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*Challenges in TTIP: Regulations, Rules, and the  
Potential Impact on Third Parties*

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## **Introduction**

In 2013 the European Union (EU) and the United States (US) began negotiations on the largest trade and/or investment agreement ever attempted, the Transatlantic Trade and Investment Partnership (TTIP). Certain goods such as shoes, automobiles, and food still carry high tariffs across the Atlantic, and their removal or reduction is part of negotiations. However, various non-tariff barriers (NTBs) constitute greater, and more costly, obstacles for businesses and consumers.<sup>1</sup> NTBs include regulations and rules which directly or indirectly restrict foreign competition by either banning a foreign presence (denying market access), or making it very expensive to compete with nationals. Examples include local product or ownership requirements, limits on business expansion or movement of employees, limitations on when and how companies can bid for contracts, overlapping or duplicate product testing, inspection, and/or certification requirements, and restrictions on certain materials and chemicals. Numerous studies assessing the economic benefits from various levels of reduced or eliminated tariffs and NTBs, find, on average, that removing all tariffs along with half of all NTBs, is estimated to boost EU and US GDP by .4-.8% annually; the economic benefits for the rest of the world are estimated by the EU Commission at €100bn.<sup>2</sup>

More than removing bilateral barriers, the Transatlantic Trade and Investment Partnership represents a strategic vision of transatlantic relations, including job creation, global leadership, and establishing high international standards, where “Mutual recognition of equivalent norms and regulatory coherence across the transatlantic space...not only promise to improve the lives of [Americans and Europeans], but form the core of broader international norms and standards”.<sup>3</sup> Given the size of the transatlantic relationship (€700bn in annual bilateral trade, 44% of global GDP, 32% of trade, and 60% of foreign investments worldwide in 2012), and the importance of respective markets for third parties, agreed standards will become globally dominant.

This paper begins by discussing regulations and rules, and their centrality to TTIP. Thereafter follows brief summaries of progress in three select sectors (agricultural products and food, automobiles, and investments), focusing on their potential standard setting impact,

with important comparisons made to recent agreements with the Republic of Korea and Canada (South Korea-EU, KOREU; South Korea-US, KORUS; Canada-EU, CETA). Though smaller, these bi-lateral FTAs provide an indication of respective side's outer parameters of acceptable compromise, and the standards we can expect from TTIP. The next section looks at general effects on other third countries, especially China, while the conclusion discusses some additional political obstacles to achieving a comprehensive agreement.

### **Regulations and rules**

Ahearne et al (2006) estimates that the EU and the US together account 80 % of global regulations and rules; if the two could harmonize, or make compatible, a majority of these, it would not only tighten the two economies, but also ensure that most other countries would adopt the same standards in order to access the large EU and US markets.<sup>4</sup> Products and services on either side of the Atlantic are generally of equally high quality and safety standards, and the fastest growing part of trade across the Atlantic is intra-firm. Yet within the same sectors different, and decisively institutionalized, regulations and safety practices often endure. Cultural and institutional factors make regulatory compatibility or mutual recognition very sensitive, requiring careful treading in several areas, e.g. pharmaceuticals, pesticides, or Sanitary and Phytosanitary measures (SPS), even when cost savings are evidenced by third parties. For example, the American Food and Drug Administration (FDA) and its European counterpart the European Medicines Agency (EMA) have been working for years within the Transatlantic Economic Council and the High Level Regulatory Cooperation Forum on coordinating inspections assessing the compliance with Good Manufacturing Practices . If an EU host country's regulators inspect a plant, the FDA could accept those results, thereby saving US taxpayers and companies both money and time. Most EU Member States (MS) oppose significant changes to SPS measures, and many object to blocking certain closed professions (notaries, pharmacies, taxis), or liberalizing the distribution of, or investments in, audiovisual services (these were excluded from KOREU and CETA, and removed from the Commission's TTIP negotiating mandate). On the American side, the 1920 Jones Act, which bans foreign shipping between American ports, is considered a "sacred cow" by trade unions and Democrats, and was excluded from NAFTA and KORUS.<sup>5</sup> The EU and the US also have fragmented markets in services. EU insurance companies are obliged to seek business approval in all 50 American states; the same applies to most other professional services across Europe and the US. EU insurance companies must seek business approval in all 50 American states; the same applies to most other professional services across Europe and the US. Some 90% of the EU public procurement market, worth €352 bn,

is open to non-EU companies; for the US the figure is 32% (by comparison, 0% of Chinese and Indian government contracts are open). Representatives from many states are part of the 600-plus American advisers with continuous access to TTIP proposals, but, American states opened additional sectors to foreign bid in 2012, through the WTO's Plurilateral Agreement on Government Procurement, and are reluctant to expand further. The US federal government lacks legal authority to compel changes in state procurement policies, thus making one of Europe's key goals with TTIP, greater access and national treatment at all administrative levels of government, very difficult. Canada (also federal) involved its provinces and agreed to expand market access beyond NAFTA and WTO agreements (CETA, chapter XX), agreeing to quadruple the acquisition level under which European companies' takeover bids are treated equivalent to domestic bids (from C\$344m to C\$1.5bn).<sup>6</sup> CETA is the model TTIP negotiators are referencing in discussions.

There are many different trade and investment-facilitating ways to remove differences between two systems and/or standards, both horizontally and vertically: sector-specific coordination (joint work to avoid unnecessary differences) or equivalency (the recognition by both sides that two regulations produce equivalent standards, examples include organic labelling and civil aircraft regulations);<sup>7</sup> Mutual Recognition Agreements (e.g. the 2004 EU-US MRA on Conformity Assessment of Marine Equipment),<sup>8</sup> harmonization of product standards (e.g. automobile parts), or harmonization of conformity assessment. KOREU, KORUS, and CETA contain commitments to provide national treatments to all goods from the other party (in accordance with GATT. art. III), ensure that accreditation and recognition of conformity assessment bodies in the territory of the other party are done on the same terms used domestically, and, at minimum, abide by the WTO's Technical Barriers to Trade Agreement (TBT).<sup>9</sup> There are general commitments on working together to remove additional regulatory barriers, increase transparency and mutual understanding of respective systems, facilitate access to each other's markets, align regulations with international standards, and identify and promote standards and technical regulations that respect both sides' laws. Crucially, none of the agreements eliminate all tariffs, a likely outcome also in TTIP. Specific safeguard measures are permitted, but cannot conflict with the General Agreement on Tariffs and Trade, article 24 on market liberalization. Thus safeguards cannot extend beyond two years, nor exceed the lowest tariff of either a) that which is accorded a third party through existing Most Favorite Nation (MFN) agreements on the same product, or b) the base rates stipulated in respective treaty's annexes.

KOREU and CETA also contain provisions stating that in service areas not covered by the common European market the EU and MS can “maintain or adopt any measures”; most states also include numerous reservations in each treaty exempting the country or sector from a treaty’s provisions on granting market access to foreign companies and/or providing a foreign company equal treatment to that of a national. Such exemptions can apply across one or more of four modes: cross-border supply, consumption abroad, commercial presence, and the presence of natural persons.<sup>10</sup> Countries (including the EU) also list certain commitments as “unbound”, enabling maximum freedom to alter market access at any future point. Such flexibility is now a recognized necessity in completing FTAs, meaning there will always be exclusions to “open markets”.<sup>11</sup>

Regulatory differences cannot all be eliminated. Regulations often reflect genuinely different constituent preferences and strategies, serving desired public and social objectives, e.g. on health or financial stability. Still, many regulatory differences stem not from divergent preferences and public policy choices, but rather from being devised independent of any transatlantic coordination. The Office of Information and Regulatory Affairs studies the impact of US legislation; the Commission assesses (most) EU legislation. Annual compliance costs with American federal laws and EU level regulations are an estimated €50 bn and €96 bn respectively.<sup>12</sup> Many areas have particularly strong potential for some form of coordination, mutual recognition, or harmonization. One study found that a Transatlantic Regulatory Impact Assessment (TARIA) just on product safety regulations applied on both sides of the Atlantic would improve real American and European income by .05-.1%, by cutting compliance costs.<sup>13</sup> In its initial position paper on TTIP the Commission proposed establishing a permanent institutional mechanism to continuously ensure “...efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices.”<sup>14</sup> The US rejected a specific May 2014 EU suggestion for formalized exchanges, to include impact assessments, in the financial services sector, and there is little prospect of a general TARIA in TTIP; the US prefers to continue with informal dialogue and legislative exchanges.<sup>15</sup>

There is also opposition from regulatory authorities and bureaucracies, who for political reasons (power) and self-interest (jobs and resource allocation) oppose change. Similar factors apply to public opinion, where ideological convictions, fear, and lack of knowledge of the complexity of foreign affairs and trade intermingle to produce often irreconcilable demands (e.g. specific protectionism at home while opening markets abroad, or

opposition to labor standards even when the other country's standards are higher).<sup>16</sup> TTIP, like CETA, will be a mixed agreement, requiring ratification in all 28 MS, thus making domestic opinion a factor in approval. Recent surveys found a majority of Americans viewing trade as an economic opportunity, while 35% see them as a threat to jobs; 76% of Americans and 75% of Europeans in early 2014 said they desire closer regulatory integration with the EU/US respectively.<sup>17</sup> Yet dig a bit deeper and one finds that among Americans aged 50 and above (the largest voting block), those lacking a college education, and among trade union members, support for TTIP is well below 50%; one also finds clear European misgiving about US standards on health and food, with over half of Germans opposed to harmonizing EU and US standards. Beyond figures on GDP and aggregate jobs, explaining the main benefits of modern trade and investment agreements (removing NTBs) to domestic audience remains challenging; leaving policy makers with communication challenges equal to, or greater than, the technical and legal obstacles faced by negotiators.

### *Agriculture and Food*

Public perceptions thus matter in accepting new rules and standards. Europeans generally express high trust in scientific research, which guides most public policy (e.g. climate or energy). However, for most Europeans food, and therefore food safety, is a large part of culture; its social value far exceeds its nutritional value, and cannot be explained by scientific evidence.<sup>18</sup> The *precautionary principle* – the process of proving a negative, of not allowing anything unless scientifically proven not to be harmful – is the guiding approach in setting policy (note: the US also applies this approach, on e.g. pharmaceuticals and homeland security). However, many Europeans reject scientific studies that find certain food processes safe, if such processes have long been thought dangerous.<sup>19</sup> An example is the MS' rejection of a GM corn (MON810), a product deemed safe by the European Food Safety Authority; Maize 1507 faces a similar fate. Citing inconclusive scientific studies on the long-term safety of products such as chlorine-rinsed poultry, hormone treated beef, and various Genetically Modified Organisms (GMOs) proposed for the EU market, the Commission has been forced to keep these on its list of “unacceptables” (for tariff and quota free entry into the EU).<sup>20</sup> This was also the case in KOREU and CETA, thus we should expect little else in TTIP.

The US interprets WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (ASPS) as allowing practices currently rejected in the EU and Korea. All Trade Promotion Authority (TPA) bills introduced in the US Congress since 2011 have recognized countries' rights under the WTO Agreement on the Application of SPS measures to allow

certain restrictions based on health concerns, while also insisting that all trading partners (read EU) must ensure “...science-based justification be provided for a sanitary or phytosanitary measure if the measure is more restrictive than the applicable international standard [and]...appropriately recognize the equivalence of health and safety protection systems of exporting countries” (read US).<sup>21</sup> A WTO dispute panel also ruled that the EU ban on hormone treated beef was not based on proper risk assessment, but noted that in the absence of accepted definitions of risk or common international standards for beef it was not strictly illegal or arbitrarily protectionist.<sup>22</sup> Nonetheless, several leading members of Congress have stated their opposition to TTIP absent significantly improved market access for American meat and poultry.

KORUS, KOREU, and CETA incorporate the ASPS, and establish a committee to work, among other things, on enhancing mutual understandings of procedures and to oversee implementation of the agreement. CETA also includes measures to establish equivalencies in each other’s inspection and certification systems. The three agreements exclude the most “contentious” agricultural products from tariff elimination, which is likely also in TTIP. The standard setting effect is that certain agricultural products can now be legitimately excluded from complete tariff elimination based on reasons of “serious domestic interests.”

### *Automobiles*

In the rapidly developing field of e-vehicles, both sides stressed in 2011 the need for “...common ground to advance the development of joint approaches in standardization for electric vehicles and their connection to the grid infrastructure...[to] reduce cost and complexity for businesses and make this new technology more acceptable for consumers.”<sup>23</sup> A concrete step was the July 2013 opening of the EU- US center for interoperability of electric vehicles and the smart grid in Chicago. The center works with two European Joint Research centers in the Netherlands and Italy, where research is also done on related aspects of renewable energy and distribution. The Atlantic partners continue promoting harmonization in these and related areas wherever possible, including in the World Forum for Harmonization of Vehicle Regulations (WP.29) Working Groups within the framework of the United Nations Economic Commission for Europe (UNECE), and the subgroups on E-vehicle Safety and the Environment, which the two created.<sup>24</sup>

The traditional vehicle sector also exemplifies how agreements on tariffs, regulatory schemes, and standards, could vastly improve competitiveness, expand markets, and set global standards. As automotive equals, the EU and the US are partners and competitors; 10%

of bilateral trade is in autos and auto parts, and the EU and US combined account for 32% of global production (the EU produces more) and 35% of sales (the US is the largest market).<sup>25</sup> Elimination of all vehicle tariffs (e.g. small trucks and SUVs face American tariffs of 25%) is assumed a TTIP minimum; with similar levels of safety (accident statistics per capita are nearly identical), divergent standards on things like headlights, windshields, or side impact testing, remain the focus. Business leaders urge transatlantic partners to “...act now...making use of first-mover advantage” to create a transatlantic auto market that improves competitiveness and sets global standards.<sup>26</sup> Intra-EU auto trade increased when the EU internal market was established, with more cross national purchases, and the same is expected with a transatlantic market place.<sup>27</sup>

KORUS requires Korea to abolish its tariffs faster and remove more NTBs than the US. American automakers can export 25,000 vehicles to Korea under US safety standards (which is equivalent to a MRA since sales from all manufacturers averaged 4-5,000 annually 2001- 2010). Korea agreed to harmonize regulations on 42 items related to vehicle standards, and all US automobiles within 19 percent of Korean emissions and fuel economy standards are recognized as compliant in Korea through 2015.<sup>28</sup> The two must work on harmonizing standards through the WP.29, and all “technical regulations” affecting trade must be based on “...available scientific and technical information, related processing technology, or intended end-uses of products.”<sup>29</sup> The core safety standards in the WP.29 apply in KOREU, and 29 other UNECE regulations will be adopted by Korea by 2016; only tractors, snow mobiles and construction vehicles are excluded.<sup>30</sup> Korea agreed that remaining differences (not subject to equivalence or harmonization) must be applied “...in such a way as to avoid market access problems.”<sup>31</sup> Tests carried out in the EU under EU standards are accepted in Korea, and in an example of treaty harmonization, it was agreed that when KORUS emission standards (more lax than in KOREU) took effect they became applicable also to KOREU.<sup>32</sup> Rules of origin requirements are set at a minimum of 55% of regional value content (using ex-works method, roughly equivalent to the build-down methods used in KORUS); a percentage which also applies to most other manufactured or processed items.

CETA resulted in 17 standards from the WP.29 (UNECE) being recognized by Canada as equivalent to its own, the first time a NAFTA member has done this, and emissions standards are those in KOREU and KORUS. There is derogation for 7 years for automobiles and trucks with less than 50% non-originating material, following which 60% of the build-down value must originate in the EU or Canada respectively. However, that figure drops to 30% for first 100,000 vehicles, far exceeding what either side imports from the other. If TTIP

is enacted American parts will also count as Canadian for the sake of origin (like Canadian beef count as part of America's beef export quota to Europe). With MFN clauses in all agreements, and high CETA quotas, manufacturers could produce the same vehicles for all four markets; with TTIP we could see the first truly global automobile.<sup>33</sup>

### *Investments*

With significant existing mutual investments this section of TTIP is largely meant to set standards that can be applied in negotiations with other countries and regions. To this effect, most of the provisions in the 2012 Joint Statement of the European Union and the United States on Shared Principles for International Investment are slated for inclusion in the TTIP.<sup>34</sup> Both the EU Commission and the US also insist on some form of Investor-State Dispute Settlement system (ISDS); one which ensures governments can fully legislate and regulate in the interest of its citizens and prevents frivolous suits, while protecting legitimate claims when governments renege on explicit commitments, adopt laws which clearly violate trade agreements, or the state expropriates company assets.<sup>35</sup> Europeans have longstanding experience with ISDS through Bilateral Investment Agreements (BITs), which began in Europe after WWII as investors wanted assurances when investing in former colonies. MS have signed 1,400 BITs, compared with the mere 48 signed by the US.<sup>36</sup> EU investors also use ISDS more than their US counterparts, especially within the EU, even as state prevails in most cases, both within the EU and globally.<sup>37</sup>

US negotiators argue that “A comprehensive 21st century trade agreement should include appropriate protections for investors...and that does include ISDS. It is important that these provisions respect national regulatory space and that nothing we do on investor protection interferes with this.”<sup>38</sup> The two most recent Congressional TPA bills also include ISDS. The EU Commission notes “...that ISDS until now has led to some very worrying litigation against the state,” but insists that an ISDS will both safeguard legitimate European public policy objectives and ensure that European investors are adequately protected from American treaty circumvention such as local favoritism, “padded contracts”, and “pork-barrel politics.”<sup>39</sup>

The inclusion of ISDS in TTIP intends to display a united front in safeguarding investor rights, and set standards that can be invoked in negotiations with China, Russia, and other countries lacking strong, independent, and transparent legal systems. An EU/US failure would undermine joint efforts to ensure players like China abide by international law and adhere to western standards. Yet its benefits are contested. Consumer groups on both sides of

the Atlantic have increasingly raised opposition, and a six-month Commission suspension of negotiations on this section in order to elicit stakeholder feedback appears only to have galvanized opposition on both sides of the Atlantic.<sup>40</sup> Ikenson (2014) argues that investments should always carry certain risks, and ISDS encourages discretionary investments while socializing private risks by having the public pay if the state is successfully sued. ISDS is thus unnecessary regulatory overkill by presuming that governments do not want FDI, will mistreat foreign investors, and that domestic courts are inadequate to cope with legal challenges.<sup>41</sup> Kleinheisterkamp (2014) finds that ISDS cannot compensate for or override weak local laws in America, while Erixon (2014) finds ISDS necessary that very reason. Having national courts settle investment disputes means governments must transpose the content of investment-protection into domestic law; yet, most countries' laws generally treat foreign entities differently than national ones, and states can change relevant laws and regulations to fit a political whim.<sup>42</sup> Thies (2013) argues that the Court of Justice of the European Union shies away from interfering with other international institutions and trade organizations because of its concerns with political interference and the potential costs to the EU;<sup>43</sup> not unlike the U.S. Supreme Court's punting on "political questions", preferring to leave those questions legislators and policy makers as often as possible. Though rarely discussed, this could strengthen the case for an ISDS.

Other agreements indicate ISDS will be included in TTIP. KOREU liberalized investment regulations in most sectors short of defense. MFN treatment applies to all covered investments, and it allows for 100% European ownership in Korean telecommunications and financial services, as well as for complete repatriation of data to national headquarters. There is an extensive ISDS with exclusions for certain sectors –APSA in particular – similar to KORUS. CETA has an ISDS applicable to most areas, including SPS measures and financial services. Either side can still adopt prudential measures, while allowing private challenges against "...regulatory action which does not have a mutually recognised prudential character".<sup>44</sup> The EU Commission expressed contentment with the result, noting that ISDS will not apply to an investment made prior to establishment, and that CETA may be a precursor for TTIP, "Given the challenge to reconcile the NAFTA approach with those of the various BIT models already existing in Member States, the outcome presents a well-balanced text, which will stand us in good stead for other negotiations".<sup>45</sup> CETA may again serve as a model for TTIP.

However, there are new hurdles. Investments and services require data storage, and the EU and US have embarked on divergent paths regarding data protection. Progress on the

voluntary Safe Harbor Agreement notwithstanding,<sup>46</sup> in March 2014 the Court of Justice of the European Union invalidated an EU Directive requiring private telephone companies to store customer data.<sup>47</sup> This directly conflicts with American policy. Two months later the court decided that individuals have a right— under certain circumstances – to request the removal of links to outdated information.<sup>48</sup> In response to concerns over data and privacy the EP adopted the General Data Protection Regulation (GDPR) in March 2014, sending it to the Council for likely approval in late 2014.<sup>49</sup> Intended to simplify regulations through a “one stop shop” while strengthening privacy protection, the GDPR excludes small business from most of the requirements. However, studies indicate that many companies find several of its provisions prohibitively expensive and largely unworkable.<sup>50</sup> A failure to institutionalize data protection in TTIP would also impede discussions with third parties with less scrupulous legal systems.

### **Other general effects on third parties, especially China**

The concern in Washington and Brussels is not of a wholesale replacement of the western built international trade and investment system – China has built its economic success on entering and slowly adapting to this system – but of modifications away from key elements, such as copyright and patent protection, rule of law and dispute settlement for investors, labor laws, and product safety. China’s questionable adherence to international agreements is evidenced by WTO dispute panel rulings, especially on autos and parts,<sup>51</sup> but neither the US nor the EU are today independently capable of convincing China to open markets, reject protectionism, cease discriminatory practices, and protect intellectual property. A completed TTIP – especially if accompanied by a completed TPP – signals western unity and commitment to an open international system. Chinese exporters will then have to comply with western based standards, while exporters to China adhering to these standards will be so numerous as to constitute a second level of external pressure on the Chinese authorities to change domestic rules and regulations.

The Chinese leadership is increasingly concerned with being sidelined and subjected to standards set by its economic rivals through agreements such as the Transpacific Partnership, TTIP, and the Trade in Services Agreement (TiSA).<sup>52</sup> During the global financial crisis China showed some willingness to assume some responsibility for international stability, engaging in the G20, refraining from new protectionism, and increasing the float of its currency.<sup>53</sup> ). In proposing negotiations on separate investment agreements with the EU and the US, China indicated a readiness to use a negative rather than positive list of sectors

open to foreign investors. It also wants to join the TSA. While the EU sees this as a way of engaging China, the US is opposed. It is suspicious of China's intentions in light of its aggressive stance with its neighbors in recent years, and questionable adherence to international agreements, evidenced by WTO dispute panel rulings.<sup>54</sup> The Regional Comprehensive Economic Partnership and the Conference on Interaction and Confidence Building Measures in Asia are two regional Chinese initiatives that have been reawakened and increasingly used to balance against what it perceives as the west's attempt to retain power in international organizations, maintain western international norms in the Asian region, and undermine China's regional influence. Finding ways to engage China, and Russia, recognizing their concerns with TPP and TTIP without diluting either, will prove necessary in order to cement commitments to a transparent and rule based international trade and investments system.

Others, including Canada, Mexico, and Turkey, and have also expressed a desire to be consulted. Ülgen (2014) discusses the prospects and benefits of third-party consultation on and accession to TTIP. A TTIP caucus of interested third countries to present joint proposals to the EU and the US could materialize as negotiations progress; "[t]he principle of mutual equivalence to eliminate nontariff barriers" and utilizing "existing regional trade agreements .... as the building blocks in the new international trading regime set up by TTIP" fits generally with the transatlantic stance of using KORUS and KOREU as base models on which TTIP expands and deepens, but both TTIP partners reject any formal role for third parties while negotiations proceed.<sup>55</sup>

Given TTIP's scope and ramification for third parties the issue of diversion has also been raised. Krueger (1999) argues that trade diversion generally results from bilateral agreements because rules of origin requirements discriminate against non-signatories; tariff elimination diverts purchases to less efficient suppliers, and the rules and implementation periods among FTAs rarely, if ever, overlap.<sup>56</sup> Yet Lawrence (1999) show that traditional static analysis is inapplicable to new FTAs where reductions in NTBs create deeper economic interdependence; where service trade, foreign investment, and other economic activities create dynamic effects, making them "welfare enhancing".<sup>57</sup> A Bertelsmann Report in 2013 identifies some trade diversion among rich countries stemming from a comprehensive TTIP.<sup>58</sup> But a 2014 World Economic Forum report, using a different methodology, finds very low trade diversification from mega-regional trade deals. The report instead highlights benefits for third countries: as TTIP spurs economic growth in the US and EU this increases consumer purchases of other countries' products, while common transatlantic regulatory

approaches reduce costs for exporters and importers – crucial as 70 percent of global trade consists of intermediate goods and services, and capital goods.<sup>59</sup> Other studies on modern multilateral regional agreements also show minimum diversion between mature economies, with increased intra-industry trade, job creation both in countries from which FDI emanates and the recipients, and increased trade with third countries.<sup>60</sup> Both the EU and US already have zero-tariff imports on most non-agricultural products from less developed countries, and are negotiating with countries whose sectors may be impacted by a complete or near complete removal of tariffs (e.g. TPP and Chile’s seafood and Japanese automobiles). Thus, while the application of Most Favored Nation (MFN) clauses to third countries offers a means of moderating any negative externalities emanating from TTIP, this will not be a crucial issue for developing countries. Extending MFN treatment on services to countries willing to abide by the rules and regulations agreed in TTIP expands common standards and increases global convergence, in effect creating a “WTO plus”.

## **Conclusion**

Though some conspicuous differences exist, KORUS, KOREU, CETA are sufficiently similar, and contain MFN clauses on most issues, to enable Canada and Korea to relatively easily adopt standards in, or even accede to, TTIP, thus quickly broadening agreed standards to four parties across three continents.<sup>61</sup> Though these agreements are templates for TTIP, it also deserves remembering that in previous negotiations the EU and the US used their size and attractiveness to extract greater concessions from and reforms in the other signatories, resulting in (a) longer transition periods with higher retained tariffs on imports during those transitions; (b) greater recognition of their own standards and greater access to the other’s markets; (c) exclusion of goods and services they wanted to protect (e.g. domestic shipping in the US and GMOs and audiovisuals in the EU). But the EU and the US have also shown they can successfully work together to establish standards through international standard setting bodies, such as the International Standardization Organization and the International Medical Device Regulatory Forum; 17 medical device standards had been mutually recognized by 2014. This sector was also among the first where the EU and US exchanged proposals (“text” in trade lingo) in May 2014. Yet TTIP requires unprecedented mutual accommodation, where finding overlap in respective actor’s range of acceptable outcomes will prove more challenging than anything previously encountered.

Economic benefits and standard setting impacts notwithstanding, policy makers and legislators assess trade and investment agreements by a different metric. Politics, not

economics, will determine the fate of TTIP, and opponents appear to have made some inroads with the public.<sup>62</sup> Ensuring sufficient domestic support for TTIP will require astute communication and marketing regarding the financial and safety benefits to citizens, as well the geopolitical gains from common standards. KORUS had was reopened by Congress and renegotiated despite TPA, something the EU will not accept; CETA ratification throughout 2015 will be a test-run for the EU.

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<sup>1</sup> This paper includes insight gained from several personal discussions with EU and US negotiators, stakeholders, and public officials in 2012, '13, and '14 as part of research done for a large four-year project focusing on explaining the political processes, challenges to, and benefits from TTIP to a non-specialized audience.

<sup>2</sup> Francois, Joseph. 'Reducing Transatlantic Barriers to Trade and Investment An Economic Assessment. Final Project Report Prepared under implementing Framework Contract TRADE10/A2/A16, March 2013: 54; Felbermayr, Gabriel, Heid, Benedik and Lehwald, Sybille. 'Transatlantic Trade and Investment Partnership (TTIP): Who benefits from a free trade deal?' Bertelsmann Foundation, June, 2013: 19; de Gucht, Karel. Speech by EU Commissioner for Trade, The Council on Foreign Relations, 21 May 21 2013, <http://www.euintheus.org/press-media/speech-by-commissioner-karel-de-gucht-ttip-a-bilateral-agreement-with-multilateral-impacts/>; Erixon, Fredrick, Bauer, Matthias. 'A Transatlantic Agreement: Estimating the Gains from Transatlantic Free Trade in Goods.' European Center For International Political Economy Occasional Paper 4, 2010, <http://www.ecipe.org/publications/a-transatlantic-zero-agreement-estimating-the-gains-from-transatlantic-free-trade-in-goods/>. Roughly 80% of benefits from TTIP are estimated to stem from removing NTBs.

<sup>3</sup> Hamilton, Daniel, Schwartz, Pedro. 'A Transatlantic Free Trade Area - A Boost to Economic Growth?' New Direction - The Foundation for European Reform, SAIS 2012: 4; '... it is very likely that many countries...will adopt the same standards and regulations.' Felbermayr, Heid, and Lehwald, 2013: 28.

<sup>4</sup> Ahearne, Alan *et al.* 'The EU and the governance of globalization.' Bruegel Working Paper, No. 2006/02; Felbermayr, Heid, and Lehwald, 2013:28, fn.3.

<sup>5</sup> The 'Jones Act' includes the Merchant Marine Act of 1920, 46 App. U.S.C. § 883; the Passenger Vessel Act, 46 App. U.S.C. §§ 289, 292, and 316; and 46 U.S.C. § 12108. Annex 2-A of Free Trade Agreement Between the United States and the Republic of Korea of 30 June 2007 explicitly rejects MFN or national treatment on this issue.

<sup>6</sup> As a result of Canada's existing FTAs the investment thresholds will rise to the same level for the US, Mexico, and other countries with which Canada has an FTA.

<sup>7</sup> The 2012 *EU-US Organic Equivalence Arrangement* (EU Regulation No 126/201) allows products certified as organic by the USDA or EU organic standards may be sold, labelled, and represented as organic in both territories. The *Agreement between the United States of America and the European Community on cooperation in the regulation of civil aviation safety* (Council of the European Union, 8312/09, Brussels, March 1, 2011) promotes reciprocal acceptance of findings and approvals of airworthiness and environmental certification and maintenance by technical agents and safety authorities, based on systems that produce equivalent results, though processes and procedures may be different..

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<sup>8</sup> Council Decision 2004/425/EC of 21 April 2004 on the conclusion of an Agreement between the European Community and the United States of America on the Mutual Recognition of Certificates of Conformity for Marine Equipment , Official Journal of the European Union L 150, 30.04.2004, p.42.

<sup>9</sup> Agreement on Technical Barriers to Trade, World Trade Organization,

[http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)

<sup>10</sup> For exemptions in KOREU see Annexes 7-A-4 through 7 D and EU's reconstructed offer for services and investments in TTIP of May 26, 2014 (leaked document available online).

<sup>11</sup> United Nations. 'Preserving flexibility in IIAs: The use of reservations.'

UNCTAD Series on International Investment Policies for Development, New York and Geneva, 2006, at [http://unctad.org/en/docs/iteiit20058\\_en.pdf](http://unctad.org/en/docs/iteiit20058_en.pdf)

<sup>12</sup> Dudley, Susan Warren, Melissa. 'Regulators Budget Report.' Weidenbaum Center on the Economy, Government, and Public Policy, 11 May 2012,

[http://wc.wustl.edu/files/wc/2012\\_Regulators\\_Budget\\_2.pdf](http://wc.wustl.edu/files/wc/2012_Regulators_Budget_2.pdf)

<sup>13</sup> Morrall III, John. 'Determining Compatible Regulatory Regimes between the U.S. and the EU.'

US Chamber of Commerce, 2011: 7, 32, 36.

<sup>14</sup> 'EU-US Transatlantic Trade and Investment Partnership Trade Cross-cutting Disciplines and Institutional Provisions' EU Commission, Initial EU position paper July 2013 at [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151622.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf). The EU sees this as part of its 'living agreement' model, allowing for continuous talks, modifications, and potentially incremental regulatory compatibility or convergence, particularly in the chapter on regulatory coherence. Many American officials oppose such a model.

<sup>15</sup> As of July 2014 the EU has withheld an offer on financial services because the US opposes including financial regulations.

<sup>16</sup> See e.g. 'Transatlantic coalition rejects anti-consumer trade deal.' *Deutsche Welle*, 13 June 2013, <http://www.dw.de/transatlantic-coalition-rejects-anti-consumer-trade-deal/a-16874500>; Freund, Caroline. 'Encouraging a Manufacturing Renaissance through the Transatlantic Trade and Investment Partnership.' Peterson Institute for International Economics, 2 May, 2014.

<sup>17</sup> Pew Global Attitudes Project, April, 2014,

<http://www.pewglobal.org/2014/04/09/support-in-principle-for-u-s-eu-trade-pact> ;

German Marshall Fund 2007, [www.gmf.org](http://www.gmf.org).

<sup>18</sup> cf.e.g. Kraus, Daniel. 'Italian and European Business.' Peterson Institute for International Economics, 2 May 2014.

<sup>19</sup> Pew Global Attitudes Project, 2012, <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap/>.

<sup>20</sup> See e.g. 'Explanatory Memorandum to accompany the EC Proposal for a Council Regulation implementing Regulation (EC) No 853/2004 of the European Parliament and of the Council as regards the use of antimicrobial substances to remove surface contamination from poultry carcasses,' 29/10/2008; 'Scientific Option of the Panel on Biological Hazards on a Request from DG SANCO on the assessment of the possible effect of the four antimicrobial treatment substances on the emergence of antimicrobial resistance,' EFSA (2008) Scientific Option of the Panel on Biological Hazards on a Request from DG SANCO on the assessment of the possible effect of the four antimicrobial treatment substances on the emergence of antimicrobial resistance,' *European Food Safety Agency Journal* 2008, 659, pp.1-26. There are 50 GMOs approved for use in the EU, but the approval process is very long and uncertain. See Regulation (EC) 1829/2000, Directive 2001/18/EC, Regulation (EC) 1830/2003, and Regulation (EU) 619/2011 Commission Regulation (EU) 619/2011 laying

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down the methods of sampling and analysis for the official control of feed as regards presence of genetically modified material for which an authorisation procedure is pending or the authorisation of which has expired, *Official Journal of the European Union*, L166, 25.6.2011, pp. 9-15.

<sup>21</sup> H.R. 3830 Bipartisan Congressional Trade Priorities Act of 2014, introduced 19/1/2014, p. 6-7; cf. also H.R. 6538, To establish trade negotiating objectives with respect to the application of sanitary and phytosanitary measures to agricultural products, and for other purposes, introduced 9/21/2012.

<sup>22</sup> DISPUTE DS26 European Communities — Measures Concerning Meat and Meat Products (Hormones), World Trade Organization, Appellate Body ruling, November 2011, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds26sum\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds26sum_e.pdf).

<sup>23</sup> ‘Report of the Transatlantic Economic Council Co-chairs to the Summit,’ State Department, Bureau of European and Eurasian Affairs, November 28, 2011, <http://www.state.gov/p/eur/rls/or/178424.htm>.

<sup>24</sup> WP.29 is a subsidiary of the Inland Transport Committee (ITC) of the United Nations Economic Commission for Europe (UNECE); it works to develop and/or harmonize technical regulations for vehicles. See <http://www.unece.org/trans/main/wp29/faq.html>

<sup>25</sup> International Organization of Motor Vehicle Manufacturers, 2013.

<sup>26</sup> Freund, 2014.

<sup>27</sup> Removing all tariffs and 10% of existing US and EU NTBs would (under a static model) increase EU vehicle and parts exports to the US by 71%, and increase US exports to the EU by 207%; eliminate tariffs and 25% of NTBs and the figures rise to 149% and 347%. Source: Commission Staff Working Document (2013) ‘Impact Assessment Report on the Future of EU-US trade Relations.’ p. 43,

[http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150759.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf); Centre for Economic Policy Research (2013) ‘Reducing Transatlantic Barriers to Trade and Investment.’ [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf).

<sup>28</sup> Information in this section is from Free Trade Agreement between the United States of America and The Republic of South Korea Chapter 2 (Sections A, D and F), Chapters 11, 12, 14; ‘Agreed Minutes on regulations pertaining to automotive fuel economy and greenhouse gas emissions,’ December 3, 2010.

<sup>29</sup> KORUS Chapter 9:7(2).

<sup>30</sup> KOREU, Annex 2-C, Articles 1-9, Annex 2-C-1.

<sup>31</sup> ‘The EU-Korea Free Trade Agreement in practice.’ Luxembourg: Publications Office of the European Union, 2011, p. 14

<sup>32</sup> KOREU. Annex 2-C, ft.3

<sup>33</sup> The most homogenized car, the Ford Fusion, is only 80% similar across the Atlantic.

<sup>34</sup> April 2012, European Commission

[http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc\\_149331.pdf](http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf)

<sup>35</sup> ‘Bipartisan Congressional Trade Priorities Act,’ Sec 2, par. 4(G); Ignacio Garcia Bercero, June 24, 2014.

<sup>36</sup> A history of ISDS: Lester, Simon. ‘Liberalization or Litigation? Time to Rethink the International Investment Regime.’ Cato Policy Analysis no. 730, 2013. EU regulations enable BITs to remain in force (transitionally) under new EU-level bilateral agreements. See Regulation (EU) No. 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries.’ OJL 351/40 of 20/12/2012.

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<sup>37</sup> Recent Developments in Investor-State Dispute Settlement, UNCTAD, No. 1, April, 2014, [http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf) (2/5/2014); Donnan, Shawn. 'France offers trade embrace even as European objections grow.' *Financial Times*, February 11, 2014:3; Abbott, Roderick, Erixon, Frederick, Ferracane, Francesca, 'Demystifying Investor-State Dispute Settlement (ISDS)' DEMYSTIFYING INVESTOR-ECIPE Occasional paper 5/2014; On what is normally included in BITs see Donnelly, Shaun. 'The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs Conference.' CATO, 20 May, 2014.

<sup>38</sup> US lead negotiator Mullaney in Fox, Benjamin. 'Germany opposes EU-US investor protection scheme.' *EUObserver*. 15 March,2014, <http://euobserver.com/news/123473>

<sup>39</sup> EU Trade Commissioner de Gucht in Whittington. Les. 'Implementing Canada-EU free-trade deal could take another two years.' *The Star*, 24 April, [http://www.thestar.com/news/canada/2014/04/24/implementing\\_canadaeu\\_freetrade\\_deal\\_could\\_take\\_another\\_two\\_years.html](http://www.thestar.com/news/canada/2014/04/24/implementing_canadaeu_freetrade_deal_could_take_another_two_years.html)

<sup>40</sup> Bermingham, Finbarr 'TTIP: 150,000 Register Concerns Over Controversial ISDS Clause of Free Trade Agreement' *International Business Times* July 24, 2014.

<sup>41</sup> Ikenson, Dan. 'The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs Conference.' CATO, 20 May, 2014.

<sup>42</sup> Erixon, Frederick. 'Investor-state disputes have put a spanner in the works for TTIP.' *European Voice*, 19 June, 2014: 4.

<sup>43</sup> Thies, Anne. *International Trade Disputes and EU Liability*. Cambridge University Press, 2013. The Bernstein exception to the Act of State Doctrine allows judicial rulings if it does not hurt US foreign relations, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>44</sup> EU-Canada Comprehensive Economic and Trade Agreement Investor-to-State Dispute Settlement. 5 March, 2014:7, <http://eu-secretdeals.info/upload/2014/02/Investment-in-CETAMarcMaes-S2B-analysis-140306.pdf>.

<sup>45</sup> EU Commission, CETA – Summary of negotiating results following the break-through on 18<sup>th</sup> October. But the Commission has also noted that "TTIP was a special case", which appears at odds with the goal of setting global standards.

<sup>46</sup> 'Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.' Official Journal L 281, 23/11/1995 P. 0031 – 0050. American companies application of Safe Harbor see [http://export.gov/safeharbor/eu/eg\\_main\\_018476.asp](http://export.gov/safeharbor/eu/eg_main_018476.asp)

<sup>47</sup> Judgment of the Court (Grand Chamber), 8 April 2014 in cases C-293/12 and C-594/12.

<sup>48</sup> Judgment of the Court (Grand Chamber) of 13 May 2014. Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González.

<sup>49</sup> European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD))

<sup>50</sup> Erixon, Frederick et al. 'The economic importance of getting data protection right: Protecting Privacy, Transmitting Data, Moving Commerce.' European Center for International Political Economy, Brussels, 3/2013, [https://www.uschamber.com/sites/default/files/legacy/reports/020508\\_EconomicImportance\\_Final\\_Revised\\_lr.pdf](https://www.uschamber.com/sites/default/files/legacy/reports/020508_EconomicImportance_Final_Revised_lr.pdf)

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<sup>51</sup> E.g. ‘China –Anti-dumping and countervailing duties on certain automobiles from the United States’ (WT/DS440/R). WTO Dispute Settlement Report, May 23, 2014 at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds440\\_e.htm#bkmk440r](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds440_e.htm#bkmk440r)

<sup>52</sup> Guoyou Song, Wen Jin Yuan. ‘China’s Free Trade Agreement Strategies.’ Center for Strategic and International Studies. *The Washington Quarterly*, 2012, Vol. 35 No 4, pp. 107-119; Layne, C. (2014), *After the Fall, International Politics, U.S. Grand Strategy, and the End of the Pax Americana*, New Haven: Yale University Press.

<sup>53</sup> Drezner, Daniel. *The System Worked: How the World Stopped Another Great Depression*. Oxford: Oxford University Press, 2014.

<sup>54</sup> see e.g. WTO (2014), *China –Anti-dumping and countervailing duties on certain automobiles from the United States*, World Trade Organization Dispute Settlement Report WT/DS440/R

<sup>55</sup> Ülgen, Sinan. “Locked In or Left Out? Transatlantic Trade Beyond Brussels and Washington”

Carnegie Europe, June 3, 2014, <http://m.ceip.org/brussels/publications/?fa=55777&lang=en>

<sup>56</sup> Krueger, Anne O. “Free Trade Agreements As Protectionist Devices: Rules of Origin”, in Melvin, James R., James C. Moore, and Raymond Riezman (eds.) *Trade, Theory, and Econometrics: Essays in Honor of John C. Chipman*. Routledge Press. New York. 1999. pp. 91-101.

<sup>57</sup> Lawrence, Robert Z. ‘Regionalism, Multilateralism, and Deeper Integration: Changing Paradigms for Developing Countries.’, in Mendoza, Miguel Rodriguez, Patrick Low, and Barbara Kotschwar (eds.) *Trade Rules in the Making*. Organization of American States/Brookings Institution Press, Washington, DC, 1999.

<sup>58</sup> Schoof, Ulrich, Petersen, Thiess, Felbermeyer, Gabriel. ‘Who benefits from a transatlantic free trade agreement?’ Bertelsmann Stiftung Policy brief 2013/04.

<sup>59</sup> World Economic Forum. ‘Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?’ July 2014, at [http://www3.weforum.org/docs/GAC/2014/WEF\\_GAC\\_TradeFDI\\_MegaRegionalTradeAgreements\\_Report\\_2014.pdf](http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf); OECD, WTO and World Bank Group. ‘Global Value Chains: Challenges, Opportunities, and Implications for Policy.’ Report prepared for submission to the G20 Trade Ministers Meeting, Sydney, Australia, 19 July 2014, at [http://www.oecd.org/tad/gvc\\_report\\_g20\\_july\\_2014.pdf](http://www.oecd.org/tad/gvc_report_g20_july_2014.pdf) ; European Commission. ‘Transatlantic Trade and Investment Partnership: The Economic Analysis Explained,’ September 2013.

<sup>60</sup> Wolf, Martin. “A Korean-American strand enters trade’s spaghetti bowl”, *Financial Times*, April 3, 2007:8; Roland-Hoslt, David, Reinart, Kenneth and Shiells, Clinton R. ‘NAFTA Liberalization and the Role of Nontariff Barriers.’ *North American Journal of Economics & Finance* 1994, Vol. 5, no. 2:163; World Economic Forum, 2014:24; Oldenski, Lindsay. ‘American Manufacturing Growth Since NAFTA.’ Peterson Institute for International Economics and Georgetown University, July 14, 2014, at <http://piie.com/publications/papers/oldenski20140715ppt.pdf>.

<sup>61</sup> Compared with KORUS, KOREU includes fewer rights under an ISDS, bans trade sanctions when violations of workers’ rights and environment provisions occur, covers fewer services (e.g. audiovisual), but allows slightly higher non-regional content value on autos (because ex-works calculations exclude domestic freight costs).

<sup>62</sup> Sherwin, Emily. ‘Tripping over TTIP: Obstacles overshadow EU-US trade pact.’ *Deutsche Welle* Feb 13, 2013, at <http://www.dw.de/tripping-over-ttip-obstacles-overshadow-eu-us-trade-pact/a-17426907>; Pew Global Attitudes Project, April, 2014.