's General Agreement on Trade in Services (GATS). Therefore, regulatory measures such as a mutual recognition of workers' qualifications under TTIP would be subject to the rules of GATS Art. V.

[59] Obligations of WTO members under different agreements are cumulative and interpreted by WTO panels in accordance with the principle of effective interpretation so that the interpretation of one provision is not nullified by the interpretation of another provision. See e.g. *US – Gasoline*, Appellate Body (AB) report, p. 23.

[60] 'Technical regulations' is a term used in the WTO's TBT Agreement to designate mandatory standards.

[61] See e.g. Labels. The EC submission to WTO Committees: Technical Barriers to Trade; Trade and Environment, Brussels, June 2002. Furthermore, while admitting the soft language of the provision of Art. 2.7 equating to a hortatory obligation, Gabrielle Marceau and Joel Trachtman, with a reference to the *Shrimp – Turtle* jurisprudence submit that "since Article XX requires that Members maintain an appropriate level of flexibility in the administration of their regulatory distinctions (footnote omitted), it is probable that Article 2.7 … will be interpreted as requiring sufficient flexibility in normative determinations and good faith

by the second part of the sentence ('provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations'), which allows WTO members to make their own decision as to whether they are satisfied with the level of other countries' standards or not. Thus, the recognition of equivalence can be rejected subjectively.

A similar situation exists with respect to the *unilateral* recognition of results of conformity assessment procedures. Pursuant to TBT Art. 6.1, "Members shall ensure, whenever possible, that results of conformity assessment in other Members are accepted, even when those procedures differ from their own". The words 'whenever possible' provide a means of escape from the guidance of the provision. There is however a provision in the TBT Agreement that clearly encourages *mutual* recognition of results of conformity assessment procedures. Pursuant to TBT Art. 6.3, "(m)embers are encouraged, at the request of other members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures". This provision provides the legal basis for MRAs.[62]

At the same time, the encouragement of MRAs poses a legal question of consistency with the WTO's fundamental principle of most-favoured nation (MFN) treatment, as stipulated both under GATT Art. I and TBT Art. 5.1.1. Some argue that the non-observance of the MFN principle by MRAs can probably be excused by the fact that "bilateral or plurilateral mutual recognition deals cannot be "multilateralised" automatically as provided by the MFN rule, simply because concessions based on assessing current and future equivalence of regulatory systems are not fungible. Hence, under an MRA, the MFN treatment is indeed conditional, not on some symmetrical lowering of trade barriers, but on actual compatibility of rules or equivalence of procedures".[63] This, however, has never been discussed in a WTO dispute and remains an open question.

As regards the rules on conformity assessment, the TBT Agreement imposes strict non-discrimination requirements of MFN and national treatment, very similar to the rules on application of technical regulations and standards.[64] The provisions of TBT Art. 5.1.1 require that conformity assessment procedures be 'prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation…". In other words, a country has to offer all suppliers of like products equally good conditions for conformity assessment to those it offers its domestic suppliers or any of its foreign suppliers. One way to

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consideration of the alternative and equivalent standards suggested by the exporting country." See Marceau G. and Trachtman J. (2006), "A Map of the World Trade Organization Law of Domestic Regulation of Goods", in G. Bermann and P. Mavroidis (ed.), *Trade and Human Health and Safety* (Cambridge University Press), p. 42.

[62] See http://www.jeanmonnetprogram.org/archive/papers/97/97-07--6.html.

[63] Ibid. In this regard, it is noteworthy that TBT Art. 5.1.1 requires non-discriminatory access to conformity assessment for foreign suppliers 'in a comparable situation'.

[64] Holzer, K., *Carbon-related Border Adjustment and WTO Law* (Edward Elgar, 2014), pp. 199–200.

achieve compliance with the national treatment requirement is to conclude conformity assessment MRAs with countries of foreign suppliers. Yet, as already noted, conformity assessment MRAs create the MFN riddle.

*6.2. WTO disciplines guiding regulatory convergence in PTAs*

The conclusion of MRAs as part of PTAs raises a number of legal questions. One of them is whether GATT Art. XXIV exempts recognition of standards and conformity assessment procedures in PTAs from the MFN obligation. The formation of a PTA (e.g. a customs union or a free trade agreement), allowed by GATT Art. XXIV for trade in goods is a derogation from the MFN obligation, which allows the liberalization of trade only between parties of a PTA. Consequently, GATT Art. XXIV may allow a derogation from the MFN rule for the application of standards, if differences in standards between countries can fall under the meaning of "other restrictive regulations of commerce", elimination of which with respect to substantially all the trade is required for the formation of a PTA in accordance with para. 8 of Art. XXIV.[65] However, the exact meaning of "other restrictive regulations of commerce" is not known.[66] If standards do not fall under 'other restrictive regulations of commerce', the GATT Art. XXIV defence for an MFN violation cannot be used and, in that case, the question of MFN compliance of MRAs concluded in PTAs remains the same as for MRAs concluded outside PTAs.

The PTA status, in any case, does not exempt regulatory convergence under the TTIP from compliance with all other GATT rules and with the rules of the TBT Agreement, as discussed above. More precisely, the PTA status could provide an excuse for non-compliance of regulatory convergence under the TTIP with other provisions of the GATT only if the formation of TTIP were prevented, had regulatory convergence not taken place.[67] Since regulatory convergence is not a *conditio sine qua non* for the TTIP (i.e. the TTIP could in principle be formed without an agreement on regulatory convergence), regulatory convergence under TTIP must comply with all rules of the GATT, except, as discussed above, the MFN.

Moreover, the PTA status of the TTIP does not seem to exempt measures taken for regulatory convergence from the MFN obligation under Art. 2.1 of the TBT Agreement.[68] While GATT Art. XXIV allows a derogation from the MFN obligation under the GATT,[69] it does not seem to apply to obligations under other WTO Agreements, so long as there is no direct reference in those agreements to GATT provisions.[70] It is unlikely that a stated purpose of the

[65] We assume that in that case a PTA would be formed in compliance with the conditions set forth by GATT Art. XXIV for the formation of PTAs.
[66] Holzer, K., *Carbon-related Border Adjustment and WTO Law* (Edward Elgar, 2014), pp. 280–281.
[67] *Turkey –Textiles*, AB report, para. 58.
[68] TBT Art. 2.1 reads: "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country".
[69] The chapeau of Art. XXIV:5 has in its wording "the provisions of this Agreement shall not prevent ... the formation of a customs union or of a free-trade area...".'This Agreement" means the GATT. See *Turkey – Textiles*, AB report, paras. 45–46.
[70]. Such an interpretation is supported by WTO jurisprudence. In the *Turkey – Textiles* dispute, the AB noted

TBT Agreement to further the objectives of the GATT, fixed in its preamble, could be viewed as a sufficient link with GATT provisions, including with Art. XXIV. It has now become clear that GATT provisions (e.g. the general exceptions under GATT Art. XX[71]) do not automatically apply to the legal content of the TBT Agreement. Furthermore, in the case of conflict between GATT and TBT provisions, the latter would prevail.[72] From this it follows that the MFN and other TBT rules applicable to regulatory convergence must be observed when proceeding with the alignment of standards under the TTIP.

TBT rules, as discussed above, do not seem to create great obstacles for regulatory convergence between the EU and US under the TTIP, taking into account that harmonisation of standards and mutual recognition of results of conformity assessment are encouraged. A question arises, however, with respect to the provision of TBT Art. 2.7 as to the recognition of equivalence of standards on a unilateral basis. The question is whether 'closed' recognition agreements, i.e. only between PTA parties and closed to third countries, are allowed. The provision of TBT Art. 2.7 may be interpreted as posing an obstacle to 'closed' recognition agreements. The answer to this question may depend on whether regulatory convergence is required for the formation of a PTA under GATT Art. XXIV.

Paragraph 8 of GATT Art. XXIV sets the so-called internal requirement to trade liberalisation within a PTA and requires that customs duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade within a customs union or an FTA. If the difference in standards between countries can be considered to be 'other restrictive regulations of commerce' within the meaning of Art. XXIV:8, their alignment is required for trade inside the PTA. However, because countries have the right to set standards,[73]standards of one country that are different from

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> The chapeau of paragraph 5 refers only to the provisions of the GATT 1994. It does not refer to the provisions of the *ATC*. However, Article 2.4 of the *ATC* provides that "[n]o new restrictions ... shall be introduced *except under* the provisions of this Agreement or *relevant GATT 1994 provisions*." (emphasis added) In this way, Article XXIV of the GATT 1994 is incorporated in the *ATC* and may be invoked as a defence to a claim of inconsistency with Article 2.4 of the *ATC*, provided that the conditions set forth in Article XXIV for the availability of this defence are met.

See *Turkey – Textiles*, AB report, footnote 13 on p. 11.

[71] See e.g. *EC – Seal Products*, AB report, para. 5.127–5.129.

[72] The precedence of TBT provisions over GATT provisions in the case of conflict is confirmed by the General Interpretative Note to Annex 1A to the WTO Agreement, which reads

> In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization…, the provision of the other agreement shall prevail to the extent of the conflict.

[73] The Preamble to the TBT Agreement says that WTO members recognise that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement". Furthermore, the AB found that 'it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation'. See *EC – Asbestos*, AB report, para 168.

standards of other countries can hardly be viewed as "restrictive" regulations of commerce, the elimination of which – through convergence or alignment – is required by GATT Art. XXIV. In its turn, para. 5 of Article XXIV sets the external requirement to trade liberalisation within a PTA and prohibits PTA parties from increasing trade barriers for products from third countries after the formation of a PTA. If the absence of regulatory convergence in a PTA could lead to an increase in trade barriers for third countries after the formation of a PTA, regulatory convergence would be required for a PTA. Yet, this does not seem to be the case. Although there is some evidence that regulatory convergence under a PTA may produce economies of scale for third countries and its impact for them may be positive,[74] it cannot be argued that preserving the *status quo* in standards (i.e. making no alignment of standards between PTA parties) would result in higher trade barriers for third countries *after* the formation of a PTA because the very same barriers existed *before* the PTA was concluded. Thus, it cannot be concluded that regulatory convergence in a PTA is required by WTO rules.

Nevertheless, in light of the provision of TBT Art. 2.7, if approached by third countries after the conclusion of MRAs under the TTIP, the EU and the US would not be able to simply ignore requests about the recognition of equivalence of third countries' standards, were these standards to provide for the same level of protection as those of the EU and the US. They would definitely need to provide the grounds for why they assess third countries' standards as not adequately fulfilling the objectives of their own regulations. As the experience with negotiating the EU–US MRAs in the wake of the creation of the EC mutual recognition system shows,[75] the initiation of talks with the purpose of reaching MRAs, even if only on the subject of conformity assessment procedures, could hold back the complaints against the EU and the US in the WTO by third countries. The financial and technical assistance for upgrading standards to the TTIP level, provided by the EU and US particularly to developing countries, could also help mitigate the risk of third countries bringing a complaint under the WTO dispute settlement procedure.

## 7. Perspectives for multilateralisation of carbon standards adopted under the TTIP and implications for third countries

If agreed between the EU and US, carbon standards could serve as a model for other countries.[76] An EU–US agreement on car emissions and safety standards, if agreed under the TTIP, could be used as the basis for development of global vehicle standards within the 1998 framework agreement of the United Nations Economic Commission for Europe (UNECE).[77] An agreement between the EU

[74] See Cottier, T., Francois, J. et al. (forthcoming).

[75] Devereaux, C., Lawrence, R., and Watkins, M. (2006), *Case Studies in US Trade Negotiation Volume 1: Making the Rules. Chapter 7. The US-EU Mutual Recognition Agreements* (Peterson Institute for International Economics), p. 313.

[76] It is important that standards negotiated under the TTIP are based, if possible, on existing international standards, such as the framework of the 1998 Agreement of United Nations Economic Commission for Europe (UNECE) on Global Technical Regulations (GTRs) for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles.

[77] See http://www.unece.org/fileadmin/DAM/trans/main/wp29/wp29wgs/wp29gen/wp29glob/tran132.pdf.

and the US may create a critical mass for globalization of carbon standards, as happened in the area of intellectual property rights, where the agreement between the EU, Japan and the US in the early 1990s pushed other countries to join the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[78] Regulatory convergence between the EU and the US may create economic incentives for third countries to adopt TTIP standards. It depends, however, on whether the economic impact of EU-US regulatory convergence on third countries will be positive or negative, which is currently not clear. It will largely depend on the outcome of regulatory convergence. The implications of harmonization of standards or their mutual recognition are different from the implications of mutual recognition of conformity assessment procedures. A recent study on the impacts of TTIP on the Swiss economy shows that

> "third country industry may actually benefit from EU-US regulatory convergence. In particular, if standards and regulations are streamlined, it may become easier for third countries to conform to these standards in both markets, even if they are outside the process that sets those standards. It may become easier to meet … standards for an integrated or mutual recognition regime, as opposed to two different and independent regimes."[79]

In other words, harmonisation of standards under TTIP would lead to economies of scale: third countries would have open access to a larger market once their products comply with the standards of TTIP parties.

At the same time, the competitive positions of third countries may be undermined by the alignment of standards between the EU and US, as these countries' products would be discriminated against in the EU and US markets vis-à-vis EU and US products.[80] To stay competitive in the EU and US markets in this situation, the exporters in the third countries would either have to unilaterally adjust to the EU–US standards or conclude MRAs with the EU and US on the recognition of equivalence of their standards. Otherwise, they would have to reorient their exports to other markets.[81] Below we examine possible channels of multilateralisation of TTIP's emissions standards.

*7.1. Diffusion of TTIP standards through unilateral adoption by third countries*

The above-mentioned economic effects of regulatory convergence may stimulate the diffusion of TTIP standards through their voluntary adoption by third countries. However, there are limits to such diffusion. It is unlikely that such countries as China, India and other emerging economies, which are the world's largest carbon emitters, would adopt carbon standards or convert

[78] See e.g. Cottier T., 'The TRIPs Agreement', in P. Macror, A. Appleton and M. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer Verlag AG, 2005).
[79] See Cottier, T., Francois, J. et al. Legal opinion (forthcoming).
[80] Trachtman, J. (2002), "Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT", Background paper, pp. 1–2.
[81] For instance, a study on the impact of TTIP on Switzerland points out that "Swiss companies exporting to the US face the need to test and approve with US authorities, while competitors in the EU will benefit from mutual recognition and, thus, from lower costs. Hence, in addition to the removal of tariffs, Swiss companies will suffer from additional disadvantages which may force them to relocate, leaving Switzerland". See Cottier T., Francois, J. et al. Legal opinion (forthcoming).

their own carbon standards into those of the EU and US. They would have enough economic power not to have to do this. In the future these countries may have enough demand for their products in their own markets and in the markets of other fast-growing developing countries.[82] As rightly pointed out by Suparna Karmakar, upgrading of standards in the markets of advanced developing countries can only be stimulated by their own consumers once they become willing to pay the price premium for a higher level of safety, consumer and environmental protection.[83] In the meantime, these countries may establish double standards: one set of standards for products exported to the EU and US markets and another set of standards for products sold in their own markets. Alternatively, they may simply seek the conclusion of MRAs on results of conformity assessment procedures with the EU and US to reduce the costs of their compliance. Under these circumstances, instead of multilateralisation, the TTIP process of regulatory convergence would lead to further fragmentation of the world's regulatory regimes.

*7.2 Plurilateralisation through PTAs*

The adoption of TTIP standards by third countries may also occur under the EU and US PTAs with third countries. The EU and US may negotiate the use of TTIP standards in trade with third countries as part of future PTAs or may incorporate these standards into their existing PTAs. While the success of this strategy depends on the scope of a trade agreement and the negotiating powers of its parties, the economic benefits and negotiating mechanism of bilateral and plurilateral PTAs are generally conducive to reaching a compromise by accepting trade-offs, especially when developing countries are supported by financial and technical assistance from developed country parties.[84] Such plurilateral forums and trade agreements as the Trans-Pacific Partnership (TPP), Asia-Pacific Economic Cooperation (APEC) and North American Free Trade Agreement (NAFTA) could serve as an umbrella for bilateral or plurilateral agreements on standards modelled on the TTIP. The WTO and other multilateral forums can then be used to multilateralise standards and recognition criteria agreed in PTAs.[85]

## 8. Conclusions

The TTIP provides an opportunity to address climate change concerns by pursuing regulatory convergence. Harmonisation of the carbon laws and standards of the EU and US, at the level of the party that has the stricter carbon restrictions in that sector, could contribute to global emissions reductions. It would both reduce emissions from domestic production in the sector of the PTA party that had the lower carbon standards before the conclusion of the TTIP, and prevent transatlantic carbon leakage. It would also

[82] Karmakar, S. (2013), 'Prospects for regulatory convergence under TTIP', Bruegel Policy Contribution, issue 2013/15, pp. 5–6.
[83] Karmakar, S. (2013), p. 6.
[84] For an examination of the possibility of the use of carbon restrictions under PTAs, see Holzer K. and Shariff N. (2012), 'The inclusion of border carbon adjustments in preferential trade agreements: Policy implications', *CCLR*, issue 3, pp. 246–260.
[85] To facilitate multilateralisation, recognition agreements in PTAs need to be transparent. In this regard, Art. 10.7 of the TBT Agreement sets out a requirement for the notification of bilateral agreements on the issues of standards and conformity assessment procedures.

decrease the carbon footprint exports to the EU and US from third countries and may stimulate the adoption of TTIP's higher carbon standards by third countries, thus paving the way for the creation global carbon standards and setting a global carbon price.

While the TTIP will not be able to harmonize all of the carbon regulations and standards of the EU and the US, success in some sectors is possible. This paper considers the possibility of alignment of the emissions standards applied by the US and the EU in the automobile sector. Harmonisation of car emissions standards is desirable for facilitating transatlantic trade in automobiles, and should be the ultimate goal of negotiations on regulatory convergence in this sector. Yet, it will be a long process given the existing differences in regulatory approaches between the US and the EU and the need for complex changes in each party's legislation. What the TTIP negotiations could strive for, however, is the mutual recognition of equivalence of EU and US car emissions standards and to fix the goal for a full convergence of the standards at a specified date in the future.

When working on the alignment of car emissions standards, TTIP negotiators could draw on the experience of the 1998 US–EU MRA and should take into account the EU and US obligations under the WTO Agreement. The examination of WTO rules made in this paper shows that the WTO law issues of alignment of standards under the TTIP are no different from what they would be if this process were carried out independently of the TTIP. The PTA status does not exempt measures taken for the sake of regulatory convergence under the TTIP from compliance with GATT rules, except the MFN, or with the rules of the TBT Agreement. At the same time, the WTO rules do not seem to create great obstacles for regulatory convergence between the EU and US under the TTIP, taking into account that harmonisation of standards and mutual recognition of results of conformity assessment are encouraged. Nevertheless, in light of the provision of TBT Art. 2.7 on the recognition of equivalence of standards on a unilateral basis, if approached by third countries after the conclusion of MRAs under the TTIP, the EU and the US would not be able to simply ignore requests about the recognition of equivalence of third countries' standards. They would need to provide the grounds upon which they assess third countries' standards as not adequately fulfilling the objectives of their own regulations. As the experience with negotiating the EU–US MRAs shows, the initiation of talks with the purpose of reaching MRAs, even if only on the subject of conformity assessment procedures, could hold back the complaints against the EU and the US in the WTO by third countries.

If aligned under the TTIP, the EU–US car emissions standards could serve as a model for global emissions standards in the automobile sector. There are at least two channels through which the diffusion of TTIP standards to the rest of the world could occur. Regulatory convergence between the EU and the US may create economic incentives for third countries to voluntarily adopt TTIP standards. Yet, this channel has limits for countries with market power, especially emerging economies. The diffusion of TTIP standards to third countries may also occur under the EU and US PTAs with third countries. The

feasibility of this channel depends on the scope of the PTA and the negotiating powers of its parties. EU and US could encourage the adoption of their standards by third countries by providing financial and technical assistance.