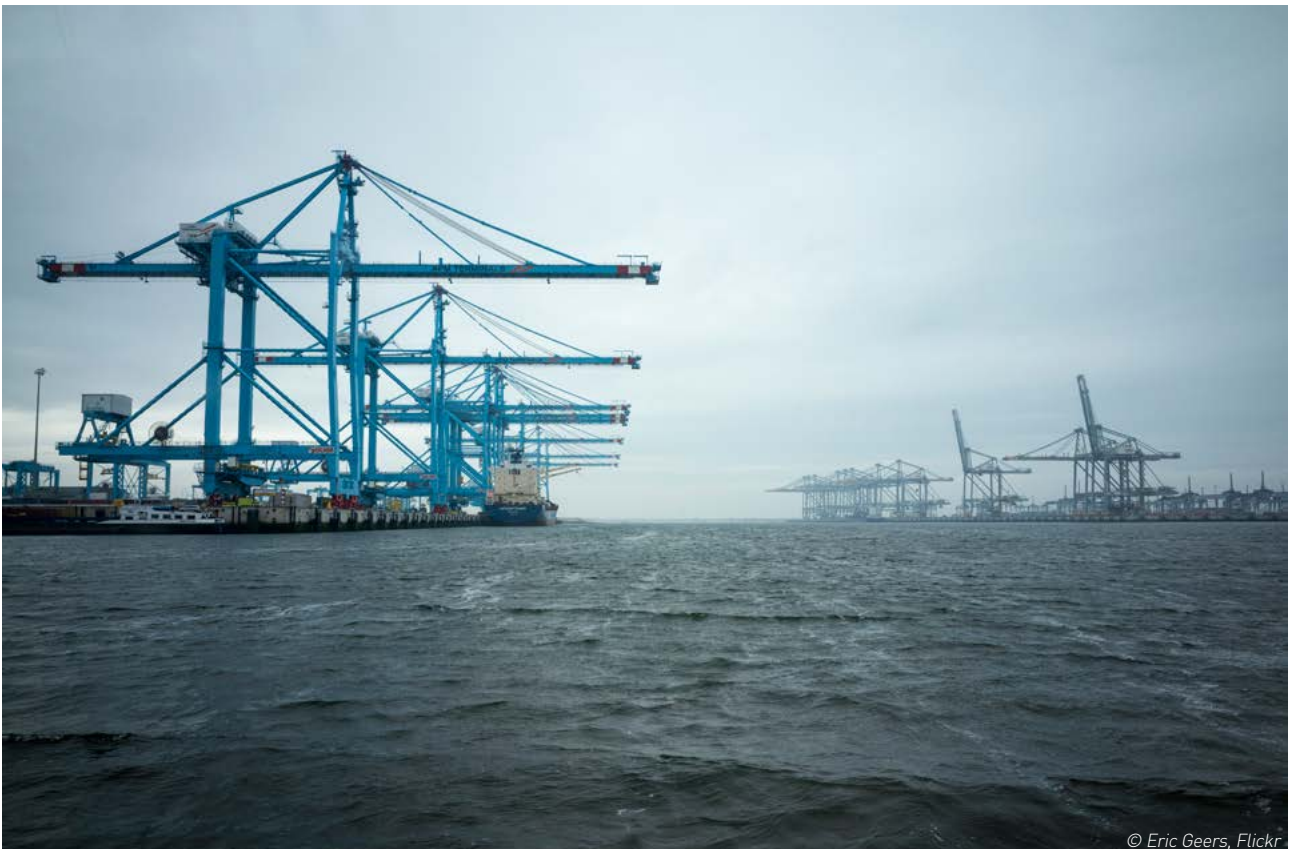


BRIEFING PAPER: TECHNICAL BARRIERS TO TRADE (TBT) PROPOSAL IN TTIP



TTIP AND TECHNICAL BARRIERS TO TRADE

One of the major aims of TTIP – Transatlantic Trade and Investment Partnership, the major future trade deal between the United States and Europe, – is to address trade barriers due to divergences in regulatory approaches across the Atlantic through what is known as ‘regulatory cooperation’. According to the European Commission, “the ultimate goal [of TTIP] would be a more integrated transatlantic market where goods produced and services originating in one party in accordance with its regulatory requirements could be marketed in the other without adaptations or requirements”.¹

The TBT (Technical Barriers to Trade) proposal by the Commission (proposed March 2014, made public January 2015) is part of this regulatory cooperation effort.² The proposal does not apply to services, food safety, or animal and plant health measures (SPS³ measures). However, the scope of the chapter is still very broad because it applies to:

- > “Technical Regulations”
(mandatory product rules, such as rules on the size, composition, and packaging of products);
- > “Standards”
(voluntary⁴ product rules), and;
- > “Conformity Assessment Procedures”
(rules on how to verify whether products meet mandatory or voluntary product rules, such as rules on testing, inspection, and certification).

An example of an EU rule that would fall under the provisions of the proposal is REACH (the EU’s chemicals regulation program, Registration, Evaluation, Authorisation and restriction of Chemicals) and most rules adopted under it. This is despite the European

Parliament’s resolution on TTIP stating that the treaty should not affect REACH.⁵ Other examples of rules that could be affected by the proposal are those on toy-safety, cigarette packaging, labelling for organic products, and eco-labelling in general.

It is important to note that this aspect of the TTIP negotiations is not new. The new generation of EU free trade agreements or FTAs (EU-Singapore FTA, EU-Canada FTA (CETA), EU-Korea FTA) contain TBT chapters with similar provisions as can be seen in the EU proposal. Moreover, the EU proposal seeks to incorporate into the TTIP text the World Trade Organisation (WTO) TBT Agreement, which already establishes basic regulatory cooperation mechanisms and disciplines at the multilateral level under the WTO.⁶ The TBT Agreement itself has the main disciplining effect on the ability for Parties to regulate and this chapter does not add many constraining additional obligations.

There are clear interests for US and EU businesses in increasing regulatory cooperation, since removing technical barriers to trade will reduce the costs of producing and testing goods. A car or a phone could be produced for both markets at the same time, instead of having to separate production lines for the US and EU markets. Moreover, regulatory cooperation may result in increasing the business influence in rulemaking and establish mechanisms that make it easier for Parties (ie EU and US administrations) and business to challenge rules that result in technical barriers to trade. These interests apply to EU business as much as they apply to US business.

For consumers and civil society, the rules that could be challenged by big business may come at the expense of safety, environmental protection, and consumer information.

AREAS TO WATCH

1. Transparency requirements

The Commission proposal contains obligations on transparency that go beyond the WTO TBT Agreement on transparency. The obligations in the Commission proposal seek to ensure that the other Party and business is informed from an early state in the rule making process about rules that can have an impact on trade. Parties are obliged to respond in *written form* to comments of the other Party, and there is a general publishing obligation of drafts of technical regulations as well as the need to set up a public register for all technical regulations.⁷

While transparency in government is generally a positive step for citizens, there may be detrimental effects if transparency makes business lobbying aimed at lowering levels of protection more effective.

In that respect, these obligations will help the other Party and business to become aware of and influence the rule-making process from an early stage of the rulemaking process, for instance when the Parties engage in regulatory cooperation. The information provided could also help in preparing a legal challenge under the dispute settlement mechanisms of the TTIP, as well as under the WTO. The proposal also contains a specific obligation allowing importers to appeal administrative decisions banning imports of specific products.⁸

2. Regulatory cooperation

The Commission proposal gives Parties **procedural and participatory rights in the legislative process of the other Party**.

Under article 4 of the Commission proposal, the United States and the European Union have the right to request bilateral discussions on the possibility of developing harmonised or compatible technical regulations. They may also, on a bilateral basis, discuss the elaboration of compatible technical regulations or enhance this compatibility of existing technical regulations.

Article 4 also places a “best efforts” obligation on both parties to ensure that products originating from one of the two Parties “can be marketed or used across all the territory of each Party on the basis of a single authorisation, approval or certificate of conformity”.

Moreover, there are various mechanisms in the Commission proposal that may make it easier to challenge the implementation of product rules. In general, these obligations relate to taking into account

information from the other Party or business in relation to compliance with each other’s technical regulations. The EU proposal also seeks to discipline conformity assessment processes so that standard setting and conformity assessment is separated. This means that an organisation that makes a rule cannot be the same organisation that checks whether a product complies with that rule.

The Commission proposal raises concerns over unwarranted foreign business influence in the regulatory process of each Party. The exporting Party is generally not concerned with the levels of environmental or health protection applicable in the importing country, but with facilitating access to the market of its business. These processes can be used to influence regulators to reconsider draft rules or amend them. Moreover, consumers and civil society should be wary of a “**lock-in effect**”: harmonisation, even if done with the highest level available, may constrain the regulator later in adopting more stringent rules.

3. Consumer information

A positive aspect of the Commission proposal from a consumer perspective is the obligation to take measures against false indications of origin. However, consumers may overall be negatively impacted by the EU proposal. Technical regulations are key tools for transmitting information to consumers, through labelling and marking requirements. EU industry, in particular, has complained about burdensome labelling rules in the United States.⁹

The Commission proposal would discipline labelling and open such rule-making up to transatlantic business lobbying through the transparency and regulatory cooperation mechanisms. New rules on plain packaging

of cigarettes and organic labels, for instance, would have to be discussed with the United States authorities if the United States wishes to develop similar rules. Also, the Commission proposal obliges the Parties to limit compulsory marking requirements “as far as possible to what is essential and to what is the least trade restrictive to achieve the legitimate objective pursued”. This may inhibit marking rules requiring the indication information through a mark or a symbol for example on the country of origin, safe use of dangerous products, or the production process used, especially when the rules for the use of such marks are detailed and contain exceptions.

CONCLUSION

The TBT proposal by the Commission is by and large based on already existing WTO commitments by both Parties. However, its provisions seek to go beyond existing commitments and improve their functioning between the two Parties. In particular, the TBT proposal gives the other Party procedural and participatory rights in the regulatory process of the other Party. It also reinforces transparency obligations, enabling business to be involved at an early stage of the regulatory process. These aspects could negatively affect regulatory outcomes aimed at a high level of protection of public interests.



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1. Initial EU Position Paper on "Trade, Cross-cutting disciplines and Institutional provisions", 16 July 2013, p. 3
2. The TTIP contains a number of chapters on regulatory cooperation: there are horizontal chapters which apply to all sectors covered by the agreement and chapters for specific sectors, such as chemicals and cars. The TBT chapter only covers product rules.
3. SPS stands for sanitary and phytosanitary measures which are measures on food safety, animal and plant health.
4. Standards can be used as a means of attesting compliance with technical regulations. While they are essentially voluntary (in the sense that it is not legally required to comply with a particular standard), in both the EU and the US, it is common that technical regulations state that a product that is in compliance with a certain standard will in principle conform to the technical regulation in question.
5. European Parliament resolution of 8 July 2015, at 2 (c) (i) and (iii) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN>
6. The WTO TBT agreement contains rules that discipline product rules. Product rules cannot be discriminatory, should be as much as possible based on international standards, and should not be more trade restrictive than necessary. The text of the TBT agreement can be found here. Both the EU and the US are party to this agreement.
7. Article 5 of the Commission proposal.
8. Article 5 [4] of the Commission proposal.
9. Eurochambres Position Paper "Eurochambres' views and priorities for the negotiations with the United States for a Transatlantic Trade and Investment Partnership (TTIP)", page 11.