PhD THESIS DECLARATION

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Regulatory coherence – cui prod est?

The law and economics of TTIP's regulatory cooperation endeavour

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Regulatory coherence – cui prod est?

The law and economics of TTIP's regulatory cooperation endeavour

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International Law and Economics

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Abstract

Our review of the main aspects of regulatory coherence in both theory and practice explores, on the one hand, the status quo on the international regulatory cooperation front and, on the other, the impact the TTIP meaning of the term has on the legal systems, the economies and the global positions of the EU, the US and third countries. Hence, we first look into what is meant by regulatory coherence, how it came to be and how it fits into the big picture of global economic governance. Then, we attempt at sketching likely future developments.

We find that, in terms of domestic legal systems, TTIP 'coherence' induces a certain degree of change to existing rulemaking procedures on both sides of the Atlantic – affecting both processes (by e.g. introducing the requirement of international information exchanges at various stages in the rulemaking procedure) and players (the Executive is favoured by the current set-up in the TTIP, which leaves elected bodies side-lined). With regards to international economic law, regulatory coherence should have a mitigating effect on regulatory heterogeneity and regulatory protectionism.

Economically, coherence would lower the costs of doing business abroad, thus favouring corporations involved in international trade and investment and positively impacting the economic system as well, triggering (modest) GDP increases and bilateral trade flows upsurges and boosting competitiveness. Its sectoral benefits are unevenly distributed, with some sectors gaining in terms of both output and exports, while others see their production and, consequently, labour demand and/or wages, go down.

Globally, TTIP rulemaking would likely position the EU and the US as norm setters; by contrast, while it can have a positive economic impact on third countries, it might put them in a delicate position politically. In interaction with the WTO, it could undermine the centrality of the Geneva-based organization if not handled in a manner mindful of multilateral effects.

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Abbreviations

APEC – Asia-Pacific Economic Cooperation

AVEs – Ad-Valorem Equivalents

BIT – Bilateral Investment Treaty

BRICs – Brazil, Russia, India and China

CEPR – Centre for Economic Policy Research London

CGE – Computable General Equilibrium

CRA – Congressional Review Act

EC – European Commission

EP – European Parliament

FDI – Foreign Direct Investment

FET – Fair and Equitable Treatment

GATT – General Agreement on Tariffs and Trade

GDP – Gross Domestic Product

GPM – United Nations Global Policy Model

GTAP – Global Trade Analysis Project

IA – Impact Assessment

ICSID – International Centre for the Settlement of Disputes

ISDS – Investor-State Dispute Settlement

ITC – International Trade Commission

MFN – Most Favoured Nation

MNEs – Multinational Enterprises

MMT – Methylcyclopentadienyl Manganese Tricarbonyl

MRAs – Mutual Recognition Agreements

NAFTA – North-American Free Trade Agreement

NTBs – Non-Tariff Barriers

NTMs – Non-Tariff Measures

OECD – Organization for Economic Cooperation and Development

OIRA – White House Office of Information and Regulatory Affairs

RIA – Regulatory Impact Analysis

RoW – Rest of the World

SPS – Sanitary and Phytosanitary Measures Agreement

SMEs – Small and Medium-sized Enterprises

TBT – Technical Barriers to Trade Agreement

TPP – Trans Pacific Partnership

TTIP – Transatlantic Trade and Investment Partnership

UNCTAD – United Nations Conference on Trade and Development

US-EU HLWG – United States-European Union High Level Working Group on Jobs and Growth

USTR – United States Trade Representative

WTO – World Trade Organization

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Executive Summary

Regulatory coherence is one of the hot topics on today's global agenda, especially in relation to mega-trade deals, such as the Transpacific Partnership or the Transatlantic Trade and Investment Partnership. It has been received with both enthusiasm (especially by policy makers who see it as a key to future economic growth and prosperity) and scepticism or even outright opposition (by some of civil society, who view coherence as a polite name for a race to the bottom towards the lowest common regulatory denominator, undermining regulatory sovereignty). Where is the truth? And where does the controversy originate?

Closer scrutiny reveals that most of the problems stem from the fact that it is still unclear what regulatory coherence actually is (compatible regulations or convergence around common norms?), what forms it will take in practice (regulatory dialogue or substantive harmonization of rules?) and, consequently, what its effects will be on the economies, legal systems and political architectures of the parties involved (since the deeper the regulatory alignment, the more powerful the effects) especially given the (surprising, to some) choice to negotiate *regulatory* matters as part of an *economic* cooperation agreement.

In this climate of uncertainty and heated debates, the aim of this thesis is to bring about some clarity on this contentious topic. What we want to understand here is what regulatory coherence actually refers to, why it is part of a trade and investment agreement, what its economic, legal and political effects might be and who the main beneficiaries of this international effort are likely to be, both domestically and globally.

In order to do so, we must work with a mix of methods: the sheer complexity of the topic being analysed means that there is no single methodological construction that can hope

to successfully lead to answers to all the important questions. Hence, what is required is an eclectic methodological approach, ranging from economic to legal to political, where inputs from various fields of knowledge and schools of thought complement each other. An important aspect is the comparative nature of certain parts of the thesis, as dictated by our geographical focus – i.e. the transatlantic economic relation. Within this geographical focus, there is the analysis of the Transatlantic Trade and Investment Partnership, which acts as a sui-generis case study on regulatory coherence.

The train of thought is fairly straightforward. First, we must understand the status quo on the regulatory coherence front. Hence, the first part of the thesis (Chapters II, III and IV) explores the reasons behind it, by looking back both theoretically and empirically, trying to understand what is meant by regulatory coherence, how it came to be and how it fits into the big picture of global economic governance. Then, we attempt at sketching likely future developments. Part two (Chapters V, VI and VII) is forward looking, an attempt at estimating the likely effects of regulatory coherence, be they economic, legal or (geo) political.

Looking back

So as to gain a better understanding of where we are, we must begin by determining what regulatory coherence actually refers to, in both theory (Chapter II) and practice (Chapter III).

We start (Chapter II) by clarifying what regulations are, how many types there are and the theories that explain their naissance and proliferation, from Public Interest Theories (whereby omniscient and benevolent regulators always choose policy responses that maximize public benefit) to Private Interest Theories (which postulate that regulations are the outcome of a competition between organized groups – e.g. producers, consumers etc. – that each try to sway policy makers to regulate in their favour) or Political Action Theory (whereby regulations are arrived at via a complex political process, with in-built mechanisms for promoting public interest and limiting the risk of regulatory capture).

We then explore how globalization transformed regulations from topics of exclusive domestic interest into subjects of international conversation. The international interaction of domestic regulations and the response of the international community to it continuously

restructured itself, from competitive to cooperative paradigms (such as convergence) ultimately arriving at coherence, which we define as *the coordination of regulatory design and implementation processes, aimed at increasing the compatibility of current and future rules and regulations.* Favoured by paradigms of power symmetry (e.g. EU–US), its main promise is to favour increased compatibility between the domestic regulations of various countries so as to lower regulatory barriers to international trade and investment (thereby boosting international economic exchanges and unlocking direly needed economic growth), while at the same time remaining respectful of each country's right to conduct its own regulatory policy in the fashion and to the level of protection it considers appropriate. The latter is true because, unlike convergence (which incentivizes the arrival at identical regulations across borders – via e.g. harmonization), coherence leads to compatibility between the regulations of various countries, which remain, nonetheless, different (via e.g. mutual recognition). This ambitious promise is the main reason for the continuously renewed interest of policy makers in pursuing regulatory coherence as part of their international regulatory cooperation endeavours.

However, as we see next (Chapter III) the translation of this promise into practice – whose beginnings can be traced back to the efforts towards better regulation and the spread of good regulatory practices and which is, currently, closely tied to mega trade and investment agreements, such as the Transpacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) – proved to be rather challenging and brought forth a series of problems. To begin with, what was supposed to be an effort by policy makers towards cross-border regulatory alignment with a view to reducing unnecessary and costly barriers to international economic exchanges and, consequently, unlocking sources of economic growth (i.e. a Public Interest paradigm) was, au contraire, perceived by some of the public as a behind the scenes corporate takeover, with transnational corporations lobbying policy makers to eliminate business un-friendly regulations and induce a regulatory race to the bottom, whereby countries party to the 'regulatory coherence' effort would lower their (e.g. environmental and health) standards and subject future rulemaking to business interest. In other words, civil society feared regulatory capture and organized to oppose it, throwing the regulatory coherence debate into a Private Interest – and pressure groups – paradigm. While the reality of the matter is structured more along the lines of Political Action theory (arriving

at regulatory coherence requires a complex process of political bargaining, which should normally take place under public scrutiny), these divergent perceptions foreshadowed that regulatory coherence was going to become quite the contentious topic.

Further adding fuel to the fire, the exact degree of 'regulatory compatibility' sought by policy makers was not set in stone: in practice, coherence can translate, depending on the negotiating context, into something as unproblematic as mere regulatory dialogue or, au contraire, go as far as substantive regulatory convergence somewhere down the line. This 'moving target' nature of coherence proved politically problematic – since the extent of regulatory alignment sought is not clear, the extent of supranational interference with domestic regulatory systems is not clear either, fostering concerns of democratic deficit and undermined regulatory sovereignty. Ergo, renewed opposition of (some of) civil society to regulatory coherence efforts. Last but not least, the choice to negotiate regulatory coherence within a trade and investment partnership (be it the TPP or the TTIP) was also seen as dangerous by civil society, furthering the concern of regulating in the corporate interest.

This latter point brings up a legitimate question: why is a profoundly *legal* topic (regulatory affairs) addressed within an *economic* agreement (such as the TTIP)? The explanation has to do with the complex relation between domestic regulations and international trade and investment (issues such as regulatory heterogeneity and regulatory protectionism) which we look into, in detail, in Chapter IV. In a nutshell: on occasion, regulations that differ from one country to another can act as non-tariff barriers to international trade and investment. They do so because they create unnecessary costs to doing business abroad: duplication/redundancy costs (when companies are obliged to comply with multiple sets of rules in multiple markets for the same product/service), information costs (the costs companies incur when learning about the regulations applicable in the markets they are interested in), surprise costs (the costs of regulatory changes), costs related to conformity assessment (the costs of proving compliance with the regulations in force in the market being served) etc.

This cost-inducing regulatory divergence can be either benign – i.e. regulatory heterogeneity (created by differences in geography, culture, attitude towards risk etc.) or malign – i.e. regulatory protectionism (whereby policy makers opt for regulatory discrimination, be it overt via e.g. openly favouring products of domestic origin or covert via

e.g. raising the stringency level of legal requirements in ways that disproportionally affect foreign producers). Counteracting this phenomenon requires tackling regulations in venues of otherwise purely economic cooperation, such as has traditionally been the case with the WTO, where the TBT and SPS Agreements tried to mitigate the risks and costs of regulatory divergence. Ergo, trying to reduce regulatory barriers to transatlantic trade and FDI by negotiating regulatory coherence in the Transatlantic Trade and Investment Partnership seems less puzzling than it may have originally.

Looking forward

If regulatory barriers to international economic exchanges negatively impact the costs of doing business abroad and, hence, hinder increased trade and investment flows, then, naturally, reducing/eliminating them should have positive effects on the economies of the parties engaged in regulatory dialogues. A key question thus becomes – can regulatory coherence unlock direly needed economic growth? Or, in other words, what will be the economic impact of TTIP's regulatory coherence efforts?

Our analysis of the likely economic effects of regulatory coherence (Chapter V) reviews the main economic impact studies carried out in relation to the TTIP (with a special focus on the study relied on by the European Commission in its own TTIP Impact Assessment – i.e. "Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment" – CEPR 2013), their methodologies, results, strong points and minuses, trying to estimate a general direction of the consequences of the regulatory part of the Agreement for the economies of the EU and the US (both systemically and sectorally), on the corporations involved in transatlantic trade and investment and on the rest of the world.

We find that coherence – in the generic sense of 'regulatory alignment' given to it by these studies – would lower the costs of doing business abroad, thus favouring corporations involved in international trade and investment and positively impacting the economic system as well, triggering (modest) GDP increases (0.48% for the EU and 0.39% for the US - CEPR 2013) and bilateral trade flows upsurges (28.03% for the EU and 36.57% for the US - CEPR 2013) and boosting competitiveness. Its sectoral benefits are unevenly distributed, with some sectors (such as motor vehicles, agriculture, processed foods, finance or insurance in the EU;

machinery, metals, water and air transport, communications, construction in the US) gaining in terms of both output and exports, while others see their production and, consequently, labour demand and/or wages, go down (electrical machinery, transport equipment and metals in the EU; processed foods, motor vehicles, finance, insurance in the US). On a tangent, the effects on employment are difficult to properly assess, given methodological limitations, but most studies predict positive effects on wage levels, for both skilled and unskilled workers. The costs of coherence include short-term (budgetary) adjustment costs, which might be ultimately offset by greater revenue due to increased economic activity.

Beyond its economic effects, coherence remains, nonetheless, a legal topic. In Chapter VI, we estimate its legal implications by looking at the TTIP Draft Chapter on Regulatory Cooperation, reviewing its main points and drawing conclusions regarding its approach to increased EU-US regulatory compatibility. The first observation is that TTIP does not define coherence, but rather replaces the term, using cooperation instead, thus broadening the possible regulatory outcomes of the Agreement, from mere regulatory dialogue all the way to common transatlantic norms. Effects wise, we find that TTIP 'coherence' induces a certain degree of change to existing rulemaking procedures on both sides of the Atlantic – although not big enough to alter the current constitutional order in either jurisdiction, this change will partially affect both processes (by e.g. introducing the requirement of international information exchanges at various stages in the rulemaking procedure) and players (the Executive is favoured by the current set-up in the TTIP, which leaves elected bodies severely side-lined). Transatlantic common regulatory design and implementation also reduces the occurrence of regulatory heterogeneity (which it targets directly) and could potentially have a mitigating (side) effect on regulatory protectionism.

The last – but equally important – point has to do with (geo)political consequences. We look at these in Chapter VII. Hence, while placing the EU and the US in a position of global rulemaking leadership, TTIP-driven transatlantic regulatory coherence has mixed effects on third countries: their economies might be positively impacted by increased access to the transatlantic market (due to lower regulatory barriers), but standard-wise they become norm-takers, having to play by the rules commonly agreed on by the EU and the US, which is politically unpalatable, especially to the BRICS. TTIP coherence will also have, most likely, negative consequences for the centrality of the WTO in the establishment of future rules for

'new issues' related to global trade and investment, with the TTIP and the like partially replacing the Geneva-based organization as the locus of future regulatory decision making.

An important note: these effects vary in intensity depending on the degree of regulatory alignment eventually arrived at – i.e. on the final meaning of 'coherence' in the TTIP. Mere regulatory dialogue will have lesser impacts (on the economy, on the degree of change brought to domestic rulemaking processes or on global governance) than convergence to common transatlantic norms.

All in all, what becomes obvious throughout the thesis is that the implications of the pursuit of regulatory coherence are complex, heterogeneous and – most importantly – prone to evolving in tandem with its contextual meaning. The fluidity of the latter (that the TTIP only adds to) also means that controversy surrounding the topic and public opposition to it are likely to continue.

Chapter I

Introduction

1. Raison d'être

Regulatory coherence is, most definitely, one of the hot topics on today's global agenda – politicians talk about it, academics talk about it, public opinion talks about it and the media does the same. So writing a thesis on the subject seems to fit the trend. But what makes regulatory coherence such a compelling talking point? And if the topic is looked at from so many different angles already, is there anything left for a PhD thesis to add?

The rising of regulatory coherence as the 'it' subject on the radar of international relations stems from the intersection of two different phenomena.

One is that "modern western governments have undergone fundamental change, moving from a positive state – in which governments intervened directly in order to achieve a range of social and economic goals – to a regulatory state – in which direct service delivery is increasingly outsourced to third parties, who governments seek to control and influence through a mix of contractual arrangements, rules and regulations." [Windholz, Hodge, 2013] This has led to an exponential increase of the number of regulations issued by domestic authorities on an yearly basis, to the point that "we now live in an age of „regulatory governance" or „regulatory capitalism", in which increasing reliance on the market as the vehicle for both individual wealth maximisation and the provision of government services has been accompanied by a proliferation of new regulation (and regulatory regimes) to ensure the market's efficiency and effectiveness; and the social responsibility of the private sector

organisations to which the government has delegated some of its functions – a phenomenon which Vogel describes as 'Freer Markets; More Rules'." [idem]

The other one is globalization, which had its own two-pronged influence. On the one hand, it fuelled economic integration and the acceleration of international economic exchanges, gradually eliminating the barriers to global flows of goods and services and promoting liberalization as the key to growth and prosperity. On the other hand, it enshrined a cooperative approach to issues too big for individual states to solve, postulating international collaboration as the optimal form of global governance and pushing nation states in the direction of bilateral, regional or multilateral agreements of various natures.

The collision of the two phenomena created a problem: the (ever increasing number of) domestic rules were different cross-countries and because of that, they were slowly becoming regulatory barriers to international trade and investment flows, hampering global integration of markets and turning into an additional cost for the companies engaged in international economic transactions. States were becoming increasingly caught in the middle between the need to properly regulate their societies and the pressure to support their economic agents in the global race for market share, between the statutory requirement to safeguard their domestic regulatory space and the necessity to acknowledge that their domestic policy choices were beginning to have an international effect that had to be taken into account.

The collision of the two phenomena also provided the solution: regulatory cooperation. The only efficient way around regulatory barriers was via increased collaboration between parties (exporter/importer in the case of trade, host state/home state in the case of Foreign Direct Investment) with a view to finding mutually beneficial solutions to unnecessarily divergent regulatory practices that were taking a toll on international economic exchanges. Said collaboration took many forms, from harmonization to mutual recognition to the development of common standards and was typically codified in various kinds of regulatory cooperation agreements.

While some efforts were successful, most of them were not. The reasons for the (partial) failure were mostly political – in a nutshell, no one wanted to renounce their own domestic regulations and/or regulatory modus operandi and adopt some one else's standards. There was, thus, this tension between the economic imperative to lower regulatory barriers to

international trade and investment and the political/public pressure to maintain one's sovereign right to regulate as one saw fit.

But these difficulties did not hamper regulatory cooperation efforts. And the latest form these efforts took is regulatory coherence, whose main promise is to favour increased compatibility between the domestic regulations of various countries so as to lower regulatory barriers to international trade and investment, while at the same time remaining respectful of each country's right to conduct its own regulatory policy in the fashion and to the level of protection it considers appropriate.

This very ambitious promise immediately attracted a lot of attention, from policy makers who began including it on their agenda, to academia who started analyzing its various aspects and potential effects, to public opinion who was concerned about its ability to deliver on its sovereignty friendly promise, to the media, who covered the topic extensively. The result was a rather chaotic scene. Policy makers' initial enthusiasm clashed with fierce civil society opposition, determining the former to backpedal on certain aspects of their original intent and redefine the very content of their initial goal. The media became divided, with some hailing the economic benefits of the new international endeavour, while others decried its negative impact on regulatory sovereignty. Academia's analysis of the issue was highly fragmented, with some looking into economic effects, others exploring legal implications, while a third category researched (geo)political consequences. In a nutshell, regulatory coherence found itself in a rather confusing climate.

It is in this confusing climate that this thesis was born, out of a very simple reason: the need for clarity. What we want to understand is what regulatory coherence actually refers to, why it differs from previous attempts at regulatory cooperation (in terms of content, likely outcome and negotiation venue – i.e. trade and investment agreements), what its main advantages/ disadvantages are, what its economic, legal and political effects might be and who the main beneficiaries of this international effort are likely to be, both domestically and globally.

The aim is to shed some light onto the reasons behind policy makers' preference and quest for regulatory coherence, the motivations behind public opinion's concern and (partial) opposition to it and the likely systemic effect said coherence will have on the parties involved in its design and implementation.

2. Methodology

In order to do so, we must work with a mix of methods. The sheer complexity of the topic being analysed means that there is no single methodological construction that can hope to successfully lead to answers to all the important questions.

Regulating is, by excellence, a legal issue, pertaining to domestic administrative law, confined within the boundaries of the nation state, whose design and implementation are guided by the provisions of each country's own legal order. It is, typically, a technical exercise, but nonetheless carried out under political scrutiny. Understanding it thus requires combining pure legal text analysis with a look into the 'science' of regulating (via e.g. regulatory impact assessments and their cost-benefit analyses) and with an understanding of the motivations of domestic political players involved in regulating, of their interaction and the rules governing it, which brings us into the analytical world of political science.

Coherence adds an international layer to the business of regulating. Consequently, an evaluation thereof must build on inputs from international law, international relations and, to a certain extent, geo-politics.

Regulatory coherence with the aim of reducing non-tariff barriers to international trade and investment, is, straightforwardly so, an economic issue. Analyzing the economic underpinnings of regulatory divergence and the likely effects of regulatory coherence requires resorting to both economic theory (e.g. economies of scale) and empirics (regression equations, computable general equilibrium modelling).

Hence, what is required is an eclectic methodological approach, ranging from economic to legal to political, where inputs from various fields of knowledge and schools of thought complement each other, so as to render a more inclusive picture of the main issues surrounding the 'hot topic' of regulatory coherence and overcome the above-mentioned fragmented approach that has thus far characterized previous analytical attempts. The dominating paradigm is a combination of law and economics, which are the main pillars of our approach, with a dash of politics whenever necessary. The analysis is predominantly

descriptive, building on both primary (e.g. the US Constitution) and secondary (e.g. works of legal scholars) sources.

An important aspect is the comparative nature of certain parts of the thesis, as dictated by our geographical focus – i.e. the transatlantic economic relation – which opposes EU to US rulemaking principles and processes, likely economic effects and political architectures. Within this geographical focus, there is the analysis of the Transatlantic Trade and Investment Partnership, which acts as a sui-generis case study on regulatory coherence.

3. In focus – the Transatlantic Trade and Investment Partnership

The best way to understand what regulatory coherence is all about is by looking at its materialization in the practice of world's countries. While there have been several cooperative instances where this concept was brought up (from the APEC to the Transpacific Partnership) the one that interests us most and that will be the focus of our thesis is the Transatlantic Trade and Investment Partnership (TTIP).

What makes the TTIP particularly interesting? In essence, the nature of the economic relation between the parties: they are not only the largest players on the world market, but they are also very closely connected. "Transatlantic trade and investment are the backbone of the world economy. Together, the European Union (EU) and the United States account for nearly half of world GDP and 30 percent of world trade. Each day, goods and services worth $2.7 billion/€2.0 billion are traded bilaterally, promoting economic growth and supporting millions of jobs in both economies. In addition, the United States and the EU have directly invested more than $3.7 trillion/€ 2.8 trillion on both sides of the Atlantic." [United States-European Union High Level Working Group on Jobs and Growth (HLWG) - Final Report, 2013]

This level of integration of the two economies has been supported, inter alia, by very low traditional barriers to trade and investment, such as tariffs and quotas, to the point that the biggest impediment to an even closer relationship and deeper integration is now represented by non-tariff (i.e. regulatory) barriers to transatlantic trade and FDI. The main goal of the

TTIP thus becomes eliminating/lowering/preventing these barriers, so much so that its focus is regulatory coherence, which aims to cover: "Enhanced compatibility of regulations and standards; Elimination, reduction, or prevention of unnecessary "behind the border" non-tariff barriers to trade in all categories; Enhanced cooperation for the development of rules and principles on global issues of common concern and also for the achievement of shared global economic goals." [HLWG, Final Report, 2013] prompting some analysts to refer to it as 'a regulatory agreement'.

The markedly regulatory nature of the TTIP and its focus on coherence make it the perfect means of analyzing the various implications of the use of the concept in practice, be they economic, legal or political.

Its raison d'être is economic: the regulatory TTIP aims to "strengthen the contribution of trade and investment to fostering jobs, growth, and competitiveness in both economies." [idem] but its goal is served by a legal effort, namely "putting processes and mechanisms in place to reduce costs associated with regulatory differences by promoting greater compatibility, including, where appropriate, harmonization of future regulations, and to resolve concerns and reduce burdens arising from existing regulations through equivalence, mutual recognition, or other agreed means, as appropriate." [HLWG, Final Report, 2013]

As a consequence, its effects will be both economic (impacting the EU and the US economies) and legal (altering, to various extents, the current rulemaking modus operandi in both jurisdictions). We will look at these effects in turn. We will also briefly explore some of the political effects, particularly in a global setting.

The regulatory TTIP – especially its take on "cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations" [idem] – will thus constitute a sui-generis case-study on regulatory coherence, allowing us to deepen and contextualize its roots and likely effects.

An important observation we need to make at this point regards what the part of the thesis dedicated to the TTIP will *not* be – an exhaustive analysis of this very complex trade and investment partnership. Topics such as TTIP provisions on market access for goods and services, investment, procurement, Intellectual Property Rights etc. – which are all highly interesting and warrant dedicated analyses – will not be addressed, for that would go far

beyond the scope of this thesis. What we focus on here is the regulatory part and, even within it, we narrow it down to the provisions on coherence, only briefly touching upon other regulatory aspects, such as TBT, SPS or sectoral chapters. And that is so because this is not a thesis about the TTIP – rather, it is an analysis of regulatory coherence which builds on relevant TTIP provisions and approaches to reach its conclusions.

4. Outline

Our x-ray of regulatory coherence is made up of two conceptually different parts.

The first part (Chapters II, III and IV) analyzes the current status quo and explores the reasons behind it, by looking back both theoretically and empirically, trying to understand what is meant by regulatory coherence, how it came to be and how it fits into the big picture of global economic governance. Its conclusions are of a more general nature, only focusing on the EU-US relation on selected issues.

Part two (Chapters V, VI and VII) is forward looking, an attempt at estimating the likely effects of regulatory coherence, be they economic, legal or (geo) political. Its focus is almost exclusively the EU-US relation and the TTIP, allowing us to sketch potential impacts of regulatory coherence efforts.

Therefore, after the current introductory chapter, we turn to conceptual delimitations. In its attempt to find an adequate working definition of 'regulatory coherence', Chapter II starts by clarifying what regulations are, how many types there are, the theories that explain their naissance and proliferation and how globalization transformed them from topics of exclusive domestic interest into subjects of international conversation. The international interaction of domestic regulations and the response of the international community to it continuously restructured itself, from competitive to cooperative paradigms, ultimately arriving at today's quest for coherence.

Chapter III goes beyond theory, looking into the practice of regulatory coherence, tracing its beginnings back to the efforts towards better regulation and the spread of good regulatory practices and then focusing its lens on the transatlantic history of regulatory

cooperation, right up to its latest stage – i.e. the Transatlantic Trade and Investment Partnership. The translation of regulatory coherence into practice has not been entirely unproblematic, with various critiques targeting its goals (including in the TTIP) revealing a set of issues that public opinion is extremely concerned about and that are worth exploring.

An interesting point about the practice of regulatory coherence is its change of venue, from regulatory agreements to trade and investment agreements. Chapter IV is dedicated to understanding the reasons behind this switch. In doing so, it analyses the complex relation between, on the one hand, domestic regulations and international trade and investment (touching upon issues such as regulatory heterogeneity and regulatory protectionism) and, on the other, between domestic regulations and international economic law (looking at how international trade/WTO law and international investment law dealt with the increasing relevance of domestic regulations to international economic exchanges and how they approached the risks of rising regulatory heterogeneity and regulatory protectionism). Some of the contentious points identified in these complicated relations will end up having powerful consequences for regulatory coherence efforts and the way these play out in the TTIP.

Part two debuts with Chapter V, which is dedicated to the analysis of the likely economic effects of regulatory coherence and marks a shift of geographical focus, from general to specific – i.e. the EU-US regulatory dialogue and the TTIP. It reviews the main economic impact studies carried out in relation to the TTIP, their methodologies, results, strong points and minuses, trying to estimate a general direction of the economic impact of the regulatory part of the Agreement on the economies of the EU and the US (both systemically and sectorally), on the corporations involved in transatlantic trade and investment and on the rest of the world.

Economics then makes room for law, with Chapter VI first comparing the EU and the US domestic legal orders, in an attempt to find their main similarities and their most important differences, so as to gain an intuition about how regulatory coherence could potentially bridge the gap between the two legal systems. It then turns to the Draft Chapter on Regulatory Cooperation in the TTIP, reviewing its main points and drawing conclusions regarding its approach to increased EU-US regulatory compatibility, its redefining of regulatory coherence and its success at addressing public opinion concerns.

Chapter VII is dedicated to answering the title question, by estimating the likely beneficiaries of regulatory coherence – be it legally (main domestic institutional players, the system of international economic law), economically (corporations, national economies) and geo-politically (third country effects, global economic governance structures).

Chapter VIII concludes and opens up to new directions for research on the topic of regulatory coherence.

Chapter II

Conceptual delimitations – what is regulatory coherence?

1. Introduction

An analysis of "regulatory coherence" as an item on the world's superpowers' current "to do list" and its implications for the workings of the global economy first requires a clarification of what "regulatory coherence" actually means.

At first sight, what the terms refer to may seem readily apparent, but a more in depth analysis reveals this first impression of obviousness is misleading. Hence, while it may seem rather straightforward that regulatory is an adjective derived from 'regulation', what we will see in the following pages is that the original term – i.e. the noun 'regulation' – itself escapes proper defining, to the point that it becomes "one of the most controversial topics in law and politics [and] one of the most misunderstood concepts in modern legal thinking." [Orbach, 2012] Its accompanying term, 'coherence', tells a no less complex story.

Therefore, the first step in our exploratory journey into the world of regulatory coherence must begin with clarifying what regulations are, how many kinds there are, why and how they came to be in the first place and how they became topics of international, as opposed to strictly domestic, interest. As we will see, globalization has fundamentally altered what had previously been a tool of national administrative law, turning it into a subject of international negotiation and haute-niveau dialogue. In their quest for structure, regulators have ping ponged from regulatory competition to regulatory convergence, only to end up in the (still) blurry paradigm of regulatory 'coherence', a shape shifting concept capable of

recalibration within each negotiating setting, from the e.g. Transpacific Partnership (TPP) to the Transatlantic Trade and Investment Partnership (TTIP).

What the following pages aim to do, consequently, is try to find an adequate working definition of regulation, explore the possibility of a would-be regulatory taxonomy and revisit theories of regulation so as to explain the current regulatory status quo; this latter endeavour will open the door for a shift of playing field, from national to global, with its search for order (via competition, convergence and coherence) and an intro into the most innovative type of international cooperation: the international regulatory dialogue.

2. Key concepts: what is a regulation?

An attempt at a clear-cut definition of "regulation" reveals a somewhat surprising truth: there is no such thing. In fact, "despite a vast academic literature and constant public usage, the concept of regulation defies close circumscription." [Novak, 1994] What this means in practice is that there are quite many definitions of regulation currently in use - varying with, e.g., professional field (political science, law, economics) or political tradition (liberalism, the welfare state) - to the extent that "there is no single accepted definition of what constitutes regulation." [US Congressional Budget Office, 1976].

Hence, in between the very broad definition of the Oxford dictionary – "rule or directive made and maintained by an authority" – to the highly specific one used by the US executive branch – "an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret or prescribe law or policy or to describe the procedure or practice requirements of an agency" [Executive Order 12866] – there is a vast palette of meanings the concept takes, depending on the context and purpose of the material referring to it or the intent and views of said material's authors.

Indeed, "scholars who grappled with the meaning of the term "regulation" produced various definitions." [Orbach, 2012] Hence, "some researchers consider and evaluate various definitions and attempt through systematization to make the term amenable to further analysis

(Baldwin and Cave, 1999; Morgan and Yeung, 2007; Ogus, 2004). Others almost entirely abstain from an exact definition of regulation (Ekelund, 1998; Joskow and Noll, 1981; Spulber, 1989; Train, 1997).” [den Hertog, 2010] Given this multitude of existing versions, choosing the right one proves to be a rather daunting task.

In order to streamline our pursuit of a definition adequate to the purpose and context of the present paper, we shall focus more on the practical aspects, for what this paper aims to do is understand regulation ‘in practice’ rather than in some abstract, more philosophical sense. Said pragmatism implies that the „specific context and goal [should] shape the particular meaning of the notion of regulation“. [Jordana and Levi-Faur, 2004] Hence, in the specific context of this paper, which targets international regulatory coherence and its effects on the world (economy), with a special focus on transatlantic regulatory cooperation, *the* definition must meet two fundamental conditions.

First of all, this paper takes a state-centred view of the regulatory system and the regulatory process, for its intent is to explore the extent to which state driven regulatory coherence (arrived at via state negotiated international agreements) is a beneficial pursuit. However, state-centred does not mean that the state is the only actor in charge of defining regulatory needs and ways to meet them. Au contraire, the influence and contribution of non-state players (be they e.g. businesses, industry standard setting bodies, non-governmental organizations etc.) in the process of elaborating regulations must be acknowledged and factored in. Therefore, ‘regulating’ needs to be defined, within the context of this research scenario, as a “process undertaken by or under the auspices or authority of government, thus retaining the state as the source of regulatory authority. This would include the direct use by government of all the regulatory tools at its disposal, as well as co- and self regulatory regimes” [Windeholz, Hodge, 2013] operating under its umbrella.

Secondly, the transatlantic perspective on regulatory processes this paper takes implies special attention must be paid to the definitions of ‘regulation’ used by the EU and the US, respectively.

While the American use of the term, originating in US administrative law, is more straightforward and is generally circumscribed to the sense specified in Executive Order 12866 quoted above, the European meaning is somewhat more diluted. In EU law, regulations are - as mentioned in Article 288 of the Treaty on the Functioning of the European Union

(TFEU) - legal acts of general application adopted by the Union's institutions, directly applicable (i.e. Member States do not need to 'translate' them into their domestic legal systems via national laws) and binding in their entirety. What is more, if, in the US, regulations are, invariably, "regulatory acts", in the EU they may well be, at times, "legislative acts" depending on the procedure for adoption and, as such, be more akin to US statutes than to US regulations. At other times, they can be "delegated" or "implementing" acts, in which case they fit the description of "regulatory" set by their US counterparts to a larger extent.[1]

In order to avoid confusions, a working definition of regulation for the purpose of this paper must thus be broad enough to cater for the idiosyncrasies of the two systems, focusing more on the spirit of the law, than on the letter of the law, so as to not risk losing meaning while engaging in transatlantic legal translation. At the same time, it must be narrow enough to keep the context legalistic and state-centred (where 'the state' is a generic term used to describe a public authority) for it is within this type of context that negotiations aiming at coherence are bound to take place.

Bearing these constraints in mind, the definition that this paper will be working with is the following:

"*A regulation is a binding legal norm issued by a public authority that aims to shape the behaviour of others according to given standards so as to produce specified outcomes.",*

where 'public authority' can refer to any legislative, executive or administrative body vested with the power to create law, while 'others' can refer to individuals, firms, state organs or, in the case of the European Union, states themselves (i.e. Member States).

Having adopted a meaning for 'regulation', the next step is looking into the forms this concept can take in practice.

[1] A detailed analysis of the US and the EU legal landscapes, of the differences between them and of what these differences mean for regulatory coherence in Chapter VI.

3. A tentative classification: economic vs. social regulations

Given the difficulties encountered in defining the very concept of regulation, it can come as no surprise that attempting at a regulatory categorization is no less complicated. The first hurdle is in deciding whether said categorization should be a taxonomy or a typology, the two most "commonly used conceptual classification systems." [Riggs, 2012]

"A taxonomy is an "empirically derived classification of actual objects based on one or more characteristics." (Hair et al. 2010). Alternatively, "a typology is a conceptually based classification of objects based on one or more characteristics. A typology does not usually attempt to group actual observations, but instead provides the theoretical foundation for the creation of a taxonomy, which groups actual observations." (Hair et al. 2010, p.486)." [idem].

3.1 A would-be taxonomy

As it becomes immediately obvious, a regulatory taxonomy – especially an exhaustive one – is a difficult objective to achieve, given the sheer amount of regulations existent worldwide and the ever growing number of regulations authorities all over the world issue every year, which makes even the gathering of data a daunting task, let alone its orderly grouping. Nevertheless, a bird's eye view of the regulatory landscape does allow observing certain regulatory how-to's that tend to repeat themselves, to the point that certain patterns emerge, sketching the rough draft of a would-be regulatory taxonomy, based on two different criteria: *what* is being regulated and *how* the regulatory process plays out.

This 'what-how' – i.e. outcome-process – based classification was chosen as it seems to be the direction taken by the promoters of regulatory coherence themselves[2] – the ambition of the latter is to enable regulators to coordinate not just in terms of the final result to be achieved (i.e. the regulation itself) but also when it comes to the process of designing and implementing regulation. Therefore, the paper adopted a similar outcome-process structure for its classification exercises, both taxonomy-wise and typology-wise (below).

[2] We will come back to this point in Chapter III.

a) The what

In terms of the *'what'*, the most straightforward classification is based on the sectors being regulated – there are regulations pertaining to, inter alia, the areas of financial services, advertising, healthcare, accounting, the automotive industry, agriculture, sales, IT, pharma, chemicals, the audiovisual sector etc., to name just a few – to the extent that almost every field of activity now has its own set of regulations. For example, the Transatlantic Trade and Investment Partnership is set to address regulatory coherence in sectors such as: cars, pharmaceuticals, medical devices, cosmetics, chemicals, financial services etc.

b) The how

As far as the *'how'* is concerned, a few approaches to regulation have stood out over time, shaping themselves into stand-alone categories.

The first such approach – and the most widely used – is the so called 'command and control', i.e. "the imposition of standards backed up by legal sanctions if the standards are not met. The law is therefore used to define and prohibit certain types of activity or force certain types of action." [UNIDO, 2006]

A second category would be that of self-regulation – as the name suggests, the locus of the regulatory power lies with the regulatee, who thus internalizes the role of regulator that typically belongs to a governmental authority. Self-regulation "often takes the form of a business or a trade association developing its own rules of performance, which it also monitors and enforces." [idem]

A third category is that of incentive-based regulation, which aims "to induce a regulatee to limit or stop an undesirable activity by imposing taxes or granting subsidies - in other words a "carrot and stick" approach to ensure a socially desirable end." [UNIDO, 2006] It is an increasingly popular form of regulating, especially in environmental regulation.

All the above categories tend to be mixed in practice, with command and control being used alongside self-regulation, and even sectoral regulations colliding more often than not – such as, e.g., *advertising* rules applied to *pharmaceuticals* or *sanitary* rules applied to the *sales* of *agricultural* goods. The complexity of the current regulatory reality makes it thus

very difficult to derive a clear-cut taxonomy and then have it set in stone – in practice, regulations tend to be fluid, prone to change and inter-sectoral (and international) crossovers.

Given the above, the use of a theoretically induced classification may be more appropriate, for a typology-like categorization might bring a greater degree of clarity to the 'what does regulatory refer to?' discussion. When it comes to types of regulation, the debate has structured itself along the lines of one major dichotomy: economic regulation vs. social regulation.

3.2 A regulatory typology

This type-based economic/social conceptual classification subdivides as well, given reasons detailed earlier, according to the object of the regulation (i.e. *what* is being regulated) and the process of regulatory design and implementation (that is, *how* we regulate).

a) The what

As far as economic regulation goes, two notions are central to its defining: efficiency and competition – both of which should be increased via regulatory intervention. The underlying assumption is that the market is "the best available mechanism for the efficient production of goods and services and for their efficient allocation between members of the community so as to maximise society's wealth." [Windeholz, Hodge, 2013] and economic regulation is an instrument meant to be used only when the market fails to deliver on its wealth maximization promises, i.e. in cases of market failure.[3]

Economic regulation thus becomes the type of regulation that "involves correcting for market failures or imperfections that reduce economic efficiency or competition within a specific market such as monopolies, inadequate or asymmetrical information, externalities and unequal bargaining power." [Windeholz, Hodge, 2013] According to the OECD, economic regulation aims to "intervene directly in market decisions such as pricing, competition, market entry, or exit so as to increase economic efficiency by reducing barriers

[3] A review of the theoretical rationale for both economic and social regulations in the next section.

to competition and innovation and improving market functioning and prudential oversight." [OECD, 1997]

At the other end of the spectrum, social regulation (which includes, inter alia, environment protection rules, health and safety standards, bans on discrimination, rules addressing morality and ethics etc.) functions based on a two-pronged aim: it is meant both to correct the negative effects of economic activity and to attain socially desirable goals.

In its first capacity, it "involves the exercise of state influence in relation to the unwanted effects of industrial activity on society – such as pollution or risks to the health and safety of employees and consumers." [Baldwin, Scott and Hood, 1998] In its second, it strives to achieve collectively beneficial objectives such as justice, non-discrimination and equality, prosperity, decent living and working conditions, morality and ethics etc.

Social regulation thus addresses specific social topics (such as pollution, consumer and worker safety, discrimination) and takes a variety of forms - ranging from bans to mandatory requirements.

b) The how

While establishing whether the 'what' being regulated is economic or social is quite straightforward, the clear divide between what is economic and what is social in the way any given regulation is designed and implemented (i.e. the 'how' behind regulatory creation and enforcement) is purely analytical. In practice, the two tend to merge.

That is, there are important value judgements[4] accompanying economic regulation design, for efficiency and wealth maximization – the capital aims of a well functioning market – are, in the end, designed with human welfare in mind. Markets are tools meant to improve people's lives by providing them with quality goods and services at competitive prices, not abstract desiderates of a dry econ book. In other words, economic regulation is not the result of mere technical analyses, of quasi mechanistic algorithms that ignore societal needs and act

[4] An interesting observation here is that these value judgments are inevitably culturally embedded and may, hence, differ, from country to country (e.g. some of the EU with its occasionally paternalistic take on the economy and/or its emphasis on solidarity vs. the US with its typical laissez-faire and commitment to meritocracy; etc.) The consequence is that the regulations they inform may also be different from one state to another. And, in fact, they often are, as we will see in the following pages. The difference in the values that frame regulatory design and trigger regulatory heterogeneity is a fundamental point that we will return to constantly throughout the thesis.

according to some rigid mathematical formulae that never factor in societal priorities. The same duality is present at the implementation stage, since "a social tool (such as government praise or pressure) can be adopted to achieve an economic objective (such as increased local investment or the moderation of anti-competitive practices)." [Windeholz, Hodge, 2013]

Along the same lines, social regulation itself makes use of economic instruments of measure and prognosis in its development – it is not the result of some philosophical debate about the future of mankind, devoid of pragmatism and calculations. The explanation is that ignoring the importance of economic implications in designing social rules can lead to the creating of regulations that are "unnecessarily burdensome on businesses and governments, reduce choice for consumers and use excessive resources to fulfil a policy goal." [idem] And those are crucial considerations, for, after all, inefficiency can never be a social goal. When it comes to translation into practice, the social-economic combination makes an appearance yet again, as "economic tools (such as markets, tax credits or levies) may clearly be adopted to achieve a social objective (such as lower pollution levels)." [Windeholz, Hodge, 2013]

The social-economic separation is also artificial in terms of consequences, for certain economic regulations can have social effects (positive or negative), while some social regulations can impact economic activity and agents (for better or worse). This is a topic we will revisit throughout the thesis.

Therefore, while the economic-social typology is very useful purpose-wise and brings about a greater degree of structure to a debate about the future developments of regulatory architectures, applying it indiscriminately to both purpose and process might be slightly out of sync with reality – when it comes to the regulatory modus-operandi, economic constraints and social drivers tend to coalesce, to the point that "there is no clear dividing line in regulatory practice between economic decisions which can be resolved through expertise and social decisions based on value judgments; this distinction may be extremely useful for analytical purposes, but it is difficult to apply to the major regulatory remits [...] which [...] characteristically involve a use of both." [Prosser, 2010]

Probably the best example of this dual approach – economic and social – to regulation is the growing popularity and increasingly extensive use of regulatory impact analyses (RIAs, as they are known in the US) or impact assessments (IAs – the EU correspondent) While a detailed overview of these processes is scheduled for Chapter VI, what should be said here is

that RIAs/IAs are essentially meant to ensure all regulations issued by the state fulfil imperative social objectives with a maximum degree of efficiency, i.e. as un-costly to the state budget (read, to taxpayers) as possible. To do so, they combine purely economic analysis (typically, cost-benefit) with discussions about compelling social values, usually approached via transparent public consultations.[5]

Bearing in mind the above, one question emerges: if economic and social regulation build on one another, why is the dichotomous typology still widely used in academia, and, perhaps more importantly, why is the public discourse still, in most instances, built around this rather rigid divide?

One explanation is that the combination of economic and social considerations within the same regulatory exercise (that is the RIA/IA) is a relatively new endeavour, one that still has a lot of ground to conquer. Because of that, purpose based approaches (i.e. what we regulate), as opposed to process-based perspectives (how we regulate), still dominate the debate.

Hence, even institutionally, economic regulation (that addresses purely economic objectives – e.g. market entry) is segregated from social regulation (with its exclusive focus on 'social' issues, such as discrimination) to the point that regulatory bodies themselves are viewed as either economic or social. In that sense, in the US, for instance, federal agencies are separated into economic regulators (The Federal Trade Commission, The Federal Communications Commission, The Federal Energy Regulatory Commission, The Comptroller of the Currency, The Federal Reserve System, The Securities and Exchange Commission etc.) and social regulators (The Consumer Product Safety Commission, The Food and Drugs Administration, The National Highway and Traffic Safety Administration, The Occupational Safety and Health Administration, The Environmental Protection Agency etc.)

Another often quoted reason for distinguishing between economic and social regulation is that the two have had very different historical evolution patterns. Hence, if economic regulation has known, ever since the deregulation movement that characterized the 1970s, a steady decline over the years, the opposite is true for social regulation, which has

[5] As we will see in the following chapters, these RIAs/IAs, together with the regulations they refer to, will become the object of regulatory coherence efforts of the trade and investment agreements currently being negotiated, translating into treaty text the aforementioned outcome-process power duo.

grown almost exponentially, with new rules, especially in the areas of social equality and environmental protection, being issued on a regular basis.

Yet, it is a less segregated approach along the economic-social divide that dominates the discussion about why regulations are necessary in the first place – that is, the theories behind regulatory responses. Given their complexity, they are dealt with, in more detail, separately,next.

4 Why do we regulate? Theories of regulation

An overview of the theories of regulation reveals an interesting, albeit not entirely surprising, status quo, one that reinforces an idea mentioned previously: namely, the economic-social duality of the regulatory universe. Indeed, while some of the motivations behind regulations can be labelled as 'economic' (such as those proposed by the Chicago School), the majority are a mixture of economic and social, as is the case with the theories related to Public Interest or Political Action.

4.1 Public Interest Theories

When it comes to explanations behind the necessity of regulatory interventions, the majority of them can be filed under what it is generally referred to as Public Interest. The main assumptions that underpin this view are that regulators are not only aiming to promote public interest, but they are also sufficiently informed about what pursuing public interest means in a given context (e.g. what the cost-benefit scenario looks like) and sufficiently powerful to ensure the regulatory measures they designed to attain said public interest are appropriately implemented. Public Interest theories revolve around the idea of market failures, which regulation is meant to correct, in an attempt to achieve the optimal (where 'optimal' can be economic, social or both) allocation of resources, seen as the ultimate 'public interest'.

Market failure can take many forms. The most common is imperfect competition, which can range from cases of natural monopolies (such as in e.g. energy, transport etc,

industries that are, therefore, heavily regulated) to otherwise competitive markets where players may engage in anticompetitive behaviours (e.g. abuse of dominant position) the correction of which requires regulatory intervention (via, for instance, competition law). The motivations behind these pro-competitive regulatory interventions are both economic (restore normal market mechanisms and correct misallocation of resources) and social (protect consumers from over-pricing).

Another instance of market failure is the so-called market instability (a crisis is probably the best, even if the most extreme, example of such instability). Economies are characterized by alternating periods of growth and periods of decline (the economic cycle) which are problematic less in terms of the market itself (demand and supply adjust to the new conditions) and more when it comes to the impact on the labour market, which suffers disproportionately the effect of an economic downturn. So as to counter these negative repercussions for employment, regulatory responses such as anti-cyclical policies are the governmental go-to.

The functional market is also undermined by the existence of information asymmetry (the producer typically knows more about the product/service than the consumer and it is not always motivated to reveal all information), bounded rationality (consumers do not always act rationally in their purchase decisions – especially in situations that require risk assessment of any kind) and negative externalities (such as pollution), which trigger regulatory responses such as product labelling (with compulsory information disclosure about various product characteristics), advertising rules, minimum quality standards (for both goods and services), certifications and permits etc. The markets for the so-called 'public goods' (e.g. defence, public order etc.) also demand special regulatory treatment so as to minimize free riding (i.e. benefiting from the good without actually paying for it) and encourage investment. What becomes immediately obvious is that the above mentioned issues can be qualified as 'social' and hence the regulations they provide a rationale to is typically viewed as 'social regulation'.

It is again for social reasons that regulations are sometimes issued in an attempt to correct economically efficient, but socially suboptimal market outcomes. This is the case of minimum wages, guaranteed access to healthcare and education, various kinds of subsidies, unemployment benefits and the like.

The Public Interest take on regulation has come under criticism for a number of reasons. Firstly, some of the very assumptions it works with are unrealistic. Regulators may not always pursue 'public' interest – cases of 'regulatory capture' (where the regulator ends up acting in the interest of the regulatee) are not as rare as it were desirable. Public Interest theories assume a perfectly working political process, allowing for no glitches in the decision making system, which is, at best, overly optimistic. And even if regulators were to be completely benevolent and honest in their declared purpose of pursuing the interest of society, they are rarely, if ever, omniscient about the exact implications of any given regulatory intervention, which means some of their actions, albeit commendable in theory, might have negative, even if unintended, consequences.

What is more, even if all the working assumptions were to be verified in practice, the conclusion that government regulation was the most efficient way of dealing with market failures remains debatable. Any given regulation comes at a cost – the fundamental question thus becomes whether this cost is justified by the benefits (intended and materialized)[6]. Sometimes, alternative responses, some developed by the market itself, might be preferable – such is the case with e.g., self regulation and standard setting stemming from within the industry, as opposed to executive agencies, voluntary information disclosure and corporate 'green' policies.

A more philosophical critique observes the difficulty in defining 'public interest' and calls into question the regulators' monopoly in giving an otherwise highly abstract term an exact meaning, especially when this interpretation is then used to justify interventions with long lasting effects on the lives of the people. The counter argument however is almost automatic – governments respond to signals from the electorate and take action on topics of concern to those who vested them with the power to rule – e.g. climate change became an issue with the public opinion and then found its way on the regulatory agenda. This is the very way democracies work, after all.

Once again, this is true only in a properly functioning democracy, where the definition of 'public interest' is not hijacked by private interests. As already mentioned, however, in reality, the opposite is sometimes true; acknowledging this alternate reality paved the way for another take on why regulations come to be – the Private Interest theories.

[6] It is precisely the imperative need to answer this question that has led to the growing use of cost-benefit analyses within Regulatory Impact Assessments (see Chapter VI).

4.2 Private Interest Theories

These revolve around the idea of regulatory capture, mentioned earlier, whereby, over time, regulators begin to act not in the interest of society at large (i.e. in the public interest) but rather to the benefit of specific groups – usually, industry (i.e. a private interest). This view has come to be known as the Chicago theory of regulation, its main proposition being that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit." [Stigler, 1971] This 'acquiring' is carried out via interest groups (such as producers) who organize with a view to hijack the political process of legislative and/or regulatory design by supporting those political candidates (through e.g. campaign funds) that, once elected, will protect their 'private interests' – that is, regulate in their favour (by, for example, limiting competition via barriers to entry, setting minimum prices, quotas, granting subsidies etc). Needless to point out this explanation targets economic regulation exclusively.

However, one question that can be raised almost automatically is – why would industry be the only one capable of organizing itself into an 'interest group' and then exert pressure on the political power players to determine them to act to their benefit? Certain motives can be put forward: producers are less numerous and hence it is easier and less expensive, transaction cost wise, for them to organize, and the benefits of the regulation would be divided among fewer members, hence the incentives to participate are higher; at the same time, the costs of the regulation would be borne by society at large, meaning the cost per consumer would be too small to incentivize the latter's organized reaction - a classical case of concentrated benefits and diffused costs. In reality, though, regulation seems to sometimes benefit consumers as much as it does producers, as Peltzman observed as early as 1976. This remark does not invalidate the theory, however, it simply changes its tone - in that consumers may well become an 'interest group' themselves, organize and lobby politicians to act in their favour.

In this new take on the regulatory process, regulation becomes the result of a competition between various private interest groups, regulators themselves being no exception. In fact, regulators have their own private interest to be mindful of, which is, according to Peltzman's extended Chicago theory, vote maximization. They will cater to the

interests of either producers or consumers, depending on which allegiance guarantees them election.

While the competition between these various 'pressure groups' [Becker, 1983] seems to provide fairly satisfactory rationales to – mostly economic – regulation, it does so starting from an assumption just as unrealistic as Public Interest theory, even if it is to be found at the exact opposite end of the spectrum. In other words, if Public Interest builds on the idea of benevolent politicians and a perfectly working political process, Private Interest goes at the other extreme – politicians are only – and always – self serving and the political process has no means of protecting itself against capture. As it is immediately obvious, this proposition is difficult to reconcile with reality – the latter finds itself, in most instances, some where in the middle. Hence, although capture and private interests are always a possibility, it is inaccurate to say they are the rule – public interest does find its way on political agendas, more often than not.

As it turns out, Public Interest paints too idealistic a picture of how regulations come to be, while Private Interest and its 'doom and gloom' approach prove just as unrealistic. The common fault of these schools lies in a profound misunderstanding of politics and its inner chemistry; it is this error that political science – and its Political Action theories – attempted to correct.

4.3 Political Action Theories

Regulation is the product of a rather complex process, which cannot be deciphered without a better understanding of "the motivation and behaviour of the various political actors, such as voters, congressmen, legislators, government workers and agencies; the interactions between the various actors in the regulation process; the mechanisms through which legislators and regulators" [den Hertog, 2010] create rules. Taking into account these systemic complexities reveals that, while maintaining the cost-benefit structure proposed by the Chicago School, there are more possible political (and, hence, regulatory) outcomes than the interest group architecture based on concentrated benefits and diffused costs.

Hence, as Wilson [1974] points out "Majoritarian politics in Congress is to be expected when both costs and benefits are widely distributed; antimonopoly legislation is one

example. Interest group politics arises if both cost and benefits are concentrated; labour legislation and railway regulation are examples of this. Client politics is the result of concentrated benefits and diffused costs; examples of this are the protection of professional groups by means of licensing and the subsidizing of companies and branches. A final characterization is entrepreneurial politics, in which the costs are concentrated and the benefits distributed; examples are protection of the environment, of consumers against unsafe products and of workers against industrial accidents and occupational illnesses." [den Hertog, 2010]

What is more, going beyond cost-benefit, the process of regulatory design itself has its own built-in 'immunity from capture' features, being characterized by transparency and extensive public consultations, the most salient issues typically ending up on the public agenda, thereby significantly limiting the opportunity for capture by private interest groups.

Going even further, there is another aspect that needs mentioning – the institutional structure. The most important players in the regulatory design and implementation game – i.e. regulatory agencies – are, themselves, regulated, subject to Congressional/Parliamentary (depending on the jurisdiction) scrutiny, while their decisions come at the end of a complex process of Regulatory Analysis and undergo periodical review[7].

Overall, the political action theories expand the palette of possible explanations behind how regulations come to be. Taken together with public and private interest hypotheses, they help show that the regulatory universe is a fairly complicated one, not just in terms of what regulations are and what forms they may take, but also with regards to their very raison d'être. So as to complicate matters further, one more element has been added to the mix – a change of jurisdiction. Or, more straightforwardly, the globalization of regulation.

5 Globalization and its effects on regulation – competition vs. cooperation. Coherence

Understood as one of the most faithful expressions of national legal identity and confined, almost entirely, to the boundaries of the nation state, for the longest of times,

[7] More on this in Chapter VI.

regulatory frameworks have gradually come, more and more, under the influence of one of the most important, equally complex and controversial, phenomena of the past few decades – globalization.[8]

The most common discourse on globalization that regulation found itself drawn into had to do with its very abolishment, as the buzzword of the new 'global marketplace' became *deregulation*. The debate surrounding the impact of globalization on regulation revolved around quantity: how much regulation is enough? The proponents of deregulation made a good point – certain regulations represented supplementary costs for businesses, making them less competitive in the global race for market share, which had become even more arduous with the expansion of 'free trade'. So the state doing away with redundant or unnecessarily burdensome regulations was seen as sine-qua-non for ensuring the success of its companies overseas. What is more, a 'friendly' regulatory environment was also seen as conducive to more Foreign Direct Investment, hailed as the driver, together with free trade, of growth and prosperity. What followed was, therefore, a massive movement towards deregulation that some states engaged in – with mixed results. To some, what deregulation brought was more and more corporations winning the global trade competition; to others, it was market anarchy that induced wide spread financial scandals and economic slowdowns.

To what extent deregulation caused economic crises is still an open question.[9] One thing, however, is certain: the successive waves of deregulation that washed over the majority of the capitalist economies, with their partial success at increased competitiveness and their – sometimes contested – role in many of the economic disasters that hit said capitalist economies (from stock market meltdowns to wide-spread bankruptcies) proved that the correct question to be asked as far as regulation goes is one of quality, rather than quantity. Just as the key to success in the global marketplace was not necessarily *less* regulation, so the correct response to economic crises was not automatically *more* regulation. Au contraire, what was needed was not so much the right amount of regulation as it was the right kind. This

[8] The relation between regulations and globalization is particularly complex – some aspects will be addressed here, while others will be tackled, in more detail and depth, in Chapter IV.

[9] The most recent financial crisis and subsequent economic downturn was also largely blamed on regulatory failure – whether this failure was one of insufficient regulation or, rather, inappropriate regulation, is a topic still heatedly debated.

determined decision makers to engage in regulatory reform and move towards the so-called 'better regulation'[10], a process aimed at improving the efficiency of regulatory frameworks.

Another thing that became clear very quickly was that regulation could no longer be seen as the exclusive business of the nation state, for one country's action in the regulatory arena had global ripple effects and triggered proportional responses from the other world players. Regulators soon found themselves forced to renounce their 'tunnel vision' and accept that the space of regulatory jurisdiction was suddenly significantly smaller than that of regulatory impact. [Alemanno, 2014] Put differently, it was becoming impossible to ignore that *domestic regulations* were starting to *have an international impact*.[11]

Hence, national regulatory systems suddenly found themselves in interaction; what form that interaction would take – i.e. competition or cooperation, was another story.

5.1 Regulatory competition

The quest for international competitiveness that drove much of the deregulatory movement described above led countries to re-design their regulatory systems not only in reference to some formal, theoretically constructed standard, but in also in comparison to what other countries were doing. Hence, states found themselves not only in search of an ideal regulatory framework, but also, while at it, in competition with each other in trying to attain just the right amount of regulation that would favour their corporations over those of 'foreigners'. It was the beginning of what would end up being known as international regulatory competition.

While the idea of regulatory competition was older – "it was first formalised within the framework of modern welfare economics in the mid-1950s" [Deakin, 2006] – it only became international once globalization started to make an impact. Initially, it had targeted the supply of public goods at local administrative level. Its originator – Tiebout – envisaged a model in which "local authorities compete to attract residents by offering packages of services

[10] These efforts towards better regulatory practices will prove to be the seeds of regulatory coherence endeavours, as we will see in the following Chapter.

[11] The acknowledgment of international impacts was not immediately followed by a decision to *actually consider* international impacts when designing and implementing regulation – this came later on. We will revisit this point throughout the thesis.

in return for levying taxes at differential rates. Consumers with similar wants then 'cluster' in particular localities." [idem] With the advent of globalization, it was now nation states that began competing so as to attract the most powerful foreign investors to their jurisdictions. What makes this particular view on regulations stand out is its proposition that laws be seen as "indivisible public goods. By showing formally that they can be understood as products which jurisdictions *supply* in response to the *demand*s of consumers of the laws, Tiebout demonstrated the relevance, even to public goods of this kind, of a market analogy." [Deakin, 2006]

Thus, within the now global market, states found themselves acting as suppliers of regulatory goods to global corporate demand and regulatory competition – which "can be defined as a process whereby legal rules are selected and de-selected through competition between decentralized, rule-making entities, which could be nation states or other political units such as regions or localities." [Deakin, 2006] – became the standard form of international regulatory interaction.

a) Pros and cons

Competition in regulation has a set of advantages. First, like competition in general, its regulatory expression caters for a 'natural selection' of the most efficient options, while the sub-optimal ones are gradually eliminated. Hence, as states compete against each other to attract corporate engines of growth and prosperity, this competition inevitably fosters regulatory creativity and innovation, as only the most efficient regulations survive – a phenomenon usually referred to as a 'race to the top'.

In practice, this means that states choose, from the wide palette of regulatory options at their disposal, those that seem to favour their corporations' international competitiveness most and/or create an investor-friendly climate – i.e. friendlier than those offered by other states. Corporations then select those regulatory spaces they perceive as most adequate to their business needs[12] and take with them, to said jurisdictions, the entire paraphernalia of

[12] This does not mean that regulatory frameworks are the only – or even the most important – determinant of a corporation's decision to locate in a given jurisdiction. Since an in-depth discussion of such location determinants is beyond the scope of this paper however, the focus here will be on regulatory motivations only.

positive externalities that accompany free trade and investment (inter alia, high quality goods and services, know-how, managerial skills and competences etc.) Regulatory competition therefore triggers an upward spiral of regulatory optimization that leads to a win-win situation in which both companies and society at large are better off.

There is, however, a caveat to this otherwise picture perfect proposition – what if those regulations deemed best by the corporate world are not necessarily the best in absolute terms? After all, the consumers of regulations within a state are not just business owners, but rather, citizens in their entirety. What if pro-business regulations have negative externalities – be it, e.g., reduced budget revenue (if the measures aim tax holidays) or higher pollution levels (if the regulations read as more relaxed environmental protection standards)[13]? In other words, what if the 'business-friendlier than thy neighbour's regulatory framework' form of regulatory competition becomes, de facto, a 'race to the bottom'?

A highly used concept, especially in relation to globalization, the 'race to the bottom' approach revolves around the mobility of capital in the new global marketplace. Its proponents argue that "In such a world, capital will seek the location where it can earn the highest rate of return. High rates of corporate taxation, strict labour laws or rigorous environmental protection lower profit rates by raising the costs of production. Capital will therefore engage in regulatory arbitrage, moving to (or importing from) countries with the lowest regulatory standards. States, fearing a loss of their tax base, have no choice but to lower regulatory standards to avoid capital flight." [Drezner, 2001]

But is this proposition without fault? Hardly – counterarguments spring to mind almost immediately. To begin with, as hinted at before, capital does not decide to locate in a given jurisdiction based solely on the 'friendliness' of the latter's regulatory framework – other elements (such as factor endowment, labour productivity, market size, transportation costs etc) play a much bigger role in determining location. Even more importantly, the assumption that in relation to the state, capital has a dominant strategy is not verified in practice – some states are powerful enough (read, represent big enough markets) to impose strict (and, as such, possibly business un-friendly) regulatory standards and attract capital to their jurisdiction nonetheless. Also, there is no compelling reason to believe corporations would necessarily target the least common denominator and prefer countries with lax

[13] This is a perfect example of economic regulation with negative social consequences hinted at before.

regulatory standards – au contraire, the biggest companies, targeting sophisticated customers, gradually make it part of their marketing strategy to brand themselves as curators of the quest for a greener Earth, decent working conditions worldwide, etc – to the point that they pride themselves on supporting causes such as ending child labour or animal testing and embrace the idea of the triple bottom line (People, Planet, Profit).

Consequently, a race to the bottom is not inevitable. It remains, however, true, that neither is a race to the top. So the million dollar questions becomes: "Does competition among regulatory jurisdictions lead to races to the bottom - downward spirals of increasingly dangerous and exploitative business environments - or to races to the top - optimization of regulation to maximize the total value of transactions to parties and society in general?" [Stephan, 1999] Unfortunately, this question can only be answered on a case by case basis, which leaves 'regulatory competition as a means to regulatory optimization' in a state of 'definitely, maybe'.

Beyond the race to the top – race to the bottom dilemma, competition in regulation has another ace up its sleeve, one that is much more straightforward and more difficult to contest – being almost tailor made, it promotes diversity. "By providing mechanisms for the preferences of the different users of laws to be expressed and for alternative solutions to common problems to be compared, [...] it allows the content of rules to be matched more effectively to the preferences or wants of those consumers, that is, the citizens of the polities concerned." [Deakin, 2006]

b) Versions of regulatory competition

A classification of regulatory competition is built, primarily, around the type of relation between competitors. Hence, there can be horizontal competition, where the entities entering the regulatory race are at the same level in the societal hierarchy – it is probably the most widespread form of regulatory competition, found either between sovereign states (in an international context – e.g. the US vs. Japan) or between administrative units within a state (e.g. the states within the federal USA). At the other end of the spectrum, there is vertical competition, between institutions at different levels in society's 'organigramme' – such as between federal agencies and local, state authorities in the United States.

A very interesting and somewhat peculiar example of vertical competition is that between EU central institutions and those of each of the Member States – a special case of regulatory interaction most commonly defined by the concept of subsidiarity. Covered by Article 5 (4) of the Treaty on the European Union[14] – subsidiarity is both competitive, in allowing Member States to define their rules independently of one another, in competition with one another and separately from EU-wide regulatory endeavours and, at the very same time, cooperative, in having supranational bodies – i.e. EU institutions – supervise the process of regulatory design and coordinate its translation into a functional regulatory environment. As it stands, this particular form of regulatory competition seems more cooperative than competitive, becoming a sui-generis category of regulatory interaction – that of cooperative competition.

5.2 Cooperative competition

The main idea behind cooperative competition is the assignment of regulatory jurisdiction among different rule makers at different levels. In the case of the EU, certain issues are the exclusive competence of the European Union and, as such, are managed directly by Brussels (e.g. trade policy) others are left in the responsibility of each Member State. In other words, there is a *cooperative* process of allocative jurisdiction beyond which states *compete* freely. In this way, haut niveau cooperation is a pre-requisite for lower level competition.

It can be argued that some form of cooperation exists in otherwise typically competitive fora as well, such as the United States (where some issues are of federal competence, others are regulated directly by the states) or even the international community (certain areas of activity are regulated via international organizations, which issue world wide applicable rules – e.g. GATT). What sets the European model aside however, is that, here, cooperation is explicitly stated as part of the process, as opposed to merely implied, as it seems to be the case in the US. Hence, instead of the classical American model of

[14] "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." – Art. 5 , paragraph 4, TEU

'competitive federalism' (the most often quoted example of which is the so-called Delaware phenomenon[15]) Europe offers an alternative usually referred to as 'reflexive harmonization'[16]. [Deakin, 2006]

"This begins with the idea that competition is a process of discovery through which knowledge and resources are mobilized [...] to protect the autonomy and diversity of national or local rule-making systems, while seeking to 'steer' or channel the process of adaptation of rules at state level away from 'spontaneous' solutions which would lock in suboptimal outcomes, such as a 'race to the bottom'. In this model, the process by which states may observe and emulate practices in jurisdictions to which they are closely related by trade and by institutional connections is more akin to the concept of 'co-evolution'." [idem]

Cooperation thus becomes the tool used by rule makers to ensure the competition jurisdictions engage in takes the form of a 'race to the top' and that the regulatory Darwinism thus encouraged always yields optimal outcomes, while simultaneously protecting a certain degree of diversity. Cooperative competition therefore acts as a bridge between unbridled competition and explicit cooperation, with the latter's most often stated end goal: regulatory convergence.

5.3 Regulatory cooperation

At the other end of the types of regulatory interaction spectrum, we find cooperation, that is, rule makers working together so as to coordinate, to various degrees, the process of regulatory design and implementation.

Certain aspects plead in favour of cooperation as the optimal form of interaction in the field of regulation. First, like any type of concentration, regulatory centralization leads to

[15] Delaware rules of incorporation are so business-friendly by comparison to those of other US states, that the overwhelming majority of US companies decide to incorporate there, to the extent that this east coast state is now seen by many as a quasi monopoly regulator as far as corporate law is concerned.

[16] This is not to suggest that rules and regulations across the EU have been harmonized completely – that is hardly the case; but the degree of compatibility that has been arrived at thus far in some sectors seems to have been reached, at least according to this school of thought, also via this process of cooperative competition.

economies of scale in terms of the costs incurred in the process of regulatory compliance – it is a cost related advantage to companies and it is double-fold.[17]

On the one hand, it saves companies the trouble – and significant additional cost – of having to comply with overlapping regulations in the different jurisdictions they operate in (e.g. double taxation). Cooperation helps mitigate the risk of duplicative compliance either by allocating jurisdiction (state A regulates to this extent, state B regulates from there onward) which is cooperation in form, or by harmonizing the content of the regulation itself, which is cooperation in substance. In the latter case, the result is de facto regulatory convergence, with "any jurisdictional overlap or conflict of laws becoming a false conflict because the competing substantive rules are the same." [Trachtman, 1993]

On the other hand, cooperation lowers the transaction costs facing corporations that operate in multiple markets. Hence, "by establishing a single set of rules to govern a broad class of transactions, transactors need not learn to deal with multiple sets of rules [so there is a] reduction of transaction costs that would otherwise be incurred in order to establish or to learn about different relationships for each transaction." [idem]

Moreover, international cooperation in rule making limits the opportunity for regulatory arbitrage – as states work together towards finding a common regulatory denominator, there is increasingly less space for exploiting differences in regulatory standards to one's own, corporate, advantage. This is particularly true when said cooperation builds towards gradual harmonization of rules – that is, when the end goal is regulatory convergence.

In terms of form, cooperation can be bilateral, regional (at the e.g. OECD, APEC level) or multilateral (e.g. ISO, WTO etc) and can take place in various fields (technical, financial, commercial etc).

But the fundamental question is why would cooperation occur? That is, why would regulatory authorities in sovereign states choose to diminish their decision making power in the domestic regulatory arena by sharing an - otherwise exclusive - competence to create rules with actors from other countries, either directly (e.g. bilaterally) or via an international institution? For, if regulatory competition preserves their jurisdiction and, implicitly, power, regulatory cooperation inevitably undermines it. Put differently, apart from the advantages of

[17] We will revisit, in more depth, the interaction between regulations and international business in Chapter IV.

cooperation mentioned above, does this particular form of regulatory interaction yield any benefits as far their own interest is concerned? If yes, what would those benefits be?

According to a paper looking into this very issue, cooperation's main plus – as far as rule makers are concerned – is that it helps mitigate "a real or perceived threat of domestic regulatory obsolescence." [Macey, 2003] In other words, if, e.g. regulatory arbitrage occurs and corporations move to other, friendlier jurisdictions, domestic regulators are left with no economic agents to regulate. Cooperation solves this problem by allowing "regulators to act in a cartel-like fashion." [idem] Another advantage is that cooperation allows certain regulatory actors to expand their reach internationally and export their standards to other jurisdictions, which translates into a power increase.[18] Last, but not least, it helps domestic agencies "in circumstances where an administrative agency lacks domestic political support for a favoured policy, and uses regulatory globalization to make it more difficult for local political rivals to block that policy." [Macey, 2003]

Could these rationales behind cooperation help explain its apparent real life victory against competition in the race for the optimal form of international regulatory interaction? For, if the theoretical debate between competition and cooperation is likely to continue and the back and forth between the sides arguing in favour of one or the another can go on ad infinitum, a quick reality check points rather clearly that states are, increasingly, more inclined to coordinate their regulatory efforts than to engage in zero-sum competitions. While the reasons put forward above might indicate, to a certain extent, why cooperation may be preferable, perhaps its apparent appeal is, nevertheless, far easier to explain – that is, it may be less a question of preference, and more a question of necessity. As more and more issues that were previously purely national become global, solving them requires, inevitably, global cooperative action. Be it financial crises or climate change, the main problems affecting today's world cannot be dealt with by one country – and its regulatory agencies – alone.

Cooperation thus becomes less of a theoretical possibility and moves beyond a 'pros and cons' paradigm, becoming, rather, almost a 'must' on the to-do list of policy makers around the world. Consequently, the question to be asked is no longer whether cooperation will occur, but rather: how far will it go? Will it lead to complete regulatory convergence, or will it mould itself as a somewhat softer version?

[18] This point will become particularly important in the context of regulatory coherence discussions.

a) Convergence

Understood for the longest of times as a synonym to cooperation – or at least as its raison d'être – convergence was seen, by many, as the most likely effect of globalization on regulatory interaction. The argument was that, as competition would inevitably reveal its limits – the above mentioned race to the bottom – convergence was bound to become its Pareto-improving substitute. Defined as "the tendency of policies to grow more alike, in the form of increasing similarity in structures, processes and performances" [Kerr, 1983] convergence is expected to prevail in certain scenarios.

Hence, neoliberal institutionalism predicts convergence as the result of international cooperation "if there are relatively few actors that are bargaining, if monitoring is easy and if there are international institutions to enforce the outcome." [Drezner, 2001] Asymmetry of power supports the process, as more powerful states are more likely to have the means to influence other, weaker ones.

The world society approach on the other hand focuses less of collective action, and more on scientific discourse as the driver of convergence. Looking at how new concepts are born and spread, it concludes that "once a dominant idea emerges, alternative models and policies lose their legitimacy. This leads to a strong degree of institutional isomorphism. Laggard states emulate the practices of global leaders, causing a convergence of regulatory policies in the process" [Drezner, 2001] In practice, this means that, as a certain modus operandi is validated by 'science', it slowly becomes the global standard, especially if backed by an international organization and the most powerful states.

It is also scientific discourse that is at the core of the elite consensus approach; as its name suggests, this view sees 'elites' – understood as "a network of policy experts who share common [...] beliefs and common standards of accruing and testing knowledge" [idem] – as the main actors in the process of regulatory convergence. "These actors play an important role in issue areas where state leaders are uncertain about the consequences of different policy options and where interdependence demands coordination. Under those circumstances, transnational epistemic communities can mould state preferences over various regulatory options, making negotiations easier and more likely to lead to a harmonization of policies." [Drezner, 2001]

Taken together, these perspectives postulate the idea that the main factors favouring convergence as the preferred form of regulatory cooperation are scientific consensus and power asymmetry (even within the ambit of an 'equalitarian' international organization, individually powerful states still retain the capacity to influence the decision of other, smaller ones). But what happens if these two main pre-requisites are missing?

b) Coherence

Power asymmetry is fairly simple concept to grasp; as is its antonym. Indeed, in the current economic world order, it is not particularly difficult to come up with examples of either. And, as far as power symmetry goes, the US and EU are probably the most eloquent such example.

Scientific consensus, on the other hand, is a somewhat more complex notion. As close scrutiny makes immediately apparent, there is sometimes very little 'consensus' in science and the latter proves to be, time and again, much less 'universal' than initially presumed. Hence, there seems to be a certain 'geography of science' – to the point that different scientists in different countries of the world may answer the same question differently and give antithetic solutions to the same problem. The EU and the US provide, yet, again, the perfect example, with their strikingly different views on e.g. hormones[19], genetically modified organisms[20] (GMOs) or poultry.[21]

Indeed, a look at some of the most long standing trade disputes between the two parties, such as the ones mentioned above, reveals that they all stem from fundamentally different perspectives on risk and its assessment and that science did very little in reconciling these opposing views. For instance, as far as GMOs go, the US claims there is no scientific

[19] "The beef hormone dispute concerned EU restrictions limiting the use of natural hormones, banning synthetic hormones, and prohibiting imports of animals and meat from animals that have been given hormones." [EP Library Briefing, 2013]

[20] The GMO dispute revolved around the potential health and environmental risks posed by genetically modified organisms and EU's decision to limit imports of such GMOs from the US.

[21] "The poultry dispute concerns an EU prohibition on the use of anything other than water to remove surface contamination on meat, thus preventing imports of poultry treated with antimicrobial rinses from the US." [EP Library Briefing, 2013]

evidence that these pose any health or environmental risks and hence their widespread use should be allowed. Au contraire, the EU considers "that the long-term effects on health and the environment are unknown and not scientifically established" [Ahearn, 2006] and, therefore, prefers to apply the precautionary principle and ban their use. As a 2013 European Parliament Library Briefing put it: "The ongoing poultry dispute, as well as the earlier beef and GMO disputes, highlight the significant divergence in understandings of scientific evidence, scientifically proven risk and the precautionary principle between the US and EU."

But even if science were universal, politics rarely is. And politics matters. Hence, "where the dominant politics are national in scope, particularized national regulatory outcomes can be expected even where the scientific foundation for regulatory action is identical across nations. National polities addressing similar concerns are likely to choose a variety of regulatory approaches in response to the local variation in the distribution of power." [Atik, 1997]

So then, is there truly any room left for convergence? The most likely answer would be – some, but not enough. Consequently, the route taken by international regulatory cooperation is a somewhat more realistic one – regulatory coherence.

While a general definition of 'coherence' is readily available – i.e. "the quality of being logical and consistent; the quality of forming a unified whole" [Merriam Webster] – in connection to 'regulatory', the exact meaning of the term suffers from one major drawback: it doesn't exist. Much like 'regulation' before, 'regulatory coherence' seems to be an open concept, lacking proper defining, in constant evolution and prone to recalibrating its sense with every context in which it is used, to the point that it "means different things to different people. There is no one, commonly accepted understanding of the concept. To some, it means a harmonization of substantive regulations. To others, it means a harmonization of the processes by which regulations are developed and adopted. To still others, it means mutual recognition of regulations." [Posner and Wolff, 2011] Hence, while in certain scenarios it is understood as loosely as 'consultation' in the design of regulatory responses, in others its meaning is taken as far as substantive harmonization of rules.

As a fairly novel issue, it also lacks a dedicated body of theoretical analysis and academic attention – the work on the topic is very recent and still in an incipient stage. Hence,

an attempt at defining regulatory coherence inevitably has to look at the meaning given to it by (still limited) usage, rather than by theory.

A tentative working definition would thus be the following:

Regulatory coherence is the coordination of regulatory design and implementation processes, aimed at increasing the compatibility of current and future rules and regulations.

Hence, coherence addresses both regulatory processes and regulatory outcomes, where the outcomes can go as far as substantive harmonization, to the point that coherence can lead to de facto regulatory convergence.

This latter point raises an important question: why is coherence *not* convergence? Essentially, because while coherence can lead to convergence, it does not necessarily do so – in other words, if reaching a common denominator is sine-qua-non for convergence to happen, the same is not true for coherence. Countries can very well cooperate in the field of regulatory affairs and arrive at compatible regulations, without fundamentally altering their rules so as to make them *the same* as those of their partners.

And this is fundamental, especially from a political point of view – coherence is more sovereignty friendly than convergence. If the latter is sometimes accused of being a more polite term for regulatory imperialism, whereby powerful players impose their standards and rules on other, weaker states (especially since convergence is favoured by the existence of power asymmetry, as seen before) coherence is more of an affair between 'equals' – it fosters cooperation, but leaves countries their 'regulatory space' intact, by encroaching less on their sovereign 'right to regulate'. This is also true as coherence is a term preferred in discussions between countries finding themselves at comparable levels of economic power, as we will see next.

All in all, regulatory coherence is not only a new goal of regulatory cooperation, but also the increasingly preferred one, especially in situations where convergence is beyond reach. Exhibiting all of cooperation's advantages and adding some of its own (i.e. sovereignty friendliness) it seems set to become a permanent fixture on the to-do list of international negotiators and a central theme of international discussions on wider inter-state cooperation.

6 Conclusion

As we have seen in the previous pages, defining regulatory coherence is still very much work in progress and both concepts – i.e. regulatory and coherence – remain highly fluid and open to interpretation. The TPP and especially the TTIP can and should bring about more clarity in this otherwise still gray area and enshrine a working definition that holds true across disciplines and countries. As globalization forces regulatory affairs to adapt and shift into an international phenomenon, a higher degree of clarity towards '*what* is *what*' is imperiously necessary.

As the thesis progresses, we will see just how relevant proper definitions are, in terms of legal scope, economic effects and political implications. For in the area of international regulatory cooperation, definitions are no longer a mere theoretical exercise belonging in academic debates, but a necessary and policy relevant endeavour.

Chapter III

Regulatory coherence in practice – international regulatory dialogues

1. Introduction

Having crayoned a working definition of regulatory coherence – one that we will come back to as the thesis progresses – the natural next step is a brief overview of the translations of the concept in practice – i.e. a short introduction into the main issues regarding what has become the key form of international regulatory cooperation.

Because while theory on the topic has, as we have seen, some catching up to do still, practice experiences an unparalleled forward momentum, as the newest form of global cooperation – i.e. the international regulatory dialogue – becomes, almost by default, an exercise of regulatory coherence in practice.

In what follows, we will review the evolution of the phenomenon, from the initial efforts towards better regulation and the ever increasing interest in smarter and more efficient ways of regulating to the internationalization of regulatory best practices via enhanced international cooperation and, eventually, the advent of coherence as an item of the agenda of international economic partnership negotiations. We will give special attention to the transatlantic approach to the topic, which grew from informal dialogues to negotiations as part of a trade and investment agreement – the TTIP. We will explore the intent behind the regulatory part of the TTIP, the main questions regarding its final version and the likely implications thereof, as well as some of the criticism targeting its perceived negative consequences.

2. A little bit of history

The birth of regulatory coherence and its rise in importance on the agenda of policy makers worldwide can be traced back to talks on regulatory reform and its quest for good regulatory practices. The instruments for creating "a regulatory system that protects and improves health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; and regulations that are effective, consistent, sensible, and understandable." [E.O. 12866] range from transparency and public consultations to science-based evaluations of risk and the widespread use of regulatory impact analyses (RIAs), with their cost-benefit estimates and penchant for quantifying potential effects of regulatory acts.

Initially a US domestic issue, this phenomenon - often-called 'smart regulation' - became a topic of wider interest when it was adopted by the OECD in its 1995 'Recommendation on Improving the Quality of Government Regulation' and its 1997 'Policy Recommendations on Regulatory Reform'. It was the beginning of the internationalization of a certain view on how the regulatory system should function, on its underlying principles and their application, on the optimal modus operandi of regulatory design and implementation processes, internationalization fostered by international economic organizations (OECD).[22]

It was gradually exported to the world, most notably to regional economic cooperation blocs such as the APEC via the e.g. "APEC-OECD Integrated Checklist on Regulatory Reform – A Policy Instrument for Regulatory Quality, Competition Policy and Market Openness".

This intersection of smart regulation with international cooperation under the umbrella of an economic institution would increasingly be referred to as regulatory coherence, signifying an effort to enshrine regulatory best practices as a goal of international regulatory dialogues and linking them both to wider economic cooperation. It wasn't long before this new direction of international regulatory cooperation was accompanied by a new venue for

[22] This marks the beginning of linking domestic regulatory system reform to international economic cooperation – a trend that has since gained momentum and global attention.

discussions – from soft instruments such as press declarations and speeches at the end of regional summits to economic cooperation agreements.

The first instance of this shift was the Regulatory Coherence Chapter within the Transpacific Partnership (TPP). Launched in 2002 as the Pacific Three Closer Economic Partnership (a joint initiative of New Zealand, Singapore and Chile), the TPP now includes 12 APEC member countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam and represents one of the most ambitious regional mega trade deals to date.

Its take on regulatory coherence (Chapter 25) reflects its double-fold origin (i.e. regulatory best practices and international regulatory cooperation) and includes both a *process* and an *outcome*, i.e. both the *how* and the *what*.[23]

Process wise, regulatory coherence in the TPP targets, inter alia: the use of Regulatory Impact Assessments in the development of regulations; the creation of an institutional framework for overseeing the attainment of regulatory coherence (The Committee on Regulatory Coherence); information exchanges between the Parties etc.

Outcome wise, the goal is "more effective regulation that does not distort markets. Regulatory coherence fosters an optimal regulatory environment that allows the market to be more open, competitive, and innovative." [National Centre for APEC, 2012]

This shift of venue meant that regulatory coherence was increasingly being mentioned alongside notions such as trade and growth, gradually linking domestic regulations to international economic exchanges and thus bringing the US credo that smart regulations should "improve the performance of the economy without imposing unacceptable or unreasonable costs" [E.O. 12866] onto the international plane. Concepts such as regulatory barriers to trade and FDI took centre-stage and regulatory coherence became the means to reduce unnecessary regulatory gaps between countries – gaps that caused friction in their economic interactions and raised the costs of doing business abroad. Regulatory coherence was, consequently, slowly growing into a new form of international economic cooperation.

Its expansion did not stop with the Asia-Pacific region - its introduction on the agenda of transatlantic cooperation soon followed.

[23] The process – outcome approach to rulemaking mentioned in the previous chapter hereby finds its translation into practice.

3. In focus – transatlantic regulatory cooperation

As far as the United States and the European Union go, they have a history with both domestic smart regulation efforts and the commitment to international cooperation on regulatory issues. The intersection of the two with the close economic partnership between the US and the EU eventually led to the Regulatory Coherence Chapter of the TTIP.

3.1. The quest for better regulation

The trailblazer when it comes to smart regulation, the US began, with the Executive Order 12866 (signed into law by President Clinton in 1993) a quest for optimal regulatory design and implementation via "a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public." [E.O. 12866] The main pillars of this reform were transparency and public participation, regulatory impact analyses (with an emphasis on quantifying costs and benefits), scientific evidence and retrospective regulatory analyses.

The process of regulatory optimization was not a one time deal, but, rather, an ongoing striving for more efficiency, as President Obama's E.O. 13563 of 2011 clearly indicates: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements."

Across the Atlantic, the EU had its own history with optimal regulation, though its evolution was, given the special nature of the Union as a supranational entity and the

tendency of EU law to be constantly evolving, far less linear and clear cut. Nonetheless, notions such as transparency and public participation were cornerstone (public consultations are demanded by the Treaties) as were, from the early 2000s onward, regulatory impact assessments, which were periodically revised and updated (the latest major overhaul was in 2015).

The latest wave in EU's efforts towards improving its regulatory system dates back to June 2015, when the action plan "Better regulation – an EU Agenda" was published. Regulatory best practices are paramount: "Applying the principles of better regulation will ensure that measures are evidence-based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole." [Better regulation – an EU Agenda, 2015] These principles include transparency and openness, stakeholder consultations, the widespread use of impact assessments, scientific evidence and retrospective regulatory analysis (via the Regulatory Fitness and Performance Programme – REFIT – which aims to assess existing legislation against new technological, economic, political etc. developments).

3.2. A commitment to international cooperation

The United States and the European Union both have a tradition of engaging in international regulatory cooperation, as proof of the understanding that, in today's global world, domestic regulations no longer operate in a vacuum, but rather intersect with and impact foreign jurisdictions. In an effort to renounce their tunnel vision[24] and take into account global regulatory developments, the US and the EU have committed to cooperating on regulatory affairs in various fora, such as, for example, the World Trade Organisation: "Both the US and the EU and its Member States have committed - in the framework of the WTO Agreements - to notify their trading partners of emerging laws and rules that impact their trading partners, and both have established enquiry points for that purpose." [Parker and Alemanno, 2014]

What is more, both have codified regulatory cooperation beyond the confines of the WTO (or the OECD) and established regulatory dialogues as a general modus operandi, with requirements in that sense in some of their key regulatory best practices documents. What is

[24] See previous Chapter for a discussion.

interesting is that, even here, the link between domestic regulations and economic exchanges remains paramount.

a) US

In the United States, the commitment to international regulatory cooperation is codified via Executive Order 13609 of 2012, suggestively titled "Promoting International Regulatory Cooperation".

Defined therein as "a bilateral, regional, or multilateral process, in which national governments engage in various forms of collaboration and communication with respect to regulations, in particular a process that is reasonably anticipated to lead to the development of significant regulations" [E.O. 13609 – Sec. 4 (b)] international regulatory cooperation is directly linked to international economic exchanges. Given that domestic regulations may at times act as unnecessary barriers to international trade and investment and impose additional costs on exporters and investors, international regulatory cooperation can help reduce said divergence and foster more productive economic exchanges, without jeopardising the level of protection afforded by domestic regulations.

"The regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies to address similar issues. In some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements." [idem]

This provision not only enshrines regulatory cooperation as a way forward, but also paves the way for regulatory coherence (understood here as a 'form of collaboration and communication with respect to regulations" in the wording of the White House) as an element in the process of domestic regulatory design.

In practice, probably the most notable steps taken towards bilateral regulatory dialogue were the Regulatory Cooperation Councils (RCC) established by the US with Canada and Mexico. Their stated goals are, inter alia: "simplifying regulations to the extent possible, reducing unnecessary requirements, and encouraging regulatory alignment without compromising public health and safety, environmental protection, or national security objectives; increasing regulatory transparency and promoting public participation to ensure that any member of the public can participate in the rulemaking process and have a meaningful opportunity - by which we mean one that can still genuinely affect the outcome - to provide views, expertise, and data in response to solicitations for public comment on the text of regulatory proposals and supporting documents; strengthening the analytical basis of regulations; and increasing relevant technical cooperation, including science and research collaboration." [Regulatory Working Group Guidelines - Executive Order 13609 "Promoting International Regulatory Cooperation", 2015]

b) EU

In the European Union, cooperation is also sine-qua-non and is, similarly, linked to regulatory effects on international trade and investment.

Hence, a proposed rule should, to the greatest degree possible, not increase regulatory divergence between the EU and its main economic partners: "It is important to assess whether the options considered will contribute to greater regulatory convergence with the EU's main trade partners (such as US, Japan, China). When developing a new regulation or standards, the analysis should include an assessment of the main regulations affecting the products/services covered by the proposal in major third countries' markets and a comparison between these regulations, and the options considered." [Better Regulation Toolbox, 2015]

The latter requirement is as clear a movement towards encouraging regulatory coherence as it could be. Given that these Guidelines and accompanying Toolbox date to May 2015 – i.e. after transatlantic regulatory efforts were well underway – it would not be unrealistic to assume they very much reflect the EU's new attitude towards regulatory cooperation as exhibited in relation to the TTIP.

3.3. The Transatlantic Regulatory Dialogue

The EU and the US also have a history of bilateral regulatory interaction, which grew from informal talks to official statements and programmatic documents.

The Transatlantic Economic Partnership (TEP), launched in 1998, aimed to be, inter alia, a forum for dialogue between regulators on both sides of the Atlantic. It was the first expression of political commitment to EU-US regulatory cooperation and produced the EU-US Guidelines for Regulatory Cooperation and Transparency, the first of what would be a series of documents meant to codify transatlantic regulatory dialogue as the way forward.

A next important such document was the 'Initiative to Enhance Transatlantic Economic Integration and Growth' (an outcome of the 2005 EU-US Summit) which identified regulatory cooperation as a priority; a priority in need of an institutional umbrella – which led to the creation of the EU - U.S. High-Level Regulatory Cooperation Forum.

The latter was soon to become the 'regulatory affairs arm' of the main political body overseeing transatlantic cooperation: the Transatlantic Economic Council (TEC), founded after the 2007 EU-US Summit and committed to working towards deeper integration between the world's two most important markets. Notable successes followed – e.g. the Common Understanding on Regulatory Principles and Best Practices (2011) – but perhaps the most important action taken under the auspices of the TEC was the decision to recommend the commencement of negotiations on a Transatlantic Trade and Investment Partnership (TTIP).

3.4. The Transatlantic Trade and Investment Partnership (TTIP)

Beyond being the single most important trade and investment agreement ever attempted at, between the world's largest economic blocs, the TTIP also aims to promote an optimized regulatory *process*, including periodic information between parties on upcoming regulatory proposals, regulatory dialogues, the use of impact assessments and costs-benefit analysis in the drafting of regulations, the undertaking of stakeholder consultations before/during regulatory design and implementation and the creation of an institutional framework to manage this process.

In terms of *outcome*, the target is better regulation and increased regulatory compatibility between the EU and the US, both horizontally, via a Regulatory Coherence Chapter and sectorally, via dedicated chapters, targeting the regulation of, inter alia, cars, pharmaceuticals, medical devices, cosmetics, chemicals and financial services.

As DG Trade put it in its Position Paper on the Chapter of Regulatory Coherence: "The TTIP provides a historic opportunity for the EU and the US to substantially enhance regulatory co-operation. Such co-operation should be guided by both Parties' right to develop and maintain, policies and measures ensuring a high level of environmental, health, safety, consumer and labour protection, fully respecting the right of each side to regulate in accordance with the level of protection it deems appropriate. Closer regulatory co-operation is not only important to progressively achieve a more integrated transatlantic marketplace but also to ensure that the EU and the US jointly and actively promote the development of international regulations and standards in co-operation and dialogue with other partners, as well as ensure together in the most effective way the objectives at stake." [Position Paper - Chapter of Regulatory Coherence, European Commission, 2013]

The TTIP thus becomes the single most ambitious exercise of regulatory coherence in history and its successful completion will undoubtedly prove to be a complicated and arduous endeavour. At the same time, it makes a very clear point – as far as world leaders are concerned, when it comes to regulatory affairs, there is only one way forward – regulatory cooperation – with its important economic and political consequences and its domestic and global effects.

4. Criticism

This seemingly unequivocal stance in favour of regulatory coherence as part of both the TPP and the TTIP shared by global decision makers did not, however, translate well to the rest of the international community. In fact, many groups expressed not only their doubts, but

even their complete opposition to certain aspects of it[25] - e.g. “stakeholder” consultations, the perceived violation of domestic, sovereign regulatory space, the alleged undermining of the right to regulate, potential regulatory convergence to the least common denominator, the perceived undermining of democratic institutions etc. We will look at these in turn.

4.1. The Transpacific Partnership

As far as the TPP goes, voices against its regulatory coherence part were raised from various fora. Some in academia were quick to come up with an analysis of its leaked Regulatory Coherence Chapter, concluding that: “Its target is domestic regulation making behind the border - not, as the title implies, coherence of regulations across the parties. Some of its elements are conducive to well-informed and consistent good decision making. However, it is inappropriate for a ‘trade’ agreement to dictate to governments how they should structure their domestic bureaucracy and procedures. Despite the apparent focus on procedures, the proposal also has substantive biases in favour of light-handed regulation – a model that has proved highly problematic in many countries and sectors, not least the financial industry. Moreover, the proposed national and TPP-wide mechanisms cross-fertilise with other chapters of the agreement to confer undue corporate influence over national policy and regulatory decisions.” [Professor Jane Kelsey, School of Law, University of Auckland, 2011]

Political circles soon chimed in – President Clinton’s Former Secretary of Labour called the agreement “a disaster in the making [...] a Trojan horse in a global race to the bottom, giving big corporations and Wall Street banks a way to eliminate any and all laws and regulations that get in the way of their profits.” [Robert Reich, 2015]

The fiercest opposition came from civil society groups and NGOs: some called the regulatory coherence negotiations “an endless cycle of corporate-dominated back-room policy laundering” [Sutton, EFF, 2015] while others expressed fears that, as it stands, the agreement can, inter alia, lead to the “rolling back of Wall Street reforms, expose the US to unsafe food and products, empower corporations to attack US environmental and health safeguards or increase of the cost of medicines.” [Citizen.org]

[25] This is a brief and, inevitably, selective overview of concerns raised with regards to regulatory coherence in the TPP/TTIP. We will return to some of the issues in more detail as the paper progresses.

4.2. The Transatlantic Trade and Investment Partnership

With regards to the TTIP, complaints ranged from lack of transparency (neither EU, nor US officials were considered forthcoming enough about their TTIP regulatory coherence intentions and ways of achieving them) and corporate bias to a potential race to the bottom in health, environment and labour standards and lack of Parliamentary oversight of negotiations.

NGOs were the first to react, pointing out that "Groups of companies are intended to be included even during the elaboration of new regulations and laws, provided that their trade interests could be affected. The name for this is: "regulatory cooperation". It means that representatives of big business are invited by governments to participate in expert groups to influence new draft laws, even before these are discussed in the elected parliaments. This undermines democracy. The political intent must originate from the people, not from representatives of big business!" [European Citizens' Initiative, 2014]

Civil society is concerned that regulatory coherence could de facto translate into lowering EU standards in a host of sectors to meet the less stringent US regulatory threshold, allowing, for instance, genetically modified foodstuffs or chlorine-washed chicken into the European market[26]. Investor-State Dispute Settlement (ISDS) is another often quoted problem, as many see it as a way for US corporations to restrict the European Union's right to regulate.[27]

Politicians soon joined the choir, with the Greens/European Free Alliance in the European Parliament clearly stating that they "are against the current negotiation agenda that was set by business interests and is taking place in complete secrecy. Negotiations need to be in the full view of the public and their representatives, and the deal needs to promote and enhance social, environmental, health and consumer rights, not undermine them." [Green/EFA Group of the European Parliament, 2015]

Academia looked at the issue from another angle, highlighting the lack of parliamentary oversight as the main minus of the current modus operandi. "Contrary to current institutional and popular narratives accompanying its negotiations, the fate of TTIP's

[26] See previous Chapter for context.

[27] See next Chapter for a discussion.

success will be played less on issues of transparency or fears of 'race-to-the-bottom' and more on its ability to ensure parliamentary and societal input to guarantee its legitimacy and accountability once in operation. [...] While there seems to be a case for building a role for the European Parliament and US Congress, it is not clear whether the ongoing negotiations currently envision a mechanism requiring their involvement and how that would connect with the existing transatlantic parliamentary cooperation." [Professor Alberto Alemanno, HEC Paris, 2014]

4.3. The silver lining

Despite the somewhat chaotic argumentative structure of the above critical stance with regards to the regulatory coherence chapter of either the TPP or the TTIP, some things - that are particularly relevant to our earlier discussion - stand out; such as the fact that none of the critics seem to oppose the idea of regulatory coherence *per se*. That is, nobody seems to be arguing against regulatory cooperation and in favour of its alternative – i.e. regulatory competition. In fact, the term 'regulatory competition' does not even come up in the debate and few, if any, seem to even consider the possibility of international non-cooperation as a valid way forward. What they appear to be opposing is the current manner in which regulatory cooperation is being approached by international negotiators (e.g. lack of transparency, undue corporate influence) and its perceived bottom line – a convergence to a lower standard.

This goes to the very heart of the issues discussed in the previous chapter.

Firstly, the – repeated – mention of business lobby and corporate influence on negotiators' agenda signals, rather strongly, that civil society perceives some sort of behind the scenes regulatory capture taking place and feels compelled to react, organize and fight against it. This perception throws us into a Private Interest Theory of Regulation[28] paradigm, where authorities promoting regulatory coherence act not in the interest of their constituencies, but in that of a powerful group of companies, while civil society is left to feign for its own interest. In this scenario, regulatory coherence becomes the result of a clash between private interest groups and its final form depends largely on which group proves to

[28] See Chapter II.

be more powerful. To what extent this perception of the status quo is realistic is highly questionable – after all, as we have seen before, Private Interest Theory has its minuses and an often limited explanatory power. Indeed, it is far more likely that this is simply an extreme view fuelled by fear and lack of access to information and that the reality of it all is probably leaning more towards the Political Action Theory rationale.

Nevertheless, this perception does help with pointing out, on the one hand, that theoretical fundamentals are still very much relevant to real life events and, on the other hand, that authorities really must approach these negotiations in a far more transparent manner, so as to alleviate concerns of a 'corporate takeover'. It must have been the realization of this imperious need that prompted the European Commission to not only pledge (through the voice of Commissioner Malstrom) its allegiance to increased transparency, but also take practical steps in that direction, by making a series of previously classified TTIP texts publicly available.

Secondly, people seem to perceive negotiations on regulatory coherence as just a polite name for tit-for-tat bargaining that will inevitably lead to lowering standards, to the point that countries party to the agreements will end up having the *same* rules and those rules will be the least stringent ones available. In other words, the outcome of these negotiations is perceived to be *convergence* (to the least common denominator), rather than *coherence* and this is revealing in at least one very important way: i.e. the complete lack of an official definition of 'coherence' makes it prone to being equated with convergence. While that is semantically incorrect (coherence and convergence are *not* synonyms) in practice the equation might not be entirely misguided, because, as we mentioned before[29], coherence can indeed lead to convergence in the long run.

Hence, the issue of the exact extent of regulatory *cooperation* intended – i.e. whether or not the agreements target at least partial regulatory *convergence* somewhere down the line[30] - needs to be addressed in a clear official statement. The lack of consensus on what regulatory coherence is, that was discussed at large previously, thus becomes more than just an interesting research topic and turns into a potential deal breaker in terms of public support for the very proposition of it. Negotiators have thus far failed to thoroughly explain what they

[29] See Chapter II.

[30] And, if they do, that this convergence will be a top up to the current situation as opposed to a lowering of standards.

actually mean by regulatory coherence and this explanatory vacuum favours misconception, speculation and fear.

This status quo only serves to demonstrate the necessity of clarifying what regulatory coherence actually is and that a clear cut conceptual delimitation is a prerequisite for proceeding with negotiations on the topic within these already highly controversial trade and investment agreements. The risk of not doing so is arriving at a situation where 'coherence' will automatically translate, in the minds of civil society, as regulatory imperialism, race to the bottom or democratic deficit, which would make it impossible for any document (especially a mega trade deal such as the TTIP) that mentions it as a goal to gain public support.

Apart from definitions, there are other concerns towards regulatory coherence expressed above that are valid (e.g. what is the risk of a regulatory race to the bottom? how endangered is the right to regulate? what role will legislators play? will these agreements change how domestic regulatory systems function?) and that require further analysis – we will return to these issues as the thesis progresses.

5. Way forward

This chapter has served as a brief overview of the main aspects of regulatory coherence as it has so far been translated into practice – from efforts towards better regulation to the establishment of cooperation as the main form of international regulatory interaction all the way to the economics-driven quest for coherence and its inclusion in mega trade and investment agreements, be it the TPP or the TTIP.

With regards to the latter development, as we have seen, it has not exactly been smooth sailing and the concept – and its translation into political action – has come under quite a lot of criticism. A first issue raised by critics that we will look into next is two-pronged.

One the one hand, there is the valid question: why is regulatory coherence included on the agenda of a trade and investment partnership? Some of the critics of the TPP, for instance,

pointed out the inadequacy of dealing with domestic regulatory best practices under the umbrella of an economic agreement. The explanation behind this choice of venue has been hinted at – regulations can sometimes act as barriers to international economic exchanges – but it is complex enough to warrant a closer look.

On the other hand, there is the fear of undue corporate influence over regulatory design and implementation which ties into the concern of democratic deficit, the violation of the right to regulate and a regulatory race to the bottom. Where do these fears originate?

As we will see in what follows the two points above are connected – dealing with regulatory cooperation under the auspices of an economic organization (especially the WTO) brought, more than once, domestic regulations at odds with international trade interests. The way this opposition was sometimes approached, handled and settled (i.e. trade interests occasionally trumped domestic regulatory goals) prompted the above fears. How exactly it happened and what it means for regulatory coherence is what the next Chapter is dedicated to.

Chapter IV

Law and economics – domestic regulations and trade and investment agreements

1. International trade and investment and domestic regulatory frameworks

The question as to why regulatory coherence would be addressed within an otherwise typical economic cooperation agreement (a trade and investment partnership) seems legitimate. After all, international cooperation in the field of regulatory affairs is not new, having been attempted at, in dedicated fora, either bilaterally (the EU-US High Level Regulatory Cooperation Forum), regionally (e.g. APEC) or even multilaterally (via the OECD)[31]; so why, then, include it in the e.g. TTIP? Why not discuss regulations in specialized environments and let trade and investment agreements focus on ... trade and investment?

For, when one thinks of domestic regulatory frameworks and international trade/FDI, it is rarely within the same phrase. The former have to do with complex legal architectures, a no less complex political decision making process and a rather intricate web of interested parties. The latter focuses on the international sale of goods and services, import/export, foreign markets and/or producing abroad. So why, then, would these fundamentally distinct issues be addressed in tandem? What do domestic regulations have to do with international trade and investment?

[31] See Chapter III before.

The answer is double-fold: on the one hand it revolves around how differences in regulatory frameworks across countries (regulatory heterogeneity) affect international economic exchanges; on the other it has to do with how an often (apparently) harmless legal instrument can end up becoming an intangible barrier to trade and FDI, giving rise to a new type of, often covert, regulatory protectionism. These are the two fundamental conveyor belts via which domestic regulations affect international trade and investment and they will be addressed in turn in what follows. As it will become clear, these two key concepts are also linked to one another, for regulatory protectionism is, at times, simply regulatory heterogeneity gone wrong.

As the chapter moves forward, we will see that, over time, both heterogeneity and regulatory protectionism have received their fair share of attention from countries involved in the international trade and investment game, be it within WTO texts or Bilateral Investment Treaties.[32] Tackling them has been only partially successful, however, with the fight against regulatory protectionism posing additional problems, such as the rather thorny issues of regulatory space and democratic deficit.

Having analysed the relation between domestic regulations and international trade and investment, we will explore, towards the end of the chapter, how regulatory coherence fits into the picture and the role it can play in limiting the costs associated with regulatory barriers to international trade and FDI, be they heterogeneity or protectionism related.

2. Regulatory heterogeneity

The first stop in the journey exploring the relation between domestic regulations and international trade and investment is globalization:[33] if trade and investment became, with

[32] This part will not be developed into a full fledged analysis of international trade and investment law in relation to domestic regulations – that would go far beyond the scope of this thesis. Instead, certain selected topics will be briefly addressed so as to highlight the bigger issue – i.e. that regulatory coherence belongs in trade and investment agreements.

[33] Some aspects of the relation between globalization and regulations were introduced in Chapter II – we will revisit here, in more depth, some of the points made and add a few more layers and points of view to the analysis, so as to get a more detailed x-ray of the issue.

time, more and more of a global affair, regulatory frameworks lagged behind, with most rules remaining a purely national endeavour, in terms of both design and implementation. A tension was bound to occur, as increased interconnectedness between the world's markets and the proliferation of multinational corporations - with their outsourcing of production to foreign jurisdictions - inevitably translated into increased relevance of domestic regulations to the players involved in the international trade and FDI game.

As they expanded their businesses worldwide, exporters/producers would often find themselves bound by one set of regulations in one country and an entirely different set in another country, for the same product/service, a situation caused by the fact that most regulations were national in scope and there was no cooperation between sovereign national regulators in terms of regulatory design.

This tendency of regulations to differ across countries and the subsequent variation in domestic regulations that this tendency led to became known as regulatory heterogeneity or regulatory divergence. It wasn't long before the negative effects of such a state of affairs would make themselves visible, igniting complaints about costs, debates about solutions and discussions around possible side effects.

2.1. The costs of regulatory heterogeneity

The first to take a stand on heterogeneity and outline its negative impacts were, naturally, multinational corporations, usually via their institutional representatives, such as the US Chamber of Commerce [2015]: "Despite the growing interconnections between economies around the world, regulatory regimes continue to be largely developed by and focused on individual countries. As countries' regulatory regimes grow in this largely isolated fashion, products and services that cross borders face a growing array of regulations in multiple countries that can range from being opaque to duplicative to conflicting. The growth of disparate regulatory regimes creates uncertainty, high costs and inefficiencies, and enforcement challenges for individual countries, their consumers, their industries and their workers."

The National Center for APEC [2012] expressed concurrent views: "The trade costs that result from divergent regulations are significant. For consumers, regulatory divergence is

tantamount to a concealed “inefficiency tax” that citizens pay on everything they purchase. This tax is the sum of the costs of duplicate regulations, cross border administration delays and fees, and other regulatory impediments. For businesses, and in particular SMMEs, higher costs of compliance hinder international competitiveness and complicate the most efficient deployment of economic resources.”

It wasn’t long before academia took an interest in the issue and began exploring it in depth, going beyond the mere statement that complying with different regulations increases the cost of doing business abroad. Certain takes on how regulatory heterogeneity can adversely impact trade and FDI therefore emerged.

To begin with, there are the obvious duplication/redundancy costs, when companies are obliged to comply with multiple sets of rules in multiple markets for the same product/service, simply because each country has its own way of regulating said product/service. For example “country A may undertake to ensure the solvency of its banks by requiring considerable levels of capital investment to cushion against portfolio losses (capital adequacy regulation). Country B may pursue the same objective by regulating the riskiness of the banks’ portfolios directly.” [Sykes, 1999] The problem is that, usually, the purpose of the regulation is the same across countries (here, ensure the solvency of the banking system) and, more often than not, said purpose can be achieved in an either/or fashion, making compliance with both sets of rules unnecessary. In the example above “the bank of country A that opens a branch in country B may become subject to the asset portfolio regulations of country B, even though the capital adequacy regulations of country A are enough to eliminate the solvency risks that concern the regulators of country B.” [idem]

On certain occasions, regulations that address the same issue differ not because of the *method* chosen for regulating (in the example above capital adequacy vs. asset portfolio regulations) but because of the *stringency* of the requirement: some countries have a preference for tighter regulatory controls. Differences in stringency automatically lead to differences in compliance costs. For example, certain substances (e.g. hormones) will be allowed (in given amounts) in goods sold in one country, while being completely prohibited in another; companies will thus be forced to come up with two sets of goods, one for each market, seeing their production costs go up as a consequence.

The implication is that regulatory heterogeneity negatively impacts economies of scale – if, as in the example above, a company will need to set up one production facility for hormone free products and a separate one for goods containing hormones, it cannot take advantage of the economies of scale it would have otherwise been able to capitalize on.

Then there are information costs, that is, the costs companies incur when learning about the regulations applicable in the markets they are interested in: "They may need to translate regulations into another language, hire lawyers to explain the regulations to them and so forth. They may even incur substantial costs trying to identify who is in charge of regulating and where their regulations may be found in an accessible form." [Sykes, 1999]

Related to information costs are the so-called surprise costs i.e. the costs of regulatory changes: having to comply with new regulations without proper advance notice increases production costs and often translates into a competitive disadvantage.

An additional set of costs have to do with conformity assessment – these are the costs of proving compliance with the regulations in force in the market being served. For example "the bank serving multiple markets may become subject to additional bank examinations and audit requirements" [idem] Hence, demonstrating compliance with various sets of regulations adds to the costs of complying with the regulations themselves, further increasing the overall costs of regulatory heterogeneity.

2.2 Regulatory heterogeneity and international law

As it became obvious that regulatory heterogeneity was indeed a costly problem disrupting international trade and investment, the international community reacted, trying to come up with legal solutions that would discourage and, gradually, reduce divergent practices. In other words, there began a quest for regulatory alignment.

Some efforts were bilateral and aimed at a reduction of redundancy and conformity assessment costs. Such was the EU's pursuit of mutual recognition - i.e. the process whereby one country accepts as equivalent the regulations of another country, if the latter's meet the former's objectives of regulatory oversight. Mutual recognition saves companies the trouble of having to, one the one hand, comply with two different sets of regulations and, on the other hand, prove such compliance twice.

Mutual recognition agreements (MRAs) were concluded with e.g. the United States, Canada, Japan, Australia, New Zealand, or Switzerland. According to the European Commission: "MRAs lay down the conditions under which the EU and the third country concerned will accept test reports, certificates and marks of conformity issued by the conformity assessment bodies (CABs) of the other party to the agreement, in conformity with the legislation of the other party."

Other efforts were regional with the e.g. APEC encouraging regulatory harmonization between its members. Harmonization is typically defined as "making the regulatory requirements or governmental policies of different jurisdictions identical."[34] [Leebron, 1996]

The highest-impact efforts were, however, multilateral ones, with the proliferation of international standards playing a key role in the quest for regulatory convergence. The most important and far reaching development on the multilateral anti-heterogeneity combat front was, by far, the adoption, by the World Trade Organization, of the Technical Barriers to Trade Agreement (TBT) and the Sanitary and Phytosanitary Measures Agreement (SPS).[35]

These texts address directly the costs of heterogeneity, such as e.g. information and surprise costs - "Members shall publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation." [TBT Art. 2.9.1]

Similarly, they aim to reduce duplication/redundancy costs by encouraging mutual recognition: "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." [TBT Art. 2.7] Equally: "Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively

[34] It is interesting to note here that, bearing in mind our definitions in Chapter II, while MRAs lead to coherence (regulations are made compatible without being identical), harmonization induces convergence, as the regulations targeted essentially become the same.

[35] "The SPS Agreement applies to measures adopted to protect human, animal or plant health from the spread of pests and from dangerous additives, contaminants, toxins and disease-causing organisms contained in foodstuffs. The TBT Agreement applies to all technical regulations and standards not covered by the SPS Agreement." [Sykes, 1999]

demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection." [SPS, Art. 4.1]

It is the same intent that animates the recommendation to adopt international standards whenever possible, thereby encouraging regulatory harmonization: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations." [TBT Art. 2.4] Similarly: "To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist." [SPS Art. 3.1]

As laudable as all of the above endeavours to reduce regulatory heterogeneity were, their success to date has only been partial, with regulations remaining, for the most part, divergent and, therefore, cost-inducing to international trade and investment. These sub-optimal results contributed to bringing about the latest development in the international community's anti-heterogeneity effort - regulatory coherence.

2.3. The roots of regulatory heterogeneity

Exploring regulatory heterogeneity and debating its effects and possible remedies brought forth a crucial issue: the causes behind this phenomenon. What those dedicated to its study soon learned was that there are certain contexts that require heterogeneous regulatory frameworks, which can thus become not only unavoidable, but even, at times, necessary for the well functioning of society. It therefore became clear was that while most heterogeneity tends to be an unnecessary cost, there is some heterogeneity that cannot and should not be eliminated.

Such is the case when differences in regulations mirror inherent differences between countries – such as geography. Regulations targeting water supply will vary widely between states located in desertification prone areas versus states with access to large supplies of water. History also plays a part – countries having dealt with racial discrimination will have a different approach to labour laws than countries that were never plagued by racism.

Then there are citizens' preferences: some countries' citizenry is more risk averse, for instance, so it is highly likely that those countries will opt for more stringent regulations in

terms of protecting life, health or the environment. Differences in attitude towards risk may be caused by experience (a society that registers a large number of deaths caused by lung cancer will favour stringent anti-pollution laws) or culture (Europeans are known to be typically more risk averse than Americans, for example).

Income and income distribution may also generate heterogeneous regulatory responses. "Consider, for example, regulations relating to the safety or quality of products. Most forms of safety and quality regulation increase the cost to consumers of the regulated good. The willingness of consumers to bear these additional costs will tend to rise as per capita income rises, because safety and quality are typically 'normal goods'. That is, individuals with higher incomes prefer to spend more on safety and quality. More generally, for all varieties of regulations that increase the costs of goods or services for the ostensible purpose of protecting consumers or the broader society from some perceived risk, we might expect that wealthier countries will prefer a greater level of regulation, all things being equal." [Sykes, 1999]

Higher incomes might also lead to societal preferences geared towards regulations addressing 'greater good' causes, such as environmental protection, fighting animal cruelty or 'fair trade', wealthy countries typically championing these issues on the global regulatory agenda.

These are all examples (and the list is by no means exhaustive) of regulatory heterogeneity triggered by legitimate variations in societal preferences, and, consequently, their legal translations, across countries. While they may, at times, adversely impact trade and investment, they are nevertheless corollaries of democracy and sovereignty and, as such, untouchable.

At the other end of the spectrum there are those regulations that vary worldwide not because of plausible cross-country differences, but because of other, far less noble causes, such as regulatory capture. As we saw in Chapter II, capture revolves around the idea that regulations can sometimes protect private, as opposed to public interests and regulators occasionally act as agents of powerful lobby groups, rather than as agents of citizenry. The relation between regulatory capture and international trade and investment is that regulators may at times pass rules that favour domestic producers that lobby them at the expense of foreign companies, effectively raising regulatory barriers to international trade and FDI.

These rules can go from prohibiting foreign companies and/or their goods and services from entering the domestic market to making such entrance extremely costly, via all sorts of (sometimes extremely stringent) requirements.

In these types of scenarios, regulatory heterogeneity becomes regulatory protectionism.

3. Regulatory protectionism

Protectionism is generally associated with traditional barriers to trade and investment, such as tariffs and quotas. But, with the liberalization of the world's markets and the subsequent gradual elimination of such old-school measures, rules slowly became the new form of protectionist efforts, giving rise to what is now commonly referred to as regulatory protectionism, with its anti-competitive, cost inducing consequences.

Defined as "any cost disadvantage imposed on foreign firms by a regulatory policy that discriminates against them or that otherwise disadvantages them in a manner that is unnecessary to the attainment of some genuine, non-protectionist regulatory objective" [Sykes, 1999] regulatory protectionism can amount to an intangible barrier to international trade. Ruling it out or, at least, limiting it to a minimum is, therefore, an issue of paramount importance to maintaining the commitment to liberal economic exchanges most nations of the world have undertaken.

But such an endeavour is no easy task: what makes this particular kind of barrier difficult to tackle is its often covert nature, in that many of these measures are, on the face, not protectionist at all. While openly discriminatory rules that favour domestic producers are easy to identify and counter and have known a steady decrease over time, being actively discouraged via international trade and investment agreements[36], seemingly neutral regulations that nevertheless end up posing higher costs to foreign producers are far more complicated to address.

[36] See Section 4.

Two fundamental questions thus arise: one, how do apparently harmless, even if heterogeneous, regulations turn into regulatory protectionism, especially in a world of 'free trade'? Two, what forms does this somewhat unusual version of protectionism take in practice?

3.1. The rise of regulatory protectionism

The road from regulation to regulatory protectionism starts with free trade agreements – once a country commits to liberalization and, hence, to the reduction/elimination of tariffs and quotas, it suddenly finds itself unable to protect its domestic producers in import-competing industries. While, in theory, it should fully abstain from doing so, in practice certain situations arise when some degree of protection is deemed necessary, the most likely such situations having to do with lobby and political mathematics - powerful, organized industries push for measures aimed at hurting their foreign competitors and thus protecting their own market share.[37]

The first alternative means of affording protection is through a discriminatory consumption tax that may, at times, be equal or even higher than the original tariff. If such discriminatory consumption taxes are prohibited via the agreement, then the country will resort to discriminatory regulations. If the latter are prohibited as well, then governments turn to non-discriminatory, but excessively stringent regulations.

Saiger and Sykes [2009] explain the phenomenon in a paper focusing on "the manner in which the terms of trade are impacted by changes in domestic regulatory standards", showing how regulations can increase production costs for foreign firms and hence create a competitive advantage for the domestic ones: "If regulatory policies remain unconstrained, a discriminatory regulatory standard will emerge that disfavours imported goods. Like the tariff or discriminatory consumption tax, the discriminatory regulatory standard exploits the fact that foreign suppliers will reduce their prices in response to it, thus externalizing costs of regulatory compliance. If the trade agreement also prohibits discrimination through regulatory standards, an upward distortion of the non-discriminatory regulatory standard will then arise

[37] Sometimes the motivation put forward for protectionist measures revolves around the 'infant industry' argument – but these do not constitute the majority of cases of regulatory protectionism.

because foreign suppliers absorb part of the regulatory compliance cost." [Saiger, Sykes, 2009]

Seeing how non-discrimination is a cornerstone of modern trade agreements, including WTO texts,[38] the consequence is a tendency for governments to resort less and less to open protectionism and, rather, issue (typically very stringent) regulations which are, albeit the same *de jure*, far more costly *de facto* for foreign producers and become, therefore, a sui-generis barrier to free trade, turning into regulatory protectionism.

3.2. The new face of regulatory protectionism

We thus find ourselves in a two-faced regulatory protectionism paradigm. On the one hand, there are rules that openly discriminate against foreign firms – but the number and incidence of such instances has been, as mentioned before, decreasing, especially with the advent of non-discrimination clauses in international economic cooperation agreements.

On the other hand, there are rules that, on the face, apply indiscriminately to both domestic and foreign producers, but which, in fact, end up favouring local firms. How does that work, in practice?

For example, let us suppose "Transportation regulators might require that all new automobiles sold in the domestic market be equipped with a particular type of airbag that is only manufactured domestically, even though other types of airbags manufactured abroad (and available more cheaply to foreign automobile manufacturers) are just as safe and effective." [Sykes, 1999] Why is this an instance of apparently neutral regulation that disguises protectionist intentions as opposed to simply a case of regulatory heterogeneity? Couldn't it be that the importing country simply happens to have a preference for a specific type of airbag?

What makes the above hypothetical rule suspicious is that the airbag is only produced locally – so there is a very good chance that the domestic government wants to raise the cost for foreign producers of automobiles (thus protecting domestic carmakers) and stimulate local production of airbags at the same time. But how can one be sure that is what the government is doing?

[38] See Section 4.

Perhaps its intention is simply to protect its consumers by providing them with the best in terms of safety and the locally produced airbag is the only airbag available (on the world market) that meets the importing country's stringent safety requirements. The key assumption the above example makes in this respect – "other types of airbags manufactured abroad [...] are just as safe and effective" [idem] – is inherently subjective. Who decides if other airbags are indeed just as safe and secure as the locally produced ones? Clearly the government does not think so. Is the government wrong? How can the government be wrong, if it bases its judgement on the assessment of risk preferences of its constituency? Perhaps that country's nationals are more risk averse and prefer more stringent safety standards. Can stringency, in and of itself, be an indication of potentially protectionist intentions?

As it becomes obvious, regulatory protectionism is a complicated issue, posing problems in terms of both proper identification (is the regulation bona fide, albeit heterogeneity – and, hence, cost – inducing or, rather, protectionist?) and remedy. As we saw before, countries have different values and perceptions of risk and these differences translate into varying degrees of stringency of their regulatory responses. However, we also know[39] there is an economic, pro-protectionist incentive for governments to raise the stringency of their standards. The million dollar question thus becomes: when does a regulation become *excessively* stringent, turning from mere heterogeneity into covert protectionism?

4. Regulatory protectionism and international law

As the world economy continued its path towards accelerated liberalization and traditional barriers were eliminated to a great extent, the issue of regulatory protectionism took centre stage in the international community's efforts to facilitate open global exchanges.

[39] "Eliminating tariffs induces the domestic country to distort upward its non-discriminatory standard relative to the efficient level. Intuitively, when the domestic government loses the ability to use its tariffs as a means of manipulating the terms of trade to its advantage, it will search for other means of doing so. Raising its non-discriminatory regulatory standard is one such means; and when adjustments in a product-level consumption tax are not possible, upward distortions in regulatory standards become attractive for the domestic government in this setting once it commits to a policy of free trade, because a portion of the cost of compliance with these higher standards is shifted onto foreign producers." [Saiger, Sykes, 2009]

International trade law dealt with it as early as the GATT, while international investment law caught up at a slower pace. In both systems, open regulatory protectionism was straightforwardly prohibited; covert regulatory protectionism proved to be somewhat more complicated to tackle.

One of the most interesting developments on the regulatory protectionism and international law front was that, unlike heterogeneity, protectionism became a constant feature not only in the legal texts themselves, but often ended up at the centre of high-profile disputes.

In the world of international trade, there were the beef hormone or the chlorine washed chicken cases,[40] which have become classic instances of very stringent regulations dangerously nearing covert protectionism territory. In the world of international investment, there were the NAFTA[41] cases, opposing environmental protection laws and business interests (e.g. Ethyl vs. Canada[42]) or the Argentine cases, in which regulations aimed at mitigating the effects of the economic crisis of 2001 negatively impacted foreign investors, triggering a series of cases against Argentina.

What these cases did was to highlight the difficulty of correctly answering the million dollar question above (i.e. identifying a regulation as protectionist as opposed to merely heterogeneous) while also raising an additional, but equally important point: who should be vested with the power to make such distinctions?

4.1. International trade

Regulatory protectionism caught the eye of international trade law[43] quite early on, particularly at the multilateral level. Initially created to codify the reduction of tariff barriers

[40] See Chapter II.

[41] NAFTA (North American Free Trade Agreement) was the first free trade agreement containing advanced provisions on FDI (Chapter 11 on Investment).

[42] In 1997 the Canadian government banned the import of a gasoline additive - MMT - on the grounds that it is a dangerous toxin to human and animal life; the sole producer of the additive – Ethyl Corp. of Virginia, a US company, sued the Canadian government for damages worth $347 mil.

[43] The focus here will be on WTO law. The majority of free trade agreements contain similar clauses (e.g. National Treatment), which is why they will not be addressed separately.

to international trade, the GATT/WTO system went, in time, beyond traditional protectionist measures (tariffs, quotas, subsidies) into the far more complex and delicate world of regulatory protectionism.

a) Existing provisions

Hence, GATT Article III – suggestively titled *National Treatment on Internal Taxation and Regulation* – enshrined the key concept of 'non-discrimination', stating that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." [GATT Art.III(4)] Open regulatory protectionism thus became prohibited.

What is more, recognizing that "Regulatory protectionism can result either from substantive regulatory requirements or from the mechanisms used by regulators to ensure compliance with substantive requirements [and] it need not be deliberate and may result simply from regulators' failure to appreciate the trade impact of their policies" [Sykes, 1999] – WTO law chose to tackle the issue by introducing the notion of "least restrictive means" via the Technical Barriers to Trade Agreement (TBT) and the Sanitary and Phytosanitary Measures Agreement (SPS).

In essence, the intention was to make regulations as least trade disruptive as possible, i.e. preventing regulations from becoming non-tangible barriers to trade, by pushing regulators to *assess their impact on trade.*[44] TBT thus aims to "ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade" [TBT Preamble] while SPS is clear on the fact that "Members should, when determining the appropriate level of sanitary or

[44] At this point there is the move between merely acknowledging that domestic regulations have an international impact to actually taking that into account when regulating – the trend will only get stronger with the advent of regulatory coherence efforts and will gradually be included in domestic law as well (see Chapter VI).

phytosanitary protection, take into account the objective of minimizing negative trade effects." [SPS Art. 5.4]

With the same goal of mitigating the risk that regulations become non-tangible barriers to international trade, WTO texts build upon the importance of international standards, scientific evidence and consistency in regulation design and implementation. [Saiger, Sykes, 2009] Departure from an international standard (e.g. a more stringent regulation), lack of proper scientific justification[45] for a measure or inconsistency in the level of stringency of rules applicable in comparable situations might be indicators of foul play.

Nevertheless, the texts do allow for alternative means of action, others than those 'encouraged' within an agreement. Therefore, while the use of international standards is recommended, departures from them are allowed: "Where technical regulations are required and relevant international standards exist [...] Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued." [TBT Art. 2.4] Similar provisions exist in the SPS Agreement [Art.3.3] with the addition that there needs to be a scientific justification for the departure from the standard or the higher level of stringency.

Most importantly, WTO law caters for situations where states adopt regulations that do impair trade, but which are nevertheless necessary to attain legitimate objectives, such as protecting human health, public morals or the environment, subject to the same constraint - that they not become "a disguised restriction on international trade." (GATT Art. XX – General Exceptions)

All this means, in practice, that there is, in fact, a great degree of deference to state regulatory decision making sovereignty – governments are free to regulate as stringently as they see fit, depart from international standards if necessary and generally define what "appropriate" means in any regulatory scenario. With one caveat: that their regulatory choices are as least trade restrictive as possible – i.e. they do not become *unnecessary* barriers to trade. If that appears to be the case, the regulation 'at fault' might become the object of WTO review.

[45] A perfect example is the beef hormone dispute mentioned before. The WTO panel that tackled the case found that the EU was in violation of the SPS Agreement because it lacked scientific justification for its measures.

Another route that the WTO took in addressing potential regulatory protectionism was to go beyond non-discrimination, targeting measures that might not even violate WTO law *per se*, but that have, nonetheless, an adverse impact on trade. In trying to discourage the creation of unnecessary barriers to trade via regulations, GATT (Art XXIII) introduced the concept of nullification or impairment of obligations which could "result, among other things, from the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement. This provision was understood to reflect the possibility that GATT commitments might be undermined by measures that did not violate the letter of GATT but that nevertheless impaired market access. Claims of nullification or impairment that rest on measures not inconsistent with GATT are known as non-violation claims." [Saiger, Sykes, 2009]

b) From drafting rules to enforcing them

We have thus far seen that WTO law addresses some of the problems concerning regulatory protectionism and international trade. What we will see next is how complicated enforcing said anti-protectionist WTO provisions actually is. Determining whether a regulation is bona fide or protectionism in disguise is, as stated before, extremely complicated. To make matters worse, having an outside body - e.g. a WTO panel - make that determination poses problems in terms of democratic deficit and regulatory sovereignty. We will look at these issues in turn.

At a careful read of the quotations from GATT, TBT or SPS above, interpretation difficulties are immediately apparent. Hence, how does one assess what the *least* restrictive means is, in a given situation? How does one establish if governmental measures become *unnecessary* obstacles to international trade? What does *(un)necessary* even mean? WTO case law reveals that these concepts tend to be interpreted in context, on a case-by-case basis and that their application is often controversial and politically delicate.

The most often quoted example is again the beef hormone dispute mentioned before. The WTO panel's conclusion – that EU was in violation of the SPS Agreement because it lacked scientific justification for its measures – is a complicated one, because it places science in a position of depositary of the ultimate truth, truth that is both universal and immune to

subjective interpretations. However, as we saw in Chapter II, science is neither universal, nor impeccably objective. Au contraire, there is a geography of science, making it culturally and societally embedded. The hierarchy of values typical of a society may be (and usually is) fundamentally different than another society's, even if, on some issues, the two may exhibit similar preferences. Such is the case of European and American societies: while, on most topics, they tend to have congruent views, in relation to risk they could not be farther apart. Europeans are far more risk averse and this attitude translates into their position towards certain issues – be it hormones, chlorine washed chicken or genetically modified organisms – that is at the opposite end of the attitude Americans have towards the very same issues.

If regulations are governmental responses to societal preferences and, often, a codification of these, shouldn't it be normal, in cases where said preferences are different, to have equally different regulations? In the beef hormone case, the EU chose to apply the precautionary principle, which, in a nutshell, means that just because a product cannot be proven dangerous with current scientific methods, that does not mean that it is not, in fact, dangerous, so it is best to be cautious and prohibit/limit its use until science can point, with accuracy, that there is, in fact, no risk. The US works differently – if science cannot prove that a product poses risks, then its use shall be allowed. This inherent difference in approaches leads to unavoidable differences in regulatory responses. And that is a sovereign prerogative ... unless it restricts trade, in which case things become far more complicated.

If trade is restricted as a result, an apparently banal regulation can become the object of a WTO inquiry and essentially bring about a situation where governments must justify their regulatory choices in front of a foreign reviewer – here, a WTO panel – explaining why a regulation was *necessary* even if it restricted trade. Which brings us to our second fundamental controversial trait of the system: should a body of international non-elected technocrats be vested with the power to assess whether a national regulation is necessary or not?

What the WTO does in relation to the topic is to elegantly avoid a direct answer. Thus far, panels have, mostly, refrained from 'balancing' – i.e. the weighing of a regulation's costs (e.g. restricting trade) against its benefits (e.g. protecting human health)[46] – because this is a

[46] The official stance is that the WTO system does not make use of balancing and that potentially protectionist measures are assessed strictly against WTO texts.

prerogative typically reserved for national regulators.[47] Yet, there are circumstances when some degree of second guessing national regulators does occur – such as in those cases evaluating whether a measure was the least restrictive means of addressing a problem. In these situations, what WTO experts must do, essentially, is see if the government may have had another, less trade restrictive regulatory response to a given problem – if such an alternative can be identified, the fact that the government did not use it may be an indication that the regulation eventually opted for was actually a protectionist measure in disguise, in which case said government acted in violation of WTO law and is liable to corrective measures. In other words, in situations like these, the WTO may find itself hypothetically substituting (or, at least, replicating) governmental decision making processes with regards to regulatory design – and that is a problem.

4.2. International investment

This problem is even more complicated in international investment law. If the WTO is, at a minimum, wary of engaging in balancing, investment dispute settlement bodies are far less shy.

a) The system in place

Consisting of what is often described as a patchwork of international (usually bilateral) investment treaties[48] (BITs) and some regional trade agreements that contain investment clauses (e.g. North American Free Trade Agreement - NAFTA), international investment law is built around a few key concepts that touch upon, to varying degrees, the role of domestic regulations in relation to FDI – inter alia, National Treatment, Fair and

[47] This cost-benefit analysis is part of a regulatory impact analysis performed by national regulators – see Chapter VI.

[48] The first such BIT ever signed was that between Germany and Pakistan in 1959 – *Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments*. What followed was an explosion of BITs signing, with one international investment agreement being concluded every other week in 2014. There are currently 2926 BITs in existence worldwide. [UNCTAD, 2015]

Equitable Treatment (FET), (Indirect) Expropriation and Investor-State Dispute Settlement (ISDS).

The notion of national treatment is built, in international investment law, in similar fashion to its construction in international trade (WTO) law – namely, it revolves around non-discrimination, in regards to both investors - "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." [Art 3.1, US Model BIT 2012] - and investments - "Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." [Art 3.2, idem] Discrimination – and, consequently, overt protectionism – is prohibited.

International investment law takes a step further into the prohibition of regulatory protectionism by going beyond non-discrimination. Hence, Fair and Equitable Treatment is an absolute standard, applicable regardless of treatment accorded to national investors/investments. A clear cut definition of this term remains elusive; its meaning often proves fluid and contextual, for what is 'fair' and what is 'equitable' is often relative and differs on a case-by-case basis, situation which proves, more often than not, a source for controversy, especially when it comes to the settlement of disputes. Still, some elements have become, with time and case law, common to the interpretation of what FET entails, namely: "prohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation; prohibition of the denial of justice and disregard of the fundamental principles of due process; prohibition of targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; prohibition of abusive treatment of investors, including coercion, duress and harassment; protection of the legitimate expectations of investors arising from a government's specific representations or investment inducing measures, although balanced with the host State's right to regulate in the public interest." [UNCTAD, 2012]

A no less complex and controversial topic is that of Indirect Expropriation. While Direct Expropriation is straightforward – an investment is nationalised or otherwise "directly

expropriated through formal transfer of title or outright physical seizure."[49] [OECD, 2004] – its 'indirect' counterpart is far less so. It revolves around "measures taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights" [Middle East Cement Shipping and Handling Co. vs. Egypt] and expands into 'regulatory takings" – i.e. "measures taken by the State that have a similar effect to expropriation or nationalisation."[50] [OECD, 2004] International investment treaties specify that (indirect) expropriation is only allowed if it is for public purpose and only if accompanied by prompt, adequate and effective compensation.

Last, but not least, a fundamental feature of the system that has found itself at the crossroads with domestic regulatory space is the mechanism for the settling of disputes arising out of breach of International Investment Treaty clauses - the so-called Investor-State Dispute Settlement Mechanism (ISDS). If, at the WTO, it is countries that bring claims to the Dispute Settlement Body and tackle differences at state-state level, in international investment law, it is possible for an investor (i.e. a private party) to bring a claim against a state in front of an arbitral tribunal. The notion that a state can be sued by a company and thus forced to explain and, possibly, amend/repel a regulation that has adversely affected an investor remains, to date, highly controversial.

b) System reset

How do the above features interact with domestic regulations? Take Ethyl vs. Canada mentioned before – the case was filed on the grounds that the ban on MMT was discriminatory (it only targeted foreign companies - Ethyl) and amounted to indirect expropriation (the environmental regulation deprived the company of expected profits): "Ethyl emphasized that the ban would benefit producers of competing oxygenates (ethanol and MTBE), and that it was possible for MMT to be used throughout Canada if manufacturing plants were established in each province. On this basis Ethyl claimed that the ban was arbitrary and intentionally discriminatory toward Ethyl, which was the sole supplier of MMT in Canada." [Aisbett, Karp, McAusland, 2006]

[49] Also referred to as 'dispossession', 'taking', 'deprivation' or 'privation'. [OECD, 2004]

[50] Also termed 'creeping' or 'de facto' expropriation or measures 'tantamount' to expropriation. [OECD, 2004]

The Canadian government's defence – that the ban aimed to protect human health and the environment – fell through because it lacked *scientific justification.* Canada could not point to any studies indicating that MMT was, indeed, toxic. We are on familiar territory here – just like with the beef hormone case, lack of scientific proof towards the dangers of a substance does not equate with scientific proof that the substance in case poses no risks – that is why governments are allowed to use the precautionary principle. The difference, however, in this case, is that the government had allowed the *use* of the additive and had only banned its *import* – its actions were not precautionary, they were protectionist. If Ethyl had decided to circumvent the ban by producing MMT directly in Canada, it would have been free to do so.

The case was settled - the Canadian government lifted the ban and paid nearly US$13 million in compensation to the company.

There were other NAFTA cases that built along similar lines, such as Methanex vs. the US (Californian authorities banned a petrol additive – the US won) or Metalclad vs. Mexico (the Mexican government prohibited the functioning of a waste facility – Mexico lost). Beyond providing additional examples of stringent regulations with an adverse impact on FDI, what these cases did was, much like their trade counterparts, bring to the fore the difficulties of differentiating between bona fide regulations (aimed at e.g. protecting the environment) and covert protectionism.

Incorrectly performing such differentiations – i.e. widely interpreting regulations as indirect expropriation – is problematic, for it raises concerns that governments might find themselves unable to pass stringent regulations to protect health or the environment for fear of corporate retaliation: "These lawsuits have prompted some critics to claim that Chapter 11 benefits multinational corporations at the expense of states' sovereign rights, the environment, and the public good." [Aisbett, Karp, McAusland, 2006] These fears that business interests might end up trumping public interest and restrain the state's room for regulatory responses seem, nonetheless, somewhat exaggerated, as investment treaties contain clauses that address this very issue: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." [Annex B, 4b, US Model BIT 2012] What these cases also did was to highlight the risks of delegating

regulatory review power to private arbitral tribunals, raising the issue of democratic deficit. This problem became even more acute with the Argentina experience.

5. Regulatory protectionism vs. the right to regulate – lessons for the TTIP

After more than a decade of liberal policies, Argentina experienced, in 2001, the worst economic crisis in its history. In order to deal with the new realities, the government reversed some its earlier decisions in terms of economic governance, including its rules on convertibility, this latter move leading to a devaluation of the peso by reference to the dollar. Foreign investors were severely hit by the new policies, seeing their profits shrink. In response, they sued Argentina, claiming the state had, inter alia, indirectly expropriated them and/or treated them unfairly and inequitably.

At the date of writing, there were 51 cases against Argentina filed with the ICSID (International Centre for the Settlement of Disputes) for various alleged breaches of BIT clauses, from FET to Indirect Expropriation. In many of them, Argentina's defence relied on the necessity of the measures: as negative an impact these may have had on foreign investment, they were nevertheless necessary to maintain public order and safeguard its national interest. This position makes use of the so-called 'non-precluded measures' clause to be found in most investment treaties – e.g. "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests." [US-Argentina BIT]

In some cases that defence worked, in others it didn't; Argentina won some cases, lost others and settled most. A large number is still pending and there is every chance more cases will be filed within the same register. While the Argentine experience with FDI, investment treaties and ISDS is complex, some issues that tie into the topic of this paper stand out. On the one hand it becomes obvious, yet again, just how difficult it is to ascertain that a regulatory response was necessary and/or necessarily stringent to address a situation (in this case, an economic crisis) even if it had an adverse impact on FDI, as opposed to it having been merely

a protectionist measure aimed at favouring local producers. On the other hand, the issue of who should be vested with the power to assess said necessity remains controversial. As mentioned before, regulatory review is, typically, a prerogative of the state – often, however, said prerogative can be outsourced to alternative fora, be it a WTO panel or, in the case of international investment, an arbitral tribunal.

Hence, "the task of identifying excessive regulation seems enormously difficult. How can the law sensibly distinguish situations in which a nation is over-regulating because it externalizes compliance costs, from situations in which the nation has a bona fide interest in stringent regulation because of, for example, a higher implicit value of life or health? An international system that second-guessed the cost-benefit determinations of national regulators would also likely intrude heavily on notions of national sovereignty and meet considerable political resistance." [Saiger, Sykes, 2009]

Taken together, these two issues created the basis for a wave of public opposition to the very idea of domestic regulations becoming subject to international scrutiny, for fear that governments would find themselves unable to enact any kind of regulation that did not suit the interests of corporations; in other words, that the sovereign 'right to regulate' would find itself restricted by international agreements (trade and/or investment) theoretically meaning to prohibit regulatory protectionism.

What started with concerns over NAFTA slowly expanded into a critique of the system of Investor-State Dispute Settlement as a whole, inevitably finding its way into the anti-TPP and anti-TTIP[51] discourse.

Citizen.org claimed that "The TPP would elevate individual foreign firms to equal status with sovereign nations, empowering them to privately enforce new rights and privileges, provided by the pact, by dragging governments to foreign tribunals to challenge public interest policies that they claim frustrate their expectations. […] Foreign corporations would be empowered to attack our health, environmental and other laws before foreign tribunals."[52] Former US Secretary of Labour Robert Reich expressed [2014] his concern that "The TPP gives global corporations an international tribunal of private attorneys, outside any nation's legal system, who can order compensation for any "unjust expropriation" of foreign

[51] Both the TPP and the TTIP originally envisaged investment chapters with ISDS provisions.

[52] This links back to cases such as Ethyl or Metalclad (see before).

assets. Even better for global companies, the tribunal can order compensation for any lost profits found to result from a nation's regulations."

That investment arbitration is vulnerable to critiques of legitimacy i.e. arbitrators become policy makers that have "a business bias" and are not qualified "to judge a country's economic policy" [Argentina's Minister of Justice] became a trending topic in TTIP related debates as well. Critics believed that "EU and US governments will hold onto a "right to regulate" but it will be severely constrained, subsumed under the overall priority of reducing barriers to investment opportunities for multinational corporations. Both European and US officials, backed by powerful business lobbies, will be pressing for maximum protection for corporations against legislative or regulatory interference into their "rights" to profit from transatlantic trade and investment." [eu-secretdeals.info]

That international investment law and its default dispute settlement mechanism – ISDS – is criticized for, inter alia, a business bias (investors' rights are not matched by investors' obligations) and a democratic deficit (the risk of outsourcing regulatory review to non-elected technocrats is inherent to ISDS) is a story that began before NAFTA and will most likely continue to create waves after the TTIP. While looking deeper into it would require a stand alone thesis, its relevance for this paper is that is serves to underline, yet again, the complex relation between domestic regulations and FDI and between bona-fide regulatory measures and regulatory protectionism.

6. Domestic regulations and international trade and investment agreements

It has thus become clear, over the last few pages, that domestic regulations and international trade and investment cannot be viewed in isolation, for they interact in complex and often controversial ways. Be it via heterogeneity or protectionism, rules adopted by national regulatory bodies can end up constituting non-tariff barriers to international trade and FDI, adversely impacting global economic relations.

Likewise, it is by now a fact that that these interactions and their – often negative – effects have not escaped the international community's attention, with attempts at dealing

with the issue having been made under the auspices of both trade and investment law. As we have seen, the success of these attempts has been limited and thorny issues remain, to date, impossible to settle.

The current situation on the 'domestic regulations and international trade and investment' front is, therefore, rather complicated.

On the one hand, the international business community keeps sending distress signals about the difficulties posed by regulatory divergence: "A University of Southern California Marshall School of Business survey of Asia-Pacific business leaders in APEC revealed that 77.3% of the business community saw inconsistent standards and regulations across the region as a significant barrier to trade. […] A separate survey in 2011 of more than 4000 business and opinion leaders by the Pacific Economic Cooperation Council (PECC) cited regulatory impediments in overseas markets as the second biggest challenge to doing business in the region. The survey showed inconsistent regulations and standards across the region will represent a significant barrier to private sector growth over the next 3–5 years." [National Centre for APEC and APEC Business Advisory Council, 2012]

On the other hand, international law does its best to combat both regulatory heterogeneity (by e.g. encouraging the widespread use of international standards and the proliferation of mutual recognition) and regulatory protectionism, by actively prohibiting it, wherever possible. Its avenues for fighting regulations as barriers to trade and investment include both traditional ones – such as WTO law or Bilateral Investment Treaties – and, given the former's limitations, more innovative approaches as well, such as dedicated chapters in international trade and investment agreements, be it the TPP or the TTIP.

The move to the latter fora for addressing regulations as non-tangible barriers to trade and FDI seems, in light of the last few pages, not only plausible, but necessary, for a number of reasons.

First of all, if domestic regulations can end up negatively affecting international trade and investment flows and they have been a feature in international trade and investment legal texts for a rather long time, it makes perfect sense that they be an integral part of a mega trade and investment deal targeting economic exchanges between big players on the world market, be it in the Pacific area (TPP) or the Atlantic shores (TTIP). Agreements of this magnitude that aim at a better integration of some of the biggest economies in the world cannot possibly

overlook a topic such as domestic regulations, which can, as we have seen, often become cost inducing barriers to economic exchanges, sometimes annihilating the liberalizing effects of a tariff reduction, for example.

In fact, as tariffs between some of these economies – e.g. the EU and the US – are already extremely low, as a result of previous waves of liberalization, further such liberalization should focus more on eliminating remaining barriers, such as non-tariff ones, namely regulations, which raise costs for businesses operating abroad. It is a reality quickly acknowledged by the architects of the TTIP and expressed as such, in no equivocal words: "The Transatlantic Trade and Investment Partnership will aim to go beyond the classic approach of removing tariffs and opening markets on investment, services and public procurement. In addition, it will focus on aligning rules and technical product standards which currently form the most important barrier to transatlantic trade. Studies show that the additional cost burden due to such regulatory differences is equivalent to a tariff of more than 10%, and even 20% for some sectors, whereas classic tariffs are at around 4%." [EC Memo, 2013]

Secondly, as the topic of regulatory barriers to trade and FDI has already been addressed within trade and investment legal texts, building on what has already been achieved seems like a sensible way forward. Hence, the TTIP envisages TBT+ and SPS+ chapters, meant at expanding the work done under the auspices of the WTO with regards to technical barriers to trade and sanitary and phytosanitary measures: "the SPS plus component would build upon the key principles of the WTO SPS Agreement, and provide for improved dialogue and cooperation on addressing bilateral SPS issues; the TBT plus component would build on provisions contained in the WTO TBT Agreement as regards technical regulations, conformity assessment and standards." [Initial EU Position Paper, 2013] In addition to this, the TTIP will also address regulations pertaining to specific sectors, in dedicated sectoral chapters, ranging from chemicals to financial services.

Likewise, the classical approach to non-discrimination - national treatment - which is a cornerstone of both international trade and international investment law is bound to be featured in the TTIP, together with other staple international economic law concepts, such as Fair and Equitable Treatment or Indirect Expropriation. The jury is still out on ISDS – mounting opposition to its inclusion in the agreement prompted officials to reconsider their

dispute settlement options. This is a direct consequence of the difficulties associated with the correct identification of regulatory protectionism, as analysed before, which make stringent regulations aimed at e.g. protecting the environment, face suspicions of protectionist intent and lead to contentious second guessing of national regulators by external bodies.

Since it remains "exceedingly difficult to devise a workable and palatable legal rule to condemn regulatory measures that are necessary to non-protectionist regulatory goals but that are nevertheless undesirable because of their trade impact" [Sykes, 1999] the TTIP might prefer to avoid a direct take on covert regulatory protectionism and focus all its efforts on regulatory heterogeneity instead. It is a tempting road to take also because the gains from reducing it promise to be worthwhile[53] and because, to the extent that regulatory protectionism is, most often, regulatory heterogeneity gone wrong, reducing the latter would automatically have mitigating effects on the former.

7. En route to regulatory coherence

This chapter has served to show that domestic regulations do have an impact on international trade and investment and should thus be addressed, in their capacity of non-tariff barriers to trade and FDI, within international trade and investment agreements. WTO law and BITs have followed this path, so it does not come as a surprise that the TPP and the TTIP would do the same.

The move to regulatory coherence chapters within mega economic partnerships therefore seems, in light of the analysis above, less puzzling than it may have originally appeared. While regulatory dialogue can and does continue in various fora (be it bilateral regulatory cooperation frameworks or international standard setting bodies) discussing regulatory cooperation within an otherwise purely economic context does, after all, make perfect sense.

The move to this alternative setting also changes the tone of the approach. Hence, what the e.g. TTIP does differently in addressing heterogeneity is focus on coherence as a

[53] See next Chapter.

solution and underline the economic benefits that reducing the former by increasing the latter can have for all the parties involved. By tackling regulations as potential non-tangible barriers to trade and FDI and assessing the impact their reduction would have on the EU and US economies, both independently and in relation to each other, the TTIP focuses on the economics of domestic regulatory design and implementation, turning an otherwise predominantly legal and political endeavour into an economic one.

It is this paradigm shift that the architects of the TTIP opted for that is explored next.

Chapter V

In economic parlance – the numbers behind the words

1. Introduction

If the direct connection between domestic regulations and international trade and investment agreements established itself rather quickly as an undeniable fact, the debate surrounding its translation into practice - heterogeneity or regulatory protectionism - and the optimal means to address them remains, to date, as lively as ever.

With the advent of regulatory coherence as a proposed solution to some of the negative consequences of regulatory heterogeneity and its associated costs to international trade and investment, the potential benefits of pursuing it within international economic partnerships piqued the interest of policy makers worldwide, with the architects of the TTIP in the lead. What followed was a series of economic studies looking into the likely impact of regulatory alignment on transatlantic trade and FDI flows and the EU/US economies. The general aim was to identify and, wherever possible, quantify the costs of current regulatory barriers to trade and FDI and estimate the economic benefits likely to be achieved should these barriers be reduced/eliminated via a TTIP negotiated chapter on regulatory coherence.

In the pages that follow we will look at these studies in turn, starting with the 2009 analysis of regulations as non-tariff measures (NTMs) to transatlantic trade and FDI, an elaborate exercise of identification and quantification of said NTMs. The results of this study feed into the European Commission's own TTIP Impact Assessment (via the underlying economic study referred to therein) as well as, to certain extents, the additional impact studies carried out by various EU Member States and external stakeholders.

Before we begin, two observations are important to make.

Firstly, what these studies analyse is the impact of potential transatlantic regulatory alignment on various economic indicators – that is, they do not isolate a specific type of alignment (e.g. coherence via mutual recognition agreements) and quantify its likely effect. They bundle up coherence and convergence under the generic term "reduction" of non-tariff measures and work with it as an all-encompassing concept. And they do so without equivoque: "reduction is used as an overall catch-phrase for possible approaches to address regulatory divergence and NTMs, like for example recognition of equivalence, MRAs, harmonization of rules, common international standard development." [Ecorys, 2009] This choice is particularly interesting within the context of this thesis, especially given our previous discussion on the fluidity of the meaning of coherence in practice (see Chapter II). The implications of this choice will be discussed in more detail towards the end of this chapter.

Secondly, the work referred to in what follows does not constitute an exhaustive list of studies done on the topic of non-tariff barriers and the economic effects of their potential reduction, but rather, a selective overview of reports that look into the issue of NTMs *in connection to a trade and investment agreement* – our example of choice, the TTIP – either directly (e.g. CEPR 2013) or indirectly (e.g. Ecorys 2009). While the topic of NTMs has been previously addressed in other fora,[54] the studies this chapter focuses on are the ones that feed directly into the policy decisions that prompted the TTIP chapter on regulatory coherence. As such, they are directly relevant to the intent of this thesis and were deemed optimal for an in-depth analysis.[55]

As we will see, these studies proved to be not only complex, but also, at times, contentious, with certain voices challenging their conclusions, be it in terms of methodology, final figures or trickle down effects. Their lasting contribution to the regulatory coherence discussion, however, remains their attempt to bring economic reasoning and mathematical

[54] The best example is OECD's *"The Benefits Of Liberalising Product Markets And Reducing Barriers To International Trade and Investment: The Case of The United States and the European Union"* [OECD, 2005]

[55] An important observation worth making here is that, as will become obvious throughout the following pages, most of these studies originate in Europe, having been commissioned by the EC, EU Member States or European stakeholders. The only exception is the Capaldo [2014] study, coming from the US based Tufts University. This geographical imbalance was unfortunately unavoidable: the numbers the US side works with (arrived at via domestic economic impact studies) remain confidential. The only bits that have been made public concern potential impact of the TTIP on SMEs – given the limited scope of that study, it was not included in our review.

rigour to a debate otherwise dominated by legal uncertainty, linguistic equivoque and political turbulence.

2. Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis (Ecorys 2009)[56]

Commissioned and financed by The European Commission, the study carried out by Ecorys, a Dutch consultancy company[57] in 2009 (hereafter referred to as Ecorys 2009) "identifies important NTMs and regulatory divergences between the EU and the US. It looks at the economic potential that could be unleashed by reducing these measures and better aligning regulations across the Atlantic. This study does not quantify the compliance costs for businesses of individual NTMs but focuses on the economy-wide and sector-level aggregate costs." [Ecorys, 2009] The time frame of the analysis is 10 years (from 2008 to 2018) so as "to allow both the EU and US economies to adjust after the potential NTM alignment and return to their economic long-run steady states." [idem]

The raison d'être behind the study is the status-quo of the transatlantic trade and investment relation, by far the most important in the world. The European and American economies are closely linked, as tariffs are at an all-time low; the biggest impediment to an even deeper integration of the EU and US markets now consists of regulatory measures that negatively impact international trade and investment flows, generally referred to as non-tariff barriers (NTBs) or non-tariff measures (NTMs) – the latter term being the one used by the present study.

Defined as "*all non-price and non-quantity restrictions on trade in goods, services and investment, at federal and state level […] including border measures (customs*

[56] Ecorys Nederland BV (K.G. Berden, J. Francois, M. Thelle, P. Wymenga and S. Tamminen) Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis. Final Report. *Rotterdam,* December 11, 2009

[57] "ECORYS-led consortium including IIDE (the Institute for International & Development Economics), Copenhagen Economics, The Trade Partnership, Risk & Policy Analysts (RPA), ICAP, Danish Technological Institute (DTI), CARIS and IFO." [Ecorys, 2009]

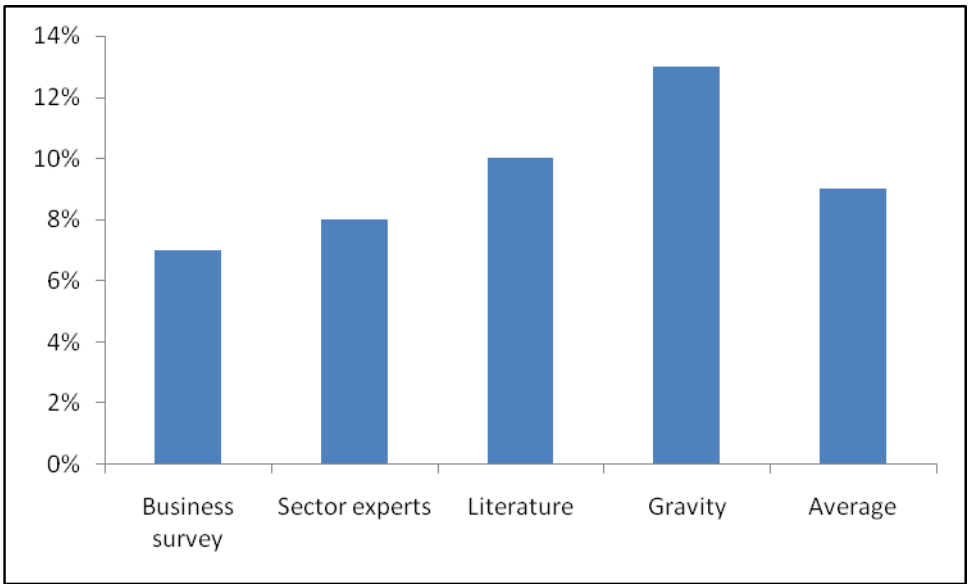
procedures, etc.) as well as behind-the-border measures flowing from domestic laws, regulations and practices" [Ecorys, 2009] NTMs also cover, here, any and all kinds of regulatory divergence resulting from the mere co-existence of two regulatory systems (i.e. European and American).

2.1. Methodology

Given the complexity of the topic of regulatory heterogeneity, a thorough analysis of its forms (NTMs) was an equally complex exercise requiring a mix of approaches, ranging from literature reviews and business surveys to econometrics and consultations with regulators and businesses on both sides of the Atlantic. A distinct advantage of a multi-pronged approach is that it allows for complementarity and cross-validation of results.

A first goal of the exercise is the 'tariffication' of NTMs – that is, expressing a non-tariff measure in its tariff equivalent (usually in percentage terms) so as to allow comparisons and subsequent calculations. Hence "the various methodologies – using different sources of information and components to measure the height of a hypothetical NTM (in percentage terms, i.e. measured as tariff equivalent) – are compared. In case a certain methodology does not yield clear or even any outcomes, it can be complemented by the other approaches. Cross-validation across different methodologies is possible and the various approaches also allow for different types of inputs from various key stakeholders to the study (e.g. from academia, business, industry federations and associations, regulators and policy-makers)." [Ecorys, 2009]

Chart 5.1 Multi-pronged approach to NTM estimation (% of trade costs):



Source: Ecorys 2009

The figures thus obtained are then used so as to model the potential outcomes of regulatory alignment between the EU and the US.

a) Literature review

Carried out by 40 sector experts, the literature review part of the study aims to put together a list of previously identified NTMs to then cross-check via the business surveys and gravity equations. It is also meant to summarize existent knowledge on the empirics of regulatory divergence that would aid the subsequent analysis.

b) Business survey

So as to validate and supplement the NTMs identified (via the literature review and expert input), both at sector level and on an economy wide level (cross-cutting NTMs) a business survey targeting companies worldwide (EU, US and third countries) followed. Corporations were asked to rank (from 0 to 100) the level of regulatory restrictiveness of the

EU and US, in their sector and overall: e.g. "Consider exporting to the US (EU), keeping in mind your domestic market. If 0 represents a completely 'free trade' environment, and 100 represents an entirely closed market due to NTMs, what value between 0 – 100 would you use to describe the overall level of restrictiveness of the US (EU) market to your export product (service) in this sector?" [Question A12a, Ecorys Business Survey, 2008]

Targeting 23 sectors and five export destinations, the survey results (5500 responses) generated bilateral/country-pair NTM indexes - indicative of the level of restrictiveness of the EU and the US - that were then used in the quantitative part of the analysis.

c) Gravity regressions

Gravity regressions are the main econometric go-to when attempting to assess, empirically, the impact of a given factor on international trade and investment flows between two countries, which can be positive (factor 'x' enhances trade and/or FDI) or negative (factor 'y' undermines bilateral economic exchanges).

Traditionally, the two main factors looked into were economic size and geographical distance: trade between two countries is positively influenced by the size of the economy as measured by GDP (i.e. large economies tend to trade more, on average, with other large economies) and negatively influenced by distance (countries prefer to engage in economic exchanges with partners located in their proximity). With time, other factors that can influence bilateral trade were identified and then introduced in the original model, be they elements with a positive effect on trade volumes (common language, colonial relations, common border, belonging to a free trade area etc.) or a negative impact on trade flows (tariffs, geographical location - e.g. access to water routes or lack thereof, different legal systems etc.)

Today, gravity equations represent the standard model for estimating the partial[58] effects of policy choices (e.g. a tariff reduction) on international trade and investment. This study uses a gravity approach to assess the impact of NTMs on EU-US trade and investment

[58] A 'partial' effect refers to the impact of a given policy measure on the trade and/or FDI flows between two countries, all other economic variables being constant.

flows – in terms of both direction (negative correlation – the existence of NTMs undermines transatlantic trade and FDI) and size (expressed as trade costs).

To do so, the NTMs indexes resulted from the business survey "are converted into logarithms and then fed into a gravity equation as a specific friction variable" [Ecorys, 2009] so as to estimate the 'costs' associated with regulatory divergence. Hence, the authors define a transatlantic NTM as a variable "measuring the increase in transatlantic trade and FDI in case of a one percent decrease in the NTM index." [idem]

Other factors considered are, inter alia, GDP, distance, whether the country is an island or landlocked, whether the country pair has a colony-coloniser relation, whether the country pair belongs to a currency union or free trade bloc (EU or NAFTA), legal systems, tariff levels, export levels, population, common language etc.

The authors run gravity equations for trade in goods, services and investment, respectively and consider two types of NTMs: sector specific and cross-cutting. The aim is to quantify these NTMs and measure the likely impact their reduction would have on European-American trade and FDI, ceteris paribus.

d) Computable General Equilibrium (CGE)

While gravity regressions are a helpful tool when estimating the costs of regulatory divergence and the extent to which these costs can be reduced should regulatory alignment be achieved, there is more to the impact of regulations on the European and American economies than a cost increase. Highly complex markets such as the ones in the EU and the US and their in-built inter-linkages would react to regulatory coherence beyond lower costs of doing business – the effect of regulatory alignment would be far reaching, creating ripple effects throughout the whole economy, impacting, inter alia, Gross Domestic Product (GDP), wages or the balance of payments.

Hence, so as to "generate overall macro-economic information related to national income changes, and wage changes for high- and low-skilled workers, as well as changes in exports and imports" [Ecorys, 2009] another model is needed – namely, a Computable General Equilibrium one. (CGE)

"CGE models help answering "what-if" questions by simulating the impact of trade policy changes on prices, incomes and substitution effects across products and sectors in equilibrium on markets under different assumptions. The results of these trade policy scenarios are compared with a "baseline", i.e. the future state of the world economy in the absence of such trade policy changes. The effect of the policy change can then be quantified as the difference between the two." [CEPR, 2013]

What CGE is used for, in this particular case, is to model how regulatory alignment will impact the European and American economies in 10 years time (2008 – 2018). The analysis is done both overall (for all the sectors taken together) and sector by sector, while looking into both cross-cutting issues (NTMs affecting all/more sectors) and sector-specific NTMs.

One of the key decisions of the analysis was that regarding which NTMs to consider as 'likely to be reduced'. As we have seen before, not all regulatory heterogeneity is bad – some of it is a corollary of democracy and sovereignty and, as such, untouchable, irrespective of its impact on trade and investment flows. Therefore, a fundamental (and very delicate) question is which elements of regulatory divergence should be viewed as NTMs likely to be reduced/eliminated via international negotiation – as this study puts it, which NTMs are 'actionable'. This study defines 'actionability' as "the degree to which an NTM or regulatory divergence can potentially be reduced (through various methods) by 2018, given that the political will exists to address the divergence identified." [Ecorys, 2009]

Certain criteria were used so as to determine the actionability of the NTMs identified in the previous stages (literature review, business survey). These included: "*Level of sensitivity* (e.g. national security, consumer perceptions) – the more sensitive, the lower the actionability potential; *Level of legal change required* for NTM reduction (e.g. constitutional change, EU member state or US state-level competence) vis-à-vis potential (economic) benefits – the higher the level of legal change required (given a potential economic benefit), the lower the actionability potential; *Incentive level for NTM reduction for industry*, reflected by the potential future economic gains that could be reaped; *Level of technical work needed* for NTM reduction – the higher the level of technical work needed, the lower the actionability potential; *Level of "broadness"* or *"narrowness"* of the NTM or regulatory divergence – the 'broader' the measure, the lower the actionability potential." [Ecorys, 2009]

The results – arrived at via the screening of NTMs against the above criteria by experts and businesses and checked by legislators and regulators – are expressed as percentages of NTM reduction and ranged from 50% (EU-US overall) to 48% (US-EU overall). The figures vary from sector to sector, with e.g. 39% in electronics (EU-US) and 70% in communication services (US-EU).

These figures were then used to model a series of scenarios of potential NTM reduction, most importantly, an ambitious one where *all actionable* NTMs could be eliminated (i.e. 50% of all existing NTMs) and a more limited one, where only half of actionable NTMs (25% of all NTMs) could realistically be reduced.

2.2. Results

a) Literature review

The literature review carried out for the purposes of this study facilitated the creation of a list of NTMs existent in every sector of interest,[59] as identified/quantified by previous research. It represents a comprehensive (albeit non exhaustive) overview of the regulatory barriers faced by firms on both sides of the Atlantic when exporting/investing to/in the European/American markets. The NTMs identified were then cross-checked via consultations with sector experts and via the global business survey.

b) Business survey

"The survey generated 5.445 data points for our bilateral country pair indexes. Of these 5.445, 3.518 data points relate to NTM indexes in trade and 1.927 in investments/FDI, leading to 2.017 and 1.088 bilateral country-pair data respectively." [Ecorys, 2009]

[59] 23 sectors, including: travel services, transportation, financial services, computer and information services, insurance, communication, construction, cultural and recreational services, chemicals, pharmaceuticals, biotechnology, machinery, electronics, medical appliances, automotive industry, aerospace industry, food and beverages, iron, steel and metal products, textiles and clothing, etc.

The figures obtained[60] paint an interesting picture with regards to how restrictive the EU and the US are *perceived* to be by the global business community, overall and sector by sector. As far as trade goes, for instance, the EU appears to be slightly more closed off to US exporters (an index of 40.5) than the US is to EU exporters (the index is 36.4) The opposite is true for FDI, where NTMs are a bigger issue for EU investors looking to enter the US (24.6) than for American corporations targeting the EU market (20.3).

Table 5.1 Overall levels of NTMs in trade and investment, for all sectors, on average:

Trade	**No. of observations**	**Average barrier**
EU-US	338	40.5
US-EU	345	36.4
Investment		
EU-US	190	20.3
US-EU	239	24.6

Source: Ecorys 2009

At sectoral level, it would appear that businesses perceive NTMs to be a bigger issue for goods sectors than for services[61] (with transatlantic NTMs reported lower for services than for goods).

"The survey results show that in some sectors (e.g. insurance, chemicals, electronics, biotechnology and textiles) EU trade NTMs and regulatory barriers are higher for US firms than vice versa. In other sectors (e.g. transport and communication services, machinery, food & beverages and iron, steel & metal products) US barriers are higher for EU firms than vice versa. With respect to investment-related NTMs and regulatory divergence, EU-US barriers

[60] "The NTM index is calculated on a 0 – 100 scale with 0 meaning there is not one NTM or any regulatory divergence and 100 meaning there are prohibitively high NTMs and levels of regulatory divergence." [Ecorys, 2009]

[61] This is an important observation that will come into play at a later stage – see section 3.2. a)

tend to be lower across the board compared to US-EU barriers, with the exception of ICT, Communication services, Chemicals, Machinery, Iron, Steel and Metal products." [Ecorys, 2009]

c) Gravity equations

The cross-cutting/sector approach to measuring NTMs was applied to the gravity regression section as well, where equations were run both for the overall impact (economy wide) and sector by sector. While the overall analysis explored the relation between bilateral trade and investment and NTMs, the sectoral one also estimated the trade cost equivalents - i.e. the percentage cost increases caused by the existence of transatlantic NTMs.

Trade (overall)

As far as *trade in goods* goes, the authors split the data into three categories (tech, durable and non-durable goods) and ran a model with a 'transatlantic NTMs' variable for all of them.

Table 5.2 Gravity estimates – pooled estimates with NTM-variables – trade

Variable	Technology	Durables	Non-durables
Tariffs	-11.787***	-7.136***	-3,092***
Transatlantic NTMs	-0.977	-1.832***	-0.353

*Note: *** p<0.01, ** p<0.05, * p<0.10.*

Source: Ecorys 2009

As it becomes immediately apparent, both tariffs and NTMs have a negative (and in all cases but two) a statistically significant (at 1% level) negative effect on EU-US trade flows.

"The proxies for geographic proximity (common border and close distance) generally turn out to have a significant and positive impact on trade although the size of the impact varies across sectors. Also, cultural ties between the two countries (captured by the common language dummy) have a small and positive impact on trade." [Ecorys, 2009]

Trade in services follows a similar path, with NTMs undermining transatlantic flows (from a coefficient of -1.758** overall to as much as -14.089** for construction services).

Investment (overall)

The gravity based analysis on NTMs and FDI tells a very different story. Without sufficient data to run regressions at sectoral level, the work focused on overall effects (all sectors) and, for goods-related FDI, on three categories (tech, durable, non-durable). The results were surprising and, in part, counter-intuitive.

Table 5.3 Gravity estimates – pooled estimates with NTM-variables – FDI

Variable	All sectors	Technology	Durables	Non-durables
Tariffs	9.554**	30.900	17.619**	-7.820
Language	1.759***	1.794*	2.296***	1.968***
Transatlantic NTMs	22.731**	-8.581	-3.554	31.597**

*Note: *** p<0.01, ** p<0.05, * p<0.10.*

Data source: Ecorys 2009

That tariffs have a positive impact on FDI is commonly accepted – one of the motivations for international investment is the so-called tariff-jumping, whereby a company prefers to produce directly abroad as opposed to exporting to a foreign market so as to avoid

(usually high) tariffs. The figures above are particularly interesting given the economic relation between the EU and US – with very low tariffs overall, one would expect their positive impact on FDI to be slightly lower. The rather large numbers are most probably driven by the 'tariff peaks' in some sectors (such as tech) which prompt companies to service the foreign market through production abroad rather than through export.

Slightly more puzzling and somewhat counter-intuitive is the positive effect NTMs seem to have on transatlantic FDI. The most plausible explanation for the unusual results is limited data (the number of observations was lower than for trade flows) that skewed the numbers.

More in line with expectations is the effect of language – positive and significant. "FDI typically involves a large degree of knowledge transfer in which case cultural ties (proxied by common language) matter." [Ecorys, 2009]

Sector by sector

The most interesting aspect of the sectoral analysis revolves around the trade cost equivalents of non-tariff barriers to EU-US trade and investment. Or, put differently, by how much (in percentages) transatlantic trade and investment would grow if NTMs were not an issue.

Table 5.4 Estimated Transatlantic trade cost reductions linked to NTMs (based on underlying regression coefficients)

Sector (selected)	US exports to the EU (%)	EU exports to the US (%)
Aerospace	18.8	19.1
Pharmaceuticals	15.3	9.5
Automotive	25.5	26.8
Financial services	11.3	31.7
Insurance	10.8	19.1

Source: Ecorys 2009

What this means, in practice, is that the regulatory barriers between the EU and the US cost American pharma companies around 15.3 % of their exports to the European market and EU financial corporations 31.7 % of their exports to the US one.

These results are particularly relevant in that they give an academic backbone to the ongoing claims by industry in both the EU and the US that regulatory divergence increases the cost of doing business and creates unnecessary barriers to transatlantic trade and investment (see Chapter IV).

d) Computable General Equilibrium (CGE)

While gravity equations are helpful with measuring the costs of maintaining NTMs, the CGE part of the analysis is perhaps the most important when it comes to quantifying the likely benefits of reducing them.

Economy-wide impact (all sectors)

The result are telling – two economy-wide scenarios (reducing NTMs in all sectors at the same time) with different actionability levels (an ambitious one with 50% reduction of NTMs and a more limited one, with 25% elimination of NTMs) both in the short run and in the long run,[62] indicate that regulatory coherence leads to gains for both the EU and the US, in terms of e.g. GDP, wages and exports.

Hence, all of elements considered (see table below) are positively influenced by a reduction of transatlantic NTMs – as expected, the more ambitious liberalization leads to higher gains, both in percentages and in absolute terms, indicating that the fewer NTMs, the better the overall state of the economy. Also as expected, the figures are higher in the long-run as opposed to the short-run scenarios, as the former allow for the positive spillovers of the

[62] "Short-run effects can be viewed as the static and direct effects of removing the NTMs and regulatory divergence, without capital adjustments. In the long-run, investments are allowed to adjust, causing a forward-looking and dynamic investment effect that reinforces the comparative advantages of the EU and US economies. The difference between short- and long run effects illustrates the importance of (dynamic allocation of) investments as part of what defines the strong transatlantic relations." [Ecorys, 2009]

NTM reduction to be absorbed and for the sectoral linkages to work their way through the economic system as a whole.

Table 5.5 Macroeconomic changes following transatlantic NTM reduction

	Ambitious scenario – short run	**Ambitious scenario – long run**	**Limited scenario – short run**	**Limited scenario – long run**
Real income – billion € ($)				
US	19.0 (24.7)	40.8 (53.0)	7.8 (10.1)	18.3 (23.8)
EU	45.9 (59.7)	121.5 (158.0)	19.4 (25.2)	53.5 (69.7)
Real income % change				
US	0.13	0.28	0.05	0.13
EU	0.27	0.72	0.11	0.32
Real wages % change - unskilled workers				
US	0.24	0.35	0.11	0.16
EU	0.40	0.82	0.17	0.36
Real wages % change - skilled workers				
US	0.26	0.38	0.11	0.17
EU	0.36	0.78	0.16	0.34
Value of exports % change				
US	6.12	6.06	2.72	2.68
EU	1.69	2.07	0.74	0.91

Value of imports % change				
US	3.97	3.93	1.76	1.74
EU	1.63	2.00	0.72	0.88

Source: Ecorys 2009

For instance, the EU GDP is expected to go up, on the long-run, by 0.7% annually (€122 billion) should 50% NTMs be aligned, while the US GDP would increase by 0.3% (€41 billion). These are the highest gains across the board, showcasing an ambitious move towards full liberalization (the reduction of all actionable NTMs – i.e. 50% of all existing non-tariff barriers) as the optimal policy option.

What explains the GDP increase? "Economic gains are achieved through different channels. First of all, cheaper prices for imported products increase consumer welfare. Second, exports and production for competitive sectors increase. Third, production costs are lower for companies due to more aligned regulation and lower levels of NTMs. Fourth, investment flows increase due to more harmonised investment regimes." [Ecorys, 2009]

Another very important result of the CGE modelling is that regarding the change in wages as a result of NTM reductions[63] – they go up, for *both* skilled and unskilled workers. This is key, for one of the recurring points made against trade liberalization, over time, is that it often has a negative impact on the labour market.[64]

Last, but not least, trade flows increase, as both imports and exports go up for both the EU and the US. While the results for exports might be worrisome for the EU, at a first glance (the forecast for the US is far better than that for the EU – American exports increase by 6% in the long run in the ambitious scenario, while European ones only go up by 2%) the following row in the table reveals that the apparent loss is partially compensated by the trend

[63] It is very difficult for a CGE model to predict impact on employment levels – hence the choice to focus on wages instead.

[64] Trade & investment liberalization is accused of hurting employment and driving down the wages of unskilled workers, whose jobs are, more often than not, outsourced to cheap labour countries. Clearly, this is hardly the case with the EU and the US, both highly developed economies with – usually – comparable wages.

in imports (US imports grow by 4% as opposed to the 2% growth of EU imports). What is more, "the EU export effects are smaller in percentage terms but of equal absolute magnitude due to larger EU base flows. […] The total value of exports in 2018 for the EU is projected to be €6.6 trillion ($8.6 trillion) and for the US, €1.9 trillion ($2.5 trillion)" [Ecorys, 2009]

What becomes readily apparent when looking at the table is that there are rather important differences in the benefits to accrue to the US and the EU, with the European Union at a distinct advantage. What explains these results? "Differences in estimated impact for the EU and US are primarily attributable to three factors. First, different sizes of affected trade and investment flows are important, with the EU having higher volumes of trade and investment flows than the US. Second, considerable NTM reductions occur in sectors where the EU has comparative advantages. This implies that NTM alignment, effectively increasing the extent of the market, will be seized upon more effectively by EU based firms (or affiliates) in some sectors like in the automotives, chemicals and insurance sectors. Third, the mixed picture of NTMs for specific sectors allows the EU to gain more from cheaper imports, while both the EU and US gain from lower costs of production due to more aligned NTMs." [Ecorys, 2009]

However, these figures should be taken with a grain of salt – they are indicative of potential outcomes, but they are by no means absolute. Their main purpose is to show that, overall, both the American and the European economies would be better off should regulatory alignment be pursued to the largest extent possible.

Sector by sector

The sectoral analysis paints a somewhat different picture. The study considered two scenarios: the sector effects of economy wide reductions of NTMs (allowing sectors to influence each other) and the sector effects of reducing NTMs each sector at a time (not allowing for inter-linkages).

In the first scenario, numbers are higher, because sectors are allowed to influence each other, something that, in complex economies such as the European and American ones, happens almost by default[65] (e.g. if insurance costs go down as a result of NTM alignment,

[65] It will thus be the numbers stemming from this scenario that the paper reports.

almost all the other sectors of the economy will benefit, for their own business costs will go down as a consequence of paying smaller premiums).

Hence, in what regards the effects on GDP, economy-wide reductions lead to higher gains than a sectoral approach to NTM reduction, which is bound to leave some sectors unaddressed: "if we align NTMs only for one sector at a time – ignoring the fact that sectors influence each other – we see that – if we add up all individual sector gains – the total gains for the EU are around €30.8 billion per year and for the US around €13.5 billion per year" [Ecorys, 2009] as opposed to €122 billion and €41 billion, respectively (see previous section).

The policy implications are quite clear: "The sum of the individual sector-specific gains is much less than the full economy-wide gains when sectors are inter-linked if NTMs are aligned. Thus for national welfare and national income, and following from this, for jobs, the gains for the EU and US as a whole are highest, when a broad economy-wide NTM alignment strategy is pursued, without excluding any sector." [Ecorys, 2009]

The analysis on output tells a less happy story: what happens - in both scenarios - is that output increases for some sectors, while it decreases for others. "The main output effects[66] occur in electrical machinery (a 29 percent increase in US output and a 5.5 percent decrease in EU output), motor vehicles (a 5.7 percent increase in EU output and a 1.4 percent drop in US output), and chemicals, cosmetics & pharmaceuticals (a 2.2 percent increase in EU output and a 3.3 percent drop in US output)." [Ecorys, 2009]

That is to say – there are winners, as well as losers. However, in the particular context of the transatlantic relation, "these results can be partially mitigated by the fact that, through investments, affiliates of US companies benefit from EU sector performance in the EU and vice versa." [idem]

2.3. Importance

The Ecorys [2009] study is fundamental for the discussion surrounding the importance of NTMs and their impact on trade and investment flows, especially in what regards EU-US economic exchanges and their future development (i.e. the TTIP).

[66] In scenario 1; scenario 2 reports smaller numbers, but the directions are the same – increase for some sectors, decrease for others.

First of all, what the study does is provide a comprehensive overview of existent transatlantic NTMs, building on both previous work (the literature review) and its own extensive research and dialogue with stakeholders (the business survey). The outcome is thus a detailed database of the NTMs affecting EU and US trade and investment - it is the most complex and extensive such overview to date and it continues to be referenced in recent TTIP-related impact studies, as we will see next.

Secondly, the study develops trade-cost equivalents of the non-tariff barriers identified, revealing just how much the NTMs maintained by the EU and the US negatively impact businesses on both sides of the Atlantic and how much reducing them would help. Beyond its face value, what this endeavour adds to the conversation on NTMs is validation of constant complaints coming from the business community towards the cost increase caused by regulatory divergence and their sustained call for tighter regulatory cooperation aiming at better regulatory alignment.

Thirdly, the CGE analysis revealed the impact NTM reduction would have on the EU and US economies, both overall and on a sectoral basis, indicating that regulatory cooperation would positively affect GDP, wages and trade flows in both jurisdictions. When taken sector by sector, results are slightly more mixed, with both winners and losers.

Perhaps most importantly, what this study does is provide the starting point of the economic study relied on by the European Commission's TTIP Impact Assessment. The Ecorys [2009] figures feed right into the evaluations used as input for EU trade policy formulation and in that lies their most important contribution, as far as this paper is concerned.

3. Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment (CEPR 2013)[67]

As EU and US policy makers were considering ways of deepening the transatlantic economic partnership and discussions were progressing along the lines of a possible free trade

[67] Centre for Economic Policy Research (CEPR) London (J. Francois, M. Manchin, H. Norberg, O. Pindyuk and P. Tomberger). Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment. Final Project Report. *CEPR London*, March 2013

agreement, an evaluation of the impact such a deal would have on both economies was deemed imperative. The Centre for Economic Policy Research (CEPR) London was tasked by the European Commission to assess possible effects of a transatlantic trade and investment partnership and its findings were then used (as part of the Impact Assessment) as a basis for recommending the launching of what became known as the TTIP.

As mentioned before, the study builds on the previous work done by Ecorys, using its definitions and quantification of NTMs,[68] while updating the figures on trade and investment volumes: "This report builds on an important previous study benchmarking the current level of transatlantic NTBs [Ecorys, 2009]. Since the Ecorys study was published, economic conditions have changed, while the likely focus of a possible agreement is now better defined. Working with new data (including the GTAP[69]8 database, more recent trade and tariff information and new investment income data from Eurostat), the present report provides an updated and more accurate set of estimates." [CEPR, 2013]

3.1. Methodology

While the study builds on Ecorys [2009] it does not mirror its approach entirely: "We provide new CGE based estimates for the economy-wide impact of removing not only NTBs (quantified on the basis of the estimates in Ecorys (2009) but also tariffs affecting transatlantic trade flows. In addition, we have expanded the analysis by providing an assessment of the impact of removing barriers to foreign direct investment (FDI) on the activity of multi-national enterprises (MNEs) across the transatlantic marketplace. Both the CGE and investment assessments build on the survey and econometric work of the original Ecorys study." [idem]

Hence, the study breaks the analysis in two, looking at trade effects and FDI effects separately, with a Computable General Equilibrium methodological approach for the former and a gravity-based one for the latter.

[68] Although they are usually referred to, throughout this study, as NTBs – that is Non-Tariff Barriers; they mean the same thing.

[69] Global Trade Analysis Project

a) Computable general equilibrium (CGE)

So as to evaluate the likely trade effects of an EU-US FTA, the CEPR [2013] study uses a dynamic CGE model which "covers global world trade and production, allows for scale economies and imperfect competition, includes intermediate linkages between sectors and allows for trade to impact on capital stocks through investment effects which allows to obtain longer-run impact on the economy." [CEPR, 2013]

The analysis covers both economy-wide and sectoral impacts and looks at the likely effects on not only the European and the American economies, but also on those of third countries (namely other OECD, high-income countries; Eastern Europe; Mediterranean countries; China; India; ASEAN; MERCOSUR; Low Income countries; Rest of the World).

The scenarios the study considers fall into two categories: limited (where bilateral liberalization would target only a given number of issues – tariffs only; NTMs in procurement only; NTMs in services only) and comprehensive (where the FTA would address both tariffs and NTMs, economy wide). As the latter are more relevant to the topic of regulatory coherence – and, as such, to the purpose of the thesis – we will focus on those.

Hence, as far as the comprehensive scenarios go, while they employ the definition of 'actionability' and the rough estimates of 'actionable NTMs' arrived at in Ecorys [2009], they are much more modest in terms of the levels of reduction considered realistically attainable. Hence, the ambitious scenario works with 100% elimination of tariffs and 25% reduction of all NTMs (that is, 50% of actionable non-tariff measures) while the less ambitious one assumes 98% elimination of tariffs and 10% reduction of all NTMs (i.e. 20% of the actionable ones).[70]

An important element introduced by CEPR [2013] is that of *spill-overs*, which are, essentially, the effects bilateral transatlantic liberalization would have on other parties than those directly targeted by the agreement – in this case, on other countries than the EU and the US. Authors define two kinds of such spill-overs.

Direct ones "are based on the assumption that improved regulatory conditions negotiated between the EU and the US will also result in a limited fall in related trade costs for third countries exporting to the EU and US. In other words, this captures the extent to

[70] CEPR also works with different levels of NTB reduction in procurement – 25% in the less ambitious scenario and 50% in the ambitious one.

which the bilateral streamlining of regulations and standards, and reduction in regulatory burdens, also benefit other exporters to the EU and US. This positive market access effect for third countries is modelled as being around 20 per cent of the bilateral fall in trade cost related to NTBs for the core scenarios." [CEPR, 2013]

Indirect spill-overs capture the impact of exporting the standards adopted bilaterally between the EU and the US to other countries – as the European and the American economies, taken together, represent the world's biggest market, it is not unlikely that the regulations governing them might be adopted by third countries as well, to the point that the rules established via the transatlantic partnership might become global standards. "This implies that the bilateral agreement will give EU and the US improved market access in third markets from reduced NTBs. In addition, there will be scope for reductions in NTBs amongst third countries, as they converge further on common standards. Therefore, indirect spill-overs will lead to lower costs and greater trade between third countries as well. We have modelled indirect spill-overs as 50 per cent of the direct spill-over rate." [idem]

Results are projected up to the year 2027, an estimated 10 years after the assumed implementation date of the agreement (2017) thus capturing the long-run effects of modelled policy changes.

b) Gravity

The analysis with regards to investment takes a different road than the one on trade: the study prefers a partial equilibrium approach, where NTB reduction (as opposed to a comprehensive FTA) is the variable of interest. The quantification of NTBs is based on a consolidated survey, building on the figures arrived at in Ecorys [2009], European Commission and the Government of Canada [2009], Francois, Sunesen and Thelle [2009, 2012].

The purpose of the exercise is to see the direction of the effects NTBs currently have on FDI (negative) and the size of the impact, so as to estimate the likely gains triggered by NTB reductions. "The resulting NTB coefficient provides an estimate of the impact of changes in the level of the NTB index on three indicators: (1) the level of investment income (the elasticity of FDI income with respect to the NTB index); (2) the number of affiliates from

a home country in a given host country (the elasticity of number of affiliates with respect to the NTB index); and (3) the number of affiliate employees (the elasticity of number of affiliates with respect to the NTB index)." [CEPR, 2013]

3.2. Results

a) Computable general equilibrium

Macroeconomic impact

In terms of the macroeconomic effects of a comprehensive transatlantic FTA, they seem to be, like with Ecorys [2009], positive, with GDP increases (in both percentage form and absolute values) for both the EU and the US, as in the table below. What is particularly interesting in the case of this study is that the authors report their findings in a disaggregated form, highlighting the effects of each policy pillar (be it tariffs or NTMs) on the economic indicators considered.

This is a welcome decomposition, especially in light of the debate surrounding regulatory alignment and the benefits of pursuing it within a trade and investment agreement – as it becomes obvious, reducing non-tariff barriers has positive effects on the GDP, in most cases its influence far outweighing the effects of tariff reductions alone. This is true for both the EU and the US, with stronger effects in the case of the American economy (in the ambitious scenario, eliminating tariffs only would increase the US GDP by 0.04%, while a reduction of NTBs in goods would yield a boost of 0.23%).

These findings back - with actual figures - the already widely held view that future FTA-induced growth will mostly come from regulatory alignment, given that tariffs between the EU and the US are already at an all time low.

Table 5.6 Changes in GDP, 2027 benchmark, 20% direct spill-overs

GDP change		**Stemming from (the liberalization of):**				
	Total	**Tariffs**	**NTBs - goods**	**NTBs - services**	**Direct spill-overs**	**Indirect spill-overs**
GDP % change						
Less ambitious scenario						
EU	0.27	0.10	0.12	0.01	0.03	0.01
US	0.21	0.04	0.11	0.03	0.03	0.00
Ambitious scenario						
EU	0.48	0.11	0.26	0.03	0.07	0.02
US	0.39	0.04	0.23	0.06	0.06	0.00
GDP change – million €						
Less ambitious scenario						
EU	68.274	25.394	29.250	3.482	7.984	2.164
US	49.543	9.784	25.505	6.899	7.404	-72
Ambitious scenario						
EU	119.212	27.409	64.344	7.014	16.291	4.154
US	94.904	10.120	56.202	14.014	14.760	-216

Source: CEPR 2013

Another interesting aspect is that reducing NTMs in goods has a bigger impact on GDP than a reduction of NTMs in services (0.26% vs. 0.03% for the EU and 0.23% vs. 0.06% for the US in the ambitious scenario). This is not a surprising result if we consider two facts:

first, the Ecorys business survey [2008] found that NTMs in goods were perceived as higher than the ones in services (see section 2.2. b) before). Second, trade data tells us goods have a bigger share in bilateral trade than services, of approximately 65% [CEPR 2013]. Which means that "for comparable cuts in barriers in per cent terms, the differences in barriers (combined with the absolute importance in goods trade relative to services trade) imply greater impact from NTB reductions in goods than in services." [idem]

As with the Ecorys [2009] simulation, here too the EU seems to be reaping greater benefits from liberalization than the US. The possible explanation for this 'benefit gap' is that "the EU has a strong, positive balance in goods sectors with relatively high NTB levels. This means that on average European firms face a higher cost burden linked to transatlantic NTBs than do US firms, so that the reduction in the cost burden linked to NTBs will be somewhat disproportionate as well, benefiting European firms more on average. As such, we can expect somewhat greater benefits from improved market access for the EU than for the US." [CEPR, 2013]

Overall, however, both the EU and the US appear to be better off with an ambitious, comprehensive FTA that targets regulatory divergence. And this seems to be true not just in terms of GDP, but also when it comes to household income.[71]

Table 5.7 Changes in household income, 2027 benchmark

Household disposable income	**Less ambitious scenario**	**Ambitious scenario**
EU % change	0.28	0.49
US % change	0.18	0.35
EU – million €	39.813	70.820
US – million €	29.982	58.434

[71] "Household disposable income is a subset of total income (it is less than total national income). It represents the income available to spend on final consumption (food, clothing, transport, housing), after allocations to the government and for savings. Changes in this variable therefore measure the changes in private consumption valued at current prices." [CEPR, 2013]

EU – € per household	306	545
US – € per household	336	655

Source: CEPR 2013

As it becomes obvious, the gains induced by a comprehensive FTA with a regulatory coherence element seem to reach citizens as well, impacting not only the economy as a whole, but trickling down to individual households. This is fundamental, for one of the often quoted problems with trade liberalization is that it favours businesses at the expense of consumers.

On the minus side, liberalization comprising the elimination of tariffs automatically means loss of tariff revenue. The amounts depend on the scenario. For instance, as far as the EU is concerned "reducing tariffs alone would cause these revenues to decrease by 7.3 billion euros, relative to the baseline situation in 2027. On the other hand, under the ambitious and less ambitious scenarios with full liberalisation, tariff revenues would decreases by less – 5.4 billion euros and 6.4 billion euros, respectively. This is due to increased trade with third countries from further liberalisation (with spill-over effects, or in other words the lowering of part of the NTBs on a MFN basis) relative to tariffs only, which would result in additional tariff revenues." [CEPR, 2013]

Labour

The impact on wages seems to be positive, as they go up for both skilled and unskilled workers, in both the EU and the US.

Table 5.8 Changes in wages, 2027 benchmark

Wages - % change	**Less skilled**	**More skilled**
Less ambitious scenario		
EU	0.30	0.29
US	0.22	0.21

Ambitious scenario		
EU	0.51	0.50
US	0.38	0.36

Source: CEPR 2013

An important observation is that the model used is a long-run model with a fixed labour supply, meaning that "changes in labour demand are captured through wage changes (in this case rising wages). As wages increase in the experiments, this means a rising demand for labour, so that under a flexible labour supply specification, employment would increase instead." [CEPR, 2013]

As it remains difficult to measure employment fluctuations and thus assess whether a comprehensive transatlantic FTA would negatively impact total employment levels in the EU and the US, what the authors choose to do instead is look at labour displacement. More specifically, in order to capture the adjustment of the labour market in the wake of the agreement, they come up with "a measure of variation of employment across sectors and thus a measure of the actual number of workers that change jobs by moving across sectors. In essence, an index value of 0.5 means that roughly 5 workers out of 1,000 have moved across sectors." [CEPR, 2013]

Table 5.9 Displacement in less and more skilled labour in the EU and the US, total effects, 2027 benchmark

Labour displacement (%)	**Less skilled**	**More skilled**
Less ambitious scenario		
EU	0.33	0.28
US	0.21	0.21

Ambitious scenario		
EU	0.65	0.55
US	0.48	0.46

Source: CEPR 2013

As the figures indicate, the effects of trade liberalization on labour displacement are somewhat larger for unskilled workers, but remain, overall, fairly limited. By comparison to the average *annual* change in employment in the EU in manufacturing, estimated by Eurostat to be at around 3.7% [CEPR, 2013] a figure of 0.65% over a time horizon of 10 years seems quite small indeed.

The changes are driven by wages – higher wages in certain sectors attract workers away from other, low paying ones. In this context, it's interesting to see the cross-sectoral labour reallocation effects of the FTA, in both the EU and the US. "In the EU, the motor vehicle sector sees employment expand by 1.28 per cent for skilled labour, and 1.27 per cent for less skilled labour. In contrast, there is a significant contraction in the electrical machinery and metals sectors. Mirroring this pattern, in the US the motor vehicle sector sees falling employment, and the metals and metal products sector sees a rise. In the US, like the EU, the electrical machinery sector contracts in terms of employment." [CEPR, 2013]

This is crucial information, for it predicts which sectors will be negatively affected by the FTA, employment wise – or, in cruder terms, which categories of workers could lose their jobs. This has economic, as well as political implications, as certain labour unions might, therefore, oppose comprehensive liberalization. It is an aspect we will return to towards the end of the section.

Output and trade

Sector by sector

That some sectors lose while others win is a conclusion[72] stemming from the impact the comprehensive FTA appears to have on output.

In the EU there seems to be a small increase in output in most of the sectors, from agriculture and processed foods to finance and insurance, the most notable upsurge being in motor vehicles, where production goes up by 1.54% in the ambitious scenario. In other sectors however - such as transport equipment and metals - there is a decline, the biggest fall being registered in electrical machinery, where there is a quite large contraction of 7.28% in the ambitious scenario.[73]

These numbers echo the ones in employment referred to before, where motor vehicles saw job numbers going up, while electrical machinery, on the contrary, experienced significant job loss (see previous section). Taken together, these figures suggest that electrical machinery may be a special case – it is clearly an outlier, results wise and might require both further exploring into why it is so and, also, special attention, policy wise, from European decision makers.

What is particularly interesting with output impact at sector level is that tariff reductions and NTM reductions have opposite effects: "For example, for motor vehicles, tariff reductions alone harm the EU motor vehicle sector, with falling output levels. In contrast, with NTB reductions, the sector expands. This is strongest under the ambitious scenario, with the deepest NTB reductions (half of actionable or 25% of total NTBs)." [CEPR, 2013] This observation is perhaps one of the strongest points to be made in favour of pursuing regulatory coherence in the TTIP and, by extension, in trade and investment agreements in general.

[72] Similar to the one reached by Ecorys [2009].

[73] The automatic policy implication is that businesses in this sector have a vested interest in opposing comprehensive liberalization. We will revisit this point.

The US figures tell a similar story: some sectors expand their production (machinery, metals, water and air transport, communications, construction etc.) while others contract (processed foods, motor vehicles, finance, insurance).

The results in sectoral trade (total exports and imports) changes mirror the ones in output. In the EU, the biggest increase is in motor vehicles, where exports go up by 41.75% in the ambitious scenario. At the opposite end, there is electrical machinery, where exports contract by 0.01%, while imports increase by 5.87% in the ambitious scenario.

On the US side, things look much more promising – all sectors see their exports increase, with no exception, the most impressive such increase being in motor vehicles (59.47%). While imports also increase in most cases, the numbers are far smaller (e.g. 20.81%).

While these sectoral numbers are interesting to look at, especially given their important policy implications, one must keep in mind that they stem from a general equilibrium model, which means they reflect systemic effects: "with the complex mix of changes in barriers across sectors, combined with intermediate linkages, the final mix of outcomes will hinge on interactions across sectors [and] may follow from general equilibrium changes rather than changes limited to a particular sector." [CEPR, 2013] This essentially means that the effects on electrical machinery, for example, may well be caused by liberalization in other sectors and the subsequent movement of factors of production thereby triggered.

Bilaterally, trade goes up across the board, with both EU exports to the US and US exports to the EU going up;[74] the numbers are very large – for instance, US exports of motor vehicles are expected to go up by an impressive 346.8% in the ambitious scenario.

Overall

The direction of the impact is the same in the case of aggregated numbers, with exports going up for both the EU and the US.

[74] Which is a natural outcome – after all, the very purpose of an FTA is to increase trade between the parties.

Table 5.10 Changes in bilateral exports to the partner country, 2027 benchmark, 20% spill-overs

Bilateral exports		**Stemming from (the liberalization of):**				
	Total	**Tariffs**	**NTBs - goods**	**NTBs - services**	**Direct spill-overs**	**Indirect spill-overs**
% change						
Less ambitious scenario						
EU	16.16	7.06	9.34	0.69	-0.76	-0.15
US	23.20	13.67	8.80	0.67	0.01	0.02
Ambitious scenario						
EU	28.03	7.67	21.00	1.40	-1.73	-0.34
US	36.57	15.34	19.93	1.37	-0.08	0.03
Million €						
Less ambitious scenario						
EU	107.811	47.083	62.289	4.598	-5.089	-989
US	100.909	59.476	38.284	2.934	57	77
Ambitious scenario						
EU	186.965	51.185	140.106	9.332	-11.525	-2.243
US	159.098	66.720	86.698	5.966	-335	151

Source: CEPR 2013

Having the effects broken down into pillars, here too it becomes obvious that the largest gains come from lowering NTBs in goods – a result that comes to certify that, indeed, the biggest obstacle to transatlantic trade is represented by non-tariff measures.

The effects are consistently larger for the US, in both scenarios – this would be a predictable outcome if the EU market were more closed off to US imports than the American market is to European ones, as, in this case, liberalization would have a greater impact on US exporters. And this, in fact, the case – in the Ecorys business survey, the EU market was indeed found less accessible than the US one – see section 2.2. b).

An interesting aspect is that spill-overs (especially direct ones) appear to have a negative impact on transatlantic trade – it could be a case of trade diversion: as common regulations in the EU and the US favour third countries' access to the European and American markets and as these common regulations are then adopted worldwide, thus facilitating, in turn, EU/US access to third country markets, some of the trade that would have otherwise taken place exclusively between the parties to the FTA is redirected towards commercial partners outside the treaty. The effect is fairly small by comparison to the total numbers and it is not, in and of itself, a negative outcome, for it means that trade with third countries increases as well as a result of a comprehensive treaty between the EU and the US.

And that seems to be the case indeed, when one looks at the numbers arrived at for *total* exports and imports.[75]

Table 5.11 Changes in total EU and US exports, 2027 benchmark, 20% spill-overs

Total exports		**Stemming from (the liberalization of):**				
	Total	**Tariffs**	**NTBs - goods**	**NTBs - services**	**Direct spill-overs**	**Indirect spill-overs**
% change						
Less ambitious scenario						
EU	3.37	1.28	1.43	0.11	0.25	0.28
US	4.75	2.11	1.69	0.16	0.52	0.27

[75] In the case of the EU, intra-EU trade flows (exports and imports between Member States) are not taken into account.

Ambitious scenario						
EU	5.91	1.41	3.23	0.23	0.48	0.56
US	8.02	2.34	3.79	0.33	1.01	0.54
Million €						
Less ambitious scenario						
EU	125.232	47.577	53.341	4.211	9.442	10.564
US	142.071	63.219	50.600	4.717	15.505	8.031
Ambitious scenario						
EU	219.970	52.327	120.313	8.523	18.010	20.959
US	239.543	70.265	113.630	9.624	30.042	15.982

Source: CEPR 2013

Hence, total exports increase for both the EU and the US, under both scenarios, with numbers under the ambitious experiment being, as expected, higher. Also as expected, it is NTB reduction in goods that drives the biggest share of the increase. Spill-overs, both direct and indirect, have a positive and significant effect, indicating that regulatory alignment across the Atlantic would benefit world trade.

This is important, as it backs the view that third countries would not be hurt by a potential EU-US FTA. This all the more true as the trend in total imports is the same as in total exports – that is, after the implementation of the agreement, both the EU and the US will import more, in total – in other words, third countries will export more to the European and American markets, post-FTA, than they do now.

In fact, all the countries analyzed in the study see their total exports go up post-FTA implementation, with ASEAN witnessing the largest increase.[76]

[76] GDP effects in third countries are also positive, with ASEAN in the lead again: a GDP increase of 0.45% in the less ambitious scenario and 0.89% in the ambitious one.

Table 5.12 Changes (%) in total exports by region, 2027 benchmark, 20% spill-overs

	Less ambitious scenario	Ambitious scenario
EU	3.37	5.91
US	4.75	8.02
Total other countries	0.51	1.04
Whereof:		
Other OECD, high income	0.50	1.00
Eastern Europe	0.42	0.95
Mediterranean	0.28	0.59
China	0.47	0.96
India	0.43	0.94
ASEAN	1.17	2.31
MERCOSUR	0.47	0.97
Low income	0.42	0.95
Rest of the world	0.37	0.76

Source: CEPR 2013

The conclusion to be drawn is that a comprehensive FTA that includes regulatory coherence would boost trade not only between the EU and the US, but also between them and the rest of world. In other words, the TTIP would encourage global trade flows. As the biggest chunk of the increase is caused by regulatory alignment, it would safe to say pursuing regulatory coherence would most likely have a positive impact on international trade flows.

The flipside is that some of these increases (to either the other party to the FTA or to third countries) will come at the expense of domestic trade. In the case of intra-EU flows for instance, the amount of trade diversion "will amount to €72.1 billion under full liberalization, of which €26.0 and €23.6 billion are caused by spill-overs and NTBs in goods respectively." [CEPR, 2013] And this is an issue.

Another vantage point on the spill-over numbers is that common global standards potentially triggered by transatlantic regulatory convergence would benefit the European, the American and the rest of the world economies. Should regulatory coherence in the TTIP hypothetically put the EU and the US in a position of regulatory leadership, there would be important consequences in terms of macroeconomic impacts (such as the ones reported before) for all of the world players. A move of this nature would likely also affect global economic governance. The political implications of such an interpretation of these numbers are tremendous and they will be explored in detail in Chapter VII. For the time being, suffice it to say transatlantic regulatory alignment would have important global consequences, in more ways than one.

b) Gravity

As far as investment goes, gravity results point towards a negative (significantly so) impact of transatlantic NTBs on all three categories (FDI income, number of affiliates, number of employees).

Table 5.13 Regression estimates for NTBs and FDI

Variable	FDI income	No. of enterprises	No. of employees
Log distance	-0.5381***	--0.9525***	-0.9773***
Log NTB index for FDI	-0.5057***	-0.3463***	-0.3136***

Source: CEPR 2013

*Note: *** p<0.01, ** p<0.05, * p<0.10.*

Here, unlike in the Ecorys [2009] study (see section 2.2. c) before), there are no unexpected outcomes (i.e. no positive relations) suggesting that the data used here was more adequate and, consequently, prone to yielding results more in line with what one might expect based on economic reasoning.

3.3. Importance

The CEPR [2013] study is fundamental, primarily because it was relied on by the EC's Impact Assessment and thus formed the basis for recommending the launch of the TTIP as a comprehensive trade and investment agreement set to target, inter alia, regulatory divergence between the EU and the US. Hence, its economic impact analysis, disaggregated into pillars, served to show, without equivoque, that lowering NTMs (in goods and services) contributes the most to the economic gains to be attained post-TTIP, in terms of both GDP and levels of trade flows: "As much as 80% of potential gains come from cutting costs imposed by bureaucracy and regulations." [CEPR, 2013] In other words, it provided evidence that pursuing regulatory coherence would benefit both the European and the American economies and it should therefore be a primary goal of the TTIP: "Reducing non-tariff barriers will be a key part of transatlantic liberalization." [idem]

Extrapolating, the study made the case of regulatory coherence as part of a trade and investment agreement that much stronger, by showcasing the clear-cut economic benefits that regulatory alignment would yield.

Benefits that, unfortunately, will not be distributed evenly across sectors – while output and trade go up for some, they decrease for others – a trend with important consequences. Most importantly, the sectors that are at a loss (e.g. electrical machinery) are likely to organize and oppose either the TTIP in its entirety, or, at the very least, a comprehensive approach to liberalization.

This potential anti-TTIP outcome is further fuelled by the numbers arrived at in labour displacement, where certain sectors lower their labour demand. In other words, certain categories might very well find themselves unemployed. Even if, systemically, wages go up and FTA-induced labour turnover seems almost insignificant by comparison to reported

yearly statistical levels, this is of little consolation to those who will lose their jobs post-TTIP. The traditional rhetoric that paints free trade as an enemy of jobs is thus fuelled by figures such as these, adding to the pressure on policy makers to address the issue and propose solutions.

The European Union has already recognized the existence of a problem and stated that "the EU and national governments will need to be prepared to support people who need to move between sectors." [EC, 2013]

Despite this somewhat gloomy outlook, the TTIP is not entirely a story of systemic win, individual loss. In fact, as far as income goes, households in both the EU and the US benefit in a post-implementation world. By estimating the likely gains of individual households in both jurisdictions, the study points to the fact that the overall positive impact of the agreement will trickle down to consumer level, in a very direct way. In addition to indirect gains (lower prices, a wider range of products and services to choose from etc.) and potential higher wages, household income increases are an added plus that serve to show that both European and American citizens are actually better off with, rather than without, the TTIP.

Another important contribution of the study is that it alleviates concerns that the TTIP would hurt third countries – as the results prove, that is not the case. However, the numbers do point to another problem – trade diversion. It is likely that increased trade with third countries comes at the expense of *some* intra-EU trade; it is equally likely that increased trade with the US will have the same effect. The consolation is that the loss caused by the TTIP via trade diversion will be more than compensated by the gain triggered by the TTIP via increased trade flows with both the US and third countries.

Last but not least, the CEPR [2013] study serves as a benchmark for other studies assessing the likely economic impact of the transatlantic agreement, as carried out by EU Member States and other stakeholders – which we look into next.

4. Additional impact studies

Given the sheer magnitude of the impact the TTIP is bound to have on the countries party to the agreement (and not only), interest in estimating likely effects was not limited to the Commission, but was echoed, on the one hand, by EU Member States, who commissioned their own analyses, and, on the other hand, by other institutions, who came up with studies as well.

4.1. EU Member States

In what follows, we will briefly review some of the studies and explore the similarities and differences between them. We will also see how they compare to the CEPR [2013] study used by the Commission.

One observation needs to be made before we proceed – all these studies look at the impact of the TTIP on the country in focus (i.e. the UK, France, Germany etc.) as well as on the 'the rest of the EU'[77] (with the exception of Austria and Italy, who only explore national impacts). Because the numbers covering the EU as a whole are more relevant to the topic of our discussion, we will mostly report those, wherever available.

a) Sweden

The Swedish study[78] is based on a static CGE with a time horizon of 10 years, building on GTAP 8 for trade data and Ecorys [2009] for NTB numbers (including actionability). Investment data is not included in the model. It envisages two scenarios: a less ambitious one with 25% removal of actionable NTBs and a more ambitious one with a 50% removal rate. In both scenarios, tariffs are eliminated. No spill-over effects are considered.

[77] At the time of the analysis, that meant EU26 (Croatia had not yet joined the European Union).

[78] S. Kinnman and T. Hagberg. Potential Effects from an EU–US Free Trade Agreement – Sweden in Focus. *Swedish National Board Of Trade*. November 1, 2012

The study finds a positive impact of the TTIP on both the EU and the US economies, much like CEPR [2013], with the EU GDP going up by 0.12% in the limited scenario and 0.22% in the ambitious one. Unlike CEPR [2013], however, the Swedish analysis predicts the US will have more to gain as a result of the agreement than the EU, with the American GDP increasing by 0.24% and 0.51%, respectively. Also unlike the study used by the Commission, income effects on the rest of the world are negative, with the GDP decreasing by 0.07% in the limited scenario and 0.15% in the ambitious one.

Output effects are positive but small for the EU (0.06%), positive and larger for the US (0.65%) and negative for the rest of the world (-0.40%) – all in the limited scenario. The figures for the ambitious scenario are not reported.

Trade wise, both exports and exports surge for the both the EU and the US. Hence, EU exports to the US go up by 19.5%, while US exports to the EU increase by 19.8%. Trade diversion is felt both in intra-EU trade (which drops by 1.4%) and in global flows, as EU exports to third countries fall by 0.8%, while US exports to the rest of the world decrease by 2.9% (unlike CEPR [2013] where worldwide trade effects were positive).

b) UK

The UK study[79] - commissioned by the Department for Business, Innovation and Skills - uses a dynamic CGE projected up to 2027, with GTAP 8 data for trade and Ecorys [2009] numbers on NTMs. It is a study carried out by CEPR, so the similarity to CEPR [2013] (the EU study) discussed before are rather apparent, in terms of both approach and results.

It proposes two basic scenarios, one modest and one ambitious, which it then modifies[80] in terms of level of NTB reduction for various sectors considered special cases.

[79] Centre for Economic Policy Research (CEPR) London. Estimating the Economic Impact on the UK of a Transatlantic Trade and Investment Partnership Agreement between the European Union and the United States. *CEPR London*, March 2013

[80] "In the modest scenario, processed food liberalization is limited because these are the sectors that stand out in terms of protection and political sensitivity, and so are candidates for treatment as "highly sensitive" sectors. Chemicals, motor vehicles, and Business/ICT services are emphasized in the modified scenarios because of their importance to overall UK exports." [UK Study, 2013]

Because those modifications were operated so as to reflect the realities of the UK economy, we will focus in what follows on the basic versions of the scenarios, which are more relevant to our interest in overall EU and US effects.

Table 5.14 Scenarios considered

Scenario	Tariff removal	Reduction of NTMs
Basic modest	100%, except limited reductions for processed food	25% of actionable NTMs
Modified modest	100%, except limited reductions for processed food	25% of actionable NTBs, except 50% NTBs in chemicals, motor vehicles, business/ICT services.
Basic ambitious	100%	50% of actionable NTMs
Modified ambitious	100%	50% of actionable NTBs, except 75% NTBs in chemicals, motor vehicles, business/ICT services

Source: UK study 2013

The figures arrived at follow the trend in CEPR [2013], in terms of directions - the TTIP would positively influence the EU and the US economies, for both GDP and trade flows. The results are reported in disaggregated fashion, emphasizing that it is, again, NTB removal that brings the greatest benefits to both parties.

Table 5.15 Macroeconomic effects

	Basic modest			Basic ambitious		
	Total	**Tariffs**	**NTBs**	**Total**	**Tariffs**	**NTBs**
GDP % change						
EU 26	0.37	0.17	0.20	0.61	0.18	0.43
US	0.16	0.04	0.13	0.31	0.04	0.27
Exports % change						
EU 26	1.18	0.53	0.65	2.02	0.57	1.45
US	3.57	1.90	1.66	5.84	2.11	3.73
Imports % change						
EU 26	1.18	0.52	0.65	2.01	0.56	1.45
US	2.32	1.24	1.08	3.79	1.37	2.42

Source: UK study 2013

Much like in CEPR [2013], the EU has more to gain in terms of GDP growth, but the US benefits from larger increases trade flows wise. Also, the numbers in the ambitious scenario are larger, suggesting the more comprehensive the TTIP, the bigger the gains for both parties.

Investment effects are not looked into, while sectoral impacts (output) and wages are modelled for the UK alone.

c) Austria

Based on a CGE model benchmarked to 2007 and using Ecorys [2009] figures for NTMs, the Austrian study[81] commissioned by the Austrian Federal Ministry of Economy, Family and Youth looks at the impact certain EU FTAs – including the TTIP – would have on the Austrian economy.

Its conclusions – the impact of the TTIP is positive, with most of the gains coming from NTM removal. "For the Austrian economy, the primary gains are linked to deeper integration with North America. A possible agreement with the United States offers the most gains, in terms of wages, employment, and national income. […] for the most part these gains follow not from tariffs, but rather from reductions in non-tariff measures." [FIW, 2012]

d) France

Using a dynamic CGE based on GTAP 7 data projected up to 2025, the French study[82] (carried out by CEPII) designs a central scenario – the 'reference' scenario – with complete elimination of tariffs and a 25% reduction of NTMs.

The element of particular interest is that the quantification of NTMs comes from the authors' own calculations, based on gravity equations aimed at estimating the ad-valorem equivalents (AVE) of non-tariff measures. The conclusion regarding the impact of NTMs is that they are much more costly to bilateral trade than tariffs, with AVEs ranging from 48% for the EU and 51% for the US in agriculture, 43% (EU) and 32% (US) in manufacturing and 32% (EU) and 47% (US) in services. The AVEs arrived at in this study tend to be higher, on average, than the corresponding figures in Ecorys [2009], which will have an impact on results, as we will see.

Unlike other Member State studies, the French one looks at the potential impact of the TTIP on the EU as a whole – i.e. EU 27.

[81] J. Francois and O. Pindyuk. Modeling the Effects of Free Trade Agreements between the EU and Canada, USA and Moldova/Georgia/Armenia on the Austrian Economy: Model Simulations for Trade Policy Analysis. *FIW-Research Reports* 2012/13 N° 03, January 2013

[82] L. Fontagné, J. Gourdon and S. Jean. Transatlantic Trade: Whither Partnership, Which Economic Consequences? *CEPII Policy Brief*, No 1, September 2013

The results for the reference scenario indicate significant gains for both the EU and the US, in terms of both GDP growth (around 3% for both jurisdictions) and trade flows, with bilateral trade expected to go up by roughly 50% on average. The authors provide disaggregated results on bilateral trade impacts, looking at the growth in agriculture (the highest – 168.5% for the US and 149.5% for the EU), industry (66.4% for the US and 61.8% for the EU) and services (14% for the US and 24% for the EU).

The results are interesting to look at by comparison to the ones in CEPR [2013], where the US was expected to gain more, bilateral trade wise, than the EU. This study confirms that expectation, but only at sectoral level and only in agriculture and industry – in services, the EU reaps much bigger benefits. This may have to do with the initial level of NTM protection: as the American market is more closed off in services, while the European one is more protected in manufacturing (see paragraph two) liberalization would impact the two parties to the FTA differently, with the US gaining more in industry and the EU benefiting more from service liberalization.

In terms of total exports and imports, they are predicted to increase for both partners: exports go up by 7.6% for the EU and 10.1% for the US, while imports increase by 7.4% (EU) and 7.5% (US).

The study finds indications of trade diversion, both within the EU and between TTIP parties and the Rest of the World (RoW) although the numbers are generally rather small. Hence, intra-EU trade is expected to decrease by 1.2%, while EU exports to RoW would be going down by 1.4%. American exports to third countries would also drop by an estimated 1.4%.

In addition to the reference scenario, the authors provide four more: 'tariff only' scenario (elimination of tariffs, no action on NTMs); targeted NTM cuts scenario (the most significant NTM reductions will come in those sectors that are the most heavily protected – around 30% - while for the others the cut will be around 15%); harmonization spill-overs scenario (where NTMs towards third countries are assumed to be reduced by 5% as a result of a bilateral NTM reduction of 25%); and finally, an Ecorys scenario (the assumptions are the same as in the reference scenario – i.e. elimination of tariffs and 25% removal of NTMs – but the estimates of the initial NTM levels come from Ecorys [2009], as opposed to own calculations).

Table 5.16 Scenario comparison

Reference scenario		Alternative scenarios			
		Tariffs only	Targeted NTM cuts	Harmonization spill-overs	Ecorys
GDP % change					
EU 27	0.3	0.00	0.2	0.5	0.1
US	0.3	0.00	0.3	0.5	0.2
Exports % change					
EU 27	2.3	0.4	1.9	3.4	1.3
US	10.1	2.1	10.4	14.5	5.4

Source: CEPII 2013

The numbers arrived at – and especially the differences between them – make three very important points.

First – it is NTM reduction that seems to matter most. The tariff only scenario yields much smaller benefits (or no benefits at all, GDP wise) than any of the scenarios that include some degree of non-tariff barrier removal – to the extent that as much as "80% in the reference scenario seems to be coming from the NTM cuts." [CEPII, 2013] This conclusion is perfectly aligned with the identical one reached by CEPR [2013]. The policy implication is clear – both the EU and the US have much more to gain if regulatory alignment is pursued within the TTIP.

Secondly – RoW impacts are important – the EU-US agreement would not be taking place in isolation. Spill-overs would positively impact transatlantic trade, as well as GDP performance in both economies. In other words, should regulatory convergence between the EU and US occur and should the common standards arrived at be then exported to third

countries, making the EU and the US regulatory first-movers, the European and the American economies would be better off. This is a point with important political consequences, also hinted at in the previous section, which will be revisited in more depth in Chapter VII.

Thirdly – data specification matters. Comparing the numbers of the reference scenario (which uses own NTM estimates) with the Ecorys scenario reveals just "how sensitive results are to the alternative measure of NTMs. Since our AVEs are higher on average and more dispersed across sectors, they lead to much larger assessed gains." [CEPII, 2013]

e) Netherlands

Commissioned by the Dutch Ministry of Economic Affairs, Agriculture and Innovation and carried out by Ecorys, the Dutch study[83] builds on two previous Ecorys studies: one on the effects of a potential EU-US FTA (*The impact of Free Trade Agreements in the OECD. The impact of an EU-US FTA, EU-Japan FTA and EU-Australia/New Zealand FTA*) and the other on EU-US NTMs (*Non Tariff Measures in EU-US Trade and Investment. An Economic Analysis*) i.e. the study discussed in depth in section 2.

It begins by reporting the results of the first study, which uses a dynamic CGE benchmarked to 2004 and NTM figures based on the authors' own AVE estimates. It envisages 100% elimination of tariffs in trade in goods, 75% reduction of barriers to trade in services and 2.5% removal rate for NTMs. Results indicate that a potential transatlantic FTA would benefit both the US and EU 26 economies in terms of GDP (€35 billion for EU 26 and €24 billion for the US in the long run), exports (1.6% for EU 26 and 5.7% for the US), imports (1.6% for EU 26 and 3.7% for the US) and real wages, for both skilled (0.5% and 0.3%, respectively) and unskilled workers (same).

Again, the US reaps bigger benefits. Also, again, it is NTM reduction that drives most of the positive effects. The impact on third countries, however, is negative in this study, with Japan, Australia, New Zealand, the BRIC countries and RoW seeing their GDP and trade flows decrease as a result of an EU-US agreement.

[83] N. Plaisier, A. Mulder, J. Vermeulen and K. Berden. Study on "EU-US High Level Working Group". Final report. *Ecorys*, Rotterdam, October 22, 2012

The second part of the 2012 Dutch study consists of a re-run of its NTM study described at large in section 2, with the intent of breaking the results down into effects on the Netherlands and effects on the rest of the EU and the US. The results follow the trend of the original study – i.e. both EU 26 and the US see their GDP, exports, imports and wages increase as a result of NTM reduction, with larger gains in the long-run scenario assuming full removal of all actionable NTMs (i.e. 50% of total).

f) Italy

Working with two liberalization scenarios, one based on tariff removal only and the other including reductions of NTMs, the Italian study[84] found positive impacts of the TTIP on the Italian economy.

"Italy is projected to reap extensive gains from the deal, particularly in the automotive and air and space industry sectors and in the areas in which Italy holds a comparative advantage (food and drinks, fashion and mechanical industries). While imports are projected to increase by approximately EUR 2 billion, some sectors – particularly agriculture, chemistry, paper and wood – may face losses due to the competitiveness of imported goods. In the most positive scenario (full liberalisation), the Italian GDP could substantially increase, with some 30 000 jobs created in the three years following the treaty's entry into force." [Bendini, De Micco, 2014]

g) Germany

Commissioned by the German Federal Ministry of Economics and Technology and carried out by the Ifo Institute for Economic Research, the German study[85] takes a fundamentally different approach to measuring the potential impact of the TTIP.

[84] Prometeia, Stima degli impatti sull'economia italiana derivanti dall'accordo di libero scambio USA/UE. *Prometeia*, 2013

[85] G. Felbermayr, M. Larch, L. Flach, E. Yalcin and S. Benz. Dimensions and Effects of a Transatlantic Free Trade Agreement between the EU and US. *IFO Institut*, February 2013

In order to estimate the likely trade and welfare effects, the authors first measure, econometrically, the trade effects of preferential trade agreements already in force and then use modelling to apply the results to a hypothetical transatlantic FTA. Both tariffs and NTBs are taken into account. What this means is that the study performs an ex-post assessment of other FTAs and then uses the figures arrived to construct an ex-ante assessment of the TTIP. How does it work, exactly?

The previous studies we looked into had the following thought pattern: if the TTIP reduced tariffs by 'x'% and NTBs by 'y'%, how much would trade between the EU and the US increase? Ifo reverses the order – first they estimate the trade creation effects of other FTAs (say 'z'%) and then ask: if we were to obtain a transatlantic trade increase of 'z'%, by how much should the TTIP lower tariffs and NTBs?

They thus design an innovative CGE model that combines econometrics with simulations. The different methodology leads to non-different directions of the results – i.e. increased trade between the EU and the US – but the figures obtained are the highest across studies.

"Across existing preferential trade agreements (PTAs), our econometric estimates show average long-term trade creation effects of at least 67%. Taking into account all relevant general equilibrium effects, trade between EU member states and the United States grows strongly by an average of 76%. Compared to other studies, our econometrically correct methods signal greater trade creation." [Ifo, 2013]

Trade diversion is also present, with the largest losses registered by NAFTA members – both Mexico and Canada see their bilateral trade flows with the US decrease by 7.24% and 9.48% respectively.

In terms of income, globally, this is expected to increase by an average 3.3%. On a country basis, "the USA and Britain are major winners with an increase of 13.4% and 9.7% respectively. In Germany, welfare increases by about 4.7%, in France by 2.6%. Countries with which either the EU or the United States already enjoy free trade agreements are the main losers. These include Mexico, Canada, and Chile, as well as countries in North Africa." [idem]

When running the exercise with tariff reduction only (100% elimination of tariffs, no NTB removal), the figures arrived at are significantly lower, leading the authors to conclude that "substantial gains from a transatlantic agreement require eliminating NTBs." [Ifo, 2013]

Analysing the effects on the labour market and firms, the study designs three scenarios: tariffs only; NTBs[86]; single market (which assumes the barriers to transatlantic trade will be lowered to reach the levels specific to the internal market – i.e. intra-EU).

Table 5.17 Labour market effects

	US	EU26
Unemployment rate (% value)		
Tariffs only	4.60	6.90
NTBs	4.55	6.85
Single Market	4.49	6.70
Number of unemployed (absolute change, thousands)		
Tariffs only	- 6.25	- 9.89
NTBs	- 68.79	- 98.91
Single Market	- 103.19	- 280.890
Real wage (% change)		
Tariffs only	0.17	0.13
NTBs	2.15	1.67
Single Market	5.25	6.18

Source: Ifo 2013

[86] "In the "NTB scenario" it is assumed that the trade creation between the US and the EU due to TAFTA is on average equivalent to what was measured econometrically for existing agreements. This means that the initially calibrated equilibrium trade barriers are reduced such that average trade creation predicted by the model is exactly 76%. This reduction of course includes the reduction of all tariffs to zero." [Ifo, 2013]

The figures speak for themselves: not only would an EU-US agreement lower unemployment rates and raise real wages for both parties, but its positive impact is directly proportional to its level of ambition. NTB removal yields greater benefits than a mere elimination of tariffs, while a deep integration of the transatlantic market to levels comparable to those of the EU Internal Market brings about the greatest gains. Thus, the more comprehensive the agreement, the more labour markets will benefit, in both the EU and the US.

The study also predicts higher productivity, more pronounced in the NTB and Single Market scenarios, with increases of 1.14% and 3.7%, respectively, in the US. This increase also benefits consumers, as usually higher productivity is associated with lower prices.

On the firm side, the TTIP would be particularly beneficial to small and medium sized enterprises (SMEs):"Trade liberalization leads to growth of export-oriented SMEs, which only start operating in the U.S. market following improved market access conditions. Therefore among the medium-sized companies, especially the smallest benefit." [Ifo, 2013] The picture is slightly more mixed for large corporations who already export to the partner country: "On the one hand they benefit from falling transaction costs; on the other hand they face stiffer competition both in their home markets and abroad." [idem]

4.2. Other stakeholders

a) The Bertelsmann Foundation

Using the same innovative approach[87] to measuring the impact of the TTIP, the Bertelsmann study[88] (also carried out by Ifo experts) first estimates, econometrically, a transatlantic trade increase of around 80% and then adapts "the trade cost matrix so that the

[87] "From the gravity equation we obtain an econometric estimate for the trade creation effects of existing free-trade agreements, such as the European Union or the North American Free-trade Agreement (NAFTA). For all sectors and on average for all participating countries, the data show that the existing agreements increase trade in aggregate by about 80%." [Bertelsmann, 2013]

[88] G. Felbermayr, B. Heid and S. Lehwald. Transatlantic Trade and Investment Partnership (TTIP) Who benefits from a free trade deal? Part 1: Macroeconomic Effects. *Bertelsmann Stiftung*, 2013

resulting simulated change in trade flows corresponds to the econometrically measured trade creation from observed free-trade agreements." [Bertelsmann, 2013]

The first conclusion is that NTBs matter more than tariffs: "mere elimination of the remaining tariffs between the EU and the USA would never suffice to bring about trade creation of this magnitude. Instead, the figures show that the lion's share of trade creation must come from lowering non-tariff barriers." [idem]

In order to estimate the trade, welfare and labour market effects on EU countries, the US and third countries, the study works with two scenarios: tariff only and comprehensive liberalization (which includes NTB removal). Given the evident greater importance of reducing NTBs, we will report the results of the comprehensive scenario only.

Hence, while trade between EU countries and the US soars (an approximate 94% increase for Germany, 90% for Italy, 80% for Spain, 60% for the UK), the study finds pronounced trade diversion with the Maghreb countries and Eastern Europe, although the figures are significantly lower (trade with Morocco drops by around 5%, with Russia by 8%). There is trade diversion in North America as well, with flows between the US and its NAFTA partners going down (by 9% with Canada and 16% with Mexico). An interesting side effect is that trade between Canada and Mexico increases by an impressive 84% after the TTIP.

In terms of welfare effects, real per capita income increases in all EU countries - 4.95% on average, with large increases in the UK (9.7%), Ireland (6.93%), Spain (6.55)% and Sweden (7.3%). Income increases are also registered in the US (13.4%) while the majority of third countries are negatively affected. Income in Canada, Mexico, Australia or Japan decrease substantially (by 9.5%, 7.2%, 7.4% and 5.9%, respectively).

Regarding this negative impact on RoW welfare, the authors make an interesting point: "The traditional trading partners of Europe and the USA are hurt by the agreement. These countries are highly motivated to imitate the elimination of non-tariff barriers between the EU and USA or improve their partially existing bilateral agreements with the USA and EU, or to enter into such agreements. [...] For the world in general, deep liberalization between the EU and USA means a rise in average real income of 3.27%. That puts enough money on the table to compensate the losers. It can be hoped that the agreement increases the willingness of developing and emerging countries to enter into compromises in the Doha Development Agenda." [Bertelsmann, 2013] It becomes obvious that the numbers arrived at

in studies such as this one have extraordinary consequences in terms of political responses and geo-economic strategy options. While the implications will be explored in more detail later, let us say for now that the effects of the TTIP are bound to be more than economic in nature.

As far as the expected labour market effects of the TTIP go, the study looks at changes in employment levels, unemployment rate and changes in real wages. The results are positive all across for the board for EU countries and the US. For example, in the UK, the number of jobs increases by 1.28%, the unemployment rate drops by 1.27% and the real wage goes up by 6.6%. For Germany, the corresponding figures are 0.47%, -0.43% and 2.19%, respectively, while for France we have 0.47%, -0.43% and 2.22%. The pattern is the same for Italy (0.62%, -0.57%, 2.9%) and Spain (0.78%, -0.62%, 3.65%). The US registers equally positive outcomes: 0.78%, -0.71% and 3.68%, respectively.

Third countries are given less positive outlooks: Norway, Canada, Australia or Japan experience job losses, a rise in unemployment rates and lower real wages.

Overall, the analysis predicts the creation of around 2 million jobs in the OECD as a result of the TTIP, with the unemployment rate falling by 0.5 percentage points.

An additional, but important observation the study makes is that the TTIP has convergence inducing effects on EU member states' unemployment levels. Analyses reveal a positive correlation between the initial unemployment rate and the subsequent drop in its value post-TTIP, so that the countries with the highest numbers of jobless people before the implementation of the agreement see the largest reduction thereof once the treaty comes into force.

A key point that needs to be made is that throughout all of the analyses, the comprehensive liberalization scenario yielded larger benefits (be it in increased trade flows, higher income or more jobs created) than the tariff only one, emphasizing, yet again, that regulatory alignment triggers most of the growth for the EU and the US. The flipside is that it also drives the biggest share of the negative impacts on third countries, a point worth revisiting later.

b) Global Development and Environment Institute, Tufts University (Capaldo, 2014)

Among the latest papers dedicated to assessing the impact of the TTIP, Tufts' study[89] is by far the outlier, in terms of both approach and results.

Making use of an entirely different model – the United Nations Global Policy Model (GPM) – this study assesses the impact of the TTIP using a baseline scenario of continued austerity and low growth in both partner countries over the next ten years (2015 – 2025). Building on previous estimates of total trade creation[90], the author nevertheless offers a different interpretation of its effects on the economy, in terms of net exports, GDP changes and employment outcomes.

How so? The GPM is "a demand-driven, global econometric model [...] where the level of economic activity is driven by aggregate demand rather than productive efficiency. Consequently, a cost-cutting trade reform may have adverse effects on the economy if the 'costs' that it 'cuts' are the labour incomes that support aggregate demand." [Capaldo, 2014]

And adverse effects are precisely what this study predicts as far as the TTIP goes. Hence, while total trade might go up for both the EU and the US, in terms of net exports (calculated as a percentage of GDP) only the US registers an increase. EU Member States see their net exports go down – the worst affected are France, Italy and Northern European countries.

How can transatlantic trade expansion lead to lower total net exports for the EU? "A likely explanation is that, in the EU's stagnating economy, domestic demand for lower-value added manufactures – in which the EU is relatively uncompetitive – will crowd out higher-value added ones. Indeed, our figures show an increase of net exports in almost every other region of the world except Europe, suggesting that higher demand for low-value added

[89] J. Capaldo. The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability. *Global Development and Environment Institute, Tufts University*. Working Paper No. 14-03, October 2014

[90] "The GPM does not include data on tariffs, so we cannot calculate the tariff equivalent of a reduction in trade costs and its impact on exports. Thus we take the approach of checking the implications of the changes in trade that have been estimated by previous studies. We express these increases in terms of each country's share in the import market of the others rather than in terms of export and import levels." [Capaldo, 2014]

product will lead to higher net imports from Asian and African economies and from the US." [Capaldo, 2014]

Put more simply, total trade goes up, but the increase in imports is higher than the increase in exports, leading to a trade deficit for the EU.

And since net exports are part of the GDP, if the former drop, so does the latter. The worst-hit are, again, Germany, France and Northern Europe.

Table 5.18 Trade, GDP and labour effects

Country/ Region	**Net exports (% GDP)**	**GDP (% change)**	**Employment (thousands)**	**Employment Income (EUR/employee)**
US	1.02	0.36	784 000	699
UK	- 0.95	- 0.07	- 3 000	- 4245
Germany	- 1.14	- 0.29	- 134 000	- 3402
France	- 1.90	- 0.48	- 130 000	- 5518
Italy	- 0.36	- 0.03	- 3 000	- 661
Other Northern Europe	- 2.07	- 0.50	- 223 000	- 4848
Other Southern Europe	- 0.70	- 0.21	- 90 000	- 165

Source: Capaldo 2014

The figures are equally worrisome in terms of employment levels and incomes. The study predicts a total job loss of 583.000 in the EU, while the US gains around 784.000 new jobs as a result of the TTIP. Employee income follows a similar trend: it increases in the US by €699, while it decreases in the EU by as much as €5518 in France or €4245 in the UK.

The bad news doesn't stop here. "The loss of employment would further accelerate the reduction of incomes that has contributed to the EU's current stagnation. Indeed, labour income will continue its steady decrease as a share of total income, weakening consumption and residential investment while likely exacerbating social tensions. The flipside of this decrease is an increase in the share of profits and rents in total income, indicating that proportionally there would be a transfer of income from labour to capital. The largest reductions will take place in UK (with 7% of GDP transferred from labour to profit income), France (8%), Germany and Northern Europe (4%)." [Capaldo, 2014]

Another implication is that increased unemployment coupled with lower employee income automatically means increased pressure on social security systems in the EU. The study predicts increasing total population to employed population ratios in the EU (the so-called economic dependency ratio), meaning a larger number of people are supported by a lower number of jobs, which, in a period of already high unemployment rates, is hardly welcome. The US experiences the opposite, with its economic dependency ratio decreasing.

Overall, this study paints a very dark picture of the TTIP, which leads to lower GDP, personal income and employment in all EU countries. The only one to benefit from the agreement, in this assessment, is the US.

4.3. Importance

The main contribution these studies make is that they paint a more complete picture of the impact of the TTIP – and regulatory alignment in the TTIP – on both the transatlantic economies and the rest of the world. They offer new insights into the likely effects by either confirming previous figures, or by challenging them, in terms of both magnitude and direction. They provide additional perspectives by working with new models and assumptions and bring new issues to the table, such as impact on employment rates and job changes.

They prove that the economics of regulatory coherence is just as complicated as its legal underpinnings and that estimating likely impacts is not only not straightforward and complex, but largely dependent on modelling and data. This latter point warrants further exploration.

5. In comparison

In the previous pages, we reviewed 11 studies dedicated to the impact assessment of the TTIP. The first two - Ecorys [2009] and CEPR [2013] - were discussed in more detail than the others, for two reasons: one, they are the most comprehensive; two, and perhaps more importantly, they served as input for the EC's decision to launch the negotiation of a comprehensive transatlantic economic agreement, focused, primarily, on reducing regulatory heterogeneity. In other words, they contributed to the political decision to include regulatory cooperation in a trade and investment agreement – which, in the context of the present thesis, is a crucial aspect.

Stopping at these two studies only, however, would have provided an incomplete tableau of the potential implications of transatlantic regulatory alignment; so other analyses were looked into, in an attempt to gain a better understanding of what reducing regulatory heterogeneity might lead to.

What we have found is mixed results and a somewhat confusing x-ray of the likely impacts. Hence, some studies found positive and significant gains for all the players of the world economy, in terms of trade flow increases, GDP growth and higher wages. Others confirmed the positive effects on the EU and the US (albeit with different numbers) but concluded the TTIP would hurt third countries. Others still predicted the agreement would have negative outcomes all across the board.

The main driver behind the differences would appear to be methodology. Indeed, a quick look at the approaches used reveals the studies can be categorized according to the method of analysis preferred in three large groups: those that adopt a CGE based methodology (the majority), those that prefer a combination of CGE and econometrics (Germany and Bertelsmann) and that which opts for a completely different model, namely the GPM (Capaldo).

5.1. CGE-based approaches[91]

Ecorys [2009], CEPR [2013] and the studies commissioned by Sweden, the UK, Austria, France, Italy and the Netherlands are all based, for the assessment of main impacts,[92] on CGE. While their[93] results are comparable in terms of direction (at least with regards to EU and US effects – RoW impacts vary widely), the actual figures arrived at do differ. Why? The explanation has to do with model, data and assumptions.

Hence, some studies used static CGEs (Sweden), others dynamic versions (all others). The latter usually lead to higher numbers, as the model is able to capture the effects of increasing returns to scale, which typically translate into larger economic gains.

Data wise, while most studies use Ecorys [2009] for the quantification of NTMs, others (France) resort to their own estimations, both in terms of actual levels and in terms of actionability. Trade data also comes from different sources, be it GTAP 7 (French and Dutch studies) or GTAP 8 (CEPR, Swedish and UK studies). Needless to insist on why working with different numbers at the outset leads to different numbers at the end.

Also, while CEPR [2013] focuses on the EU as whole (EU 27), the other studies look at their country of choice and then at the 'rest of the EU' (EU 26). It becomes obvious that 'the rest of the EU' means something entirely different in each study – the heterogeneous composition of the pool of countries analyzed inevitably leads to heterogeneous results. Base years also vary, with e.g. Ecorys looking at a time horizon ranging from 2008 to 2018, CEPR and UK at 2017-2027, and France at 2015-2025.

In terms of assumptions, the most obvious difference lies in the scenarios envisaged by the studies. Some operated tariff elimination and progressive NTM reductions economy wide (CEPR, Sweden) others modelled various degrees of NTM removal on a sectoral basis (UK) while others preferred a combination of the two (Ecorys, France, Netherlands).

The level of ambition in the scenarios is not uniform either, with the removal of NTMs ranging from 2.5% in the Dutch study to as much as 50% in Ecorys [2009]. The number of

[91] The exact type of CGE model used varies, with most studies using the GTAP version and CEPII opting for MIRAGE. For the purposes of this paper however, they will be treated together as CGE-based approaches.

[92] FDI effects are tackled via partial equilibrium analysis (CEPR 2013).

[93] The Austrian and the Italian study only report results for the respective economies; hence they will not be addressed in this section.

scenarios considered varies as well, with e.g. 7 in total for Ecorys and 5 for France. Some studies included spill-over effects, while others didn't.

As it becomes readily apparent, modelling choices matter tremendously. Even when the base model is the same, apparently small differences in simulation assumptions or data input affect the end result, leading to differences in the predicted impact on key variables.

Still, all the studies "suggest a direction of results of TTIP that are similar and positive. Depending on the different parameters used in the simulations, it is the precise results only that differ." [Bauer, Erixon, 2015]

5.2. CGE and econometrics

If there are differences between studies that use the same modelling approach, it is to be expected that analyses that build on alternate methodologies will lead to even more marked differences in terms of the results obtained. That is the case with the German and the Bertelsmann studies.

These two are quite similar – the latter actually builds on the former in terms of model specification – and they both lead to significantly higher figures than the CGE studies. While the direction of the results is the same (the EU and the US both benefit from the TTIP) the gains predicted by these two analyses are of a magnitude that surpasses by far even the most ambitious estimates of any of the previous 7 CGE studies.

5.3. GPM

The gap between the results arrived at reaches its widest with the Tufts assessment. The use of the GPM model to estimate the impact of the TTIP makes Capaldo [2014] by far the most unusual of all the studies. Even if it builds on the trade creation figures estimated by other (CGE-based) studies, the entirely different approach to assessing the implications thereof leads to negative effects all across the board, which makes this study the ultimate outlier.

6. Criticism

Ex-ante evaluations of the impact of policy choices are always a tricky thing. This is especially true when it comes to estimating the likely effects of a trade and investment agreement of such complexity and controversy as the TTIP.

As it was to be expected, the studies reviewed before were not met with enthusiasm only – certain problems with their approach to the issues, the modelling assumptions used and the results arrived at were pointed out rather quickly.

6.1. Main problems

a) The bundling

An important issue already hinted at in the beginning of the chapter has to do with these studies' choice to treat regulatory alignment as an all-in-one deal, without distinguishing between the very, very different routes to achieving it. As discussed at large in Chapter II, coherence and convergence are theoretically distinct forms of regulatory cooperation with technically distinct results.

Hence, a disaggregated analysis would have been optimal. It would have also been particularly challenging. As we have seen, in practice, it is extremely difficult to delimitate coherence from convergence, especially since the former can very well lead to the latter, in the long run. The difficulty of the task is only increased by the lack of an official definition of 'coherence' within the context of the Transatlantic Trade and Investment Partnership, to the point that its pursuit may consist of mere mutual recognition or, au contraire, the development of common standards, somewhere down the line.

Since correctly identifying coherence remains elusive, it becomes obvious that measuring it and modelling its reduction so as to determine likely effects, all within the

confines of strict economic assumptions and mathematical constraints, proves an impossible task.[94]

There is another implication, of a more political nature, of the bundling – it could very well be seen as foreshadowing. That is, economists worked with what is likely to become the official take on coherence, which may very well turn out to be 'all-in-one', at least as far as the EU's view on the regulatory part of the TTIP goes. In that sense, it is not inconsequential that the European Commission has effectively replaced the term 'coherence' with 'cooperation' in its latest documents,[95] a choice of words that automatically broadens the spectrum of measures likely to be adopted and leads to much deeper regulatory alignment down the road.

b) Identifying NTMs

Even when bundling up all the possible ways to achieve alignment and bringing them under the umbrella called 'NTM reduction', other language problems arise, such as what does 'NTM' cover and what does 'reduction' refer to? In other words "how can the change in non-tariff barriers be modelled? There is a problem with this in the scientific literature, because the definition and quantification of non-tariff barriers continues to be disputed." [Bertelsmann, 2013]

The solution found by the studies reviewed (in particular Ecorys [2009], whose findings were then imported by the majority of the other analyses) is not flawless. Their main flaw is immediately apparent: the NTM estimates are subjective.

The problem stems from the fact that part of the results come from business surveys and, as such, reflect the *perception* corporations have on types and levels of restrictiveness. Their accounts are, consequently, inherently subjective. The numbers were cross-checked with expert opinions and literature reviews, but that does not fully alleviate subjectivity

[94] That being said, some conclusions regarding coherence can nevertheless be drawn from the general analysis of alignment. We will return to these in section 7.

[95] See next Chapter for a discussion.

concerns (who were the experts?[96] what methodologies did previous studies use to identify NTMs? did those also include surveys?)

This is important, as the responses from the business surveys were then fed into the trade costs estimation equations and hence, further down the line, into the modelling, thus influencing greatly the end result – i.e. the effects of regulatory alignment. And that is because "the higher the estimated NTMs to be removed, the higher the potential benefits."[97] [Raza et al, 2014]

c) Determining actionability and removal rates

Along similar lines, there is the issue of determining actionability and NTM removal rates. In addition to subjectivity, here there is also potential bias.

To be fair, determining the above is no easy task as "it remains unclear which components of the non-tariff barriers can in fact be influenced by free-trade agreements. In this context, the literature speaks of "actionability" and seeks to identify those which, in the jungle of the most varied trade policy measures, can be changed in some circumstances. There is no systematic and generally recognized way of doing that. In a second step, there must be a way of clarifying the extent to which a free-trade agreement could lower the non-tariff barriers. There is no recognized method of estimation for this either; the studies use estimates by experts." [Bertelsmann, 2013]

That is precisely what most studies did and where the problems come from. We discussed in extenso previously (Chapter IV) how difficult it is to distinguish between heterogeneity that is unavoidable (e.g. because it reflects inherent differences in risk assessments or societal values) and divergence that can be acted upon, because it is merely protectionist. We will not revisit the discussion here; suffice it to say that making the

[96] According to Ecorys the "key stakeholders to the study come from academia, business, industry federations and associations, regulators and policy-makers." [Ecorys, 2009]

[97] This is a point also made by the French study. Its NTM estimates were higher than Ecorys', which led to higher predicted benefits - see section 4.1. d). This served to underline "how sensitive results are to the alternative measure of NTMs. Since our AVEs are higher on average and more dispersed across sectors, they lead to much larger assessed gains." [CEPII, 2013]

distinction is a very delicate, complex and politically controversial process. Consequently, substituting this process with an ad-hoc evaluation of private parties, however knowledgeable (be they experts or regulators) is sub-optimal. Because even assuming business bias away (and that may be a strong assumption) there remains a rather large degree of subjectivity. What is more, it is undemocratic, for such private party determination of actionability undermines the standard political process, characterized, inter alia, by public disclosure, public debate and public input.

The problem with this approach to determining actionability is not just political in nature, but also economic, in that it may lead to an overestimation: experts might very well have appreciated more NTMs to be removable than it would have been realistic to, under normal circumstances of political decision making. When fed into the modelling, these higher actionability numbers lead to higher gains from liberalization, because "the larger the actionable share of the estimated NTMs, the higher the potential benefits." [Raza et al. 2014]

A similar argumentation can be made for determining removal rates: how were those percentages (25%, 50% etc.) decided upon? How realistic are they? What assumptions were made? The figures may not necessarily be wrong, but the question is: how do we know they are right?

6.2. Technical critique

In addition to the general assumptions, the methodologies chosen by the studies above were also met with criticism.

a) CGEs

The standard model for trade policy analysis is, traditionally, the CGE. It was the one used by 10 of the 11 studies reviewed above, either exclusively (by the first 9 of them) or in combination with econometrics (by the German one and Bertelsmann). Its widespread use does not equate, however, with flawlessness – CGEs come with a series of shortcomings, some of which were recognized by the authors of the studies themselves. Others were pointed out by external critics.

To begin with, most CGEs are unable to fully capture the effect liberalization has on FDI – the model can "only cover the impact on some of the business done by services companies (essentially only those that strictly cross a border – known as «mode 1» in the language of WTO services agreements). Services business that depends on foreign direct investment, which makes up a substantial part of transatlantic services trade, is largely outside the scope of the CGE analysis." [European Commission, 2013] Given the very strong bilateral investment relation between the EU and the US, an estimate of the impact of the TTIP on transatlantic FDI flows is, nonetheless, extremely important. That is why some studies (e.g. CEPR 2013) resort to partial equilibrium analysis to estimate these effects. The problem is, however, that because investment is not covered in the main simulation, the results therein most likely underestimate the future overall impact of the TTIP.

Along the same lines, CGEs cannot properly estimate all the gains stemming from increased productivity – via e.g. increased competition-induced innovation – a large part of which is driven by FDI (the presence of multinationals with their knowledge transfers). "No productivity effects beyond those associated with the accumulation of capital are taken into account due to the limitations of any CGE model to capture them." [idem] The consequence is, again, the underestimation of final effects.

Another limitation of the CGE framework is its inability to estimate labour effects. That is because the model assumes a fixed supply of labour in the long run. The impact of the liberalization shock can only be captured via change in factor prices (i.e. wages) and not in factor quantity (i.e. jobs) as the latter is stable throughout the experiment – i.e. employment is constant. In other words, wages will adjust until everybody has a job: "the industries that will grow the most as result of TTIP will pull away workers from other sectors by offering higher wages." [European Commission, 2013] While that may turn out to be so in the long run (i.e. there is complete market clearance to the point that nobody remains unemployed) on the short run there is bound to be some degree of unemployment, at least until the sectors that are better off after the implementation of the agreement can absorb workers from the sectors that lose out.

This reallocation between sectors is something the model can and does predict (see CEPR 2013 before). The problem with reallocation is that it is not automatic and it is not necessarily smooth – as some sectors lose as a result of the agreement and others win, it is not

guaranteed that workers from the former can simply migrate to the latter, not without some training and re-qualification – e.g. employees in a shoe factory cannot simply get hired in a software company right off the bat.

That is why the assumption that, if in a fixed labour supply scenario, wages go up (the way most studies predict) then in a flexible labour supply scenario it would be the number of jobs (employment) that would go up instead, might not be entirely realistic, at least not in the short run.

This drawback of the model[98] is particularly unwelcome, as employment levels are a concern for both policy makers and society at large, especially in the wake of a liberalization agreement that is bound to dramatically impact the economies involved. Short term unemployment and the measures needed to counter-act it represent costs for state budgets, so estimates of their potential levels would be crucial – CGEs are, unfortunately, unable to provide any.

The CGEs are also sub-optimal means of evaluating likely sectoral impacts – while they do look into how various sectors react to liberalization, the results arrived at stem from general equilibrium effects. Hence, "it is problematic to assign outcomes to policy changes in individual sectors, as the changes in output and trade depend on what happens across all sectors." [CEPR, 2013] In other words, the sectoral estimates of the CGE studies need to be taken with a grain of salt and partial equilibrium analyses would probably be the preferable method of evaluation.

Still, even if "CGE models may rightly be criticized, no doubt about that – few would argue that they are perfect! – and we have every reason to be cautious when interpreting the results they lead to. Nevertheless, the scientific consensus must be said to remain that this is the least flawed of the models available when it comes to analyzing beforehand the effects of a trade agreement not yet in existence. The choice of other methods leads, in a way, to a burden of proof, where you need to make a compelling case for why the alternative method is better, and why it provides a different result." [Persson, 2015]

The latter is what the studies referred to next attempted to do, with limited success.

[98] Some of the studies explored solved the CGE limitation by using alternative methods to estimate the likely impact on jobs, some with positive conclusions (e.g. Germany, Bertelsmann) others with worrisome ones (Capaldo).

b) CGE and econometrics

The Ifo/Bertelsmann innovation suffers from its own major drawbacks. The first one lies in its very novelty – it is entirely unprecedented and, therefore, untested, which warrants caution when basing one's assessment of the TTIP on the figures proposed therein.

All the more since said figures are extraordinarily high – and this is problem number two. The gains to accrue to both the EU and the US, and the losses incurred by third countries are all unrealistically high. For example: "US exports account for about 14% of gross US GDP. Currently, about 20% of US exports go to the EU, meaning that only about 3.5% of US GDP is directly affected by trade with the EU. In order to achieve the 13.4% GDP increase in the US estimated by the IFO study, bilateral trade would have to vastly increase." [European Commission, 2013]

And in the Ifo/Bertelsmann model, bilateral trade does vastly increase: their unusually high numbers are all arrived at, via modelling, starting from the econometrically derived trade creation of previous FTAs, which is, itself, very high (around 70-80%). It is possible for this to be the source of the problem. And the name of the problem would be endogeneity - i.e. the possibility that countries enter an FTA if they are already engaged in trade relations. In other words, bilateral trade creation can very well precede an FTA as opposed to being caused by it. Like the authors themselves point out, "trade agreements are not reached between random pairs of countries or regions. Instead, the probability of having an agreement is higher if there is already a relatively large amount of trade between a country pair." [Bertelsmann, 2013] Endogeneity thus overestimates results – consequently, in an exogenous scenario, we might very well arrive at much smaller figures.

Another issue has to do with the fact that the evaluation is based on the trade creation effect *other FTAs* have had, effect which is then applied to the TTIP. Hence, the original "data set includes very different FTAs (goods; services; goods & services; only tariffs; comprehensive agreements; FTAs with developing countries or industrial countries; very different time periods etc.)" [Stephan, 2014] Because of that, it is very difficult to estimate what exactly in those agreements leads to the trade creation observed – it can be everything from tariff removal and NTM reduction to a common currency (authors suggest their pool of

FTAs includes the EU). The question thus becomes: "is it reasonable to extrapolate from heterogeneous past agreements to today's situation between EU and US?" [idem] What is more, as both the EU and the US have repeatedly highlighted, the TTIP will be *unlike* any other agreement before, so it does not seem far fetched to assume that, if the agreements differ, so will their trade effects.

All in all, the Ifo/Bertelsmann numbers "beg greater scrutiny [and] caution is needed before jumping to validate these results." [European Commission, 2013]

c) GPM

The Capaldo study that resorts to the use of the United Nations' GPM to estimate the impact of the TTIP has not escaped criticism either.

The first point raised is that the model itself is ill-suited for this task because it was simply "not designed to analyse the effects of changes in trade policies. Trade economists do not use it. Nor do United Nation's agencies use it in their analyses of *changes in trade policy*." [Bauer, Erixon, 2015] In fact, it would appear that "when it comes to trade policy analyses, the UN agencies also rely on CGE models." [European Commission, 2015]

Why is the GPM not suitable for trade policy analysis? In a nutshell, because it cannot capture the effects changes in trade policy (e.g. liberalization via a trade and investment agreement) have on actual trade flows. The model cannot estimate how reducing barriers to trade (tariffs, NTMs) would affect trade volumes – which, in the context of the TTIP conversation, is a crucial element of the analysis.

Capaldo himself acknowledges the limitation – "The GPM does not include data on tariffs, so we cannot calculate the tariff equivalent of a reduction in trade costs and its impact on exports." [Capaldo, 2014] The solution found is somewhat ironic, as the author decides to import data on trade flow changes predicted by other, *CGE-based*, studies: "Thus we take the approach of checking the implications of the changes in trade that have been estimated by previous studies." [idem]

Another issue with the model is that, being essentially demand-driven, it does not "capture the supply-side effects of trade, which are the effects that are proven to be the core effects of trade liberalisation [...] e.g. the impact of lower barriers for international commerce

on product and process innovation; structural change and the growth of some industries because of trade; the impact of competition on the cost of production and final consumer prices." [Bauer, Erixon, 2015]

What is more, much like the CGE, the GPM is unable to capture the effect on investment and it hence misses out on the role of the important driver of economic change that is FDI.

Overall, it would seem that the study's – surprising and counter-intuitive – results must be viewed with a healthy dose of scepticism, as they have yet to be validated as robust.

6.3. Other issues

As already hinted at, some issues that would be particularly relevant to assessing the likely impact of TTIP liberalization were not looked into. These refer to potential costs, as well as potential benefits. The overlook was mostly due to model limitations – still, a discussion, even a qualitative one, would have been welcome.

The elephant in the room is the cost of regulatory alignment. While all the studies focus on the – predominantly long-term – benefits of reducing NTMs via increased regulatory cooperation (coherence/convergence) most of them[99] do not consider potential – most likely short-term – costs. While quantifying these costs is extremely challenging, identifying them – at a minimum – is a sine-qua-non condition for providing a balanced assessment of what regulatory alignment would imply.

What could these costs look like? "Firstly, harmonization of NTMs, e.g. technical standards, will imply a short-term adjustment cost for public institutions and for firms required to align their administrative procedures, production processes and products to the new standards. Secondly, mutual recognition of regulations and standards between trading partners will increase information costs for consumers, since the latter will be confronted with a more complex and potentially less transparent multiplicity of permissible standards, e.g. on goods and services. Thirdly, the elimination of NTMs will result in a potential welfare loss to

[99] It is important to note here that the TTIP Impact Assessment carried out by the European Commission, which served to inform the decision to launch the TTIP, did look into potential costs (e.g. impact on administrative costs). But the majority of the economic impact studies whose results are most often quoted in support of regulatory coherence in the TTIP ignored the cost side of the equation (CEPR 2013 looked into loss of tariff revenue, but did not go any further).

society, in so far as this elimination threatens public policy goals (e.g. consumer safety, public health, environmental safety), which are not taken care of by some other measure or policy. Though subject to considerable insecurity, these types of adjustment costs might be substantial, and require careful case-by-case analysis." [Raza et al. 2014]

Another issue worth more attention revolves around short-term state budget adjustment costs. As we have seen, the majority of the analyses above focus on long term – mostly positive – effects, while neglecting short run consequences and their associated costs. Two such consequences stand out.

One has to do with revenue losses caused by tariff cuts. While on the long run, higher revenue stemming from increased exports to third countries could compensate EU-US tariff-cuts related income losses, on the short run the latter will create a hole in the budget. The other consequence revolves around employment effects. While more jobs and higher wages in the long run translate as more budget revenue, in the short run, less jobs – i.e. unemployment benefits, lower income tax revenues and budget sponsored re-training programmes – inevitably mean increased expenses.

One study estimated these adjustment costs for the EU. It "calculated a lower and an upper bound of cumulative adjustment costs of TTIP during the ten year implementation period. Our lower bound is €33 billion, our upper bound €60 billion. On an annual basis that would amount to €3 billion to €6 billion. Of these, between €0.5 – €1.4 billion will come from unemployment benefits, and €0.4 – €1 billion from foregone income from taxes and social contributions." [Raza et al. 2014]

Another fundamental issue is, clearly, investment. An in depth discussion on the advantages and costs associated with increased FDI is way beyond the scope of this paper. However, one could briefly mention, on the benefit side, increased product and process innovation, knowledge transfer, more product variety and lower prices, new jobs, higher wages, increased productivity etc, while on the cost side, there's repatriation of profits, speculative capital movements, potential losses of domestic jobs (due to substitution effects) and negative impacts on local companies, in particular SMEs (due to increased competition).

6.4. Results

Given the points already made above, three things become readily apparent when referring to the results of these studies.

Firstly, they need to be taken with a grain of salt, primarily because they, as we have seen, depend heavily on modelling. Given that Ifo/Bertelsmann and Capaldo still require further analysis, for the time being the figures arrived at by CGE based studies appear more realistic and reliable. Still, even these remain "a ballpark indication of the economic effects rather than precise predictions of exactly what will happen." [European Commission, 2013]

Secondly, they do not paint a complete picture of the costs and benefits of the TTIP. This is so because the underlying models cannot capture the whole range of effects and also because the impacts they can capture are usually long term. In the short run, as explained before, the cost-benefit balance may very well shift more on the cost side and lead to potentially high prices to pay for liberalization.

Third, the figures are fairly small, especially when viewed on a per annum basis. The increases to be expected in e.g. GDP are not impressive, in either the EU or the US.

7. Conclusion

Going through the previous pages, certain things stand out in terms of the likely economic impact of regulatory coherence, the estimation of which was the primary goal of the chapter.

To begin with, given that the studies reviewed assess the potential effects of regulatory alignment in its entirety (via varying degrees of NTM removal) on the economies of the EU, US and third countries, their results inevitably comprise the effects of regulatory coherence also. While disaggregated effects remain unattainable due to the methodological limitations, it does not seem far fetched to assume that, if taken independently, coherence would yield similar results to alignment, albeit much smaller in magnitude.

In practice, the final effects depend, inter alia, of what coherence will eventually come to refer to in the final text of the agreement. If it is defined narrowly, then its impacts will be

of a smaller scale than the ones estimated above. If, au contraire, it ends up meaning alignment, in an 'all-in-one' kind of deal, then its effects might very well be comparable to the ones these studies predict.[100]

Speaking of final effects, one could venture to draw a few conclusions, albeit keeping in mind the various minuses of the estimations above that warrant caution when forecasting potential impacts.

First off, the gravity analyses carried out by some of these studies regarding trade costs estimates proved that, indeed, NTMs do increase the cost of doing business abroad and reducing them would facilitate international trade and investment flows (an important aspect that relates to our discussion in Chapter IV).

Secondly, the overwhelming majority of the studies conclude that the biggest share of the economic benefits to be derived from the TTIP stem from regulatory alignment and that the deeper said alignment (i.e. the higher the NTM removal rate) the bigger the gains. One policy implication of this conclusion is that any benefits expected from future trade and investment agreements will come, predominantly, from the regulatory part thereof – put differently, *there needs to be a regulatory part to any future trade and investment agreement.*

Another implication is that the broader the definition of coherence, the deeper the alignment and, consequently, the larger the benefits. This could very well lead policy makers to bring under the umbrella of coherence measures such as e.g. the development of common standards. In a nutshell, economics seems to be of the opinion that *the broader the definition of coherence, the better.*

As regards the effects on the EU and the US, most studies predict them to be positive, be it in terms of GDP, trade flows or wages.[101] Problems arise when it comes to the distribution of these gains, which is uneven, both between the two economies (the EU reaps bigger GDP gains, the US is favoured by trade flow growth) and within – i.e. sectorally.[102] Hence, while some economic sectors see their output increase, others take major hits

[100] With the caveat that the numbers arrived at in the studies are merely indicative, as already explained.

[101] The effects on employment are by far the most controversial issue in the studies above – given the highly contentious nature of the results, we refrain from advancing any prognosis on likely impacts in this area.

[102] In the particular case of the EU, the uneven distribution of gains is also present at country level, meaning not all Member States benefit equally from the TTIP, with some (e.g. the UK) clearly leading the gain game.

following liberalization. The fall in output is inevitably followed by a drop in employment and wages. The political consequence is straightforward – groups associated with the losing sectors will lobby against liberalization. Also on the problem side, a certain degree of trade diversion is to be expected, as far as intra-EU trade goes.

Along different lines, the impact on third countries is deemed either negative or positive, depending on the study, which makes drawing conclusions on this topic particularly difficult. However, leaving the results themselves aside for a moment, one important point stands out.

A study that found positive third country effects - CEPR [2013] - introduced the concept (that other studies then imported) of spill-overs, which cover, inter alia, the extent to which third countries converge to the transatlantic standards (the so-called indirect spillovers). This choice to opt for spillovers is interesting in two ways.

On the one hand, it indicates economists expect TTIP coherence to lead to convergence and the development of mutual standards between the EU and the US, standards that can later be exported globally (i.e. they will spill over). On the other hand, it suggests there is an opinion among the people behind these studies that *third countries should and will adopt the regulatory outcomes of the TTIP* – and they will do so because it is in their economic best interest.

The latter point is also mirrored by the studies who found negative third country effects – their authors suggested RoW should adopt TTIP-created standards so as to minimize the negative impact it can expect from its implementation (see Bertelsmann).

This apparently shared point of view carries tremendous implications, as it adds another layer to the regulatory part of the TTIP – that of geo-political strategic move. Before heading in that direction, there is one more element we must look into – the legal underpinnings of coherence.

Chapter VI

In legal parlance – the regulatory part of the TTIP

1. Introduction

Beyond linguistics and economic interactions and effects, there is the legal side of regulatory coherence. Part of an international agreement and aimed at reducing the gap between the approaches to lawmaking of two traditionally different legal systems, the very idea of regulatory coherence is, inherently, a legal topic.

Hence, a well informed debate around its TTIP effects is premised on two things. One, a solid understanding of how the EU and US legal systems work in the first place: who the main players are, what legal acts cover, how the process of creating law unfolds. Two, the likely provisions of the TTIP itself with regards to regulatory coherence: i.e. where the EU and the US stand on the issue, at this point in the negotiations.

This is what this Chapter aims to do: after a brief comparative overview of the two legal orders comes an intro into the positions of the US and the EU with regards to the regulatory part of the TTIP, as they have been so far made public, with an emphasis on the TTIP Draft Regulatory Cooperation Chapter published by the European Commission. We conclude with the implications of these positions and how they feed into the discussions around definitions, criticism and likely effects so far addressed in this thesis.

2. Comparative overview

The first stop in the analysis of the regulatory part of the TTIP is an x-ray of the legal systems coherence efforts target, namely those of the EU and the US, so as to get a clearer picture of what the main issues in the current negotiations are.

Two observations before we begin: one, as an in depth comparison of the two legal orders is way beyond the scope of this thesis and would require a dedicated analysis, only certain aspects that are particularly relevant to our discussion of regulatory coherence will be briefly touched upon.

Two, there are two facets to the analysis – one has to do with central lawmaking (i.e. US federal level and EU community level) while the other revolves around sub-central lawmaking (i.e. individual US states and EU Member States). Due to space constraints, we will only focus here on the former.

2.1. General remarks

The first thing that springs to mind when viewing the US and the EU legal orders side by side is that they exhibit strikingly different features, in terms of modus operandi and decisional architectures.

a) Legal philosophy

Some of the difference comes from the distinct guiding principles of law making. While some are similar – e.g. the respect for fundamental rights – others could not be further apart. The most relevant example in the context of our discussion is the European Union's use of the precautionary principle in relation to risk assessment and risk management when making law, a preference the US does not share.

In the EU, the precautionary principle is a general principle of law as established by Union courts, meaning it informs all legal acts adopted by the Union and can be used as a basis for invalidation if breached. What does it mean in practice? "It is settled case-law that,

in the field of public health, the precautionary principle implies that where there is uncertainty as to the existence or extent of risks to human health, the institutions may take precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent." [Artedogan GmbH and others vs. Commission, 2002] This principle sits at the heart of the EU's resistance towards e.g. GMOs, hormones or chlorine washed chicken.

In the US, by contrast, the requirement that "risk analyses be based upon the best available scientific methodologies, information, data, and weight of the available scientific evidence" [Memorandum M-07-24, 2007] and the emphasis on quantitative assessments leave little room for mere cautiousness. The implication is that "worst-case or conservative analyses are not usually adequate" [Circular A-4] and "conservative assumptions and defaults (whether motivated by science policy or by precautionary instincts)" [idem] are sub-optimal. In practice, it means that if science cannot prove something is harmful, then for purposes of regulatory action, it is not. Again, see GMOs, hormones or chlorine washed chicken.

b) Political setting

Most of the difference between the two systems, however, is driven by the fact that they are embedded in distinct political realities: the US is a sovereign federal republic, while the EU is a supranational entity made up of 28 sovereign states, each with their own chosen form of government (monarchy, (federal) republic etc). As a consequence, the legal order (i.e. who makes law and how) necessarily reflects these divergent backgrounds.

While there are similarities between the two legal systems – e.g. both derive their order from their respective founding legal texts (the Constitution in the US, the Treaties[103] in the EU); they are both built along the principle of separation of powers and include a system of checks and balances;[104] they are both founded on democratic principles; they both

[103] The Treaty on the European Union (TEU); The Treaty on the Functioning of the European Union (TFEU)

[104] In the US, like in most domestic legal systems, that means separating power into legislative, executive and judiciary. In the EU, by contrast, that translates as striking "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." [Alemanno, 2014]

encourage transparency and accountability etc.[105] – the predominant feeling when comparing them remains one of divergence, in terms of who the players in the law making process are, how the process plays out and what the outcomes (i.e. the legal norms) arrived at are. We will look at these elements one by one.

2.2. The who

When it comes to the actors involved in the lawmaking process, the distinct political settings the two entities operate in are accommodated via sui-generis decisional architectures.

a) The United States

In the US, legislating is a prerogative of Congress, regulatory power belongs to the executive, while the courts are tasked with overseeing that both the legislative and the regulatory processes are carried out in accordance with the law.[106]

The legislative power of Congress is defined by the 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." [US Constitution, Article 1, Section 1]

The regulatory power of the federal agencies,[107] is defined by acts of Congress: "The US Constitution clearly stipulates (with a few narrow exceptions not relevant here) that all

[105] These are some examples only and this list is by no means exhaustive.

[106] "Courts in the United States are empowered to hear challenges to statutes enacted by Congress as well as regulations promulgated by agencies. But the standard of review that courts apply to statutes is very different, and much more deferential, than the judicial review accorded to rules passed by agencies." [Parker and Alemanno, 2014]

[107] The main players on the regulatory stage are federal agencies: "Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive Order." [E.O. 12866, Sec. 2 (a)]

These can be either executive (part of e.g. Cabinet, the Executive Office of the President etc.) or independent (e.g. the Securities and Exchange Commission, the Federal Trade Commission, the CIA). The latter are, constitutionally speaking, part of the executive branch, but they have a greater degree of independence from presidential oversight. While there are differences between the rules applicable to the two categories, the majority of the features are the same – most importantly, they both derive their regulatory power from acts of Congress.

agency power, including the regulatory power, derives from Congress. This means that no federal agency has authority to regulate anything unless it has been delegated power to do so in a statute passed by Congress." [Parker and Alemanno, 2014] What is more, agencies lack the power to modify legislation passed by Congress - they are only allowed to implement it.

Consequently, in the US, the separation between the roles of the legislator (Congress) and regulators (agencies) is very rigid, with agencies having no input in legislating.

An equally important observation to be made at this point is that the Constitution provides that certain issues are not legislated/regulated at federal level, bur rather left under State jurisdiction: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [US Constitution, 10th Amendment]

b) The European Union

In the EU, legislative power belongs to both the European Parliament and the Council, who act as co-legislators: "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions." [Art. 14.1 TEU]

The European Commission has another set of legal prerogatives, e.g.: "The Commission shall ensure the application of the Treaties and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties." [Art. 17.1 TEU] Beyond its *executive* powers (which lead to it occasionally being compared to a would-be government of the Union) the Commission also has a say in the *legislative* process: "Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise." [Art. 17.2 TEU]

Hence, the relation between the legislative and the executive is, when it comes to legal design, much more collaborative in the EU than in the US. As we will see next in more detail, unlike in the US, in the EU all the main players - Commission, Council and Parliament - are

For a list of the main US Federal Agencies see Annex 1.

involved, to various extents, in both legislating and regulating,[108] with the European Court of Justice playing a more modest role than, e.g., the US Supreme Court.[109] More to the point, unlike US agencies, the Commission is very much involved in legislating and, in contrast to the US, can very well modify primary legislation via non-legislative acts (i.e. delegated acts).

Also, in the European Union, "EU legislative bodies have no inherent powers, and wield only the powers assigned to them by the EU Member States in EU Treaties. According to the principle of conferral, unless the EU Treaties provide a legal basis for action at the EU level – by means of a specific Treaty article allowing the EU to intervene in a certain area - then only Member States may take action in that area." [Parker and Alemanno, 2014] These are the so-called competences. As mentioned in the Treaties, they can range from exclusive (only the EU can take measures) to shared (action can be taken by both the EU and the Member States) or coordinating (EU creates the framework for action taken at national level).

c) Side by side

The institutional organization of the European and the American legal systems thus puts forward a similarity (only certain issues are covered at central decision making level – federal/EU) and a difference (the legislative-regulatory divide is, in practice, much stricter in the US than in the EU) that both carry important implications for regulatory coherence endeavours.

First, it becomes obvious that, if the TTIP aims to cover *all* legal issues with potential effects on transatlantic trade and investment (and, as we saw in Chapter IV, the vast majority of domestic rules can end up having a – positive or negative – impact on international trade and FDI), it will have to target not only central level institutions and processes, but also those

[108] And that is so because of the EU's "supranational character driving the nature of the institutions, meaning that the Commission represents the interests of the Union, the Council represents the interests of Member States, and the European Parliament is the only institution whose members have been elected by direct universal suffrage." [Alemanno, 2014]

[109] "US regulations are subject to searching judicial review on matters of law, fact, and analysis, and it is not uncommon for agency rules to be reversed and remanded for reconsideration after judicial review. In the EU, by contrast, strict rules on *locus standi* and the rather deferential standard of review exercised by EU courts has meant that only a few acts – be they legislative or non-legislative – are challenged and struck down by courts every year." [Parker and Alemanno, 2014]

at state-level (US State/EU Member State). It becomes immediately apparent that striving for regulatory coherence between 78 jurisdictions (50 US states and 28 EU Member States) will be a gargantuan task, with a myriad of hurdles, huge (economic and political) stakes and questionable chances of success.

Secondly, in terms of the legal decision making bodies that the regulatory coherence chapter will target, negotiators need to find a way around the idiosyncrasies of the two systems. Since the European Commission plays an important part in the legislative process, whereas the US agencies do not, the implication is that if TTIP regulatory coherence only covers executive bodies, the rules set up in the agreement will end up affecting how EU legislation is made, but will not have a similar effect on US legislation.[110] Obviously, this would create an acute imbalance between the coverage the agreement has in the US as opposed to the EU. We will revisit this point throughout the chapter.

If, au contraire, the agreement targets all the main players in both the US and the EU, from Commission/Federal Agencies, to European Parliament/Congress, this levels the playing field, but inevitably poses severe problems with regards to sovereignty and regulatory space, which makes it the least likely option to be pursued.

2.3. The how

Looking at how the legislative and the regulatory processes in the US and the EU are carried out reveals a no less complex set of issues.

a) The US mechanisms

As expected, the legislative process in the United States revolves around Congress – a Congressman introduces a bill, which is then debated in both House and Senate (first in the relevant Committees and then on the floor) and, if approved, is then sent to the White House and signed by the President.

[110] This is all the more problematic since 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." [Alemanno, 2014]

The regulatory process – i.e. rulemaking – is agency-centred. While there are some variations with regards to exact steps (there is a large degree of agency autonomy) the key elements are the same.

A proposed rule is first published in the Federal Register - Notice of Proposed Rulemaking and then it undergoes a process of 'notice and comment', whereby interested parties can give their input. The agency is required to consider comments received, but not necessarily incorporate them in a revised version of the rule. However, when issuing the final rule, the agency must provide "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." [Alemanno, 2014] The final version of the rule is then published in the Federal Register and sent to Congress for review.

A special case is represented by 'significant' rules. In addition to the normal steps of the rulemaking process above, these are also required to undergo a regulatory cost-benefit analysis and, if 'economically significant', a Regulatory Impact Analysis (RIA)[111] before being open for public comment.

An important point worth making here is that, while de jure, the Congressional Review Act (CRA) allows Congress to reject agency regulatory proposals, de facto, it can rarely do so because of the complicated process it has to go through. "The "joint resolution" process requires that both chambers pass the identical resolution and that the President then sign that resolution. Since the President is quite unlikely to sign a resolution disapproving a rule that one of his agencies has just enacted, congressional review very seldom results in the reversal of a rule." [Parker and Alemanno, 2014] That is why, since the adoption of the CRA, only one agency rule was successfully overturned. A bill aimed at changing the status quo and giving Congress more say in agency rule making (REINS Act) is currently being debated in the Senate. The implication is that Congress is not particularly involved in regulating, beyond the initial delegation of regulatory power – "federal rule-making is in the exclusive remit of regulators and thus is done in its entirety by non-elected public officials." [Alemanno, 2014]

[111] We will revisit this topic in greater detail in the next section. We only observe here that this regulatory analysis, as the name suggests, is required solely of regulations, not legislation – "there is no impact assessment of draft legislative proposals, and no required process of stakeholder consultation prior to introducing the proposal." [Alemanno, 2014]

b) The EU mechanisms

The legislative process in the European Union is, in its most common form – i.e. the ordinary legislative procedure[112] – a party of three. It is the European Commission that has the almost exclusive right to propose legislation to the European Parliament and the Council, which then decide – jointly – whether adopt it, with or without amendments.[113]

It is important to note here that "major[114] 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,[115] extensive stakeholder consultations, full-fledged Impact Assessment (IA)." [Alemanno, 2014] It is, to a certain extent, the European counterpart of the US 'notice and comment' process and RIA, but applied to legislation, as opposed to regulation. This is an important difference with far-reaching implications for regulatory coherence efforts.

As far as regulatory processes go, these can take two forms, depending on the type of act aimed at – whether delegated (which can modify primary legislation in 'non-essential' ways) or implementing (which, as the name suggests, allows the Commission to merely implement legislative acts).

Delegated acts are adopted by the Commission under the scrutiny of the Parliament and the Council, who have the power to veto the rule in question if they so see fit.[116]

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[112] In the special legislative procedure, the EP and the Council can act without the Commission, with either of them in the lead – this is a less common version of law-making.

[113] "Once the legislative proposal is pending before EP and Council (the process of "colegislation"), the Commission participates in 'trilogues' with the EP and Council co-legislators aimed at achieving voluntary consensus on a common position. It also expresses its position on amendments." [Parker and Alemanno, 2014]

[114] Also referred to as 'significant' – details on what that means, exactly, in the following section.

[115] "Roadmaps explain what the Commission is considering. A Roadmap describes the problem to be tackled and the objectives to be achieved. It sets out why EU action may be needed and its value added. The policy options being considered are outlined. It also announces the details of the stakeholder consultation strategy." [Better Regulation Guidelines, 2015]

[116] It becomes obvious that the European Parliament has an easier task when rejecting regulations than Congress. The implication is that the EP is much more involved in rulemaking than the American Legislator.

Implementing acts are drafted by the Commission together with representatives of Member States via committees, without EP or Council input. Such a committee's role in developing implementing acts goes from that of mere consultant – in the advisory procedure – to that of final decision-maker (it can either approve or reject the proposed rule) in the examination procedure. "Moreover, in sensitive policy areas (including taxation, consumer health, food safety, and protection of the environment) and in cases where the basic legislation so provides, the Commission may adopt its draft measure only with the active concurrence of the Examination Committee." [Parker and Alemanno, 2014]

Delegated and implementing acts undergo an Impact Assessment if they are considered as likely to have a significant impact (economic, social, environmental etc.) in which case the IA procedure is the same as for legislative proposals.

c) The use of (R)IAs

As mentioned above, certain types of rules – those that are 'significant' – have to be screened for potential impacts, in both the US and the EU. The exact definition of significant, as well as the screening processes – Regulatory Impact Analysis (RIA) in the US, Impact Assessment (IA) in the EU – differ in the two jurisdictions.

The United States

In the US, there are two types of 'significant' rules which trigger two kinds of regulatory analysis.

On the one hand, "any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth

in this Executive order." [E.O. 12866, Sec 3(f)] is considered *a significant regulatory action* and requires a so-called general analysis, i.e. "an assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions." [idem - Sec. 6 (a)(3)(B)]

On the other hand, there are *economically significant rules* – whose main feature is that they have a likely economic impact of $100 million per year.[117] These require a more in depth analysis of potential impacts – a Regulatory Impact Analysis or RIA. Such an RIA typically includes "(1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs - quantitative and qualitative - of the proposed action and the main alternatives identified by the analysis." [Circular A-4] where "costs and benefits shall be understood to include both quantifiable measures and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach." [E.O. 12866 - Sec. 1 (a)]

A point worth mentioning is that while all federal agencies are required to provide "A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits" [Unified regulatory Agenda - Sec. 4 (c)(1)(B)], only executive agencies must carry out an RIA for economically significant rules. And they do so under the scrutiny of the White House Office of Information and Regulatory Affairs (OIRA).[118]

[117] Hence, any rules that fall under categories (2), (3) and (4) of E.O. 12866, Sec 3(f) are 'significant' and undergo a general analysis. But only those that (also) fall under category (1) are 'economically significant' and require an RIA. Sometimes an RIA can be performed for non-economically significant regulations too, but that is an exception, not the rule.

[118] Independent agencies can also carry out RIAs if so required by their founding statute, but without OIRA oversight. An example is the Securities and Exchange Commission.

International economic impact

When estimating the likely effects that regulatory initiatives might have, agencies are required to also consider international impact, echoing an effort by the administration to catch up with the consequences of globalized markets in their interaction with domestic regulatory spaces.[119]

According to the White House "International impact is a direct effect that a proposed or final regulation is expected to have on international trade and investment, or that otherwise may be of significant interest to the trading partners of the United States." [E.O. 13609 – Sec. 4 (b)] Hence, "the role of Federal regulation in facilitating U.S. participation in global markets should also be considered. Concerns that new U.S. rules could act as non-tariff barriers to imported goods should be evaluated carefully." [Circular A4]

The European Union

In the EU, "an IA is required for Commission initiatives that are likely to have significant economic, environmental or social impacts." [Better Regulation Guidelines, 2015] However, an exact definition of 'significant' is absent.

It is specified that "the benchmark criterion of "significant impacts" applies both to the macro- and the micro-level. This implies that IA is not only required for proposals expected to have far-reaching impacts on the economy or society as a whole, but also for initiatives likely to have a significant impact on a particular sector, societal group or geographical area." [Better Regulation Toolbox, 2015] but, in contrast to the US, there is no general rule on when an evaluation of the likely impact of legal acts is required. It rather operates on a case-by-case basis: "an IA should be carried out only when it is useful. An assessment of whether an IA is needed should therefore be done on a case-by-case basis." [idem]

Consequently, unlike the US, where there are two kinds of analyses (the general one for significant rules and the RIA for economically significant ones) in the EU there is only one kind of Impact Assessment. Also unlike the US, in the EU "impact assessments should be

[119] Recall our earlier discussions on the widening gap between regulatory jurisdiction and regulatory impact and the failure of national regulators to take into account the cross-border effects of their domestic regulations (Chapters II, III and IV).

carried out for both legislative and non-legislative initiatives as well as delegated acts and implementing measures, taking into account the principle of proportionate analysis." [Better Regulation Guidelines, 2015]

Procedurally, there is first an Inception Impact Assessment – i.e. "a Roadmap for initiatives subject to an IA that sets out in greater detail the description of the problem, issues related to subsidiarity, the policy objectives and options as well as the likely impacts of each option" [idem] – followed by a full-fledged IA Report.

Such a report should "collect evidence (including results from evaluations) to assess if future legislative or non-legislative EU action is justified and how such action can best be designed to achieve desired policy objectives. An impact assessment must identify and describe the problem to be tackled, establish objectives, formulate policy options and assess the impacts of these options." [Better Regulation Guidelines, 2015] The impacts assessed can relate to competitiveness, research and development, SMEs, competition, the internal market, human rights, labour market, health, consumers, the environment etc.[120]

Unlike the US RIA, which focuses heavily on cost-benefit analysis and strongly encourages the quantification thereof, "The Commission's impact assessment system follows an integrated approach that assesses the environmental, social and economic impacts of a range of policy options thereby mainstreaming sustainability into Union policy making." [idem]

International economic impact

The Better Regulation Guidelines strongly urge IAs to take into account the likely international impact of the regulatory proposals under review, where international impact ranges from international legal obligations to international trade and investment effects.

Hence, a proposed rule should not be inconsistent with international legal commitments, such as WTO law (especially the TBT and SPS Agreements), Free Trade Agreements signed by the EU, Investment Treaties and other types of economic partnerships. Also, the new legal act should not create unnecessary barriers to trade and FDI and should be

[120] For more details see Annex 2.

screened for effects on, inter alia, EU exports and imports, investment flows, potential for trade in services etc.

d) Side by side

When looked at comparatively, the EU and the US are rather far apart in terms of legislative and regulatory processes.

If in the US, the two are clearly separated, carried out by different bodies and operating on distinct rules, in the EU there is quite a bit of a mix, with all the major players involved in both processes, albeit at different stages and with different prerogatives. This status quo makes designing a palatable regulatory coherence algorithm for harmonizing the 'how' of law/rulemaking in the two jurisdictions particularly challenging.

As far as assessing likely impact of regulations, while the guiding principles are comparable and both approaches emphasize the importance of taking international effects into account, the US and EU differ in terms of why and when the RIAs/IAs are carried out,[121] under what legal constraints, by whom and for what types of legal acts.

As relevant for our discussion on regulatory coherence, the latter distinction is paramount. If in the US, only regulatory acts are required to undergo an RIA, if economically significant and (most often) if issued by an executive agency, in the EU both legislative and non-legislative acts must be accompanied, if significant, by an IA.

How does this difference play out in practice? The best example is the TTIP itself. As a major legal proposal, it had to be backed by a rather detailed IA[122] in the European Union. In the US, given its status of international agreement, it did not have to comply with RIA requirements, as those only apply to regulations. Should the US be interested in exploring the

[121] "Whereas in the US an IA is produced in order to find the most efficient way of implementing laws passed by Congress in the form of a rule or a regulation, a Commission IA serves mainly to inform policy makers when deciding on what sort of legislative or non-legislative proposal to make. Created at different points in the process, the analyses that follow these guidelines necessarily serve different purposes." [O'Connor Close and Mancini, 2007]

[122] The assessment of likely economic impacts contained in the Commission's TTIP IA is based on the CEPR [2013] study presented in detail in Chapter V.

likely effects of the TTIP, an assessment could be carried out by the International Trade Commission,[123] but not in mandatory fashion.

Why is this so important? Because if regulatory coherence aims to cover the evaluation of impacts in the two jurisdictions with a view to increasing compatibility between the two approaches, it will have a hard time achieving balance between the scope of the provisions in the US as opposed to the EU. Legislative acts are under no impact analysis obligations in the US and it is very unlikely that the TTIP can change the way Congress makes law.

2.4. The what

Arriving at the results of the legislative and regulatory processes described before – i.e. the legal acts themselves, we find the gap between the US and the EU wider than ever.

a) The United States

The results of legislative action – i.e. legislative acts – are typically called statutes. "Federal statutes are laws enacted by Congress with (and in some circumstances without) the approval of the President." [Library of Congress]

The outcome of regulatory action – regulations or rules – are defined by Executive Order 12866: "'Regulation'' or ''rule'' means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." [E.O. 12866, Sec. 3 (d)][124]

[123] It is The International Trade Commission (ITC) that is usually in charge of assessing the likely costs and benefits of a trade agreement the US is considering, whenever such an assessment is required by the US Trade Representative – for example, the ITC carried out such assessments on the Transpacific Partnership (TPP) and on elements of the TTIP, which remain, however, confidential (unlike in the EU, where the TTIP IA is public).

[124] There are some exceptions to this, such as, inter alia: "Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services; Regulations or rules that are limited to agency organization, management, or personnel matters" etc. [E.O. 12866, Sec. 3 (d)]

As it becomes obvious there is clear cut delimitation between the two kinds of legal acts.

b) The European Union

In the EU, as we saw before, the outcome of the legislative procedure is, generically speaking, legislation, while the acts adopted following non-legislative procedures can be either delegated acts (which modify primary legislation in non-essential ways) or implementing acts (which merely implement legislation).

When looking at the formal names attributed to these 'legal acts' – as specific to EU law – we find five main categories: regulations, directives, decisions, recommendations and opinions, the first three being the most important, as they are the only ones legally binding. According to the Treaty on the Functioning of the European Union: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force." [Article 288 TFEU]

The most striking feature of the above categorization is that it says nothing on whether these acts are legislative or not legislative in nature. And that is so because they can be either. Regulations, directives and decisions can take the form of legislative, delegated or implementing acts – it all depends on the procedure used for their adoption: "Legal acts adopted by legislative procedure shall constitute legislative acts." [Art. 289 TFEU] What this means is that an e.g. regulation can very well be – and often is – a legislative act.

Hence, the categorization of legal acts into legislative and non-legislative is based solely on form, disregarding entirely the content of the act. "If a legislative procedure is prescribed for the enactment of a legal act then it is by definition a legislative act, notwithstanding that the content of the measure might well be regarded as administrative in nature. The converse is equally true. If the Lisbon treaty does not prescribe a legislative procedure for the passage of a legal act then it is not a legislative act, even if judged by its

content it lays down rules of general application that would in substantive terms be regarded as legislative in nature." [Craig and De Burca, 2011]

To complicate matters further, EU law also operates with the concept of 'regulatory acts', which, in the view of the Court of Justice of the European Union, represent acts of general application except for legislative acts. [Inuit Case, 2013] By this token, a *regulation* may or may not be *regulatory* depending on the procedure used for its adoption.

As it becomes obvious, in the EU, definitions tend to be a slightly more complicated matter. While this is not problematic within the confines of the EU, when these interact with, e.g. US law and its definitions, problems arise.

c) Side by side

When looked at comparatively, it is immediately apparent that analogies between the categories of legal acts typical of the US and those specific to EU law are very difficult to make – which spells trouble ahead for regulatory coherence efforts.

Most straightforward, an EU regulation and a US regulation are two very different things. An EU regulation may, if legislative, be more akin to a US statute, whereas, if regulatory, more similar to a US regulation,[125] although these similarities never go as far as complete equivalence. The implication for the TTIP is that it will be particularly difficult to establish which legal acts coherence should cover – a generic reference to 'regulations' will be of very little help.

Therefore, it all largely depends on how negotiators end up defining "regulatory". Another option would be to avoid a definition altogether and simply enumerate the categories of legal acts TTIP should, in principle, cover (a positive list – the items on the list are included) or the ones the TTIP does not address (a negative list – whereby all items not on the list are automatically included)[126] depending on which approach is better suited.

[125] This goes right back to our Chapter II discussion on the proper definition of "regulation" – which proves to be, as detailed therein and further emphasized here, exceptionally challenging.

[126] This approach might work best for coherence aimed at legal acts adopted at sub-central level (US State/EU Member State).

2.5. Conclusion

Overall, it appears that the US and the EU have "very different institutional and legal frameworks, following different processes under rather different constraints." [Parker and Alemanno, 2014]

The principles underscoring their legal thinking vary to some extent, which leads to diverging legal solutions which often collide.[127] Moreover, the legal decision making architectures vary widely, from main players and their prerogatives, to the modus operandi typical of each system (legislative/regulatory) and the types of legal acts arrived at as a result.

The main challenge for regulatory coherence efforts thus lies in finding a politically palatable way to include all relevant elements of US and EU law making under the TTIP umbrella.

Broadly defining each of them would be the most straightforward way to do so – along the lines of e.g. the definition this thesis works with: *"A regulation is a binding legal norm issued by a public authority that aims to shape the behaviour of others according to given standards so as to produce specified outcomes."*, where 'public authority' can refer to any legislative, executive or administrative body vested with the power to create law, while 'others' can refer to individuals, firms, state organs or, in the case of the European Union, states themselves (Member States).[128]

Or it could be broadened further, so as to include soft-law (such as private standard setting) within its realm, in OECD-like fashion: "For the OECD, regulation is defined broadly, referring to the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and informal orders and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to which governments have delegated regulatory powers." [OECD, 2012]

Unfortunately, the most straightforward way is also the least politically feasible. Its main advantage – it is broad – is also its main flaw – it is *too* broad. Bringing everybody and everything under the constraints of a coherence commitment in an international agreement borders undermining legislative and regulatory sovereignty – and that is hard to sell.

[127] See the famous cases on hormones, GMOs or chlorine washed chicken.

[128] See Chapter II.

While it is true that any international legal commitment chips away at national sovereignty to some extent, the dent into domestic legal space that coherence promises to make is unprecedented. Granted, it all hinges on what negotiators will end up meaning by 'coherence'. Defining it as mere dialogue between the parties poses no problems (there already is a dialogue framework between e.g. the US Congress and the EP – the Transatlantic Legislative Dialogue) while setting it up as a gateway to eventual convergence between the end results of legislative and regulatory processes might prove to be a deal breaker.

The lack of standard definitions for either of these concepts makes it complicated for TTIP negotiators to carve out the appropriate limits to the scope of the agreement. At the same time, it allows them complete freedom in making their own definitions, in ways that best suit their interest, without having to worry about consistency with e.g. other areas of law that may have build on other definitions of the same concepts.

The latter does indeed seem to be true for TTIP architects, if one looks at the approach they have so far chosen towards the notion of 'regulatory coherence'.

3. The TTIP and Regulatory Coherence

Assessing an agreement currently being drafted is exceptionally difficult – there is virtually no way of predicting what the end result will be. The same is true for the TTIP and its take on regulatory coherence. We will only have definite answers when the final text is made public. Until then, everything is speculation.

However, some educated guesses towards likely directions can be made based on the information made available by the parties themselves. Both the EU and the US have given some indication of what their intentions are with regards to the regulatory part of the agreement.

Hence, we know there will be a Horizontal Chapter, dealing with cross-cutting issues pertaining to regulatory affairs; TBT+ and SPS+ chapters, which will, as their name suggests, build on existing provisions in the WTO TBT and SPS Agreements[129] with some added

[129] See Chapter IV for an overview.

elements; and sectoral chapters, dealing with regulatory issues relevant to specific economic sectors (from chemicals to communication) with special attention dedicated to financial services.

We will further focus on the horizontal chapter, as that will be the gateway to the other chapters and give the overall direction to the discussion on regulatory coherence contained in the other parts of the agreement.

3.1. The US view

As the United States maintains a strict confidentiality policy with regards to its exact objectives in the negotiations, there is quite little to infer about what the regulatory part of the TTIP looks like as seen from Washington. What US officials have expressed is rather brief: "*While maintaining the level of health, safety and environmental protection our people have come to expect*, we seek greater *compatibility* of U.S. and EU *regulations* and related *standards development processes*, with the objective of reducing costs associated with unnecessary regulatory differences and facilitating trade, inter alia by promoting transparency in the *development and implementation* of regulations and good regulatory practices, establishing mechanisms for future progress, and pursuing regulatory *cooperation* initiatives *where appropriate.*" [United States Trade Representative (USTR) website - author's emphasis]

However, certain elements do stand out, giving an indication about the general intentions of the US side.

a) Regulatory coherence revisited

First off, there is the complete lack of the term 'coherence' which is replaced with a combination of 'cooperation' and 'compatibility'.[130] But the change is not substantive, for de facto, cooperation which leads to compatibility is precisely what coherence is. Recall our working definition in Chapter II: *Regulatory coherence is the coordination of regulatory*

[130] The US text does not provide any clarification as to how far said compatibility will go – will it lead to convergence somewhere down the line?

design and implementation processes, aimed at increasing the compatibility of current and future rules and regulations.

What does constitute substantive change, however, is the qualification '*where appropriate*' – cooperation will not be the default mechanism for all areas, but only for some specifically identified ones. We will have to wait for the text of the Agreement to know which areas those might be and what criteria were used for their selection.

Similarly, we are given no details on the potential forms of said cooperation (harmonization, mutual recognition etc). In the wording of the USTR: "a range of regulatory cooperation tools as well as other steps aimed at reducing or eliminating unnecessary regulatory differences." [USTR website]

What is more, the US refers to regulations and regulatory practices. We now know just how complicated it is to say what types of laws can/should end up under the 'regulatory' umbrella; the text above does not bring any clarity on that front either.

On a different note, the process-outcome approach to coherence is maintained, with both regulations and their development and implementation being on the agenda.

A novelty is the reference to standards and standard development processes as an element of interest and relevance to the TTIP, in addition to general rules and regulations.

b) Principles of regulation

An important point made has to do with the US commitment to 'maintaining the level of health, safety and environmental protection our people have come to expect' [USTR website] – in plain English, to its own risk assessment and risk management principles. As we know, these US principles often clash with the EU's precautionary principle, leading to conflicting regulations (e.g. GMOs) and, at times, even to trade disputes. If the US is set to not compromise on this issue, there is every chance the EU will adopt a similar stance, leading us to assume these sensitive areas of regulatory intervention might be precisely those where cooperation will not be considered 'appropriate' and will hence not be pursued.

c) Third country effects

Another interesting aspect is the US expectation for commonly agreed transatlantic norms to "serve as a positive example for third-country markets around the world" [idem] which may easily be seen as the diplomatic way of expressing the belief that the TTIP induced 'how-to' will eventually be adopted by the international community at large.

3.2. The EU input

The European Union has been much more forthcoming about its intentions, particularly after coming under severe criticism for its lack of transparency.[131] Ever since, the Commission has been publishing regular updates about the progress of the negotiations, including its proposals on various parts of the agreement as submitted to the American officials during bilateral talks. Such is the case of the EU's take on the horizontal regulatory chapter – tentatively called Regulatory Cooperation[132] – whose draft is up on DG Trade's website and which serves to make certain important points.[133]

a) The who and the what

To begin with, we find out the regulatory part of the TTIP should cover rules adopted at both central (US federal/EU) and sub-central level (US state/EU Member State). Likewise, we are given information on who the decision-making bodies covered are and what 'regulations' mean in TTIP context.

Hence, at central level, the 'regulators and competent authorities' are the European Commission and US Federal Agencies. [Art. 2 b)] This choice made by TTIP architects to focus on the executive is problematic – as we saw before, the European Commission is

[131] See Chapter III.

[132] The original title (2013) was Chapter on Regulatory Coherence – we will explore the likely reasons behind the change of name below.

[133] Only certain aspects of the content of the draft chapter will be discussed here – an exhaustive analysis seems sub-optimal for a rather simple reason: this content is bound to change as negotiations progress. One can already notice differences between the first version of the draft (published in February 2015 on DG Trade's website) and the current version (published in May, after negotiation round 10).

involved in EU lawmaking much more than US Federal Agencies are, by actively participating in the legislative process and influencing heavily the acts adopted by the EP and Council, something that never happens in the US, where Congress runs the show. So there is a certain lack of balance between TTIP coverage in the EU vs. its scope in the US in this respect.

With regards to regulations, EU negotiators chose to name the acts to be covered, instead of designing an all-inclusive definition. Hence, in the EU, 'regulatory acts' refer to "Regulations and Directives within the meaning of Article 288 of the Treaty on the Functioning of the European Union, including: Regulations and Directives adopted under a legislative procedure in accordance with the Treaty; Delegated and Implementing acts adopted pursuant to Articles 290 and 291 of that Treaty" [Art. 2 a) - TTIP Regulatory Cooperation Chapter Draft, 2015] As it become obvious, in TTIP parlance, 'regulatory acts' refer to both legislative and non-legislative (i.e. regulatory) acts, as defined by EU law.

The same is true for the US, where 'regulatory acts' should cover "Federal Statutes; Rules as defined in 5 USC § 551 (4); Orders as defined in 5 USC § 551 (6) and Guidance documents as defined in Executive Order 12866 § 3 (g) issued by any federal agency, government corporation, government controlled corporation or other establishment in the executive branch of government covered by 5 USC § 552 (f) (1) of the Administrative Procedures Act, as amended; Executive Orders and [other executive documents that lay down general rules or mandate conduct by government bodies]." [idem] The main feature of this definition is that it brings Federal Statutes – i.e. pure-blooded legislative acts adopted by Congress – under the 'regulatory' umbrella.

What is striking about the approach taken by the EU negotiators with regards to the 'definition dilemma' outlined in the previous section is that while the legislators themselves (e.g. Congress) are *not* covered by the TTIP, the laws that they make (i.e. Federal Statutes) *are*. It is an ingenious and unexpected solution to the otherwise irreconcilable difference between the two systems: it avoids the sovereignty problem by not encroaching into domestic lawmaking too much (i.e. legislators do not have to abide by TTIP rules) but it does ensure

equal coverage[134] in both the EU and the US, by including legislative acts in the 'regulatory' pool.

Therefore, the stance taken with regards to the 'what' somewhat mitigates the perceived lack of balance regarding the 'who' outlined before, giving TTIP comparable coverage in both jurisdictions.

When it comes to the sub-central level, regulators and competent authorities include "central government authorities of an EU Member State and central government authorities of a US State" [Art. 2 d)] while regulatory acts cover "laws and regulations adopted by the central authorities of an EU Member State, except those that transpose into domestic law European Union acts and laws and regulations adopted by the central authorities of a US State." [Art. 2 c)] This part is clearly still work-in-progress, given how vague the wording is – "laws and regulations adopted by the central authorities" means very different things in the 78 jurisdictions targeted. It is going to take an impressive amount of legal acrobatics to neatly lay down what this part of the TTIP will end up covering.

What is of paramount importance here is that the scope of this chapter of the TTIP is driven by the 'what' – i.e. by the nature of the legal acts covered. Judging by the definitions alone, one could easily say the scope is virtually unlimited – both legislative and regulatory acts, at both central and sub-central level, are included. But then comes Article 3 of the Draft Chapter – Scope – which effectively narrows it to down to two types of acts: "acts at central level[135] which a) determine requirements or related procedures for the supply or use of a service in the territory of a Party, such as for example authorization, licensing or qualification; or b) determine requirements or related procedures applying to goods marketed in the territory of a Party concerning their characteristics or related production methods, their presentation or their use." [Art. 3.1 – TTIP Regulatory Cooperation Chapter – Draft]

The EU architects of the TTIP are very clear about the limits of the coverage of the provisions therein with regards to the regulatory part: "The scope of this Chapter is determined by the definition of 'regulatory acts' and by the provisions of Article 3. Only those regulatory acts that fulfil the criteria in Art 3.1 (i.e. subject-matter of regulatory acts) are

[134] As explained before, EU regulations may well be legislative, while in the US, they never are. A mere reference to 'regulations' would mean a greater scope for the TTIP in the EU than in the US, which would be unbalanced. The approach opted for by the EU negotiators thus solves the problem.

[135] The equivalents at non-central level have not yet been drafted.

covered. Accordingly, this chapter does not cover legislation at central or non-central level which establishes the framework or principles applicable on a cross-sectoral basis to achieve public policy objectives, such as acts determining the principles of, inter alia, competition, consumer protection, IPR protection, the protection of personal data or the protection of the environment." [General notes – TTIP Regulatory Cooperation Chapter – Draft]

While it is clear that the current version is not set in stone and the exact coordinates of the scope will change as negotiations progress, it can already be said, without fear of erring, that the EU is very clear about its intent and takes the liberty of defining otherwise fluid concepts – such as 'regulatory' – in accordance with its objectives within this specific negotiating context. As we will see next, it has a similar position with regards to 'coherence' and its contextual translation into practice.

b) The how

The nature of the regulatory acts determines not only the scope of the chapter, but also the kind of regulatory interaction envisaged. Hence, 'good regulatory practices'[136] will cover all acts as defined by Art 3.1, while 'regulatory cooperation' applies only to those regulatory acts which fulfil the criteria of Art 3.1 and, in addition, "have or are likely to have a significant impact on trade or investment between the Parties." [Art 3.2] where the 'significance' is to be determined domestically. We will look at these in turn.

Good regulatory practices (Section II)[137]

Good regulatory practices include, first off, 'Early information on planned acts' (Article 5) which essentially boils down to making "publicly available at least once a year a list of planned regulatory acts at central level, providing information on their respective scope and objectives." [Art 5, TTIP Regulatory Cooperation Draft] We know from the previous

[136] This reference to 'Good Regulatory Practices' connects back to our Chapter II discussion on the origin of regulatory coherence – i.e. the efforts towards 'smart regulation' and its subsequent internationalization. As we will see going forward, the TTIP text mentions precisely the 'good regulatory practices' established by domestic use and addressed in our coverage of the topic in Chapter II.

[137] An important observation is that this section (presently) covers only acts at central level.

section that this early information stage is already part of the process in both the EU (Commission Roadmaps) and the US (Notice of Proposed Rule Making) – we also know that while in the EU the requirement covers all proposals (legislative/regulatory) in the US it only addresses the latter. What the TTIP aims to do is extend the requirement of early information to legislative acts as well, in an attempt to level the playing field between the two parties. Hence, "draft regulatory acts proposed by the US Administration to Congress are considered as 'planned' acts, as are bills introduced by Congressmen." [Notes - TTIP Regulatory Cooperation Draft] This is clearly an innovation – currently, Congress is under no obligation to make public its lawmaking intentions before they are introduced for debate. But since in TTIP parlance, 'regulatory acts' include Federal Statutes, any provision with regards to the former automatically includes the latter and hence touches upon Congress modus operandi.

What is more, "for planned regulatory acts at central level undergoing impact assessment each Party shall make publicly available, as early as possible, information on planning and timing leading to their adoption, including on planned stakeholder consultations and potential for significant impacts on trade and investment." [Art. 5.2]

In fact, with regards to impact assessment, while each Party reserves the right to carry out such assessments according to their own rules and procedures, TTIP does mandate certain aspects of it, such as assessing how "the options under consideration a) relate to relevant international instruments; b) take account of the regulatory approaches of the other Party, when the other Party has adopted or is planning to adopt regulatory acts on the same matter; c) impact international trade or investment" [Art 7.2] where international trade or investment is set to cover EU-US flows.

The most interesting element of this part of the proposal is clearly the requirement to assess impacts taking into account '*the regulatory approaches of the other Party, when the other Party has adopted or is planning to adopt regulatory acts on the same matter*' [idem] – while formally filed under Good Regulatory Practices, this provision might as well be part of the Regulatory Cooperation section for what it mandates, in practice, is dialogue and a certain degree of coordination between the institutions in charge of assessments, who will no longer act in 'splendid isolation'. Rather, they will "promote the exchange of information on available relevant evidence and data, on their practice to assess impacts on international trade

or investment, as well as on the methodology and economic assumptions applied in regulatory policy analysis." [Art. 7.3 b]

Regulatory Cooperation (Section III)[138]

We do, in fact, find the topic addressed under Regulatory Cooperation as well, but from a slightly different angle. This section creates the so-called bilateral cooperation mechanism, which aims to "support regulatory cooperation between regulators and competent authorities to foster information exchange and to seek increased compatibility between their respective regulatory frameworks." [Art. 8.1]

From the get go, the term coherence is nowhere to be found, but compatibility and cooperation are, just like in the US communication, consistently referred to. Unlike in the US text, here we are told what *'cooperation'* would amount to: "meetings, written exchanges or any other appropriate means of direct communication." [Art. 9.6]

An interesting – and potentially contentious – element: these exchanges can take place at any stage in the development of a regulatory act. For example, in the case of the US "a dialogue may take place [...] before the publication of a draft for consultation." [Notes on Art. 12.2] – i.e. before the proposed rule reaches the public. In other words, the EU might get a chance to influence a US rule before US stakeholders do – a feature which, if adopted, can obviously create quite a controversy.

What is also important is that legislative bodies are included in this mechanism: "those exchanges include submissions concerning acts that are being prepared or reviewed by each Party's *legislative authorities*." [Art. 8.3 – author's emphasis] In fact, the text underlines that "A Party shall also regularly inform the other Party about proposed regulatory acts at central level that are likely to have a significant impact on international trade or investment [...] where those proposed acts do not originate from the executive branch and were not included in the most recent list published pursuant to Article 5.1" [Art. 9.2]

If this is the process of cooperation, then its targeted outcome includes, but is not limited to: "a) Mutual recognition of equivalence of regulatory acts, in full or in part, based on evidence that the relevant regulatory acts achieve equivalent outcomes as regards the

[138] The provisions therein apply, unless otherwise stated, to both central-level and non-central level acts.

fulfilment of the public policy goals pursued by both Parties; b) Harmonisation of regulatory acts, or of their essential elements, through: i) application of existing international instruments or, if relevant instruments do not exist, cooperation between the Parties to promote the development of a new international instrument; ii) approximation of rules and procedures on a bilateral basis; or c) Simplification of regulatory acts in line with shared legal or administrative principles and guidelines." [Art. 10.2]

This Article brings forth a few very important issues.

One, we see that the outcome can be either coherence (via mutual recognition, whereby regulatory acts remain *different* in the two jurisdictions, but are no longer in conflict) or convergence (via harmonisation, whereby the EU and the US end up having *the same* regulatory acts, developed on the basis of an international instrument or via bilateral approximation). This is crucial, for it answers a recurrent question throughout the thesis – i.e. what is the extent of 'regulatory alignment' sought by the TTIP? In the EU's view, it can go from coherence to convergence, on a case by case basis.[139]

Two, it helps explain the change of vocabulary – what was initially known as the Regulatory Coherence Chapter is now titled Regulatory Cooperation, signalling a shift of focus, from outcome to process, mirroring EU's take in the TTIP, whereby the process of cooperation can lead to a *multitude of outcomes*, from coherence to convergence.

Three, a clear reference is made to the intent of developing international standards – the underlying message is that the bilaterally agreed transatlantic norms will gradually spill over and ultimately be adopted by the international community at large. In fact, the TTIP Chapter has an Article focused on this very issue – Promoting International Regulatory Cooperation – which stipulates that: "The Parties agree to cooperate between themselves, and with third countries, with a view to strengthening, developing and promoting the implementation of international instruments inter alia by presenting joint initiatives, proposals and approaches in international bodies or fora, especially *in areas where regulatory exchanges have been initiated or concluded pursuant to this Chapter and in areas covered by this Agreement*." [Art. 13 – author's emphasis]

[139] This has tremendous implications – political, economic, legal – for our 'Cui prod est?' debate – see next Chapter.

The text also provides for regulatory exchanges at non-central level, but the language used is softer: "The Parties encourage regulatory exchange on regulatory acts at non-central level in areas or sectors where there may be common interest." [Art. 11.1]

Along different lines, the creation of a body meant to coordinate the implementation of the Chapter's provisions is envisaged - The Regulatory Cooperation Body (RCB). While the final details regarding this body are still being ironed out, there are voices saying that it will be built and operate in similar fashion[140] to the Regulatory Cooperation Council (RCC) the United States has in place with Canada,[141] but nothing has yet been confirmed.

Since its features are still under construction, only one observation will be made here in what regards its future role: it will apparently lack the power to make law (it merely oversees regulatory exchanges) but its relation to the parties' legislative bodies – which is fundamental – is, for the time being, still being looked into. While one could venture out to say it is highly unlikely the RCB will be given any kind of power over domestic lawmakers, still, its potential interaction with the EP or Congress necessitates thorough analysis.

4. Implications

Looking at the set-up of the two systems and at the initial draft of the TTIP Regulatory Cooperation Chapter, a few important things stand out. One the one hand, it becomes clear just how complicated it is to design a framework that can cover all relevant aspects while at the same time remain sovereignty friendly and politically realistic; on the other hand, it

[140] "These RCCs, per their terms of reference, are co-chaired by the OIRA Administrator and a high-level representative of a similarly situated agency in the partner country's government. The RCC co-chairs work closely with their respective trade and foreign affairs agencies - in the United States, these are USTR and the Departments of Agriculture, Commerce, and State - and the agencies and ministries with legal authority to implement any of the agreed-upon initiatives. The co-chairs of the RCCs must engage as necessary with the specific regulatory agencies and ministries to address policies and issues for which the regulatory agencies and ministries are responsible. Through this process, the United States and its RCC partners identify sectors for cooperation that will yield significant net benefits and develop and implement cooperation work plans." [Regulatory Working Group Guidelines - Executive Order 13609 "Promoting International Regulatory Cooperation", 2015]

[141] See Chapter III for details on the US-Canada RCC.

becomes immediately apparent that the implications of the choices made by the TTIP architects with regards to this chapter are not just of a legal nature.

4.1. The difficulty of the task at hand

We have seen throughout our brief comparative analysis of the US and the EU legal systems just how different they are with regards to principles, political setting and the architecture of who and how makes law and what forms legal norms end up having. We have also seen, via our selective overview of the regulatory part of the TTIP that it has so far been designed to cater, to a certain extent, to the idiosyncrasies of the two political entities.

a) A healthy dose of criticism

This underlying necessity to reconcile fundamental differences between the two legal orders has resulted in a text that is somewhat chaotic – legislators are not covered, but legislative acts are; 'regulatory' acts can be both regulatory and legislative, depending on the context; all acts that spell out requirements for goods and services are covered by 'good regulatory practices' but only those with a 'significant' impact on trade and investment are covered by 'regulatory cooperation', although at a closer look there is quite a lot of cooperation involved in good practices as well; said cooperation can lead to either coherence or convergence, but we are not given indications as to the circumstances when one could turn into the other; etc.

Naturally, this is merely the draft of the Chapter – in all likelihood, the final version will be very different, with some of the current rough edges probably smoothened and a lessened overall impression of patchwork.

Nonetheless, the amount of legal acrobatics required to make this Chapter work is unlikely to decrease as the final details are ironed out, for a very simple reason – there is no other way. The EU and the US are so different in many key areas that a certain degree of improvisation is – and will remain – sine-qua-non. Likewise, the approach towards certain issues - hinted at in this draft - is quite probably going to stay the same – such as, for example, the meaning of regulatory.

b) 'Regulations' and international trade and investment revisited

Given the way TTIP architects seem to be approaching the issue, the definition this thesis has been working with fits rather well. Indeed, de facto, under TTIP, the term does end up covering "*binding legal norms issued by a public authority*", where 'public authority' can refer to any legislative, executive or administrative body vested with the power to create law.[142] The main filters added by the TTIP are that these legal norms must determine requirements related to the supply, use, production methods, presentation etc. of goods and services and they must have a demonstrated significant impact on transatlantic trade and investment.

These filters feed right into our earlier discussion on why regulation is an element on the agenda of a trade and investment agreement – because it inevitably affects, in various forms, the way economic exchanges take place. As detailed elsewhere in this thesis,[143] domestic regulations have international effects, especially in relation with foreign trade and FDI. It is thus to be expected that they be dealt with as part of wider negotiations on an economic partnership. In fact, the TTIP spells out its intention to reduce regulatory barriers (NTBs) to trade and investment, that is "to reduce unnecessarily burdensome, duplicative or divergent regulatory requirements affecting trade or investment" [Art. 1.1 b]

These filters serve an additional role - that of confining what might, otherwise, become an unlimited scope of the agreement, to solely market-related regulatory acts. In other words, TTIP only addresses regulatory acts that have a demonstrated relation to transatlantic trade and FDI – which is clearly the politically correct approach. An approach that might, nevertheless, be difficult to put into practice for at least two reasons. One, determining that a regulatory act has a significant impact on trade and investment is a task that remains, even under TTIP, the exclusive prerogative of domestic authorities. And, as we have seen, 'significant' tends to mean different things in the EU and the US. Two, as discussed at large in Chapter IV, the range of rules potentially affecting trade and investment is extremely wide (from environmental to health to technological requirements), which means that using the

[142] See Chapter II for a discussion.

[143] See Chapter IV.

impact on transatlantic trade and FDI as the main criterion for applying the provisions of this chapter might not, in fact, narrow its scope all that much.

c) Cooperation and coherence – a new perspective

In the context of our discussion on 'coherence', we see the EU negotiators have, much like US officials, completely discarded the term – this part of the TTIP was initially (2013) titled Chapter on Regulatory Coherence – and resorted to the same combination of cooperation and compatibility, which, as stated before, does not change the substantive meaning of their pursuit in any relevant way.

What also does not change is the lack of clarity towards what degree of regulatory alignment is sought. And that is a crucial clarification, for, in the end, the exact scope of the agreement is determined not just by the 'regulatory' part of the equation, but also by the 'cooperation' one. The exact extent of the 'compatibility' sought by the TTIP between EU and US regulatory acts is the one that effectively decides just how much the agreement encroaches upon domestic regulatory space: it is immediately apparent that mere exchange of information on best practices is far less threatening to sovereign rulemaking than the requirement to arrive at identical norms.

What is more, as we saw in Chapter V, likely economic benefits likewise depend on the degree of regulatory alignment sought – the deeper the alignment, the higher the NTM removal rate, hence the larger the potential economic gains. Or, as we worded it, the broader the definition of coherence, the bigger the likely benefits; as it appears in the draft chapter, negotiators have broadened the scope of their regulatory efforts well beyond coherence, by renouncing the term altogether and replacing it with cooperation instead, which can cover all outcomes, from coherence to convergence. Consequently, as predicted by the economists that carried out the ex-ante impact assessments, the TTIP does indeed seem to bring under one conceptual umbrella very different types of regulatory alignment endeavours.

But what was the raison d'être behind the change of vocabulary and, implicitly, focus, from coherence to cooperation? The most plausible explanation would be marketing - political marketing. We explored elsewhere the agitated history of regulatory coherence so far

and the severe criticism it has been under,[144] to the point that the mere mention of the term as an objective of the TTIP gave rise to heated debates. This fall from grace most likely made it rather unpalatable to TTIP architects, who simply stopped using it. The replacement – cooperation – is the safest option for a reason also explored earlier – i.e. none of the critics of coherence were equally vocal against cooperation or suggested replacing it with competition. In fact, the term 'cooperation' is by now so deeply ingrained in collective thinking on international affairs as the 'default' form of global interaction, that few still question its appeal.

4.2. Multifaceted effects

Hence, the focus on cooperation rather than coherence (which we find not just in the EU text, but also in the US communication) has to do with more than just law and linguistics – it has to do with politics. And its political implications are multi-faceted, essentially constituting themselves into a TTIP response to the various concerns and critical stances towards the agreement that have, since the beginning of negotiations, been gaining momentum and steam.

a) Process vs. outcome

To begin with, the underlying political reason for the shift of focus from outcome (coherence) to process (cooperation) is – beyond the purely legal, text-based fact that there might other outcomes to cooperation than coherence – the need to appease concerns that the TTIP would force certain regulatory outcomes on either the EU or the US, i.e. that it would become a supra-national mechanism with the power to dictate to both parties what laws to adopt. This often expressed fear has determined negotiators to clearly state that: "This Chapter provides a framework for cooperation among regulators and encourages the application of good regulatory practices. It will help identify and make use of possibilities for cooperation in areas or sectors of common interest. *Its provisions do not entail any obligation to achieve any particular regulatory outcome*." [Article 1.2 – author's emphasis]

[144] See Chapter III.

The fear towards the negative impact of the TTIP on domestic lawmaking has multiple versions, ranging from endangering the right to regulate and the principles of regulation to undermining the integrity of the law making process itself, as discussed at large previously.[145] What we see here is that authorities have specifically targeted these issues, in either the text of the Draft Chapter itself or in additional, supporting documents.

b) The right to regulate

The most often quoted concern has to do with the right to regulate, which the TTIP would, as some worst-case scenarios suggest, all but abolish, to the point that domestic regulators would be hand-tied by the agreement and thus unable to regulate in the public interest, for e.g. the protection of health or the environment, if those regulations were not business friendly enough. It is a fear that builds extensively on negative NAFTA and ISDS experience[146] and is fuelled by the fact that the TTIP remains, in essence, an economic agreement aimed at fostering increased trade and FDI.

Official responses have been very direct, with the current text of the agreement emphasizing its purpose is "To reinforce regulatory cooperation thereby facilitating trade and investment in a way that supports the Parties' efforts to stimulate growth and jobs, while pursuing a high level of protection of inter alia: the environment; consumers; public health; working conditions; social protection and social security; human, animal and plant life; animal welfare; health and safety; personal data; cyber security; cultural diversity; and preserving financial stability." [Art. 1.1.a]

The right to regulate is explicitly stated as inviolable, with Parties recognizing "the importance to achieve public policy objectives and their *right to regulate* and adopt measures to ensure that these objectives are protected at the level that each Party considers appropriate, in line with its respective principles." [Preamble - author's emphasis]

[145] See Chapter III.

[146] See Chapter IV.

c) Principles of regulation

Another element that is explicitly stated as set in stone is the respect for domestic regulatory principles, which would not be altered by those of the other Party: "The provisions of this Chapter do not restrict the right of each Party to maintain, adopt and apply timely measures to achieve legitimate public policy objectives, *at the level of protection that it considers appropriate, in accordance with its regulatory framework and principles*." (Art. 1.3 - author's emphasis) The language chosen is similar to the wording in the US communication.

This is a direct response to fears that TTIP would force the EU to renounce its use of the precautionary principle, adopt the US approach to risk assessment (which, as we saw before, does not encourage precautionary stances) and eventually lead to GMOs or chlorine washed chicken to be allowed on the European market. In the words of the TTIP opponents, it would trigger a race to the bottom to the least common denominator.[147] As it becomes obvious upon reading the Draft Chapter excerpts, this is not the case. So as to make it even clearer, the EU side has published an accompanying document to its Draft Chapter, where it states that "the two parties would continue to regulate in accordance with their regulatory framework, procedures and principles. This means that the well-established **precautionary approach to regulation** in the EU would not be affected by the provisions of the Regulatory Chapter. The EU would retain the ability to maintain and develop its own approach with respect to e.g. risk assessment or risk management." [Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation, 2015 – original emphasis]

In combination with the commitment to process rather than outcome, what this reinforced pledge to not alter principles means is that compatible regulations will be arrived at *only* in areas where there already is a degree of similarity: "In a number of areas EU and US regulations provide similarly high levels of protection and could be compatible. In others, we will keep our different levels of protection." [Regulatory Cooperation in TTIP – Factsheet, 2015] This point mirrors the US intent to cooperate only 'where appropriate'.

[147] See Chapter III for a discussion.

d) Institutional setting

Along similar lines, there have been voices arguing that the TTIP would represent a major overhaul of domestic regulatory processes, not just in terms of applicable principles, but also with regards to the role of the institutions themselves. Most have voiced concerns that elected parliaments (be it Congress or the EP) would be marginalized by the agreement's regulatory provisions, especially by the setup of the Regulatory Cooperation Body.

While we do not, at present, have enough information regarding the RCB and its role in relation to domestic lawmakers to draw a conclusion, we can observe that the European Commission has been rather direct in counteracting these allegations of democratic undermining, stating that the TTIP will not "circumvent parliaments, governments or stakeholders' roles in the regulatory process. TTIP will not change the rules set out in the EU treaties about how our regulations are made." [Regulatory Cooperation in TTIP – Factsheet, 2015]

More to the point: "The adoption of regulations would remain in the hands of domestic regulatory and legislative bodies or institutions. Any future initiative to further regulatory compatibility would follow the democratic process of each side, in full respect on the European side of the role of EU Member States and the European Council and Parliament, respectively. Such activity will also be conducted with the necessary transparency. The RCB will not interfere with internal regulatory decision making by each side as it will not have any role of prior vetting or examination of draft regulations." [Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation, 2015]

e) Business bias

A related concern has to do with the influence businesses would have on the regulatory process – corporate interests are perceived to have disproportionate weight in the design of regulatory solutions, especially since the stated purpose of the agreement is to reduce regulatory costs to business. Corporate lobby is feared to have too much power in shaping regulatory stances by, inter alia, being given access to draft regulations and,

consequently, the opportunity to influence them before they are finalized – all in the so-called consultation stage of rulemaking.

What officials have been quick to emphasize is that access will be given to all stakeholders, not just corporate ones and that consumer groups or NGOs will have just as much say in the design of future regulations.

Hence, "interaction with stakeholders is crucial to achieve the objectives pursued by the Regulatory Cooperation Chapter. Stakeholders and the general public would benefit from transparency provisions ensuring early publication of lists of planned regulations and consultations on significant measures. [...] All stakeholders would be offered a way to submit observations and concrete suggestions to regulators which would be carefully examined by the sectoral working group in charge or directly by the Regulatory Cooperation Body (RCB)." [Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation, 2015]

Even more straightforward – "The RCB should proactively interact with stakeholders, including businesses, consumers, NGOs and trade unions, in line with best practice." [idem]

4.3. Third country effects

In a different vein, the Draft Chapter makes clear that transatlantic regulatory cooperation is expected to have global effects. This transpires from both the US and the EU positions – commonly agreed rules[148] will be proposed as potential international instruments for the international community to eventually converge around. In the words of the European Commission: "We also want to work with the US to promote: international cooperation on regulatory issues; internationally agreed approaches to regulation." [Regulatory Cooperation in TTIP – Factsheet, 2015]

In practice, this means that new transatlantic rules will not only interact with international legal norms already in force (e.g. WTO's TBT and SPS Agreements) but will most likely influence the future evolution of international law in new fields, where norms are still work in progress (e.g. biotechnology, the internet) or are currently undergoing a deep process of redesign (e.g. financial rules).

[148] Provided there will be any. The EU/US expectation that it will be so can be taken as an indication that at least some of the cooperation attempted at will yield *convergent* results – i.e. common rules. We will revisit this point next Chapter.

What is also interesting to note here is that the Draft Chapter gives legal teeth to the global effects assumed by the economists carrying out TTIP impact assessments. As we saw in Chapter V, some premised their estimations of likely effects on the international spill-over of transatlantic norms. What we see now is that they were correct in doing so, at least in terms of the intentions with regards to the issue of TTIP architects. To what extent this intention will materialize and TTIP agreed norms will become global standards, it is impossible to estimate at this moment in time.

5. Conclusion

This Chapter has served to clarify a few very important issues. To begin with, we have seen where the US and the EU stand with regards to the design and implementation of rules and regulations and where the differences lie, from principles and political setting to actors, processes and outcomes. What became obvious throughout this brief comparative analysis is that bridging the gap between these rather divergent legal orders will not be an easy task.

Secondly, the solutions proposed with regards to said bridging – i.e. TTIP's regulatory cooperation – come with their own set of drawbacks and complications, from volatile scope and fluid, contextual meanings to political caveats and public perception biases. While a definitive analysis can only come when these solutions are officially adopted, one can venture out to say that some of the points mentioned here will likely be valid with regards to the final text as well – such as, for example, each side's commitment to its own domestic principles of regulation or the need to limit to a minimum the degree of interference with domestic lawmakers and their regulatory space.

Thirdly, we have seen how neatly the legal aspects of regulatory coherence tie into our earlier discussions on definitions, connection to trade and investment, economic analyses and civil society concerns. In other words, we now have the complete picture of the most pressing issues regarding the topic of regulatory coherence and its myriad implications, be it legal, economic or political.

And this point is fundamental for it gives us the green light to answer the million dollar question – i.e. cui prod est?

Chapter VII

Cui prod est?

Having explored the theoretical underpinnings of the concept of regulatory coherence, its conceptual fluidity and work-in-progress-like definition; the various meanings given to it in practice; its connection to international trade and investment, in particular to regulatory heterogeneity; its likely economic effects and, finally, its envisaged form in the Transatlantic Trade and Investment Partnership, it is now time to put all the pieces of the puzzle together and attempt to answer the title question: cui prod est?

1. What is regulatory, what is coherence and what does it all mean?

Analyzing, throughout the previous pages, the various expressions of regulatory coherence, in both theory and practice, one thing has become clear.

Theory's lack of consensus on what the concept actually means and the subsequent lack of a standard definition that holds true across countries and disciplines, is only reinforced by practice – the various fora that operate with the term have thus far failed to coin an official meaning, thus perpetuating the sub-optimal status quo where it refers to different things in different contexts. The TTIP is no exception.

This open-meaning nature of the concept applies to both regulatory (as we have seen, in the TTIP, regulatory actually ends up meaning legislative on occasion) as well as coherence. In fact, to add insult to injury, the TTIP architects have decided to stop using the latter altogether, and further complicate the discussion by choosing to operate with the term

cooperation instead. The relation between coherence and cooperation - as well as the likely reasons behind the TTIP shift from the former to the latter - have been explored elsewhere (Chapters II and VI, respectively). What is of interest here is what the consequences are.

Most straightforwardly, this lack of clear delimitation of what coherence is makes it impossible to discern the level of regulatory alignment sought – it could be merely increased communication on rules and rulemaking or actual convergence to common transatlantic norms. To complicate matters further, cooperation is only set to happen 'where appropriate', meaning we cannot, presently, estimate an overall outcome of regulatory dialogue efforts, which can have very different results from sector to sector.

Operating with such a fluid, context-dependant concept necessarily brings a certain degree of relativity to estimating its likely effects, be they economic, legal or political. It is immediately apparent that regulatory collaboration has a very different impact on economic indicators, political architectures or global interactions than convergence to common regulatory solutions.

Nevertheless, it is safe to assume the difference of outcome between non-binding dialogues and regulatory convergence is one of *degree*, rather than direction: the latter will have a greater impact on the current status quo than the former, but the nature of the change they both initiate is the same.

Therefore, we will explore, in the following pages, the potential – legal, economic and political – effects of the regulatory part of the TTIP, keeping in mind the main caveat: that these effects will vary in intensity with the degree of regulatory alignment eventually agreed on by the negotiators. We will thus offer rough estimates and leave room for additional impacts.

This is the optimal approach not only given present constraints (i.e. the relativity and open-endedness of transatlantic regulatory cooperation efforts) but also because the TTIP is set to be "a living agreement", meaning the EU and the US will continue to add to its content so as to keep it constantly up to date. Therefore, as the provisions of the treaty are bound to constantly evolve, so are their effects. And yet, again, the change is most likely going to be one of intensity, not direction – it is highly improbable that TTIP architects will go for a 180 degree switch from cooperation to e.g. competition.

Hence, we can make a few cautious, but still confident predictions. Let's take them one by one.

2. Law and regulatory coherence

With regards to the effects transatlantic regulatory coherence will have on the legal systems of the EU and the US, these can be categorised into (the by now default – in the context of this thesis) who, how and what: the main actors will be affected, albeit unequally, as will regulatory processes and regulatory outcomes.

While the negotiators' claim that the TTIP will not alter the way domestic legal orders function is, in principle, correct, still, a certain degree of post-TTIP adjustment will be necessary in both jurisdictions and this adjustment cannot be inconsequential for the key elements of the respective legal system.

2.1. The who

As far as the main actors are concerned, the focus of the TTIP lays, primarily, with the executive, whose key players (EU Commission and US Federal Agencies) are at the forefront of the discussion. Legislative bodies (European Parliament and US Congress) are, at least in the current form of the Regulatory Cooperation Chapter, severely sidelined.

a) The Executive

The first observation that comes to mind upon reading the TTIP Draft Chapter is that, in terms of the actors involved in the regulatory coherence game, the Executive is clearly in the driver's seat, with the European Commission and US Federal Agencies in charge of most of the design (during negotiations of TTIP clauses) and implementation (application of TTIP provisions) of regulatory cooperation endeavours.

Hence, in terms of power attribution, they are, by far, the main TTIP winners. How does 'winning' look like, in this context? We explored, in Chapter II, some of the drivers of cooperation, amongst which we identified science and agency power increase.[149] Now we can see these theoretical propositions materialize: European and American rule makers are suddenly at the helm of transatlantic regulatory cooperation, which promises to be mostly a technical – and, hence, technocrat driven – exercise. What regulators on both side of the Atlantic will, therefore, gradually grow into is their very own epistemic community, with their own 'science of regulation' based on shared good regulatory practices (such as regulatory impact analyses/assessments) as refined by regulatory dialogue and cooperation. Provided their collaboration yields common rules, with time, these can be adopted by the international community at large. This ensures that EU/US influence can now expand beyond domestic borders and that, in the long run, their modus operandi can become the standard for other countries as well. The latter is especially true given TTIP's stated intention of exporting, over time, commonly agreed transatlantic norms to third countries.

This globalization of TTIP rules all hinges, however, on the assumption that the TTIP will yield tangible regulatory results, which might prove to be a rather strong assumption.[150] And that is so because, as we also discussed in Chapter II, science is rarely universal and, despite their many similarities, the EU and the US have quite often arrived at conflicting regulatory solutions to the same problems – e.g. GMOs, hormones, chicken etc. So the legitimate concern is: should the two parties not agree on commonly developed norms, whose preference will prevail? Put differently, if EU and US executive power increases vis-à-vis other global players, how does their influence fare vis-à-vis each other? Will the parties engage in tit for tat bargaining, each trying to impose their regulatory principles on the other? According to official statements, no – the only commitment made in the TTIP is to regulatory dialogue, not regulatory outcomes. The latter will come only when appropriate and only when – or if – common solutions are considered mutually beneficial.

This renewed pledge on both sides to not renounce domestic regulatory principles (that we explored in depth in the previous Chapter) is consequential not only for the relation

[149] See Chapter II for a reminder.

[150] All the more since the TTIP does not commit to delivering any concrete common norms.

between executive players in interaction with each other, but also in their relation to stakeholders.

As we know, there is this perceived tension between societal interests at large - that officials are bound to respect via their democratic role - and the private interests of corporations engaged in transatlantic trade and investment, whose stake in the outcomes of an agreement aiming to, inter alia, reduce the costs of their doing business abroad is, obviously, quite large. Talks of business bias, undue corporate influence and potential regulatory capture bring us into a by now familiar Private Interest Theory setting. As already detailed before (Chapter III) this seems like an imperfect paradigm for the TTIP, not simply because the other stakeholders (public interest groups, NGOs, consumer groups) are powerful enough to stage their own intervention, but because the political system in both the EU and the US has – at least in theory – a strong enough mechanism of checks and balances designed to mitigate the risk of any private interest high jacking the regulatory design and implementation process.

Part of this in-built immunity mechanism is Parliamentary oversight: it is unlikely that, for example, Congress would accept Executive departures from US regulatory philosophy or that the European Parliament would allow the European Commission to stray from the application of Union values in its regulatory actions: “Although the EP may not be directly involved in negotiating terms of an agreement, it will withhold its consent if not satisfied with the results. 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.” [Alemanno, 2014]

The pre-requisite for Parliamentary oversight to function as a regulatory capture deterrent is for there to be Parliamentary oversight to begin with. This brings us to one of the most contentious aspects of the current form of regulatory cooperation in the TTIP – Parliaments are not involved.

b) Legislative bodies

The way the regulatory coherence part of the TTIP looks like now, there is very little room for the input of legislative bodies. This is true both at the current, negotiation stage of

the agreement, but also for its adoption and implementation, which may prove to be, in the long run, more problematic.

Parliamentary lack of involvement in the negotiation of the clauses of the agreement is not surprising (but rather typical for these kinds of international texts); nor is it necessarily sub-optimal. After all, the issues discussed are very technical and, as such, better left to the people usually in charge of them domestically – i.e. the Executive.

At the adoption stage, matters tend to become more complicated. While this would normally be the part where elected bodies are presented with the final version of the agreement, review it, potentially amend it and then vote either in favour or against, in practice, with the TTIP, things will play out differently – and not necessarily for the better.

Hence, in the US, Congress has recently (June 2015) approved Trade Promotion Authority (TPA - also referred to as 'fast-track'). This gives the President the power to negotiate a trade agreement that Congress can then either approve or reject in integrum, without being able to amend it in any way, on condition that the President keeps Congress informed on how negotiations proceed. What this means for the TTIP is that, should an agreement be reached, Congress will have no power to change its final version - should certain provisions be considered unacceptable, the only viable response is the rejection of the whole text. Combined with the lack of involvement of Congress in the design of the clauses of the TTIP, this inability to alter the final form of the text is most unwelcome and raises important concerns of legitimacy.

The situation is not very different on the EU side. Like Congress under the TPA, the European Parliament must give its consent for an international agreement to take force, but can only do so with regards to the text in its entirety and cannot operate any modifications to the form presented to it for approval. On the bright side, the EP is periodically updated on the evolution of the negotiations and given access to the documents drawn up during bilateral talks; still, it does not have the authority to modify the text itself, only to make recommendations to the Commission on points considered contentious, recommendations that – while taken into account by the EC – may not necessarily find their way into the final text of

the agreement. This somewhat limited influence[151] of the EP on the TTIP design is, as with Congress, cause for unease.

We touched upon the criticism targeting this lack of parliamentary input in the TTIP negotiations earlier (Chapter III) – we will further explore here some of its aspects, in light of the new developments on the TTIP negotiations front.

As we saw in the previous Chapter, the intent of the negotiators (as indicated by the EU Draft) is for the agreement to cover both regulatory and legislative acts, thus encroaching, somewhat, upon Parliamentary territory. While Legislators themselves are not set to be bound by TTIP provisions, the fact that the outcome of their work (i.e. legislative acts) is, automatically means the process of arriving at said outcome (i.e. lawmaking) will be, at least indirectly, altered in the post-implementation world.[152] This point is problematic when analysed in tandem with the above mentioned lack of Parliamentary involvement in TTIP drafting: both Congress and EP will end up being affected by provisions they made no substantive contribution to. The involvement of domestic elected bodies (giving them the possibility to influence the evolution – and likely outcome – of negotiations) thus becomes not only desirable, but compulsory, so as to avoid a situation where Legislators find themselves either bound by international obligations they are unfavourable towards or, should these obligations be considered unacceptable, forced to reject in integrum an agreement that might otherwise be highly beneficial for both the EU and the US.

A further complication has to do with the – still under construction – Regulatory Cooperation Body envisaged by the TTIP and its potential relation to domestic Legislators. Albeit lacking any decision-making power per se, this Body is supposedly going to be in charge of, inter alia, "the monitoring of the implementation of the provisions of this Chapter; the consideration of new initiatives for regulatory cooperation [...] including of proposals for increased regulatory compatibility; the preparation of joint initiatives for international regulatory instruments." [TTIP Draft Chapter on Regulatory Cooperation, Art. 14.2] It is

[151] One might rightfully ask why the current power of the EP is not sufficient – in a nutshell, because, while the EP can influence Commission decisions, it cannot impose any outcomes on the EC. The only truly powerful leverage the EP has is the threat to veto the Agreement – a threat which, while highly effective in certain instances, seems, in the particular case of the TTIP (given its huge political importance) unlikely to be used.

[152] For example, the requirement to make information on legislative acts available to the other party early on (Art.5; Art.8) creates an obligation for e.g. Congress to keep the EU informed on its planned bills, an obligation that does not currently exists.

immediately apparent that these prerogatives of the RCB will inevitably lead to interactions between this body, on the one hand, and the EP and Congress on the other. The exact features of these interactions are of paramount importance to ensure the legitimacy and the accountability of the decisions made pursuant to the TTIP and to insulate the agreement from accusations of undermining legislative sovereignty and creating a democratic deficit.

That is all the more important since this RCB will act as a TTIP supervisory body of sorts, thus being given the power to oversee the implementation of the Agreement and all that stems from it – which can affect virtually the entire legal system. The responsibility is immense. So a fundamental question is: *quis custodet custodes*? If the RCB supervises the TTIP, who supervises the RCB? If the RCB is going to be (most likely) composed of representatives of the Executive, then the most legitimate answer to the question above would have to be domestic Legislators – i.e. European Parliament and Congress. It thus becomes obvious that detailing the type of interaction between these three institutions is compulsory – and very complicated. The fact that the EU and the US have not yet agreed on how the RCB and domestic elected bodies will work with each other serves as additional evidence for both the delicacy and the importance of the task.

A final point relates to the implementation of the provisions of the Agreement – beyond their initial translation into domestic law, a key question is how the EP and Congress will be involved in the regulatory decisions taken pursuant to the provisions of the Agreement – i.e. the regulatory acts borne out of the cooperation between EU and US executives. It is to be expected that, albeit the TTIP focuses on the process of cooperation rather than its likely outcomes, still, some results should be arrived at, over time, especially since the TTIP is set to be a 'living agreement' – in other words, even if all authorities commit to is dialogue, one can venture to assume this dialogue will, in the long run, yield some tangible results (i.e. regulatory acts).

Although the TTIP is, for now, silent on the matter, there should "be a role for both US and EU legislators at the stage of adoption of the decisions agreed under TTIP [...] 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**." [Alemanno, 2014 – original emphasis]

Why is this fundamental? Because arriving at new regulatory solutions via transatlantic cooperation requires looking at current regulatory issues from a new angle – a new angle that might not reflect the (domestic) concerns taken into account when the original solution was proposed and that might, therefore, stray, to various degrees, from the original intent of domestic policy makers. This is all the more likely since the process of bilateral regulatory cooperation is set to be run, essentially, by technocrats. The risk is, therefore, that rulemaking become, post TTIP, increasingly detached from domestic societal preferences as reflected – and championed – by elected bodies. Mitigating this risk necessitates EP and Congress oversight of TTIP implementation.

Hence, "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 capable of satisfactorily addressing the legitimacy and challenges raised by the operation of its horizontal coherence chapter." [Alemanno, 2014]

Beyond further making the case of the need for greater EP and Congress input, this latter point also offers some insight into the effects of the TTIP on rulemaking processes – the how – and regulatory outcomes – the what.

2.2. The how

We explored in the previous chapter the way both the EU and the US create legal norms and how the TTIP will interact with that setup, outlining the difficulty of reconciling fundamentally distinct approaches and the commitment both parties have made towards

maintaining their own, domestic principles of regulation and not compromising on their standards of protection. We have seen officials on both sides of the Atlantic go out of their way to reassure the public opinion that TTIP will not change how regulations are made in either jurisdiction.

While that statement is true de jure (the Agreement will not alter constitutional orders) it is, nonetheless, somewhat inaccurate de facto, for the TTIP does introduce new elements to domestic rulemaking how-to, from e.g. information exchanges to taking into account international impacts when carrying out (regulatory) impact analyses/assessments to sharing information on planned legislative acts to creating a supervisory body – the RCB. And these new elements are not inconsequential.

Two consequences are key. The first one was hinted at in the previous section: regulatory alignment of any degree (coherence, convergence) is, inevitably, premised on a re-evaluation of previous policy choices – with or without parliamentary input. Beyond the risk of arriving at solutions potentially misaligned with original policy choices and hence lacking parliamentary sponsored legitimacy, this reconsideration process also means additional costs. Any major rule arrived at domestically was informed by an impact analysis – altering it will automatically require a new such assessment, which must take into account the new cost-benefit matrix. These analyses cost both time and money, so the question thus becomes: does the benefit provided by the aligned regulation outweigh the cost of arriving at it? In other words, could the alternative of keeping regulations non-aligned be, in fact, less costly than the combined costs of re-evaluating them with a view to a potential alignment and then aligning them? This question can only be answered on a case by case basis and it is important that regulators keep it in mind, so that alignment does not become a goal in itself, as opposed to the solution to cost-inducing, trade-disrupting NTBs.

The second consequence has to do with, on the one hand, the additional requirements placed on domestic regulators by the TTIP and, on the other, with the creation of the Regulatory Cooperation Body – these are all extra layers added on top of an already impressive pile of compulsory procedures and supervisory bodies currently in existence in the regulatory systems of both the EU and US. The TTIP hence increases the number of phases of the domestic rulemaking process (by adding the international cooperation one) and the number of institutions involved in rulemaking (by involving the RCB). The concern here is

that, in this way, the TTIP might, ironically, actually increase bureaucracy, as opposed to toning it down, which was the original intention. As we know, regulatory coherence efforts are rooted in the quest for smart regulation, whose tenet is, inter alia, reducing red tape. While the final, aligned, regulations arrived at will reduce said red tape for companies operating abroad, if the process of arriving at these regulations actually increases the amount of internal paperwork required, can we truly speak of an overall efficiency gain?

2.3. The what

In terms of the actual outcome of TTIP changes – i.e. regulatory acts – the most obvious question is: will there be any? Given the re-iterated intent of the parties to focus on the process of cooperation rather than its potential outcomes (be it coherence or convergence), it is not farfetched to wonder whether there will, in fact, be any deliverables at the end of TTIP mandated regulatory dialogue. The most probable answer is yes – it is highly unlikely that there will be no concrete regulatory acts adopted as a result of TTIP's regulatory cooperation efforts. As to the nature of these acts, it is virtually impossible to make any estimates now.

The risk, however, is, as mentioned above, that TTIP regulatory solutions depart too much from their original form, form that was given by domestic societal preferences and codified into law by democratically elected bodies, which thus gave them the seal of legitimacy. The best way to mitigate this risk is, again, to involve, as much as possible, in all the stages of TTIP design and implementation, the European Parliament and US Congress.

Beyond legal effects, the final regulatory acts adopted as a result of coherence efforts in the TTIP – if any – also impact economic indicators and international interactions – we will explore these effects in the upcoming sections.

2.4. Conclusion

While a raw 'winners-losers' categorization (a legal 'cui prod est?' if you will) seems somewhat inadequate when discussing the impact of TTIP regulatory coherence efforts on the legal orders of the EU and the US, still, it is rather immediately apparent that the current form

favours the Executive to a large extent – EP and Congress are severely marginalized. Rectifying this situation is sine-qua-non for ensuring the Agreement stays respectful of regulatory sovereignty and insulates itself from accusations of democratic deficit and regulatory capture.

"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 use extends well beyond the EU and the US. It would consist of a sophisticated and permanent regulatory mechanism enabling the respective regulators 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**. […] 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** and also offering **political oversight on its output**." [Alemanno, 2014 – original emphasis]

Beyond the main legal actors, it is also legal procedures and outcomes that are impacted – and these have, as we will see next, ripple effects for the relation of the TTIP with WTO law, economic indicators and the international community.

3. Law, economics and regulatory coherence

We explored, in depth, earlier,[153] the relation between domestic regulations and international trade and FDI, the roots and forms of regulatory heterogeneity and the instances where the latter can translate as regulatory protectionism. What we are interested in, here, is to see how TTIP's proposal for regulatory cooperation manages to address these issues and what its chances of success at solving some of them are.

[153] See Chapter IV.

3.1. The TTIP and regulatory heterogeneity[154]

The Agreement's take on regulatory heterogeneity is rather straightforward: its early information requirements (e.g. Early information on planned acts – Article 5; Information and Regulatory Exchanges on regulatory acts at central/non-central level – Articles 9 and 11; Timing of regulatory exchanges – Article 12) address information costs and surprise costs head on.

Potential mutual recognition, harmonisation, development of common regulations and/or use of/creation of international instruments all target duplication/redundancy costs and conformity assessment costs directly. The operative word here is 'potential' – that is, this part of TTIP action against heterogeneity all hinges on its capacity to deliver regulatory results – i.e. arrive at regulatory compatibility (Article 10). Mere dialogue on contentious issues will not reduce unnecessary regulatory heterogeneity and thus minimize the costs of doing business abroad.

Still, there is one aspect that even regulatory dialogue alone can help with – regulatory protectionism.

3.2. The TTIP and regulatory protectionism[155]

The road from bona-fide heterogeneity to regulatory protectionism is, typically, paved with good intentions. Countries want high levels of protection for their e.g. environment and sometimes take it too far, either for innocent lack of proper assessment of their regulations' side effects or malevolently, because of regulatory capture – and end up in the complicated, grey area of regulatory protectionism. Upon arrival, they often find themselves at odds with international trade and investment law.

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[154] It goes without saying that the kind of heterogeneity the TTIP aims to reduce is the one amounting to *unnecessary* barriers to transatlantic trade and FDI – not the one mirroring inherent societal, cultural or political differences between the EU and the US. See Chapter IV for a discussion on the different kinds of heterogeneity.

[155] The focus here is on covert regulatory protectionism – the only kind that is still relevant for the EU-US relation.

How can regulatory coherence help? While the TTIP Regulatory Coherence Chapter does not address regulatory protectionism directly (we saw in Chapter IV why it might refrain from doing so) the actions it mandates – especially with regards to information exchanges and good regulatory practices – have a mitigating effect on the very possibility of it arising. How so?

To begin with, the requirement to consider the international impact (i.e. on transatlantic trade and investment) of domestic regulations at the regulatory design stage ensures regulators become aware if their proposed rules run the risk of amounting to non-tariff barriers to transatlantic economic exchanges.

Secondly, the requirement to maintain an active dialogue with the other party with regards to regulatory actions in the pipeline and consult with regulators and stakeholders on the other side of the Atlantic early on in the rulemaking cycle creates the opportunity for the other party to signal potential negative effects of a proposed rule before said rule is adopted.

Hence, domestic regulators become aware of the risk that their proposed regulation amount to an NTB and can include said risk in their cost-benefit matrix. At this point they can decide whether the regulation ought to be re-tailored so as to suit the interests of the other party as well - without jeopardising its capacity to attain its initial regulatory goal - or remains, despite its adverse effects on transatlantic trade and investment, nevertheless *necessary* (in its current form/at current level of stringency) for the achievement of their legitimate regulatory objectives, of which ever nature those may be in specific cases (protecting human health, the environment etc.)

If they choose the former, then obviously cost-inducing heterogeneity becomes a non-issue. If they opt for the latter route, regulatory cooperation as mandated by the TTIP will still have been of great use in making sure regulators considered the *necessity* of their proposed rule against its negative trade and/or FDI side effects and evaluated (as per the requirements of (Regulatory) Impact Analyses/Assessments) other policy options (that may have been less trade restrictive) albeit deciding against them. The fact that this process of optimal regulatory solution selection takes place in a transparent manner, in collaboration with the other party and it is backed by solid (scientific, quantitative or qualitative) argumentation insulates domestic regulators from accusations of engaging in covert regulatory protectionism.

It does so not only with regards to international economic relations (with parties suspecting each other of protectionist practices disguised as bona fide regulations) but also in what concerns international (trade/WTO or investment) law.

Increased early information exchanges and constant regulatory dialogue at the design stage of regulations may help solve differences between the EU and the US bilaterally, reducing the instances of recourse to external dispute settlement, such as WTO panels, for cases concerning regulatory measures adopted by one of the parties.

Or, at the very least, should such a case nonetheless occur, engaging in a process of optimal policy selection such as the one envisaged by the TTIP may act as a pre-emptive measure available to domestic regulators vis-à-vis external, supra-national scrutiny. As we remember from our earlier exploration of international trade and investment dispute settlement process and selected case law,[156] it is not rare for WTO panels or investment arbitral tribunals to try to assess whether a contentious regulation may have been motivated by protectionist intent by looking at whether domestic regulators may have had other, less trade/FDI restrictive (but equally efficient towards attainting legitimate objectives) policy options to choose from. The same way US agencies use their RIAs to justify their policy choices when their regulations are challenged in court, so EU/US regulators can point towards their bilateral communication laden, transparent and (R)IA-centred process of regulatory design to prove there is no trace of protectionist intent in their choice of policy.

Granted, this is no guarantee that WTO panels or investment arbitral tribunals cannot reach opposing conclusions, especially since we know there is very rarely only one, ultimate truth, be it with regards to science – see hormone case at WTO – or economic policy – see the Argentine cases at ICSID. But, at a minimum, it can provide a solid defence, should either party find itself summoned before an international dispute settlement body for alleged covert regulatory protectionism.

3.3. Conclusion

It thus becomes obvious that regulatory coherence efforts under the aegis of the TTIP have an impact not only on regulatory heterogeneity between the parties (which is their

[156] See Chapter IV.

official goal) but also on potential allegations (and subsequent WTO/ICSID cases) of covert regulatory protectionism. Even if the latter is not necessarily the intent of the regulatory cooperation part of the Agreement, it is, nevertheless, a most welcome side effect, especially given the often tensed past relation between the EU and the US (as shown by their string of WTO cases against each other) on precisely such matters.

4. Economics and regulatory coherence

One of the most often quoted – by the EU and the US alike – reasons behind the TTIP is economic benefit. Put simply, regulatory coherence as promoted by the Agreement should lead to less unnecessary regulations acting like non-tariff barriers to transatlantic trade and investment, thus reducing the cost of doing business across the Atlantic and boosting EU-US economic transactions, which should, further, create positive ripple effects in both economies, leading to GDP increases and more jobs.

Both sides were as direct about this as possible, from as early as the launch of negotiations: “Presidents Barroso, Van Rompuy and Obama have made it clear that reducing regulatory barriers to trade will be one of the most important ways that the Transatlantic Trade and Investment Partnership (TTIP) will help the European and American economies.” [The European Commission, 2013]

These statements were based, besides economic logic, on ex-ante impact assessments, which were often quoted as further proof for the need to include regulatory coherence in the TTIP so as to boost jobs and growth: “Studies suggest that between two thirds and four fifths of the gains from a future agreement would come from cutting red tape and having more coordination between regulators.” [The European Commission, 2013]

We reviewed these studies, in extenso, in Chapter V and discussed, in detail, their methodology, data and results, as well as the strengths and weaknesses of their predictions and the implications of their estimated impacts. Beyond their differences, one thing was true for all of them: the likely economic impacts (positive/negative, big/small, (un)equally

distributed etc.) are determined, primarily, by NTM removal. *The sine-qua-non condition for important economic effects is the gradual lowering/elimination of non-tariff barriers.*

Now, *non tariff barriers are lowered/eliminated by given degrees of economic alignment.* As we remember, the economists in charge of the studies considered various kinds of likely alignment, from mutual recognition to harmonization and the development of new standards. Despite representing different degrees of regulatory alignment, all these options can be filed, in essence, under the same category: *results*. In other words: *regulatory alignment, irrespective of its form, represents the outcome of the process of cooperation.*

As it becomes obvious (putting the words in italics together) *economic gains are conditioned by the regulatory outcomes of the TTIP*. In the context of Chapter V and/or of a general discussion on regulatory cooperation, this statement seems unproblematic. However, in light of last Chapter's insight into the TTIP Horizontal Regulatory Chapter and the accompanying official statements, matters tend to get more complicated, for one simple reason: *the TTIP does not commit to any regulatory outcomes.*

The move from outcome to process, signalled by the change of vocabulary (from coherence to cooperation) meant, as previously discussed (Chapter VI) that the TTIP parties were open to any outcome (coherence, convergence) including *no outcome at all*. In fact, they were rather straightforward about it, committing to cooperate only where appropriate and adopt common norms only where there already is a given degree of compatibility between regulations. This non-committal stance towards any given outcomes is enshrined in the Agreement itself: "This Chapter provides a framework for cooperation among regulators and encourages the application of good regulatory practices. It will help identify and make use of possibilities for cooperation in areas or sectors of common interest. *Its provisions do not entail any obligation to achieve any particular regulatory outcome*." [Article 1.2 – author's emphasis] The reasons behind this non-commitment were, as analyzed before, political, having to do with allegations of democratic deficit, the undermining of sovereign regulatory space and corporate takeover.

The TTIP therefore finds itself in a rather delicate position: on the one hand, it is placed under political constraints that force it to adopt a vague stance towards achieving certain regulatory outcomes and commit only to the process of cooperation instead and, on the other hand, it is backed into a corner by the need to achieve a degree of alignment so as to

justify its claim that it will boost EU and US economies and create jobs and growth. There is this tension between what is politically optimal (process only) and economically necessary (outcome).

Granted, it is, again, a question of degree. The economic studies reviewed all worked with NTM removal rates (on average around 25%) thus allowing for regulatory alignment to *not be achieved* in certain areas. Likewise, the TTIP negotiators did not completely discard alignment as an objective, but rather gave themselves room for situations where said alignment would not be deemed achievable. Whether the TTIP can meet the 25% NTM removal threshold set by the studies its architects so often quote is something that we will only be able to evaluate ex-post.

For the time being, it remains true that, at least to a certain degree, the TTIP discourse on jobs and growth inevitably finds itself at odds with its political commitment to 'process only'. In pure economic terms, TTIP parties should only resort to quoting the positive results of economic impact studies if their reference is accompanied by a pledge to achieve the removal of at least[157] 25% of transatlantic NTMs. Such a pledge, however, tends to be politically unpalatable, so it is unlikely to ever occur.

Along different lines, there is concern that, even if regulatory alignment does happen, the economic benefits it yields might not be worth the political and administrative hassle. As we discussed at large previously, even the studies that predict positive effects, speak of significant increases only in the case of bilateral trade flows (which grow considerably). As far as GDP goes, impacts are more modest. Also, potential gains are unequally distributed, both between the two economies and within the two markets (with some sectors gaining, others losing) and have unpredictable consequences for employment levels in both jurisdictions.

Overall, the economic 'cui prod est?' is difficult to answer[158] – *if* the TTIP delivers results, and depending on the magnitude of these results (as measured by the number of NTMs eliminated) there *will* be lower costs of doing business abroad for EU and US

[157] We say 'at least' because, as we remember, the studies concluded that the more alignment, the bigger the economic benefits.

[158] The main issue with economic gains is the difficulty of properly estimating them, because of the methodological limitations of current analytical approaches – there *will* be economic effects, that is a fact; but their direction and magnitude remains particularly difficult to predict.

corporations involved in transatlantic trade and investment. This is supported by both the studies and basic economic logic. And that represents very good news.

As far as the economic system as a whole goes (i.e. wide impact on the economies of the EU and the US) there will be a significant boost to the trade and FDI flows between them and some small GDP gains for both economies, which could, in turn, create positive effects for some sectors, output wise and employment wise. On the flipside, the changes potentially induced by the Agreement could cost other sectors both their production levels and their labour demand. The TTIP could also cost public budgets some adjustment costs – costs that might or might not be offset by potential higher budget income generated by potential increased economic activity.

Also hinging on results is the effect of the TTIP on third countries, who could see their GDP and trade/FDI flows affected, for better or worse (depending on the study). When it comes to global interactions however, the TTIP has an impact beyond economic indicators – it is a geo-political strategic move.

5. Geopolitical implications

The main reasons behind the launch of the (regulatory) TTIP were economic – as detailed before, they revolved around regulatory heterogeneity acting like a non-tariff barrier to transatlantic trade and investment, which the Agreement sought to mitigate via increased regulatory cooperation, so as to boost EU-US economic exchanges and, consequently, trigger growth in both economies. Still, beyond economics, another mobile behind the regulatory efforts of the TTIP was politics: geopolitics.[159]

In pure strategy parlance, the TTIP's attempt at creating common transatlantic norms gives the EU and the US a first-mover advantage: in areas where there currently are no

[159] In this context, the TTIP tends to be referred to as a mega Regional Trade Agreement (RTA), or, in short, mega regional. Mega regionals are defined as "deep integration partnerships in the form of RTAs between countries or regions with a major share of world trade and FDI and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains (i.e. the US, the EU, Japan, China). Beyond market access, emphasis in this integration is on the quest for regulatory compatibility and a rules basket aimed at ironing out differences in investment and business climates." [Melendez-Ortiz, 2014]

standards (e.g. nanotechnology) or where standards are being redefined (e.g. financial rules) the TTIP parties can effectively create the standard which they can then export to the rest of the world. As we remember, this internationalization of TTIP rules is actually one of the stated goals of the Agreement.[160] Why would third countries adhere to the standard? Essentially because, taken together, the EU and the US represent too large a part of the world economy for any other country's rival standard to stand a chance. Anyone looking to enter the European and American markets will have no choice but to play by TTIP rules – the most cost-effective response for third countries whose companies do business on either side of the Atlantic is to transplant TTIP rules into their domestic legal orders, so as not to force their corporations to comply with two divergent sets of rules.

Hence, another perspective on regulatory coherence in the TTIP is that of geo-strategic move: it symbolizes "the will and determination of the US and the EU to keep a decisive say on the rules applicable to trade and investment in the 21st century. Many analysts point out that the TTIP will ensure that the US and Europe remain "standard makers, rather than standard takers" in the global economy, subsequently ensuring that producers worldwide continue to gravitate towards joint USEU standards, and that they would set the international "rules of the road" (Bollyky and Bradford, 2013; Kaeser, 2014)." [Yong, 2014]

If that is the geo-strategic raison d'être behind transatlantic regulatory coherence efforts, what will be their effects? Two directions can be identified with regards to potential impacts: on third countries taken individually and on the trade system as a whole, i.e. multilaterally. Let's take them one by one.

5.1. Third country effects

We explored the economic impact that TTIP regulatory alignment might have on third countries – some of the studies that considered spill-over effects predicted positive responses in a post-TTIP world, with both GDP and trade flows increasing for selected non-TTIP states (CEPR 2013). Others, on the contrary, estimated negative effects. Beyond the contradictory

[160] This all hinges, of course, on the TTIP's ability to actually deliver common regulatory standards that it can then export. Should the TTIP fail to create common norms, all the estimates of the likely effects of their potential internationalization become irrelevant.

results, what is of interest here is the common assumption: that third countries will eventually adopt TTIP standards.

But will they? What if third countries decide to, au contraire, join forces, create their own norm-setting RTAs and attempt at designing alternative standards? While geo-politically interesting, this option seems, nonetheless, rather unrealistic and most likely inefficient: "There is nothing on offer that is likely to compare in terms of ambition or scope with the TPP and TTIP. The prospect of RCEP, which includes China, India and Japan – geopolitical rivals with very divergent trade agendas – resulting in a high ambition agreement is, to say the least, distant. Any number of other opportunities exist for countries to enter into far reaching trade agreements with neighbours or with their most important trading partners in other regions. However, these agreements would be limited in their reach (proportion of trade covered). They would only be a very partial response to the mega-regionals." [Dadush, 2014]

Hence, strategically speaking, adopting TTIP/TPP standards remains the most likely response,[161] even for rising powers such as China, India or Brazil, which lack, at the time, the possibility to create alternative standards. Because, by the time they might be able to compete with the EU and the US on the regulatory coherence front, "the rules-of-the-road will have been written by the deep RTAs of the US, the EU and Japan. If the mega-regionals conclude, they will have been firmly embedded in international commerce; the members of TPP and TTIP account for over half of world trade. More precisely, they will be embedded in the domestic laws and regulations of all the host-nations that the Chinese, Indian and Brazilian companies will be looking at. Like it or not, Chinese, Indian and Brazilian companies will have to play by the rules that are now being written by the mega-regionals." [Baldwin, 2014]

And yet, the political reality of international relations creates a scenario far less conducive to an unconditional acceptance by third countries of the TTIP (or TPP) acquis. It would be naïve to assume that e.g. Russia will simply embrace transatlantic regulatory norms and translate them into its own domestic law. But if competing with TTIP standards is not an

[161] One avenue for said adoption would be for third countries to join ongoing negotiations. Canada and Mexico have already asked to join the TTIP, but given the sheer complexity of the Agreement (especially on the regulatory coherence front, as we have seen) the EU and the US decided to keep the deal between them only, at least for now. Other possibilities are unilateral adoption (which is politically unlikely for the big players) and the multilateralization of new common rules, which we will look into in the next section.

available option, what can third countries do?[162] Retreating into protectionist autarchy is highly unlikely, while simply ignoring TTIP norms and carrying on with 'business as usual' is a material impossibility, given that all countries are involved in global exchanges and corporations based in non-TTIP countries will inevitably clash with TTIP regulatory requirements.

Another avenue where countries outside the TTIP (or TPP) can hope to sweeten the pill is the WTO: "the only realistic response for those worried about the systemic implications for the global trade system are "plurilateral", or flexible geometry approaches within the WTO. Such approaches would probably form an important part of their overall national response to mega-regionals." [Baldwin, 2014]

5.2. The TTIP and the WTO

The relation between regional trade agreements and the multilateral trade system is not new. The question whether RTAs are building blocs (towards multilateralism) or stumbling blocs (leading to fragmentation) in connection to the WTO centred world of global trade has been looked into, extensively, in literature, without any definitive conclusions.

Asking the same question with regards to the TTIP is, therefore, legitimate. What is of interest now, given the heavily regulatory nature of the TTIP, is whether the rules it hopes to establish will favour multilateralism or, on the contrary, undermine the WTO. We will not analyze each provision of the regulatory part of the TTIP and see how it might interact with WTO law, because that would be a very complex endeavour that goes well beyond the scope of this thesis and would require a dedicated analysis. We will rather sketch the most important aspects of the TTIP-WTO regulatory interaction and try to see to what extent the EU-US Agreement serves as a building bloc towards likely regulatory multilateralization.

To begin with, many analysts see the TTIP "as a potential new pillar of trade governance, complementary to the multilateral trade system: a. The agreement would affect a

[162] "This is no minor issue. While mega-regional negotiations encompass a large number of countries, they exclude an even larger group. About 160 nations, home to over 80% of the world's population, are sitting on the sidelines while these discussions take place. The way in which countries choose to react to these developments may determine, at least in part, the impact of these pacts on individual non-members and on different regions, as well as on countries that are party to the mega-regionals. The broader question of the geopolitical impact that mega-regionals may have in today's world is an issue that demands great reflection." [Dadush, 2014]

share of at least a quarter of world trade in goods and services (TTIP: 43.6%) and of global FDI. b. At least two economies party to the agreement are hubs in Global Value Chains as evidenced by their share of trade intermediate goods and tasks in the region or regions involved. c. The agreement's coverage goes deeper and beyond existing contractual obligations and disciplines of the WTO, RTAs and BITs. In this context, the agreement addresses a minimum of areas and regulatory reform essential to 21st century world markets such as services, investment, competition policy, regulatory convergence, the digital economy and customs cooperation. d. Parties to the agreement are engaged in multiple RTAs with third-party economies and enjoy extensive trade and investment exchange with a significant number of non-members, making the partnership a potential reverse trade-diversion scheme." [Melendez-Ortiz, 2014]

The key question here is how *complementary* will this new pillar of trade governance be with the current main locus of global trade rulemaking? Some fear the TTIP might undermine the centrality of the WTO on the rulemaking front, since the vast majority of world countries are excluded from the setting up of rules that will, nonetheless, end up affecting them.[163] This is the side effect of the internationalization of common transatlantic norms that we were mentioning earlier: it will be the EU-US duo that effectively creates the rules of the global trade system, as opposed to a more inclusive WTO. Granted, it can be argued that even within the WTO, big economic players are the ones that often push for regulatory innovations, but they do so in dialogue with, with the input of and needing the agreement of third countries.

This is the main difference between TTIP driven global norm setting and the WTO driven one: the power asymmetries are not so strong in the second venue. For e.g. the EU or the US to champion a regulatory take on any given issue at the WTO and successfully multilateralize it, they need to negotiate and cooperate with third countries. In the TTIP led version of global rule making, they can easily use their impressive economic muscle to simply impose their standards on pretty much anyone else. The only likely worthy opponent would be an equally powerful economic bloc with competing standards: currently, the only one matching the description is the TPP. While a comparative analysis of the likely interaction between the TTIP and the TPP is not something we will explore now, suffice it to say that,

[163] These new rules will be the ones governing the (arguably) largest integrated market in the world - the transatlantic one. Third countries will, undoubtedly, want to do business there.

given the US is part of both, they will probably not be in any significant rivalry on matters of regulatory substance.

Even if a comparably powerful bloc were to form, the rivalry thereby created would only further undermine the multilateral system, by creating competing regional blocs, each with their own standards and fragmenting the global marketplace along regulatory divides, with severe economic consequences. The impact on the WTO in such a case is that it will gradually become sidelined and, as far as new rules governing new areas of economic activity go, irrelevant, for these new rules will be written under the aegis of a mega-regional.

Hence, "this scenario runs the risk that global trade governance drifts back towards a 19th century Great Powers world. In the best of cases, the WTO would continue to thrive as the institution that underpins 20th century trade flows. The Marrakesh Agreement would form a "first pillar" of a multi-pillar trade governance system. All the new issues would be addressed outside the WTO in a setting where power asymmetries are far less constrained." [Baldwin, 2014]

Another aspect has to do with dispute settlement – the fragmentation of the world trade system along mega-regional lines would not only affect the design of new rules, but also their implementation and the potential sanctioning of noncompliance. If, presently, issues between world trade players are addressed under the WTO's Dispute Settlement mechanism, a series of RTAs, each with their own rules on dispute resolution and enforcement system could lead to a "potential fragmentation of international jurisprudence." [Bagwell, Bown, Staiger, 2015] A way around such fragmentation would be the adoption by the WTO of the TTIP dispute settlement acquis, which brings us right back into the 'imposing EU-US standards on the international community' scenario – as mentioned before, the main problem with this scenario is that it is politically unpalatable to e.g. the BRICS. Hence, as far as dispute settlement goes - "The judges can connect the dots for particular cases, but the basic rules must be updated occasionally to match evolving realities. If the rules are being written in the mega-regionals, the only way to update the WTO rules is to multilateralize TPP and TTIP rules. That may be very difficult politically." [Baldwin, 2014]

So is there a way for mega-regionals to complement the WTO, rather than undermine it and (partially) substitute it? It is obvious that the TTIP isn't going anywhere and, should it

deliver any regulatory outcomes, these are bound to interact with WTO provisions. Is there a way to smoothen this interaction and perhaps make it work for as many countries as possible?

The best option would be the internationalization of TTIP rules *with the involvement of the WTO*. As we know, the TTIP will build on certain WTO provisions, with its Chapters on TBT and SPS (the so-called 'WTO+' part of the agreement) while adding some regulatory features of its own (e.g. the horizontal regulatory cooperation chapter). A key question is how these TTIP innovations will interact with WTO law. In a study looking into this very issue, one analyst divided the TTIP take on regulations into WTO-plus and WTO-extra and assessed the potential for multilateralization. "Parameters to take into account in assessing this potential for each provision or chapter would include representativeness (whether a provision is common to a considerable number of RTAs already, and used in agreements involving countries at different levels of development); homogeneity (the similarity between the provision across RTAs); and, enforceability (whether the provision is contractual and, furthermore, whether it may be enforceable through WTO dispute settlement)." [Melendez-Ortiz, 2014] His results were good news for the prospect of WTO-TTIP interaction: regulatory coherence, SPS and TBT rules were estimated as having high potential for expanding multilaterally.

Hence, there seems to be room for bringing certain issues championed by the TTIP under the umbrella of the WTO, with potential for successfully multilateralizing them. Granted, the real chances of such multilateralization heavily depend (as mentioned before) on politics. And because politics remains a delicate game to play, especially in global interactions, the most realistic way forward for bringing TTIP rules in agreement with WTO law would be to include them in a plurilateral agreement that new members can adhere to over time.

Indeed, plurilateral agreements (PAs) might be the best way to connect TTIP rules with the WTO acquis, for they present a series of advantages: "PAs are 'open' in that other WTO members should (in principle) be allowed an explicit path to accede to the PA in the future. [And] problems arising between PA signatories would be addressed through litigation taking place under the WTO, thus more likely completing the contract in a coherent way, as opposed to the potential fragmentation of international jurisprudence that might take place otherwise arising under PTA dispute settlement provisions." [Bagwell, Bown, Staiger, 2015]

Consequently, “the WTO could restore its centrality by moving towards a variable geometry, in which obligations to which all members adhere are complemented by deeper open plurilateral agreements. These plurilaterals could, in fact, build on the achievements of the mega-regionals by using innovations made in mega regional agreements as models for negotiating plurilaterals with broader WTO membership. Regional arrangements can be valuable in their own right and appropriate to reflect the unique needs of particular groups of countries, but they can also help advance progress towards a global system, in which needs that are more universal are achieved through the WTO.” [Lawrence, 2014]

5.3. Conclusion

Overall, a global ‘cui prod est?’ reveals that, as expected, the main beneficiaries of the TTIP regulatory coherence efforts remain the EU and the US.

Economic logic dictates that common transatlantic norms would have a positive impact on third countries as well, by lowering the regulatory costs of market access: “firms outside the mega-regional also benefit from accessing all member markets with one standard. This is why regulatory convergence measures [...] are more like a multilateral liberalization that benefits the member nations and third nations alike – even if the member nations gain more. Regulatory convergence tends to increase both trade among members and imports from the rest of the world.” [Baldwin, 2014]

But economic benefits come at a political cost – that of accepting rules one had no input in designing. The TTIP will most likely make third countries norm-takers. While economically that might not necessarily be such a bad outcome (many argue that the EU and the US presently have regulatory practices of the highest quality, so should the TTIP initiate global convergence around transatlantic norms, that would qualify as a race to the top, which is, essentially, a very good thing) but politically it might prove to be quite the imperialistic pill and very difficult to swallow.

Also on the ‘losers’ list, there is the WTO, that mega-regionals might slowly replace as the main trade rule makers on new trade-related issues. In order to avoid this outcome, the international community must find a way to integrate TTIP rules with WTO law and foster a positive, multilateralism-conducive interaction between the Geneva organization and the

transatlantic agreement. “Mega-regionalism is not yet a disaster for the world trade system. The present trajectory, however, seems certain to undermine the WTO’s centricity – mega-regionals will take over as the main loci of global trade governance for beyond-WTO issues. Without reform that brings existing RTA disciplines under the WTO’s aegis and makes it easier to develop new disciplines inside the WTO system, the trend will continue, further eroding WTO centricity and possibly taking it beyond the tipping point where nations ignore WTO rules since everyone else does.” [Baldwin, 2014]

6. Overall

Our overview of the main aspects of regulatory coherence in both theory and practice has revealed just how important proper definitions are and the magnitude of the impact the TTIP meaning of ‘regulatory cooperation’ can have on the legal systems, the economies and the global positions of the EU, the US and third countries.

While a black and white cui prod est is perhaps slightly too rigid, regulatory coherence efforts in the TTIP do confer clear advantages on certain parties and have a more ambivalent effect on others.

Hence, the Executive in both the EU and the US has more to gain than the Legislative, in the current form of the approach to regulatory cooperation envisaged by the Agreement. We believe, however, that negotiators will change their stance and make the process more inclusive of Parliaments, thus gradually levelling the playing field between the different institutional players.

Economically, the biggest winners are EU and US corporations engaged in transatlantic trade and investment, whose costs of doing business abroad will decrease with the removal of non-tariff barriers. Systemically, benefits are less certain, albeit, in the most positive scenario, both the European and the American economies should be better off post-TTIP.

Regulatory coherence should have a mitigating effect on both regulatory heterogeneity – which it targets directly – and on regulatory protectionism, which it touches upon indirectly.

Globally, TTIP rulemaking can have a positive economic impact on third countries, but put them in a delicate position politically. Its interaction with the WTO is also complicated and could undermine the centrality of the Geneva-based organization if not handled carefully and in a manner mindful of multilateral effects.

Chapter VIII

Conclusion

1. In a nutshell

Our thesis-long exploratory journey into the complicated web of motivations behind, meanings, criticism and likely effects of regulatory coherence has revealed a series of fundamental points.

To begin with, conceptually, the term remains highly fluid and contextual. TTIP practice has done very little to enshrine a working definition of coherence that holds true across disciplines and international agreements. Should the term continue to be used[164] it will likely recalibrate itself with every negotiating context[165] and mean whatever negotiators want it to mean, from mere regulatory dialogue to substantive regulatory convergence.

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[164] And, despite the TTIP suggestions to the contrary, it appears that it will, indeed, continue to be used, if the final text of the Transpacific Partnership (made public on November 5, 2015) is any indication – the TPP chapter dealing with regulatory affairs (Chapter 25) is titled Regulatory Coherence.

[165] For instance, in the TPP, "regulatory coherence refers to the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment." [TPP Art. 25.2.1]

It can be argued that TPP coherence appears to be somewhat of a combination between TTIP's Good regulatory practices (Section II of the Agreement) and Regulatory cooperation (Section III) minus the pledge to strive for compatibility. While a comparison between the TPP and the TTIP with regards to their take on coherence would require a dedicated paper, what can be briefly said here is that the TPP focuses more on groundwork (smart regulation and cooperation) while the TTIP takes it further, in targeting varying degrees of compatibility between regulatory outcomes. The most likely explanation is that compatibility seems more likely to be achieved between the EU and the US (where most of the groundwork has already been done) than between the 12 parties to the TPP, who find themselves at very different levels of regulatory best practices acquis.

Secondly - the closer its meaning to the latter (i.e. the greater degree of regulatory alignment/compatibility), the more pronounced its effects.

Economically, coherence would lower the costs of doing business abroad, thus favouring corporations involved in international trade and investment and positively impacting the economic system as well, triggering GDP and trade/FDI flows increases and boosting competitiveness. Its sectoral benefits are unevenly distributed, with some sectors gaining in terms of both output and exports, while others see their production and, consequently, labour demand and/or wages, go down. On a tangent, the effects on employment are difficult to properly assess. The costs of coherence include short-term (budgetary) adjustment costs, which might be ultimately offset by greater revenue due to increased economic activity.

Legally, coherence means a certain degree of change to existing rulemaking procedures on both sides of the Atlantic – although not big enough to alter the current constitutional order in either jurisdiction, this change will partially affect both processes (by e.g. introducing the requirement of international information exchanges at various stages in the rulemaking procedure) and players (the executive is favoured by the current set-up in the TTIP, which leaves elected bodies severely side-lined). Transatlantic common regulatory design and implementation also reduces the occurrence of regulatory heterogeneity and could potentially have a mitigating effect on regulatory protectionism.

Politically, TTIP-driven EU-US regulatory coherence has mixed effects on third countries (with likely negative implications for their regulatory 'free choice') and most likely negative consequences for the centrality of the WTO in the establishment of future rules for 'new issues' related to global trade and investment, with the TTIP and the like partially replacing the Geneva-based organization as the locus of future regulatory decision making.

All in all, it became obvious throughout the pages of this thesis that regulatory coherence is an immensely complex topic that needs to be looked at from multiple angles for a correct image to be constructed. Its implications are numerous and of a rather heterogeneous nature and are likely to continue to evolve in tandem with its contextual meaning.

2. Limitations

It is this very complexity of the topic that provides both the strong point of this thesis – its multifaceted analysis – and its main limitation – it is, inevitably, selective and, because of that, somewhat incomplete.

The inter-disciplinarity of this thesis' approach was sine-qua-non for a proper understanding of a concept that defies rigid categorization. Regulatory coherence is a profoundly legal topic, with economic effects of systemic magnitude and important political consequences, that can only be tackled via a combination of legal, economic and political analytical tools. Our eclectic perspective on the topic has thus allowed us to capture the most salient features of regulatory coherence, as well its most prominent impacts. Opting for only one of the three would have rendered a fragmented analysis and would have hence missed out on fundamental connections and cross-discipline interactions.

At the same time, it is this very multifaceted analysis that, occasionally, acted like a constraint: we inevitably had to be selective about the issues we looked into in depth, meaning certain points that are, nevertheless, important, were either only briefly mentioned or entirely left out. Consequently, topics that would have deserved more attention and would have made the paper richer and almost exhaustive had to be pushed aside.

The implication is that these points that were only hinted at here can constitute subjects of future research on the topic.

3. Avenues for future research

The complexity of the topic automatically means there is so much to be said about possible side effects and so many implications to be explored.

Some were already hinted at throughout this thesis, such as the regulatory parts of the TTIP beyond the horizontal chapter we analyzed – i.e. the TBT+ and SPS+ chapters, as well as the sectoral chapters, which are bound to have significant consequences either for the

relation between newly developed transatlantic norms and WTO law (the first two) or for the future rules of specific areas of economic activity (the latter) from food security to financial stability.

Another interesting avenue that deserves further attention is the relation between the TTIP (and the TPP) and the WTO. While the previous pages sketched main effects, it is a topic that warrants further analysis, as it essentially translates as a major shift in global economic governance.

Along similar lines, an interesting interaction will be that between the TTIP and the TPP. A deal on the latter has recently been reached (October 5, 2015) and, while the road to its adoption is long and full of obstacles (the main of which is alleged US Congress animosity) its likely effects in a world where the TTIP is also a reality (and this is not a given either) would be extremely interesting to look into.

Another topic could be the effect of TTIP approaches on ISDS – whether the final version of the transatlantic agreement ends up including any investor-state dispute settlement provisions and especially the form these eventually take will undoubtedly impact the current status-quo in the field. This impact is worth exploring in depth.

These and other directions of future research could contribute to a more complete picture of the causes, forms and, perhaps more importantly, effects of regulatory coherence. This thesis aimed to lay the foundation such future work can build on, by bringing more clarity to the debate and opening it up to inter-disciplinary perspectives. Hopefully it managed to constitute solid groundwork and can act like a useful springboard for future diving into the complicated world of international regulatory cooperation.

Annex 1

List of main US Federal Agencies (selected)

Executive Agencies (selected)

Department of Commerce (DOC)

- Bureau of Economic Analysis (BEA)
- Census Bureau
- International Trade Administration (ITA)
- National Institute of Standards & Technology (NIST)
- National Technical Information Service (NTIS)
- National Telecommunications and Information Administration
- Patent and Trademark Office

Department of Defense (DOD)

- Defense Logistics Agency (DLA)
- National Security Agency (NSA)

Department of Energy (DOE)

- Federal Energy Regulatory Commission (FERC)
- National Nuclear Security Administration (NNSA)

Department of Homeland Security (DHS)

- Federal Emergency Management Agency (FEMA)
- Secret Service

Department of Housing and Urban Development (HUD)

- Government National Mortgage Association (Ginnie Mae)

Department of Justice (DOJ)

- Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)
- Drug Enforcement Agency (DEA)
- Federal Bureau of Investigation (FBI)
- Office of Justice Programs (OJP)
- US Marshals Service (USMS)

Department of Labor (DOL)

- Mine Safety and Health Administration (MSHA)
- Occupational Safety & Health Administration (OSHA)

Department of State (DOS)

- Bureau of International Security and Nonproliferation (ISN)

Department of Transportation (DOT)

- Federal Aviation Administration (FAA)

Department of the Treasury

- Alcohol and Tobacco Tax and Trade Bureau (TTB)
- Financial Crimes Enforcement Network (FinCEN)
- Internal Revenue Service (IRS)
- Office of the Comptroller of the Currency (OCC)

Independent Agencies (selected)

- Central Intelligence Agency (CIA)
- Environmental Protection Agency (EPA)
- Federal Deposit Insurance Corporation (FDIC)
- Federal Housing Finance Agency (FHFA)
- National Aeronautics and Space Administration (NASA)
- National Science Foundation (NSF)
- Office of Personnel Management (OPM)
- Overseas Private Investment Corporation (OPIC)
- Peace Corps
- Small Business Administration (SBA)
- Social Security Administration (SSA)
- United States Agency for International Development (USAID)
- United States Trade and Development Agency

Boards, Commissions and Committees

- Board of Governors of the Federal Reserve System
- Commodity Futures Trading Commission (CFTC)
- Consumer Product Safety Commission (CPSC)
- Federal Communications Commission (FCC)
- Federal Trade Commission (FTC)
- Nuclear Regulatory Commission (NRC)
- Securities and Exchange Commission (SEC)
- United States International Trade Commission (USITC)

Source: Library of Congress

[http://www.loc.gov/rr/news/fedgov.html; accessed on November 1, 2015]

Annex 2

EU Better Regulation Guidelines
Selected issues on Impact Assessment

Chapter III
Guidelines on Impact Assessment

Key requirements

- IAs must set out the logical reasoning that links the problem (including subsidiarity issues), its underlying drivers, the objectives and a range of policy options to tackle the problem. They must present the likely impacts of the options, who will be affected by them and how.
- Stakeholders must be able to provide feedback on the basis of an Inception Impact Assessment which describes the problem, subsidiarity related issues, objectives, policy options and an initial consideration of relevant impacts of these policy options.
- A 12-week internet-based public consultation covering all of the main elements of the IA as part of a broader consultation strategy to target relevant stakeholders and evidence.
- IAs must compare the policy options on the basis of their economic, social and environmental impacts (quantified as far as possible) and present these in the IA Report.
- Certain elements must be included in the final IA Report. These include: (i) a description of the environmental, social and economic impacts and an explicit statement if any of these are not considered significant; (ii) a clear description of who will be affected by the initiative and how; (iii) impacts on SMEs; (iv) impacts on competitiveness; and (v) a detailed description of the consultation strategy and the results obtained from it.

- The draft IA Report must be presented to the Regulatory Scrutiny Board for its scrutiny. A positive opinion of the Board is necessary before an interservice consultation can proceed.
- The IA report must be complemented by a 2-page executive summary sheet available in all languages.

THE KEY QUESTIONS AND PRINCIPLES OF IMPACT ASSESSMENT

IA is a tool to help structure reflection and conduct analyses informing policy design. It is not a list of tasks to tick off. There is no recipe for the perfect IA. Given the widely differing nature of Commission initiatives, the best way to carry out an IA and present its results will vary from case to case.

However, all impact assessments must answer a set of key questions and respect a number of principles. An impact assessment should comprehensive, proportionate, evidence-based, open to stakeholders' views, unbiased, prepared collectively with relevant Commission services, embedded in the policy cycle, transparent and of a high quality.

The Questions an Impact Assessment Should Answer

1. What is the problem and why is it a problem?

2. Why should the EU act?

3. What should be achieved?

4. What are the various options to achieve the objectives?

5. What are their economic, social and environmental impacts and who will be affected?

6. How do the different options compare in terms of their effectiveness and efficiency (benefits and costs)?

7. How will monitoring and subsequent retrospective evaluation be organised?

The process of finding answers to these questions is necessarily iterative. The IA process should start from broad definitions of the problem, the objectives and the possible solutions and then narrow them down to what is most relevant. The questions are also interrelated. Compliance with subsidiary and proportionality, for example, can only be fully verified once objectives are set and the impacts of alternative options assessed. The following should guide the IA process:

(1) When making choices about the focus and depth of the analysis, the IA should concentrate on what is relevant to inform decision-making, leaving out what is not.

(2) The results of any relevant evaluations of the existing policy framework should be used as the starting point for the IA. The expertise of other services in the Commission should also feed into the IA in order to consider and properly assess all relevant issues.

(3) The most appropriate methods should be identified to collect data and analyse impacts. Where necessary, external studies may be contracted out to provide input on specific elements.

(4) A consultation strategy should be designed, keeping in mind the need to consult on all key IA issues. The IA Report should corroborate the conclusions of the analysis with stakeholder views and justify any significant differences. The synopsis report summarising the results of stakeholder consultation should be integrated into the IA Report as a mandatory annex.

(5) Throughout the IA Report, conclusions should be substantiated with evidence (e.g. data, estimations, scientific findings) together with appropriate citations and, if this is not possible, it should be explained why. Stakeholder views should also be referred to.

***Question 5*: What are the impacts of the different policy options and who will be affected?**

Once a set of policy options is selected, a robust assessment should be carried out of their economic, social and environmental impacts and of who will be affected. At the end of this process, policy-makers should know to what extent different policy options would meet

their objectives, with what benefits, at what cost, with what implications for different stakeholders, and at what risk of unintended consequences.

To support policy decisions that deliver the best balance between benefits and costs, the IA analysis must assess all the relevant advantages and disadvantages of the retained policy alternatives ("the options") against the reference of the baseline. Once again, it is best to do this through an iterative process that starts with a wide reach and then focuses, and deepens, the analysis on the most relevant impacts, being ready to go back and improve the retained options before finalizing.

Using internal and external expertise along with stakeholders' knowledge is particularly helpful when analysing impacts. The consultation strategy, any external studies and the ISG work should be organised in a manner which allows views to be collected and results tested with regard to all elements of the impact analysis.

2.5.1. Identify all potential impacts of the options.

For all retained options, the impact assessment should specify how they would tackle the identified problems and meet the policy objectives.

To do this, there is a need first to identify the changes that a proposal would imply for those affected, notably those who would have to comply with any new legislative requirement, those who would have to implement and enforce it and those who are expected to be the final beneficiaries:

• What actions and measures would affected parties need to take (to comply or to enforce compliance)?;

• Would these realistically be taken (balance between compliance costs and costs for public authorities involved in ensuring compliance)?;

• Would this allow the objectives to be reached?

Answering these questions at the very beginning of the analysis is important to ensure that the technical assessment of the impacts remains concrete and closely related to the practical implications of the various policy options.

Answering such questions will also highlight how different options can trigger different changes and thus have different types of impacts. A wide range of possible impacts

should be reviewed across the economic, social and environmental policy areas, going beyond the most obvious consequences of the proposed policy. All potentially important impacts should be identified regardless of whether or not it will be possible to assess them precisely. It is important not to "miss" a significant impact as this may affect the overall comparison of options or weaken the case for the Commission's proposal later on.

The impact assessments should, in particular, examine the impact of the different options on fundamental rights, when such an assessment is relevant and address the potential exposure to fraud in the context of spending programmes.

Potentially important indirect impacts should also be considered, i.e. positive or negative consequences that are incidental to the main purpose of the initiative (such as those stemming from an increase in the accumulated costs borne by a party, evasive behaviour by those who need to comply, or positive spill-overs from one affected sector to another).

Both positive impacts (i.e. the benefits) as well as negative impacts (i.e. the costs or adverse environmental and social impacts) should be identified. A positive impact for one party can be negative for another. It is therefore important to identify who would be specifically affected by each impact.

It is also likely that a policy option will require some sort of IT system or network to automate business processes, publish/exchange information, deliver online services via web-based Portals, etc. It means that the impact related to the implementation of new or the adaptation of existing ICT solutions should be assessed. The possibility of re-using what exists already and not "reinvent the wheel" should not be overlooked. A "digital screening" and possible further ICT impact analysis may be needed.

At the end of this analysis, all potential impacts – positive or negative – should be mapped out according to their expected magnitude and likelihood and to the specific parties that would be affected. The following classifications can be used when describing identified impacts:

• Broad nature: economic, social and environmental.

• Specific nature, for instance: increases (or decreases) in compliance costs, i.e. those costs incurred by the relevant parties (businesses, citizens etc.) to comply with any new legislative requirement, their sub-components (administrative burdens, labour costs; equipment costs etc.) and the administration and enforcement costs incurred by the

responsible authorities; gains (or falls) in market efficiency, competitiveness, innovation; impacts on health, quality of the environment, combating climate change, levels of education and training, fundamental rights, employment and skills, social inclusion, poverty etc.;

• Relation with the underlying initiative: direct impacts are those directly generated by a policy measure. Indirect (or second-round) impacts arise as a result of the behavioural changes prompted by the direct impacts and often affect third parties and can be just as significant as direct impacts.

• Affected parties, groups or regions: businesses of different sizes (SMEs or not), citizens, workers, learners, consumers, public administrations, third country actors, developing countries, different territories and regions (less developed or prosperous regions, cities, rural areas, border regions, overseas territories etc.);

• Frequency and certainty: long/short term, one-off, recurrent; certain or likely (risks).

While all of the above classifications are useful in principle, each analysis should use the categories that are most appropriate for the initiative at hand. Importantly, the IA Report should always be transparent about the methodological choices made to assess impacts, the underlying reasons particularly where non-standard approaches are deployed).

2.5.2. Select the significant impacts.

The choice of impacts to be retained for deeper assessment should be clearly justified, taking account of their:

• Expected overall magnitude;

• Relevance for specific stakeholders (enterprises and in particular SMEs, trading partners, economic sectors, consumers, learners, workers, public administrations, regions, developing countries etc.);

• Importance for Commission horizontal objectives and policies.

The expected significance of impacts should be assessed in terms of changes relative to the baseline. In making the selection, the principle of proportionate analysis should be applied. However, it is important not to leave out anything that is of relevance for political decision-making. The choice should take account of stakeholders' views and relevant expertise, including within the Inter-Service Group.

2.5.3. Assess the most significant impacts.

All relevant impacts should be assessed quantitatively, if possible, as well as qualitatively. Similarly, impacts should be monetized whenever possible. When quantifying, spurious precision should be avoided and ranges provided, complemented by qualitative comments. In many cases, quantification will rely on a given set of assumptions. These should be clearly presented. Whenever an assumption is particularly important or uncertain, sensitivity analysis should be used to check whether changing it would lead to significantly different results.

There are several methods to quantify impacts, both in terms of overall methodological approach and specific techniques for individual types of impacts. For each case, the most appropriate method should be used. The choice of method should be clearly justified and explained in the IA Report.

There is no best method which would apply to all possible Commission initiatives. There is, however, an obligation to make the most sensible methodological choice given the specificities of the case at hand, the availability of data and the requirement to carry out a proportionate analysis. In all cases, methodological complexity is not an excuse for not presenting the practical implications of different options for affected parties. Similarly, the fact that it may not be possible to monetize, or quantify, some impacts does not mean they should not be taken into due account. All significant impacts should be analysed regardless of the nature of the available methodology to do so.

When quantitative analysis is not possible or proportionate, impacts should be assessed qualitatively. Also the qualitative analysis should be rigorous and thorough, focusing on the practical implications for affected parties. As for quantitative assessments, important underlying assumptions will have to be stated. The conclusions should rely on available theory and evidence, including on illustrative examples, while also referring to stakeholder views. They should acknowledge limits and clearly distinguish between facts, expert opinions and stakeholder views. If a broad order of magnitudes cannot be given, a qualitative reasoning should be provided of why one option is considered likely to have larger (or smaller) impacts than another.

In the case of both quantitative and qualitative analysis, it is important to remember that:

• Changes should be assessed relative to the baseline scenario. Normally, this will evolve overtime (for instance as a result of on-going policies). Therefore, changes should not simply be determined relative to the current situation but to how the latter would evolve in the absence of a new planned initiative;

• Different impacts are likely to occur at different times (with costs often being incurred early on and benefits emerging only later). This should be reflected in the assessment, discounting monetized estimates as appropriate when these are available;

• Impacts should be assessed from the point of view of society as a whole although distributional effects and cumulative burdens on individual parties should also be proportionately assessed and considered. Whenever impacts are aggregated, you should make sure you avoid any double-counting (for instance, businesses transferring increased compliance costs on consumer prices, public authorities imposing fees to cover for the costs of enforcing a regulation).

Assessing impacts can be particularly challenging at the EU level. First, data across the EU may not be available or comparable. Secondly, final impacts will often depend on Member States' choices at the implementation stage (or on future delegated and implementing acts). It is often difficult, therefore, to provide accurate estimates, at the Commission proposal stage, even of direct impacts such as compliance or implementation costs. Nevertheless, "known unknowns" should not be cast aside in the analysis. On the contrary, they should be readily acknowledged. In case of lack of data or uncertainties, the qualitative assessment needs to be strengthened (e.g. based on theoretical approaches), while being transparent about the impact that such uncertainties may have on the comparison of options.

At the end of this analysis, there should be a solid understanding of the extent to which each option achieves the objectives, with what benefits and at what costs at the aggregate level and for affected parties. Potentially disproportionate impacts (e.g. on fundamental rights, SMEs, competitiveness, specific communities, workers' health and safety, employment, poverty, regions or Member States, developing countries etc.) should have been identified along with any significant risk of unintended consequences. This will help compare

the options in terms of their coherence with horizontal EU objectives as well as to identify potential mitigating measures for any preferred option.

The IA Report should summarize the results of the impact analysis in an accessible manner. It should be clear and transparent about any limitations (e.g. data, methodological) and risks of unintended consequences. While the more technical aspects of the assessment are important, the final concrete impacts for individuals, enterprises or public administrations, and where possible the societal or geographical distribution of such impacts, should be kept at the forefront of the analysis and the IA Report.

Aggregated costs and benefits should be clearly distinguished from distributional impacts and transfers. The choices made in the selection of relevant impacts and in the analytical methods should be clearly justified in the annexes. Data sources should be provided and underlying assumptions illustrated in relation to any quantification.

Source: European Commission
Better Regulation Guidelines
Commission Staff Working Document
Strasbourg, May 19, 2015

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