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TTIP AND THE LEGITIMATE FEARS OF GERMAN PUBLIC OPINION

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Germany is one of the member states in which public opinion is the most sceptical towards the Transatlantic trade and investment partnership (TTIP) negotiations launched over two and a half years ago. Regulatory cooperation and the question of investor-state dispute settlement are notable areas of public worry. This synthesis takes the principal elements of the debate organised in the German capital on 28 September 2015 by the Jacques Delors Institut – Berlin, in order to shed light on the objectives pursued by the EU, the methods used and the conditions for democratic control.

Introduction

European public opinion in the various member states reacts very differently to the project of a Transatlantic trade and investment partnership (TTIP). While trade has been an exclusively European competence since the Treaty of Rome in 1957, the impact of trade agreements on employment and growth sparks debate in Europe, just as it does in the United States. But where TTIP is concerned, the big surprise is German public opinion's reaction to the project. While not all member states have always looked kindly on the opening up of international trade, Germany on the other hand has always been in favour of it. Yet today it is now the member state whose grassroots opinion appears to be the most sceptical with regard to the TTIP talks.

The dearth of information on the content of the project when negotiations began over two years ago has triggered strong mobilisation at the grassroots level in every state, spawning a combination of imagined risks and legitimate fears which require answers. Given that, unlike previous trade agreements, the TTIP project concerns European standards and thus, by extension, the European way of life, it requires a debate that is at once technical and political. It was this realisation that prompted the Jacques Delors Institut – Berlin to convene a debate in the German capital on 28 September 2015 attended in particular by Sigmar Gabriel, Germany's Minister for Economic Affairs and Energy, Matthias Fekl, the French Secretary of State for Foreign Trade, and Pascal Lamy, the former Director-General of the WTO and current President Emeritus of the Jacques Delors Institute, along with representatives of the European Commission and Parliament and experts in trade policy, international public law and investment *(full programme in annex below)*.

The debate focused on the chief fears being voiced in Germany, namely the threat to Europe's values and lifestyle, and the erosion of sovereign regulatory jurisdiction. Thus special attention was afforded to the regulatory cooperation envisaged and to the settlement of disputes between the investor and the state, in an effort to clarify the objectives being pursued by the EU, the method adopted, and the provision for democratic monitoring.

1. Transitioning from the old world of trade to the new world of trade

If we are to fully grasp public opinion's reaction to TTIP, we need to understand the current changes taking place in international trade. Pascal Lamy opened the debate by pointing out that we are in the process of shifting from an old world of trade in which opening up trade consisted in lifting protective barriers such as customs tariffs and subsidies, to a new world of trade in which the aim is to harmonise the precautionary principle embodied in norms and standards. This transition has major implications for the international trade system, and the project for regulatory cooperation envisioned by the TTIP raises questions which are both new and legitimate, and which require clear-cut answers from the negotiators and from the political authorities.

The entire picture of economic trade policy is changing. Customs tariffs have dropped in the past sixty years from a weighted global average of 40% of a product's price to less than 5% of that price, and as the multi-location of manufacturing spreads, these customs tariffs appear to be counterproductive because they undermine imports and, in so doing, also exports whose import content is constantly growing.

While customs tariffs have gradually declined throughout the world, the barriers to trade targeted by the new generation of trade negotiations are the non-tariff barriers represented by norms, standards, certification procedures and the licensing tests that go with them. These measures impact risk management, the implementation of the levels of precaution to be observed, and the management of that precautionary level.

In the old world of trade, negotiators had to cope with opposition from manufacturers but they had the consumer on their side. In the new world of trade, they have manufacturers on their side but they have to cope with consumer fears that regulatory convergence may lead to a lowering of the precautionary level that consumers have come to expect.

So what guarantee can we have that the European precautionary level will not be lowered and that we will not see a supposedly less protective American system of standardisation being forced on us?

2. Regulatory cooperation and the risk of regulatory dumping

While we intend to lift tariff barriers, it would make no sense to suggest removing consumer protection standards or even lowering their level of stringency. And besides, where precautionary levels are concerned, there can be no trade-off in concessions such as there is with customs tariffs.

2.1. A different assessment of the risks involved in Europe and the United States

It was agreed in the course of the debate that the precautionary level is no higher in the EU than it is in the United States. It is commonly thought that the EU errs on the side of caution and the United States on the side of risk: in Europe whatever is not authorised is prohibited, whereas in the United States whatever is not prohibited is authorised. But there are numerous instances where the precautionary level is higher in the United States, for instance in the field of financial services or in the sphere of pharmaceutical and cosmetic products. Numerous cosmetic products are monitored by the Food and Drug Administration (FDA) as non-prescription drugs in the United States and the regulation of such products is stricter than it is in Europe.

2.2. The goal: a TTIP to facilitate regulatory cooperation, not to regulate

TTIP aims to cut the cost of trade barriers – which is far more significant than the cost of customs tariffs – erected behind borders and caused by differences in our respective regulatory systems. This cut in costs would be especially strategic for small and medium businesses, which rarely have the financial resources to bear such costs necessary for them to access the export market.

In the view of Denis Redonnet, director for WTO, legal affairs and trade in goods in the DG Trade of the European Commission, when it comes to the precautionary principle we need to distinguish between two types of differences between the Americans and the Europeans. First of all, there are the differences between the goals of the public policies the two are pursuing. Our collective preferences are sometimes different and we cannot aim to achieve the same results in the fields of precaution and of regulation. Regulatory cooperation does not concern those differences, which rest on different precautionary levels.

And then there are the differences in the regulatory field that are not the result of political preferences but of the fact that regulators tend to work in ivory towers and quite simply were not working together when their standards were originally being defined. These groundless regulatory barriers – redundant or pointlessly costly tests that hamper our exports (when not actually preventing them outright) – are the result of a different approach to the management of the precautionary principle, and form the core area being tackled by TTIP, which could significantly reduce the cost of exporting for manufacturers.

Regulatory cooperation does not concern the precautionary level of standards to which the citizens are accustomed. TTIP can under no circumstances set off a deregulatory feast or cause regulatory dumping. It is not a matter of negotiating the protection levels themselves, or of superimposing a transatlantic regulatory system on our respective regulatory systems; nor is it a matter of pooling together our regulatory sovereignties, of slowing down the regulatory process, or indeed of generalising mutual recognition.

TTIP simply aims to boost cooperation at the regulator level between partners with similar values and who enjoy mutual trust, so that they can build bridges between their different precautionary systems; and that can only be achieved between equivalent precautionary levels. Thus the TTIP is not designed to regulate but to create a framework capable of facilitating regulatory cooperation by setting it on the right track. The fact that regulatory cooperation is built into an overarching trade agreement is exactly the aspect that would make it possible to ensure adequate regulator cooperation.

The TTIP aims to create greater regulatory compatibility between our two systems by codifying the terms for improved regulator cooperation, so as to move on from an ethos of regulatory competition toward an ethos of regulatory cooperation. This is a far cry from the approach adopted in previous free-trade agreements, which sought essentially to list the things that the signatory countries did not have the right to do (e.g., disciplining the sphere of protection against discrimination). TTIP aims to outline what the two parties are going to do together, in a proactive manner. Thus it embodies a radically different approach, a different negotiating technology and a different philosophy.

2.3. The method: evaluating sector by sector and standard by standard

To eliminate pointless barriers without undermining the right to regulate in accordance with the precautionary level that each party considers appropriate, Article 25 in the negotiation mandate proposes two kinds of tools: mutual recognition and harmonisation, or the improved joint implementation of international norms and standards on the basis of a very specific analysis, sector by sector, of equivalences in the precautionary levels.

Regarding industrial goods (which need to be distinguished from agricultural produce, sanitary and phytosanitary (SPS) products, or indeed from the service industry, for which one might envisage for example the mutual recognition of qualifications), the planned work schedule is divided into three chapters:

- a chapter regarding regulatory consistency or cooperation (which involves clauses and commitments), making it possible to codify the best practices which exist on either side and which overlap in the fields of transparency, information on regulations in force, consultation with the interested parties, impact assessment, and so forth. The idea is to facilitate the adoption of an open, transparent and participatory procedure in which the negotiators are responsible to the political authorities, in an effort to foster cooperation among regulators well upstream of the regulation process;

- a chapter on the technical barriers to trade (TBT) going beyond the United States' and the EU's obligations in the context of the WTO's TBT agreement (designed to ensure that any technical regulation devised to achieve a given general policy goal – be it the protection of personal health, security, the environment or otherwise – only has as restrictive an impact on trade as is strictly necessary to achieve its legitimate objective; in other words to ensure that precaution does not turn into protection. This chapter is far more complex than the previous one: our systems for assessing compliance and standardisation are very different. It is necessary to come up with pragmatic solutions that are in accordance with our respective systems;

- and lastly, a chapter involving sectoral regulatory cooperation in nine specific industrial sectors, in which in each sector we need to achieve a quantum of tangible results in terms of mutual recognition or harmonisation. There is absolutely no question of mutual recognition being implemented across the board in a sweeping trans-sectoral manner; the goal is to achieve a significant quantum of cost reductions as soon as the agreement comes into force, in addition to which a series of work schedules would allow the regulators to pursue their cooperation. Even if that means slow, standard-by-standard progress, the negotiators wish to succeed in achieving cost cuts (for instance, by affording priority to certain pharmaceutical products).

So it will not be possible to implement generalised mutual recognition in every sector.

Some sectors are sufficiently alike to implement mutual recognition among certain norms, as for example in the pharmaceutical sector where factory inspection systems are similar enough to support mutual recognition.

In other instances, the regulatory frameworks are simply too different and no equivalence is possible. This is true of the chemical sector, where we would restrict our action to producing a classification of chemical products. In view of the differences between the two systems, these classifications entail legal obligations which are different in the EU and the United States, and which the regulators will also be taking into account. For example, if the classification of a product in the category of particularly hazardous products means that it can no longer be used in pesticides in Europe, while its use is permitted in the United States, the regulators will not apply mutual recognition to that product.

3. Democratic monitoring of the regulatory capture

3.1. Regulators' framework

Regulatory cooperation is not performed by the negotiators but by the regulators themselves and it continues to be based on their respective (unchanged and strictly defined) mandates, as well as on the objective assessment of data and evidence. So there is no room in regulatory cooperation for compromises that might translate into lower precautionary levels.

As Peter Chase, Vice President, Europe at the U.S. Chamber of Commerce, pointed out, regulation is political by its very nature. The fact that the regulators both in the United States and in the EU are subject to democratic oversight has a practical impact. The American Congress has developed a very strict democratic process for the adoption of laws, based on the customary procedure of notification and receipt of comments on a draft bill, which allows all interested parties to have their say, and the regulators are obliged to publish those comments and respond to them, while a regulator himself has no provision in his mandate for changing the precautionary level. Thus he cannot lower the precautionary level in norms and standards.

Moreover, neither the United States nor the EU plan to change their method for developing regulations. Naturally, the TTIP would lead to a far broader integration for our two economies than all previous trade agreements, but the aim certainly is not to build a single transatlantic market between Europe and the United States. There is not the same level of political commitment. The single market was designed to forge a European democracy making it possible to define that market's common regulations, while TTIP

does not have that ambition. The mandate assigned to the regulator to safeguard the original precautionary level is still in force, and the regulator continues to be responsible to the political authorities.

The appendices to the final agreement should specify which regulators are involved in the sector-by-sector discussions on both sides, in order to highlight the structural differences that exist between the two systems (in the pharmaceutical sector for instance, it is the EMEA, the European Medicines Agency, that debates with the US FDA, the Food and Drug Administration).

In Pascal Lamy's view, given that lowering precautionary levels is out of the question, the only possible way forward is to raise them, adopting the higher precautionary level when the gap between the two is not too great. But that will be harder to achieve than discussing customs tariffs.

Moreover, there is still no solution in sight for the question of how to resolve the case of a dispute caused by a situation in which, despite mutual recognition between two standards having initially been established following the ratification of TTIP, there arise new scientific grounds for a raising of the norm's requirement level, but one of the two parties does not agree.

3.2. The mandate for a Regulatory Cooperation Council

Yet despite everything, the regulatory capture which regulatory cooperation could have on our democratic systems still sparks concern. In the view of Reinhard Bütikofer, a member of the Greens/European Free Alliance Group, it is businesses rather than governments or citizens who do the trading and control the agenda; and in the world of precaution, businesses can strengthen their influence via the regulators. So what are the right democratic standards to apply to these regulatory cooperation processes?

The answer to this argument is that there are several options for democratic monitoring on the part both of the executive and of the legislative powers. Denis Redonnet pointed out that the European negotiators consider that best practices in the sphere of regulatory cooperation should be built into the institutional framework created by TTIP. But the regulatory cooperation council that they have proposed creating would have no direct decision-making authority, nor the ability to vet all of the regulation proposals drafted on neither side, nor even the power to directly address a trade issue.

This council's sole function would be to keep the regulators' attention focused on the cooperation effort through a bilateral exchange of information at an early stage in the development of a new regulation, in order potentially to facilitate the adoption of the same standard when the precautionary level envisaged by the European and American legislators is the same on both sides. To achieve that, an annual programme would be drafted for the council and conducted in public in order to ensure respect for transparency and democratic oversight, in accordance with existing European and American rule-making procedures – and this, whether, as far as the EU is concerned, we are talking about the ordinary legislative process or, in certain cases, the comitology procedure of delegated and implemented acts, neither of which would be affected by the TTIP. Thus the regulatory cooperation council would itself have no legislative authority whatsoever.

Annual consultation with external interested parties such as the trade unions, consumers, businesses, NGOs and the broader public should be held on the basis of balanced representation. While the manner in which the European and American lawmakers are involved in its work has yet to be established.

In any event, conceiving TTIP as a "living agreement" would not mean proceeding to a transfer of sovereignty without democracy or changing the TTIP's aims and commitments over time, but it would make it possible to ensure that the cooperation effort among regulators is properly maintained in the longer term.

4. Transparency: an imperative

Everyone who took the floor at the conference agreed that failure to immediately publicise the negotiation's mandate was a political mistake that has been responsible for fuelling numerous concerns. Regulatory cooperation demands far greater transparency than previous negotiations focusing on customs tariffs ever did.

Reinhard Bütikofer argued that it is difficult to hold a public debate on the issues involved in TTIP and to

assess its expected benefits or risks without national political authorities and administrations having access to all the negotiation reports.

Having said that, Friedrich Merz, legal counsel at Mayer Brown, a former member of the European Parliament and a former parliamentarian in the Bundestag, opined that total transparency is not something we should even be trying to put in place, because it would mean that the Commission would have to justify everything it says or does not say, whereas the final results could change during the various different stages of negotiation; also, if the EU were to present its position to its negotiating partner in public, that would weaken its overall position in the negotiations. The final text is in any case going to be published and subjected to the democratic process with a chapter-by-chapter analysis.

Matthias Fekl, for his part, stressed that a "transparency agenda" is not an option, but an imperative which reflects the aspiration to govern differently, in a manner open to the sharing of information and to debate, and which has confidence in the community's collective intelligence. The establishment of a strategic follow-up committee in France to debate with civil society (via regular meetings with parliamentarians, representatives of associations, NGOs, trade unions and professional federations) and of a similar body chaired by Sigmar Gabriel in Germany are moves in the right direction for transmitting all the information and for explaining developments in the negotiations. Also, all of the information is accessible via the websites both of the Commission and of the national governments (position reports and the state of advancement of the negotiations after each round of talks). Yet a question mark still hangs over access to the so-called consolidated texts in which the negotiators outline their respective positions, on the basis of which the negotiations go forward: government members and parliamentarians need easier access to the documents (rather than only being able to read them in American Embassies). Denis Redonnet reported that the Commission is mulling the issue over with the Americans in an effort to develop appropriate proposals[1].

5. Settling disputes between investors and the state: should we improve current mechanisms or create a specific institution?

Foreign direct investment (FDI) is also linked to the precautionary principle, and the choice of recourse possible in dealing with a dispute between an investor and a state is a cause of great concern in Germany. Unforeseen changes in public policy can have a serious impact on the viability of a project, even if commercial risk is part and parcel of any economic activity. But the fear is that the mechanisms for settling disputes between investors and the state, better known under the acronym ISDS, may have a regulatory freeze effect by impairing sovereign states' regulatory authority. So should TTIP afford priority to recourse to American and European law courts, to improving the ISDS, or to setting up a permanent investment court?

It was pointed out that after a huge rise in the volume of FDIs in the 1990s, that volume has now dropped and it is not expected to continue growing exponentially because FDIs are closely linked to developments in the world's economy. But having said that, countries wish to continue being the beneficiaries of FDIs and investors want to continue to be able to invest abroad, so that it is in the interests of both groups for there to be a clear legal framework regulating the issue.

5.1. Do we need arbitration?

In the view of Markus Krajewski, professor of public law and international public law at Erlangen-Nürnberg University, foreign investors need to enjoy the same opportunities for legal recourse as national investors, namely to be able to appeal to a national law court. The argument that it would entail the risk of discrimination against the foreign investor has not been borne out by any economic report proving that bilateral investment agreements lead to an increase in the volume of FDIs. The volume of FDI between the United States and the EU is already very high as it is, even with only nine member states having signed a bilateral investment treaty (BIT) that includes an ISDS.

While the ISDS is a heritage from the past and Germany has over 130 treaties with mechanisms of this kind built into them, should we consider ISDS to be bad per se? In the view of Anna Joubin-Bret, a Paris barrister, specialised in international investment law, the issue here is the multiplicity of ISDS standards currently existing. If the present system is unsatisfactory, it is primarily because it rests worldwide on fully 3,725 treaties – and rising – that entail a multiplicity of ISDS standards. Furthermore, existing treaties between the United States and the nine member states do not rest on the best standards. We need to renew the system.

Christoph Benedict, legal director at Alstom Germany, presented the investor's viewpoint, recalling the case of public subsidies over long periods stretching from twenty to thirty years. Investments frequently cover longer periods of time than a politician's mandate, thus in the case of wind turbines in Spain, for example, the Zapatero government offered public subsidies, but those subsidies were repealed by the government that came after, thus causing investors to suffer huge losses. Investors could not turn to Spanish law courts, which were bound hand and foot by the new law repealing the subsidies, and so they appealed to international arbitration instead in 2012. Recourse to national law courts simply was not an option for the investors. Thus in Christoph Benedict's view, ISDS mechanisms are not perfect and are used by investors as a last resort, but the TTIP offers the EU an opportunity to bring its system up to date.

In view of this, the debate pits those who wish to improve the existing situation against those who favour the adoption of a brand new system, namely the creation of a permanent investment court.

5.2. Reforming ISDS

Anna Joubin-Bret pointed out that reforming ISDS does not have any impact on most favoured nation status, which is addressed fairly well. The safeguard clauses or the definition of fair and equitable treatment, however, deserve more specific attention. Above all, we must be sure of exactly what we mean by "legitimate expectations". We have to bear in mind that, in the TTIP negotiations, it is not a matter of debating the issue of settling disputes between an investor and a state because investors would like the system to be more favourable to them, but because we have principles of international law that define and demarcate investors' legitimate expectations and a state's commitments on the basis of established standards. States involved in negotiations use the public good as their yardstick, not investors' expectations.

Yet in Anna Joubin-Bret's view, we must avoid "tinkering" with the current ISDS mechanisms. Bilateral investment agreements are instruments of international public law which are developed by states and in regard to which states have a duty to be clear and consistent. With TTIP we have an opportunity to build a new regulatory framework for the protection of investments. It is not simply a matter of gradually patching up the flaws with adjustments, or of stopping up the loopholes with a clarification or an exception. When arbiters have vague and inconsistent texts to go on, they can do nothing about it and they cannot just invent standards which states have not introduced clearly. Treaties must not be negotiated only through exceptions.

Moreover, certain American bilateral investment treaties do countenance the possibility of introducing an appeal mechanism, but the option has never been used. Introducing such a mechanism would be a path worth pursuing in the context of TTIP.

5.3. Setting up a permanent investment court and promoting global standards

In Markus Krajewski's view, the establishment of an international institution for settling disputes is justified if we consider that the unique characteristics of the American legal system do not allow treaties to be implemented directly and that American law courts would not apply the principle of non-discrimination.

Sigmar Gabriel pointed out that the position of Germany and France, which have submitted joint proposals for the establishment of a permanent court, is that the TTIP negotiations can only be pursued on condition that parliaments' democratic right

to decide on laws and regulations is safeguarded and that a permanent court is set up.

According to Matthias Fekl, the Franco-German position has built up a consensus in Europe today, and the European Commission relied heavily on it when forging its final proposal for the establishment of a permanent investment court taking international law into account and including: an appeal mechanism, a clarification of the legal concepts involved, a framework for judges to work within (including a ban on conflicts of interests), and transparency rules. This court would be a first step in the more ambitious project of eventually establishing a public multilateral investment court. Thus another brick would have been added to the edifice of multilateralism, regulation and international responsibility.

Trade Commissioner Cecilia Malmström went even further than the Franco-German proposal, voicing the hope that all previous free-trade agreements signed by the Europeans should also rest on this new institution to settle disputes between the investor and the state. It would take time, but if we succeed in achieving this with the United States, we might well achieve the same also with other countries.

Here again, it is a matter of promoting global standards. In Peter Chase's view, we need to work for the development of an international system. Given that the United States and the EU are the chief FDI recipient countries and chief foreign investors worldwide, if they reach an agreement, that would make it possible to promote global standards.

Christoph Benedict, for his part, argued that investors would be in favour of such a move but that it would be necessary to make sure that a court of this nature offered procedural rapidity, as well as fairness and enforceability of verdict. If procedure is excessively sluggish, the investment is lost whatever the final ruling. Moreover, in arbitration one can choose the arbiters, thus in each case one could choose people with technical expertise in the sphere relevant to the grievance. Referring to the Spanish wind turbine affair, Benedict also opined that it is not a matter of striking a balance simply between trade and the right to regulate, but also within the right to regulate exercised at different times (in other words, between past government policy and a new government policy). We should focus not only on the precautionary level which we consider to be appropriate, but also on how to determine the extent to which a government is bound by decisions in connection with the precautionary level taken by a previous government.

And finally, today's debate does not sufficiently address the issue of the power to enforce a ruling. Even though the ICSID[2] tells us that some 30% of cases taken to arbitration are successful, the ruling is not always easy to then implement. In the case pitting Yukos against the Russian Government, it is by no means a foregone conclusion that Vladimir Putin will endorse the arbitrator's ruling calling on the government to pay $50 billion for the Yukos oil group's nationalisation in 2007, when it was incorporated into Gazprom and Rosneft. Yet clearly the value of a ruling depends on its implementation.

So, is the agenda realistic? In Markus Krajewski's opinion, the way the debate has evolved in recent months has proven that anything is possible, and the European Commission itself has surprised us in a positive manner. Yet Anna Joubin-Bret and Christoph Benedict argued that it hardly seems realistic to think that an institution of this kind can be set up in the short term. Such a thing could certainly be achieved at the bilateral level with the necessary political will, though it is doubtful whether that will exists today, but the establishment of a multilateral investment court would take far longer. In Anna Joubin-Bret's view, it would be more realistic to envisage reforming the ISDS mechanisms, in particular by introducing an appeal system.

6. Geopolitical issues and the impact on multilateralism

Is the United States' decision to conduct these ambitious negotiations consistent with the strategic partnerships which the EU has to build worldwide if it is to continue carrying weight in the global economy? And in any case, is TTIP not a threat to multilateralism?

6.1. The United States: a legitimate partner

While the Americans, like the Europeans, are negotiating an investment agreement with the Chinese, and have recently sealed such sweeping accords as the Trans-Pacific Partnership (TPP), TTIP prompts a far broader debate on Europe's strategic interests in the global economy.

It was agreed in the course of the debates that the United States is a key partner for Europe. Yet Reinhard Bütikofer stressed that in the view of Angela Merkel and the federal government, China is also a strategic partner for Germany and TTIP must not lead to a situation that would be at variance with the EU's cooperation with China or with its other partners. If TTIP is devised as a bilateral "defensive and offensive alliance against China", that could have a particularly negative impact on German industry.

Friedrich Merz, for his part, pointed out that Europe will not be able to maintain its place in the global economy unless it plays a decisive role in the development of international standards. Competition among economic powers to enforce their own standards at the international level is only getting stronger, whether we are talking about data protection, social standards, health standards, or even the protection of the environment. Those who manage to define standards today are going to dominate the market in the future. But by 2050 some 90% of the world's population will reside outside of the US and EU. The debate on standards is not merely technical, it is also political. We have to realise today, just as we did at the member state level back in the days when we were building the single market, that the EU needs partners if it is to conquer global markets. The TTIP is not a "defensive and offensive alliance", but under current circumstances, a partnership of the kind is impossible to envisage with China, and even less so with Russia.

6.2. Bilateral or multilateral regulatory cooperation?

We should probably consider TTIP a second-best option compared to the multilateral cooperation organised by the WTO at the global level. But what role might the WTO play in the field of regulatory cooperation?

Pascal Lamy pointed out that the WTO already plays a role in the field of regulatory cooperation. The agreements on technical barriers to trade (TBT) and on sanitary and phytosanitary standards (SPS) are WTO agreements which already specify how and when it is possible to obstruct trade on precautionary grounds. They regulate the grey area that exists between protection and the precautionary principle. In Pascal Lamy's view, horizontal regulation should also exist in the service industry. There is no equivalent to the TBT and SPS agreements in the service industry, clearly laying down what can and cannot be done in the field of protection by invoking the precautionary principle. A large part of the service industry's regulation is based on domestic regulation developed by domestic manufacturers, but multilateral regulation would go a long way towards opening up trade in the service industry. Moreover, the WTO should be given a monitoring mandate to ensure that regulatory convergence at the bilateral level reflects a certain degree of transparency.

Yet the WTO's experts are not going to decide on the appropriate level of pesticide residue or on animal well-being standards, for instance, because such issues have nothing to do with trade negotiators' areas of expertise or with the WTO secretariat's domain. Thus the crucial issue here is to determine how many global standards are needed to ensure regulatory convergence, but that is an issue which lies outside the WTO's purview.

The important thing is to find out the extent to which, over and above the strictly bilateral benefits accruing from compatibility between our standards, TTIP will allow us to work together to produce a common set of rules and standards. For instance, the idea has been mooted of working together in the UNECE (World Forum for the Harmonization of Vehicle Regulations) for automobiles, and in the ICH (International Council for the Harmonisation of Technical Requirements for Pharmaceuticals for Human Use) for the pharmaceutical industry.

6.3. The impact of transatlantic regulatory cooperation on third countries

Peter Chase pointed out that achieving regulatory cooperation demands that the regulators enjoy a relationship of mutual confidence and trust, which are bilateral by definition. Thus regulatory cooperation cannot automatically be extended to third countries, and they can be multilateralised even less because trust is by nature not a multilateral animal.

But having said that, there can be benefits for third countries: cooperation on the transatlantic level may be beneficial, for example, for a Rwandan cut-flower grower. American pesticide residue levels can be different from those authorised by the Europeans. If they are not equivalent, it will be impossible to build a bridge between them; but if they are equivalent, it may be possible to build one. If the Americans agree that the Europeans' assessment of the pesticide level in Rwandan flowers is reasonable, then they will be able to accept their monitoring system's findings and so the Rwandan grower will also be able to export to the American market, which would entail a substantive reduction in his certification and testing costs.

Conclusion: The way forward for the TTIP talks

As Reinhard Bütikofer pointed out, the current debates leave plenty of room for the corporate lobbies' Christmas tree as they attempt to defend their specific interests in the negotiations, considering that given the efforts expended to date it is impossible to countenance failure. But that rationale could just as well mean failure for the negotiations.

Matthias Fekl argued, for his part, that as things stand today, the negotiations are not balanced. It will only be possible to make progress if the American negotiators are amenable to greater reciprocity. Where the service industry is concerned, the EU has put forward ambitious goals in connection with an opening up of the markets, but its proposals have not been greeted with a great deal of enthusiasm in the United States. We are still a long way away from a balanced agreement on the opening up of public markets. If the current asymmetrical situation lasts, France will not rule out the option of calling for a stop to the negotiations.

In the view of Sigmar Gabriel, the promotion of global standards making it possible to regulate the globalisation process, which is one of the things that the centre-left is constantly calling for, justifies keeping the negotiations going. At the end of the day the Europeans will still have the opportunity, through the European Parliament, their national parliaments, and the European Council, to choose whether or not to ratify an agreement.

As things stand today, it is unlikely that an agreement will be reached between now and the end of 2016, thus during the final months of Barack Obama's mandate, as the Americans would like. While the negotiators' goal remains to achieve political agreements on a certain number of issues before the American election, the benefits of regulatory cooperation are in any event only going to materialise at a much later date. And the final agreement would probably be less detailed than people think today.

Friedrich Merz, however, opined that it would be a good idea to prevent the negotiations from dragging on for too long and that it is necessary to bear in mind that failure in the negotiations would send out a very negative signal: if we are unable to embark on regulatory cooperation – the true challenge of the next few decades – with the United States, then what other country could realistically harbour such an ambition with us?

At the same time, as the negotiations move forward, they must be matched by a stronger will on the part of member states to agree amongst themselves on the issues that are relevant to European businesses' competitiveness, such as the energy transition, for example. In that sense, TTIP demands a strengthening of the European internal market in goods and services.

1. Author's note: On 2 December 2015 an agreement between the Parliament and the Commission approved by the college of Commissioners allowed all members of the European Parliament access to every category of confidential document associated with the TTIP talks, including the so-called "consolidated" documents that reflect the United States' position. Reading rooms will also be open in the member states to the ministers and member of the national assemblies.
2. ICSID is the International center for settlement of investment disputes created by the World Bank.

PROGRAMME

A TTIP-ING POINT FOR EUROPE IN THE WORLD

Monday 28 Septembre 2015 • 2 pm - 6.45 pm
Allianz Forum, Pariser Platz 6, 10117 Berlin

2 pm - 2.10 pm **Welcome and Introduction**
Henrik Enderlein, Director, Jacques Delors Institute – Berlin and Professor at the Hertie School of Governance

2.10 pm - 2.45 pm **Keynote speaker**
Pascal Lamy, former Director-General of the WTO and President Emeritus of the Jacques Delors Institute

2.45 pm - 3.30 pm **First session**
Regulatory cooperation: how to improve transatlantic standard setting?

Speakers:
Peter Chase, Vice President, Europe, U.S. Chamber of Commerce
Denis Redonnet, Director for WTO, Legal Affairs and Trade in Goods, DG Trade, European Commission
Moderator : Pascal Lamy, former Director-General of the WTO and President Emeritus of the Jacques Delors Institute

3.30 pm - 4.30 pm **Second session**
Foreign investment in TTIP and beyond: what is the correct balance in the protection of investors and of state?

Speakers:
Christoph Benedict, Legal Director, Alstom Germany
Anna Joubin-Bret, International inverstment lawyer, Avocat à la Cour, Paris
Markus Krajewski, Professor of Public law and Public international law at Erlangen-Nürnberg University
Moderator : Christoph von Marschall, Der Tagesspiegel

4.30 pm - 5.00 pm **Break**

5.00 pm - 5.45 pm **Third session**
Is TTIP good for Germany ?

Speakers:
Reinhard Bütikofer, MEP, The Greens/European Free Alliance Group
Friedrich Merz, Legal Counsel, Mayer Brown, former MEP and former member of the Bundestag
Moderator: Christoph von Marschall, Der Tagesspiegel

5.45 pm - 6.45 pm **Keynote speeches**
Matthias Fekl, French Minister of State for Foreign Trade
Sigmar Gabriel, German Minister for Economic Affairs and Energy
Moderator : Henrik Enderlein, Director, Jacques Delors Institut – Berlin and Professor at the Hertie School of Governance

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Abstract from the Berlin conference of the 28th of September 2015, *Video*, Jacques Delors Institut - Berlin, October 2015

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