

Potential Impacts of Transatlantic Trade Negotiations on the EU Environmental Policy

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Abstract. The current EU–US negotiations on the Transatlantic Trade and Investment Partnership (TTIP) may result in a comprehensive agreement which will be able to shape not only the traditional trade agenda but will cover a set of non-trade matters as well. Specifically, the environmental impacts as a matter of public concern are at the centre of attention of both the academia and the civil society. The proposed paper intends to analyse two aspects of the likely implications which could be triggered by the future transatlantic agreement. First, the policy level of the analysis is focusing on the question of how the contracting parties will integrate the environmental concerns into the agreement and how these concerns could be reconciled with the standard trade concerns and principles. Second, the TTIP could also have a direct impact on the environmental regulation; for this reason, the paper will also focus on the regulatory level. The paper concludes that a carefully planned agreement will not constrain the policy leeway of the EU in the field of the environmental protection, however, the EU negotiators have to pay very close attention to choosing the right models, methods and formulations in the future text of the agreement.

Keywords: EU external trade policy, EU–US relations, TTIP, EU environmental policy

1. INTRODUCTION

‘@MalmstromEU: what TTIP changes for our rules on e.g. consumer protection, food safety and environment? The simple answer is... No change.’ – The statement of Cecilia Malmström, European Commissioner for trade, rapidly spread on Twitter on 15th October 2015.¹ If one would interpret this in a restrictive manner, suggesting the Transatlantic Trade and Investment Partnership (TTIP) will not have any impact on the EU regulation, the title of the present paper would offer a completely pointless challenge. However, we want to read this tweet in a slightly more permissive way, which would not exclude a more complex answer and therefore the premise of the present paper is that the TTIP might have implications specifically on the environmental regulation. This premise is not a revolutionary finding since the environmental effects of the TTIP are one of the most debated issues relating to the current trade negotiations between the European Union and the United States. Many experts warn that the future of transatlantic agreements might lead to a rollback in the European Union’s environmental regulation, putting at risk the principle of high level of protection of the EU environmental law. The present paper intends to analyse two aspects of the potential implications that could be triggered by the future transatlantic agreement.

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¹ See the Press conference of Cecilia Malmström (2015) link 1.

First, the policy level of the analysis focuses on the question of how to integrate the environmental concerns in the trade agreement. This is important as the EU, when implementing the Common Commercial Policy and entering into trade negotiations, is required by the provisions of the Founding Treaties to place environmental concerns in the trade agenda and integrate them into the targeted trade agreement. This policy level of the question can be considered as a part of the ‘Trade and Environment’ debate, which has been at the centre of attention of the international trade discourse since the 1990s.² The importance of the subject can be explained partly by the fact that the two areas represent an ‘ideological’ policy conflict between the free trade concept and the environmental thinking, which underpins the policies behind the international regulation. The European Union for the last two decades has been involved in this debate, it has a very strong commitment to introducing significant reform with the aim of providing wider accommodation for environmental measures within the world trade law.³ Additionally, it is notable that the EU’s focus is not placed separately on environmental aspects, but it attempts to include these interests in conformity with other societal concerns, like the social policy, labour standards or human rights.⁴ The integration of environmental – and other societal – concerns is a flagship issue also in the ongoing transatlantic negotiations and therefore, the outcome can influence – at the policy level – the future relation between the trade and environmental policies in the European Union.

Second, the TTIP can also have a direct impact on the environmental regulation; for this reason, the paper will focus on the regulatory level as well. It is well known that the declared objective of the planned transatlantic trade agreement is to unify the standards of the European Union and the United States as much as possible by regulatory cooperation. However, an improper design of regulatory cooperation carries considerable risks for environmental protection in the EU, as environmental standards might be lowered if for instance the rules on harmonisation can result in a ‘race to the bottom’ effect.

Considering the fact that the TTIP negotiations are still in progress, the subject of this paper can be regarded as some sort of a ‘moving target’, and therefore, the scope and the extent of the analysis have to be restricted more or less to an abstract level of problems raised by the topic. Even if the negotiation mandate,⁵ the negotiating directives⁶ or the available text proposals of the European Commission can give certain hints on how the TTIP could address a specific question,⁷ it is always to be taken into account that these documents never represent the final and compromised text of the future agreement. In other

² See the ‘Trade and Environment’ debate in e.g. Araya et al. (2001) and Santarius et al. (2004).

³ Prost (2005) 411–59.

⁴ For human rights requirements, see Arts (2000). For labour requirements in general context, see Thomas (2002) 791–819.

⁵ Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM (12.3.2013) 136 final.

⁶ Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America. ST 11103/13 (17 June 2013). EU restricted document, declassified on 9 October 2014.

⁷ Alternatively, we also use conceptual models of other EU trade agreements, e.g. the adopted text of the CETA can give some orientations in a certain issue if we presuppose that the EU will represent a similar position in the TTIP negotiations.

words, until negotiations commence, we can only speculate about the likely implications arising from hypothetical regulatory options. The genuine effects of the TTIP will be seen only after the agreement has entered into force. Keeping in mind this reservation, the first introductory chapter ('2. Trade Negotiations, Environmental Concerns and the Mandate of the European Union') makes an attempt to explain why the environmental concerns are important for the European Union in the ongoing negotiations, and then, the policy level is examined ('3. Policy Impacts of the TTIP: The Integration of Environmental Concerns into the Trade Agreements'), which is followed by the analysis of the regulatory issues ('4. Regulatory Impacts of the TTIP: The Regulatory Cooperation and the Environmental Standards'), and finally, the paper closes with some concluding remarks ('5. Conclusion – How to avoid the “race to the bottom” harmonisation’).

2. TRADE NEGOTIATIONS, ENVIRONMENTAL CONCERNS AND THE MANDATE OF THE EUROPEAN UNION

The trade negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (TTIP) were launched in 2013, aiming to be the most ambitious – ‘comprehensive’ (Barroso)⁸ and ‘high-standard’ (Obama)⁹ – trade agreement ever attempted, due to both its scale and its significance for the transatlantic relationship between the European Union and the United States. Moreover, this time, the chances of success of an agreement have seemed more feasible than ever,¹⁰ even though at this moment in time, the negotiations have slowed down and it is not expected to find a compromise until the end of 2016 for predominantly political reasons (e.g. the current US presidential election, and approaching federal election in Germany, and the presidential election in France in 2017). Moreover, the TTIP could overstep the borders of the multilateral framework of the trade liberalisation, doing far more than to eliminate merely the already low average tariffs and target the non-tariff barriers as well, which are a typical trade obstacles for the relations

⁸ ‘A future deal will give a strong boost to our economies on both sides of the Atlantic. It will be a comprehensive agreement going beyond tariffs, by integrating markets and removing barriers. It is estimated that, when this agreement is up and running, the European economy will get a stimulus of half a per cent of our GDP – which translates into tens of billions of euros every year and tens of thousands of new jobs.’ Speech of José Manuel Durão Barroso, former President of the European Commission. (2015) link 2.

⁹ ‘Promoting growth, creating jobs, strengthening the middle class – these are the principles that animate President Obama’s economic policies, including this Administration’s trade policy. As President Obama said [...], TTIP can be a success if “we can achieve the kind of high-standard, comprehensive agreement that the global trading system is looking to us to develop.”’ Michael Froman, the US Trade Representative cited president Obama in his speech, see Froman (2013) 135–36.

¹⁰ From an economic point of view, the growth is weak equally in the EU and the US, however, the monetary and fiscal policy instruments are largely exhausted: Felbermayr & Larch (2013). The trade growth has been slow-moving because of the effects of the financial crisis of 2008–2009 and competing subsidy and regulatory policies that impede commercial activity, see Schott & Cimino (2013). Structural reforms are demanded in both regions, from which the prospect of economic growth is expected. Moreover, both the EU and the US have widely lost market shares in the last two decades. Therefore, the liberalization of bilateral trade relations could increase their ability to compete with the emerging economies.

between the well-developed industrial nations.¹¹ These barriers also include the measures applied by the Member States for achieving public policy objectives. The question can be raised concerning the possible consequence of a comprehensive trade agreement between the EU and US as to why the European Union has been consistently conducting a 'values-driven trade policy' in the last decades and strongly prioritises the environmental concerns in case of a trade agreement as well.

In order to understand the specific relation and sensitivity of the European Union to the 'trade and environment' issues, it is worth highlighting two major factors. First, Europe has always had a stronger commitment to social and environmental concerns, in comparison, e.g., to the United States. More literally, the idea of Adam Smith in *Wealth of Nations* regarding the concept of the 'invisible hand' has never gained importance in Europe,¹² and as a result, the European Union and also the governments of the Members States compared to the US are seen as charged not only to promote liberty but also to reduce inequalities in society. This attitude has led to far-reaching regulatory interventions also in the environmental area and explains the social context of the above 'sensitivity' of the EU in these issues (which is, thus, oversensitivity in the eyes of the USA).

Secondly, in contrast to other countries, the environmental awareness in the European Union has actually a strong basis rooted in the treaties. The objectives and principles of the external trade policy of the EU (Common Commercial Policy) before the Treaty of Lisbon were laid down in a homogeneous and closed structure. This consistency was based primarily, as a leading principle, on the liberalisation, which allowed the legal and political framework of the Common Commercial Policy to develop according to the logic in line with its free-trade commitments to the international economic law and the legal order of WTO. However, the expansion of the external policy horizon of the European Communities and the introduction of new policy areas led to conflicts of objectives more frequently, causing tensions between the CCP and other external policy areas. Due to the Treaty of Lisbon, the Common Commercial Policy has become an integral part of the Union's external action. The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have made it clear¹³ that the EU has to ensure consistency between the different areas of its external action and pursue and implement the general principles and objectives in the whole field of the EU external relations.

The CCP is founded on a two-level structure of values, principles and objectives now, which encompasses not only inner principles like liberalisation but also the peripheral values and principles outside the trade policy including the sustainable development and environmental concerns as well. Therefore, when implementing the Common Commercial Policy, the European Union is required by its own constitutional structure to put the environmental concerns on the agenda of the trade negotiations and integrate them into the targeted trade agreement.

¹¹ According to the EU Commission's document, it is actually an average of 4%, see the Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM(12.3.2013) 136 final. There are some tariffs peaks for sensitive products on both sides of the Atlantic, e.g. tobacco, textiles and clothing, sugar, footwear, dairy products and some vegetables.

¹² Krämer (2004).

¹³ The consistency requirement regarding the EU external action is laid down in Article 21.3 TEU. Specifically to the Common Commercial Policy, Article 205 TFEU requires the application of the general objectives and principles of the EU external action.

3. POLICY IMPACTS OF THE TTIP: THE INTEGRATION OF ENVIRONMENTAL CONCERNS INTO THE TRADE AGREEMENTS

As mentioned above, since the 1990s, the environmental concerns became a standard item in the negotiation of international trade agreements. The principal reason for connecting environmental issues to the trade agenda is closely connected to policy tensions that are rooted in domestic environmental measures, which can oppose the efforts to further liberalisation in trade and leads often to trade barriers. Moreover, the liberalised and growing trade have environmental impacts in terms of conventional pollution, as well as air pollution, forest and species depletion, etc. This tension can be observed as typical policy conflicts, which the negotiating parties, according to their domestic policy priorities, address (or intentionally not)¹⁴ in the trade agreement. Countries involved are interested in more liberalisation, but the emerging importance of the environmental protection requires maintaining the adequate measures that can manifest as restrictive trade practices. These tensions are stimulated by two concrete factors as well. Globalising economic systems increases general incentives for engaging in international trade¹⁵ hence the growth-oriented policies are causing harmful environmental impacts. The international trade law, with the single purpose of increasing trade flows, is unlikely to have a neutral effect on the world's environment. There is a natural tendency for trading countries to try the effectiveness of their environmental regulation, as well as to influence the environmental behaviour of others,¹⁶ by resorting to trade measures, including import bans and other restrictive measures. The unilateral trade instruments in question are harshly criticised mostly by the developing countries, which see these measures as nothing but 'green protectionism'¹⁷ of the developed nations. As a consequence of the evolving environmental awareness, countries nowadays could not avoid addressing these conflicts and questions in their trade agreements. The examples of the major ongoing trade negotiations obviously support this trend.¹⁸

From the perspective of the negotiations, the real question is how this policy conflict between trade and environment can be addressed and reconciled successfully within the framework of an international trade agreement with incorporated environmental concerns. A successful outcome is that the negotiating parties have found an adequate solution to consider the environmental impact of their trade agreement and laid down normative

¹⁴ The premise of the following analysis is that the negotiating parties want to regulate and resolve this conflict. However, it cannot be neglected that the parties also have other (policy) options. There are examples of international agreement provisions, the goal of which is to avoid something special to regulate. Often, the reason for this option is that the negotiating could not find mutual compromise, or with the avoidance of strict or precise regulation they want to leave more space for interpretation – they do not want to confine the room for the future policy options. However, our starting point is that the parties want to regulate and integrate the environmental objectives in their trade agreement, they want to tackle common environmental challenges, and they are aware of these challenges, even though these challenges are not necessarily equally shared in the contraction parties.

¹⁵ Dillon (2002) 120.

¹⁶ Dillon (2002) 120.

¹⁷ Dagne (2010) 441, Keukeleire & Delreux (2014) 202–03.

¹⁸ Excluding the subject of this paper, the TTIP, and other agreements negotiated by the EU (e.g. with Canada), the United States' recent negotiation on the Trans-Pacific Partnership Agreement can be taken as example. For a detailed analysis, see Meltzer & Voon (2014).

provisions regarding the relationship of the trade and environmental policy objectives. The EU and the US, in this case, do not want to address the trade policy objectives in an isolated context but want to reflect and incorporate the environmental concerns. It is evident that the above success is influenced by the framework, namely by the substantive and the procedural components of the trade agreement. The substantive components refer to the content of the agreement and imply the obligations and rights of the contracting parties. However, the procedural aspect of a trade agreement ensures that these obligations and rights can be really effectuated.

The role and stance of the European Union to the ‘Trade and Environment’ debate, compared to with the US position, represent a very strong commitment to the real inclusion of environmental concerns into the legal framework of the world trade. From the perspective of the ongoing negotiation on a transatlantic free trade and investment partnership agreement, it means that a successful compromise can be reached only if the striking divergences between the positions of the parties are reconciled. However, it is hard to pave the way for a mutually acceptable agreement because of the big differences in the positions of the parties and because of their specific interest. At the current stage of the negotiations, it is hardly possible to foresee which compromise could be found regarding the disputed issues, in which the EU has expressed crucial interest in the last two decades, e.g., GMOs, hormone treated beef and pork, chlorine-sterilized chicken, or the recent disagreements on fracking shale gas reserves.

However, is the reconciliation of these positions required? Technically, no! An agreement could be concluded without the real inclusion of ‘bridges’ between the trade and environmental concerns. There would be a very small chance of the ratification of such a treaty. The specificity of the EU’s position to the ‘Trade and Environment’ issues has its roots in the EU law (examined above) and also in a European sensitivity to environmental concerns. Therefore, an agreement without the real inclusions would be politically unacceptable in Europe. The question can be raised of what kind of a compromise would mean a real solution that can bring trade as well as environment concerns together. Essentially, four basic concerns could be highlighted, which are pivotal elements of an environmentally conscious trade agreement and therefore it could be considered as the major policy impact of the TTIP.

An environmentally conscious trade agreement¹⁹ sets down the most important, environmentally relevant principles and objectives and makes clear the relationship between these principles and the free trade principles, such as progressive liberalisation. It is important to ensure that these principles and objectives have legal effects as well e.g., as tools of the interpretation in the dispute settlements, and that the principles of the free trade should not overrule the environmental principles and objectives. The principle structure of the EU funding treaties furnishes a good instance of that solution when introducing a consistency requirement between the environmental concerns, as the general principle of the EU’s external activities, and the free trade and progressive liberalisation, as principles of the Common Commercial Policy. The negotiation mandate of the European Union is a good base towards this compromise, but at this time, the details in this regard are still not clear. According to negotiation mandate, this part of the agreement i.e., its preamble, should express the commitment to sustainable development and the contribution of international trade to sustainable development ‘(...) in its economic, social and environmental dimensions, including economic development, full and productive employment and decent

¹⁹ For this concept, see Horváthy (2013); Horváthy (2014).

work for all as well as the protection and preservation of the environment and natural resources (...).²⁰ However, the notion of sustainable development is questionable. If this reference is interpreted in context with the EU law, the proposition of the EU is that the agreement should recognise the sustainable development as an overarching objective as well as the aim of the parties at promoting high level of protection for the environment. In this regard, the mandate also emphasises a specific objective. The agreement should also recognise that the Parties will not encourage trade or foreign direct investment by lowering domestic environmental standards – the agreement should prevent the ‘race to the bottom’ effect, which could lead to sinking the level of protection in the contracting parties.

The agreement should also cover substantive provisions, which enables the parties to introduce measures with the intention to achieve environmental objectives. However, the real question is whether the guarantees should also be established, which can prevent the parties from introducing illicit discriminatory measures. The mandate is not clear enough in this regard as it only refers to general statements that are in line with the proposed principles and objectives. The substantial content of this future chapter is questionable. Consideration will be given to measures to facilitate and promote trade in environmentally friendly and resource-efficient goods, services and technologies including green public procurement and to support informed purchasing choices by consumers.²¹ Moreover, the agreement will also include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labour and environmental domain as a necessary condition for sustainable development.²² The importance of implementation as well as the enforcement of domestic legislation on labour and environment should also be stressed. It should also include provisions in support of internationally recognised standards of corporate social responsibility, as well as of the conservation, sustainable management and promotion of trade in legally obtained and sustainable natural resources, such as timber, wildlife or fisheries. The future agreement will foresee the monitoring of the implementation of these provisions through a mechanism including civil society participation, as well as one to address any disputes.

It should also be noted that the mandate refers, among the market access rules, to the general exceptions under the WTO law, noting that the agreement should have a general exception clause based on Articles XX and XXI GATT and Articles XIV and XIVbis GATS. In context with the non-tariff barriers, the agreement should also reflect on the specificity of Sanitary and phytosanitary measures (SPS). According to the mandate on SPS measures, the negotiations shall follow the former negotiating directives of the EU.²³ The parties shall establish provisions that build upon the WTO SPS Agreement and, on the provisions of the existing veterinary agreement, introduce disciplines with regard to plant health and set up a bilateral forum for improved dialogue and cooperation on SPS issues. Moreover, the chapter on the SPS measures should be based on ‘(...) the key principles of the WTO SPS Agreement, including the requirement that each side’s SPS measures be based on science and on international standards or scientific risk assessments, applied only to the extent necessary to protect human, animal, or plant life or health, and developed in a transparent

²⁰ See COM (12.3.2013) 136, paragraph 6.

²¹ See Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America. ST 11103/13 (17 June 2013), paragraph 31.

²² COM (12.3.2013) 136, paragraph 25.

²³ Adopted by the Council on 20 February 1995, see Council Doc. 4976/95.

manner, without undue delay (...).²⁴ In addition, the proposed agreement should also cover the technical regulations, which is also an important regulatory area from an environmental perspective. In line with the WTO Agreement on Technical Barriers to Trade (TBT), the EU's mandate also expects provisions in this area. The objectives of these provisions would be to generate greater openness, transparency and convergence in regulatory approaches and requirements and related standards-development processes, as well as, *inter alia*, to reduce burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies and enhance cooperation in conformity assessment and standardisation issues globally. This requirement leads to the regulatory implications as well which are thoroughly exposed in the next section.

An essential element of the future agreement should also be the dispute settlement system, an investor-state dispute settlement mechanism – ISDS, which is able to reconcile effectively the disagreements of the contracting parties and the investors. In this regard, the main point, raised in the early summaries of the negotiation mandate, is that the dispute settlement procedure should be applied also to the ‘Trade and Sustainable Development’ chapter of the future agreement. However, it is questionable how the ISDS mechanism relates to the parties’ right to regulate in the field of the environmental matters. If no specific provisions would be laid down in this regard, the environmental legislation of the member states could be easily attacked by the investors as all domestic environmental measures that might have implications on the trade are to be regarded as potential trade restriction. The turning point in this issue was that the European Commission proposed a new system of dispute settlement mechanism in 2015,²⁵ which was based on an entirely new approach establishing a permanent system consisting of a Tribunal and an Appellate Tribunal. The concept of the Investment Court System has been channelled into the TTIP negotiations²⁶ and the new approach also touches upon all current trade agreements under negotiation and ratification. From the perspective of the environmental concerns, the most important part of the concept is the clarification of the parties’ public policy leeway, certain aspects of the right to regulate principle, in specific areas including the environmental policy. According to the Commission’s proposal, the dispute settlement provisions should not affect the right of the parties to regulate within their territories through measures necessary to achieve legitimate policy objectives and the notion of legitimate policy objectives covers the environment amongst other concerns. This part of the concept seems to be immensely significant, however, at this stage of the negotiations it is not clear and questions remain whether the EU proposal will be accepted by the US negotiators. This question is vital indeed, because even if the final text will cover the above exceptions, the Court (or whatever dispute settlement body will be institutionalised by the TTIP) will have wide autonomy in interpreting the broad concepts of these exceptions. Consequently the dispute settlement mechanism might also have indirect effects²⁷ on the environmental regulation when shaping the scope of the exceptions.

²⁴ See COM (12.3.2013) 136, paragraph 18.

²⁵ Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations – Press release (2015) link 8.

²⁶ Commission draft text – Investment (2015) link 7.

²⁷ From a legal point of view, the ISDS can never have direct effect on the domestic law, i.e. the forum principally is not competent to annul the rules of the domestic law. However, there is no doubt if huge amounts of compensations are at stake, the country in question can decide to modify the domestic law, in other words, the ISDS can influence the domestic legislator indirectly.

The final requirement is that a trade agreement taking into consideration the environmental interest should make clear its relationship to the multilateral environmental agreements. One option could be that the most important relevant agreements previously concluded by the EU²⁸ are to be listed explicitly in the text agreement. This concern is completely in compliance with the EU commitments to these issues, as mentioned before, as the EU has intended to make provisions regarding the multilateral environmental agreements already in the course of the Uruguay round. As the text of the TTIP is under negotiation, it is still unclear how the parties will address this context of the trade agreement. However, the agreement concluded between EU and Canada (CETA)²⁹ contains detailed provisions on this issue in order to except all trade measures from the scope of the CETA, which are justified under a multilateral environmental agreement.³⁰ This model can also be considered by the negotiators of the TTIP.

4. REGULATORY IMPACTS OF THE TTIP: THE REGULATORY COOPERATION AND THE ENVIRONMENTAL STANDARDS

The early summaries of the Commission's negotiation mandate highlighted the elimination of the regulatory trade barriers as a major issue. The term *regulatory trade barriers* refers to a variety of trade obstacles, which take can different forms. In general, two main categories are covered by non-tariff-barriers. This includes the whole range of quantitative restrictions that directly restrict market access, e.g. import quotas, and secondly, it covers regulations, which add to the cost importation, e.g. domestic regulations requiring expensive reconfiguration of products, such as adapting the technical parameters (environmental standards of cars, standards and product requirements of foods, administrative measures, etc.). Therefore, the terms typically refer to the behind-the-border barriers to trade.³¹ From the perspective of their effects, this category might cover the need to allow products separately for the markets involved, often on the basis of different procedures and conditions for admission; different industrial standards, packaging requirements and information or labelling obligations; regulation of access to public procurement procedures or economic development programs, such as the state export credit insurance and also different public policy (environmental, health or consumer etc.) standards and restrictions.³²

The majority of differences in the environmental standards can be explained by the different approach of the EU and US environmental regulations. In the EU, risk regulation is based on the precautionary principle, which requires demonstration that no danger e.g. to

²⁸ The most significant agreements are Montreal Protocol on Ozone Depleting Substances, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on Persistent Organic Pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticide.

²⁹ Comprehensive Economic and Trade Agreement (CETA) between Canada, of one part, and the European Union and its Member States, of the other part (2016) link 9.

³⁰ CETA Article 24.4. (2016) link 9.

³¹ See Sadikov (2007).

³² Expressive examples are examined by Lester and Barbee, illustrating how fruit and vegetable product can sizes or car headlights standards can operate as regulatory trade barriers, see Lester & Barbee (2013) 848.

human, animal or plant health might emanate from the products in question. The evaluation of the potential dangers is principally based on scientific analysis. However, in cases where scientific data does not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous. In the United States, the approach is exactly the opposite – the risk-based approach allows the use of products as long as no considerable danger has been detected. As a result, a large number of materials that are banned in the EU because of their potential unsafe character are approved in the US as there is no scientific data that could demonstrate the grave danger to the public or animal, or plant health and life.

These differences in domestic regulations, technically, can be addressed by three major approaches, which are the standard techniques of the regulatory cooperation.³³ The first method is the unification, which provides a tool for establishing the same requirements in all contracting countries. However, the unification has its limitations; namely, if strong industrial actors are competing in the market at stake, setting common standards is much more than difficult. However, it is not impossible: even today unified standards are working in several areas, like telecommunication, IT technologies, automotive industry, or international aviation and maritime transport. Secondly, the harmonisation implies the alignment of regulations to a single best practice. Usually a voluntary agreement, harmonization can be based on a reference to international standards from a standard-setting body, or simply involve coordination among nations. Countries basically agree to converge on a single standard or regulation. This is usually the most difficult way to achieve regulatory cooperation, in part because countries are reluctant to adjust their standards and also because the harmonisation of standards requires complete consensus. Thirdly, the principle of mutual recognition can also help to eliminate the regulatory trade barriers; it is especially useful in eliminating duplicative testing and certification processes.³⁴

All of these approaches would facilitate trade by reducing the regulatory hurdles faced by prospective exporters on both sides in that they would save them the trouble of complying, and/or demonstrating that they have complied with, a different regulatory regime. The question arises, however, how the EU and US can find a compromise on these issues. Probably, the solution should simply be to remove regulatory divergences that are accidental or serve no purpose; however, it is inevitable that some inefficiency and higher costs must be accepted by both negotiating parties.³⁵

The methods of the regulatory cooperation are highly significant in the field of environmental policy because improper design can bring considerable risks for the high level environmental protection in the EU. It could occur, if the cooperation is based on the ‘lesser denominator’ principle and therefore, the higher environmental standards of the European Union would be lowered. It cannot be denied that in some areas the environmental regulation of the United States are more demanding in comparison with the EU level of

³³ Lester (2013) 84.

³⁴ Both the EU and the US have already concluded Mutual Recognition Agreements (MRAs), and the EU and the US even has common agreement on specific issues. The MRAs have the objective of promoting trade in goods between the contracting parties by facilitating market access. They are, in general, bilateral agreements, and aim to benefit industry by providing easier access to conformity assessment. The EU has currently MRAs with USA, and Australia, Canada, Japan, New Zealand, Switzerland.

³⁵ See Lester and Barbee’s example: if a car producer wants to sell vehicles in the United Kingdom, it must account for the UK’s use of left-hand drive traffic, see Lester & Barbee (2013) 856.

protection, e.g., specific energy efficiency requirements, or emission standards in some fields. However, the EU regulations are stricter in other fields e.g., ban of certain heavy metal substances;³⁶ nanomaterials;³⁷ some pesticides and biocides,³⁸ fracking mining technology, or the most palpable example could be the EU GMO regulation.

The question is how these regulatory differences can be addressed by trade agreements, specifically in the context of the future transatlantic agreement. The regulatory cooperation is not a new phenomenon in the trade relations and practice of the European Union and the United States. Even in the 1990s, efforts were made to establish cooperative institutional mechanisms. The first significant attempt was the ‘Transatlantic Declaration on EC–US Relations’.³⁹ Cooperation on important political and economic matters was laid down as one of the most striking objectives of the Declaration, which had to be achieved through channels of consultations organised at several levels.⁴⁰ In 1995, the initial institutional framework of cooperation was improved by the signing of the New Transatlantic Agenda (NTA).⁴¹ In the NTA, the European Union and the United States agreed to further cooperation based on four broad principles: promoting peace and stability, democracy and development around the world; responding to global challenges; and contributing to the expansion of world trade and closer economic relations; and building bridges across the Atlantic. The NTA set out specific committees and formalised the regulatory cooperation agreements and launched a series of civil society dialogues between interest groups in business, labour, environmental and consumer policy areas.⁴² The NTA was widely regarded as an overall genuine attempt at widening the depth of regulatory cooperation between the

³⁶ E.g. substance bans for electrical appliances, in which the use of heavy metals, first of all mercury and lead, are prohibited.

³⁷ A narrower definition applies in the US, which means that the environmental impacts of various materials are not included and their hazards cannot be counteracted. See Burger & Matthey (2015).

³⁸ Bioaccumulative and toxic substances (PBTs) and carcinogenic, mutagenic and teratogenic substances (CMRs) are banned in the EU.

³⁹ Transatlantic Declaration on EC–US Relations (1990) link 5.

⁴⁰ E.g. bi-annual consultations to be arranged in the United States and in Europe between, on the one side, the President of the European Council and the President of the Commission, and on the other side, the President of the United States; bi-annual consultations between the European Community Foreign Ministers, with the Commission, and the US Secretary of State, alternately on either side of the Atlantic; ad hoc consultations between the Presidency Foreign Minister or the Troika and the US Secretary of State; bi-annual consultations between the Commission and the US Government at Cabinet level; briefings, as currently exist, by the Presidency to US Representatives on European Political Cooperation (EPC) meetings at the Ministerial level.

⁴¹ The New Transatlantic Agenda (1995) link 4.

⁴² The dialogues that were initiated by the NTA and developed over time between the EU and the US are many and include the following: the Transatlantic Business Dialogue (TABD), the Transatlantic Consumer Dialogue (TACD), the Transatlantic Environment Dialogue (TAED) (inaugurated in 1999), the Transatlantic Legislators’ Dialogue (TLD) (launched in 1999), and the Transatlantic Labour Dialogue (TALD), the EU–US Financial Markets Regulatory Dialogue, the EU–US Development Dialogue, the EU–US Education Policy Forum, the EU–US Energy Council, the EU–US Task Force on Biotechnology Research, the EU-US Insurance Regulatory Dialogue. NTA also generated a range of unofficial dialogues that are not government sponsored, such as the Transatlantic Policy Network, the Transatlantic Dialogue on Sustainable Development, the Transatlantic Dialogue of Aviation and Climate Change and the Transatlantic Donors Dialogue.

EU and the US but it was also heavily criticised for not delivering more substantial results. In particular, 'it has been claimed that the "laundry list" of "deliverables" for each EU-US summit was not only overly bureaucratic but also failed to address and solve the major trade disputes that affect overall transatlantic relations.'⁴³ In order to reflect on the criticism formulated on the shortcomings of the NTA, the EU and the US have made further steps to enhance the cooperation in establishing the Transatlantic Economic Partnership (TEP) in 1998.⁴⁴ From the perspective of the environmental policy, it was important, that the TEP introduced the mutual recognition agreements (MRAs) as a standard instrument and later in 1999, 'Transatlantic Early Warning System' was also added to the cooperation. This system required the parties to take the other side's interest into account at an early stage when formulating legislative or regulatory decisions. The main aim of this achievement was to prevent the escalation of a new regulation, which would have been based on entirely different concepts or approaches. The system, according to some critics, institutionalised an obstacle on the legislations also in the field of environmental policy.⁴⁵ In order to improve the transatlantic policy and regulatory cooperation, the parties established a new institution, the Transatlantic Economic Council (TEC) in 2007, which was similar to many of the other initiatives that have been pursued since the early 1990s to advance the goal of deepening the economic cooperation. TEC has achieved some results regarding EU-US regulatory cooperation in selected areas.⁴⁶

Finally, the question can be raised how the TTIP might add new approaches to the cooperation. The EU draft text and the stance to these topics are already public even though the texts of the new agreement have not yet been agreed. The European Commission published its proposal for the design of regulatory cooperation in the free trade agreement between the US and the EU on 10 February 2015.⁴⁷ The underlying method, which can be derived from the document, is harmonisation. The negotiating parties have to identify certain issues, in which harmonisation seems to be feasible and then, the EU and US regulatory standards should gradually be brought closer through a unilateral 'dynamic process' during in the course of the negotiations. This process of harmonisation should also be maintained in a bilateral way after the completion of the TTIP negotiations. It is most likely, however, that the 'dynamic process' will not result in substantial harmonisation, i.e. no unilateral adjustment of US standards to the higher EU environmental regulation will be made. The cost of the higher standards and the consequential loss of competitiveness could also influence the ratification process of the agreement.

⁴³ Alemanno (2014) 27.

⁴⁴ Transatlantic Economic Partnership (1998) link 6.

⁴⁵ As a striking example, it is most likely that the system could prevent the escalation of a dispute such as regarding hush kits. This revolved around the EU legislation banning the use of hush-kit outfitted aircraft in the EU, thus reducing the value of the mostly American used airplanes so equipped and hurting the profits of American hush kit manufacturers. By the time the US authorities and relevant industries became aware of the potential trade consequences stemming from such a proposal, the text was already in second reading in the European Parliament, see Alemanno (2014) 27.

⁴⁶ E.g. the area of electric cars, ICT services, investment, mutual recognition of organic labelled products; the common understanding on regulatory principles and best practices and the standards bridge building documents, reinforced cooperation in emerging areas such as nanotechnology and e-health etc. See Alemanno (2014) 19.

⁴⁷ See Textual Proposal of the European Commission for legal text on Regulatory Cooperation in TTIP (10 February 2015) link 3.

The proposal also lays down the institutional setting of the EU and domestic standardisation beyond harmonisation. The coordination would be carried out within a Regulatory Cooperation Body and the process would involve stakeholders. According to the document, in the future the parties would be required to inform the other party on the planned regulatory measures at the earliest stage of decision making, which would help to take into consideration the likely effects these might cause.

Two extreme scenarios can be derived from the perspective of the higher and stricter EU environmental standards. First, nothing will happen – the EU will not engage in negotiation in order to find a compromise of the harmonisation and therefore, its standards will not be made softer in this regulatory field. The second scenario is, that even though the aim of the dynamic process could not be fully achieved by the time the agreement is concluded, the harmonisation of standards will continue in the framework of TTIP regulatory cooperation and if the harmonisation required a compromise between the parties, it would lead to a softening of the precautionary principle method towards the risk-based US approach. This second scenario, namely lowering of the higher EU environmental standards would be problematic in not only ecological but also economic terms. In certain areas, the EU economy has a technological competitive advantage due to higher environmental standards, thus, harmonisation with lower US standards or recognition of their equivalence would mean giving up ecological and economic benefits as well.⁴⁸

5. CONCLUSION – HOW TO AVOID THE ‘RACE TO THE BOTTOM’ HARMONISATION

The role and position of the European Union to the ‘Trade and Environment’ debate, compared to the US stance, represents a very strong commitment to the real inclusion of environmental concerns into the legal framework of the world trade. It has the consequence, from the perspective of the environmental policy, that a successful compromise can only be reached if the striking divergence between the positions of the parties will be reconciled. However, it is hard to pave the way to a mutually acceptable agreement because of the broad differences in the positions of the parties and also because of their specific economic and sectoral industrial interests.

The potential regulatory implications have shown the unavoidable need to strengthen environmental protection, in the context of the future agreement, in order to avoid both the negative environmental and economic impacts. This risk seems to be tackled with the following two regulatory ‘pillars’ of the future agreement. The EU negotiators should pay attention to the opportunity in the ‘race-to-the-top harmonisation’. For this result, the systematic examination would be needed to discover all areas of the environmental regulation, where the harmonisation could bring positive environmental (and also economic) impacts on both sides of the Atlantic. Moreover, an important point would be to shape well the text of the regulatory chapter of the future agreement, considering strong rules regarding the environmental policy, specifying the policy leeway of the parties and giving clear

⁴⁸ Strong EU standards in certain industrial fields where the US industry is not yet technologically capable of meeting the same standards, for instance, pollution of the so-called ‘F-gases’ (fluorinated greenhouse gases), see Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006.

meaning and content for particular principles (e.g. right to regulate, good regulatory practices etc.).

There are countless uncertainties regarding the content of the future agreement even at this stage of negotiations. Consideration of the above examined questions is essential if Cecilia Malmström's tweet is wanted to come true.

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