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# THE PLANNED REGULATORY COOPERATION BETWEEN THE EUROPEAN UNION AND CANADA AND THE USA ACCORDING TO THE CETA AND TTIP DRAFTS

Legal opinion commissioned by the Chamber of Labour, Vienna

June 2015



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# The Planned Regulatory Cooperation between the European Union and Canada and the USA According to the CETA and TTIP Drafts

Legal opinion commissioned by  
**the Chamber of Labour, Vienna**

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## Executive Summary

This legal opinion focuses on the institutionalized regulatory cooperation envisaged in CETA and TTIP. It examines how these agreements jeopardize or safeguard the interests of workers, consumers and the environment.

1. In addition to lowering and abolishing customs duties (tariff-based barriers to trade) CETA and TTIP aim to remove restrictions to trade through policy measures (non-tariff barriers to trade). One way of achieving this is through regulatory cooperation.
2. Regulatory cooperation here means *future* cooperation between the contracting parties on regulatory matters (for example through measures such as harmonization, mutual recognition or conformity assessments) *after* CETA and TTIP have been ratified.
3. Apart from a few exceptions, the scope of application of regulatory cooperation in CETA und TTIP includes all regulations relevant to trade in goods and services. On the EU side, this includes both regulations of the European Union and those of the Member States.
4. Many of these regulations also serve to protect workers, consumers and the environment.
5. CETA and TTIP each contain a chapter with general provisions regarding regulatory cooperation. These are supplemented or modified for application in specific areas by special provisions in other chapters.
6. Particular importance is given to each of the primary committees envisaged in CETA and TTIP (*CETA Joint Committee* and *TTIP Joint Ministerial Body*) as well as to the sub-committees that deal specifically with regulatory cooperation (*CETA Regulatory Cooperation Forum* and *TTIP Regulatory Cooperation Body*). Each of these committees has representatives of both contracting parties who adopt decisions unanimously.
7. The above-mentioned committees deal with regulations of both sides, either in place or planned, according to their own work program. Harmonization, mutual recognition, and conformity assessment are the regulatory cooperation methods provided for overcoming divergences that inhibit trade.
8. Atypically, the TTIP also mentions simplification as a tool. This term does not come from foreign trade and economics, but rather is commonly seen in the context of debate surrounding the introduction of reforms to reduce bureaucracy and simplify administration. Regulatory cooperation in the TTIP is thus not limited to overcoming divergences that pose barriers to trade; it also strives to reduce other, unnecessarily cumbersome regulations.

9. Regulatory cooperation in the TTIP also extends to regulations that are in the drafting stage by both contracting parties. In this respect, it provides for mechanisms such as obligatory information sharing and the right to comment that can make regulatory projects the object of regulatory cooperation at an early stage.
10. The primary committee (CETA) can make decisions that are binding under international law. This also applies to amendments to annexes, appendices, protocols and comments. In the context of regulatory cooperation this could lead to a significant further development of the agreement. Ultimately, however, it is still unclear how far the authority to make binding decisions extends in the context of regulatory cooperation. This is a matter that urgently requires clarification.
11. Moreover, it is not sufficiently clear whether and in which cases decisions made by the primary committee (CETA), which are binding under international law, require the consent of the competent internal organs of the contracting parties, in particular of the EU Parliament. A sufficient level of involvement of the EU Parliament should be ensured, especially when it comes to decisions of far-reaching importance.
12. CETA and TTIP stipulate that the regulatory sovereignty (*right to regulate*) of the contracting parties should not in any way be affected by regulatory cooperation. However, this absolute imperative is hardly attainable. Logically, the mere existence of binding regulations regarding regulatory cooperation in itself limits the contracting parties' regulatory sovereignty to a certain extent. It is therefore of crucial importance how each party's regulatory sovereignty is positioned and protected in the context of regulatory cooperation.
13. In addition to regulatory sovereignty, CETA and TTIP emphasize efforts aimed at ensuring the highest protection standards possible. But in the context of provisions that apply to regulatory cooperation, comparatively little weight is given to these requirements. The inclusion of regulatory sovereignty and protection standards in the agreement texts are either subject to restrictions or vaguely worded. This calls for improvement.
14. The precautionary principle is a core element of European regulatory policy, but it is practically absent from CETA and the parts of TTIP that have been made public to date. Exception clauses that address precaution in a very specific manner are to be found only in CETA and concern occupational health and safety and environmental protection. Reference to, or the incorporation of WTO law simply does not make up for the absence of the precautionary principle from the two agreements because, according to WTO law, only temporary provisional regulations may be based on precautionary aspects while all other regulations require a science-based approach. Efforts must therefore be made to work towards a general establishment of the precautionary principle that extends beyond exception clauses.

15. The fact that CETA and TTIP provide special chapters on sustainable development concerning work standards and environmental protection is to be welcomed. However, these chapters and the activities envisioned therein stand largely isolated and unconnected to regulatory cooperation. Since the realization of sustainable development is particularly dependent on regulations, this also needs improvement.
16. The drafts of both agreements envision the involvement of social groups in various contexts, but do not provide specifics. To ensure appropriate representation of civil society and societal partners, the regulations, which are often sketchy at best, must be formulated more precisely. Moreover, the representation of civil society groups must be ensured in activities and committees that are relevant to their work, and their involvement must be given ample opportunity to influence results.
17. The European Parliament will consider these issues only once, at the time of the *conclusion* of the agreements. This is not enough to confer democratic legitimacy on the far-reaching possible actions and results of *future* regulatory cooperation (*living agreements*). In any case, in view of significant aspects of regulatory cooperation, the European Parliament should also participate in decision-making after the agreements are concluded.
18. CETA and TTIP affect (also in the context of regulatory cooperation) areas, which according to EU law, fall within the jurisdiction of the Member States. At the same time, as things currently stand, only the EU itself, but not the Member States, is directly involved in regulatory cooperation. In this respect, in the relations of the EU with its Member States there is a conflict between the need for the EU to maintain a unified foreign policy stance in CETA and TTIP on one hand, and on the other, the right of the Member States to autonomously exercise the competencies they are entitled to. In order to establish a balance between these conflicting interests, an appropriate agreement between the EU and its Member States appears advisable.

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### **Note on the citation of CETA and TTIP**

Insofar as provisions of the CETA draft are referenced in this report, the term “chapter” refers to the bookmarks contained in the PDF file of the version published by the EU Commission on 26 September 2014. The actual chapters of the CETA draft have not yet been numbered.

The TTIP draft version referred to is the draft of the general chapter on regulation of the TTIP published on 4 May 2015.

## **Names of institutions relevant to CETA and TTIP**

The following is a list of the institutions referred to in this legal opinion. Other institutions provided for in the drafts of the agreements have not been included in the list below for the sake of brevity.

Joint Committee (CETA)

Regulatory Cooperation Forum (CETA)

Committee on Trade and Sustainable Development (CETA)

Domestic Advisory Group (CETA)

Civil Society Forum (CETA)

Joint Ministerial Body (TTIP)

Regulatory Cooperation Body (TTIP)

## **1. Engagement, Scope of the Study, Methodology**

The Chamber of Labour of Vienna commissioned the author and his two above-mentioned colleagues to prepare a legal opinion on regulatory cooperation in the free trade agreements between the European Union and Canada (CETA), and the USA (TTIP).

Regulatory cooperation here refers to the *future* cooperation between the contracting parties on regulatory matters (for example on *future* harmonization, mutual recognition, or conformity assessments) *after* ratification and on the basis of relevant mechanisms in CETA and TTIP. The adjustments made directly through, and embodied in the treaty texts of, CETA and TTIP are *not* deemed part of the regulatory cooperation within the scope of this study.

The focus of this study is to question the extent to which European standards – in particular standards for the protection of the environment, health, workers and consumer interests as defined by the European precautionary principle – are, or can be safeguarded under this regulatory cooperation. Furthermore, this study seeks to clarify the extent to which the contracting parties retain or must retain their sovereign right to shape their own national protection policies (*right to regulate*).

Another focus of the study is the question of democratic legitimacy under regulatory cooperation in both the European Parliament and in the Member State parliaments, as well as the question of adequate involvement of societal partners and civil society (such as workers' representatives and consumer protection associations).

As agreed, this legal opinion will be based primarily on provisions contained in CETA, as the draft text has already been completed. Moreover, proposals and drafts from TTIP negotiations – to the extent to which they have been made public – will also be considered.

## **2. Introduction: Trade Liberalization and the Safeguarding of Protection Policies**

The General Agreement on Tariffs and Trade (GATT) and later, the WTO have greatly reduced tariffs across the globe. This has contributed significantly to the liberalization of world trade.

This success, however, makes it all the more evident that trade in goods and services can also be restrained by the manifold and unstandardized regulations of the Member States and/or the European Union. These regulations include a variety of very different standards for goods and services. Federal laws and private standards determine the composition, properties, quality, approved use, handling of goods, and the scope and requirements of relevant information. Sometimes these regulations provide uniformity and orientation. Frequently however, they pursue other, more ambitious goals such as the protection of health, the environment and consumers, and their ability to make informed decisions. At the national level, the involvement of parliaments as legislators, of specialized public institutions and their expertise, and the participation of associations and the general public all work to ensure that regulations reflect a variety of public objectives and interests. Different historical, social, economic and political factors cause these regulations to vary, sometimes significantly. Therefore, one of the most important tasks in view of the further liberalization of global trade is to bridge these differences. This task is so pressing because the growing demands for protection and information in many societies mean that the need for regulation is also increasing.

## **2.1. Trade liberalization and protection policies in the EU**

The European Union has been aware of this challenge for many years. Using a variety of approaches, the EU has been trying to replace existing standards in Member States with European standards, or to at least obtain mutual recognition for them as equivalents so that goods and services from one Member State can be marketed and sold in another Member State without further ado. The Council, in which the Member States of the European Union are represented, makes the fundamental decisions. It acts on the initiative of the Commission and with the approval of the European Parliament, thus providing the general public and interest groups with many opportunities to make their voices heard. To accomplish its tasks, the European Union was transformed long ago. Where the creation of a single European market was once the primary goal of trade liberalization, today the tasks of the European Union also include safeguarding and protecting health, consumers, workers, and the environment.

Although this meant that individual Member States frequently had to give up traditional rules – and many European regulations reflect the necessity to compromise – there can hardly be any doubt that, at least in most cases, a viable framework has been found to advance market access in the EU while legitimately safeguarding the interests and need for protection of society.

## **2.2. The WTO system does not safeguard protection policies**

A similarly advanced system does not exist on a global scale. As evidenced by its goals and powers, the objectives of the WTO are to further the liberalization of world trade. But the WTO has no mandate to act autonomously in the interest of harmonizing regulations to protect health, the environment and consumer interests. The immediate extent of the WTO SPS<sup>1</sup> and TBT<sup>2</sup> agreements, and some general rules, are limited to defining external prerequisites of regulation in the interest of trade liberalization, and to providing rules for resolving disputes in individual cases. At an international level, other organizations such as the WHO, the FAO, the Codex Alimentarius Commission, and others are involved in the protection of health, consumer and environmental interests. However, they have no powers when it comes to trade issues. In addition, there is an abundance of individual treaties, some of them very technical, with which states attempt to bilaterally settle differences in regulation and standards – mainly by recognizing them as equivalent.

## **2.3. Free trade agreements as opportunities for liberalization *and* protection policies?**

Due to the WTO's current limited capacity to act, recently negotiated and concluded free trade agreements – in addition to reducing or abolishing tariffs and ensuring market access for services – routinely contain comprehensive regulation regarding the problems posed by

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<sup>1</sup> The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (WTO SPS Agreement) applies to all trade regulatory measures related to the protection of human, animal, and plant life. One of the principles of the WTO SPS Agreement is that member countries may only apply sanitary and phytosanitary measures to set standards that restrain trade, to the extent necessary to protect human, animal or plant life or health, and that are based on scientific principles (Article 2.2 WTO SPS Agreement).

<sup>2</sup> The WTO Agreement on Technical Barriers to Trade (WTO TBT Agreement) regulates technical regulations, standards and conformity assessment procedures that restrain trade.

divergence in standards and regulations. Although in many cases a multilateral solution should ultimately be sought, such cooperation at a bilateral level can be useful if it takes advantage of the basis of trust that such cooperation between two states should foster. However, it must not be forgotten that CETA and TTIP were created as free trade agreements whose primary concern as regards regulation issues is not to pursue protection purposes, but to facilitate trade. As explained above, this is the difference between European economic integration and the global economic order. Along with the creation of the single European market, “real” powers of protection in the areas of health, the environment and consumer protection were also gradually transferred to the European Union. At the international level, this merging of trade policy and protection policies in an institutional framework has been neither realized nor is it foreseeable. Other international institutions, examples of which are listed above, are responsible for the protection of health and the environment at an international level. Their activities are not institutionally coordinated with the trade policies of the WTO and free trade agreements, and can only exert limited influence on these policies.

#### **2.4. Transatlantic regulatory cooperation: goals and divergences**

Regulatory cooperation is particularly close in the free trade agreements between the EU and Canada (CETA) – whose contents have been negotiated and a draft of which is now available – and in the free trade agreement between the European Union and the USA (TTIP), which is in the process of being negotiated and of which only isolated parts of the text have been made public. However, when considering and evaluating the drafts of the agreement, it must also be noted that in some areas there are significant differences in the regulatory culture of the USA and Canada on one hand, and the European Union and its Member States on the other.

#### **2.5. Key questions addressed in this study**

The provisions of the drafts of the agreements must be analysed holistically, whereby the general institutional provisions of the agreements must also be taken into account. However, a complete picture emerges only when we also consider the extent to which the agreements will interact with and be integrated into the constitutional and administrative structures of the contracting parties once the agreements have gone into effect. In particular, questions arise regarding how the European Union and its Member States will be represented in the institutions of the agreement and how, on the other hand, resolutions under the treaties will be translated into the European legal system.

Regulatory cooperation in both agreements – each of which are at different stages of finalization – is the subject of intense public debate. A critical analysis must not only examine whether the existing regulatory standards of the European Union are to remain inviolable, but above all must scrutinize the dynamics of regulatory cooperation laid out in the agreements, which extend from new regulatory proposals to a review of existing regulations. This is not just about whether the existing letter of European law continues to be valid, but also about how these dynamic areas of regulatory cooperation are shaped in accordance with the objectives, principles and values of European institutions, the Member States and the European public, as well as with regard to their proper participation. Such an analysis must consider the system of regulatory cooperation from various points of view. Thus, the extent of the direct effect of regulatory cooperation on the legal systems of the European Union and its Member States, and envisioned decision-making procedures must be investigated. Moreover, we must examine to what extent regulatory cooperation creates obligations which hamper existing regulations, and especially to what extent they stand in the way of future regulations of the contracting parties; for instance, when regulatory cooperation makes regulations

dependent on meeting certain standards that deviate from the precautionary principle by requiring them to have a purely scientific orientation. At the same time, in view of the protection goals discussed above, and the participation of groups whose interests are to be protected, we must ask how regulatory cooperation accommodates such protection objectives and how their effective implementation can be ensured.

### **3. The System of Regulatory Cooperation under CETA and TTIP**

#### **3.1. Regulatory elements**

The core of regulatory cooperation under CETA and TTIP will be governed by chapters that bear the title “Regulatory Cooperation” and which set forth general provisions for all areas of regulatory cooperation (referred to hereafter as general regulatory chapters).<sup>3</sup> However, besides institutional provisions in other places, there are two special chapters<sup>4</sup> to consider that provide rules for cooperation in the special areas of sanitary and phytosanitary measures (SPS) and in the area of technical barriers to trade (TBT). Finally, both drafts of the agreements contain other chapters which are materially relevant for regulatory cooperation; whereby only the CETA drafts are known. Of particular note in this respect are the regulations on services (including financial services and professional qualifications)<sup>5</sup>, the Protocol on the Good Manufacturing Practices for Pharmaceutical Products<sup>6</sup>, and the sustainable development chapter including its subchapters on labor and the environment<sup>7</sup>.

#### **3.2. Is there any obligation to cooperate on regulations?**

Whether and to what extent there is any obligation on the part of the contracting parties to collaborate on regulatory issues is not easy to answer. On one hand, the CETA draft expressly states that concrete regulatory cooperation projects should take place only on a voluntary basis.<sup>8</sup> However, should one of the contracting parties refuse to cooperate on a particular project or later withdraw from it, then, according to the CETA draft<sup>9</sup>, that party should provide the other with a reason for doing so, which will at least trigger pressure to provide political justification.

Beyond that, basic “voluntariness” does not release parties from fulfilling existing specific duties. Thus, for example, the “early warning system” of the TTIP draft obliges contracting parties to inform each other of planned regulatory projects at an early stage.<sup>10</sup>

Finally, a more comprehensive refusal to cooperate on regulations beyond a specific project could be prohibited under provisions of general international law: There are various passages in the CETA draft that set forth goals for deepening and further developing regulatory

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<sup>3</sup> Chapter 26 of the CETA draft; TTIP draft.

<sup>4</sup> Chapters 6 and 7 of the CETA draft.

<sup>5</sup> Chapters 11, 13 and 15 of the CETA draft.

<sup>6</sup> Chapter 28 of the CETA draft.

<sup>7</sup> Chapters 23 to 25 of the CETA draft.

<sup>8</sup> Chapter 26 Art. X.2 Para. 6 of the CETA draft.

<sup>9</sup> Chapter 26 Art. X.2 Para. 6 of the CETA draft.

<sup>10</sup> Art. 5 Para. 1 of the TTIP draft.

cooperation.<sup>11</sup> If, as a result of a party's refusal, regulatory cooperation in a certain area were brought into question altogether, then it might be considered a violation of international contract law, which prohibits the frustration of contracts<sup>12</sup> and contains the duty to fulfill contracts in good faith.<sup>13</sup> Although high threshold requirements must be met to affirm the existence of such a violation, these depend on individual cases and their evaluation. In this context it should be kept in mind that, depending on their merits, such individual case-by-case assessments can be reviewed under the inter-state dispute resolution mechanism provided for in the CETA draft, and adjudications within that framework can require the contracting parties to conform their behavior to the contract.<sup>14</sup>

### **3.3. Institutions and decision-making**

#### **3.3.1. Primary and subcommittees under CETA and TTIP**

Future regulatory cooperation as provided by the CETA and as proposed for the TTIP will be carried out primarily by inter-state committees staffed by competent representatives of the governments of both sides that, in a manner that will be explained below, will also include, at certain intervals, stakeholder representatives.

Both the CETA and the TTIP provide for one primary committee (the CETA Joint Committee and the Joint Ministerial Body in the TTIP). These committees will be staffed by the competent ministers of Canada and the USA respectively as well as the competent EU commissioners, and are intended to coordinate the overall administration and implementation of the free trade agreements.<sup>15</sup>

In addition, a series of subcommittees (see list of committees above) will be established for individual chapters and substantive areas; these subcommittees will mostly prepare and assist the work of the respective primary committee and act under its supervision. They will assume a role of considerable importance by predetermining later decisions. For example, regulatory subcommittees are established for the general chapter concerning regulatory cooperative work (referred to as the Regulatory Cooperation Forum under the CETA and the Regulatory Cooperation Body under the TTIP). The primary committee will also be empowered to create new subcommittees as well as dissolve older ones, or alter their staffing and areas of responsibility.<sup>16</sup>

#### **3.3.2. Decision-making**

Regulatory cooperation may include nonbinding and even binding regulatory decisions by the committees described above (see 3.4. below for methods of regulatory cooperation).<sup>17</sup>

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<sup>11</sup> An example of a general goal may be found in Chapter 26 Art. X.2 Para. 3 of the CETA draft. Special goals, that is those related to a particular area, can be found for example in Chapter 6 Art. 3 Sentence 1 of the CETA draft.

<sup>12</sup> Enshrined in part in Art. 18 of the Vienna Convention on the Law of Treaties.

<sup>13</sup> Art. 26 of the Vienna Convention on the Law of Treaties.

<sup>14</sup> Chapter 33 Art. 14.11 of the CETA draft.

<sup>15</sup> Chapter 30 Art. X.01 of the CETA draft.

<sup>16</sup> See in particular Chapter 30 Art. X.01 and Art. X.02 of the CETA draft.

<sup>17</sup> See Chapter 30 Art. X.03 and Chapter 34 Art. X.02 Para. 2 of the CETA draft.

Decisions will be made by the respective competent (primary) committees. According to the drafts of the agreements, decisions will become legally valid only if the representatives of both sides in the respective committee reach agreement,<sup>18</sup> in other words, each side has a kind of veto right. However, here too, the limits on the right to refuse cooperation discussed above (under 3.2) might well apply.

### **3.3.2.1. Binding decisions**

There is apparently some differentiation in the degree of legal bindingness a decision carries with it: besides decisions in the form of nonbinding recommendations, decisions are also envisioned which will bind the contracting parties under international law.<sup>19</sup> The CETA draft regulates who can make such decisions (in most cases the primary committee) and the content of the obligations assumed in a variety of ways. The draft contains an initial general provision, the language of which states that the primary committee can “take decisions in respect of all matters in the cases provided by this Agreement [CETA]” for the purpose of attaining the objectives of CETA.<sup>20</sup> This inexact wording leaves unclear the central question as to what issues can be made the subject of binding decisions. On one hand, the wording might be intended to mean that the primary committee should only be able to pass binding decisions in cases in which the CETA expressly speaks of binding decisions (see wording “in the cases provided”).<sup>21</sup> Although this would also include potentially problematic cases such as the simplified modification of appendices, it would altogether be the less far-reaching alternative. However, it might also be intended to mean that in all cases in which the CETA provides for (any kind of) activity on the part of the primary committee (without expressly mentioning binding decisions), the primary committee should also be able to make binding resolutions (see wording “in respect of all matters”). This interpretation of the wording would have a very extensive effect and would grant authority to the primary committee to make decisions that are binding under international law in potentially all areas of regulatory cooperation.

### **3.3.2.2. Is national consent required?**

Furthermore, it is not clearly discernible whether in cases in which the committees make binding decisions regarding the results of regulatory cooperation, both contracting parties should be regarded as bound without any further action. It is also conceivable that a decision would not become binding under international law until the competent national bodies, in particular the parliaments, have given their consent.

The question of whether consent is required is of particular importance in the case of treaty modifications of CETA and TTIP; such modifications are also intended to be rendered possible, at least in part, through decisions made by the primary committee. In the case of modifications to the text of the agreement itself, the prior consent of the competent national bodies – normally the parliaments – might well be required, as is the norm under international law. However, the CETA draft also contains a special procedure – probably intended to simplify procedures – for modifying appendices, annexes, protocols and commentaries to the

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<sup>18</sup> Chapter 30 Art. X.03 Para. 3 of the CETA draft.

<sup>19</sup> Chapter 30 Art. X.03 Para. 2 of the CETA draft.

<sup>20</sup> Chapter 30 Art. X.03 Para. 1 of the CETA draft.

<sup>21</sup> Examples in Chapter 29 Art. X.01 Para. 5; and Chapter 34 Art. X.02 Para. 2 of the CETA draft.



agreement.<sup>22</sup> Many of these appendices and other documents contain the results of regulatory cooperation already addressed above that were achieved during the negotiation of the agreement itself. Beyond that, some of these documents also include provisions concerning future regulatory cooperation. Modifying these appendices and other documents might make it possible to formally adopt the results of additional regulatory cooperation by means of a simplified contracting modification procedure. In this case, regulatory cooperation under CETA and TTIP would be extremely far reaching.

The individual provisions relevant to the issue as to whether or not consent is required are not always easily understood. In the case of a modification of appendices and other documents, a binding decision made by the primary committee is expressly required which the contracting parties “may” approve – which might imply that they do not necessarily have to in order to render the committee’s decision binding under international law. Also, in cases involving matters other than the modification of appendices and other documents, there is a strong case that the responsible and authorized bodies of the contracting parties need not consent to a binding decision made by the primary committee. Firstly, in certain other sections of the CETA, the need for consent of the respective national bodies is expressly laid down in the case of the conclusion of separate contracts.<sup>23</sup> Conversely, this could mean that in the case of binding decisions made by the primary committee, such consent by the competent national bodies might be unnecessary. Moreover, this would require complicated and time-consuming consent proceedings with the participation of all parliaments. That would contradict the declared intention of the EU Commission, expressed in earlier stages of the TTIP, to introduce “streamlined proceedings” that do not require consent by the competent national bodies.<sup>24</sup>

### **3.4. Activities and methods of regulatory cooperation**

According to a work program that is to be determined, the committees for the sectors that fall within the ambit of regulatory cooperation (see detailed discussion below under 3.5.) are – to a certain extent according to certain procedures – to discuss, negotiate, and in individual cases make decisions (see detailed discussion above) concerning individual existing or planned regulations and/or regulatory areas. As regards content, there are essentially three different methods of application that are also established at the international level (in particular at the WTO) and which have certain parallels to European Union law.

The farthest-reaching method of regulatory cooperation lies in the establishment of common standards intended to apply equally in both economic regions and, if necessary, to replace existing national standards (this is referred to as harmonization). Apart from the practice in the European Union and in such individual cases as the regulatory cooperation between New Zealand and Australia, for example, this method plays only a limited role at the international level because it requires a high degree of willingness on the part of the states involved to agree on such standards and abandon their own national regulatory schemes. Thus, at the international level, harmonization often takes place, if at all, through the adjustment of

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<sup>22</sup> Chapter 34 Art. X.02 Para. 2 of the CETA draft.

<sup>23</sup> For example, the Mutual Recognition Agreements for Professional Qualifications (see Chapter 13 Art. 3 f of the CETA draft).

<sup>24</sup> *European Commission*, TTIP: Trade Cross-cutting Disciplines and Institutional Provisions, 2013, [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151622.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf) (last accessed on 20 May 2015).

national regulations to international standards previously established by international organizations and institutions, such as the Codex Alimentarius Commission and the International Organization for Standardization (ISO).

A second method by which the participating parties retain their own standards but recognize the standards of the other side as equivalent (mutual recognition of standards) carries greater weight at the international level. As a consequence, one contracting party treats products and services that are deemed to conform to the standards of the other contracting party as if they met its own standards. With respect to reducing trade barriers at the international level, this method promises rapid success without requiring any (often politically inopportune) modification of domestic standards. However, for the same reason, this method at the same time poses the risk of a silent undermining of standards because from the outside it is often very difficult to perceive by what criteria and with what range of tolerance differently worded standards are regarded as equivalent.

A third method provides in a similar fashion for recognizing the results of foreign conformity assessment.<sup>25</sup>

As far as can be seen, the rules of regulatory cooperation in the CETA and TTIP drafts refer to all these methods. The harmonization of regulations will likely be undertaken only in isolated cases and rather as a potential future perspective. In contrast, there is an emphasis on exchanging opinions and information as well as on the mutual recognition of standards and conformity assessment procedures, whereby specific individual standards and procedures are sometimes regulated in special chapters.

The EU's draft of the chapter on regulatory cooperation in the TTIP addresses another method that has not been common in this form in foreign trade law: it mentions simplification in addition to the methods identified above. This term is commonly used in the context of administrative simplification, the reduction of red tape, and corresponding efforts at reform. This is supported by the fact that the CETA and the drafts for the TTIP – albeit to different extents – both refer to the methods and principles of modern regulatory policy. The draft text to the TTIP in this context expressly addresses the recommendation of the OECD Committee on Regulatory Policy and Governance dated 22 March 2012.<sup>26</sup> From a regulatory technical point of view, one might imagine that simplification is really a unilateral or bilateral modification of regulations with the goal of simplifying them by waiving formalities, substantiation obligations or permit requirements. Clearly, it implies an expansion of the purposes and standards of regulatory cooperation: it thus does not restrict itself exclusively to overcoming trade barrier divergences but also strives to reduce unnecessarily burdensome regulations.<sup>27</sup> The CETA also addresses this, but less clearly.<sup>28</sup>

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<sup>25</sup> The CETA draft, for example, contains detailed provisions in the Protocol on the Mutual Acceptance of the Results of Conformity Assessment (see Chapter 27 of the CETA draft).

<sup>26</sup> OECD, Recommendation of the Council on Regulatory Policy and Governance dated 22 March 2012; <http://www.oecd.org/governance/regulatory-policy/49990817.pdf> (last accessed on 20 May 2015).

<sup>27</sup> In the draft of the TTIP regulatory chapter, the goals of regulatory cooperation in Art. 1 Para. 1b are described as follows: “To *reduce unnecessarily burdensome*, duplicative or divergent regulatory requirements affecting trade or investment, particularly given their impact on small and medium-sized enterprises, by promoting the compatibility of envisaged and existing EU and US regulatory acts ...” (emphasis added).

<sup>28</sup> See Chapter 26 Art. X.2 No. 1 Para. 4.

### 3.5. Issues and sectors included

The described scope of regulatory cooperation is broadly outlined in both drafts of the agreements. Apparently, regulatory cooperation is intended to extend to the entire spectrum of possible regulations in the area of goods and services.<sup>29</sup>

That particular sectors should be exempted from cooperation is usually prescribed only for certain special chapters and is generally the exception to the rule. Thus, for example, the current CETA draft exempts European audiovisual services from the scope of application of the chapter on cross-border trade in services and excludes certain social services from regulations concerning qualifications and permit requirements,<sup>30</sup> but not, however, from the general regulatory chapter. Although the current TTIP draft allows in principle individual areas such as chemicals and financial services to be exempted from the scope of application of the general regulatory chapter<sup>31</sup>, they would at the same time be subject to separate – currently still unknown – rules for regulatory cooperation. Natural water resources are almost completely exempt from the scope of application of the CETA, but once a contracting party allows the commercial use of a specific water resource it must do so in conformity with the specifications of the CETA (and thereby probably allow commercial use also to contracting partners under most-favored nation treatment).<sup>32</sup>

### 3.6. Regulations included

The subject of intense public debate, the scope of application of the regulatory cooperation as provided, is not only very broad as concerns subject matter, but also includes regulations at various stages. First, it includes existing regulations within the conceptual ambit of regulatory cooperation. As discussed earlier (see 2.5. above), some of these regulations were conclusively dealt with during negotiations of the agreements. Other existing regulations for which no final solution could be found during agreement negotiations will be dealt with by the institutions of regulatory cooperation described above. Besides that, however, provision is also made for the parties' future regulatory projects to be dealt with as part of the regulatory cooperation. In this regard, one of the provisions is that the parties to the free trade agreement will share information on any regulatory initiatives and that the other side will have the right to comment in this respect.<sup>33</sup>

### 3.7. Dispute resolution

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<sup>29</sup> See Chapter 26 Art. X.1 of the CETA draft (“inter alia”) as well as Articles 3 and 4 of the TTIP draft. In this regard, the assertion in *General Note No. 5* of the current TTIP draft, that a restriction of the scope of application with regard to certain *framework or principle legislation* such as in the areas of consumer protection or environmental protection purportedly derives from Articles 3 and 4 of the TTIP draft, is incomprehensible.

<sup>30</sup> See the exception for European audiovisual services in Chapter 11 Art. X.01 Para. 2b of the CETA draft, as well as exceptions in Chapter 14 Art. X.1 Para. 2b of the CETA draft for the services named therein, including the “social services” listed.

<sup>31</sup> Preliminary Note 2 to the TTIP draft (chemicals), and Art. 4 Para. 2 of the TTIP draft (financial services).

<sup>32</sup> See Chapter 2 Art. X.08 of the CETA draft.

<sup>33</sup> See for example Chapter 6 Art. 6, Chapter 26 Art. X.4 and Chapter 31 Art. X.01 of the CETA draft, as well as Art. 5 of the TTIP draft.

In concluding this overview of regulatory cooperation, it must be noted that the obligations ensuing from the regulatory cooperation and its associated procedures are the subject of special dispute resolution provided for in both treaties.<sup>34</sup> As an inter-state dispute resolution following the WTO model, this is linked to the possibility that in the event of nonfulfillment of corresponding obligations, trade sanctions can be levied against the losing respondent party.<sup>35</sup> Finally, it must be noted that both free trade treaties are regarded as bilateral supplemental treaties to the multilateral WTO system, and for that reason they leave untouched existing obligations under the WTO, including the possibility of petitioning for dispute settlement procedures to enforce them.

#### **4. Safeguarding of European Protective Standards under Regulatory Cooperation**

Given the remarkable range and depth of the regulatory cooperation, it becomes that much more urgent to answer the question as to how public interests in the broadest sense – including environmental, labor protection and consumer interests as they are determined on both sides of the treaties by existing statutes, regulations, standards, programs, state and social organizations, and notions of value – can be protected in such a cooperation. As noted at the beginning of this paper, it would fall well short of the mark to pinpoint the focus of this question solely on whether the two proposed free trade treaties directly challenge the substance of certain existing regulations. Besides examining whether the treaties clearly leave certain existing regulations for all time inviolable, an analysis must take into consideration that regulations for the protection of public interests in the broadest sense – as stated – are dynamic. Here, the examination must be further expanded to address how regulatory cooperation might affect future projects such as the modification or creation of new regulations of the EU and/or its Member States. The public interests mentioned can be safeguarded in a variety of ways under the system of regulatory cooperation described above.

##### **4.1. Exceptions**

A particularly clear and effective form of safeguarding public interests is evident in the exceptions that exempt certain regulatory areas from cooperation. An exception could, for instance, apply to the current status of a regulation (for example of the European Union or its Member States) that would allow such regulation to remain in effect unchanged. However, except for the individual cases mentioned above (see 3.5.), neither of the drafts of the agreements apparently contains any such excepted area that would permanently and completely rule out regulatory cooperation for individual sectors.

In a somewhat weaker form, such an exemption of a sector might be considered to be encompassed – for instance in the case of biotechnology – where the CETA draft provides for a special form of dialogue that is less precisely worded regarding procedures, results and possible obligations.<sup>36</sup> However, whether such provisions can be understood to require that issues related to biotechnology in the broadest sense be dealt with only and exclusively in this form of “dialogue” is doubtful because the CETA primary committee can exercise influence

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<sup>34</sup> The regulations in the CETA are already known; see Chapter 33 of the CETA draft.

<sup>35</sup> See Chapter 33 Art. 14.13 of the CETA draft.

<sup>36</sup> See Chapter 29 Art. X.03 of the CETA draft.

on the bilateral dialogue, initiate or terminate it, change its tasks, and finally assume the dialogue itself.<sup>37</sup> Particularly by taking on the tasks itself, the primary committee could also make the topics of the dialogue subject to regulatory cooperation. In fact, if the complete exclusion from regulatory cooperation of especially controversial subjects such as genetic modification or the issue of the hormonal treatment of cattle for fattening were intended, then this exclusion would need to be guaranteed by a clear statement of that intent and be renegotiated into the CETA as well as inserted from the start into the TTIP.

#### **4.2. Safeguarding of European protective standards through the *right to regulate*?**

To protect the regulatory interests of the contracting parties, various parts of the drafts of the agreements emphasize that regulatory cooperation should not impair or limit the right of the contracting parties to autonomously stipulate protective standards (the so called *right to regulate*).<sup>38</sup> This right proceeds from the sovereignty of the contracting state parties (or the EU Member States in the case of the EU, and derived from them, the EU itself).

Whether emphasizing the *right to regulate* provides any genuine protection is doubtful. Although the conclusion of international agreements, such as free trade agreements, is a sovereign decision of the states involved, at the same time the treaty obligations restrict the sovereignty of the contracting parties. By their very existence, most obligations of the contracting states that fall within the scope of regulatory cooperation will restrict their regulatory autonomy. In fact, the intention is *not* to allow each party to regulate as it chooses, but rather only within the scope of the contractual parameters and in consultation with the other contracting parties. Consequently, it cannot be a matter of the complete and absolute protection of the *right to regulate*, but rather of how to place this right and the desired regulatory cooperation in an appropriate relationship to each other through relevant treaty arrangements.

Thus the comprehensive protection of the *right to regulate*, apparently intended in the drafts of the agreements, can hardly be implemented to the extent that the text of the agreement sometimes suggests. Accordingly, the *right to regulate* is subject to reservations in various parts of the drafts. The TTIP draft recognizes the *right to regulate* only for the pursuit of “legitimate” public welfare interests<sup>39</sup>, whereby it remains unclear what that means exactly and who decides as to the legitimacy of a goal. Since this is a legal term in the TTIP, it is possible that the question as to whether a measure pursues legitimate goals can be reviewed within the scope of the inter-state dispute resolution mechanism (see 3.7. above).

In turn, the CETA chapters on labor and the environment place more emphasis on the *right to regulate* vis-à-vis the obligation of the contracting states to achieve high protective standards (see below)<sup>40</sup>, thereby seemingly relativizing the goal of achieving and maintaining a high level of protection. Thus, on the whole, there is reason to conclude that the present provisions concerning the *right to regulate* cannot sufficiently guarantee European protective standards.

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<sup>37</sup> Chapter 29 Art. X.01 Para. 1 of the CETA draft.

<sup>38</sup> See for example Chapter 24 Art. 2, Chapter 25 Art. X.4, Chapter 26 Art. X.2, Para. 4 of the CETA draft, and Art 1 Para. 3 of the TTIP draft.

<sup>39</sup> Art. 1, Para. 3 of the TTIP draft.

<sup>40</sup> See Chapter 24 Art. 2 and Chapter 25 Art. X.4 of the CETA draft.

#### **4.3. Protection by making “high protective standards” a goal?**

The drafts of the agreements further attempt to safeguard standards by stipulating a “high level of protection”.<sup>41</sup> By setting such goals, calling to mind the EU legislation concerning legal harmonization within the European market, the intention is to ensure that regulatory cooperation does not lead to a lowering in the level of existing standards. But here too, the extent to which the provisions specifically stipulated in the drafts of the agreements can contribute to securing European standards is open to question because there is no detailed explanation as to what constitutes a “high standard”. The specific wording also raises doubt. For example, according to the CETA chapter on regulations, high protective standards are to be pursued only “in conformity with” WTO regulations, which for their part do not aim for a high level of protection. The CETA chapter on environmental protection states only vaguely that the contracting parties must “seek to ensure that those [environmental protection] laws and policies provide for and encourage high levels of environmental protection”.<sup>42</sup> This language is probably much too weak to steer regulatory cooperation in any substantial way.

#### **4.4. Justification of regulations through the precautionary principle?**

Numerous European regulations are based on the precautionary principle.<sup>43</sup> The precautionary principle states that in the presence of certain indications, measures for the protection of persons and the environment can be undertaken, even if a danger has not yet been established with final scientific certainty. The precautionary principle also plays an important role at the international level. In respect to environmental protection, the precautionary principle finds expression in Principle 15 of the legally nonbinding closing declaration of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro that states: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Similar binding statements are contained in the Framework Convention on Climate Change and the Convention on Biological Diversity. Cases of the application of the European precautionary principle may be found in bans and regulations regarding the use of hormones in meat, and regarding genetically modified organisms such as crops like corn.

The science-based approach dominates in the law of the WTO, particularly in the Agreement on the Application of Sanitary and Phytosanitary Measures (WTO SPS Treaty). This generally allows the application of trade-restricting regulations to defend against dangers only if scientific evidence has been established. Here, in cases of insufficient scientific evidence, the often legally relevant WTO SPS Treaty allows for provisional measures only, without mentioning the precautionary principle as a term. Moreover, these measures are subject to an obligation of rapid clarification and must be reviewed within a reasonable time in the light of

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<sup>41</sup> See Chapter 24 Art. 2, Chapter 25 Art. X.4, and Chapter 26 Art. X.2 Para. 2 of the CETA draft, as well as Art. 1 Para. 1a of the TTIP draft.

<sup>42</sup> Chapter 25 Art. X.4 of the CETA draft.

<sup>43</sup> See on this subject the Year 2000 Report of the European Commission concerning the Applicability of the Precautionary Principle, KOM (2000) 1 final, and Art. 191 Para. 2 Sentence 2 of the Treaty on the Functioning of the European Union (TFEU).

further advances of knowledge.<sup>44</sup> During the WTO dispute proceedings concerning bans on the import of hormone-treated beef, the EU did not refer to these WTO regulations; instead, albeit without success, the EU attempted to justify its measures by invoking the international precautionary principle.<sup>45</sup>

There is no mention of the precautionary principle in the drafts of the agreements. Instead, provisions under WTO law are “confirmed”<sup>46</sup>, which suggests that the underlying science-based approach applied in WTO law is also to be adopted. Precautionary measures taken that are not based on scientific risk assessment would, according to this approach, be at most only temporarily permissible. In the area of the bilateral dialogue concerning biotechnology, the CETA even designates the promotion of “efficient science-based approval processes for products of biotechnology” as a “shared objective.”<sup>47</sup> Precisely at this point, mention of the precautionary principle – even if only as a point of discussion – would have been appropriate.

Conversely, that the science-based approach of the WTO SPS treaty is to be adopted and strengthened here is also made clear by the fact that a different, namely expanded, understanding of precaution is used as a basis in two special, quasi-exceptional cases coming significantly closer to the European understanding of the term. Chapter 24, dealing with trade and labor, states that “where there are existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a person, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective protective measures”. A corresponding formulation is found in Chapter 25, concerning trade and the environment with regard to threats of severe or irreversible environmental damage.<sup>48</sup> Both these provisions contain wording that corresponds to Principle 15 of the Rio Declaration cited above.

One could now put forward that the CETA regulatory chapter makes the precautionary principle a possible subject for regulatory cooperation because it expressly provides that methods and assumptions for evaluating problems can also be dealt with.<sup>49</sup> However, apart from these two exceptions, the entire CETA is keeping in with the limited approach of the WTO, making it difficult to conceive that more room for the precautionary principle can be created within that framework.

All this allows the conclusion that the precautionary principle is not strengthened in the CETA and may be pushed aside even further in favor of a science-based approach. In summary, one may therefore conclude that under the CETA draft, a regulation based on precautionary concerns is permissible only in isolated, specially regulated, exceptional cases, while otherwise a science-based approach is the foundation. Furthermore, one can ascertain that this runs contrary to the European Union’s existing regulatory culture.

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<sup>44</sup> See Art. 5.7 of the WTO SPS Treaty.

<sup>45</sup> See the Report of the Panel in *EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States* – Report of the Panel, WT/DS26/R/USA dated 18 August 1997, Item Nos. 4.108, 4.239, 8.157 et seq., and the Report of the Appellate Body, WT/DS26/AB/R dated 16 January 1998, Item No. 124.

<sup>46</sup> Chapter 7 Art. 5 of the CETA draft.

<sup>47</sup> Chapter 29 Art. X.03 Para. 2 of the CETA draft.

<sup>48</sup> Chapter 24 Art. 3 Para. 3 S. 3 and Chapter 25 Art. X.8 Para. 2 of the CETA draft.

<sup>49</sup> See Chapter 26 Art. X.4 Item Nos. 9 - 12 of the CETA draft.

To the extent that the CETA is considered a blueprint for the TTIP draft currently under negotiation, it can be expected that the precautionary principle will not be anchored in the TTIP either.

#### **4.5. Chapter on sustainable development and labor standards**

The CETA draft (something similar can be expected in the case of the TTIP) contains a chapter on the issue of trade and sustainable development with subchapters on labor protection and environmental protection. Besides setting the goal of achieving the high level of protection already mentioned above, this chapter also has clauses providing that the contracting partners may not lower their labor or environmental standards to create incentives for trade or foreign investment.<sup>50</sup> These clauses are intended to prevent a “rollback”. However, they do not prevent the signatories from lowering standards for other motives. This can raise problems in particular in cases where other “allowable” motives, such as budgetary policy, are being asserted at the same time as trade policy motives.

Regarding labor issues, the contracting states obligate themselves to implement international minimum standards, including the conventions ratified by the contracting states themselves, and to pursue the goals of international reference documents. In so doing, comparatively broad reference is made in particular to the declarations, conventions and documents of the International Labor Organization (ILO). In addition, health and safety regulations governed under labor law must be provided, and a “domestic preventative safety and health culture” must be developed. Finally, the parties obligate themselves to effectively enforce their labor laws and guarantee specific procedural standards for the enforcement of rights, which include the reasonable duration of proceedings, the guaranteed right of parties to be heard, and the possibility of independent review of administrative decisions. Taken in isolation and compared with other free trade agreements, the labor law rules, which also provide a framework for future cooperation, seem comparatively far ranging. However, reliable prognoses can hardly be hazarded here concerning how effective these provisions will ultimately be.

In contrast, environmental protective standards are to be safeguarded primarily by having the parties obligate themselves to implement already concluded agreements effectively, to enter into new environmental protection agreements, and to grant interested associations certain options for the enforcement of environmental standards.

Sustainable development provisions in the CETA draft show two potentially significant weaknesses. Firstly, bilateral exchange and cooperation concerning sustainable development issues will indeed take place, but apparently within a framework that is separate from regulatory cooperation in other areas, namely in the Subcommittee for Trade and Sustainable Development.<sup>51</sup> Secondly, the labor and environmental chapters are excluded from the inter-state dispute settlement mechanism.<sup>52</sup> Disputes concerning the trade and sustainable development chapter can only be brought before a Panel of Experts that can issue a report making recommendations for the adoption of measures or, where appropriate, a mutually satisfactory action plan, which must be consented by the contracting parties.<sup>53</sup> No provision is

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<sup>50</sup> Chapter 24 Art. 4 and Chapter 25 Art. X.6 of the CETA draft.

<sup>51</sup> Chapter 23 Art. 4 Para. 5 of the CETA draft.

<sup>52</sup> Chapter 24 Art. 11 and Chapter 25 Art. X.16 Para. 1 of the CETA draft.

<sup>53</sup> Chapter 24 Art. 10 and Chapter 25 Art. X.15 of the CETA draft.



made for “hard” enforcement by imposing trade sanctions, for example. While the effectiveness of sanctions for enforcing sustainable development issues is a matter of debate, the categorical exclusion of sanctions does not in any way create an incentive to fulfill sustainable development-related obligations.

In summary, although sustainable development provisions offer basic approaches for safeguarding and improving protective standards, they also allow the weaknesses discussed above, raising doubts regarding comprehensive and effective protection. Since the inclusion of sustainable development chapters in free trade agreements is relatively new, the storehouse of experience is so limited that any conclusive statements about the (in)effectiveness of individual provisions cannot always be made accurately. However, the weak points already highlighted here should at least be improved upon. Finally, it is very discomfiting that this chapter and the activities described in it are not linked to regulatory cooperation, even though sustainable development must be put into practice primarily through regulatory activity.

## **5. Democratic Legitimacy and Regulatory Cooperation**

Besides the international law design of CETA and TTIP, another focus of attention must be on the structures of legitimation and control of the international regulatory cooperation exercised by organs of the European Union (and/or its Member States) as contracting parties. This presents the issue of how future regulatory cooperation, as part of the EU's foreign policy and foreign relations, will be connected to the EU's institutional framework on one hand and its Member States on the other, and democratically legitimized. The obligations posed by international law under CETA and TTIP themselves are not so relevant to this issue; rather, this is more about the preceding decision-making process within the EU.

As previously discussed, the primary committees in CETA and TTIP can in theory certainly establish new international legal obligations within the framework of far-reaching regulatory cooperation. Once ratified, additional integration steps can be taken on the basis of the agreement itself.<sup>54</sup> Thus, in particular with respect to regulatory cooperation, CETA and TTIP represent so-called *living agreements*.

### **5.1. Democratic concerns – at the EU level**

#### **5.1.1. Conveying democratic legitimacy**

Both the EU as well as its Member States recognize democracy as a fundamental value and make it one of their abiding principles. Put simply, the principle of democracy anchored in European and Member State law requires that all public decisions and activities, of both state and supranational bodies, can be attributed to the will of the European electorate and the European electorates respectively. In other words, they have democratic legitimacy. This also includes the regulation of economic life.

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<sup>54</sup> Concerning the lack of clarity regarding the necessity of renewed ratification by the contracting parties, see 3.3.2.2 above.

Furthermore, the representatives of a parliament directly elected by the people must be able to at least make the most important political decisions. However, it is not unlawful from the start for decisions to be transferred to other bodies, such as the government or international bodies that have not been directly democratically elected. But in such cases, the democratically elected parliaments must retain – at least when it comes to fundamental issues – the legal and factual possibility of making a final decision.

Only if these prerequisites are met can the activities of public actors, including the regulation of economic life, be considered democratically legitimate within the meaning of European and Member State law.

### **5.1.2. Legitimation of foreign affairs**

The democratic legitimation of the negotiation, the conclusion and application of international agreements (and of the competent bodies in that respect) are normally done by holding a parliamentary vote in which the democratically elected representatives of the people partake as part of the ratification process. Also within the institutional system of the EU, the conclusion of most international law agreements, in particular trade agreements, is dependent on the consent of the EU Parliament.<sup>55</sup>

The consent to conclude an international agreement (in the EU, this consent is granted by the Council of Ministers and generally the EU Parliament) guarantees first and foremost a point-by-point legitimation of the agreement to be ratified in the initial form in which it was submitted. Frequently, to make foreign policy effective, the body authorized to handle foreign dealings (the EU Commission) is given a certain degree of latitude in how the concluded agreement is further applied or how the EU acts in the new bodies created under international law by the international agreement. Importantly, parliamentary consent is not generally required for each and every individual measure within the ambit of international agreements and international bodies.

Thus EU law does not provide for any further decisive<sup>56</sup> involvement of the EU Parliament in international actions and decisions taken within international agreement committees *after* the conclusion of an agreement – unlike the process of *concluding* an international agreement. Rather, only the Council of Ministers (consisting of representatives of Member State governments) decides on the EU's positions and voting behavior in international committees (including, in the future, those of the CETA and TTIP).<sup>57</sup>

### **5.1.3. Living agreements and the required degree of democratic legitimacy**

As previously discussed, this limited involvement of the EU Parliament is in principle not a special feature. But if, as in the cases of CETA and TTIP, the international agreement in the area of regulatory cooperation qualifies as a particularly far-reaching, so-called *living agreement*, then one must question to what extent parliamentary approval taking place only

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<sup>55</sup> Art. 218, Para. 6 of the TFEU.

<sup>56</sup> Provision is made for a relatively vague duty to inform, see Art. 218 Para. 10 of the TFEU. In particular, the consent of the EU Parliament is not required.

<sup>57</sup> Art. 218 Para. 9 of the TFEU; such decisions will be prepared in the Trade Policy Committee of the Council of Ministers (Trade Policy Committee, Art. 207 Para. 3 of the TFEU).

once, when the agreement is concluded, will have a sufficient and lasting legitimizing effect. Added to that is the fact that future regulatory cooperation is not restricted to a clearly defined area, but rather provides very far-reaching possibilities for creating future obligations. This raises doubts about effective separations of power or, more appropriately for the EU system, the adequate “institutional balance”.

The issue of the required degree of legitimation can hardly be answered in the abstract. What matters is how politically *essential* the specific regulatory cooperation activity is, and to which extent the committees develop further and thus depart from the agreement’s original stipulations. If one takes into consideration that the EU deems the principle of democracy to be one of its most fundamental values,<sup>58</sup> it seems justified, in view of the special circumstances identified, to demand enhanced democratic legitimation in the area of regulatory cooperation. Despite the undeniable democratic deficiencies of the EU Parliament (inequality of representative voting weight, and other issues), such legitimation would nevertheless be best guaranteed by continuously requiring the approval of the directly elected EU Parliament. This would also be consistent with the principle of dual legitimation (by the Council of Ministers *and* the EU Parliament) set forth in the EU treaties.<sup>59</sup>

## 5.2. Competency concerns – the Member State level

Because of the mixed agreement<sup>60</sup> character of CETA and TTIP, problems also arise with respect to the positions and voting behavior of the EU Commission. Specifically, these can also affect areas that under EU law fall within the competency of its Member States (and not the EU).

The EU Commission alone will represent the EU itself and its 28 Member States in the respective CETA committees, some of which have already been mentioned above (for lack of a treaty text, in particular concerning TTIP institutions, nothing categorical can yet be stated about TTIP). So far as is apparent, this will also apply to regulations that sometimes (depending upon the subject matter) fall within the competence of the Member States. This exclusive representation by the EU Commission is in line with the EU’s general efforts to convey the appearance of unity and close cooperation as much as possible in its international representation.<sup>61</sup>

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<sup>58</sup> Pursuant to Art. 21 of the TEU, the fundamental values of the EU laid down in Art. 2 of the TEU also apply to its foreign policy activities.

<sup>59</sup> Because of the *sui generis* character of the EU as an entity with a higher degree of integration than a confederation of states, without forming a federal state either, democratic legitimacy is normally achieved through the Council of Ministers as the representatives of nationally legitimized governments, and through the EU Parliament as direct representatives of the Union’s citizens; Art. 10 Para. 2 of the TEU.

<sup>60</sup> *F.C. Mayer*, Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar? [Is the EU’s Planned Free Trade Agreement with Canada (Comprehensive Economic and Trade Agreement, CETA) a Mixed Agreement?], Legal opinion for Germany’s Federal Ministry for Economic Affairs and Energy, dated 28 Aug. 2014.

<sup>61</sup> See, for example, the ruling of the European Court of Justice (E), C-246/07 dated 20 Apr. 2010, Commission/Sweden, para. 73 with further references (“Where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the Community and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.”)

This exclusive representation by the EU Commission however raises the question as to how the Member States should effectively exercise the powers they are entitled to within the scope of regulatory cooperation – for instance in the areas of transportation, mutual recognition of professional qualifications, and labor protection<sup>62</sup> – if they are not represented in the respective committees. The Council of Ministers, which consists of representatives of the Member States, decides on the position and voting behavior of the EU Commission in the respective committees, but this kind of Member State participation cannot satisfy the basic requirement that there be a sovereign exercise of powers. On one hand, the Council of Ministers in certain cases passes resolutions by a qualified majority<sup>63</sup> so that in theory a single Member State cannot always block a certain position or voting behavior of the EU Commission even if that Member State rejects it. On the other hand, it logically follows from the joint decision-making of the Council of Ministers (even in cases where unanimity is required) that each individual Member State has only a right of veto. A Member State cannot take up an own sovereign positive position of influence (that is independent of the consent of the remaining 27 Member States).

As a result, this curtailing of a Member State's sovereign exercise of powers will ultimately also impact the question of the democratic legitimacy of Member States' conduct as granted by their national parliaments (to the extent that the legal systems of Member States provide for the participation of their parliaments in determining Member State conduct within the institutional structures of the EU).

### **5.3. Possible solutions**

#### **5.3.1. At the EU level**

Inter-institutional framework legislation (for CETA and TTIP respectively) should be considered in view of inadequate democratic legitimacy of future regulatory cooperation. Specifically, this could mean an inter-institutional agreement (between the EU Commission, the Council of Ministers and the EU Parliament) in which the positions and voting behavior of the EU Commission would be made dependent not only on the decision made by the Council of Ministers, but also on the consent of the EU Parliament (within specified limits). No modification of the existing treaties (TEU and TFEU) would be necessary for such a mechanism. Rather, the TFEU provides for the possibility of enacting inter-institutional agreements in the form of an EU regulation to concretize cooperation.<sup>64</sup> To avoid excessively curtailing the ability of the EU Commission to effectively work in respective committees, the EU Parliamentary consent requirement could be restricted to particularly fundamental measures of regulatory cooperation (for instance in the areas of health protection, environmental protection, and labor protection). Whether a measure of regulatory cooperation is fundamental or not could be determined by the respective preceding decision of the Council of Ministers. As it constitutes a formal legal act, in case of any doubt, it could in turn be made

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<sup>62</sup> *F.C. Mayer*, *Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar? [Is the EU's Planned Free Trade Agreement with Canada (Comprehensive Economic and Trade Agreement, CETA) a Mixed Agreement?]*, Legal opinion for Germany's Economics and Energy Ministry dated 28 Aug. 2014, p. 10 ff.

<sup>63</sup> Art. 218 Para. 8 of the TFEU.

<sup>64</sup> Art. 295 of the TFEU.

the subject of proceedings by the EU Parliament, filed with the European Court of Justice (thus over time defining the meaning of “fundamental measures”).

### **5.3.2. At the Member State level**

The problems arising out of the conflict between presenting a unified EU position on international law on one hand, and the complex structures in the distribution of powers within the EU on the other hand, are not new – especially in the area of mixed agreements. Nevertheless, one can look in vain for a draft legal agreement between the EU and its Member States concerning the solution to these problems regarding CETA and TTIP; at any rate, no such document is presently known to exist. The creation of an intra-European agreement, similar to the inter-institutional agreement mentioned above, between EU bodies on one hand, and its Member States on the other to clarify their respective powers, is conceivable. However, when realizing the legitimate claim of the EU to a unified external representation (deriving from the duty of sincere cooperation<sup>65</sup>), the Members States’ partial loss of sovereignty would be unavoidable upon the conclusion of what is first and foremost a mixed international law agreement on foreign trade which affects their competencies. The completely sovereign representation of the interests and competencies of Members States would otherwise necessarily demand that the EU Commission would eventually have to represent as many as 29 different positions within the respective committee.

## **6. Civil Society and Regulatory Cooperation**

### **6.1. Integrating civil society in CETA and TTIP<sup>66</sup>**

In those parts of the contracting text of CETA and TTIP that have been made available to date, there are passages providing for the participation of non-governmental stakeholders. The CETA draft – unlike many voices in the debate – does not differentiate sharply between (business or employer-friendly) “stakeholders” on one hand, and (public welfare interests advocating) “civil society” on the other hand, but rather uses both terms more or less synonymously, and at least formally integrates both equally.<sup>67</sup>

The draft contains various models with varying degrees of normative comprehensiveness. These models are largely fragmentary however. Thus, for instance, the general regulatory provisions of the CETA<sup>68</sup> provide for the possibility that “Parties may [...] consult” representatives of interests to “gain non-governmental perspectives.”<sup>69</sup> Otherwise, no further

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<sup>65</sup> Art. 4 Para. 3 of the TEU.

<sup>66</sup> This section rests on, among other sources, *H. Gött, Legitimation der Regulierungszusammenarbeit durch Einbindung der Zivilgesellschaft? [Legitimation of Regulatory Cooperation by Integrating Civil Society?]*, juwiss-Blog, 23 Apr. 2015, available at: <https://www.juwiss.de/38-2015/>.

<sup>67</sup> See for example Chapter 26 Art. X.6, Chapter 24 Art. 8 Para. 3, and Chapter 25 Art. X.13 Para. 4 of the CETA draft.

<sup>68</sup> Chapter 26 Art. X.8 of the CETA draft.

<sup>69</sup> Chapter 26 Art. X.8 of the CETA draft reads: “In order to gain non-governmental perspectives, the Parties may jointly or separately consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organizations, business, consumer and other organizations by any means they deem appropriate on matters relating to the implementation of this Chapter.”

details are spelled out for what is only a voluntary consultation anyway. We encounter similarly patchy provisions in the TBT chapter of the CETA.<sup>70</sup> The possibility for “interested persons to participate” provided for therein is based on the transparency rules familiar from WTO law and appears to expand them. However, the requirements placed on the group of persons, the required “interests”, and in particular the nature and extent of “participation” remain unclear.

An “institutionalized” model of integration can be found in the trade and sustainable development chapter of the CETA;<sup>71</sup> the chapter provides for the establishment of intrastate consulting groups and a bilateral civil society forum. Each of these is to have a “balanced representation” of “relevant” interests of civil society stakeholders<sup>72</sup> (the terms used remain undefined however). The forums are intended to promote dialogue. They receive information about the status of the implementation of the agreement and can for their part, and on their own initiative, submit comments that the parties must consider. However, the chapter does not provide for direct communication with the Subcommittee for Regulatory Cooperation, but rather only with the Subcommittee on Trade and Sustainable Development. Beyond that, participation is restricted to the subject matter addressed in the trade and sustainable development chapter.<sup>73</sup> No provision is made for forum participation with respect to other important subjects (such as sanitary measures or biotechnology).

In contrast, the chapter concerning regulatory cooperation under TTIP<sup>74</sup> provides for direct dialogue with the regulatory subcommittee. According to this provision, “stakeholders” can submit comments on the annual cooperation program of the contracting parties even if no specific regulatory project affects them. Provision is also made for them to submit concrete proposals to which the contracting parties are then obligated to respond in writing. However, the early stage of negotiations of the TTIP makes it impossible to assess the extent to which this model – whose primary aim is clearly the dialogue between the contracting parties – is also intended to provide for dialogue between stakeholders.

## 6.2. Deficient integration

The integration models envisaged so far demonstrate interesting approaches, but also sometimes reveal considerable deficiencies. The “whether” in respect to participation – at least in areas that typically require the special expertise of societal partners and civil society, or that are politically sensitive – should not be placed at the sole discretion of committees. In any event, in these cases, purely optional integration as provided in the CETA regulatory chapter is insufficient. Indeed, participation must be obligatory and should not be limited from the start to being mentioned only in single chapters of the free trade agreement. Furthermore, a selected choice of participants is inadequate if they represent only certain interests. Finally,

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<sup>70</sup> Chapter 6 Art. 6 Para. 1 of the CETA draft.

<sup>71</sup> Chapter 23 Art. 5 of the CETA draft.

<sup>72</sup> Chapter 23 Art. 5 of the CETA draft reads: “[...] The Civil Society Forum shall be convened once a year unless otherwise agreed by the Parties. The Parties shall promote a balanced representation of relevant interests, including independent representative employers, unions, labour and business organisations, environmental groups, as well as other relevant civil society organisations as appropriate. The Parties may also facilitate participation by virtual means.” See also Chapter 24 Art. 8 Para. 3 and Chapter 25 Art. X.13 Para. 4 of the CETA draft.

<sup>73</sup> Chapters 23-25 of the CETA draft (Labour and Environment).

<sup>74</sup> Art. 15 of the TTIP draft.

both in the case of participation models that provide for integration only in individual cases as well as in those that provide only vague rules on integration, or completely fail to regulate individual issues of participation, there is the danger that participation takes place only at certain points or that it lacks influence. Likewise, there is a danger of disadvantaging or even excluding certain societal partners and civil society stakeholders, in particular where there are insufficient provisions to ensure that stakeholders with weak resources have an equal right to access and can expect to be heard and exercise influence. In summary, the integration models provided for in the contracting drafts are still deficient and should be improved (see also 7.1.5. below).

## 7. Need for Clarification and Recommendations

Based on the findings of the present study, recommendations and a list of matters requiring clarification can be compiled. To the extent that the following comments relate specifically to the contracting text of the CETA, it depends on the, at present, largely unknown contents of the final TTIP agreement's text whether they may also apply to TTIP. Nevertheless, it is not improbable that the treaty texts will be similar or even identical in large parts.

### 7.1. Clarification and modifications of the drafts of the agreements

#### 7.1.1. Institutions, resolutions and decision-making powers

7.1.1.1 The under the current draft unclear extent of the powers of the CETA primary committee to render binding decisions must be defined explicitly, for instance by revising Chapter 30 Article X.3 of the CETA draft. Instead of the wording "provided by this Agreement," we recommend using the words "*explicitly* provided by this Agreement" (see 3.3.2.1 for details).

7.1.1.2 Clarification is needed as to whether a binding decision of the CETA primary committee requires the consent of the parliaments. What is needed here is a precise clarification in the agreement as to when this should be the case. Cases for which no consent is envisioned should generally be limited, and should not extend in particular to politically fundamental areas (such as protection of health, workers and the environment).

#### 7.1.2. General regulatory chapter

7.1.2.1. The scope of application of the CETA regulatory chapter must be clarified. The wording in Chapter 26 Article X.1 of the CETA draft ("*inter alia*") is too imprecise.<sup>75</sup>

7.1.2.2. Particularly in the context of regulatory cooperation (and not least in the interest of legal certainty), the present guarantee of the *right to regulate* should be clarified and stated more precisely. One possible solution would be a highlighted, general clause type structure. As part of a positive list, fundamental areas of state regulatory sovereignty (such as protection of health, workers and the environment) could be specially listed for emphasis.

7.1.2.3. Regarding the obligation to cooperate, provided for in the CETA regulatory chapter, the requirement that a party needs to justify its decision to refuse cooperation, or withdraw from cooperation, should be reconsidered (Chapter 26, Article X.02, Paragraph 6, Sentence 3 of the CETA draft). In addition, an express provision for the possibility of a general refusal to cooperate on important grounds should be inserted as an addition to the existing possibility to refuse cooperation on specific initiatives.

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<sup>75</sup> Chapter 26 Art. X.1 of the CETA draft reads: "This Chapter applies to the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities that are covered by, *inter alia*, the *TBT Agreement*, the *SPS Agreement*, the *GATT 1994*, the *GATS*, and Chapters X (TBT); X (SPS); X (CBTS); X (Environment); X (SD) and X (Labour); of this Agreement."



7.1.2.4. The pursuit of welfare goals in national regulations should not be made dependent – as it is in the TTIP draft – upon these being “legitimate”. Alternatively, at least, it should be made sufficiently clear what the exact meaning of this term is, who decides on whether a goal is legitimate, and whether – a situation to be avoided as far as possible – the dispute resolution mechanism can control such decisions (see 4.2. above).

### **7.1.3. Precautionary principle**

7.1.3.1 The precautionary principle should be expressly anchored in the agreements’ texts. In cases where scientific evidence is unclear, it should be possible to apply precautionary measures not merely on a provisional basis, to the extent this is consistent with WTO law.

### **7.1.4. Aspects of sustainable development (labor and environment)**

7.1.4.1 The chapters on sustainable development should more clearly commit the parties to promoting the goal of higher levels of protection. The existing language in Chapter 24 Article 2 and Chapter 25 Article X.4 of the CETA draft<sup>76</sup> is too weak. Attenuating phrases such as “strive to” or “seek to” could be eliminated.

7.1.4.2 The opportunities for implementing the chapters on sustainable development should be significantly improved. In particular, they should not be excluded from the general dispute settlement mechanism. In addition, the option of imposing trade sanctions for the violation of provisions of the chapters on sustainable development should not be excluded from the outset.

### **7.1.5. Improved integration of societal partners and civil society, transparency**

7.1.5.1 Opportunities for the participation of societal partners and civil society should be improved as follows:

- The participation of societal partners and civil society must at least be ensured where particular expertise is needed, or fundamental political decisions are at stake.
- To integrate societal partners and civil society, a permanent organizational framework should be created also in those areas where there is no such institution encompassed in the current drafts. This should be designed to enable and promote communication between societal partners and civil society with the committees staffed by representatives of government, as well as the communication between societal partners and civil society stakeholders with each other.
- It is necessary to ensure the inclusion of the positions of various societal partners and civil society. This can be best accomplished, preferably through legal prescriptions that are formulated as precisely as possible:
  - give equal opportunity of access to all parties interested in participating. This should be safeguarded by legal remedies;

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<sup>76</sup> “[...] each Party shall strive to continue to improve those laws and policies with the goal of providing high levels of labour protection” or “[...] each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.”

- specify the goal of a balanced and representative staffing. In so doing, contractual parameters should more precisely define the terms “balanced” and “representative” in the interest of equal distribution (of employee and employer representatives, for example) or also in the form of non-exhaustive criteria, listing typical examples, or the like. Any potential civil society stakeholders (for instance, consumer protection agencies, environmental associations and others) should be expressly named in a non-exhaustive list. An exhaustive, comprehensive listing should be avoided to retain flexibility;
  - ensure that even those stakeholders who are relatively weak in resources are given the possibility of having their positions heard.
- Participation should extend to the entire area of regulatory cooperation. The integration of societal partners and civil society should not be excluded from individual, in particular sensitive, chapters or restricted from the outset to individual chapters.
- There must be assurance that the input from societal partners and civil society representatives will exert influence on consultations and decision-making in regulatory cooperation. To that end:
  - a regular exchange between the committees and societal partner and civil society institutions should be ensured in all areas of regulatory cooperation;
  - provisions should be made for the obligation of committees and offices responsible for regulatory cooperation to decide and react, preferably by means of written and public answers. Follow-up procedures should be available which may be used on the initiative of societal partners and civil society.

## **7.2. Intra-European level recommendations**

Unlike recommendations at the level of international law, the following recommendations at the intra-European level could be realized even without the consent of the other respective contracting parties (Canada or the USA, respectively).

### **7.2.1. The EU Parliament**

7.2.1.1 The EU Parliament should consent to the ratification of CETA and TTIP only on condition that fundamental measures of future regulatory cooperation under CETA and TTIP depend not only on the decision of the Council of Ministers, but also require the consent of the EU Parliament.

### **7.2.2. The Member States**

7.2.2.1 The requirements for activities of the EU Commission within the regulatory cooperation committees that touch on areas that lie within the competency of Member States should be expressly regulated by a special agreement between the EU institutions and the EU Member States (for CETA and TTIP respectively). Such an agreement should take adequate account of the need for a unified external representation of the EU on one hand, and the sovereign interests of Member States on the other hand.

