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# Potential Environmental Policy and Regulatory Impacts of the Transatlantic Trade and Investment Partnership

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## Summary

The current EU-US negotiations on the Transatlantic Trade and Investment Partnership can result in a comprehensive agreement, which will be able to shape not only the traditional trade agenda, but will cover a set of non-trade matters (environmental, labour standards and other societal issues) as well. Specifically the environmental impacts have become a matter of public concern and are in the centre of attention of both the academia and the civil society since the negotiations have been started in 2013. The proposed paper intends to analyse two aspects of the likely implications, which could be triggered by the future transatlantic agreement and affect the EU environmental policy. First, the policy level of the analysis is focusing on the question how the contracting parties will integrate the environmental concerns into the agreement and how these concerns could be reconciled with the standard trade concerns and principles (e.g. liberalization). The environmental integration became a flagship issue also in the ongoing transatlantic negotiations and therefore the outcome can influence, at policy level, the future relation between the trade and environmental policies in the European Union. Second, the TTIP can also have direct impact on the environmental regulation, for this reason the paper will focus also on the regulatory level as well. It is well known that the declared objective of the planned transatlantic trade agreement is to unify the standards of the European Union and United States as much as possible by regulatory cooperation. However, an improper design of regulatory cooperation carries considerable risks for environmental protection in the EU, as environmental standards might be lowered, most specifically in a case, if the rules on harmonization would result in a ‘race to the bottom’ effect. The paper concludes that a carefully planned agreement will not constrain the policy leeway of the EU in the field of the environmental protection, however the EU negotiators have to pay very close attention to choosing the right models, methods and formulations in the future text of the agreement.

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

## 1. Introduction

“@MalmstromEU: what TTIP changes for our rules on e.g. consumer protection, food safety and environment? The simple answer is... No change.” – the statement of Cecilia Malmström, European Commissioner for trade has rapidly spread on Twitter on 15th October 2015.<sup>1</sup> If one would interpret this in a restrictive manner, suggesting the TTIP will not have any impact on the EU regulation, the title of the following paper would offer a completely pointless challenge. However, we want to read this tweet in a bit more permissive way, which would not exclude a more complex answer and therefore, the premise of the present paper is that the TTIP might have implications specifically on the environmental regulation. This premise is not a revolutionary realisation, since the environmental effects of the Transatlantic Trade and Investment Partnership (TTIP) is one of the most debated issue relating to the current trade negotiations between the European Union and the United States. Many experts are warning that the future transatlantic agreement might lead to a rollback in the European Union's environmental regulation, putting at risk the principle of high level of protection of the EU environmental law. The present paper intends to analyse two aspects of the potential implications that could be triggered by the future transatlantic agreement.

First, the policy level of the analysis is focusing on the question how to integrate the environmental concerns in the trade agreement, as the EU, when implementing the Common Commercial Policy and coming into trade negotiations, is required by the provisions of the Founding Treaties to put the environmental concerns into the trade agenda and integrate them into the targeted trade agreement. This policy level of the question can be considered as a part of the ‘Trade and Environment’ debate, which has been in centre of attention of the international trade discourses since the 1980s.<sup>2</sup> The importance of the subject can be explained partly by the fact that the two areas represent an ‘ideological’ policy conflict between the free trade concept and the environmental thinking, which underpins the policies behind the

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<sup>1</sup> The tweet is available at <https://twitter.com/eu4be/status/654651549470208002>.

<sup>2</sup> See for ‘Trade and Environment’ debate, Araya, M., Figueres, J.M. and Salazar-Xirinachs, J.M. 2001. “Trade and Environment in the World Trade Organization. The Need for a Constructive Dialogue.” In *The Role of the WTO in Global Governance*, edited by Sampson, G., 156. New York: United Nations University Press. Santarius, T., Dalkmann, H., Steigenberger, M. and Vogelpohl, K. 2004. *Balancing Trade and Environment: An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance*. 18. Wuppertal: Wuppertal Institute.

international regulation. The European Union is involved into this debate from the very outset, and for the last two decades, it has a very strong commitment to introduce significant reform with the aim of providing wider accommodation for environmental measures within the world trade law.<sup>3</sup> Besides, it is notably that the EU's focus is put not separately on the environmental aspects, but it attempts to include these interests in conformity with other societal concerns, like the social policy or human rights.<sup>4</sup> The integration of environmental – and other societal – concerns is a flagship issue also in the ongoing transatlantic negotiations and therefore the outcome can influence, at policy level, the future relation between the trade and environmental policies in the European Union.

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

The first introductory chapter (2. *Trade Negotiations, Environmental Concerns and the Mandate of the European Union*) makes attempt to explain why the environmental concerns are important for the European Union in the ongoing negotiations, then, the policy level is examined (3. *Policy Impacts of the TTIP: The Integration of Environmental Concerns into the Trade Agreements*), which is followed by the analysis of the regulatory issues (4. *Regulatory Impacts of the TTIP: The Regulatory Cooperation and the Environmental Standards*), and finally the paper closes with some concluding remarks (5. *Conclusion – How to avoid the 'race to the bottom' harmonisation*).

## 2. Trade Negotiations, Environmental Concerns and the Mandate of the European Union

The trade negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (TTIP) has been launched last year, aiming the most ambitious – 'comprehensive' (Barroso)<sup>5</sup> and 'high-standard' (Obama)<sup>6</sup> – trade agreement ever attempted, due to both its scale and its significance for the transatlantic relationship between the European Union and the United States. Moreover, this time the chances of success of an agreement seem more feasible than ever.<sup>7</sup> Moreover, the TTIP could overstep the borders of the multilateral framework of the trade liberalisation, doing far more than merely to eliminate the already low average tariffs and targets the non-tariff barriers as well, which are typical trade obstacles for the relations between the well-developed industrial nations.<sup>8</sup> These barriers include also the measures applied by the Member States for achieving public policy objectives. Apart from this possible consequence of a comprehensive trade agreement between the EU and US the question can be raised,

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<sup>3</sup> Prost, M. 2005. "Is European Law Becoming More Sustainable?" In *Sustainable Development in World Trade Law*, edited by Cordonier Segger, M.-C. and Gehring, M., 411–459, The Hague: Kluwer Law International.

<sup>4</sup> See for human rights requirements: Arts, K. 2000, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention*, The Hague: Martinus Nijhoff Publishers. For labour requirements in general context, Chantal, T. 2002. "Trade-Related Labor and Environment Agreements?" *Journal International Economic Law* 5: 791-819.

<sup>5</sup> "A future deal will give a strong boost to our economies on both sides of the Atlantic. It will be a comprehensive agreement going beyond tariffs, by integrating markets and removing barriers. It is estimated that, when this agreement is up and running, the European economy will get a stimulus of half a per cent of our GDP – which translates into tens of billions of euros every year and tens of thousands of new jobs." Speech of José Manuel Durão Barroso, former President of the European Commission. See: Barroso, J. M. D. 2013. "Statement on the Transatlantic Trade and Investment Partnership." Joint press conference, Brussels (13 February 2013), available at: [http://europa.eu/rapid/press-release\\_SPEECH-13-121\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-121_en.htm).

<sup>6</sup> "Promoting growth, creating jobs, strengthening the middle class-these are the principles that animate President Obama's economic policies, including this Administration's trade policy. As President Obama said [...], TTIP can be a success if »we can achieve the kind of high-standard, comprehensive agreement that the global trading system is looking to us to develop.«" Michael Froman, the U. S. Trade Representative cited president Obama in his speech, see: Froman, M. 2013. "Remarks at the Transatlantic Trade and Investment Partnership First Round Opening Plenary (July 8, 2013)" *Law and Business Review of the Americas*, 19: 135–136.

<sup>7</sup> From economic point of view, the growth is weak equally in the EU and the US, however, the monetary and fiscal policy instruments are largely exhausted, see Felbermayr, G. J. and Larch, M. 2013. "The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives" *CESifo Forum*, 14:49–60. The trade growth has been slow-moving because of the effects of the financial crisis of 2008–2009 and competing subsidy and regulatory policies that impede commercial activity, see Schott, J. and Cimino, C. 2013. "Keys to negotiating the transatlantic trade and investment partnership" *Intereconomics* 48: 263–264. Structural reforms are demanded in both regions, from which the prospect of economic growth is expected. Moreover, both EU and US have widely lost market shares in the last two decades. Therefore, the liberalization of bilateral trade relations could increase their ability to compete with the emerging economies.

<sup>8</sup> According to the EU Commission's document, it is actually an average of 4 %, see: Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM(12.3.2013) 136 final. There are some tariffs peaks for sensitive products on both sides of the Atlantic, e.g. tobacco, textiles and clothing, sugar, footwear, dairy products and some vegetables.

why the European Union have been consistently conducting a “values-driven trade policy” in the last decades and prioritizes strongly the environmental concerns in case of a trade agreement as well.

For understanding the specific relation and sensitivity of the European Union to the ‘trade and environment’ issues, it is worth highlighting two major factors. First, Europe has had always a stronger commitment to social and to environmental concerns, in comparison, *eg.* to the United States. More literally, the idea of Adam Smith in *Wealth of Nations* regarding the concept of the ‘invisible hand’ has never gained great importance in Europe,<sup>9</sup> and as a result, the European Union, and also the governments of the Members States comparing with US are seen as charged not only to promote liberty, but also to reduce inequalities in the society. This attitude has led to far-reaching regulatory interventions also in the environmental area and explains the social context of the above ‘sensitivity’ of the EU in these issues (which is, thus, oversensitivity in the eyes of the USA).

Secondly, in contrast to other countries, the environmental awareness in the European Union has actually a strong basis in the founding treaties. The objectives and principles of the Trade Policy of the EU (Common Commercial Policy) before the Treaty of Lisbon were laid down in a homogeneous, consistent and relatively closed structure. This consistency was based primarily, as a leading principle, on the liberalisation, which allowed the legal and political framework of the Common Commercial Policy to develop according to the own logic in line with its free trade commitments to the international economic law and the legal order of WTO. However, the expansion of the external policy horizon of the European Communities and the introduction of new policy areas led to conflicts of objectives more frequently, causing tensions between the CCP and other external policy areas. Later, thanks to the Treaty of Lisbon, the Common Commercial Policy has become an integral part of the Union’s external action. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have made it clear<sup>10</sup> that the EU has to ensure consistency between the different areas of its external action and pursue and implement the general principles and objectives in the whole field of the EU external relations.

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

### 3. Policy Impacts of the TTIP: The Integration of Environmental Concerns into the Trade Agreements

As mentioned above, since the 1990s, the environmental concerns became a standard item in the negotiation of international trade agreements. The principal reason of picking up the environmental issues to the trade agenda is closely connected to the policy tensions which are rooted in the fact that domestic environmental measures can oppose the efforts to further liberalisation in trade and it leads often to trade barriers. Moreover, the liberalised and growing trade are tending without doubt to environmental impacts in terms of conventional pollution, as well as in air pollution, forest and species depletion etc. This ‘tension’ can be observed as typical policy conflicts, which the negotiating parties, according to their domestic policy priorities want (or intentionally do not want) to address<sup>11</sup> in the trade agreement. On the one hand, the countries involved are interested in more liberalisation, but on the other hand, the emerging importance of the environmental protection requires maintaining the adequate measures that can manifest as restrictive trade practices. These tensions are stimulated by two concrete factors as well. Since the globalising economic system increases general incentives for engaging in international trade,<sup>12</sup> the growth-oriented policies are causing harmful environmental impacts. In other words, the international trade law, with the single purpose of increasing trade flows, is unlikely to have a neutral effect on the world’s environment. Second, it is fact that there is a natural tendency for trading countries to try the effectiveness of their own environmental regulation, as

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<sup>9</sup> Krämer, L. 2004. “The Roots of Divergence: A European Perspective.” In *Green Giants? Environmental Policies of the United States and the European Union. American and Comparative Environmental Policy*, edited by Vig, N.J. and Faure, M.G., 67, Cambridge: The MIT Press.

<sup>10</sup> The consistency requirement regarding the EU external action is laid down in Article 21.3 TEU. Specifically to the Common Commercial Policy, Article 205 TFEU requires the application of the general objectives and principles of the EU external action.

<sup>11</sup> The premise of the following analysis is that the negotiating parties want to regulate and resolve this conflict. However, it cannot be neglected that the parties have other (policy) options as well. There are examples of international agreement provisions, the goal of which is to avoid something special to regulate. In many times, the reason for this option is that the negotiating could not find mutual compromise, or with the avoidance of strict or precise regulation, they want to leave more space for interpretation (in other words, they do not want to confine the room for the future policy options). However, our starting point is that the parties want to regulate and integrate the environmental objectives in their trade agreement, want to tackle common environmental challenges, and they are aware of these challenges (even though these challenges are not necessarily equally shared in the contraction parties).

<sup>12</sup> Dillon, S. 2002. *International Trade and Economic Law and the European Union*, 120, Oxford: Hart Publishing.

well as to influence the environmental behaviour of others,<sup>13</sup> by resorting to trade measures, including import bans and other restrictive measures. The unilateral trade instruments in question are harshly criticised mostly by the developing countries, which are seeing in these measures nothing else but ‘green protectionism’<sup>14</sup> of the developed nations. As a consequence of the evolving environmental awareness, nowadays the countries could not avoid addressing these conflicts and questions in their trade agreements, the examples of the major ongoing trade negotiations support this trend obviously.<sup>15</sup>

From the perspective of the negotiations, the real question is how this policy conflict between trade and environment can be addressed and reconciled successfully within the framework of an international trade agreement with incorporated environmental concerns. The success is here simple the fact that the negotiating parties have found adequate solution to consider the environmental impact of their trade agreement and laid down normative provisions regarding the relationship of the trade and environmental policy objectives. In other terms, the countries – in this case the EU and the US – do not want to address the trade policy objectives in an isolated context, but want to reflect and incorporate the environmental concerns as well. It is evident that the above success is influenced by the framework, namely by the substantive and the procedural components of the trade agreement. The substantive components refers to the content of the agreement and implies the obligations and rights of the contracting parties, however, the procedural aspect of a trade agreement ensures that these obligations and rights can be really effectuated.

As we have seen, the role and stance of the European Union to the ‘Trade and Environment’ debate, comparing with the US position, represents a very strong commitment to the real inclusion of environmental concerns into the legal framework of the world trade. From the perspective of the ongoing negotiation on a transatlantic free trade and investment partnership agreement, it means that successful compromise can be reached only if the striking divergence between the positions of the parties can be reconciled. However it is hard to pave the way to a mutually acceptable agreement not only because of the big differences in the positions of the parties, but also because of their specific interest. At the current stage of the negotiations it is hardly possible to foresee, which compromise could be found regarding the disputed issues, in which the EU has expressed crucial interest in the last two decades (from the past e.g. GMOs, hormone treated beef and pork, chlorine-sterilized chicken, or quite recent disagreements on the so called ‘fracking’ shale gas reserves).

However, is the reconciliation of these positions really required? On the one hand, technically, it is not, in other terms an agreement could be concluded without real inclusion of ‘bridges’ between the trade and environmental concerns. On the other hand, the chance of the ratification of such a treaty would be precious little. The specificity of the EU’s position to the ‘Trade and Environment’ issues has its roots not only in the EU law which was examined above, but also in a kind of European sensitivity to environmental concerns. Therefore an agreement without the real inclusions would be politically unacceptable in Europe. Over this, the question can be raised finally, what kind of compromise would mean a real solution, which can bring the concerns of trade as well as of environment together. Essentially, four basic concerns could be highlighted, which are pivotal elements of an ‘environmentally conscious’ trade agreement and therefore it could be considered as the major policy impact of the TTIP.

An ‘environmentally conscious’ trade agreement sets down the most important, environmentally relevant principles and objectives and makes clear the relationship between these principles and the principles of the free trade. It is important to ensure that these principles and objectives have legal effects as well (e.g. as tools of the interpretation in the dispute settlements etc.), and that the principles of the free trade should not overrule the environmental principles and objectives. The principle structure of the EU funding treaties furnishes a good instance of that solution, when introducing a clear hierarchy between the environmental concerns, as the general principle of the EU’s external activities, and the free trade and liberalisation, as principles of the Common Commercial Policy. The negation mandate of the European Union is a good base towards this compromise, but at this time, the details in this regard are not clear. According to the public summary of the mandate, this part of the agreement (e.g. its preamble) should express the commitment to sustainable development and the contribution of international trade to sustainable development “[...] in its economic, social and environmental dimensions, including economic development, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources [...]”<sup>16</sup> Questionable is, however, the notion of ‘sustainable development’. If we interpret this

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<sup>13</sup> Ibid.

<sup>14</sup> Dagne, T. W. 2010. “The Debate on Environmentally Motivated Unilateral Trade Measures in the World Trade Organization: The Way Forward.” *Wash. U. Global Stud. L. Rev.* 9:441.; Keukeleire, S. and Delreux, T. 2014. *The Foreign Policy of the European Union*, 2nd edition, 202-203., London: Palgrave Macmillan.

<sup>15</sup> Excluding the subject of this paper, the TTIP, and other agreements negotiated by the EU (e.g. with Canada), the United States’ recent negotiation on the Trans-Pacific Partnership Agreement can be taken as example. See for detailed analysis, Meltzer, J.P. and Voon, T. (eds.) 2014. *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*. Cheltenham: Edward Elgar.

<sup>16</sup> See Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America. COM (12.3.2013) 136, paragraph 6.

reference in context with the EU law, the proposition of the EU is that the agreement should recognize the sustainable development as an overarching objective, as well as the aim of the parties at promoting high levels of protection for the environment. In this regard, the mandate emphasizes a specific objective as well. In terms of that the Agreement should also recognize that the Parties will not encourage trade or foreign direct investment by lowering domestic environmental standards. In other words, the agreement should prevent the 'race to the bottom' effect, which could lead to sinking the level of protection in the contracting parties.

Second, the agreement should cover also substantive provisions, which enables the parties to introduce measures with the intention to realize environmental objectives. However, the real question is whether also the guaranties should be established, which can prevent the parties from introducing illicit discriminatory measures in this way. In this regard the mandate is not clear enough, it refers only general statements which are in line with the proposed principles and objectives, but the material content of this chapter is questionable. The mandate stresses only that the separate chapter of 'Trade and sustainable development' will include commitments by both parties in terms of the trade and sustainable development. Consideration will be given to measures to facilitate and promote trade in environmentally friendly and resource-efficient goods, services and technologies, including through green public procurement and to support informed purchasing choices by consumers. Besides the Agreement will also include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labour and environmental domain as a necessary condition for sustainable development,<sup>17</sup> and the importance of implementation and enforcement of domestic legislation on labour and environment should be stressed as well. It should also include provisions in support of internationally recognized standards of corporate social responsibility, as well as of the conservation, sustainable management and promotion of trade in legally obtained and sustainable natural resources, such as timber, wildlife or fisheries' resources. The future Agreement will foresee the monitoring of the implementation of these provisions through a mechanism including civil society participation, as well as one to address any disputes.

It should be also noted that the mandate refers, among the market access rules, to the general exceptions under the WTO law, noting that the agreement should have a general exception clause based on Articles XX and XXI GATT and Articles XIV and XIVbis GATS. In context with the non-tariff barriers, the agreement should reflect also on the specificity of Sanitary and phytosanitary measures (SPS). According to the mandate, on SPS measures, the negotiations shall follow the former negotiating directives of the EU.<sup>18</sup> In terms of that, the parties shall establish provisions that build upon the WTO SPS Agreement and on the provisions of the existing veterinary agreement, introduce disciplines as regards plant health and set up a bilateral forum for improved dialogue and cooperation on SPS issues. Moreover the chapter on the SPS measures should be based on "[...] the key principles of the WTO SPS Agreement, including the requirement that each side's SPS measures be based on science and on international standards or scientific risk assessments, applied only to the extent necessary to protect human, animal, or plant life or health, and developed in a transparent manner, without undue delay [...]"<sup>19</sup> In addition to that the proposed agreement should also touches upon the technical regulations, which is also an important regulatory area from environmental perspective. In line with the WTO Agreement on Technical Barriers to Trade (TBT), the EU's mandate foresees also provision. The objectives of these provisions would be to generate greater openness, transparency and convergence in regulatory approaches and requirements and related standards-development processes, as well as, inter alia, to reduce burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally.

Third, essential element of such an agreement is also a dispute resolution system, which is able to effectively reconcile the disagreements of the contracting parties. In this regard the main point is that the proposed the dispute resolution procedure should be applied to the 'Trade and Sustainable Development' chapter. In other terms the agreement has to express clearly that the same implementation requirements are to be applied to this chapter as for all other content of the agreement. The EU mandate touches upon the question of the dispute resolution but it is silent on its possible extent, therefore it is still unknown, how these requirements will be applied to the trade and environmental matters.

Finally, the fourth requirement is that a trade agreement which takes into consideration the environmental interest should make clear its relationship to the multilateral environmental agreements. One option could be that the most important relevant agreements previously concluded by the EU<sup>20</sup> are to be listed explicitly in the text agreement. This concern is totally in compliance with the EU commitments to these issues, as it was mentioned before, the EU has intended to make provision regarding the multilateral environmental agreements already in the course of the Uruguay round. However, the current and publicly accessible information on the EU mandate is silent on this issue.

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<sup>17</sup> Recommendation for a Council Decision... COM (12.3.2013) 136, paragraph 25.

<sup>18</sup> Adopted by the Council on 20 February 1995, see Council Doc. 4976/95.

<sup>19</sup> See Recommendation for a Council Decision... COM (12.3.2013) 136, paragraph 18.

<sup>20</sup> The most significant agreements are as follows: Montreal Protocol on Ozone Depleting Substances, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Stockholm Convention on Persistent Organic Pollutants, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity, Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticide.

## 4. Regulatory Impacts of the TTIP: The Regulatory Cooperation and the Environmental Standards

As indicated above, even the early summaries of the Commission's negotiation mandate highlighted as major issue the elimination of the regulatory trade barriers. The term 'regulatory trade barriers' refers to a variety of trade obstacles, which can take different forms. In general, two main categories are covered by the term 'non-tariff-barriers.' Firstly, it includes the whole range of quantitative restrictions that directly restrict market access (e.g. import quotas), and secondly, it covers regulations, which add to the cost of exporting into that market, e.g. domestic regulations requiring expensive reconfiguration of products, such as changing voltage or adapting the technical parameters (environmental standards of cars, standards and product requirements of foods, administrative measures, e.g. price controls etc.). Therefore the term refers typically to the so-called 'behind-the-border' barriers to trade.<sup>21</sup> From the perspective of their effects, this category might cover, e.g. the need to have to allow products separately for both markets, often on the basis of different procedures and conditions for admission; different industrial standards, packaging requirements and information or labelling obligations; regulation of access to public procurement procedures or economic development programs, such as the state export credit insurance, and also different public policy (environmental, health or consumer etc.) standards and restrictions.<sup>22</sup>

The differences in the environmental standards can be mostly explained by the different approach of the EU and US environmental regulations. In the EU, risk regulation is based on the precautionary principle, which requires demonstration for the products in question that no danger e.g. to human, animal or plant health might emanate from it. Principally the evaluation of the potential dangers has to be based on scientific analysis, however, in cases where scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous. In the United States, the approach is exactly the opposite: the 'risk-based' approach allows the use of a products as long as no considerable danger has been detected. As a result, a large number of materials are banned in the EU because of their potential unsafe character, while they are approved in the US since no scientific data have been made evident that could demonstrate grave danger to the public, or animal, or plant health and life.

These differences in domestic regulations, technically, can be addressed by three major approaches, which are the standard techniques of the regulatory cooperation.<sup>23</sup> The first method is the unification, which provides a tool for establishing the same requirements in all contracting countries. However, the unification has its own limitations; namely, if strong industrial actors are competing in the market at stake, setting common standards is much more than difficult. However, it is not impossible, even today unified standards are working in several areas, like telecommunication, IT technologies, automotive industry, or international aviation and maritime transport. Secondly, the harmonization implies the alignment of regulations to a single best practice. Usually a voluntary agreement, harmonization can be based on a reference to international standards from a standard-setting body, or simply involve coordination among nations. Countries basically agree to converge on a single standard or regulation. This is usually the most difficult way to achieve regulatory cooperation, in part because countries are reluctant to adjust their standards, and also because the harmonization of standards requires complete consensus. Thirdly, the principle of mutual recognition can also help to eliminate the regulatory trade barriers; it is especially useful in eliminating duplicative testing and certification processes.<sup>24</sup>

All of these approaches would facilitate trade by reducing the regulatory hurdles faced by prospective exporters both sides, in that they would save them the trouble of complying and/or demonstrating that they have complied with, a different regulatory regime. The question arises, however, how the EU and US can find compromise on these issues. Probably, the solution should simply be to remove regulatory divergences that are accidental or serve no purpose, however, it is inevitable that some inefficiency and higher costs must be accepted by both negotiating parties.<sup>25</sup>

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<sup>21</sup> See Sadikov, A. 2007. "Border and Behind-the-Border Trade Barriers and Country Exports." *IMF Working Paper* (WP/07/292), December 2007. Available at: <https://www.imf.org/external/pubs/ft/wp/2007/wp07292.pdf>.

<sup>22</sup> Expressive examples are examined by Lester and Barbee, illustrating how fruit and vegetable product can sizes, or car headlights standards can operate as regulatory trade barriers, see: Lester, S. and Inu, B. 2013. "The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership." *Journal of International Economic Law* 16: 848.

<sup>23</sup> Lester, S. 2013. "Tackling Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership," in *Transatlantic Colossus – Global Contributions to Broaden the Debate on the EU-US Free Trade Agreement*, edited by Cardoso, D., 84, Berlin: Berlin Forum on Global Politics.

<sup>24</sup> Both the EU and the US have already concluded Mutual Recognition Agreements (MRAs), and even the EU and the US has common agreement on specific issues. The MRAs have the objective of promoting trade in goods between the contracting parties by facilitating market access. They are, in general, bilateral agreements, and aim to benefit industry by providing easier access to conformity assessment. The EU has currently MRA with USA, and Australia, Canada, Japan, New Zealand, Switzerland.

<sup>25</sup> See Lester's example: if a car producer wants to sell vehicles in the United Kingdom, it must account for the UK's use of left-hand drive traffic (Lester et.a. 2013, 856).

The methods of the regulatory cooperation are highly significant in the field of the environmental policy, because an improper design can bring considerable risks for the high level environmental protection in the EU. It could occur, if the cooperation is based generally on the 'lesser denominator' principle and therefore, the higher environmental standards of the European Union would be lowered. It cannot be denied that in some areas the environmental regulation of the United States are more demanding in comparisons with the EU level of protection (e.g. specific energy efficiency requirements, or emission standards in some fields), however in a wide range of other fields, the EU regulation is stricter (e.g. ban of certain heavy metal substances;<sup>26</sup> nanomaterials;<sup>27</sup> some pesticides and biocides,<sup>28</sup> the 'fracking' mining technology, or the most palpable example could be the EU GMO regulation).

The question is how these regulatory differences can be addressed by trade agreements, specifically in the context of the future transatlantic agreement. The regulatory cooperation is not a new phenomenon in the trade relations and practice of the European Union and United States. Even in the 1990s efforts were made in order to establish cooperative institutional mechanisms. The first significant attempt was the 'Transatlantic Declaration on EC-US Relations'.<sup>29</sup> Cooperation on important political and economic matters was laid down as one of the most striking objectives of the Declaration, which had to be achieved through channels of consultations organised at several levels.<sup>30</sup> In 1995 by the signature of the New Transatlantic Agenda (NTA)<sup>31</sup> the initial institutional framework of cooperation were improved. In the NTA the European Union and the United States agreed to further cooperation based on four broad principles: promoting peace and stability, democracy and development around the world; responding to global challenges; and contributing to the expansion of world trade and closer economic relations; and building bridges Across the Atlantic. The NTA set out specific committees and formalised the regulatory cooperation agreements, and launched a series of civil society dialogues between interest groups in business, labour, environmental and consumer policy areas.<sup>32</sup> Although widely regarded as an overall genuine attempt at widening the depth of regulatory cooperation between the EU and US, the NTA was also heavily criticised for not delivering more substantial results. In particular, "it has been claimed that the 'laundry list' of 'deliverables' for each EU-US summit was not only overly bureaucratic, but also failed to address and solve the major trade disputes that affect overall transatlantic relations."<sup>33</sup> In order to reflect on the criticism formulated on the shortcomings of the NTA, the EU and the US have made further steps to enhance the cooperation by establishing the *Transatlantic Economic Partnership* (TEP) in 1998.<sup>34</sup> From the perspective of the environmental policy it was important, that the TEP introduced the mutual recognition agreements (MRAs) as standard instrument, and later in 1999, it was also added 'Transatlantic Early Warning System' to the cooperation. This system required the parties to take the other side's interest into account at an early stage when formulating legislative or regulatory decisions. The main aim of this achievement was to prevent the escalation of new regulation, which would have been based on entirely different concepts or approaches. The system – according to some criticism – institutionalised an obstacle on the legislations also in the field of the environmental policy.<sup>35</sup> In order to improve the transatlantic policy and regulatory cooperation, the parties established a new institution, the

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<sup>26</sup> E.g. substance bans for electrical appliances, in which the use of heavy metals, first of all mercury and lead are prohibited.

<sup>27</sup> A narrower definition applies in the US, which means that the environmental impacts of various materials are not included and their hazards cannot be counteracted. See *Environmental protection under TTIP*(2005) 4–5, Dessau-Roßlau: Federal Environment Agency.

<sup>28</sup> Bioaccumulative and toxic substances (PBTs) and carcinogenic, mutagenic and teratogenic substances (CMRs) are banned in the EU.

<sup>29</sup> *Transatlantic Declaration on EC-US Relations* (1990), available at: [http://eeas.europa.eu/us/docs/trans\\_declaration\\_90\\_en.pdf](http://eeas.europa.eu/us/docs/trans_declaration_90_en.pdf)

<sup>30</sup> E.g. bi-annual consultations to be arranged in the United States and in Europe between, on the one side, the President of the European Council and President of the Commission, and on the other side, the President of the United States; bi-annual consultations between the European Community Foreign Ministers, with the Commission, and the US Secretary of State, alternately on either side of the Atlantic; ad hoc consultations between the Presidency Foreign Minister or the Troika and the US Secretary of State; bi-annual consultations between the Commission and the US Government at Cabinet level; briefings, as currently exist, by the Presidency to US Representatives on European Political Cooperation (EPC) meetings at the Ministerial level.

<sup>31</sup> *The New Transatlantic Agenda* (1995), available at: [http://eeas.europa.eu/us/docs/new\\_transatlantic\\_agenda\\_en.pdf](http://eeas.europa.eu/us/docs/new_transatlantic_agenda_en.pdf)

<sup>32</sup> The dialogues that were initiated by the NTA and developed over time between the EU and the US are many and include: the Transatlantic Business Dialogue (TABD), the Transatlantic Consumer Dialogue (TACD), the Transatlantic Environment Dialogue (TAED) (inaugurated in 1999), the Transatlantic Legislators' Dialogue (TLD) (launched in 1999), and the Transatlantic Labour Dialogue (TALD), the EUUS Financial Markets Regulatory Dialogue, the EU-US Development Dialogue, the EU-US Education Policy Forum, the EU-US Energy Council, the EU-US Task Force on Biotechnology Research, the EU-US Insurance Regulatory Dialogue. NTA generated also a range of unofficial dialogues that are not government sponsored, such as the Transatlantic Policy Network, the Transatlantic Dialogue on Sustainable Development, the Transatlantic Dialogue of Aviation and Climate Change and the Transatlantic Donors Dialogue.....

<sup>33</sup> Alemanno, A. 2014. *The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation*. 27, Brussels: Directorate-General for External Policies of the Union. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET\\_ET\(2014\)433847\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET_ET(2014)433847_EN.pdf)

<sup>34</sup> *Transatlantic Economic Partnership* (1998), available at: [http://eeas.europa.eu/us/docs/trans\\_econ\\_partner\\_11\\_98\\_en.pdf](http://eeas.europa.eu/us/docs/trans_econ_partner_11_98_en.pdf)

<sup>35</sup> As a striking example, it is most likely that the system could prevent the escalation of a dispute such as regarding hush kits. This revolved around the EU legislation banning the use of hush-kit outfitted aircraft in the EU, thus reducing the value of the mostly American used airplanes so equipped and hurting the profits of American hush kit manufacturers. By the time the US authorities and relevant industries became aware of the potential trade consequences stemming from such a proposal, the text was already in second reading in the European Parliament (Alemanno, 27, 2014.)

*Transatlantic Economic Council (TEC)* in 2007. Similar to many of the other initiatives that have been pursued since the early 1990s to advance the goal of deepening the economic cooperation, TEC has received some results regarding EU-US regulatory cooperation in selected areas<sup>36</sup>.

Finally the question can be raised, how the TTIP can add new approaches to the cooperation. Even though the texts of the new agreement are not agreed yet, the EU the draft text and the stance to these topics is already public. The European Commission published its proposal for the design of regulatory cooperation in the free trade agreement between the US and the EU on 10 February 2015.<sup>37</sup> The underlying method, which can be derived from the document, is the harmonisation. The negotiating parties has to identify certain issues, in which harmonisation seems to be feasible, and then, the EU and US regulatory standards should gradually be brought closer through a so called unilateral 'dynamic process' even in the course of the negotiations. This process of harmonisation should also be maintained in bilateral way after the completion of the TTIP negotiations. It is most likely however that the 'dynamic process' will not result in substantial harmonisation, i.e. no unilateral adjustment of US standards to the higher EU environmental regulation will take place. It is because the cost of the higher standards and the consequential loss of competitiveness could influence also the ratification process of the agreement.

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

Two extreme scenarios can be derived from the perspective of the higher and stricter EU environmental standards. First, nothing will happen, in other terms, the EU will not engage into negotiation in order to find a compromise of the harmonisation, and therefore its standards will not be made softer in this regulatory field. The second scenario is, that even though the aim of the above mentioned 'dynamic process' could not fully achieved by the time the agreement is concluded, the harmonisation of standards will continue in the framework of TTIP regulatory cooperation and if the harmonisation will require a compromise of the parties, it would lead to a softening of the precautionary principle method towards the „risk-based“ US approach. This second scenario, namely lowering of the higher EU environmental standards would not only be problematic in ecological but also economic terms. It is because in certain areas, the EU economy has a technological competitive advantage due to higher environmental standards, thus harmonisation with lower US standards or recognition of their equivalence would mean giving up ecological and economic benefits as well.<sup>38</sup>

## 5. Conclusion – How to avoid the ‘race to the bottom’ harmonisation

The role and position of the European Union to the ‘Trade and Environment’ debate, comparing with the US stance, represents a very strong commitment to the real inclusion of environmental concerns into the legal framework of the world trade. It has the consequence from the perspective of the environmental policy that successful compromise can be reached only if the striking divergence between the positions of the parties can be reconciled. However it is hard to pave the way to a mutually acceptable agreement not only because of the broad differences in the positions of the parties, but also because of their specific interest.

As the potential regulatory implications also has shown unavoidable need to strengthen environmental protection in the context of the future agreement in order to avoid both the negative environmental and economic impacts. This risk seems to be tackled with the following two regulatory ‘pillars’ of the future agreement. First, the EU negotiators should pay attention to the opportunity in the “race-to-the-top harmonisation.” For this result, systematic examination would be needed to discover all areas of the environmental regulation, where the harmonisation could bring positive environmental (and also economic) impacts on the both sides of the Atlantic. In addition to that, as a second pillar, important point would be to shape well the text of the regulatory chapter of the future agreement, considering strong rules regarding the environmental policy, specifying the policy leeway of the parties, and giving clear meaning and content for particular principles (e.g. right to regulate, good regulatory practices etc.). If doing so Cecilia Malmström’s tweet will come true.

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<sup>36</sup> E.g. the area of electric cars, ICT services, investment, mutual recognition of organic labelled products; the common understanding on regulatory principles and best practices and the standards bridge building documents, reinforced cooperation in emerging areas such as nanotechnology and e-health etc. See Alemanno, 19, 2014.

<sup>37</sup> See Textual Proposal of the European Commission for legal text on Regulatory Cooperation in TTIP (10 February 2015), available at: [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153120.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf)

<sup>38</sup> E.g. strong EU standards in the certain industrial fields, where the US industry is not yet technologically capable of meeting the same standards, for instance, pollution of the so called “F-gases” (fluorinated greenhouse gases), see Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006.

## Short Bio

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