

# TTIP Regulatory Part

Jacques PELKMANS

CEPS & College of Europe

Presentation in Public Hearing on TTIP negotiations

European Parliament, INTA Ctee

14 October 2013

# Structure

- TTIP negotiations : good beginning or regulatory quicksand ?
- Effective market access: general principles or specifics?
- Better regulation lowers trade costs
- General principles & specifics: no easy match
- Business as a frontrunner - good idea ?
- Economic effects TTIP : yet more gains from regulatory part

# TTIP, good beginning or regulatory quicksand ?

- High Level Group report promising
  - EU mandate basically good and helpful
  - Provides encouraging guidelines
  - Whilst not constraining negotiators too much
  - And 'protecting' EU 'preferences' sunk into existing policies
- 
- Such a mandate >>> unthinkable only (say) 10 yrs ago
  - And Doha would never, ever have come close

# Good beginning or regulatory quicksand ? (2)

- Yet, the regulatory part is the hard core
- A classic area of “Pride and pre-judice”
- (1) regulatory trade policy is distinct from classic trade policy ; ‘balancing’ cannot mean that regulations in area X can be traded against those in area Y (except perhaps in MRAs) ; neither can you ‘lower’ or ‘tighten’ technical requirements purely and only because ‘concessions’ have to be made
- (2) ideally, regulatory trade policy is more about ‘regulatory diplomacy’, with a view to improve market access
- (3) and ‘regulatory diplomacy’ only works if ‘pride & pre-judice’ is replaced by a search for ‘better regulation’, prompted by partners, incentivized and disciplined by what is still called a trade agreement

# Good beginning or regulatory quicksand ? (3)

- Despite best intentions, regulatory diplomacy may well sink into regulatory quicksand
- endless bickering on chlorine disinfection of chicken is quicksand
- In the EU internal market for goods, before 1985 >>> TTIP experience avant-la-lettre (with 1000nds of chlorine-type cases) - the Old Approach and many stalemates
- The EU turn-around was a profound one because the CJEU, based on free movement (which does not exist in EU-US), **forced (national) regulators to assume a “functional” view of national restrictions** and their impact on intra-EU market access
- Although in TTIP of today, there is no free movement and no court, the **mental switch of thinking functionally about SHEIC goals and instruments is critical for TTIP to avoid the quicksand**
- The mental switch creates a receptive attitude to think about ‘good’ regulation together, based on **Better Regulation principles**, and that yields fruitful regulatory diplomacy
- Thus, SHEIC objectives are not at issue (though explanations might help) and cooperation is to **focus on instruments** such as technical requirements, standards, test codes, certification questions, and the underlying measurements and perceptions of “risk”
- The Commission background paper called ‘TTIP, the Regulatory Part’ has the right spirit

# Effective market access : general principles or the specifics ?

- Market access is only 'effective' without NTBs (basically, "regulatory barriers") and with competitive, undistorted (export) markets
- Removal or minimisation of 'regulatory barriers' to market access requires **BOTH** general (Better Regulation) principles and specifics
- "Only specifics" swiftly leads you to the quicksand ; regulatory trade policy degenerates into a firebrigade: smothering conflicts, no gains
- This even happens, although TBT and SPS Codes (and WTO case law) already contain sound general principles, reducing potential conflict
- "Only general principles" are just a necessary but insufficient condition for effective market access

# Effective market access: general or specific (2)

- First-best is that Better Regulation principles be ‘internalised’ (a) through domestic reform, (b) plus the acceptance to remove implicit discrimination
- For ***both*** partners >>> no ‘splinter and the beam’ illusions
- While avoiding the arche-typical trade policy trap of ‘victorious’ parlance (as in WTO litigation). Why ????
- Well, if regulatory barriers render market access to A very costly due to a violation of Better Regulation principles, **BOTH** country A and exporters from B will incur unnecessary costs (static and dynamic)
- In dealing with specifics, the general (B.R.) principles must be adhered to
- Thus, TTIP based on Better Regulation principles internalized through domestic reform, is in the ***joint economic interest of the US and the EU***

# Better Regulation lowers trade costs

- Better Regulation principles now well-established
- I focus on risk regulation for goods now (56 % of economic gains of TTIP, CEPR study 2013)
- ***BR principles*** include :
  - >>> (i) REGn justified by market failures - that means, SHEIC objectives matter for removing market failures, the instruments can be many ;
  - >>> (ii) risk-based (and not hazard based);
  - >>> (iii) rigorous, independent risk assessment always comes first ;
  - >>> (iv) scientific risk assessment does not mean that risks are exactly known, at times, very large ranges of probabilities may result;
  - >>> (v) SHEIC objectives are essentially about 'risk reduction' ;
  - >>> (vi) REGn to be decided after rigorous and open RIAs, with meaningful options and quantification ;
  - >>> (vii) open consultation should include e.g. US/EU stakeholders ;
  - >>> (viii) pre-cautionary principle should not be ideology or a toy for NGOs 'living on it', but a last-resort, even then with the best-possible risk assessment, equally rigorous RIAs and a sunset/review clause ;
  - >>> (ix) joining international standardisation and allowing such standards (unless unfit for SHEIC objectives) to underpin SHEIC is crucial



# Better regulation lowers trade costs (2)

- Thus, if B.R. principles prevail domestically, it must mean that a 'safe' car overcomes the market failure, and the different technical requirements for achieving this 'safe' car cannot be essential
- The most radical interpretation of that line is that US and EU could both allow Atlantic car imports, subject to a safeguard clause (and possible incompatibility issues). This would amount to a drastic reduction of trade costs !!
- If one retreats from this 'equivalence' logic, one risks being sucked into the quicksand again, quarelling (COM paper) about 'how a crash test dummy ... be positioned' - that is stuff for standardisers and belongs in Geneva
- Hence, retreating from B.R. Principles has to be strictly disciplined and justified in non-technical and transparent ways ; relying on international standards has to be incentivised e.g. via a 'presumption of conformity'

# General principles & specifics: no easy match

- In 1998, the EU and US concluded a 'deep' and careful MRA, and specifics for six goods sectors
- Why was there never a detailed public assessment ? Why could such a carefully drafted agreement still derail hopelessly (except for telecoms equipment and the tiny marine equipment ones) ? Does this failure not tell us that it is the nitty-gritty which prevails, and those who control it ?
- Consider conformity assessment of cars and of electric goods : how can B.R. principles be the same ['regulatory coherence'], yet.....
  - >>>> US cars and EU electric goods are subject to self certification
  - >>>> whereas EU cars (type approval) and US electric goods (UL) under mandatory 3rd party assessment (UL even a monopoly ; Sherman Act ??)

# General principles & specifics : no easy match (2)

- oldest US product standard is that for pressure vessels, after Mississippi steam boats exploded one after the other around 1880s ; but that is precisely the reason why B.R. Principles are not adhered to, not even TBT Code principles
  - >>> no performance but design standards (hence, very restrictive)
  - >>> no reference to EU or world standards [EU worked decades on this problem, first great variety amongst Member States, well tested]
  - >>> no risk assessment of the US refusal to allow EU-based vessels
- And what credibility does EU adherence to B.R. Principles have if GMOs are still regulated extremely restrictively or banned, although literally 1000nds of scientific publications have generated zero (!) empirical evidence of risk anywhere in the world over decades, plus.....
  - >>>> the impressive 2008 EFSA inventory report on risks associated with GMOs (following earlier reports), with half the world cooperating
  - >>>> this year's common report and later position by 23 national (EU) science associations, strongly seconded by the EU Chief Science Advisor

# Business as a frontrunner - good idea ?

- Since 1995 TransAtlantic business has been an advocate, driver and facilitator of 'deeper' market integration between the US and the EU
- And once again in TTIP, invited by the 2 trading partners, especially on the 'regulatory part'
- Is this tantamount to 'regulatory capture' ?
- Or, are all these competitors facilitating 'tacit collusion'?
- Or, do business wishes and the EU (or US) public interest somehow and magically happen to coincide?

# Business as a frontrunner – good idea ?(2)

- In appreciating what business can (and should not be allowed to) do, one has to consider two important problems :
- One is the extent and quality of information on technical specifications: it would be excessively costly, slow, if not at times 'undo-able', for authorities to try to always match fully the technical information which manufacturers have and continuously improve - over many sectors with great complexity and global value chains
- Starting from B.R. Principles where SHEIC objectives are set by domestic political processes, and one regulates after solid RIAs, the (technical) instruments can vary between countries as well as over time, and with innovation, too
- In most cases, (COM paper) 'technical differences are unintentional and not the result of political choices' ; thus, they can be changed and business (from both sides !) can help a lot, without ever touching objectives

# Business as a frontrunner – good idea? (3)

- The other problem has to do with political economy in classical trade policy
- More often than not, there are vested (business) interests behind barriers, tariffs of course, but also ‘regulatory barriers’
- ECORYS (2009) has proxied sectoral trade cost equivalents of the ‘regulatory barriers’ : in manufacturing, they range from 6.5 % to 56.8 % for US exports to EU, and from 6.5 % to 73.3 % for EU exports to the US. Without the outlier of food & beverages, the highest equivalents are 25.5 % for US exports and 32.4 % for EU exports.
- These are comfortable margins, far higher than tariff protection, and might suggest deep vested interests against ‘regulatory convergence’ and B.R.
- Precisely therefore, it is so helpful to let EU **AND** US business **together** propose how to go about mutual recognition, technical convergence, or ‘equivalence’ or compatibility or alignment or cooperation, interacting with regulators protecting the SHEIC objectives
- Not only does it greatly reduce asymmetries of information to the EU and US simultaneously – which helps negotiations – but it should normally ensure that business cannot defend or uphold entrenched vested interests in EU or US technical requirements

# A final Note on economic effects

- Admirable efforts by Joseph Francois and his team (CEPR, 2013) as well as CESifo/Bertelsmann (2013) – with a different simulation technique – have been undertaken on economic effects of TTIP
- One key aspect, going to the heart of the ‘regulatory part’, is not in, however; it is all solely about ‘trade costs’
- With ‘deep’ market integration, hence, B.R. principles and equivalence/mutual recognition/alignment/compatibility/ harmonisation, the consequences are not just about ‘trade costs’ but will also ‘trickle down’ to **domestic** markets
- Since EU /US North Atlantic exports amount to only a small share of total sectoral activity in each case of ‘equivalence’ (etc.), the inference must be that the **economic gains of lower costs in domestic markets ought to be sizeable as well**
- Exactly the same has been shown in the empirical analysis of the gains from the EU services directive: most gains found in **domestic** markets of Member States
- To some degree, ‘deeper’ market integration amounts to domestic regulatory reform, and it pays off handsomely !