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

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

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1. Introduction

The European Union (EU) and the United States of America (US) are presently negotiating the Transatlantic Trade and Investment Partnership (TTIP), a bilateral preferential trade agreement (PTA) with a high level of ambition for the liberalisation of trade and the promotion of investment between the world's two most powerful political and economic players. Accounting for nearly half of the world's gross domestic product (GDP) and almost one-third of the world's trade, the TTIP (if concluded) will belong to the family of mega-regionals currently being negotiated outside the multilateral trade forum of the World Trade Organization (WTO).¹ The negotiations cover a wide range of areas of transatlantic economic relations, including trade in goods, trade in services, government procurement, intellectual property rights and investment protection (European Commission, 2013b). Through the conclusion of a PTA, the EU and the US are striving to remove the remaining tariffs and to reduce non-tariff barriers in their bilateral trade. They also aim to facilitate investments in one another's economy by achieving a higher level of investment protection. Economic benefits from the agreement are expected to be mutual and significant: an impact assessment study conducted by the Centre for Economic Policy Research in London suggests the EU economy could benefit by €19 billion a year and the US economy could gain an extra €5 billion a year (Francois et al., 2013).

Although tariffs between the EU and US are already low, with an average of 5.2% for the EU and 3.5% for the US, the combined size of the EU and US economies and their markets means that removing the remaining tariffs would still significantly increase export revenues for EU and US firms (European Commission, 2013b). However, most of the expected economic benefits of the TTIP would come from the reduced costs of bureaucracy and regulations, and from liberalised trade in services and government procurement. Non-tariff barriers, in the form of regulations on the US and EU markets, add the equivalent of tariffs of 10–20% to the price of goods (European Commission, 2014a). There are a number of US products that are entirely banned from entering the EU market and a number of EU products that cannot be sold in the US market because of significant differences in sanitary and phytosanitary (SPS) regulations between the countries.² The same is true of the access to the public procurement sector. Reaching a bilateral agreement on opening up markets would therefore considerably benefit businesses and consumers on both sides of the Atlantic.

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

¹ The US is also leading negotiations on the Trans-Pacific Partnership (TPP), a mega-PTA between countries of the Pacific Rim.

² In agriculture, for example, the US's plant health regulations ban European apples, while their food safety rules make it illegal to import certain European soft cheeses. The EU, for its part, restricts imports of US meat treated with hormones and products with genetically modified organisms (GMOs). New issues are US chlorine-treated chicken and ractopamine, a Codex-approved food additive prohibited in Europe.

avenues for the alignment of emissions standards for cars of the EU and US in accordance with the objectives of TTIP, WTO rules and climate policy goals.

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

2. State of play of the TTIP negotiations

Negotiations on the TTIP were launched in spring 2013. They are led by the EU Trade Commissioner and the US Trade Representative and proceed relatively quickly, so that they could be concluded within a few years. The negotiations are split into thematic blocks. With respect to market access, negotiators discuss three issues – tariffs, trade in services and public procurement. On tariffs, the parties have had an initial exchange of offers. On services and on public procurement, negotiators are examining the possibility of exchanging offers (European Commission, 2013b).

In the context of regulation, negotiators consider how to increase regulatory compatibility and coherence, looking particularly at five key industries: pharmaceuticals, cosmetics, medical devices, automotive, and chemicals. They have already made written proposals on technical barriers to trade (TBT) and are preparing the ground for proposals on sanitary and phytosanitary (SPS) measures (European Commission, 2013b).

Negotiations on rules entail discussions in three areas: sustainable development, labour and the environment; trade in energy and raw materials; customs and trade facilitation. While negotiations of provisions on labour rights and environmental protection will most likely be based on the standard environmental and sustainable development chapters of US and EU PTAs, negotiations on energy and raw materials may result in a legal framework for trade in energy and raw materials that has never existed before (European Commission, 2013a). The inclusion of provisions on energy and raw materials in the TTIP is particularly being pushed by the EU, which strives not only to adopt rules for energy trade that can become global but also seeks to launch supplies of natural gas and oil from the US to increase its energy security (Carter and Sheppard, 2014).

3. The climate change relevance of the TTIP

Synergies between trade and climate change policies exist or can be achieved within each of the TTIP's negotiating blocks. The impact of TTIP on climate change would primarily be indirect, as in most cases PTAs impact the environment indirectly (Ghosh and Yamarik, 2006). This means that the TTIP may decrease the negative effects on the environment not because of the environmental provisions it would contain, but because of the increase in income that would result from the liberalization of bilateral trade and would become available for investments in low-carbon technologies and support of climate change and other environmental programmes.

At the same time, the TTIP may cause adverse effects on the climate. The economic growth driven by trade liberalisation could result in increased consumption of non-renewable resources and in environmental degradation (Meltzer, 2014), all the more so as the EU and US are discussing the liberalisation of the US energy export regime in

order to launch US exports of natural gas and oil to the EU. An agreement between the EU and the US potentially leads to an increase in the US's production of oil and gas through fracking, which is associated with environmental risks. It may also discourage investments in renewable energy in the EU (Carter and Sheppard, 2014).³

Moreover, regulatory convergence pursued under the TTIP may lead to a race to the bottom in the area of emissions standards and climate laws. EU green parties and environmental non-governmental organizations (NGOs) have expressed concerns that the TTIP might become a pathway for the transmission of weaker climate policies and carbon standards from the US to the EU (Gerstetter and Meyer-Ohlendorf, 2013).⁴ These concerns arise because the US so far has failed to enact climate change legislation at the federal level and did not ratify the Kyoto Protocol with mandatory emissions reduction targets. Yet, in response to these concerns, EU negotiators officially stated that there would be no compromise whatsoever on environmental protection, so much so as there would be no compromise on consumer protection, product safety, intellectual property rights (e.g. geographical indications) and cultural heritage (e.g. the audio-visual sector) (European Commission, 2013b). The US and the EU would both keep the right to protect their public policy interests at the level they consider necessary.⁵

Having said that, the TTIP also has the potential to directly contribute to achieving climate change policy objectives. It would be possible if it could contain provisions that specifically regulate the carbon content of bilateral trade, promote renewable energy and low carbon technologies and stimulate bilateral cooperation on climate change.⁶ Climate change-related provisions may be contained not only in a separate chapter on trade and sustainability, but also in other chapters of an agreement, including chapters on trade in goods, trade in services, regulatory convergence, government procurement, energy, investment and dispute settlement. One such measure is the dismantling of trade barriers on environmental goods and services (EGS). The elimination of tariffs, which is planned under the TTIP across the board, would be a small step toward the achievement of this goal. Dismantling of non-tariff barriers to EGS is a more important and undoubtedly a harder task.⁷

The bilateral trade negotiations also present an opportunity to develop a binding legal framework for reducing fossil fuel subsidies and protecting renewable energy

³ It should be noted that those are assumptions. A definite conclusion requires a proper study.

⁴ They warn that TTIP risks challenging existing EU emissions standards, including energy efficiency standards. They also warn that some of the EU's important environmental regulations can be challenged in courts under TTIP's investment protection clauses. This particularly relates to laws affecting fossil fuel exploration and regulations that shorten the lifetime or curtail the profitability of carbon-intensive assets or activities, such as coal-fired power plants. Consequently, there is vehement opposition in the EU to the inclusion of investor-state dispute settlement in the TTIP.

⁵ It is worth mentioning that even though the EU has stricter environmental and consumer protection standards in its internal market, the US is ahead of the EU in promoting sustainable trade through PTAs. The US subjects environmental provisions of its PTAs to enforceable dispute settlement under PTAs, just as it subjects to enforceable dispute settlement PTAs' commercial provisions, whereas the EU excludes the applicability of the general dispute settlement procedures set out under its PTAs for any matter arising under environmental chapters of PTAs. See OECD (2010), Workshop on implementation and assessing impacts, Report, para. 37, and OECD (2007), Environment and Regional Trade Agreements, pp. 124–125.

⁶ At present, it is hard to say whether and to what extent these topics are being taken up by TTIP negotiators because the negotiations are confidential.

⁷ Negotiations on dismantling trade barriers on EGS in the WTO and other PTA forums stumble over the definition and classification of EGS.

subsidies – a task that so far has not been achieved in other forums (Porterfield and Stumberg, 2014).⁸ Energy subsidies could be part of the negotiations of rules on trade in energy and raw materials.

Moreover, the TTIP could include provisions on EU–US cooperation in areas related to the United Nations Framework Convention on Climate Change (UNFCCC) agenda, the functioning of market-based mechanisms of emissions reduction (e.g. ETS) and development and deployment of green technologies, including carbon capture and storage, electro- and fossil cell vehicles, the fourth generation of nuclear reactors etc.

Finally, the TTIP could contribute to climate change policy goals by reaching agreements on the alignment of carbon regulations and standards. Harmonisation of the carbon laws and standards of the EU with those of the US, at the level of the party with stricter carbon restrictions in the sector, would contribute to the global reduction of emissions. It could reduce emissions from domestic production in the sector of the PTA party that had the lower carbon standards before the conclusion of the TTIP, and reduce transatlantic carbon leakage. It could furthermore stimulate the adoption of TTIP's higher carbon standards by third countries, paving the way for the setting of global carbon standards and a global price on emissions. The following sections consider the feasibility and WTO law implications of different options for regulatory convergence on carbon standards under the TTIP.

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

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

The outcomes of the regulatory convergence between the US and EU may vary in different sectors and for different products. In the area of carbon-related standards, regulatory convergence in its shallow form may lead to better coordination and greater transparency in the standardisation process between the EU and US and to mutual recognition of results of conformity assessment procedures (Meltzer, 2014).⁹ In its deeper form, regulatory convergence may result in the recognition of equivalence of EU and US standards or even full harmonisation of some standards.

It should be noted that regulatory convergence in product standards between two or more countries does not need to occur in PTAs, and in most cases takes place outside PTAs. Countries may agree to convert their different standards into the same ones to achieve full harmonization of their standards. However, while strongly supported by business and industries, the process of standard harmonization is very slow and is not easily attainable because of differences in institutions, conditions and interests of countries. Faced with high costs of compliance with different standards in different markets and the difficulties of achieving harmonization of standards, countries may enter into mutual recognition agreements (MRAs) reciprocally recognizing the equivalence of each other's standards and/or the results of conformity assessment

⁸ The G20's commitment of 2009, to phase out fossil fuel subsidies, has had little effect because of the lack of enforcement. The WTO has an enforcement mechanism but lacks rules on elimination of fossil fuel subsidies and promotion of green energy subsidies. As a result, the WTO dispute settlement mechanism has so far been used to challenge renewable energy programmes rather than fossil fuel subsidies.

⁹ For instance, TBT-plus commitments under PTAs may encourage cooperation among standard-setting bodies of PTA parties leading to the development of common approaches to issues such as energy efficiency and the methodology for determining the greenhouse gas (GHG) lifecycle of products.

procedures in certain sectors (Nicolaidis and Shaffer, 2005). Recognition of equivalence of standards means that the pertinent standards remain different in the two countries but, in their bilateral trade, these countries agree to treat each other's standards as if they were equivalent. One of the most prominent mutual recognition systems was developed within the single market of the EU after it became clear that the harmonization of standards among EC members was unrealistic. The EU's mutual recognition system is based on the *Cassis de Dijon* principle, according to which if a product meets the standards of any one EU member state, it can be sold throughout the Union (Devereaux et al., 2006).¹⁰

A necessary supplement to both the harmonization and the recognition of equivalence of standards is the recognition of conformity assessment procedures, i.e. procedures in which products are measured against the various safety, environmental and quality standards set by governments. It is the first step towards alignment of standards between countries and the main subject of MRAs. The recognition of conformity assessment procedures entails the recognition and acceptance by the importing country of the results of product testing performed by the conformity assessment bodies (CABs) of the exporting country. The basis of the recognition is the use of the importing country's tests and standards. Instead of inspecting the exporting country's manufacturers or products themselves, the CABs of the importing country accept the inspection reports issued by the exporting country's CABs, including authorized private ones, as being sufficient to demonstrate conformity with the standards of the importing country (Nicolaidis and Shaffer, 2005). Consequently, the mutual recognition of the results of conformity assessment procedures reduces costs by avoiding the need to duplicate testing of products in the other party's market (Devereaux et al., 2006).

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

In 1998, the EU and the US signed an MRA that covers six product areas: telecommunications equipment, electromagnetic compatibility, electrical safety, recreational craft, good manufacturing practices for pharmaceuticals, and medical devices.¹¹ It is a traditional MRA that does not provide for recognition of standards but merely designates the CABs from both parties and obliges the importing country to recognize the certification procedures followed by these bodies, and their outcomes, in the territory of the exporting country. Mutual recognition of standards proved to be unattainable in view of the existing regulatory differences between the US and the EU, particularly as concerns the institutional basis of certification and testing procedures. Concerns were raised, for instance, that an agreement on mutual recognition of standards would radically alter the role of regulators in the US, relying on a more rigorous and taxing approval system than in the EU (Devereaux et al., 2006). Consequently, the agreements on mere recognition of testing, certification and

¹⁰ The *Cassis de Dijon* principle stems from a 1979 decision by the Court of Justice of the European Communities in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (also known as the *Cassis de Dijon* case). In that case, the EC court found the restriction of the free circulation within the EC of products (liqueur), which meet different standards of EC countries (percentage alcohol content for liqueurs), unlawful.

¹¹ Council Decision 1999/78/EC of 22 June 1998 on the conclusion of an Agreement on Mutual Recognition between the European Community and the United States of America (OJ L 31, 4.02.1999, p.1), as amended by Council Decision 2002/803/EC of 8 October 2002 (OJ L 278, 16.10.2002, p.22). Entered into force in December 1998.

For a complete list of the designated CABs under the MRA with the United States, see the Commission's Websites: http://ec.europa.eu/enterprise/policies/single-market-goods/international-aspects/mutual-recognition-agreement/usa/index_en.htm.

inspection procedures in the specified sectors took four years to negotiate, and many terms appeared to be non-operational at the implementation stage. Problems in implementing the agreements arose in the sectors of medical devices, pharmaceuticals and electrical safety. These problems were mainly caused by the reluctance of the US regulatory agencies (Food and Drug Administration, Occupational Safety and Health Administration etc.) to acknowledge EU inspection and testing procedures as equivalent to those of its own procedures (Devereaux et al., 2006). Consequently, in 2003, when it became clear that the European producers of electrical appliances essentially gained nothing from the MRA, the EU withdrew from participation in the MRA on electrical safety.

Despite the challenges facing the implementation of the 1998 EU–US MRAs, the TTIP negotiations on regulatory convergence can build on these agreements and strive for the extension of sectoral scope. The mutual recognition of the results of conformity assessment procedures could also be supplemented with the recognition of equivalence of standards for certain products, and in some cases could possibly lead to harmonization of EU–US standards. As the recognition of standards and their harmonization is proving to be a long process, the TTIP negotiations may end up with a framework agreement, which would set conditions and a timeline for mutual recognition and harmonization of standards to be implemented within, say, five to seven years after the conclusion of TTIP. As experience with the 1998 EU–US MRA shows, achieving sectoral MRAs is not possible without direct involvement of industry representatives who are familiar with actual business practices and who know what concessions their industry could offer to its foreign counterpart (Devereaux et al., 2006).¹²

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

5.3 A case study of car emissions standards

Concern about the increasing emissions in the automobile sector led the EU to introduce a comprehensive legal framework to reduce carbon dioxide (CO₂) emissions from new light-duty vehicles (ten Brink, 2010).¹³ The adoption of the legislation on car emissions standards was part of the EU's efforts to ensure the achievement of emissions reduction targets under the Kyoto Protocol and beyond. The legislation sets binding emission targets for new car and van fleets. For cars, the producer's new fleet must not emit more than an average of 130 g CO₂ per kilometre (km) by 2015 and 95 g CO₂/km by 2020 (European Commission, 2014b). Translated into fuel consumption norms, the 2015 standard is equivalent to 5.6 litres (l) per 100 km of gasoline or 4.9 l/100 km of diesel. The 2020 norm corresponds to 4.1 l/100 km of gasoline or 3.6 l/100 km of diesel. For vans, the producer's new fleet is permitted to emit on average 175 g CO₂/km by 2017 and 147 g CO₂/km by 2020 (European Commission, 2014b). Translated into fuel consumption norms, the 2017 target corresponds to 7.5 l/100 km of gasoline or 6.6 l/100 km of diesel. The 2020 target is equal to 6.3 l/100 km of gasoline or 5.5 l/100 km of diesel.

¹² A major breakthrough in the EU–US MRA negotiations in the pharmaceutical sector was reported to be due to the participation of the CEOs of EU pharmaceutical companies, who knew better than representatives of the European Commission what conditions the EU pharmaceutical industry could concede to, including public disclosure of plant inspection reports.

¹³ CO₂ emissions from passenger cars constitute over 12% of EU's emissions of CO₂. In 2006, they were 29% higher than in 1990.

Emissions standards for cars in the US are based on the Corporate Average Fuel Economy (CAFE) standards. CAFE standards were enacted in 1975 and initially intended to increase the fuel economy of US cars in the wake of the Arab Oil Embargo (C2ES, 2014). Nowadays, they also pursue the objectives of emissions reduction (EPA, 2012). CAFE standards are set in miles per gallon (mpg) and depend on the vehicle's "footprint", which is the size of a vehicle determined by multiplying the vehicle's wheelbase by its average track width. The CAFE footprint requirements are progressive: a vehicle with a larger footprint has a lower fuel economy norm than a vehicle with a smaller footprint.

Non-compliance with a CAFE standard entails a fine for every 0.1 mpg below the standard multiplied by the total production volumes of the car producer. Additionally, the Gas Guzzler Tax is levied on individual passenger car models (but not trucks, vans, minivans, or sport utility vehicles) that do not meet CAFE standards. CAFE standards have been tightening over the years and will reach 54.5 mpg (4.32 l/100 km) in 2025 (C2ES, 2014). Stricter CAFE standards are beneficial both for the environment and for the economy. While stricter CAFE standards are opposed by car manufactures, car buyers will save an average of US\$8000 per car in reduced costs of fuel in 2025 (EPA, 2012). Moreover, stricter CAFE standards are beneficial for producers of car components as new technologies and additional components are needed to make cars more fuel efficient.

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

Table 1

Comparison of EU and US emissions standards for passenger cars (based on the data of C2ES, 2014 and European Commission, 2014b)

	EU	US
2015	130 g CO ₂ /km or 5.6 l/100 km	36.4 mpg or 6.5 l/100 km
2021	95 g CO ₂ /km or 4.1 l/100 km	46.1 mpg or 5.1 l/100 km

The TTIP negotiations offer an opportunity for further alignment of these standards. While harmonisation of car emissions standards would be desirable for facilitating transatlantic trade in automobiles and should indeed be the ultimate goal of negotiations on regulatory convergence in this sector, it will be a long process given the differences in regulatory approaches between the US and the EU and the need for complex legislative changes on both sides of the Atlantic.¹⁴ What the TTIP negotiations should thus strive for is the mutual recognition of equivalence of EU and US car emissions standards with the fixed goal of full convergence of standards at a specified date in the future.

¹⁴ This is also the view of carmakers: "The level of minutiae that would have to be agreed upon is apparently too daunting for either party to consider, and a likely stumbling block to reform. Instead, Ford suggested "mutual recognition", which would ostensibly be some kind of reciprocity agreement whereby the US and EU would accept vehicle's built to either standard." See <http://www.thetruthaboutcars.com/2013/03/ford-calls-for-harmonized-us-eu-standards/>.

5. The WTO rules applicable to regulatory convergence under the TTIP

The scope of negotiations on the alignment and mutual recognition of standards is defined by the disciplines of WTO law, including WTO rules on technical barriers to trade (TBT). Additionally, if taken under the TTIP, the measures would be subject to the WTO rules on the formation of PTAs for trade in goods set out in Article XXIV of the General Agreement on Tariffs and Trade (GATT).¹⁵ These two sets of rules would apply cumulatively.¹⁶

5.1. WTO rules generally applicable to regulatory convergence on product standards

The WTO Agreement does not oblige WTO members to harmonize product standards. However, it promotes harmonization of technical regulations¹⁷ through the provision that encourages the use of international standards. Article 2.5 of the TBT Agreement states that if based on a relevant international standard, a technical regulation is rebuttably presumed to be in compliance with the necessity test for trade restrictiveness under TBT Article 2.2. In addition, the TBT Agreement contains provisions on unilateral recognition of equivalence of standards of WTO Members and unilateral recognition of results of conformity assessment procedures. For instance, TBT Article 2.7 requires that “Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations”. Yet, the actual normative value of these provisions is not clear. In particular, it is not clear if the words ‘WTO members shall give positive consideration to’ in TBT Article 2.7 are to be interpreted as a requirement or an encouragement. Even if this wording could be interpreted as being close to a requirement (European Commission, 2002), this requirement is weakened by the second part of the sentence (‘provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations’), which allows WTO members to make their own decision as to whether they are satisfied with the level of other countries’ standards or not).¹⁸ Thus, the recognition of equivalence can be rejected at discretion of the importing country.

A similar situation exists with respect to the *unilateral* recognition of results of conformity assessment procedures. Pursuant to TBT Article 6.1, “Members shall ensure, whenever possible, that results of conformity assessment in other Members are

¹⁵ GATT Art. XXIV authorises reciprocal liberalisation of trade in goods on a non-MFN basis in the form of customs union or free trade agreements – both called PTAs – between WTO members. It sets however strict conditions for such liberalisation. It should be noted that the conclusion of PTAs for trade in services is regulated by the provisions of Art. V of the WTO’s General Agreement on Trade in Services (GATS). Therefore, regulatory measures such as a mutual recognition of workers’ qualifications under TTIP would be subject to the rules of GATS Art. V.

¹⁶ Obligations of WTO members under different agreements are cumulative and interpreted by WTO panels in accordance with the principle of effective interpretation so that the interpretation of one provision is not nullified by the interpretation of another provision. See *US – Gasoline*, Appellate Body (AB) report, p. 23.

¹⁷ ‘Technical regulations’ is a term used in the WTO’s TBT Agreement to designate mandatory standards.

¹⁸ While admitting the soft language of the provision of Art. 2.7 equating to a hortatory obligation, Gabrielle Marceau and Joel Trachtman (2006), with a reference to the *Shrimp – Turtle* jurisprudence point out that “since Article XX requires that Members maintain an appropriate level of flexibility in the administration of their regulatory distinctions (footnote omitted), it is probable that Article 2.7 ... will be interpreted as requiring sufficient flexibility in normative determinations and good faith consideration of the alternative and equivalent standards suggested by the exporting country” (Marceau and Trachtman, 2006, p. 42).

accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures". The words 'whenever possible' and 'provided they are satisfied' provide a means of escape from the guidance of the provision.

There is also a provision in the TBT Agreement that clearly encourages *mutual* recognition of results of conformity assessment procedures. Pursuant to TBT Article 6.3, "Members are encouraged, at the request of other members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures". This provision provides the legal basis for MRAs (Nicolaidis, 1997).

At the same time, the encouragement of MRAs poses a legal question of consistency with the WTO's fundamental principle of most-favoured nation (MFN) treatment, as stipulated both under the GATT and the TBT Agreement. To be in compliance with the MFN principle, any advantage or favourable treatment given to any product from one country shall be extended to the like products originating in all other WTO members with respect to the application of any laws, regulations, requirements, rules, formalities (GATT Article I:1) or, specifically, technical regulations (TBT Article 2.1). MRAs provide an advantage of improved market access only to MRA parties and thus impact the competitive positions of non-participating countries (Davey and Pauwelyn, 2000). At the same time, MRAs are "part of the positive integration exercise, along with harmonization", which should be welcome (Marceau and Trachtman, 2014, p. 394). It seems therefore logical that "two WTO agreements (TBT and SPS) encourage Members to negotiate MRAs but at the same time require that they do so in a transparent and open way" (Davey and Pauwelyn, 2000, p. 24). As a practical matter, the non-observance of the MFN principle by MRAs can probably be legitimised by the fact that "bilateral or plurilateral mutual recognition deals cannot be "multilateralised" automatically as provided by the MFN rule, simply because concessions based on assessing current and future equivalence of regulatory systems are not fungible. Hence, under an MRA, the MFN treatment is indeed conditional, not on some symmetrical lowering of trade barriers, but on actual compatibility of rules or equivalence of procedures" (Nicolaidis, 1997, p. 68). This, however, has never been tested in a WTO dispute and remains an open question.

As regards the rules on conformity assessment, the TBT Agreement imposes strict non-discrimination requirements of MFN and national treatment, very similar to the rules on application of technical regulations and standards (Holzer, 2014). The provision of TBT Article 5.1.1 require that conformity assessment procedures be "prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation...". In other words, a country has to offer all suppliers of like products equally good conditions for conformity assessment to those it offers its domestic suppliers or any of its foreign suppliers. One way to achieve compliance with the national treatment requirement is to conclude conformity assessment MRAs with countries of foreign suppliers. Yet, as already noted, MRAs create the MFN riddle.

5.2. WTO disciplines guiding regulatory convergence in PTAs

The conclusion of MRAs as part of PTAs raises an additional legal question, namely whether GATT Article XXIV on the formation of PTAs for trade in goods could excuse recognition of standards and conformity assessment procedures in PTAs from a

violation under the GATT and the TBT Agreement, particularly with respect to the MFN obligation discussed above. In other words, the question is whether ‘closed’ recognition agreements, i.e. only between PTA parties and closed to third countries, are allowed.

The answer to this question depends on whether pursuing regulatory convergence is part of WTO requirements for the formation of a PTA. Paragraph 5 of Article XXIV sets the so-called external requirement to trade liberalisation within a PTA and prohibits PTA parties from increasing trade barriers for products from third countries. Accordingly, if the absence of regulatory convergence in a PTA led to an increase in trade barriers for third countries after the formation of a PTA, regulatory convergence would be mandatory for a PTA. Yet, this does not seem to be the case. Although there is some evidence that regulatory convergence under a PTA may produce economies of scale for third countries and its impact for them may be positive (Cottier et al., 2014), it cannot be argued that preserving the *status quo* in standards (i.e. making no alignment of standards between PTA parties) would result in higher trade barriers for third countries *after* the formation of a PTA because the very same barriers existed *before* the PTA was concluded.

Furthermore, pursuant to the so-called internal requirement to trade liberalisation within a PTA set by paragraph 8 of GATT Article XXIV, customs duties and other restrictive regulations of commerce must be eliminated with respect to substantially all the trade within a customs union or an FTA. The exact meaning of “other restrictive regulations of commerce” is not known and is the subject of discussion among WTO members (Mavroidis, 2006). If the difference in standards between countries could be considered to be ‘other restrictive regulations of commerce’ within the meaning of Article XXIV:8, their alignment would be required for trade inside the PTA. However, taking into account that countries have the right to set standards,¹⁹ standards of one country that are different from standards of other countries can hardly be viewed as “restrictive” regulations of commerce, the elimination of which – through convergence or alignment – is required by GATT Article XXIV.

That being said, the conclusion of MRAs is not part of the requirements for the formation of PTAs. Thus, MRAs, which are concluded within PTAs, in principle, raise the issue of compliance with the MFN obligation under the GATT to the same extent as MRAs, which are concluded outside PTAs (Trachtman, 2003; Nicolaidis and Shaffer, 2005). As follows from the *Turkey-Textiles* jurisprudence, a measure taken on the formation of a PTA could be excused from a violation under the GATT in case if not applying the measure would prevent the formation of a PTA.²⁰ In other words, the MFN issue would be settled, if it could be established that the US and the EU would not have ratified the TTIP without agreeing on MRAs and regulatory convergence. Can MRAs be viewed as such a *conditio sine qua non* for the TTIP? It is difficult to say but it cannot be excluded considering the importance the parties give to achieving regulatory convergence under the TTIP.

¹⁹ The Preamble to the TBT Agreement says that WTO members recognise that “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement”. Furthermore, the AB found that ‘it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation’. See *EC – Asbestos*, AB report, para 168.

²⁰ *Turkey-Textiles*, AB report, para. 58.

In any case, the PTA status of TTIP would not exempt EU-US measures taken for regulatory convergence from the obligations under the TBT Agreement. The WTO's Appellate Body made it clear that GATT Article XXIV can apply to obligations under other WTO Agreements only if there is direct reference in those agreements to GATT provisions.²¹ It is unlikely that a purpose of the TBT Agreement to further the objectives of the GATT, fixed in the preamble of the TBT Agreement, could be viewed as a sufficient link with provisions of GATT Article XXIV.

Like the GATT, the TBT Agreement also contains the MFN obligation. TBT Article 2.1 prohibits 'less favourable treatment' of like imported products when applying technical regulations. So far, the WTO adjudicative bodies have not dealt with the normative content of this obligation directly. However, it can be presumed that the interpretation of the MFN obligation under the TBT Agreement would be the same as the one of the national treatment, which has been recently dealt with in a number of TBT disputes. It is because these two obligations (MFN and national treatment) are both contained in TBT Article 2.1 and refer to the same requirement of providing treatment that is not 'less favourable'.

If so, the MFN obligation under the TBT Agreement is not the same as the MFN under the GATT and does not prohibit detrimental effect on imports stemming exclusively from a legitimate regulatory objective.²² In other words, the recognition of standards between the US and the EU, which would increase market access for EU and US products while not providing the same advantage for products from other WTO members, might be justified on the grounds of legitimate regulatory objective. TBT Article 2.2 contains the list of legitimate policy objectives under which a technical regulation can be taken. As the list is not closed but exemplary (Marceau and Trachtman, 2014), it is possible that a WTO adjudicative body in a dispute over an MRA will find a regulatory objective under which the MRA was concluded to be legitimate for the purposes of non-discrimination test under TBT Article 2.1. Such an interpretation would reconcile the provision encouraging MRAs with the MFN obligation under the TBT Agreement and would be in line with the principle of commutative application of WTO provisions and effective interpretation of treaties, followed by WTO adjudicative bodies.²³

As regards other TBT rules, it has to be noted that in light of the provision of TBT Article 2.7 on unilateral recognition of equivalence of technical regulations and also TBT Article 6.1 on unilateral recognition of results of conformity assessment procedures, the US and the EU would have to give positive consideration to third countries' standards. If approached by third countries, the EU and the US would not be able to simply ignore requests about the recognition of equivalence of third countries' standards, were these standards to provide for the same level of environmental or

²¹. In *Turkey – Textiles*, the AB noted

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

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

²² *US-Clove Cigarettes*, AB report, paras 180-182.

²³ See e.g. *US – Gasoline*, Appellate Body (AB) report, p. 23. The principle of effective interpretation is set out in Article 31 in the Vienna Convention on the Law of Treaties as one of the corollaries of the general rule of interpretation of treaties.

climate protection as those of the EU and the US. As the experience with negotiating the EU–US MRAs in the wake of the creation of the EC mutual recognition system shows, the initiation of talks with the purpose of reaching MRAs, even if only on the subject of conformity assessment procedures, could hold back the complaints against the EU and the US in the WTO by third countries (Devereaux, 2006). Capacity building and technical assistance for upgrading standards to the TTIP level, provided by the EU and US particularly to developing countries, might also help mitigate the risk of third countries bringing a complaint under the WTO dispute settlement procedure. Capacity building and technical assistance could also be an important precondition for the progressive opening of TTIP MRAs to third countries. Finally, as evidence of ‘openness’, EU-US MRAs may also foresee the status of ‘associate parties’ for third countries and create a roadmap for their future inclusion (Nicolaidis and Shaffer, 2005). In that case, third countries would be given access to MRA meetings, evaluation and accreditation missions and other MRA bodies and forums.

6. Conclusions

The TTIP provides an opportunity to address climate change concerns by pursuing regulatory convergence. Harmonisation of carbon laws and standards of the EU and the US at the level of the party that has the stricter carbon restrictions in a sector could contribute to global emissions reductions. It would reduce emissions from domestic production in the sector of the PTA party that had the lower carbon standards before the conclusion of the TTIP, and prevent transatlantic carbon leakage. It would also decrease the carbon footprint exports to the EU and US from third countries and may stimulate the adoption of TTIP’s higher carbon standards by third countries, thus paving the way for the creation global carbon standards and setting a global carbon price.

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

When working on the alignment of car emissions standards, TTIP negotiators could draw on the experience of the 1998 US–EU MRA and should take into account the EU and US obligations under the WTO Agreement. The examination of WTO rules undertaken in this paper shows that the WTO law issues of alignment and recognition of standards under the TTIP are no different from what they would be if this process were carried out independently of the TTIP. The PTA status does not exempt measures aimed at regulatory convergence under the TTIP from compliance with the rules of the GATT and the TBT Agreement. At the same time, these rules do not seem to create great obstacles for regulatory convergence between the EU and US if this process will be transparent and open. In light of the provision of TBT Article 2.7 on the recognition of equivalence of standards on a unilateral basis, and the provision of TBT Article 6.1 on unilateral recognition of results of conformity assessment procedures, if approached by third countries the EU and the US would not be allowed to simply

ignore requests about the recognition of equivalence of third countries' standards. They would be obliged to give positive consideration to third countries' standards. As the experience with negotiating the EU–US MRAs shows, the initiation of talks with the purpose of reaching MRAs, even if only on the subject of conformity assessment procedures, could hold back the complaints against the EU and the US in the WTO by third countries.

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