

Regulation in the Transatlantic Trade and Investment Partnership

Susan Ariel Aaronson

After years of talk, the twenty-seven democracies of the European Union are launching negotiations with the United States for a free trade area called the Transatlantic Trade and Investment Partnership or T-TIP. The marriage of the US and the EU has huge implications for the global economy. If policymakers succeed at negotiations, they could create a free trade area comprising some 40% of world GDP. However, the negotiations have even more important implications for the future of democracy than the expansion of trade.

Trade diplomats from both the US and EU say they want to create a 21st century trade agreement. They stress that in order to achieve that goal, they must not only reduce visible barriers to trade such as tariffs, but also achieve coherence among a wide range of social and environmental regulations. Policymakers plan to discuss US and EU regulations protecting consumers such as food safety and data protection rules; regulations affecting how business is conducted such as banking and labor regulations; and regulations affecting the global commons such as environmental regulation. They note that although these regulations have legitimate objectives, these regulations may, without deliberate intent, distort trade. If they can find common ground on these regulations, trade would be eased. However, neither the US nor the EU has made it clear whether the end goal of regulatory coherence is harmonization, convergence, or some form of safe harbor or mutual recognition (where both countries accept the regulations of another country without demanding change).

Trade negotiators may find coherence between US and EU regulations is not easy to achieve. First, both the EU (at the national and EC-wide level) and the US have honed these regulations over time based on public and business comments. Whatever their opinion about particular regulations, the public accepts these regulations as democratically determined and hence, legitimate. US and EU citizens may not feel the same about regulatory compromises developed in secret by trade negotiators. Secondly, the US and the EU have very different approaches to designing and implementing such regulations; these differences stem from two very different approaches to democratic capitalism and governance. In general, the EU focuses on risks to society from not regulating; US regulators focus on the risks to market forces, and thus, tend to prefer that the private sector self-regulate. The two trade giants also have different regulatory strategies. The EU tends to regulate in a top down, state-controlled manner with labor, business and civil society input. The US, in contrast, tries to encourage business self-regulation and when directly regulating tries to use regulation that encourages market forces (such as transparency) rather than the visible hand of government. Thus, trade diplomats may

find that some citizens may oppose T-TIP because they believe attempts to achieve regulatory coherence mean deregulation or defining regulations downward.

Given the stakes for democratically determined regulation for both the US and the EU, the public should have direct input into the negotiation. But that is not the current strategy. Trade policymaking in both the US and the EU remains stuck in a 19th century time warp of opacity and secrecy. While trade negotiators require secrecy to discuss sector-specific tariffs or business confidential information, it is hard to understand why such secrecy should apply to the negotiation of chapters on regulatory issues such as labor rights, internet issues, environmental issues etc... Diplomats have long argued that secrecy builds trust among nations, as they can count on other diplomats to keep information confidential. But in this type of negotiation, trade diplomats don't really need to keep the objective, strategy and progress confidential. In fact, when trade policymakers keep so much of the negotiation from the public, they may engender public distrust.

Trade policymakers in both the US and EU have taken some steps to seek public comment before the negotiation begins. But neither the US nor the EU have clearly delineated how policymakers will incorporate these comments as the negotiations proceed.

The US has also not met promises made by the Obama Administration to ensure transparent, accountable governance. Although the Obama Administration has made "openness" a meme of this Presidency, openness has not characterized the Administration's approach to trade policymaking. When he campaigned for President, then Senator Obama promised to restore the American people's trust in their government by making government more open and transparent. When he attained the Presidency, he issued the Open Government Directive in 2009, requiring government agencies to go public with their data. The regulation was designed not only to make government agencies more accountable, but also to create economic opportunities. On May 9 2013, OMB issued a new regulation on open data which declared, "information is a valuable national resource...Making information resources accessible, discoverable and usable by the public can help...improve Americans' lives." But the Administration does not fully and consistently share information related to trade negotiations with the public at large. The Office of the US Trade Representative (which is in charge of negotiating for the US) could use its web site to facilitate a broader dialogue with more Americans concerned about trade. Currently, the site is basically a dissemination device and is not interactive.

In general, trade policies in both the US and EU are determined by senior government officials who are responsive to a small group of concerned citizens/business interests. The US Trade Representative does allow some individuals greater insights into the negotiations.

Cleared advisors, including some members of Congress and Congressional staff are allowed to see up to date information about the negotiations, but they are required to keep this information secret. The bulk of these advisors represent commercial and economic interests and/or individuals with connections to the current administration. Neither the US nor the EU has developed an advisory committee infrastructure to examine how to achieve regulatory coherence in a transparent accountable manner. So here are two suggestions.

First, Congress and the EU Parliament should keep a close watch on negotiations to achieve regulatory coherence. Congress and the Parliament should also clarify whether coherence means harmonization, mutual recognition or some other approach. Secondly, USTR and other agencies involved in the negotiation should become more proactive as well as more interactive online. The Administration should develop a web site encouraging consistent public feedback and dialogue on T-TIP, rather than solely at the beginning and end of the negotiations. The web site should clearly delineate the objectives of the regulatory coherence negotiations as well as the Administration's desired outcome. The web site should also include updates that describe the state of ongoing negotiations for each chapter of the proposed agreement, particularly those that relate to environmental and social regulations.

Regulatory coherence is an important objective for the US and the EU. If the two trade behemoths can find common ground on regulations in a transparent and accountable manner, their shared standards will set the bar for the global economy and facilitate high standards worldwide. Moreover, the trade agreement will reflect 21st century standards for transparency and accountability in democratic governance.

Susan Ariel Aaronson is Associate Research Professor, Institute of International Economic Policy, GWU, and the Minerva Chair at the National War College.