Foreign & Commonwealth Office

Wilton Park

Conference report

Transatlantic Trade and Investment Partnership (TTIP)

Monday 17 – Tuesday 18 February 2014 | WP1307

In association with:

BIS Department for Business Innovation & Skills

Wilton Park

Conference report

Transatlantic Trade and Investment Partnership (TTIP)

Monday 17 – Tuesday 18 February 2014 | WP1307

Trade in goods and services between the EU and the US amounts to nearly $1 trillion each year, and total bilateral investment between them to nearly $4 trillion. TTIP aims to remove trade barriers in a wide range of economic sectors to make it easier to buy and sell goods and services between the EU and the US. The agreement could add as much as €120 billion to the EU economy, €90 billion to the US economy, and as much as €100 billion to the rest of the world.

Many of the gains are anticipated to come from tackling non-tariff barriers, on a scale not seen before in a trade deal. If TTIP is to be agreed by 2015 much work has to be done.

The complexity of regulatory barriers and their entrenched nature makes overcoming differences difficult. If TTIP is to reach its full potential and act as a platform for removing regulatory obstacles, regulatory differences must be addressed swiftly. It will not be enough just to identify minor changes and improvements.

The opportunities for regulatory coherence certainly exist. This conference discussed how TTIP can build on these promising prospects to deliver benefits for businesses and consumers, while not reducing the levels of protection expected in developed countries.

Participants focussed on how to achieve the two main goals of regulatory collaboration: cooperation on future regulations and making existing regulations more compatible across the Atlantic. The meeting debated how best to achieve these, with particular regard to delivering a substantive TTIP agreement in 2015.

The dialogue assessed different approaches to regulatory convergence, legal frameworks, enforcement and arbitration of regulatory matters and then discussed ways in which these can be supported through institutions, both on either side of the Atlantic and across it.

Finally, participants were able to frankly discuss where issues have proved challenging, why the challenges occurred and how to avoid the same difficulties arising in future. This will take into account how TTIP can progress as an evolving agreement, and so the conference will assess the long term implications for the array of stakeholders involved.

Background

1. The European Union (EU) and the United States (US) account for nearly half of world GDP and 30 per cent of world trade. Their bilateral trade in goods and services is worth $2.7 billion/ €2 billion each day. Two way direct investment is more than $3.7 trillion/€2.8 trillion. The two have similar economic and democratic structures, values, and are both concerned about their relative decline in global competitiveness to emerging economies, notably China.

2. With 75% of EU imports from the US having tariffs below 2.5% (40% are zero-rated) and 77% of US imports from the EU having tariffs below 2.5% (50% are zero-rated) in 2012, and an EU simple average tariff rate of 3.5% and an US simple average tariff rate of 4.4% in 2011, the scope for further tariff Most Favoured Nation (MFN) liberalisation is limited. Stalled multilateral negotiations on further liberalisation in the World Trade Organisation (WTO), and modest to low growth add impetus to their search for alternative trade arrangements. As the main obstacle to increasing trade is regulatory divergence, which some estimate to amount to 20-30% of delivered costs, transatlantic liberalisation efforts are focused on pursuing regulatory coherence.

3. Economic size matters because it underpins the rule of law, transparency, compliance, competitiveness, and regulation. The largest economies set global regulations and standards. Ultimately the PRC's scale and market size will allow it to set global rules. For example, in two years China will produce as many cars as the EU and US combined. The US alone is no longer able to determine rules. Only by coming together can the EU and US again 'call the regulatory shots'. By excluding China from trade initiatives, the US and EU can attempt to retain global economic and regulatory leadership, at least initially.

4. Against this background, a High Level Working Group (HLWG) in February 2013 examined a range of potential options for expanding transatlantic trade and investment including, but not limited to: elimination or reduction of conventional trade barriers such as tariffs and tariff-rate quotas; elimination, reduction or prevention of barriers to trade in services and investment; enhanced compatibility of regulations and standards; elimination, reduction or prevention of unnecessary 'behind the border' Non-Tariff Barriers (NTBs) such as the harmonisation of product standards and health controls, and enhanced co-operation for the development of rules on global issues of common concern. Specifically, there was hoped-for progress on substantive reduction of duties and tariffs on agricultural and industrial goods; laying the ground for a first exchange of offers in services so EU and US firms can compete on equal terms; allow firms to bid for public contracts; improved access and transparency on procurement rules; 'rules' issues to increase trade whilst respecting social rights and environment protection ('sustainable development') frameworks; enable EU firms to import energy and other raw materials from the US; and ensure specialised food and drinks products from regions in the EU can be marketed as such in the US (Geographical Indications).

5. The Transatlantic Trade and Investment Partnership (TTIP) was launched in June 2013 at the G8 Summit at Lough Erne with a view to concluding a comprehensive agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues. TTIP aims to achieve greater openness, transparency, convergence in regulatory approaches and to reduce redundant and burdensome testing and certification requirements, promote confidence in respective conformity assessment bodies, and enhance co-operation on conformity assessment and standardisation issues globally. TTIP therefore essentially goes beyond traditional trade agreements, with the key aim to make the EU and US regulatory systems more compatible, a matter which formed the focus of this Wilton Park conference.

6. The original expectation was for the actual talks to last a couple of years; however a 2015 deadline is ambitious. The Obama administration supports TTIP but Congress is hesitant and the next administration may be even more so. A new Commission and Parliament will be elected in 2014, and the impact of envisaged greater populist representation is uncertain. Any TTIP agreement will be highly complex involving many

national, sub-national and regulatory actors. TTIP won't result in a FTA nor an EU – US joint body, but something in between involving changes in US and EU legislative and regulatory processes relating to trade.

7. Some are pessimistic a TTIP deal can be concluded because: EU-US regulatory co-operation has to date encountered limited success; an ambitious sounding competition agreement has limited application of 'positive comity'; the framework agreement on Mutual Recognition of Conformity Assessment enjoys little sectoral implementation; there is little low hanging fruit; the EU and US have quite different law making, regulatory and litigation approaches; precautionary versus risk based principles prevail; there are different approaches to standard setting; there is no framework for systematic cooperation between regulators; and a TTIP deal might weaken safety and environmental standards. Some question whether we are starting the exercise at the wrong point - a more business-like approach such as mandating governments to draft a framework and letting lawyers get on with it might pay dividends. The TTIP process itself may prove controversial and the negotiations could become easily politicised.

8. Furthermore, why should TTIP succeed when previous transatlantic attempts such as the first NAFTA (originally a North Atlantic initiative); TAFTA and the Transatlantic Business Dialogue made little progress? So what makes TTIP more likely this time? Firstly, the growth of international supply chains has changed modern manufacturing. Secondly, EU and US political will is now believed to be stronger. Lastly the rapid growth of emerging economies, and the likelihood that China will be the world's largest economy in the medium term, is forcing change. This might be the last chance for the EU and US to join together to create a critical mass to influence China, change its behaviour and demonstrate regulatory leadership and standards setting.

9. Most though believe TTIP is doable. If concluded, TTIP will not be a traditional trade agreement as it will mostly feature regulatory cooperation built on trust between regulators, trade and other competent authorities. As such, it will be something between an internal market and a regional trade agreement. The Single European Market, although incomplete, proves substantive regulatory harmonisation can be achieved between a range of developed economies. So there is little reason why greater regulatory coherence cannot also be achieved between the EU and US.

10. The gains that can be achieved through greater co-ordination of rules and their application across jurisdictions remain largely untapped, under-analysed and under-promoted. Regulatory divergence leads to economic inefficiency and hinders trade and growth. Greater EU-US co-operation will reduce production costs, produce greater economies of scale, increase exports and jobs, generate more global standards, reduce consumer prices, and increase investment. One study suggests a successful TTIP negotiation could add an extra half of one per cent of Gross Domestic Product (GDP) a year for the EU by 2027. A Bertelsmann study suggested removal of NTBs would increase Germany-US trade by 1-2% per annum.

11. TTIP is purely bilateral at the outset but once concluded there may be an effort to open up any finalised package to third parties. Should TTIP be concluded and become an open agreement (like the original Asia-Pacific Economic Co-operation), the multilateral trading system could be strengthened. The impact of excluding China from TTIP and the Trans Pacific Partnership (TPP) may be significant, but any initial effects are likely to be limited. Turkey will not be a party to TTIP but will be required by the EU-Turkey customs union to negotiate an identical agreement with the US. Least Developed Countries (LDCs) face the possibility of mostly small preference erosion.

12. TTIP is the UK Prime Minister's top trade priority, but if the UK decided to leave the EU, its ability to benefit from any TTIP deal may be infringed. British Eurosceptics argue the UK outside EU would be able to secure a similar TTIP deal but many believe this is far from assured. Any package agreed between the EU and US would require a UK outside the EU to accept the regulatory provisions that EU agrees with US, as well as all of the EU *acquis* as the price for free access to the EU Single Market. Many governments, including the US, Germany and Japan, have expressed support for

continued UK membership of the EU.

13. There are consequences of not concluding TTIP or achieving only a modest result. No deal or a scaled down patchwork of new harmonised rules will not meet the political vision behind TTIP. Without TTIP, relative EU and US economic decline would continue and decline would be exacerbated by the inability of the two blocs to wield as much influence in the international economy and economic institutions.

Scope of TTIP

14. To date there has been little progress in EU and US regulatory co-operation. There have been EU-US sectoral arrangements in aviation (Open Skies) but still some limits on foreign ownership; no progress in maritime services; mutual recognition of architects' qualifications, and Authorised Economic Operator (AEO) mutual recognition. The EU has tried to secure multilateral rules and bilateral cooperation on competition, but the US relies more on unilateral measures. In Sanitary and Phytosanitary (SPS) issues, there have been long-standing differences on beef hormones and Genetically Modified Organisms (GMOs). The EU and US are no longer both strengthening Intellectual Property Rights (IPRs). In software and business methods patents, the US is inching towards EU styles. Some fundamental principles of existing chemicals framework legislations in the EU (the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation) and the US (Toxic Substances Control Act) are very different.

15. The HLWG Report 2013 outlined five regulatory areas for work: SPS-Plus, Technical Barriers to Trade (TBT) Plus; cross-cutting disciplines on regulatory coherence and transparency; mutually agreed upon goods and services; and a framework for future regulatory cooperation, including its institutional basis.

16. TTIP's regulatory component (TBT, SPS, and regulatory coherence) represents two thirds of its envisaged benefits and is the most complex part of the negotiations: "cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective and more compatible regulations for goods and services, including early consultations on significant regulation, use of impact assessments, periodic review on existing regulatory measures, and application of good regulatory practices". For some, the relatively low ambition on TBT and SPS with no reference to mutual recognition or harmonisation in the latest HLWG report is barely a WTO Plus mandate. The detail is often modest, e.g. on chemicals; there are many exception clauses in anti-dumping and safeguards; and agriculture is not mentioned except with regard to SPS.

17. TTIP aims to build upon the WTO SPS Agreement including ensuring each side's measures are based on international standards or scientific risk assessments, and are applied only to the extent necessary to protect human, animal or plant life or health, and developed in a transparent manner, without undue delay. Other areas of agriculture not explicitly excluded from the negotiations so agriculture could yet form an appropriate trade off with services to constitute an even more meaningful overall TTIP package. Indeed EU Trade Commissioner De Gucht recently suggested negotiations will include agriculture and tariffs may be lowered.

18. Cultural industries (audio-visual) are excluded given mainly French objections. Communications, net neutrality, and data security are also excluded, as are public services, although the definition of the latter is unclear. The recent exposure of spying has led to strong demands for data protection to be included, but the Commission has to date resisted including this politically charged issue in the negotiations mandate.

19. The conference did not investigate in any great depth the prospects for including financial services in TTIP. There is jurisdictional resistance by some US government bodies to include this area. This situation is anomalous as there are volumes of un-coordinated regulations in financial services aimed to contain the transmission of systemic risk across national borders. Financial stability is not served by a fragmented

regulatory approach, inconsistent rules and a low level of supervisory co-operation. This being the case, it was felt strongly that there was no reason why financial services should be excluded from a TTIP package building regulatory coherence. In fact, the inclusion of financial services could provide a more attractive overall package for the US as it would provide it with an additional bargaining chip with which to secure concessions from the EU, notably in agriculture and possibly other sectors. Including financial services could ensure an overall TTIP package of considerable weight commensurate with the political vision behind it.

International Regulatory Co-operation

20. The Organisation for Economic Co-operation and Development (OECD) 2013 study International regulatory co-operation: addressing global challenges (pp. 15-17) notes: "Governments increasingly seek to maximise the benefits of globalisation by eliminating unnecessary regulatory divergences and barriers … Countries are embedded in webs of regulatory co-operation that go beyond the traditional treaty-based model of international relations, to encompass trans-governmental networks, involving multiple actors with sometimes limited oversight or monitoring by the centre of government…. International Regulatory Co-operation (IRC) has changed from complete 'harmonisation' of regulation (i.e. uniformity of laws) to more flexible options such as mutual recognition agreements. This shift is partly due to the recognition that frictions generated by regulatory divergences result as much from diverging enforcement and implementation efforts as from differences in the regulations and standards themselves….informal co-operation, such as dialogue between regulators and exchange of information, is becoming more important in promoting regulatory co-operation... decision making on IRC remains mainly guided by political considerations and is not informed by a clear understanding of benefits, costs and success factors of the diverse IRC options… Most cases of successful co-operation have, however, tended to develop in an ad hoc manner, along paths of least resistance, and without following general principles of good regulatory governance".

21. Regulations have cross-border effects and unintentional consequences elsewhere. One country's regulation is another country's NTB. Regulatory divergence wastes money and effort. First though, definitions for 'regulation' are needed. Does the term 'regulation' mean actual regulations, or (at a more general level) 'regulatory requirements', and did 'regulation' include 'standards'? If so, what kinds of standards (e.g. regulatory or manufacturing type approval) were intended? A good deal of work on definitions, and on a common glossary of terms, remains to be done.

22. IRC includes: deep integration and harmonisation through supranational EU institutions e.g. directives, regulations; specific agreements (treaties and bilateral conventions); formal regulatory co-operation (US-Canada); inter-governmental organisations (OECD, WTO) through different mechanisms that can be binding; Regional Trade Agreements with regulatory provisions whether or not they are enforced; Mutual Recognition Agreements (MRAs); trans-governmental networks of regulators (e.g. International Laboratory Accreditation Cooperative (ILAC) and International Consumer Protection and Enforcement Network - ICPEN); formal requirements to consider relevant framework in other jurisdictions in the same field – countries align regulatory processes to achieve convergence in regulations and standards; recognition and incorporation of international standards (through e.g. the International Standards Organisation); soft law, principles, guidelines and codes of conduct, dialogue and exchanging information.

23. The key objectives for transatlantic regulatory coherence are: a more integrated market place through more compatible measures; avoid new and reduce existing unnecessary restrictions to trade and investment; further regulatory co-operation; promote development of international regulations and standards in dialogue with other partners; and ensure transparency and accountability of the regulatory process with input from all relevant stakeholders.

24. Concerns addressed in IRC include: no lowering of present levels of protection of legitimate public policy objectives; no impact on the sovereign right to regulate; no imposing of each other's systems; no creation of additional red tape; respect for existing regulatory competences, and difficulty collecting evidence of benefits and costs which hampers negotiations. A key challenge is how do authorities harmonise duplicative ways of achieving the same objective without allowing higher standards to be undermined by a system of mutual recognition that is a race to the bottom (for example accepting US chemical safety rules as being equal to the EU's REACH provisions), or alternatively a race to the top, which some businesses may argue might erode competitiveness? Evidence points to a shift away from competitive harmonisation of rules to more flexible regulatory co-operation mechanisms.

25. Possible ways of achieving regulatory coherence are: ensuring conditions for regulatory co-operation are in place; providing periodic information on significant regulatory and legislative initiatives; effective and timely dialogue between regulators with possibility for comments and receiving feed-back; strengthening assessment of impacts on international trade and in particular transatlantic trade; establishing a strong institutional mechanism to monitor existing and enable new cooperation, including in sectors; and ensuring transparency through stakeholder consultations, enquiry points, central information tools for legislative and regulatory initiatives.

Good regulatory practice

26. The Swedish National Board of Trade argues Good Regulatory Practice (GRP) at the national level is the single most important aspect in efforts to avoid unnecessary technical barriers to trade. GRP aims to make it automatic that barriers to trade in agreed areas do not suddenly arise.

27. GRPs include transparency and public participation, considering stakeholder inputs; analysis tools to assess need/impact of, proposed regulation (e.g. impact assessment, cost benefit analysis and risk assessment); retrospective reviews; and co-ordinated coherent 'whole government' approach. Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment.

28. TTIP allows for a two-step approach: publish proposed regulatory text, an impact assessment, and any underlying information, data or analyses for public comment on the internet; and secondly take comments into account before issuing a final version of the text and impact assessment with revisions, and explanations at the end of that authority's process. Similar models exist in Denmark, elsewhere in the EU, and APEC.

29. Analysis alone is insufficient to achieve regulatory coherence. *Ex-ante* analysis is pro-forma. More *ex-post* analysis, including on impact of public welfare, needs to be undertaken on a multi-stakeholder basis but who does this, and what resources are being allocated? Companies can help promote procedural cooperation; work between regulatory and trade policy committees can be strengthened, and more proactive coordination reports could be produced. There must be evidence based outcomes.

Reforming existing regulations

30. Ways of reforming existing regulations need to be found to make them more compatible, coherent and less duplicative for business. It is important that this does not compromise existing consumer standards. How could these guarantees be built in? Does it have to be done regulation by regulation, or could a more general approach be taken? How could we prove that existing standards are being maintained?

31. TTIP, if successful, could be seen as inaugurating an improved process for examining regulation, whether present or future, rather than changing it. Does the concept of changing regulation mean simply aligning pre-existing regulation? What about more significant adaptations of regulation, or even fundamental updates embarked upon by

one side or the other? How are such updates managed to try to ensure ongoing convergence? Methodologies might need to be developed to address these problems. One feature could be clear concepts of the structure and function of regulation, as an aid to recognising functional equivalence. Another might be agreement by both sides on the importance of an evidence-base for regulation and regulatory change. This could be a valuable approach in its own right, as an alternative to mutual recognition, if the latter were to prove challenging.

32. How is evidence collected? What account can be taken of the views of stakeholders or pressure groups? Would either the US or the EU seek to adduce evidence and bring it to the attention of the other? This would not necessarily matter if there were informal discussions or exchanges of information (and it would be as well for there to be clear political direction to ensure that these took place). Any proposed agreement on "privileged access" (i.e. each side formally agreeing to undertake to give due consideration to the other's views) could raise delicate issues (possibly constitutional issues) that would need to be worked through carefully.

Towards a mutual recognition approach?

33. Traditionally regulators have relied on mutual recognition and used compliance agreements to promote international co-operation. These agreements allow regulatory agencies to recognise one another's systems as equivalent, and thereby permit market participants from each jurisdiction to operate in their own jurisdiction so long as they have complied with their home regulators requirements. However, these solutions, and particularly substituted compliance, have historically been the culmination of a long series of inter-agency negotiations, from which authorities concluded that supervisory frameworks were essentially the same or could be adjusted relatively easily by one partner to ensure mutual conformity. Thus, an existing benchmark standard existed, against which markets were judged. This is no longer always the case given the relative absence of domestic regulation.

34. Mutual recognition is realistic but there is a need to define/clarify its terms, e.g. functional equivalents and performance assessments. Are we referring to mutual recognition of authorising or standard-setting bodies? Or recognition of each other's standards and regulations? Either way, is it recognition of similar functional requirements, or mutual acceptance of conformity to the other's standards or rules, and were terms such as 'substitute compliance' or 'exemptive relief' involved? There is considerable room for confusion if these aspects are not ironed out early on.

35. What value should each side place on the evidence-base for the other's requirements? Data, collected in line with shared standards, is likely to be important. This could be influenced by political campaigns, vested interests, or the preferences of conformity assessment providers. An upcoming University of Michigan study of methodology for mutual recognition in safety and performance criteria in the automobile industry may provide some guidance on implementation in practice, rules, the agreement process, and which regulatory agencies would take responsibility. Processes to address the lack of trust between regulators, and if trust in each other's regulations and/or standards (and their enforcement) broke down need to be elaborated. In many cases there will probably be no realistic alternative to some form of mutual recognition, if progress in regulatory coherence is to be made.

What happens when we want to change aligned regulations?

36. Every so often, one side or the other might wish to change aligned regulations, for a variety of reasons. New developments, or the detection of defects in existing regulation, could lead to pressure for change. But how is change to be brought about with a minimum of divergence? Shared data on the justification for change would be one route. Another would be the 'virtuous circle' that TTIP would hopefully create through which regulators on both sides, aware of the issue and trusting each other, would come together and exchange views on mutually satisfactory solutions. This would avoid regulators proceeding on separate paths allowing divergence to develop, and avoid the

current risk of divergence being entrenched, with regulators meeting *ex-post* to compare notes on the divergence, but under no pressure to resolve divergences. Again, any constitutional trap of "privileged access" would need to be avoided; but clear political direction should help to ensure that informal early discussion took place between regulators in acceptable and uncontroversial ways.

US and EU institutional and legislative framework

37. Regulatory cooperation also requires an institutional framework with compatible processes. The US and EU have very different ways of developing legislation. The US rulemaking process is structured to balance the interests of states and the federal government, while EU rulemaking is a hybrid of supranational, inter-governmental, national and sub-national decision-making bodies.

38. Bills in the US are drafted by Committee staff typically with no impact assessment and minimal public consultation. It is therefore not surprising that only 5% of US bills pass. The US process is opaque and not as transparent as many would think – typically the public is only allowed into the process at the end. Opportunities to comment on draft legislation are present in the US but not in rulemaking phase.

39. The US notice and public (internet) comment process involves: agencies draft proposed rule text and assess impact including through regulatory impact analyses (RIA); inter-agency review of draft significant proposed rule of RIA; notice of proposed rulemaking; explanation and invitation of public comment normally includes: preamble (narrative of agencies, rulemaking efforts); rationale for proposed approach, including a summary of the factual or scientific basis for rule; draft rule text, and RIA if economically significant, and/or other applicable analyses; and draft final rule text and impact. The final rule is an outgrowth of the public regulatory docket which includes an Advance Notice of Proposed Rulemaking (ANPRM); supporting materials; RIA; public comments; underlying studies, stakeholder meeting record, and related notices if any inter-agency review of draft significant final rule of RIA in which agencies provide explanations and the rationale for (not) accepting comments, including on the RIA.

40. US independent agencies can and do break with executive agencies (like the United States Trade Representative (USTR), and even the US Treasury Department) on international regulatory policy. This domestic 'divergence' can prevent a unified 'US position' across a variety of sectors.

41. The EU process is often more prescriptive than the US' 'legislation and delegation'. The Commission retains a major role in regulatory policy, while independent EU agencies play a more limited supporting role, providing technical expertise with little direct authority. Since the late 1980s, EU member states commit to standstill and have to submit to other member states for comment. This process help reduce barriers to international negotiations (90% of problems are resolved before regulations are implemented). Unlike the US process, in the EU there is no opportunity to stakeholder comment at the end.

42. The Commission is eager to use its new powers given in the Lisbon Treaty on investment and seek to replace Bilateral Investment Treaties with one EU-US Investment Treaty. This may provoke a negative reaction, especially as it had to reassure France that cultural issues would be excluded from TTIP. The EU Parliament's role has been limited so far but its chair said in early February 2014 that TTIP should demonstrate progress on data protection, and in the past the European Parliament rejected a Commission proposal to harmonise EU rules with the US on software patents in 2005 and an Anti-Counterfeiting Trade Agreement (ACTA) in 2012.

43. US exporters and investors have concerns about the EU process: white and green papers are too general and produced slowly; draft text and impact assessments are not available, or need to be revised in response to public comment; the ability to provide input on text proposal and impact assessment is often too late; there is heavy reliance on 'invited stakeholder' meetings in Brussels and on EU associations (between Small

and Medium Enterprises (SMEs), new entrants, foreign investments and trading partners), and practice varies unpredictability in Directorate Generals.

A joint US-EU collaborative body?

44. As both the EU and US offer transparency at different stages, the challenge is how to align and structure the two systems. Both sides will have to adapt and find common procedures for regulatory co-operation on rules relating to trade. There are two possible models: *ex-post* – a trade impact analysis and comment with impact assessment and saying why they propose this. Regulators may not initially know of trade impacts even until proposed rule. Rules creating trade problems may have to be scrapped or revised after opposition.

45. In contrast, the *ex-ante* approach aims to get the model right before starting the process. The issue then is how to get regulators to talk to each other and avoid making mistakes and having to withdraw the proposal. Regulators should be given a mandate and timeline within a sovereign-sovereign dialogue. Strong public dialogue is also needed as part of the *ex-ante* model. The European Parliament has greater role than the US Congress in rule-making, and the EU is arguably more suitable to the envisaged discipline. A US-EU Regulatory Collaboration organisational structure could have USTR, DG-Trade and other ministries in a Regulatory Cooperation Council under which come sovereign sector committees such as auto emissions, auto safety, pharmaceutical and electrical manufacturing – beneath which there are multi-stakeholder working groups. Existing institutions should be used instead of creating new ones.

46. Assuming a green light throughout, the TTIP collaborative process could be envisaged as follows: idea for regulation, notice to the sectoral committee, decision to act, convenor polls stakeholders regarding interest in collaboration, public request for nominations to working group; selection of working group; working group consultations; report to the sectoral committee on working group findings and recommendations; sectoral committee deliberates and reaches decision; US-EU regulators enter proposal into their respective domestic procedures; sectoral committee consults internally and with working group regarding comments received; and sectoral committee regulators issue final decision, jointly or separately. Common/central mechanisms and information exchange to make steps towards each other should be established. In the event of disputes, an ombudsman could deal with straightforward cases. More political issues could be taken to a binding council. One can learn from existing FTAs/structures on dispute settlement (not reinvent wheel).

47. Regulators don't operate in a vacuum. EU and US governments should not focus on different areas, regulations and guidance at different times. Both governments need to set common goals at the outset as their legislative systems start at opposite ends. Agreed checklists and timelines set at the outset could help. Similarly, relevant measures in the G20 should be agreed in advance and launched at the same time.

Standards

48. Standards, a widely misused word, and regulation have different roles and functions. Standards are voluntary agreements between producers with no regulatory effect, whilst regulations are minimal requirements. Fewer than 20% of standards are used by regulators. Technical regulation involves the incorporation of standards into regulations and law. It has to be considered whether the standard make sense and supports the goal of regulation. Regulations should be data driven, be based on evidence and subject to rigorous analysis to avoid any accusation of regulatory capture. The greater the initial understanding, the greater acceptance of final rule.

49. Standards aim to improve product quality, enhance safety, facilitate market access and trade, build consumer confidence, and in so doing balance the interests of business, the public and governments. Standards drive performance, innovation and productivity, and support firms that ideally want one global standard. As such, standards can help

create opportunities beyond EU and US.

50. Standards bodies are more than facilitators for their members and firms. Standards bodies should be open, transparent and listen to stakeholders. Standards are developed primarily by the business advisors to the regulatory body. The private sector should help develop standards and not use taxpayer money. Standard setting is expensive; for example, an Environmental Protection Agency (EPA) regulation can cost $2 million. Open dialogue and quality data are vital. An Open Governance framework to cooperate at industry level as well as with EU can be paid for by standards organisations.

51. Standardisation systems in the EU and US have been framed by different legal and regulatory procedures and customs. In the EU, market regulation is increasingly being channelled towards standardisation in technical bodies, and excludes national and European parliaments. Such standardisation can be regarded as replacing legislation and thus by-pass democratic processes. Nevertheless, the EU standardisation system is based on a delicate balance in which policy is framed in legislation and supported by technical standardisation with active stakeholder and government engagement.

52. The US government has different approach from US Standards organisations. 275 standards are overseen by American National Standards Institute (ANSI), which although not a standards-setting organisation like the European Committee for Standardisation (CEN), monitors standards development nation-wide. US standards can be set by any sectoral organisation provided there is enough business support. This has created fragmentation and reduced the scope for stakeholder oversight. A private sector American Society for Testing and Materials (ASTM) standard can be brought in to the EU but needs to pass to become an EN (a one-stop shop).The problem is there is no reciprocal US process. Reciprocity of standards could be incorporated in the US by a reference, but this depends upon the relevant agency.

53. Some fear the TTIP agenda is being overloaded, and it may need to accommodate flexibility on standards making. Regulatory flexibility depends upon the scope within the legislative mandate. TTIP's timing is unfortunate as it duplicates negotiations between ANSI and three European Standards Organisations (ESOs). The two simultaneous processes need to inform one another. There needs to be an agreement on modalities for cooperation through common understanding of systems; consistent messaging (voluntary standards are useful support for some regulations), and a commitment to support trade, improve market access, productivity, innovation, and efficiency. There should be conformity assessment and governance procedures, and no barriers to new standards being adopted outside. Conflicting national standards will be withdrawn.

Engaging consumers, unions and civil society

54. Formal social stakeholder engagement with consumer associations, unions and civil society is more essential in attempts to achieve regulatory coherence than in traditional trade agreements. Regulatory convergence in TTIP can't simply leave the matter to industry; otherwise there will be allegations of regulatory capture and ignoring the public interest. TTIP and its benefits need to be communicated clearly by governments and politicians to non-experts to build support. Unions, consumer groups, environmentalists and others need to be engaged pro-actively and have their voice heard in the process. Regulators and standard setters should look more broadly to stakeholders because workers can often know more about the workplace than employers.

55. Governments need to bring together a reference group of stakeholders, civil society and regulators to review data and provisions to judge the appropriateness of proposed rules with an independent mediator ensuring balance in committee, content and outcome. Even if there is no greater consensus at least there will be greater understanding. Civil society will have difficulty keeping up and influencing such a complex process. Civil society cannot operate in the silos of the 80 plus groups. Accordingly, there has to be public sector funding for civil society groups to allow their

full participation in standards and consultative bodies.

56. Agreement on social and environmental provisions should not reduce existing standards or impinge on public authorities' right to regulate. Civil society fears the levelling down of standards and domestic regulation as they become sub-ordinated to a business-led trade regime. EU Commissioner De Gucht has however insisted "we are not lowering standards in TTIP. Our (EU) standards on consumer protection, on the environment, and on data protection and on food (e.g. importing hormonally-enhanced US meat into the EU) are not up for negotiation". Pooling sovereignty is not tantamount to levelling down of standards. In fact, the European Single Market has raised standards throughout the EU. However, the EU Single Market can't be viewed in isolation from the social model prevailing throughout most of the EU which balances it. For example, EU health and safety regulations have helped reduce workplace fatalities (which are a third of that in the US).

57. Governments need to explain IRC in a positive manner rather than say it won't lower benefits. Evidence is needed to demonstrate that people's working lives and living standards will be improved. Unfortunately, to date there has been little research on the actual benefits to consumers of any TTIP agreement. Some argue it is not necessarily proven that consumers would benefit from lower prices, although one study estimates there would be a €545 per annum benefit to families from TTIP. TTIP may in fact reduce competition which could adversely impact consumers. Freer trade does not necessarily mean lower prices are passed onto consumers (e.g. it took some time for the Commission to enforce lower mobile roaming charges in the EU). Geographical Indications, which arguably stop greater regulatory coherence in some cases, arguably increase consumer choice and maintain prices. Reduction in consumer prices did not compensate for the $3,300 per annum decline in wages and standards as a result of NAFTA. The assertion that regulatory coherence will benefit consumers may therefore be overplayed, and requires more study.

58. The Commission's Transatlantic Regulatory Council would allow preferential industry participation and have powers to guide and monitor future regulations. This poses questions about who and how market rules are made affecting workers and citizens, and the role of democratic process and transparency. If the TTIP negotiations and consultations lack transparency, this will increase suspicion and will not create the preconditions for union and civil society acceptance of any final agreement. If negotiations only take corporate interests into account, public, union and NGO opposition could grow, thus imperilling the TTIP process.

Nick Hopkinson
Wilton Park | March 2014