



The **E15** Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM
FOR SUSTAINABLE DEVELOPMENT



**US Efforts to Ensure that Regulation
Does Not Present Trade Barriers**

Steve Charnovitz

November 2015

E15 Task Force on
Regulatory Systems Coherence

Think Piece

Co-convoked with



ACKNOWLEDGMENTS

Published by

International Centre for Trade and Sustainable Development (ICTSD)
7 Chemin de Balexert, 1219 Geneva, Switzerland
Tel: +41 22 917 8492 – E-mail: ictsd@ictsd.ch – Website: www.ictsd.org
Publisher and Chief Executive: Ricardo Meléndez-Ortiz

World Economic Forum
91-93 route de la Capite, 1223 Cologny/Geneva, Switzerland
Tel: +41 22 869 1212 – E-mail: contact@weforum.org – Website: www.weforum.org
Co-Publisher and Managing Director: Richard Samans

Acknowledgments

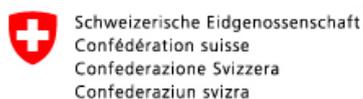
This paper has been produced under the E15 Initiative (E15). Implemented jointly by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15 convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global and investment trade system for sustainable development.

For more information on the E15, please visit www.e15initiative.org/

The Task Force on Regulatory Systems Coherence is co-convened with the European University Institute (EUI) www.eui.eu/

This study was completed on 11 October 2015.

With the support of:



Canada

And ICTSD's Core and Thematic Donors:



Citation: Charnovitz, Steve. *US Efforts to Ensure that Regulation Does Not Present Trade Barriers*. E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/

The views and opinions expressed in this publication are those of the authors and do not reflect the views of ICTSD, World Economic Forum, or the funding institutions.

Copyright ©ICTSD, World Economic Forum, and the European University Institute, 2015. Readers are encouraged to quote this material for educational and non-profit purposes, provided the source is acknowledged. This work is licensed under the Creative Commons Attribution-Non-commercial-No-Derivative Works 3.0 License. To view a copy of this license, visit: <http://creativecommons.org/licenses/by-nc-nd/3.0/> or send a letter to Creative Commons, 171 Second Street, Suite 300, San Francisco, California, 94105, USA.

ISSN 2313-3805

ABSTRACT

Making domestic regulation more coherent and expanding cooperation between regulators has the promise of lowering the unnecessary costs of regulation for companies and consumers and thus translating into greater economic output for national economies. At a time when global economic growth has been slowing, policymakers are renewing their interest in reducing trade barriers from regulation. At the multilateral level, the World Trade Organization (WTO) has successfully completed the negotiation for the Agreement on Trade Facilitation and the new Information Technology Agreement. At the regional level, regulatory issues have been on the table in the negotiations for the Atlantic and Pacific trade agreements. The Trans-Pacific Partnership (TPP) negotiations were given greater impetus in June 2015 when the United States enacted new fast track trade negotiating authority.

The E15 Task Force on Regulatory Systems Coherence is examining the problems posed by differences in regulation and regulatory regimes across markets and considering alternative approaches that could be taken by governments and the business community to reduce regulatory barriers to trade. To assist those deliberations, this study looks at US approaches, on top of trade liberalisation negotiations, for reducing trade barriers arising from domestic and foreign regulations. Introducing the problem of optimising regulation, this study examines the recent experience of the US government in carrying out programs to reduce the impact of regulations on US economic growth and on exports and imports of goods and services. The study goes on to examine US government efforts to cooperate with other governments on mutual regulatory challenges.

As close observers have noted, European Union-US regulatory cooperation is now being pursued on multiple fronts more ambitiously than ever before. Yet so far these efforts have failed to achieve a standardised process for cooperative regulation on an ongoing basis. The Transatlantic Trade and Investment Partnership (TTIP) negotiations provide an opportunity to strengthen regulatory cooperation, but, at present, both sides of the Atlantic are moving with insufficient boldness and imagination. Through a comparison of the transatlantic initiatives addressing regulatory trade barriers with the across-the-board initiatives, the study shows that the geographic component is critical to gaining buy-in of busy officials. The geographic cooperation also succeeds in enlisting the support of the business community, which renders the project more practical and improves the likelihood of an economically useful outcome. More effective efforts to build in balanced participation by economic and social actors is important for future public support of regulatory cooperation initiatives.

CONTENTS

Introduction	1
The Problem and Opportunity Of Regulation	1
US Internal Responses	2
US Transnational Responses	4
Conclusions and Recommendations	6
References	7

LIST OF ABBREVIATIONS

CFTC	Commodity Futures Trading Commission
CSPC	Center for the Study of the Presidency and Congress
EU	European Union
FSB	Financial Stability Board
FTC	Federal Trade Commission
G-7	Group of Seven
ISDS	investor-state dispute settlement
ITC	International Trade Commission
ITDS	International Trade Data System
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
SEC	Securities and Exchange Commission
TABC	Trans-Atlantic Business Council
TACD	Trans-Atlantic Consumer Dialogue
TEC	Transatlantic Economic Council
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
US	United States
WTO	World Trade Organization

INTRODUCTION

Making domestic regulation more coherent and expanding cooperation between regulators has the promise of lowering the cost of regulation to companies and consumers and thus translating into greater economic output for national economies (Bollyky 2012: 2). At a time when global economic growth has been slowing, policymakers are renewing their interest in reducing trade barriers from regulation. At the multilateral level, the World Trade Organization (WTO) has successfully completed the negotiation for the Agreement on Trade Facilitation and the expanded Information Technology Agreement. At the regional level, regulatory issues are a key part of the negotiations for the Atlantic and Pacific trade agreements. The recent announcement of a successful conclusion to the Trans-Pacific Partnership (TPP) negotiations is expected to provide for some improved regulatory cooperation, but the details of the agreement have not yet been publicly released. When the US Congress and President Obama agreed to new trade promotion authority in June 2015, this law strengthened US negotiating abilities and assuredly contributed to securing the TPP deal. Whether the re-institution of fast track procedures will have a similar positive impact on the EU-US negotiations remains to be seen. The trade debate in the US Congress pointed to new political fault lines on the broad questions of pursuing regulatory harmonisation in trade agreements. Indeed, one close observer, former Treasury Secretary Lawrence Summers, has called into question US practices to demand that trading partners change their domestic policies as a price for obtaining a free trade agreement (2015).¹ Already, one issue, regarding data protection in biologic patents, may prove to be an important sticking point whenever the President submits the TPP for Congressional approval.

The E15 Task Force on Regulatory Systems Coherence is examining the problems posed by differences in regulation and regulatory regimes across markets and considering alternative approaches that could be taken by governments and the business community to reduce regulatory barriers to trade. To assist those deliberations, this study looks at US approaches, in addition to trade liberalisation negotiations, for reducing the trade barriers arising from domestic and foreign regulations. Following this introduction in Part 1, the discussion in Part 2 presents an analytical framework for considering the problem of optimising regulation. Part 3 examines the recent experience of the US government in carrying out programs to reduce the impact of regulations on US economic growth and on exports and imports of goods and services. Part 4 examines US government efforts to cooperate with other governments on mutual regulatory challenges. Part 5 offers conclusions and recommendations.

THE PROBLEM AND OPPORTUNITY OF REGULATION

In thinking about regulatory cooperation,² one should recall the purpose of domestic economic regulation, which is to remedy market failure and attain needed public goods.³ Because of constant changes in market players and technology, the challenge for the economic regulator is to assure that the benefits of regulation not only exceed the costs at the time a regulation is imposed, but also that the benefits continue to exceed costs as regulations get older. Regulators are subject to error due to regulatory capture and due to the arrogance of power.

Aside from this ongoing temporal challenge, there is an even more important spatial challenge when the authority of the regulator does not coincide with the territory of the market being regulated or when the spatial jurisdiction of one regulator overlaps with another national regulator. This latter phenomenon occurs prominently in antitrust policy, product regulation of traded goods, prudential financial regulation, tax collection, judicial resolution of insolvency, and monetary policy. When regulators from two governments have differing regulatory philosophies or move at different speeds with the same philosophy, there will be inevitable tensions when the regulations of one side affect the markets of another. Since the foreign regulator does not have the same principal-agent relationship with democratic decision-making as the domestic regulator notionally does, the concerns about regulatory legitimacy are apt to be magnified when the regulations of one country have significant effects on the markets and market participants of another country. Different legal systems and different structures of delegated administrative authority can further magnify the inherent tensions.

1 According to Summers, the "reflexive presumption in favor of free trade should not be used to justify further agreements" ... on "the protection of investments and the achievement of regulatory harmonization and establishment of standards in areas such as intellectual property."

2 Although topic of this paper is regulation, a similar paper could be written on how to optimize government subsidies, particularly subsidies that cause trans-border effects. Political scientist Theodore Lowi is credited with originating the idea in 1969 of a tenure of statutes act in which government programs would periodically terminate unless renewed. This idea of a framework "sunset" law was popularized in the US in the 1970s and often included a requirement of an evaluation of whether a program was useful or counterproductive (Charnovitz 1977:, 64).

3 This study uses the term "economic" regulation to also include health, social, and environmental regulation designed to address market failure or generate public goods. Knowledge itself is a public good.

To reduce frictions between regulators, governments have utilised several different approaches, including bilateral pacts, transgovernmental cooperation, and multilateral hard law rules or soft law norms (Farrell and Newman 2015). For example, the WTO has hard law disciplines on product standards that create unnecessary barriers to trade. The Organisation for Economic Co-operation and Development (OECD) has its influential Transfer Pricing Guidelines. The North American Free Trade Agreement (NAFTA) in 1993 set a pattern for future trade agreements to incorporate investor-state dispute settlement (ISDS). The NAFTA environmental (and labor) side agreement established an important precedent for an independent review of national implementation of the enforcement of domestic law in a situation involving goods or services traded between the territories of the parties. The Financial Stability Board (FSB), established by the Group of Seven (G-7) in 2009, is a Swiss not-for-profit association consisting of national financial regulators and central bank officials. In 2012, the Camp David Declaration stated, "Recognising that unnecessary differences and overly burdensome regulatory standards serve as significant barriers to trade, we support efforts towards regulatory coherence and better alignment of standards to further promote trade and growth" (para. 8).

Sometimes transgovernmental and intergovernmental cooperation is challenged as being in tension with national policy autonomy and constitutional principles. At present, there are many objections to ISDS and the FSB on those grounds (Warren 2015; Wallison and Gallagher 2015: A13). In the recently enacted Bipartisan Congressional Trade Priorities and Accountability Act of 2015, the Congress included a (little noticed and) unique provision in US law to address the "sovereignty" impact of new US trade agreements.⁴ Unlike previous legal standards on the relationship between trade agreements and subnational US law, this provision makes clear that new international trade treaties are trumped by not only federal law, but also state and local law (19 USC §4207).

Effective international regulatory cooperation has two goals. First, international rules and norms can help governments learn and use best practices on intrinsic challenges such as learning from science, regulating in the face of scientific uncertainty, achieving stakeholder participation, and avoiding conflicts of interest. The achievement of such regulatory coherence at the domestic level is not something that can be discovered in a laboratory.⁵ Rather, experience has shown that in some fields regulators will achieve a value-added race to the top through regulatory competition.⁶ Of course, regulatory competition also has the potential of yielding a bad result through the much-feared race to the bottom that occurs if regulators under-regulate to prevent a loss of national competitiveness. Second, regulatory cooperation can help governments bridge differences between overlapping regulations governing the same market. Depending on the ambition of the cooperation (or coordination), governments may seek mutual understanding of their regulations, mutual recognition of certifications or

other data, or deeper integration that could be characterised as "harmonisation."

An effective tool kit exists for achieving these two goals. Many mechanisms can be used as highlighted by the OECD.⁷ For example, good regulation can be enhanced through public participation, especially using new techniques of online regulatory information (Coglianese 2012). Dispute resolution procedures also play an important role, such as to resolve a claim that one country's regulators are improperly discriminating against the economic actors of another country.

US INTERNAL RESPONSES

Systematic US policy initiatives to prevent unnecessary trade barriers from US regulations began in the Trade Agreements Act of 1979. In Section 402 of that law, the Congress directed federal agencies not to "engage in any standards-related activity that creates unnecessary obstacles to the foreign commerce of the United States, including, but not limited to, standards-related activities" that violate non-discriminatory treatment, that fail to base standards on international standards (if appropriate), and that fail to base standards on performance criteria (if appropriate) (19 USC §2532). In Section 403, the Congress directed the President to take reasonable measures "to promote the observance by State agencies and private person" of requirements equivalent to those imposed on federal agencies (19 USC §2533). In Section 413, the Congress established a procedure for the Secretary of Commerce to assure that domestic private persons who participate in private international standard-setting organisations provide "adequate representation of United States interests ..." (19 USC §2543). No study of the implementation of these provisions has come to my attention, and I am not aware of any use of these provisions with reference to state agencies and private standard-setting organisations.

In 1981, an early Reagan Administration initiative was Executive Order 12291 to promote "well-reasoned regulations" by US agencies. The Executive Order applied to new regulations, review of existing regulations, and the

4 | Public Law 114-26, Section 108..

5 | See US Chamber of Commerce (undated 2015: 1), defining "regulatory coherence" as being about good regulatory practices, transparency, and stakeholder engagement in a domestic regulatory process.

6 | See generally Esty and Geradin (2001). Lebl uses the term "co-petition" to mean a new vision for the US to compete and cooperate with the EU at the same time (US2007: 57).

7 | See OECD (2013: Table 1.1); OECD (2014).

development of legislative proposals and basically sought to assure that the benefits of new regulations outweigh the potential costs. Notwithstanding the Trade Act of 1979, President Ronald Reagan's Executive Order promoting cost-benefit analysis gave no attention to avoiding obstacles to US commerce.

The Reagan-era template was revised several times after 1981 with little attention given to the international dimension. In 1993, President Bill Clinton revoked Executive Order 12291 and replaced it with a new Executive Order 12866 on Regulatory Planning and Review. A key purpose of this new Executive Order was to "restore the integrity and legitimacy of regulatory review and oversight," and the Order stated that "Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public."⁸ Although this analysis was to consider whether a regulation is suited to its purpose, the Executive Order did not address a key gap in the Reagan-era Order which omitted any attention to regulations that create unnecessary obstacles to foreign commerce or regulations that impose disproportionate burdens on foreign economies. In 2002, President George W. Bush promulgated a new Executive Order 13258 to amend 12866 and did so again in 2007 with Executive Order 13422. Neither of those Bush-era Orders address burdensome barriers to US trade. In 2011, President Obama issued Executive Order 13563 that makes further amendments to the program on Regulatory Planning and Review. This Order states general principles of regulation and emphasises the importance of public participation. In May 2012, President Obama issued a new Executive Order 13610 that expanded provisions for public participation, agency priority setting, and agency accountability. As with the Bush Administration Orders, none of these Orders addresses burdensome barriers to US trade.

The first Executive Order specifically addressing international regulatory cooperation came in the Obama Administration in May 2012 with Executive Order 13609. This Order directs federal agencies to "address unnecessary differences in regulatory requirements between the United States and its major trading partners" when "stakeholders provide adequate information to the agency establishing that the differences are unnecessary."⁹ In addition, for regulations that an agency identifies as having "significant international impacts," the agency is directed to consider "any regulatory approaches by a foreign government that the United States has agreed to consider under a regulatory cooperation council work plan."¹⁰ At that time, according to the OECD, the only regulatory work plans that the US had agreed to were with Canada and Mexico (2013: 39).¹¹ In February 2014, President Obama issued Executive Order 13659 on "Streamlining the Export/Import Process for America's Businesses." This Order specifically addresses international trade and states as a purpose to "reduce supply chain barriers for commerce." In its operative provisions, however, this

Order focuses only on improving the International Trade Data System (ITDS) established by the Congress in 2006 to provide a "single window" through which businesses transmit information about the importation and exportation of cargo. The ITDS is a means by which US agencies "interact with traders" and the Order calls for "a reduction of unnecessary procedural requirements that add costs to both agencies and industry and undermine our Nation's economic competitiveness." The Order calls for participating agencies to utilise the ITDS by the end of 2016. Aside from the slow pace of implementation, customs experts have criticised the ITDS for excluding some of the most burdensome regulatory requirements such as permits, licenses, and certifications (Neville 2015: 27–28).

Executive Order 13659 also established a Border Interagency Executive Council with a mandate to "develop policies and processes to enhance coordination across customs, transport security, health and safety, sanitary, conservation, trade and phytosanitary agencies with border management authorities and responsibilities to measurably improve supply chain processes and improve identification of illicit shipments." Among the functions of the Council are to encourage other countries to develop similar single window systems and to "engage with and consider the advice of industry and other relevant stakeholders regarding opportunities to improve supply chain management processes, with the goal of promoting economic competitiveness through enhanced trade facilitation and enforcement."¹²

The organisation of the Council is noteworthy because its narrow range of representation sits in tension with Executive Order 13659's emphasis on public participation. The Council is chaired by the Secretary of Homeland Security (or his designee) and includes senior level representatives from agencies that provide approval before goods can be imported and exported, representatives from other agencies with border management interests, and representatives from the Executive Office of the President. In other words, the Council is comprised only of federal bureaucrats or federal political appointees. The Council fails to feature any participation from business, labor, consumers, or environmental groups. In addition, President Obama missed the opportunity to be internationally minded by inviting foreign regulators to participate.

8 | Executive Order 12866, 30 Sept. 1993, Section 1(b)(3).

9 | Executive Order 13609, 1 May 2012, Section 3(c).

10 | Executive Order 13609, 1 May 2012, Section 3(d).

11 | The US-Mexico High Level Regulatory Cooperation Council had agreed to a joint work plan in Feb. 2012.

12 | Executive Order 13659, 19 Feb. 2014, Section 5(e).

Just as the Congress in the 1979 Trade Agreements Act legislated on US regulations that create unnecessary obstacles, the Congress returned to this topic in the next major US trade policy legislation after the 1979 Trade Act, which was the Omnibus Trade and Competitiveness Act of 1988. Unfortunately, however, in the same way that the promise of the 1979 provisions was not achieved, the 1988 provision failed to achieve its intended purpose.

In Section 5421 of the 1988 Trade Act, Congress directed not only the head of agencies but also the President to

include in every recommendation or report made to the Congress on legislation which may affect the ability of United States firms to compete in domestic and international commerce a statement of the impact of such legislation on (1) the international trade and public interest of the United States, and (2) the ability of United States' firms engaged in the manufacture, sale, distribution, or provision of goods or services to compete in foreign or domestic markets.

This requirement for a competitiveness impact statement was authored by Congressman Don Pease, and in the House-Senate conference committee, a six-year sunset was added.

Although this procedural innovation had great promise, nothing of value ensued. Notwithstanding the law, the Bush Administration did not submit competitiveness impact statements. In 1992, this deficiency was reviewed by the quadripartite US Competitiveness Policy Council, which called on the Administration to include the competitiveness impact statement in each new recommendation for legislation and called on the Congress to insist that such statements be submitted and to take them fully into account (US Competitiveness Policy Council 1992: 34–35).¹³ Hopes that the incoming Clinton Administration would begin submitting such statements were dashed, however, and this novel requirement expired in 1994 (2 USC § 194[b]; Echeverri-Carroll and Ayala 2008: 3). No study has come to my attention explaining why the Clinton Administration refused to implement the law regarding competitiveness impact statements.

Another US initiative has been the E-Government Act of 2002. This law established a federal Office of Electronic Government (headed by a Chief Information Officer) and a Chief Information Officers Council, composed of federal bureaucrats from across the government. Although the law discusses the benefits of electronic government for interagency collaboration, the law does not address in detail regulatory cooperation across governments.¹⁴ The work of the Office is summarised in an annual White House report and the most recent report on E-Government Act implementation was released in February 2015.¹⁵ A perusal of this Report reveals no discussion of transgovernmental regulatory cooperation or parallel e-government initiatives in North America or Europe. There is also no mention of the Services Trade Restrictiveness Initiative.

What lessons can be learned from these cross-cutting initiatives since 1979? First, no evidence has come to light demonstrating significant positive results from unilateral, official self-review of the competitive impact of US regulations. Second, while there may be features of the US ITDS that could be emulated by other countries after US efforts are completed in 2017, other models will surely blossom given that the new WTO Agreement on Trade Facilitation mandates that Members endeavor to establish a single window for traders to submit documentation for importing, exporting, and transit.¹⁶ In addition, while the ITDS addresses an important technical need regarding US customs, one should remember that its agenda covers only a sliver of the overall trade barrier agenda.

The new US trade negotiating authority enacted in 2015 expands on the principal US negotiating objectives for "Regulatory Practices" enacted by the Congress in 2002. The new objective specifically calls for "increased regulatory coherence," "convergence of standards development processes," "regulatory compatibility through harmonisation, equivalence or mutual recognition," encouraging "the use of international and inoperable standards," and the protection of undisclosed proprietary information.¹⁷ The new US law also contains a new negotiating objective regarding "good governance, transparency, the effective operation of legal regimes, and the rule of law of trading partners."¹⁸

US TRANSNATIONAL RESPONSES

This section looks at the recent experience in bilateral and transnational attention to regulatory barriers to trade, in the form of European Union (EU)-US cooperation. In contrast to the internal practice discussed above, the bilateral practice discussed below has proven useful. From a theoretical

13 Recognizing the analytical challenges in conducting an impact assessment, the Council's reports offered a conceptual framework for thinking through competitiveness linkages. The Council did not specifically discuss the resources and staffing that would be needed to properly implement the federal legal requirement.

14 The law does state that agencies shall link their performance goals to key groups, including other governments (44 USC §3501 note).

15 See report at https://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/final_fy14_e-gov_act_report_02_27_2015.pdf.

16 WTO Agreement on Trade Facilitation, WT/L/931, July 2014, Article 10.4.

17 Public Law 114–26, Section 102(b)(7).

18 Public Law 114–26, Section 102(b)(21).

perspective, this differential pattern can be explained by the proposition that attention to the transborder effect of regulation is best carried out by representatives from both sides of the border and both sides of the transaction. Another theoretical proposition that emerges from recent practice is that across-the-board efforts may be less effective than other approaches, such as sectoral initiatives, because neither stakeholders nor bureaucrats have sufficient incentive to participate in exercises merely for the general interest.

This study chooses the US-EU cooperation initiatives rather than US-Canada initiatives because the former are broader and because of the relevance of current transatlantic regulatory cooperation to the ongoing consideration of new approaches in the Transatlantic Trade and Investment Partnership (TTIP) now being negotiated.

But a paper could also be written about US-Canadian technical cooperation, which harks back to the Joint Committees on Economic Cooperation established in 1941.¹⁹ The most recent Canada-US initiative was the 2011 establishment of the Regulatory Cooperation Council consisting of government officials from both countries.²⁰ The Council is not an independent agency and does not appear even to have a website. To its credit, however, the Council has engaged stakeholders in consultations. Among the Council's terms of reference is that "Each country will maintain its own sovereign regulation—mutual reliance on the other country's system to inform one's own decision-making, and closer alignment of existing federal regulatory systems, consistent with domestic law, will be the focus."²¹

Leaving aside mid-century post-war antecedents, comprehensive EU-US regulatory cooperation began only two decades ago and has thickened progressively since the 1990s. The first major initiative was launched at the EU-US Madrid Summit in 1995 as the New Transatlantic Agenda and the Transatlantic Marketplace. This official effort also stimulated the creation of the private sector Transatlantic Business Council, which spurred the approval of mutual recognition agreements in six sectors in 1997 (Frost 1998: 1). At the EU-US London Summit in 1998, the two sides established the Transatlantic Economic Partnership. An assessment of the partnership conducted by the European Commission in 2000 found that joint progress had been made in regulatory cooperation, including consumer product safety, food safety, biotech, and competition. On the other hand, the assessment noted the difficulty "to have established regulations and practices in both sides changed in order to take into account the other party's interests and concerns."²² In 2002, the two sides agreed on voluntary "Guidelines on Regulatory Cooperation and Transparency." One of those Guidelines, for example, called on regulators to "examine opportunities to minimise unnecessary divergences in technical regulations through means such as achieving harmonised or compatible solutions or to consider the use of mutual recognition, as may be appropriate, in specific cases."²³ In 2004–05, the two sides agreed to Roadmaps

for EU-US Regulatory Cooperation and Transparency. In 2008, the Secretariat General of the European Commission and the US Office of Management and Budget co-authored a comparative analysis of regulatory impact assessment guidelines.²⁴

In 2007, the EU and the US established a Transatlantic Economic Council (TEC) co-chaired by senior government officials from both sides. Today, the TEC continues to superintend ongoing official cooperation to "further integrate the transatlantic economies."²⁵ A joint official report in February 2015 found that the TEC "has succeeded in fostering cooperation" in emerging sectors.²⁶ For example, one project was the development of common standards, test procedures and tools to promote universal compatibility and interoperability between electric vehicles and supply equipment.

Catalysed by periodic summits in 2009, 2010, 2011, and 2014, EU-US cooperation has continued to expand in many fields involving regulation such as energy and energy security, environmental regulation, science and technology, transport and aviation, and cyberspace. In the 2014 Summit statement, the two sides reaffirmed the goals of "increasing regulatory compatibility while maintaining the high levels of health, safety, labour and environmental protection our citizens expect of us; and formulating joint approaches to rules that address global trade challenges of common concern" (26 March: para. 5).

Transatlantic regulatory cooperation is being discussed in the current TTIP negotiations, but little detail is publicly available. A citizen on either side of the Atlantic might be puzzled by the fact that the EU's website on TTIP presents

-
- 19 | Agreement concerning Joint Committees on Economic Co-operation between the United States of America and Canada, 17 March and 6–7 June 1941, reprinted in ILO (1943: 171–74).
 - 20 | A recent study of US-Canada regulatory cooperation can be found at <http://www.oecd.org/gov/regulatory-policy/canada-usregulatorycooperatiouncouncil.htm>.
 - 21 | See report at <http://actionplan.gc.ca/page/rcc-ccr/terms-reference-united-states-canada-regulatory-cooperation-council>.
 - 22 | Transatlantic Economic Partnership. 2000. Overview and Assessment, DG Trade. E.3, Oct.
 - 23 | Guidelines on Regulatory Cooperation and Transparency, April 2002, para. 15.
 - 24 | Review of the Application of EU and US Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment. 2008. Final Report and Conclusions, May.
 - 25 | See website at <http://www.state.gov/p/eur/rt/eu/tec/c33255.htm>.
 - 26 | Transatlantic Economic Council. 2015. "Cooperation on Innovation and Growth." 19 Feb. Another recent report summarizes TEC accomplishments over the preceding two years. See Transatlantic Economic Council. 2015. "Facilitators' Report to Stakeholders." 27 March.

“regulatory cooperation” as an objective,²⁷ while the USTR website fails to do so.²⁸ Based on the little information that has been publicly released, the two sides have not put forward any bold initiatives to expand regulatory integration.

One of the discontinuities in ongoing EU-US cooperation is that on the EU end, the European Commission is the party whereas on the US end, the Executive Branch is the party. This means that while the EU can make commitments on law-making and implementation, the US merely makes commitments on implementing regulation and then only within the non-independent agencies.²⁹ This discontinuity is intrinsic to governmental structure and can only be partially remedied by the ongoing EU-US inter-parliamentary meetings, the most recent of which was the 76th meeting in June 2015.

One interesting new legislative development relates to financial services, where the US Dodd-Frank Act of 2010 established a Federal Insurance Office with authority to preempt a state insurance measure that results in less favorable treatment of a non-US insurer (domiciled in a foreign jurisdiction that is subject to a covered agreement) as compared to a US insurer domiciled, licensed, or otherwise admitted in that state. A “covered agreement” is an agreement between the US and a foreign government, authority, or regulatory entity involving the recognition of prudential measures that achieve a level of protection for insurance or reinsurance consumers that is substantially equivalent to the level of protection achieved under state insurance or reinsurance regulation (31 US §313).

As is commonly the case, the intergovernmental cooperation was paralleled with EU-US nongovernmental cooperation. The most successful of these efforts has been the cooperation in the business community which began with the Transatlantic Business Dialogue in 1995. Today, business cooperation has been reformatted into the Trans-Atlantic Business Council (TABC), which was chartered in 2013 and comprises more than 70 global companies. The TABC’s mission is to (1) promote a barrier-free transatlantic market that contributes to economic growth, innovation, and security; (2) foster discussion and the exchange of ideas among business and government leaders; and (3) serve as a platform for EU and US companies to jointly address trade and investment barriers in third countries. In addition, there is transatlantic business cooperation ongoing in particular sectors such as autos, chemical, and pharmaceuticals to develop proposals for mutual recognition agreements.

In conjunction with the business networks, there have been efforts to strengthen transatlantic civil society ties (Francesca and Charnovitz 2001). The most successful effort today is the Trans-Atlantic Consumer Dialogue (TACD), which seeks to champion the consumer perspective in transatlantic decision-making. In April 2015, the TACD issued a statement opposing any horizontal chapter on regulatory cooperation in the TTIP.³⁰

CONCLUSIONS AND RECOMMENDATIONS

As one US expert Ambassador C. Boyden Gray recently observed, while EU-US regulatory cooperation is now being pursued on multiple fronts more ambitiously than ever before, “all of these past efforts have failed to achieve a standardised process for cooperative regulation on an ongoing basis...”.³¹ The TTIP negotiations provide an opportunity to strengthen regulatory cooperation, but, at present, neither side of the Atlantic seems to be moving with sufficient boldness and imagination.

Through a comparison of the transatlantic initiatives addressing regulatory trade barriers with the across-the-board initiatives, this study has shown that the geographic component is critical to gaining buy-in of busy officials. The geographic cooperation also succeeds in enlisting the support of the business community, which renders the project more practical and improves the likelihood of an economically useful outcome. More effective efforts to enhance transparency and expand balanced participation by economic and social actors is important for achieving future public support of regulatory cooperation initiatives.

28 | <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip> (visited 11 October 2015).

29 | In the US, the independent agencies with nominal independence from the Executive Branch include the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Federal Trade Commission (FTC), the Center for the Study of the Presidency and Congress (CSPC), and the International Trade Commission (ITC).

30 | TACD Resolution on Regulatory Cooperation in the Transatlantic Trade and Investment Partnership, Doc. No. Trade 17/15, Apr. 2015.

31 | Gray forthcoming.

REFERENCES

- Bollyky, Thomas J. 2012. "Better Regulation for Freer Trade." Council on Foreign Relations, 19 June.
- Gray, C. Boyden, "Upgrading Existing Regulatory Mechanisms for Transatlantic Regulatory Cooperation," forthcoming *Law and Contemporary Problems*.
- Camp David Declaration. 2012. 18–19 May, <https://www.whitehouse.gov/the-press-office/2012/05/19/camp-david-declaration>.
- Charnovitz, Steve. 1977. "Evaluating Sunset: What Would It Mean?." *The Bureaucrat*, 6 (3), Fall.
- Coglianesi, Cary. 2012. "Enhancing Public Access to Online Regulatory Information." 2, *Michigan Journal of Environmental and Administrative Law*, Fall.
- Echeverri-Carroll, Elsie and Ayala, Sofia G. 2008. "Regulation and Competitiveness of US Businesses: Is It Time for a Competitive Impact Statement?." University of Texas, IC2 Institute.
- Esty, Daniel C. and Geradin, Damien (eds.). 2001. *Regulatory Competition and Economic Integration*. Oxford University Press: Oxford.
- Farrell, Henry and Newman, Abraham. 2015. "The New Politics of Interdependence: Cross-National Layering in Trans-Atlantic Regulatory Disputes." *Comparative Political Studies*, 48 (4), March.
- Francesca, Bignami and Charnovitz, Steve. 2001. "Transnational Civil Society Dialogues." In *Transatlantic Governance in the Global Economy*, Mark A. Polack and Gregory C. Shaffer (eds.), Lanham, MD: Rowman and Littlefield.
- Frost, Ellen L. 1998. "The Transatlantic Economic Partnership." Peterson Institute for International Economics, Sept.
- ILO. 1943. *Intergovernmental Commodity Control Agreements*. ILO, Geneva.
- Lebl, Leslie S. 2007. "Advancing US Interests with the European Community." Atlantic Council, Jan.
- Neville, Mark K. 2015. "The Customs 'Single Window'." June, <http://www.itctradelaw.com/pdfs/JOIT-June-2014-Single-Window.pdf>.
- OECD. 2013. *International Regulatory Co-operation, Addressing Global Challenges*. OECD, Paris.
- OECD. 2014. *International Regulatory Co-operation and International Organisations*. OECD, Paris.
- Summers, Lawrence. 2015. "Rescuing the Free-Trade Deals." *Washington Post*, 14 June.
- US Chamber of Commerce. Undated 2015. "Regulatory Coherence and Cooperation in the Transatlantic Trade and Investment Partnership."
- US Competitiveness Policy Council. 1992. "Building A Competitive America." First Annual Report to the President and Congress, March.
- Wallison, Peter J. and Gallagher, Daniel M. 2015. "How Foreigners Became America's Financial Regulators." *Wall Street Journal*, 20 March.
- Warren, Elizabeth. 2015. "The Trans-Pacific Partnership Clause Everyone Should Oppose." *Washington Post*, 25 Feb.

Implemented jointly by ICTSD and the World Economic Forum, the E15 Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.



International Centre for Trade
and Sustainable Development



COMMITTED TO
IMPROVING THE STATE
OF THE WORLD