Is Transatlantic Trade and Investment Partnership a Regional Contribution to Global Economic Governance?

Jacques H.J. Bourgeois*

The negotiation of Transatlantic Trade and Investment Partnership (TTIP) has been followed to an unprecedented extent by civil society. One of the issues underlying the debate is whether TTIP would contribute positively to global economic governance.

This contribution is a limited attempt to address this issue from two different perspectives. First, it tries to reply to the question of how TTIP would relate to the World Trade Organization (WTO), a major form of global economic governance; whether it would be legally consistent with the WTO and whether, where it deals with areas potentially within the scope of the WTO, it blocks any action at WTO level in these areas.

Second, this contribution addresses the question whether TTIP would contribute in other areas beyond the scope of the WTO, to global economic governance; it examines a few such selected areas.

1 INTRODUCTORY REMARKS

This contribution deals with the following question: will the Transatlantic Trade and Investment Partnership (TTIP) contribute to global economic governance in selected areas? In this context, 'TTIP' is used as shorthand for what might become an agreement between the European Union (EU) and the United States. There are two parts to this question. First, how does TTIP relate to the World Trade Organization (WTO), a major system of global economic governance? Does WTO consistency matter in this regard? And will TTIP be a 'building block' or a 'stumbling block' for a revived WTO? (section 2). Second, will TTIP contribute

* Advocate (Member of the Brussels Bar), Senior Advisor of Sidley Austin LLP (Brussels), Professor at the College of Europe, Guest Professor at the University of Ghent. Thanks to Victor Libet (Sidley Austin LLP) for excising language errors and to Bregt Natens (Sidley Austin LLP) for casting a critical eye on the substance. Errors are mine. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

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otherwise outside the scope of the WTO to global economic governance in selected areas? (section 3)

Before we provide some tentative answers, three introductory remarks are in order.

First, as of this writing, TTIP is a moving target, which makes an in-depth legal and legal policy analysis somewhat challenging. In addition, the documentary evidence is of unequal quality: no text has been initialled by the negotiators; there are no 'agreed texts'; and at any rate, 'nothing is agreed until everything is agreed'. This article relies, therefore, on the textual proposals as published by the European Commission[1] – under the rather theoretical hypothesis that the US side will accept these proposals. And, for areas where such proposals are not available, this article relies on the Comprehensive Economic and Trade Agreement (CETA)[2] between Canada and the EU, under the double working hypothesis that the European Commission will make TTIP proposals along the lines of CETA, and that the United States will accept them.

Second, assessing the contribution of TTIP to global economic governance implies offering a working definition of 'governance'. 'Governance' has various meanings and functions and means many different things to different people.[3] For the purpose of this article, 'global economic governance' simply means the set of rules, processes and behaviours by which global economic relations are managed.

Moreover, the 'governance' framework of reference in this article is the global economic governance set out by and in the WTO. The WTO is not the only form of global economic governance, of course. Only part of the TTIP subject matter is dealt with by the WTO. Moreover, WTO governance includes 'soft law' that we will not consider here, because there is no readily available concrete evidence showing the extent to which this soft law forms part of the WTO's effective governance structure. WTO is used as a point of reference because it is primarily based on, and operates through, rules and the presence of an effective system of resolving disputes. By analogy, this article focuses on the contribution of TTIP to 'hard law', i.e. the generally more effective governance.

At first blush then, TTIP will contribute to international governance to the extent that it is consistent with the WTO, or reinforces or complements the WTO. Where it departs from the WTO, the question arises whether TTIP can be seen, together with other mega-FTAs as a WTO substituting governance.

Third, the nature of a party commitment to economic governance in an international agreement conditions that agreement's contribution to global

1 Published on the European Commission DG Trade website.

2 *Ibid*.

3 D.V. Malito, *The Difficulty of Measuring Governance and Stateness*, EUI Working Papers (RSCAS 2015/38). Malito identified at least twenty-five different meanings.

economic governance. As a rule, the weaker the contracting parties' commitments are, the less their agreement will contribute to global economic governance. The extent to which TTIP will contribute to global economic governance depends thus on the *nature* of the commitments into which both Parties enter. The textual proposals of the European Commission contain a fair number of what the late John Jackson called 'norms of aspiration' as opposed to 'norms of obligation',[4] as well as non-committal wording designed to article over differences or to placate opposition. For example, in the TTIP Chapter on Trade and Sustainable Development, 'the Parties should continue to strive towards further ratification of Multilateral Environmental Agreements' (Article 10.3),[5] and the parties 'recognize that it is inappropriate to weaken or reduce levels of protection afforded in domestic environmental or labor laws in order to encourage, or in a manner affecting, trade or investment'.[6] There are also many 'norms of obligation' with 'shall' language, e.g. on labour law,[7] on reducing the use of antibiotics in annual production,[8] on biological diversity,[9] and on trade in wild fauna and flora.[10]

2 TTIP AND THE WTO

2.1 TTIP's WTO consistency

TTIP, of course, is an FTA. For the purpose of examining whether obligations in FTAs are consistent with the WTO, writers distinguish between WTO+ and WTO-Extra obligations.[11] This classification helps clarify whether treaty obligations are WTO-consistent.

WTO+ refers to include obligations relating to policy areas that are already subject to some form of commitment in WTO agreements. They either confirm existing WTO commitments or provide further obligations based on existing WTO commitments. WTO-Extra refers to obligations in areas that are 'qualitatively new', i.e. relating to a policy area that has not previously been regulated by the WTO.

4 John H. Jackson, *World Trade and the Law of GATT* 760 (Bobbs Merill, Indianapolis 1969.
5 Art. 10:3 – emphasis added.
6 Art. 17.
7 In the proposal on *Trade and Sustainable Development*, Section II – Labour Aspects.
8 In the SPS chapter.
9 In the proposal on *Trade and Sustainable Development*, Section III – Environmental Aspects, Art. II.
10 *Ibid.*, Art. 12.
11 Terminology used by H. Horn, P. Mavroidis & A. Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33 World Economy 1565 (2010).

2.1[a] *WTO+*

In TTIP, the EU and the United States seem ready to enter into WTO+ commitments, i.e. commitments on matters within the scope of the WTO on which no agreement between all WTO Members appears possible. In Article XXIV of the GATT 1994, the WTO accepts that WTO Members forming a customs union or a free-trade area exclude other WTO Members from the benefits they grant to each other. And in Article V of the General Agreement on Trade in Services (GATS), the WTO accepts the same thing with regard to WTO Members becoming a party to an agreement liberalizing trade in services, e.g. becoming a party to an FTA like TTIP. Both Article XXIV of the GATT 1994 and Article V of the GATS subject this major exception to the Most Favoured Nation (MFN) treatment, a basic principle of the WTO, to several conditions, however.

One of these conditions is provided in Article XXIV of the GATT 1994: an FTA has to cover 'substantially all the trade' between contracting parties, in this case the EU and the US Article V of the GATS sets out a similar condition: it must have 'substantial sectoral coverage'.

A second condition is: the elimination of 'the duties and other restrictive regulations of commerce',[12] and the absence or elimination of substantially all discrimination in the trade between the contracting parties, in this case, the EU and the United States.[13]

A third condition is that an FTA may not result in the contracting parties maintaining duties and other regulations of commerce in trade in goods vis-à-vis other WTO Members that are higher or more restrictive than the corresponding duties and other regulations of commerce existing in FTA contracting parties prior to the formation of an FTA.[14] Likewise, in trade in services a FTA may not, in respect of other WTO Members, raise the overall level of barriers to trade in services compared to the level applicable prior to that FTA.[15] In assessing whether TTIP meets these WTO requirements, these specific conditions above call for interpretation. What is meant by 'discrimination' in the provision of services or by the 'restrictive regulation of commerce'? For example to what extent do WTO+ technical regulations in TTIP benefit from the departure from MFN treatment or Article XXIV GATT?[16]

12 GATT Art. XXIV (8) (b).
13 GATS Art. V (1) (b).
14 GATT Art. XXIV (5) (b).
15 GATS Art. V (4).
16 J. Trachtman, *The Limits of PTAs: WTO Legal Restrictions on the Use of WTO-Plus Technical Regulations in PTAs*, in *Research Handbook on the WTO and Technical Barriers to Trade* (T. Epps & M. Trebilcock eds., EE Publishing, Cheltenham 2013).

This is not the place to examine the record of the WTO with respect to FTAs and the attitudes of individual WTO Members towards FTAs.[17] Suffice it to say that these interpretative questions are still with us – as the WTO has failed to address them for more than 20 years. At any rate, a number of FTAs very likely do not fulfil the above WTO conditions, and nothing has yet been done about it by the collectivity of WTO Members. Importantly, the WTO has been notified of 400+ such agreements, and nearly all WTO Members are a Party to one or more such agreements. FTAs have become almost the norm, while MFN treatment – one of the basic principles of the WTO – has become almost an exception.[18]

This being said, TTIP will likely at least meet the 'substantially all trade' test for trade in goods and the 'substantial sectoral coverage' test for trade in services.

2.1[b] *WTO-Extra*

The EU and the United States are also entering into WTO-Extra commitments, i.e. TTIP commitments in areas outside the scope of the WTO, such as competition, investment and labour. Such commitments cannot, by definition, be legally inconsistent with the WTO. WTO-Extra commitments do raise policy questions, however, which are dealt with in Section II.

2.1[c] *Interim Conclusion on WTO-Consistency of TTIP Obligations*

TTIP will likely meet the 'substantial trade' and the 'substantial sectoral coverage' requirements. The issue of WTO-consistency remains with respect to other conditions due to interpretative questions.

On the policy question raised by Pauwelyn ([19]) – how can states combine the benefits of a multilateral treaty like the WTO with the undeniable existence of plurilateral, regional and bilateral agreements on trade and non-trade issues like TTIP– so far the WTO has provided no answers. How to assess in legal terms a departure by an FTA from WTO rules appears to be an unanswered question as well. *Peru-Agricultural Products*[20] concerned an additional duty levied by Peru on certain products imported from Guatemala. Guatemala claimed that the duty was inconsistent with certain WTO provisions. Peru referred to the Guatemala-Peru FTA

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17 See among other sources, J. Bourgeois & S. Chobanova, *Did Time Overtake the WTO Rules on Regional Trade* in *Scrutinizing Internal and External Dimensions of European Law – Liber Amicorium Paul Demaret* 695 (Govaere & Hanf eds., P.I.E. Peter Lang, Bruxelles 2013).

18 WTO, *The Future of the WTO* (Geneva 2004) para. 60.

19 J. Pauwelyn, *Interplay Between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence* 7 (draft 10 Feb. 2016).

20 *Peru-Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015.

which provided that Peru may maintain that duty. It argued that Guatemala and Peru had modified between themselves the relevant WTO provisions and relied on Article 41 VCLT, which permits states to contract out of a multilateral treaty, provided they respect the rights of the other contracting parties. The WTO Appellate Body was 'not convinced that, as Peru suggested before the Panel, such alleged modification as between FTA parties would be subject to Article 41 of the Vienna Convention'.[21] The AB noted 'that the WTO Agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements, which prevail over the general provisions of the Vienna Convention, such as Article 41'.[22] In light of the current state of decision-making in the WTO, possible departures by TTIP from WTO provisions are not likely to be brought in line with the WTO via one of the ways identified by the Appellate Body.

2.2 The impact of TTIP commitments on the WTO

On the impact on the WTO of FTAs such as TTIP, there are three schools of thought. These schools differ on whether bilateral commitments under FTAs constitute 'building blocks' that can be multilateralized, or 'stumbling blocks' that preempt possible multilateral commitments[23] – and thus on whether such commitments strengthen or weaken the WTO and global governance.

The first school of thought is the 'stumbling block' camp. Commentators of this camp consider that the parties to an FTA are unlikely to multilateralize what they have agreed *inter se.*[24] The WTO did focus on FTAs in its 2011 World Trade Report, which had the subtitle 'from co-existence to coherence'. The WTO was optimistically referring to different approaches that have been proposed for improving coherence between FTAs and the WTO multilateral trading system: accelerating multilateral trade opening; fixing the differences in the WTO legal framework; adopting a softer approach as a complement to the existing legal framework; and multilateralizing regionalism.[25] This was an interesting but theoretical exercise. It will likely remain so in light of the current state of the WTO.

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21 *Ibid.*

22 *Ibid.*, para. 5.115.

23 Term used in WTO, *The Future of the WTO* (Sutherland Report 2004) para. 83; see also R.E. Baldwin, *Multilateraling Regionalism, Spaghetti Bowls or Building Blocks on the Path to Global Free Trade*, 29 World Economy 1451 (2006).

24 Sutherland report para. 85; cfr. J. Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford U. Press 2008).

25 WTO, *World Trade Report 2011, The WTO and Preferential Trade Agreements; From Co-Existence to Coherence* 184–191 (Geneva 2011).

The second school of thought is the 'building block' camp. Those with this view believe that FTAs have certain elements in common that could be multilateralized.[26] It may be worth examining with respect to what elements TTIP may serve as an example for, and candidates of, further WTO disciplines. However, this does not seem likely for well-trodden paths in the WTO that led nowhere. It is very doubtful for topics such as competition policy, which the Cancùn WTO Ministerial Meeting deleted from the Doha-round list. One could also argue that the very existence of WTO-Extra provisions shows that FTA partners themselves do not wish to include certain items in the WTO and that is why they consistently maintain them in their FTA's.[27]

The third school of thought falls somewhere in between. According to Baldwin, the traditional 'stumbling block' framework can no longer be used to analyse FTAs because these agreements are more about reducing 'frictional' trade barriers, lowering the cost of daily business, and removing 'behind the border' measures. FTAs thus improve governance while not necessarily pre-empting WTO commitments. Baldwin notes that at least some of the more recent FTAs represent 'an independent system of governance that does not intersect much, or at all, with the Marrakesh rules'.[28] Baldwin may be right on this – doubts remain permitted as indicated above – but the issue here is that by dealing with WTO-Extra matters TTIP would block or develop WTO action in these matters.

A tentative conclusion could be that TTIP is at the same time at most one of the 'stumbling blocks' and a regional substitute for a blocked WTO precisely in view of its WTO+ and WTO-Extra provisions.

3 TTIP'S CONTRIBUTION TO GLOBAL ECONOMIC GOVERNANCE IN OTHER MATTERS

We now turn to whether TTIP would contribute to global economic governance in other matters. The answer depends not only on whether TTIP is consistent with WTO rules, but also on what TTIP would do outside the scope of the WTO. We look briefly at some matters: (1) pluri- or multilateral disciplines in specific areas, (2) regulatory cooperation, (3) the rights of private parties, and (4) investor-state dispute settlement (ISDS).

26 Pascal Lamy in a speech at the University of International Business and Economics, Beijing 20 Sept. 2012, https://www.wto.org/english/news_e/sppl_e/sppl246_e.htm; See also A. Reich, *Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity*, 60 U. Toronto L. J. 263 (2009), cited by M. Trebilcock, *Understanding Trade Law* 51 (Edward Elgar Cheltenham 2011).

27 Horn, Mavroidis & Sapir, *Supra* n. 11, at. 1566.

28 R. Baldwin, *21st Century Regionalism. Filling the Gap Between 21st Century Trade and 20th Century Trade Rules*, Geneva Graduate Institute Working Papers (No. 2010-31).

3.1 Ttip's links with pluri- or multilateral disciplines in specific areas

In this area, TTIP would definitely improve global governance without weakening WTO rules which are more general. In the European Commission proposal, TTIP would refer to a number of international instruments in relation to Trade and Sustainable Development. These instruments would concern the environment and labour and relate to sanitary and phytosanitary measures, such as the Codex Alimentarius, to technical regulations, and to international norms. In so doing, TTIP would breathe (new) life into these pluri- and multilateral disciplines. In terms of EU-US relations, the nature of at least part of these disciplines would change from being that of 'norms of aspiration' to that of 'norms of obligation'.

3.2 Regulatory cooperation

In the TTIP negotiations, the EU and the United States hope to facilitate better regulatory cooperation. They address one of the most significant obstacles to international trade in goods and services, and arguably the most difficult one to deal with internationally: the myriad of domestic regulations and standards on technical requirements, as well as on protection of human, animal and plant life or health from certain risks.[29] Before analysing whether TTIP will improve regulatory cooperation in these areas, we provide some initial remarks on how the WTO and the EU have so far tried to deal with the problem of disparate national regulations (the former globally and the latter within Europe). The WTO has generally followed the traditional path of cooperation through transparency, whereas the EU has first tried real harmonization before embarking on a solution limited to lying down at EU level only 'mandatory requirements'.

3.2[a] *The WTO Field*

In an attempt to address the obstacles that the above types of national regulations can pose to trade, WTO Members have agreed on certain rules. These rules are contained in the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (hereinafter 'SPS').[30] These agreements lay down certain transparency requirements, including the obligation to inform interested WTO Members of regulations at an early stage, as well as taking comments and the results of discussion into account, and qualified notification obligations.

29 WTO, *World Trade Report 2012, Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century* (Geneva 2012).

30 For a good description, see P. Van den Bossche & W. Zdouc, *The Law and Policy of the World Trade Organization* 850–949 (3d ed., Cambridge U. Press 2013); see also *Research Handbook on the WTO and Technical Barriers for Trade* (T. Epps & M. Trebilcock eds., EE Publishing, Cheltenham 2013).

The agreements also contain several substantive obligations (MFN; national treatment; the obligation to refrain from creating unnecessary obstacles to international trade; and the obligation to 'base' technical regulations on international standards, to base measures on scientific principles and not to maintain them without sufficient scientific evidence, and to consider accepting technical/sanitary and phytosanitary regulations as equivalent). Under the WTO, a TBT Committee and an SPS Committee have been established, acting mainly as fora for consultations and encouraging and facilitating consultations or negotiations between Members.

However, available documents do not shed much light on whether these rules, agreements, and committees are really heading off unnecessary obstacles to trade and furthering the development of international technical standards, as well as the use of harmonized sanitary and phytosanitary measures. From 1 January 1995 to 1 October 2015, the SPS Committee was notified of national regulations 14,138 times.[31] From March 2013 to November 2015, 126 new 'trade concerns' were raised in the TBT Committee, and 124 previously raised 'trade concerns' were discussed.[32] These numbers suggest that WTO rules are not much of a counterweight to the multitude of national regulations in these areas.

A 2012 case study of EU practice in relation to the impact of the SPS transparency rules found that there was a 'gradually emerging culture of transnational SPS governance involving a regular routine of dialogue, cooperation and critical self-reflection'. However, the case study did not address the extent to which this routine could bear fruit,[33] even leaving aside that the numbers given above are not particularly impressive.

3.2[b] *The EU Scene*

Like the WTO, the EU faces disparate regulations among its members on technical requirements and on protection of human, animal and plant life or health from certain risks. But while the WTO mainly pursues transparency to improve regulatory cooperation, the EU embarked on a policy of harmonizing such regulations at EU level. Several 'constitutional' changes were designed to ease the decision-making process. However, the exercise was and remained very burdensome, inefficient and politically unpopular. Harmonizing such regulations at the regional or international level is an almost impossible task technically. Even if harmonization succeeds after

31 WTO Committee on SPS Measures, *Report on the Activities of the Committee on Sanitary and Phytosanitary Measures* (2015) para 1.10.

32 WTO Committee on TBT, *7th Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade* (2015) para 8.1.

33 C. Downes, *The Impact of WTO Transparency Rules: Is the 10.000th SPS Notification a Cause for Celebration?*, 15 J. Intl. Econ. L. 503 (2012).

long and laborious negotiations – in the face of opposition from vested interests and simple inertia – any harmonized regulations would already then be obsolete as a result of intervening technical developments.

The weakness of EU harmonization policy was clear but remained fundamentally unchanged until the end of the 1970s, and more precisely with the *Cassis de Dijon* judgment of the European Court of Justice. Here the Court established two important principles that changed fundamentally the operation of the EU rules on free circulation of goods. First, as a general rule, where a product has been lawfully produced and marketed in an EU Member State, it must, in principle, be allowed to be traded in another EU Member State. This means that the EU rules on the free circulation of goods as interpreted by the Court obviate the need for harmonized rules. Second, some disparities in EU Member State rules have to be accepted even where their application constitutes an obstacle to intra-EU trade, if they 'can be justified by a public interest objective taking precedence over the free movement of goods'.[34] This was the case, stated the Court, where the rules were necessary to satisfy 'mandatory requirements', e.g. for the effectiveness of tax supervision, for public health, for fairness of commercial dealings, or for the defence of the consumer.[35]

Ever since this judgment, the 'mandatory requirements' test has done more to reduce obstacles to trade than efforts at harmonization. An EU Member State wishing to exclude products shipped from another Member State – by relying on its own different rules and regulations – is now required to prove that its rules are necessary to satisfy these 'mandatory requirements', which are laid down in the growing body of EU regulation and complemented by 'reference to standards'. These 'mandatory requirements' are also used to develop Voluntary European Technical Standards on the basis of 'mandates' issued by the European Commission. The European Commission then recognizes these standards. Products meeting these standards are presumed to comply with the relevant 'mandatory requirements', and thus cannot normally be excluded from one Member State market due to the national regulations of that Member State.[36]

3.2[c] *Regulatory Cooperation and TTIP*

Forms

Given that both the WTO and the EU have had difficulty fostering improved regulatory cooperation to deal with the multitude of national regulations related to

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34 EU Court of Justice, Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung* (1979) ECR 649.
35 *Ibid.*, para. 8.
36 Based on the description by J. Pelkmans, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, Bruges European Economic Research Papers 24/2012.

technical requirements and risk, how would TTIP deal with the problem? Although the scope of regulatory cooperation would be limited under TTIP (see infra), the latest European Commission proposal[37] includes it in two forms: traditional 'regulatory cooperation' and something called 'specific activities promoting regulatory compatibility'. The latter initiative would involve a novel form of direct cooperation between the regulatory authorities of both Parties, and not the usual communication and information exchange between foreign trade officials or diplomats. These 'specific activities' thus seem promising, especially as different means of cooperation are to be used, i.e. not only mutual recognition of testing, and certification, but also mutual recognition of (equivalence of) regulatory measures of the other Party, and even harmonization (Article X 5 (1)). A joint Annual Regulatory Cooperation Program will provide an overview of ongoing and planned regulatory cooperation initiatives (Article X 6 (2)).

The first (classical) form of 'regulatory cooperation' proposed by the EU for TTIP would also improve on previous schemes of both the EU and the WTO. Under this TTIP scheme, the Parties would provide each other with mutual information on 'developments related to their upcoming regulatory measures', giving each other 'opportunities for cooperation and information exchange, at the earliest possible stage' (Article X 4 (2) (a)). Each Party would also commit to taking into account 'approaches' followed by the other Party when adopting or planning to adopt regulatory measures (Article X4 (2) (b)). According to a footnote, this happens on the EU side before the European Commission adopts a formal position. So this probably implies that the obligation arises either before the European Commission adopts a proposal to be submitted to the Council and the European Parliament under Article 289 TFEU, or before it enters a draft into the 'comitology' procedure. The 'regulatory compatibility' applies 'at the stage preceding the regulatory process, including on research, where appropriate' (Article X 5 (4)).

Scope

But if the latest TTIP proposals seem promising from a technical point of view, the scope of regulatory cooperation – in both envisioned forms – is nevertheless circumscribed and qualified.

First, regulatory cooperation would apply to any area (other than an area covered by specific or sectoral provisions) 'that has or is likely to have a significant impact on trade or investment between the Parties in relation to which regulatory authorities of both parties have determined common interest' (Article X 3 (1) (a))

[37] Tradoc 154377.pdf; Tradoc 154379 pdf; Tradoc 154381.pdf; published on 21 Mar. 2016 on the European Commission DG Trade website .

(emphasis added). Moreover, the goal of cooperation is to improve 'the level of protection in public policy areas … as considered appropriate by either Party' (Article X 1 (2)).

Second, TTIP would affirm the ability of each Party to take public policy measures to achieve public policy objectives, as well as each Party's ability to provide services of general interest and to apply its fundamental principles governing regulatory measures, e.g. for risk assessment and risk management (Article X1 (31)). Such measures would not be excluded from the scope of regulatory cooperation under TTIP, meaning that e.g. a draft EU measure destined to provide a service of general interest or based on the precautionary principle would be subject to the TTIP 'regulatory cooperation'. As far as EU regulatory measures are concerned, TTIP regulatory cooperation would apply to 'proposed regulations and directives' referred to in Article 288 TFEU, delegated and implementing acts (Article 290 and 291 TFEU), documents having a de facto impact on rights and obligations of entities subject to regulation (Article X 2 (b)).

Third, TTIP's general provisions on regulatory cooperation apply to 'specific or sectoral provisions'. This refers to what could become concrete commitments for specific industries (chemicals, cosmetics, engineering products, ICT, medical devices, pesticides, pharmaceuticals, textiles and vehicles). This can be seen as advance implementation of TTIP itself of 'regulatory cooperation'. They show how the negotiators apply the 'ifs and buts' of regulatory cooperation to arrive to these concrete commitments.

Overall, then, how far in each Party's decision-making process would all this regulatory cooperation go? The available draft texts do not address the question of 'up until when' regulatory cooperation would apply. Right now, the Parties seem ready to accept the participation of one Party in the 'decision shaping' of the other Party, but no Party is ready to accept the participation of one Party in the 'decision making' of the other Party. The difficulty lies in defining when 'decision shaping' becomes 'decision making'.

These envisioned forms of regulatory cooperation raise the issue of whether the latest EU TTIP proposal, if accepted by the United States, would be constitutional under EU law – and subject to democratic control via the participation of the European Parliament.[38] We will not address this issue here, however, as our topic remains the ability of TTIP to promote better global governance by mitigating the effects of disparate national regulations in the areas of technology and risk.

[38] For broader issues, see A. Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, 18 J. Intl. Econ. L. 625 (2015).

The fate of private parties under TTIP

If TTIP is to contribute to good global governance, its provisions must protect the rights of private parties. Would TTIP do this, and what effect would TTIP have on the Parties' legal systems? Unfortunately, the EU's approach to this issue – both its specific position in the TTIP negotiations and its overall position on the enforcement of international agreements protecting the rights of private parties – could rightfully be qualified as schizophrenic. [39]

On the one hand, it is highly likely that TTIP will include a 'belt and suspender' clause of the type included in the CETA between Canada and the EU. This clause is designed to make sure that, in general, private parties have no rights whatsoever under the agreement and that domestic courts will be kept out of the application of the agreement. First, the agreement will not be construed as conferring rights or imposing obligations on private parties, or as permitting the agreement to be directly invoked in the domestic legal system of the Parties. Second, the Parties agree that a Party will not provide for a right of action under domestic law against the other Party on the ground that that a Party's measure is inconsistent with the agreement (Article 30.6). Negotiators of CETA were manifestly anxious to avoid any such risk: Article 8.22 subjects a claim by an investor to a withdrawal by that investor from any proceeding before a court and to a waiver of the right to pursue such a proceeding. And Article 30.6 excludes such proceedings in general by providing that CETA does not create private rights.

This approach is a contribution to global governance, but of the nineteenth-century type.

On the other hand, TTIP is likely to include provisions protecting specifically the rights of investors, through an ISDS system (see infra). Claims by investors may be submitted to an arbitration tribunal. The contrast is striking. It may very well be that US domestic law and EU Member State laws will not honour certain claims of domestic private parties for loss or damage suffered as a result of laws. That does not justify excluding de plano any claim for breaches of TTIP, while at the same time allowing claims by investors for breaches of TTIP.

Investor-state dispute settlement

Other contributions to this book deal extensively with the resolution of investment disputes as it is likely to be shaped in TTIP. The only aspect dealt with here is its contribution to global economic governance. In relation to FTAs in general, many concerns about investment disputes have been expressed on various aspects of the

[39] By Bronckers in his blog posted on 21 Jan. 2015 on http://leidenlawblog.nl/articles/schizophrenia-in-the-eu-about-international-law.

operation of investor/state arbitral proceedings – leaving aside those that put ISDS as such into question.[40] These concerns are taken into account in the latest Commission proposals[41] on investment dispute resolution that depart from existing provisions of the ICSID Convention.[42]

First, there will be a Tribunal to hear investment disputes, the members of the Tribunal being appointed by the Parties from a roster, for a renewable term of five years (Article 8.27). The roster does not leave much choice to the parties, contrary to the well-established principle of party autonomy. Moreover, arbitrators appointed by the Parties are more likely to be 'pro-State'.

Second, there will be an Appellate Tribunal to review the application or interpretation of applicable law by the Tribunal (Article 8.28). The members of the Appellate Tribunal will also be appointed by the Parties. The experience of the WTO dispute settlement system shows the Appellate Tribunal would contribute to the consistency and predictability of the investment rules as applied on a case-by-case basis by the Tribunal.

Third, in the Commission proposal TTIP defines the scope of ISDS differently or more narrowly than that of ISDS in most investment treaties. The dispute is defined by a claim by a claimant of one Party that the other Party's treatment is in breach of key provisions set out in section 2 on Investment Protection. The extent to which other international law rules are to be applied by the Tribunal is unclear. On the one hand, section 3 Article 13 (2) declares that in determining that the treatment subject to the claim is inconsistent, the Tribunal shall apply the provisions of this Agreement and other rules of international law. On the other hand, section 2 Article 3 (6) states that a breach of any other international agreement does not constitute a breach of fair and equitable treatment.

The text proposed by the Commission carves out 'no-go zones' (section 2 Article 3). It affirms the right of the Parties to regulate in order to achieve a number of legitimate policy objectives. In addition, the Parties are not committed to 'change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectation of profits'. Furthermore, in the absence of a specific commitment under law or contract to the contrary 'a Party's decision not to issue, renew or maintain a subsidy … shall not constitute a breach of the provisions of this section'. And a Party is not prevented from putting an end to a subsidy or from requesting its reimbursement where such action has been ordered by a competent authority.

Fourth, the constituent elements of the Fair and Equitable Treatment are spelled out (section 2 Article 3 (2)).

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40 By NGOs that reject the 'privatisation of justice'; but also by the Deutscher Richterbund, *Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP*, Nr 4/16.

41 http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc153955.pdf.

42 https://icsid.worldbank.org/ICSIDWEB/icsiddocs/icsid-convention.

Fifth, 'indirect expropriation' is defined and it is made clear that non-discriminatory measures to protect certain legitimate policy objectives, as a rule, do not constitute indirect expropriation (Annex I (3)).

Sixth, under the heading 'Denial of benefits' Parties may exclude investors that have no genuine link to either Party from the investment protection (section 2 Article 9).

In conclusion, if TTIP follows the Commission's proposal in this area, it will 'judicialize' significantly investment dispute resolution through an Investment Tribunal and appellate review and by defining more precisely the scope of ISDS. This would depart significantly from a traditional ISDS system.

4 TENTATIVE CONCLUSION

As already indicated TTIP is a moving target and comments are based on textual proposals of one Party. It was nonetheless thought worthwhile to examine whether, should TTIP be in line with these proposals, it would contribute to global economic governance within the scope of the WTO and in certain selected areas outside the scope of the WTO.

From a WTO law perspective as far as WTO+ obligations are concerned TTIP overall would not put that central piece of global economic governance into question. As far as WTO-Extra obligations are concerned, TTIP and other mega-FTAs may conceivably be considered as blocking further developments at WTO level. They are not the only ones. In the end, in light of the WTO paralysis, an FTA between the EU and the United States that represents 25.7% of world merchandise trade and 44.5% of world trade in commercial services would be a complement, albeit a sub-optimal one, to the global economic governance constituted by the WTO.

In addition, TTIP would marginally improve global economy governance by strengthening inter se some pluri- and multilateral disciplines.

Finally, TTIP would address through regulatory cooperation one of the most significant obstacles to international trade in goods and services and improve significantly investor-state dispute resolution. The Commission's proposals take into account much of the criticism of civil society. Some of this criticism, however, comes close to rejecting all together the very idea of concluding TTIP and this often for reasons that apply equally to other FTAs concluded or to be concluded by the EU. This misses the point that in today's world EU cooperation with other countries is necessary to serve the overall interest of the EU citizens. In entering into an agreement such as TTIP, the EU would accept constraints on the exercise of that autonomy rather than surrendering it. A counter-factual of no TTIP would very probably show that the EU regulatory autonomy would in fact be much less effective.