Transatlantic Trade and Investment Partnership Agreement and the Development of International Standards

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Introduction

Horst-Günter Krenzler conducted and steered trade negotiations on behalf of the EU for a long time. After his resignation from the European Commission, he continued to be closely involved in matters concerning the Union's common commercial (trade) policy, both as a professional and academic, until his untimely death. There is no doubt that he would have been intrigued by the ongoing attempt of the EU and the US to build a more integrated "transatlantic marketplace"[1] by concluding a transatlantic free trade agreement (hereinafter *FTA*). With this in mind, the following observations will address the current negotiations between these two global (trade) players and focus specifically on the *regulatory* aspects of these negotiations.[2]

[1] Statement by former EU Trade Commissioner Karel De Gucht on the Transatlantic Trade and Investment Partnership (TTIP) ahead of the second round of negotiations, 30 September 2013, p. 1, available at: http://ec.europa.eu/trade/policy/in-focus/ttip/.

[2] In its announcement of launching trade negotiations with the US, the European Commission stressed that TTIP "will aim to go beyond the classic approach of removing tariffs and opening markets on investment, services and public procurement. In addition, it will focus on aligning rules and technical product standards which currently form the most important barrier to transatlantic trade." Further, the European Commission pointed out that "the most significant trade barrier is not the tariff paid at the customs, but so-called 'behind-the-border' obstacles to trade." European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, pp. 1–2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. The EU's chief negotiator, Bercero, stated at the end of the sixth negotiating round in July 2014 that the regulatory agenda "is considered to be the most economically significant part of TTIP and what makes TTIP different

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Early 2013, the EU and the US announced their intention to start negotiating a bilateral FTA dubbed the "Transatlantic Trade and Investment Partnership" (hereinafter *TTIP*).[3] The name does not seem to be coincidental: it indicates that the negotiations regarding the conclusion of a Trans-Pacific Trade Agreement, currently conducted by a number of Pacific countries, including the US, form a backdrop to the negotiations between the EU and the US. For the EU, therefore, the TTIP negotiations are also an attempt to prevent being sidelined, in political and economic terms, by those other plurilateral trade negotiations. For the US, the TTIP negotiations serve at least two goals: first, to put pressure on their Pacific partners to agree on an ambitious trade deal as a means of avoiding to fall behind in the "race" with the EU and, second, to place the US in the middle of two "major" trading regions with—politically close—third countries,[4] thereby also trying to keep the People's Republic of China in check as regards trade matters.[5] Moreover, the lack of progress in the Doha Round[6] is a prime motive for both the EU and the US in seeking to conclude an FTA.[7] Most recently, Russia's annexation of Crimea, which

from the other trade agreements." European Commission (Trade), press release, EU–US trade—latest round of talks on transatlantic trade pact ends in Brussels, 18 July 2014, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1132.

[3] European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, pp. 1–2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. The Council adopted a decision on the negotiating directives for the Commission on 14 June 2013; see European Commission, press release MEMO/13/564, Member States endorse EU–US trade and investment negotiations, 14 June 2013, available at: http://europa.eu/rapid/press-release_MEMO-13-564_en.htm.

[4] Biden (2014), p. 9 ("The two agreements now in the works would place the US at the centre of two vast trading regions").

[5] See the comments by Stevens (2013), p. 9; and Donnan (2014a), p. 2.

[6] In spite of the modest success of the ninth WTO Ministerial Conference held in Bali in December 2013, which agreed on a Trade Facilitation Agreement and certain measures in the areas of agriculture as well as special and differential treatment of LDCs (see the overview on the WTO website, available at: http://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm), the core elements of the Doha Round—market access in agriculture, nonagricultural goods and services—still awaits its conclusion (see the statement of WTO Director-General Azevêdo to the General Council, WTO, news, Azevêdo reports "excellent start" on efforts to put Doha Round back on track, 14 March 2014, available at: http://www.wto.org/english/news_e/news14_e/gc_rpt_14mar14_e.htm). The momentary inability of WTO members to adopt the protocol on the application of the Trade Facilitation Agreement had cast a new shadow on their willingness to revive the dormant Doha Round and even threatened the proper functioning of the multilateral trading system, according to WTO Director-General Azevêdo; see his statement at the informal meeting of the Trade Negotiations Committee, WTO news (2014).

[7] Former EU Trade Commissioner De Gucht stressed that "good multilateral rules on these kind of issues take a lot more time to achieve, if at all, because they are complicated. Working bilaterally within the TTIP to begin with is therefore much easier than working with the 159 members of the WTO." European Commission, press release SPEECH/24/357, De Gucht (2014d), p. 3.

has thrown the relationship of Western democracies with Russia into disarray, provided another strong geopolitical impetus to the TTIP negotiations.[8]

Prior to announcing the start of the TTIP negotiations, both sides had set up a so-called High-Level Working Group on Jobs and Growth, whose task consisted of identifying policies and measures that could spur the transatlantic trade and investment relationship. After intensive deliberations, this working group issued a final report that recommended negotiations on "a comprehensive, ambitious agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules."[9] In particular, the economic gains that could be potentially reaped from a transatlantic FTA are estimated to be significant: a study commissioned by the European Commission estimates that an FTA between the EU and the US, once fully implemented, would increase the EU GDP by 0.4 % (or EUR 120 billion per annum) and the US GDP by 0.5 % (or EUR 95 billion per annum) as a result of expanded bilateral trade between the EU and the US.[10] In their efforts to explain to the civil society why they have entered into these negotiations, both sides allude persistently to these potential economic benefits. Much of these welfare aspects, namely as much as 80 %,[11] would stem from the reduction of non-tariff barriers to trade (NTBs) or "behind the border policies," given that the average tariff rates of the EU and US are rather low.[12]

Against this backdrop, it is not surprising that the TTIP negotiations pursue the goal of aligning the respective norms, standards, and technical regulations of both

[8] ICTSD (2014), p. 4; Kafsack (2014b); Malmström (2014a), p. 4.

[9] High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 6, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

[10] European Commission (2013b), pp. 6–7. See also European Commission, press release MEMO/13/211, Independent study outlines benefits of EU–US trade agreement, 13 February 2013, available at: http://europa.eu/rapid/press-release_MEMO-13-211_de.htm.

[11] European Commission (2013b), p. 6. In its communication "Global Europe: Competing in the World," the European Commission had already emphasised that "the economic gains from tackling non-traditional, behind-the-border barriers are potentially significant in the EU and US," p. 10, COM(2006) 567 final. In the same vein, the Commission's communication "Trade, Growth and World Affairs" states with respect to the trade relationship with the US that "the biggest remaining obstacles lie in the divergence of standards and regulations across the Atlantic, even though we have very similar regulatory aims," p. 11, COM(2010) 612 final. See also ECORYS (2009) for an overview of NTBs in various sectors of economic activity and the possible effects of their reduction.

[12] On average, EU tariffs amount to 5.2 % and US tariffs amount to 3.5 % (see European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, p. 2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm). Interestingly, the final report of the High-Level Working Group on Jobs and Growth notes that "both sides should consider options for the treatment of the most sensitive products," High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 3, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf, which presumably means that the planned removal of customs duties will not cover 100 % of bilateral trade.

parties and, more broadly, their approach to regulatory action so as to minimise the impact on cross-border trade.[13] At the same time, the TTIP agenda of "regulatory coherence" stirs a public debate within the EU and US about the ensuing consequences for consumers; there is widespread concern that this regulatory agenda will trigger a race to the bottom and thus lead to a lowering of standards (in a broad, nontechnical sense), thereby creating risks for consumers' health and safety.[14] Former EU Trade Commissioner *De Gucht* sought to assuage these concerns by insisting that no European standard relating to the areas of health, environment, and food would be lowered as a result of TTIP.[15]

In this context, it is worth recalling that this is not the first time the EU will negotiate an FTA containing specific disciplines on NTBs. The FTA with South Korea, for instance, sets forth (sector-specific) commitments relating to the elimination and reduction of NTBs, in particular as regards consumer electronics, motor vehicles, pharmaceuticals, and chemicals.[16] In a similar manner, the FTA negotiated with Singapore also includes (sector-specific) disciplines on NTBs, especially as regards electronics, motor vehicles, pharmaceuticals, and equipment to generate renewable energy.[17] The focus on NTBs and regulatory barriers to trade in FTA

[13] "The goal of this trade deal is to reduce unnecessary costs and delays for companies, while maintaining high levels of health, safety, consumer and environmental protection"; see European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, p. 2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. In his press statement following the political stocktaking meeting with USTR Froman, former EU Trade Commissioner De Gucht stressed: "What we aim to achieve in TTIP is that these regulatory agencies coordinate more closely with each other," European Commission, Statement/14/12, "Stepping up a gear": Press Statement by EU Trade Commissioner Karel De Gucht following the stocktaking meeting with USTR Michael Froman on the Transatlantic Trade and Investment Partnership (TTIP), 18 February 2014, p. 2, available at: http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152198.pdf. See also European Commission (Trade) (2014), p. 1.

[14] See Financial Times (2013a), p. 2; Financial Times (2014b), p. 6; Financial Times (2014a); Donnan (2014b), p. 3; Kafsack (2014a), p. 9; Caldwell (2014), p. 9. A similar concern is voiced with respect to the TTIP chapter on investment protection, in particular as regards its investor-State arbitration provisions, in that firms from the other party would avail themselves of the investor-state arbitration mechanism against regulatory measures, e.g. in the environmental area, that may have a negative impact on their businesses; see Frankfurter Allgemeine Zeitung (2013), p. 19; ICTSD (2014), p. 4.

[15] European Commission, press release SPEECH/14/52, De Gucht (2014c); see also European Commission (Trade) (2014), p. 5; Malmström (2014b), p. 2.

[16] European Commission (2010), pp. 1 and 3–5. The EU–South Korea FTA is "the first of the new generation of FTAs launched in 2007 as part of the 'Global Europe' initiative" and "the most comprehensive free trade agreement ever negotiated by the EU," id., p. 1. The Commission stated that the EU–South Korea FTA "will inform our approach for further FTAs under negotiation," Commission, Staff Working Document, External sources of growth, 2012, p. 12, available at: http://trade.ec.europa.eu/doclib/docs/2012/july/tradoc_149807.pdf.

[17] European Commission (Trade) (2013), pp. 4–6. Contrary to the EU–South Korea FTA, the FTA with Singapore has not entered into force yet but is expected to become effective by late 2014; European Commission, press release MEMO/13/1080, The EU's bilateral trade and investment

negotiations corresponds to the Union's strategy of pursuing deep and comprehensive trade agreements that dismantle NTBs and establish a more systematic regulatory cooperation with major third countries.[18]

What would set the TTIP apart is, of course, its scale and scope since the EU and US stand for roughly one-third of global trade flows.[19] Inevitably, therefore, these negotiations attract a lot of attention from third parties due to the effect that a TTIP would have on their trade relations with the EU and the US.[20] Indeed, the EU and the US are cognisant of the impact on third countries but claim that such impact would be benign in nature due to positive (direct and indirect) spill-over effects.[21] They argue that the envisaged alignment of the EU's and the US's regulatory regimes would reduce compliance costs of companies in third countries that export to the EU or the US and provide an incentive to third countries to move towards any new common standard created in the framework of TTIP.[22]

In fact, the negotiating parties envisage that "there may be areas in which the development of common or technically equivalent standards could be considered."[23] In turn, it is suggested that such common standards "are more likely to be followed around the world"[24] and hence stand "a good chance of becoming

agreements—where are we?, p. 4, available at: http://europa.eu/rapid/press-release_MEMO-13-1080_en.htm.

[18] European Commission, Trade, Growth and World Affairs, COM(2010) 612 final, pp. 4–5, 7; see also European Commission (2013a), pp. 5–6, European Commission, press release SPEECH/14/405, De Gucht and Malmström (2014d), pp. 3–4.

[19] European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, p. 1, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. Together, the EU and the US account for 46 % of world GDP; see European Commission (2013b), p. 10.

[20] See The Economist (2013), p. 39; Le Temps (2014), p. 8.

[21] European Commission (2013b), pp. 10–11. In contrast, a study conducted by the Ifo-Institute on behalf of the Bertelsmann-Stiftung finds that TTIP would have negative effects on third countries; see Financial Times (2013b).

[22] European Commission (2013b), p. 11. See also European Commission, press release SPEECH/14/141, De Gucht, pp. 4–5 ("many of the regulatory barriers we remove will not only benefit European and American companies but also exporters from developing countries").

[23] European Commission, EU–US Transatlantic Trade and Investment Partnership – Technical barriers to trade, Initial EU position paper, p. 5, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf.

[24] European Commission, Transatlantic Trade and Investment Partnership – The Regulatory Part, p. 2, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf. As was candidly pointed out by De Gucht, "many of the technical solutions will be able to be applied more widely, especially as they will already be operating in 40% of the world economy," European Commission, press release SPEECH/14/141, De Gucht, p. 5. De Gucht reiterated this stance in a speech in Berlin on 5 May 2014: "And if the agreement covers 40% of the world economy, that will be a basis for future work with a wider set of partners." European Commission, press release SPEECH/24/357, De Gucht (2014d), p. 3.

international standards."[25] It appears that this latter aspect is very present in the negotiators' minds: their public announcements proclaim that both sides could set the benchmark for developing global standards.[26] In his welcoming remarks prior to the first stocktaking meeting with USTR *Froman* on February 2014, former Commissioner *De Gucht* stated openly: "What we are trying to do is [. . .] work together to make sure that we can continue to play a leading role in world markets about norms and standard setting – not in a 'closed shop' manner, but in an open way."[27]

Given that the regulatory alignment sought under the TTIP should ostensibly serve also as a vehicle for (contributing to) the development of international standards, this "standard setting" for the international community is further examined below along the following lines: firstly, the main components of the envisaged regulatory chapter of the TTIP and their perceived potential to contribute to international standard setting are identified (see below section "Regulatory Chapter of the TTIP"); secondly, the approach to international standard setting under the TTIP is compared to the understanding of this process in relevant WTO Agreements (see below section "International Standards and WTO Law"); and, finally, some concluding remarks are offered (see below section "Conclusions").

Regulatory Chapter of the TTIP

Main Elements and Instruments

The "regulatory part" of the TTIP negotiations is composed of five elements: (a) sanitary and phytosanitary measures, (b) technical barriers to trade, (c) annexes for specific goods and services sectors, (d) cross-cutting disciplines on regulatory coherence and transparency regarding goods and services, and (e) a framework for regulatory cooperation.[28] Although these elements differ in scope, as

[25] European Commission, press release SPEECH/13/801, De Gucht (2013), p. 6. In a recent speech in Paris, De Gucht pointed out that "the third way people would benefit from regulatory cooperation is because whatever we do together would provide an excellent basis for future global efforts towards regulatory coherence." European Commission, press release SPEECH/14/314, De Gucht (2014a), p. 5.

[26] European Commission, Press release at the occasion of the conclusion of the third round of negotiations, 20 December 2013. De Gucht stressed that common approaches of the EU and the US "may shape regulation around the world, including in countries like Brazil, India, China and Russia, where today standards are typically much lower than in the US and the EU," European Commission, press release SPEECH/14/52, De Gucht (2014c), pp. 6–7. See also European Commission (Trade) (2014), p. 3.

[27] European Commission, Statement/14/11, 17 February 2014, p. 1. In a similar vein, De Gucht stated: "This means that TTIP will be an important way for us to shape regulations, norms, including on investment, and ultimately values that govern economic exchange worldwide," European Commission, press release SPEECH/14/405, De Gucht, p. 2; similarly Malmström (2014b), p. 3.

[28] High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 4, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

some are sectoral and some are horizontal in nature, they share two overarching aims: first, to make—both existing and future—regulations more *compatible* and, second, to promote increased *cooperation* between the regulatory bodies of both sides.[29] Regulatory compatibility and cooperation are intertwined because the compatibility of regulations will ultimately bear fruit only if the competent regulatory bodies, which are responsible for applying and enforcing those regulations, are willing to cooperate with one another.[30]

In order to achieve regulatory compatibility and cooperation, the aforementioned elements have to rely on certain instruments. In this respect, the final report of the high-level working group on jobs and growth referred to "early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices," as well as "regulatory harmonization, equivalence, or mutual recognition, where appropriate."[31] It should be noted in this context that some of these instruments form part of a broader set of regulatory policies and practices that were identified by the OECD Regulatory Policy Committee and recommended to OECD members with a view to improving regulatory quality,[32] including the promotion of regulatory coherence through coordination mechanisms between the supranational, national, and subnational levels of government.[33]

Irrespective of their distinct characteristics, the various elements and instruments of TTIP's regulatory chapter are first and foremost intended to foster regulatory compatibility and cooperation in the *bilateral* trade relationship between the EU and the US. This raises the question of how the bilateral process of

[29] European Commission, Transatlantic Trade and Investment Partnership – The Regulatory Part, pp. 3–4, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf; European Commission, EU–US Transatlantic Trade and Investment Partnership. Trade Cross-cutting disciplines and Institutional provisions. Initial EU position paper, p. 3, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf. See also European Commission, press release SPEECH/13/801, De Gucht (2013), pp. 4–5; European Commission, press release SPEECH/14/406, De Gucht (2014b), p. 3; Malmström (2014c), pp. 2–3. The EU's chief negotiator, Bercero, underlined at the end of the sixth negotiating round that "enhanced regulatory cooperation is essential if the EU and the US wish to play a leading role in the development of international regulations and standards based on the highest levels of protection." European Commission (Trade), press release, EU–US trade—latest round of talks on transatlantic trade pact ends in Brussels, 18 July 2014, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1132.

[30] Malmström (2014b), p. 2. It has been pointed out that the early identification of potential regulatory friction is a key part of regulatory cooperation, and an effective regulatory cooperation should operate as a means of preempting trade concerns, WTO (2014), p. 32.

[31] High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 4, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf. On the use of harmonisation, equivalence, and mutual recognition in bilateral and regional FTAs as a means to achieve regulatory coherence as well as the differences in the approaches pursued by the US and the EU, see Lesser (2007), paras. 27 et seq., paras. 43–44 and 51–53; see also WTO (2011), pp. 140–141.

[32] OECD (2012).

[33] OECD (2012), recommendation no 10.

regulatory alignment between the EU and the US is supposed to bring about *international* standards.

Potential Contribution to International Standard Setting

Three patterns of how the regulatory agenda of the TTIP could potentially contribute to international standard setting are discernible at this stage of the negotiations: (1) cooperation of the parties' regulatory bodies in international standardisation organisations,[34] (2) use of international standards as a basis for regulatory action,[35] and (3) unilateral adoption by third countries of newly created transatlantic standards.[36] The manner and extent to which these patterns would or could contribute to the development of international standards differs considerably.

The first pattern—cooperation of the EU and US regulatory bodies within international standardisation organisations—seems to be the most obvious and possibly most promising way to contribute to the making of international standards. The responsibility of devising relevant international standards lies with the international standardising organisation concerned. Any international standard adopted by such organisations will have benefitted, in principle, from input received from all of their members. By coordinating and cooperating their input into the process of developing a relevant international standard within an international standardisation organisation, the EU and the US will be more influential in the standard-setting process than if they acted on their own, especially if they pursued different or even divergent objectives instead. This type of "coalition building" is a natural phenomenon occurring within any international organisation that seeks to establish a common denominator for its membership.[37] It is also a sign for members' willingness to engage in the collaborative effort of the organisation's members to find such common denominator that will then form the basis for an international standard.

In contrast, the second pattern—the use of existing international standards as a basis for regulatory action—will only have an *indirect* effect on international standards. This behaviour does not contribute *per se* to the development of international standards since it relies on an existing standard as a foundation for subsequent regulatory action.[38] Nonetheless, this kind of behaviour is meaningful

[34] European Commission, EU–US Transatlantic Trade and Investment Partnership – Technical barriers to trade, Initial EU position paper, p. 5, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf; European Commission (Trade) (2014), p. 1.

[35] European Commission, EU–US Transatlantic Trade and Investment Partnership. Trade Cross-cutting disciplines and Institutional provisions. Initial EU position paper, p. 2, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf.

[36] European Commission (2013b), p. 10.

[37] It has been noted that the "development of international standards is, by definition, a form of multilateral cooperation," WTO (2012), p. 179.

[38] The abovementioned recommendations of the OECD Regulatory Policy Committee include a recommendation to give consideration to all relevant international standards, OECD (2012), recommendation no 12.

in relation to international standards in two respects: first, it confirms that the international standard concerned is sufficiently appropriate and effective so as to serve as a relevant basis for regulatory action at the national level; second, it fulfills the core purpose of the international standard in constituting a common benchmark for regulatory action at the domestic level of all members of the organisation that has set the standard in question.[39]

The third pattern—the expectation that third countries would unilaterally adopt transatlantic standards created under the TTIP—appears to be the most sensitive and possibly most controversial one since it seeks to exploit the dominant position of the transatlantic trade relationship within global trade. The first pattern consists of multilateral action through participation in the international standard-setting process, while the second pattern consists of unilateral action; this unilateral action is rooted in a multilateral outcome, i.e. an existing international standard previously adopted by an international standardising organisation, and may induce widespread reliance on the international standard in question for regulatory action at the national level. In contrast, the third pattern bears no (direct) relationship to plurilateral or multilateral discussions and efforts regarding the setting of international standards since this pattern implies that no relevant international standard yet exists or, conversely, an existing international standard will be deemed not to be relevant, appropriate, or effective for the pursuit of the regulatory goal in question. Thus, the third pattern relies simply on the fact that the EU and the US stand for roughly one-third of global trade and that this, in and of itself, would provide third countries with an "incentive to move towards any new transatlantic standards that the TTIP creates."[40] Although this so-called indirect spill-over effect may well materialise, as a *factual* matter, it appears somewhat difficult to reconcile this policy stance with the understanding that international standards should result from a collaborative effort of the membership of a relevant international standardisation organisation provided that one exists and is active in the area in question.

The aforementioned patterns will be contrasted below with pertinent WTO rules that relate to international standards.

International Standards and WTO Law

Several WTO Agreements refer, in one way or the other, to international standards. In light of the abovementioned elements of the regulatory chapter of the TTIP, three WTO Agreements are particularly relevant: as regards trade in goods, the

[39] It must be noted, though, that the linkage between regulatory action and international standards is often very difficult to establish because of a lack of transparency, i.e. there is a lack of information that would allow to identify, for a given sector, whether and to which extent international standards form the basis for regulatory action; see Fliess et al. (2010), paras. 74–75 and 76 et seq. As regards services, the problem is compounded by the fact that international standards are much less prevalent as compared to goods, WTO (2012), p. 185.

[40] European Commission (2013b), p. 10.

Agreement on Technical Barriers to Trade (hereinafter *TBT Agreement*) and the Agreement on the Application of Sanitary and Phytosanitary Measures and, as regards trade in services, the General Agreement on Trade in Services (hereinafter *GATS*). The following considerations differentiate between goods trade, on the one hand, and services trade, on the other, because of their distinct characteristics and the different rules that apply under the said Agreements; the focus here is on the TBT Agreement and the GATS, respectively.

Before turning to these two multilateral trade agreements in more detail, though, it is noted that these agreements serve in the present context as the most important examples of multilaterally agreed "benchmarks" for the three regulatory patterns regarding international standard setting that are currently contemplated in the TTIP negotiations. What is of interest here is the question of how the common intention of the EU and the US to proceed with respect to international standard setting compares to the multilateral "benchmarks" established by the TBT Agreement and the GATS. As WTO members, the EU and the US have to adhere to their obligations under those agreements. Neither Article XXIV GATT 1994 nor Article V GATS allows them to "opt out" from those obligations. For one thing, both provisions provide for exceptions from (nondiscrimination) obligations under the GATT or GATS as regards the *internal* (*inter se*) trade between or among the parties to an FTA.[41] When it comes to the contribution of FTA parties to the standard setting at the international level, though, said exceptions do not apply because in this instance their internal (*inter se*) trade relationship is not a stake. For another, Article XXIV GATT 1994 is *ipso iure* inapplicable to obligations under the TBT Agreement,[42] whereas the two GATS provisions that are relevant in the present context—Articles VI and VII GATS—do not come under the scope of Article V GATS.[43]

[41] Notwithstanding the fact that both provisions also set out requirements regarding the impact of an FTA on the trade with other WTO members not parties to the FTA in question.

[42] The Appellate Body observed that "the *TBT Agreement* does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX." WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 101. Referring to this ruling, the Appellate Body later stated that "Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement)." WTO, report of the Appellate Body, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, para. 5.56. The same conclusion applies, *mutatis mutandis*, to Article XXIV GATT 1994.

[43] Article V GATS allows the conclusion of economic integration agreements by WTO members if two conditions are met: such agreements must have substantial sectoral coverage and provide for the absence or elimination of substantially all discrimination, in the sense of Article XVII. However, Articles VI and VII GATS relate to domestic regulation and recognition, which are both distinct from national treatment in the sense of Article XVII GATS. See also Marchetti and Mavroidis (2012), p. 415 (426–427), who argue that recognition is not necessary for the establishment of a PTA.

Trade in Goods and Technical Barriers to Trade

The preamble of the TBT Agreement recognises the important contribution that international standards can make to improving the efficiency of production, facilitating the conduct of international trade, and enabling a technology transfer to developing countries. It is not surprising, therefore, that the preamble encourages the development of international standards in order to promote the harmonisation of technical regulations.[44]

Article 2 of the TBT Agreement concerning the preparation, adoption, and application of technical regulations by central governmental bodies[45] imposes two obligations on WTO members with respect to international standards that are particularly relevant in the present context: (1) to base national technical regulations on relevant international standards[46] and (2) to participate in the preparation of international standards by appropriate international standardising bodies.[47] Before turning to these obligations in some more detail, it is important to apprehend how the TBT Agreement understands the notion of "international standard" as this has an impact on the contours of the aforementioned obligations.

International Standard Within the Meaning of the TBT Agreement

Annex 1 to the TBT Agreement (hereinafter *Annex 1*) sets out the terms and their definitions for purposes of the TBT Agreement. The definitions of the terms "standard" and "international body or system" seem to be particularly relevant as regards the meaning of international standard in the framework of the TBT Agreement since there is no explicit definition of the terms "international standard" or "international standardisation organisation/body."

The definition of "standard" reads as follows: "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." The explanatory note to this definition states in relevant part: "For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This

[44] In this way, international standards can play a crucial role in the process of achieving regulatory alignment on a global scale, Wijkström and McDaniels, para. 2.1.

[45] The provisions of the Agreement on Technical Barriers to Trade (TBT Agreement), 1868 U.N.T.S. 120 regarding central government bodies apply to the EU, as per the explanatory note to paragraph 6 of Annex 1 to the TBT Agreement.

[46] Article 2.4 TBT Agreement.

[47] Article 2.6 TBT Agreement.

Agreement covers also documents that are not based on consensus." Moreover, the definition of the term "international body or system" reads as follows: "Body or system whose membership is open to the relevant bodies of at least all Members." The aforementioned definitions of the terms "standard," including the explanatory note, as well as "international body or system," when read together, may serve to understand the meaning of "international standard" in the context of the TBT Agreement.

Moreover, the introductory part of Annex 1 refers to the definitions used in the sixth edition of the "ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities" (hereinafter *Guide*). The latter definitions have the same meaning under the TBT Agreement when used in that agreement provided that they do not conflict with the definitions spelled out by Annex 1.[48] The Guide defines "international standard" as a "standard that is adopted by an international standardizing/standards organization and made available to the public." Further, the Guide defines "standards body" as a "standardizing body recognized at national, regional or international level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public."

Based on the aforementioned definitions, the Appellate Body arrived at the conclusion that a "standard has to be adopted by an 'international standardizing *body*'" in order to constitute an international standard in the sense of the TBT Agreement.[49] In turn, an international standardising body is a "body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members."[50] As regards the element of "recognized activities in standardization," the Appellate Body held that "evidence of recognition by WTO Members as well as recognition by national standardization bodies would be relevant."[51] As regards the element of "openness," the Appellate Body noted that "a body will be open if membership to the body is not restricted. It will not be open if membership is *a priori* limited to the relevant bodies of only some WTO Members."[52]

In this respect, the Appellate Body also had recourse to the TBT Committee Decision on Principles for the Development of International Standards, Guides and

[48] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 354.

[49] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 356 (emphasis in the original).

[50] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 359.

[51] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 363.

[52] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 364.

Recommendations with Relation to Articles 2, 5, and Annex 3 of the Agreement,[53] which it considered to constitute a subsequent agreement within the meaning of Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties.[54] This decision was adopted with a view to guiding WTO members in the development of international standards by setting out six principles that relate to transparency, openness, impartiality and consensus, effectiveness and relevance, coherence and development.[55] Relying on the principle of openness, as set out by said TBT Committee decision, the Appellate Body took the view that "in order for a standardizing body to be considered 'international' for the purposes of the *TBT Agreement*, it is not sufficient for the body to be open, or have been open, at a particular point in time. Rather, the body must be open 'at every stage of standards development.'"[56] Further, a standardising body "must be open 'on a non-discriminatory basis.'"[57]

The foregoing observations lead to a preliminary conclusion with respect to the development of standards under the TTIP: any such standard would not constitute an *international* standard in the sense of the TBT Agreement because the TTIP will not constitute an international standardising body within the meaning of that agreement. In particular, the TTIP will not be open on a nondiscriminatory basis since membership to the TTIP will *a priori* be limited to the EU and the US. That being said, standards developed by the EU and the US in the TTIP framework could serve as a template for the development of international standards by international standardising bodies if the EU and the US work together in such bodies to this end, as envisaged by the first pattern of TTIP's regulatory agenda.

International Standards as a Basis for Technical Regulations

Having clarified the meaning of international standard under the TBT Agreement, the obligation imposed by Article 2.4 TBT Agreement can now be addressed. This provision reads: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when

[53] WTO, Committee on Technical Barriers to Trade, Decisions and recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, Note by the Secretariat, G/TBT/1/Rev. 11 (16 December 2013).

[54] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 372.

[55] The observance of these principles has been a prominent feature in the discussions of WTO members within the TBT Committee. Following the last triennial review of the TBT Agreement by the TBT Committee, it is likely that WTO members will focus on how standardising bodies implement these six principles in their standard-setting practice, Wijkström and McDaniels, para. 3.16.

[56] Wijkström and McDaniels, para. 374.

[57] Wijkström and McDaniels, para. 375.

such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

This provision mandates WTO members to use international standards as a basis for their technical regulations but subjects this obligation to certain conditions.[58] The words "as a basis" circumscribe the link that has to exist between a relevant international standard and a technical regulation: it has to be "a very strong and very close relationship."[59] For this to be the case, the international standard has to be the "principal constituent or fundamental principle for the purpose of enacting the technical regulation."[60]

The said obligation is qualified in several respects, however. To start with, the obligation only applies if an international standard exists or its completion is imminent. This condition is self-explanatory.

Next, an international standard has to be (at least partially) relevant for the technical regulation in question. This condition is closely linked to the aforementioned obligation of using international standards as a basis for technical regulations since an international standard cannot be the principal constituent of a technical regulation unless it is *relevant* for that technical regulation. For this to be the case, the international standard must somehow matter or be material to the substantive (i.e., scientific and/or technical) content of the technical regulation in question. As per the definition in Annex 1, a technical regulation lays down product characteristics or their related processes and production methods in a mandatory manner. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process, or production method. Accordingly, the international standard in question has to "bear upon, relate to, or be pertinent to"[61] (one of) the elements (i.e., product characteristics, terminology, labelling, etc.) that are laid down, included, or dealt with by the technical regulation in question so as to be relevant for that technical regulation. Put differently, a comparison between the international standard and the technical regulation has to show that their respective (scientific and/or technical) subject matters overlap, at least partially.

Finally, WTO members may refrain from resorting to a relevant international standard if it were an ineffective or inappropriate means for the fulfilment of the

[58] By codifying scientific and technical knowledge developed at the global level, the use of international standards in technical regulations may help to generate economies of scale and production efficiencies, reduce transaction costs, and facilitate international trade, thereby contributing to regulatory convergence; see WTO (2014), p. 22.

[59] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 245.

[60] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 243–244.

[61] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 229–232.

legitimate objective pursued by the technical regulation in question. Clearly, the adjectives "ineffective" and "inappropriate" refer to distinct situations, as is also reflected by the examples referred to in Article 2.4 TBT Agreement.[62] Conceptually, effectiveness has to do to with the *results* of the means employed, while appropriateness pertains to the *nature* of the means employed.[63] Accordingly, an international standard is an ineffective means if it is not capable of achieving the legitimate objectives pursued by the technical regulation and an inappropriate means if it is not suitable for accomplishing the legitimate objectives pursued by the technical regulation at stake.[64] It follows that both the effectiveness and the appropriateness (or suitability) of an international standard have to be determined in relation to the legitimate objective(s) pursued, and the level of protection sought, by the technical regulation in question.[65] The determination of the effectiveness and the appropriateness (or suitability) of international standards involves inevitably an element of discretion, given that WTO members may pursue different policy objectives with distinct levels of protection due to divergent national preferences and circumstances.[66] Depending on the preferences and circumstances involved, an international standard may thus be deemed by some WTO members to be an ineffective or inappropriate means for achieving a particular legitimate objective or the desired level of protection,[67] irrespective of the fact that international standards should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions.[68]

The second pattern discerned in the regulatory agenda pursued by the TTIP negotiations correlates to the requirement set forth by Article 2.4 TBT Agreement since this pattern contemplates to rely on international standards as a basis for regulatory action at the domestic level. In order to give full meaning to Article 2.4 TBT Agreement, TTIP parties would have to adopt the following approach under the said pattern: first, they would have to determine whether there are or will be in the near future any (at least partially) relevant international standards in relation to

[62] By way of example, Article 2.4 TBT Agreement mentions three situations where an international standard could be ineffective or inappropriate, namely because of fundamental climatic or geographical factors or fundamental technological problems. These examples provide an indication as to the meaning of "ineffective" and "inappropriate," respectively.

[63] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 285.

[64] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 288.

[65] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 287.

[66] WTO (2014), p. 21.

[67] See Wijkström and McDaniels, para. 2.5.

[68] WTO, Committee on Technical Barriers to Trade, Decisions and recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, Note by the Secretariat, G/TBT/1/Rev. 11 (16 December 2013), para. 10 (principle of effectiveness and relevance).

an envisaged technical regulation; second, they would have to establish whether the identified international standard would be both an effective and appropriate means to achieve the legitimate objectives, and the desired level of protection, that the envisaged technical regulation is intended to pursue.

The suggested approach would be important not only so as to abide by the obligation set out by Article 2.4 TBT Agreement. Additionally, said approach would have the benefit that TTIP parties could avail themselves of the presumption provided for by Article 2.5 TBT Agreement. Pursuant to this provision, a technical regulation that is "prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards [...] shall be rebuttably presumed not to create an unnecessary obstacle to international trade."[69] However, the presumption only arises if a technical regulation meets two conditions: first, it seeks to achieve a legitimate objective listed *explicitly* in Article 2.2 TBT Agreement,[70] and, second, it is in conformity with the international standard in question. This "conformity" requirement is linked to the obligation that WTO members must use relevant international standards as a basis for their technical obligations. The latter requirement would not be met if a technical regulation and the international standard concerned contradicted each other or if a technical regulation was based on only some (as opposed to all) of the relevant parts of the international standard concerned.[71] Even if a technical regulation is in accordance with relevant international standards, though, the presumption is only *rebuttable* in nature.[72] Yet in order to rebut a presumption arising under Article 2.5 TBT Agreement, it would have to be demonstrated that a technical regulation is more trade restrictive than necessary to fulfill a legitimate objective, in terms of Article 2.2 TBT Agreement.[73]

[69] Article 2.2 TBT Agreement explicitly mentions, albeit only by way of example, a number of legitimate objectives: national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment.

[70] The presumption does not arise if the legitimate objective pursued by the technical regulation in question is not "explicitly" mentioned in Article 2.2 TBT Agreement in spite of the fact that policy objectives other than those explicitly listed in Article 2.2 TBT Agreement may be legitimate in terms of that provision; see WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 313; WTO, report of the Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, para. 370.

[71] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 248 and 250.

[72] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 348.

[73] On Article 2.2 TBT Agreement and its conditions see WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 311–323, and WTO, report of the Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, paras. 369–379.

Participation in the Preparation of International Standards

The obligation to use relevant, effective, and appropriate international standards as a basis for technical regulations is complemented by the requirement set forth by Article 2.6 TBT Agreement. Pursuant to this provision, WTO members have to "play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations." The introductory part of this provision highlights the rationale underlying this obligation, namely to harmonise technical regulations on as wide a basis as possible. The participation of as many WTO members as possible in standard-setting activities of international standardising bodies will mean that the international standards will be apt to become benchmarks for future technical regulations,[74] thereby contributing to regulatory convergence.[75] The said rationale is related to the abovementioned obligation to use relevant, appropriate, and effective international standards as a basis for technical regulations since the harmonisation sought by international standards would not be realised if WTO members could simply neglect such standards.

The obligation to play a full part in the preparation of international standards by appropriate international standardising bodies is mitigated by a condition of a *factual* nature, namely the limits of WTO members' resources, in terms of human, financial, and technical resources. This condition takes into account that developing countries, especially the least developed among them, have only (very) limited (or even no) resources at their disposal. The participation of WTO members in the preparation of international standards may thus range from full to partial to no participation at all, depending on the resources available to them to this end.[76]

Notwithstanding the said resource limitation, the obligation to participate in standard-setting activities of international standardising bodies applies if the standard-setting activity relates to a *product* for which WTO members have already adopted technical regulations, or expect to do so. For the obligation to apply, it is thus sufficient that technical regulations adopted by WTO members pertain to the same products as the international standards being prepared by the appropriate international standardising bodies. In other words, the nexus between technical regulations of WTO members and nascent international standards is created by the products that are covered by both the technical regulations and the nascent international standards. This shows the interaction between Article 2.6 and Article 2.4 of the TBT Agreement: the former is concerned with the situation where international standards have not yet come into existence, whereas the latter addresses the situation where international standards exist, or their completion is imminent.

[74] Wijkström and McDaniels, para. 2.2.

[75] WTO (2014), p. 22.

[76] This state of affairs may create a risk of capture or bias in international standard-setting activities, Wijkström and McDaniels, para. 4.4.

The first pattern identified in the regulatory agenda of TTIP corresponds to the aforementioned obligation. The caveat relating to the limits of WTO members' resources is irrelevant for the TTIP parties. Consequently, they are duty bound to participate fully in the preparation by appropriate international standardising bodies of international standards for products for which they will have adopted technical regulations, or expect to do so. The intention of the TTIP parties to cooperate in international standardising bodies does not contradict said duty. To the contrary, the rationale underlying that duty, namely to harmonise technical regulations on as wide a basis as possible, lends support to WTO members willing to cooperate within international standardising bodies and coordinate their participation in the standard-setting activities of such bodies since such behaviour is conducive to the development of international standards by the bodies concerned.

This leads to the third pattern perceived in the regulatory agenda of the TTIP, namely the expectation that standards developed by the TTIP parties would be adopted by third countries in order to gain a better access to the transatlantic market for their goods. Even if this expectation became reality, it would not mean that the EU and the US could disregard their obligation under Article 2.6 TBT Agreement. If they adopt, or expect to adopt, technical regulations in the TTIP framework for products for which international standards are being prepared by the appropriate international standardising bodies, they have to play a full part in the preparation of those standards, even if they could advocate that their transatlantic standards should provide a blueprint for the international standards to be prepared.

Trade in Services and International Standards

In contrast to the preamble of the TBT Agreement, the GATS' preamble does not mention international standards and their relevance for (the regulation of) international trade in services. Rather, the GATS' preamble refers to the right of WTO members to regulate, and introduce new regulations, on the supply of services within their territories in order to meet national policy objectives. The short-hand reference of the GATS for this particular right of WTO members is "domestic regulation."

Domestic regulation is subject to certain disciplines set forth by Article VI GATS, most of which only apply to services sectors in which WTO members have undertaken specific commitments on market access and/or national treatment.[77] One of these disciplines is concerned with the *application* of licensing and qualification requirements and procedures as well as technical standards by

[77] The General Agreement on Trade in Services, 1869 U.N.T.S. 183 (GATS), disciplines that hinge on specific commitments are commonly referred to as "conditional" obligations whereas disciplines that apply irrespective of specific commitments are commonly referred to as "unconditional" obligations; see Adlung and Mattoo (2008), p. 48 (63 and 66).

WTO members and makes reference to international standards applied by WTO members.[78] The authorisation, licensing, or certification of (domestic and foreign) service suppliers is governed by domestic standards or criteria. Accordingly, the *recognition* of education or experience obtained, requirements met, or licenses or certifications granted in a particular country plays a crucial role in determining whether these domestic standards or criteria are met. In this respect, Article VII GATS calls on WTO members to contribute to the establishment and adoption of common international standards by relevant intergovernmental and nongovernmental organisations.[79]

The requirements under Articles VI and VII GATS relating to international standards, including the understanding of this notion in the GATS context, and their import for the regulatory patterns identified in the TTIP context, are explored in the following.

International Standards for Trade in Services

The definitions set out by Article XXVIII GATS for purposes of this agreement comprise neither a definition of the term "international standard" nor a definition of the notion "technical standard." In the area of services, a standard may be understood to mean a document that provides for criteria or rules that specify the characteristics of a service and/or the manner in which a service is performed.[80] Performance-related standards ultimately serve the aim to improve the quality of a service and assist service suppliers in meeting regulatory requirements, for instance pertaining to public health, safety, and the environment.[81] Given that the quality of a service is inextricably linked to the competence of the supplier, standards often lay down qualification criteria to be met by service suppliers.[82]

A standard is international in nature if it has been developed by an international body or organization.[83] It is interesting to note that Articles VI:5(b) and VII:5 GATS use a somewhat different language in this respect: Article VI:5(b) GATS refers to "international standards of relevant international organizations"; the latter term is defined as "international bodies whose membership is open to the relevant bodies of at least all Members of the WTO."[84] By way of analogy to the principle of

[78] Article VI:5(b) GATS.

[79] Article VII:5 GATS.

[80] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 20.

[81] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 38.

[82] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 30.

[83] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 44. See also WTO (2012), p. 185.

[84] Footnote 3 to Article VI:5(b) GATS. This definition is identical to the definition of the notion "international body or system" in para. 4 of Annex 1 to the TBT Agreement.

openness applicable in the context of the TBT Agreement, it may be argued that an international body in the aforementioned sense has to be open at every stage of its standardisation activity on a nondiscriminatory basis.[85] In contrast, Article VII:5 GATS refers to "relevant intergovernmental and non-governmental organizations" as regards the establishment and adoption of international standards. Despite the difference in wording, it is submitted that the meaning is the same as in the case of Article VI:5(b) GATS. As Article VII:5 GATS is concerned with *multilaterally* agreed criteria for recognition as well as the development of *international* standards in this respect, the intergovernmental and nongovernmental organisations also must have an international character. Accordingly, they constitute international organisations of either an intergovernmental or a nongovernmental nature, as the case may be. Furthermore, it is irrelevant that Article VII:5 GATS differentiates between intergovernmental and nongovernmental organisations, whereas Article VI:5(b) GATS simply refers to international organisations. This is because international standardising activities are carried out by both nongovernmental and intergovernmental bodies of an international nature.[86] In view thereof, it has to be assumed that Article VI:5 (b) GATS also extends to international bodies of a nongovernmental nature; otherwise, a large part of international standardisation activities would be excluded from its scope of application.

For (technical) standards to fall within the scope of the GATS, they have to meet the conditions of Article I:1 GATS.[87] This provision states that the GATS "applies to measures by Members affecting trade in services." While a technical standard adopted by a WTO member, as envisaged by Article VI:4 GATS, constitutes a measure within the meaning of Article I:1 GATS,[88] international standards do not because of their *international* nature, i.e. they cannot be attributed to WTO members unless a member has transposed an international standard into its domestic law.[89] Yet this does not mean that international standards do not come within the scope of the GATS since Articles VI:5(b) and VII:5 GATS confer on international standards a specific function in relation to (certain) regulatory measures by WTO members affecting trade in services. Therefore, international standards are relevant to the regulatory measures by WTO members addressed by Articles VI:5(b) and VII:5 GATS and thus come under its scope in this regard.

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[85] See supra "International Standard Within the Meaning of the TBT Agreement" on the principle of openness in the context of the TBT Agreement and the conclusions derived by the Appellate Body on the basis of this principle.

[86] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), paras. 49–50.

[87] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 26.

[88] A measure means any measure by a member, whether in the form of a law, regulation, procedure, decision, administrative action, or any other form, pursuant to Article XXVIII (a) GATS.

[89] See WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 15.

In light of the above considerations, it may be preliminarily concluded that any standard developed by the EU and the US within the TTIP framework would not amount to an *international* standard in the sense of the GATS: TTIP is not an international (intergovernmental) organisation for purposes of the GATS, in particular its Articles VI:5(b) and VII:5, given that membership in the TTIP is *a priori* limited to the EU and the US. This conclusion does not prevent the EU and the US from cooperating and coordinating their work in international standardising bodies with a view to contributing to the development of (truly) international standards, possibly by taking pertinent transatlantic standards as a reference point, as envisaged by the first pattern of the regulatory agenda under discussion in the TTIP negotiations.

Application of International Standards in Relation to Regulatory Measures

Pending the outcome of the negotiations of WTO members regarding disciplines for the domestic regulation of services trade,[90] Art. VI:5(a) GATS imposes a *stand-still* obligation on WTO members regarding the application of certain regulatory measures by mandating, *inter alia*, that such measures not be applied in a manner that could not reasonably have been expected at the time the specific commitments were made.[91] In determining whether a WTO member complies with this stand-still obligation, "account shall be taken of international standards of relevant international organizations applied by that Member," pursuant to Article VI:5(b) GATS.

Article VI:5(b) GATS refers to international standards applied by a WTO member but does not require WTO members to make use of international standards in relation to the regulatory measures covered by this provision.[92] This implies that WTO members enjoy discretion as regards the application of international standards. However, should they choose to apply international standards, this has to be taken into account in determining whether the WTO member in question complies with the stand-still obligation set forth by Article VI:5(a) GATS. In other words, the application of international standards is not determinative of whether the WTO member in question complies with the stand-still obligation, but it may be said to weigh in favour of a finding that the latter obligation is being complied with.[93] This presupposes, of course, that the international standards applied by the WTO member in question are relevant to the (application of the) regulatory measure at issue.

[90] On the state of play in these negotiations, see WTO, Working Party in Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Chairman's Progress Report, S/WPDR/W/45 (14 April 2011).

[91] Nicolaïdis and Trachtman (2000), p. 241 (259); Trachtman (2003), p. 57 (67).

[92] Krajewski (2003), p. 152.

[93] This does not amount to a (rebuttable) presumption; see WTO, Council for Trade in Services, Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to all Services, Note by the Secretariat, S/C/W/96 (1 March 1999), para. 35.

This would be the case if the international standards concerned specify criteria or rules that are "incorporated" in the licensing or qualification requirements or the technical standards whose application is at stake.

Article VI:5(b) GATS has an impact on the second pattern of the regulatory agenda of the TTIP negotiations, i.e. the use of international standards as a basis for regulatory action. To the extent that the TTIP parties agree on new regulatory measures in the sense of Article VI:5(a) GATS and base them on relevant international standards, this would have to be taken into account as a positive factor in determining whether the regulatory measures concerned are in conformity with the stand-still obligation imposed by Article VI:5(a) GATS.

Developing International Standards for Recognition

Article VII:1 GATS provides that WTO members "may recognize the education or experience obtained, requirements met, or licences or certifications granted in a particular country," thereby leaving it entirely to WTO members whether they wish to provide such recognition.[94] If WTO members proceed in this regard, recognition "should be based on multilaterally agreed criteria."[95] Again, no obligation is imposed on WTO members.[96] However, Article VII:5 GATS directs WTO members to work in cooperation with relevant intergovernmental and nongovernmental organisations "towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions." Hence, this is an obligation to engage in the process of international standardising activity, but the obligation only arises "in appropriate cases."[97] WTO members thus enjoy a certain degree of discretion in this respect.

Article VII:5 GATS differentiates two types of international standards: on the one hand, international standards for recognition and, on the other, international standards for the practice of relevant services trades and professions.[98] Both types of international standards have to be "common." Given that international standards, by definition, represent a common understanding of a particular characteristic or process shared by those involved in the standardisation process, the word "common" must mean something different in order for it not to be redundant. Arguably, by qualifying international standards as common, Article VII:5 GATS seeks to avoid a situation where *divergent* international standards for recognition or the practice of services trades and professions would emerge, depending on the international body involved in the standardising activity. Article VII:5 GATS thus

[94] Marchetti and Mavroidis (2012), p. 415 (421).

[95] Article VII:5, first sentence, GATS.

[96] Marchetti and Mavroidis (2012), p. 415 (422).

[97] Krajewski (2008), para. 12.

[98] Krajewski (2008).

requires WTO members to strive for consistency in the international standardising process relevant to recognition and the practice of services trades and professions.

International standards for recognition would be standards that specify criteria for the recognition of the education or experience obtained, requirements met, licenses or certifications granted in a particular country.[99] Since each service sector has its own specificities,[100] the criteria for recognition have to be different for each sector so as to reflect its specificities. While each service sector has a number of common characteristics, the practices in a given sector may nonetheless differ from country to country. This is why Article VII:5 GATS also refers to international standards for the *practice* of relevant services trades and professions. Such standards would specify criteria for the manner in which the services concerned would have to be performed.[101]

The aforementioned requirement under Article VII:5 GATS impacts on the first pattern of the regulatory agenda contemplated by the TTIP parties whereby they intend to cooperate within international standardising bodies. As per the said requirement, the TTIP parties would have to cooperate with relevant international bodies with a view to establishing and adopting international standards of the abovementioned types, although this obligation would arise in appropriate cases only. In assessing whether a given situation constitutes an appropriate case within the meaning of Article VII:5 GATS, the TTIP parties would enjoy some discretion. The fact that the TTIP parties envisage to coordinate their standpoints within relevant international bodies would not run counter to the aforementioned obligation; rather, it would further the objective of developing international standards.

Conclusions

A "regulatory agenda" is at the core of the TTIP negotiations. This regulatory agenda focuses on the ways and means to make the regulation of economic activity on both sides of the Atlantic more compatible, including through an increased cooperation between their respective regulatory bodies. The underlying idea is that this sort of regulatory convergence offers by far the highest potential for raising the economic welfare of both the EU and the US. However, the negotiating parties' vision goes beyond creating a transatlantic marketplace based on an aligned regulatory framework. Rather, they also seek to make an impact on the global level by influencing the international standard setting through the creation of transatlantic standards as an inherent part of their regulatory alignment.

[99] Krajewski (2008).

[100] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 86(e).

[101] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 86(c).

As regards the latter aspect, three patterns are discernible at this stage of the TTIP negotiations: the first pattern would consist of an increased cooperation of the TTIP parties' regulatory bodies within international standardising bodies. The second pattern would involve the use of international standards as a basis for regulatory action within the TTIP framework. While these two patterns relate, directly or indirectly, to the international standardising process, the third pattern is of an entirely different nature. This last pattern is characterised by the expectation of the TTIP parties that third countries would adhere to, or even adopt, the transatlantic standards developed within the TTIP framework, thereby *de facto* elevating these standards to the status of international standards. The expectation embodied by this last pattern is worrisome as it displays a willingness of the EU and the US to rely on their economic power in shaping international trading relationships beyond the TTIP.

When comparing the aforementioned patterns with relevant rules of the TBT Agreement (with respect to goods trade) and the GATS (with respect to services trade), it becomes clear that the pertinent rules of these two multilateral trade agreements of the WTO concerning international standards are somewhat different. However, the starting point under both agreements is the same: a standard is *de iure* international in nature only if it has been developed by an international standardising body that requires the openness of the body in question to the relevant bodies of at least all WTO members on a nondiscriminatory basis. It follows that any standard developed within the TTIP framework will not constitute an international standard for purposes of either the TBT Agreement or the GATS because TTIP is *a priori* limited to the EU and the US. This has a clear implication for the aforementioned third pattern: even if transatlantic standards were followed by third countries, this would not somehow transform these standards into international standards in the sense of the TBT Agreement or the GATS. For this to be the case, transatlantic standards would have to go through the "vetting" process undertaken by international standardising bodies.

Next, both the TBT Agreement and the GATS impose on WTO members an obligation to participate in the work of international standardising bodies, although both agreements condition this obligation somewhat. These conditions have different implications: the TBT Agreement makes a reservation as regards the limits of WTO members' resources, which is, however, irrelevant to the EU and the US. Accordingly, the EU and the US are required to participate in the standardising activity of appropriate international standardising bodies for products for which they will adopt technical regulations, or intend to do so, within the TTIP framework. Their expectation that transatlantic standards would be followed by third countries will not relieve them of this legal duty. TTIP parties will remain free, of course, to present their transatlantic standards as blueprints for international standards to be developed by the appropriate international standardising bodies. The situation is less clear-cut under the GATS. In principle, the same legal duty as under the TBT Agreement applies here, but it is mitigated since it arises "in appropriate cases" only, thereby leaving a margin of discretion to WTO members. Moreover, the scope of the obligation under the GATS is more limited than its counterpart

under the TBT Agreement. This is because it is concerned with the development of international standards for recognition and the practice of relevant services trades and professions; the obligation thus does not cover the whole realm of international standardising activities for services trade.

Further, both the TBT Agreement and the GATS confer a role on international standards in the domestic regulatory sphere but in rather distinct ways. The TBT Agreement mandates WTO members to base their technical regulations on relevant international standards unless the latter were ineffective or inappropriate in achieving the (legitimate) policy objectives pursued or the level of protection sought. The second pattern under the envisaged regulatory agenda of TTIP correlates to said requirement, although TTIP parties retain some discretion in determining whether existing international standards are relevant, effective, and appropriate. In marked contrast to the TBT Agreement, the GATS does not oblige WTO members to base their domestic regulatory measures addressed by Article VI GATS (namely, licensing and qualification requirements and procedures, as well as technical standards) on international standards. But if they do, they stand a better chance of being considered in compliance with the disciplines under Article VI:5(a) GATS.

The foregoing observations show that the first and second patterns contemplated by the EU and the US in the TTIP negotiations as regards the future participation of their regulatory bodies in the process of standard setting by international standardising bodies as well as the use of international standards as a basis for their future regulations of both goods and services correspond to requirements set forth by the TBT Agreement and the GATS, respectively. In contrast, the third pattern envisaged under the prospective regulatory agenda of TTIP appears to undermine the requirements of those two multilateral trade agreements. Admittedly, WTO members retain some discretion in deciding whether international standards are relevant, effective, and appropriate (in the case of the TBT Agreement) or whether it is appropriate to contribute to the standard-setting work of relevant international standardising bodies (in the case of the GATS). Nonetheless, in the first instance, the EU and the US ought to undertake good faith efforts in achieving truly international solutions for regulatory issues before forging ahead on a unilateral basis in the expectation that their economic weight will "persuade" third countries to follow suit. Consequently, the third pattern should remain a measure of last resort.

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