TTIP Leaks: A Welcome Opportunity for More Homework

*Christian Häberli**

So the damage is done: both emperors go naked, and this at a particularly sensitive stage of the negotiations. Worse, the hegemons sit on an applecart already so full that only a "TTIP light" seems to save it from toppling, albeit at a price of losing its most precious apple: regulatory coherence, now and forever![1]

But wait! We may already have given up hope for transatlantic agreements on financial cooperation and data protection. Hormone beef and biotech seeds, if not feed, also look rather far away from good and risk-free regulatory solutions. And car makers in Asia and South America may have chuckled with relief when the efforts of US and EU manufacturers of automobiles failed to define a fully harmonised, standardised and mutually recognised "TTIP Car" – after which they would have had little if any leeway for their own motors, emission limits, windscreens and safety standards.

This is where the leaks may have opened a welcome window of opportunity for third countries, blinded as they apparently all are by the prospects of trade liberalisation racing ahead with megaregional steps too big for them to buy in with any hope for negotiating power. Let's first have a look at the old horse called WTO where – apart from the Trade Facilitation Agreement 2014 and a few plurilateral deals – two decades of negotiations produced nothing serious since its birth in the Marrakesh desert, in March 1995.

OK, there is little the WTO can do about preferential rules of origin by which regional trade agreement partners of all sizes shield off their reciprocal tariff concessions from what they consider (often wrongly) as free-riders. This also means that without further MFN tariff reductions the world risks becoming rather uneven with a TPPA and, perhaps later, with a TTIP. Especially for outsiders like poor developing countries having successfully fought for ceiling bindings of two hundred percent across-the-board when joining the WTO. Who will now talk to them? Mind you, without a TTIP, and if TPPA enters into force, even Europe will become an island with many tariff peaks, not only for foodstuffs, garments, computer parts and some raw materials – not to mention the ridiculously outdated GATS schedules countersigned in 1995 by the other WTO founding members, and not really updated ever since. The leaked EU "flexibilities" for GIs and services can hardly come as a surprise to anyone.[2]

So much for the tariffs and some other peanuts. Yet, at least for third countries there is something worse than tariff freedom for the hegemons: *regulatory close-off* threatens to restrain their effective market access, if their accession offers are spurned by Washington or Brussels. Indeed, even if they accept the whole future TTIP package and offer *at least* commensurate concessions in all fields of interest to the TTIP partners, the remaining non-tariff barriers (NTB) will become a moving target, for which further liberalisation is envisaged in *new* negotiating rounds between the US and the EU. Non-TTIP members won't sit at those future tables, but stand by and then buy the new regulations without access even to a toned-down litigation procedure, let alone investor-state dispute settlement for their operators without EU or US subsidiaries.

Now what? Does the holy Article XXIV of the GATT (and Article V GATS) really shield all mutual standard recognitions and agreements from all MFN and NT obligations? Will equivalence recognition demands for technical regulations based on Article 2.7 TBT fail as quickly as similar demands based on Article 4 SPS without a proof of an equivalent "ALOP"?

---

* PhD (Law), Senior Research Fellow, World Trade Institute, Bern University (Switzerland). Research for this paper was funded by the Swiss National Science Foundation under a grant to the National Centre of Competence in Research on Trade Regulation, based at the University of Bern's World Trade Institute. Web: http://www.wti.org http://www.nccr-trade.org/people/haeberli/. Mail: christian.haeberli@wti.org.

1 As for *investor-state dispute settlement* (ISDS), the other big apple on that cart, it may already have fallen off. As matters stand, especially when looking at the difficulties WTO now has to reappoint Appellate Body members and to fill vacancies, this is perhaps not a big drama... but that is another story unrelated to this paper.

2 "TTIP Round Produces Signs Of New Flexibilities On GIs, Services Exceptions", 34/17 *Inside U.S. Trade* (29 April 2016), at p. 2.

Will third countries really be unable, after the conclusion of the TTIP, to invoke their WTO rights to non-discrimination – as they have rarely but successfully done in a few cases of mutual recognition agreements and autonomous standards *outside* RTA?[3]

Here is my advice for TTIP addicts: instead of playing haruspex with TTIP leaks – or paying lobbyists in Brussels and Washington to find out what's in the cards – start identifying your goods and services for exports to the EU and the USA mostly affected when elephants mate. And look not at tariffs (if you want to join the biggies you will have to abolish yours anyhow, except for a few agricultural quotas). Rather look at those non-tariff barriers which according to the TTIP leaks are up for complex deals.

Regulatory cooperation is indeed the name of the game, and academia has enthusiastically embraced it. Too quickly? We applaud the efforts and first "WTO Plus" results obtained at the regional level: megaregionals (TPPA), especially among "like-minded" partners (TTIP), will make the most inroads in lifting the NTB which remain despite their prohibition by default under various WTO agreements. In their report commissioned by the European Commission, Parker and Alemanno carefully describe the legislative and regulatory differences to be addressed in the negotiations.[4] In another study requested by the European Parliament, Alemanno highlights the parliamentary dimension of such regulatory cooperation.[5] Rudloff sees "enormous" prospects for economic growth, particularly for non-tariff barriers for food trade.[6] Yet, for regulatory cooperation Lester and Barbee wisely suggested, back in 2013, to look for the "low-hanging fruits".[7] Josling and Tangermann agree, recalling the long history of transatlantic conflicts just for food, that the effort is certainly worthwhile.[8]

Most observers thus welcome regulatory cooperation (and enhanced intellectual property protection) under TTIP, pointing out to the competitive advantage for EU and US products resulting from the joint risk assessment and risk management this implies. The transatlantic differences in risk attitudes and regulatory cultures remain huge – somewhat surprisingly for two otherwise very 'like-minded' 'trading partners'. Nonetheless, in their report from two major conferences on new approaches to international regulatory cooperation, Bull et al reiterate the promises of newly agreed standards and technical regulations, as well as of *procedural* regulatory cooperation, for 'more competitive markets, lower prices, broader diffusion of innovations, and enhanced consumer welfare, as well as other benefits from liberalization of countries' domestic economies and regulatory governance structures.'[9] Wiener and Alemanno consider the TTIP as a learning process whereby interest groups may find alliances, and solutions for joint risk management, across borders. They point to empirical studies contradicting the stereotype notion that Europeans favour "precaution" whereas Americans readily embrace "science-based" standards, concluding that overall, U.S. and European risk regulation over the past four decades has exhibited average parity. Hence, regulatory cooperation, involving stakeholders with common interests and political leverage on both sides of the Atlantic, represents a new form of collective action for shared risk management.[10]

The already signed TPPA provides a good template – its NTB extent and content has surprised us all. And then there is the CETA, with a new attempt for dispute settlement allowing for ratification which might also inspire TTIP negotiators. It also has several risk management features of interest to observers, and a new formula for the protection of geographical indications: "Schwarzwälder Schinken" remains protect-

3 Consider, for example (i) *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Appellate Body, WTO Doc. WT/DS381/AB/R, 16 May 2012, at p. 133 *et sqq*. (ii) *European Communities – Trade Description of Sardines,* Report of the Appellate Body, WTO Doc. WT/DS231/AB/R, 23 October 2002, at p. 61 *et sqq*.

4 Richard Parker and Alberto Alemanno, *Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems* (Brussels: European Commission, 2014), cf. Annex: Process for developing laws and regulations in the EU and the US.

5 Alberto Alemanno, *The Transatlantic Trade and Investment Partnership and the parliamentary dimension of regulatory cooperation*. Brussels, Doc. EXPO/B/AFET/2013/32, April 2014, at p. 46 *et seqq*.

6 Bettina Rudloff, "Food Standards in Trade Agreements: Differing Regulatory Traditions in the EU and the US and Tips for the TTIP", *German Institute for International and Security Affairs, SWP Comments 49* (November 2014), at p. 4 *et seqq*.

7 Simon Lester and Inu Barbee, *The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*. 16 *Journal of International Economic Law* (2013), pp. 847–867, at p. 849.

8 Timothy E. Josling and Stefan Tangermann, "*Transatlantic Food and Agricultural Policy: 50 Years of Conflict and Convergence*. Edward Elgar Publishing (2015), at Chapter 6

9 Reeve T. Bull et al., "New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements", 78 *Law and Contemporary Problems* (2015), pp. 1-29 at p. 3.

10 Jonathan B. Wiener & Alberto Alemanno, "The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory". 78 *Law and Contemporary Problems* (2015), pp. 103-136, at pp. 104 and 114.

ed for dried ham producers in Germany's Black Forest – but "Black Forest Ham" will be available for both European and Canadian produce. Does the prosciutto war story in Europe ring a bell?

What is now required first and foremost is political leadership – not only in Germany.[11] But this leadership needs guidance. The homework menu proposed here requires close cooperation with standard-setting bodies and operators across the whole range of a country's exports to either the US or the EU. Of course, a special risk assessment will be necessary not only as in Articles 5 and 6 SPS and for all sorts of contentious foods such as chlorine-treated chicken. The same goes for the EU prohibition of the veterinary drug ractopamine: the maximum residue limit (MRL) for traces of ractopamine in muscle cuts of meat, razor-thin adopted in a most unusual Codex alimentarius vote as a new standard, henceforth dividing the membership, and with an uncertain outcome in a WTO/SPS case.[12]

We are on new risk assessment grounds here. And risk management is not made easier by the fast-evolving production standards and technical regulations churned out weekly by the National Standardization Bodies of 33 European countries federated in CEN and CENELEC, *ex ante* recognised and mandated as official standard-setters by the European Commission. Of course, there are pros (efficiency) and cons (competition) in joint standard-setting and privileged information-sharing between CEN/CENELEC and the American National Standards Institute (ANSI). But their support to regulatory harmonisation is definitely a plus to a future TTIP.[13] Which means risk assessments and conformity presumptions will have to play both for food and non-food, child safety requirements, and even for services such as maintenance works in mode 4: anything goes in a "transatlantic internal market" – and non-members beware!

And, again, do keep an eye on your WTO rights. Trade "concerns" can be addressed to the SPS and TBT and other WTO bodies, but the lead time is long and nowhere near the foreseeable TTIP hotlines between like-minded and transatlantic regulators. Networking, nudging, and then acceding to new standards will be the available avenues. For third countries, most important of all the WTO rights will be a new assessment of the provisions in Article XXIV:5(b) GATT specifying that "other regulations of commerce [...] shall not be higher or more restrictive than the corresponding duties and other regulations of commerce [...] prior to the formation of the free-trade area". Admittedly, the scarcity of case law and the historic context especially in this 1947 formulation do not allow a safe prediction of the outcome of a challenge under SPS, TBT and the GATT or the GATS Agreements. Perhaps significantly, neither of the three "regulatory" WTO agreements has a RTA exception like in Article XXIV GATT and Article V GATS: Howse suggests that since neither the SPS nor the TBT Agreement allow exceptions for RTA, preferential regulatory cooperation in RTA 'must be opened up to all WTO members where the conditions are appropriate for their participation' in order to be consistent with WTO norms.[14] A more differentiated approach is found in Article 4 TRIPS which prescribes MFN treatment for any concession made by a Member to foreign nationals – except for four specific cases enumerated in lit.(a) to (d) of that article. There is no case law for MFN violations in respect of technical regulations based on legitimate (here, regional) regulatory distinctions. At any rate, it is always useful to remind big powers that they too are bound by their WTO obligations, and that their present, exclusive mutual recognition agreements (MRA) e.g. for wines and spirits, and for organic agriculture, may not pass all WTO compatibility and necessity tests forever. In my view, this might even happen when they come in the shape of treaty annexes, in order to better fulfil the 'basically all the trade' requirement in Article XXIV for MFN exceptions.

All of this means a lot of work, perhaps facilitated as the TTIP negotiations now enter a cold phase for some months. The impasse must be used for more and better structured consultations.[15] Negotiators do not give up because demonstrators try to change or to annul their ministerial and parliamentary terms of reference. A recent online survey by YouGov, com-

11 Peter Sparding, "Germany's Pivotal Role on the Way to TTIP", *Europe Policy Paper*, November 2014, at p. 10.

12 "EU Stance On Food Safety in TTIP Makes Resolving Irritants Tough Road" 32/16 *Inside U.S. Trade* (18 April 2016), at p. 2

13 "CEN-CENELEC, ANSI Negotiate Deal That Could Aid TTIP Regulatory Effort" *Inside U.S. Trade* (Daily News, 8 October 2013), at p. 1

14 Robert Howse, "*Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?*" 78 *Law and Contemporary Problems* (2015), pp. 137-151, at p. 151.

15 European Commission, "*Report on the Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement*". Commission Staff Working Document SWD(2015) 3 final, Brussels, 13 January 2015

missioned by the Bertelsmann Stiftung, does show important differences in attitudes towards trade liberalisation and risk between Germany and the United States.[16] But nobody should be over-impressed by the countless impact assessments on trade, growth, income and employment – often contradictory even when coming from pro-traders.[17] In a recent study commissioned by the American Chamber of Commerce to the European Union (AmCham EU), Francois, Hoekman and Nelson show, in macro-economic terms, GDP increases under a TTIP for all but one EU Member State; it should also lead to export increases, wage increases, consumer price decreases for the majority of EU Member States, and to a small decline in income inequality.[18] In respect of TTIP climate risks, environmental and development lawyers Porterfield and Gallagher are sceptical[19] while the trade lawyers Holzer and Cottier point out that a lot of home work is still required for a trade rules review.[20]

The famous last night, with the long knives out, all chips on the table and Champaign with a GI in the fridge, may have to be postponed. But especially the present bystanders, and third countries intending to benefit from a TTIP "right" (rather than "light")[21], can and should act now. "Science-based" is the word dividing the Atlantic, but "fact-based" is more than ever a must, for both sides of the divide.

16 Christian Bluth, "*Attitudes to global trade and TTIP in Germany and the United States*". GED-Team, Bertelsmann Stiftung (2016), Gütersloh

17 Matthias Bauer and Fredrik Erixon, "*Splendid Isolation as Trade Policy: Mercantilism and Crude Keynesianism in "the Capaldo Study" of TTIP*" (2015). *ECIPE Occasional Paper* 03/2015, at p. 17.

18 World Trade Institute, "TTIP and the EU Member States" (2016). World Trade Institute, University of Bern, Bern, January 2016

19 Matthew C. Porterfield and Kevin P. Gallagher, "*TTIP and Climate Change: Low economic benefits, real climate risks*" (2016). International Institute for Sustainable Development, posted 1 December 2015, at p. 1-2.

20 Kateryna Holzer and Thomas Cottier, "*Addressing climate change under preferential trade agreements: Towards alignment of carbon standards under the Transatlantic Trade and Investment Partnership*". 35 *Global Environmental Change* (2015) 514–522, at p. 515.

21 Laura von Daniels, "*»TTIP right« geht vor »TTIP light«*". *German Institute for International and Security Affairs*. SWP-Aktuell 33, April 2016, at p. 5.