

# CONSTITUTIONAL ASPECTS OF REGULATORY COHERENCE IN TTIP: AN EU PERSPECTIVE

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## I

### INTRODUCTION

Regulatory cooperation is far from new, and the transatlantic variety in particular has long been at the forefront of its development.<sup>1</sup> Approaching regulatory cooperation as an effort solely to harmonize or mutually recognize existing rules risks foregoing learning opportunities that cooperation provides through variation across legal systems.<sup>2</sup> With the need to adopt a dynamic approach to trade agreements<sup>3</sup> comes proceduralization of bilateral regulatory cooperation: not the rules themselves, but the procedures for producing them, become the object of cooperation. The compatibility of domestic structures for producing rules and regulation becomes crucial to the success of regulatory cooperation as a pathway to further economic integration.<sup>4</sup> Contemporary

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1. See generally TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (Mark A. Pollack & Gregory C. Shaffer eds., 2001); TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann et al. eds., 2000) [hereinafter PROBLEMS]; George A. Bermann, *Regulatory Cooperation between the European Commission and U.S. Administrative Agencies*, 9 ADMIN. L. REV. AM. U. 933 (1996); Giandomenico Majone, *International Regulatory Cooperation: A Neo-Institutionalist Approach*, in PROBLEMS, *supra*; Ernst-Ulrich Petersmann, *Globalization and Transatlantic Regulatory Cooperation: Proposals for EU–U.S. Initiatives to Further Constitutionalize International Law*, in PROBLEMS, *supra*.

2. See generally Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory*, 78 LAW & CONTEMP. PROBS., no. 4, 2015.

3. See, e.g., Boris Rigod, *Trade in Goods under the Korea–EU FTA: Market Access and Regulatory Measures*, in THE EUROPEAN UNION AND SOUTH KOREA: THE LEGAL FRAMEWORK FOR STRENGTHENING TRADE, ECONOMIC AND POLITICAL RELATIONS 86 (James Harrison ed., 2013) (analyzing the EU–Korea free trade agreement as an example of a “living instrument” with provisions for cooperation and consultations by committees and working groups functioning as an in-built mechanism for filling lacunae in domestic regulation).

4. See Susanne Lütz, *Back to the Future? The Domestic Sources of Transatlantic Regulation*, 18 REV. INT’L POL. ECON. (SPECIAL ISSUE) iii (2011) (mapping the domestic factors that hamper cooperation or conflict in transatlantic regulation); Kai Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 57 (2002) (analyzing the role of “agency-to-agency cooperation” addressing domestic rules as a vehicle for

regulatory cooperation efforts in trade contexts are increasingly focused on minimizing future regulatory barriers through joint procedures in order to avoid freezing in time the results of regulatory trade agreements. Recent efforts to advance transatlantic regulatory cooperation have taken this procedural approach to the next level, as evidenced by the draft textual proposals for the regulatory coherence chapter of the Transatlantic Trade and Investment Partnership (TTIP) agreement, an envisaged free trade agreement being negotiated between the United States and the European Union (EU). It appears that TTIP will lean on the idea of a permanent bilateral regulatory cooperation mechanism.<sup>5</sup>

TTIP is not the first attempt at mutually streamlining procedures for the creation of regulation as a way to reduce regulatory barriers between the United States and the EU.<sup>6</sup> Negotiation texts published by the European Commission (EC) reveal some novel mechanisms being proposed for inclusion in TTIP, however. Instead of the usual joint-consultation forums, such as the Transatlantic Financial Services Regulatory Dialogue, the idea is to establish a Regulatory Cooperation Body (RCB) composed of senior regulators from both sides that prepares annual regulatory coordination programs. Another proposal concerns the establishment of sectoral working groups that will conceivably study the trade impact of more technical regulation in detail.<sup>7</sup> Rather than being viewed as a barrier to transatlantic regulatory cooperation,<sup>8</sup> as it was in the past, governance is now seen as a gateway to it. This may be due to the view that this “mega-regional”<sup>9</sup> agreement would not be accepted by the European Parliament without deferring decisions on controversial regulatory issues, which is what many provisions in the regulatory coherence chapter will effectively do.

At a time when many feel uncomfortable with the influence that

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regulatory cooperation).

5. Article 8 of the EU negotiation text for the horizontal chapter of TTIP states, “The Parties hereby establish a bilateral mechanism . . . .” European Commission, *TTIP—Initial Provisions for CHAPTER [ ] – Regulatory Cooperation*, May 4, 2015 [hereinafter *Initial Provisions*]. On February 10, 2015, the European Commission made public several negotiation texts that were tabled for discussion with the United States in the negotiating round of February 2–6, 2015. On May 4, 2015 a slightly updated version was published on the website of DG Trade. These texts come with the disclaimer that “[t]he actual text in the final agreement will be a result of negotiations between the EU and US.” *Id.*

6. See generally Anne Meuwese, *EU–U.S. Horizontal Regulatory Cooperation: Mutual Recognition of Impact Assessment?*, in *TRANSATLANTIC REGULATORY COOPERATION: THE SHIFTING ROLES OF THE EU, THE US AND CALIFORNIA* (David Vogel & Johan F.M. Swinnen eds., 2011) (detailing earlier attempts to convergence on rulemaking procedures and impact assessment specifically).

7. *Initial Provisions*, *supra* note 5, art. 14(4) at 14.

8. See generally Jonathan R. Macey, *US and EU Structures of Governance as Barriers to Transatlantic Regulatory Cooperation*, in *PROBLEMS*, *supra* note 1 (providing, with special attention to banking regulation, an overview of the potential obstacles that structures of governance in both Europe and the United States may pose to regulatory cooperation); DAVID VOGEL, *BARRIERS OR BENEFITS? REGULATION IN TRANSATLANTIC TRADE* (1997) (detailing sector-specific barriers to transatlantic trade, including governance-related ones such as inspection requirements).

9. Polly Botsford, *Global Free Trade in the 21st Century*, IBA GLOBAL INSIGHT, Aug.–Sept., 2014, at 16.

international norms have on their domestic legal systems,<sup>10</sup> the problems regulatory cooperation poses for democratic legitimacy are being widely and openly debated—in academia, in the antiglobalization movement, and within a variety of institutions.<sup>11</sup> These debates on regulatory cooperation center on the fear that regulatory coherence will amount to lower standards in the EU and will give lobbying groups more influence over the content of regulation at the expense of democratic and accountable institutions. However, stakeholders and politicians rarely phrase their concerns in constitutional terms, which means that potential protections or solutions stemming from concrete treaty provisions, principles, and case law may easily be overlooked.

This article aims to address that lacuna. It suggests that regulatory cooperation—certainly horizontal regulatory cooperation, or cooperative endeavors that go beyond approximation of concrete rules and even specific sectors—is not solely an international law issue but also a matter of constitutional law.<sup>12</sup> The main constitutional concerns can be grouped under two headings: (1) regulatory sovereignty, which refers to the right of sovereign entities to regulate as they see fit, and (2) democratic legitimacy, which refers to the idea that regulations should be promulgated by institutions accountable to voters. These worries might be aligned but need not be, because the first category assumes that too many constraints may arise on the part of domestic regulators whereas the second category hypothesizes that the production of binding rules, as it is being influenced by cooperative regulatory efforts, may face too few of these constraints.

What makes regulatory cooperation a particularly salient constitutional problem is that insider–outsider demarcations have become fluid. The constituents and regulated parties within the legal system whose representatives are entering into regulatory cooperation agreements may be confronted with a loss of sovereignty and democratic accountability through those agreements. The agreements may also provide an opportunity, however, to set boundaries as to the sort of regulatory authority that may be deployed in regulatory cooperation settings and to transfer certain substantive and procedural preferences to a different legal system—an opportunity that is unavailable to stakeholders in “third countries,” who are affected by the outcomes of regulatory cooperation but are not parties to the negotiations.

Some constitutional limits are clear-cut. Provisions in international agreements such as TTIP cannot create any new law-making or rule-making institutions, nor can they endow existing institutions with new law-making powers. At the same time, the United States and the EU would not bother with

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10. Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733, 740 (2014).

11. Factsheet, European Comm'n, *Regulatory Cooperation in TTIP* (Jan. 7, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153002.1%20RegCo.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf).

12. See Petersmann, *supra* note 1, at 616. The two are intertwined. See generally Joris Larik, *Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law* (Center for the Law of EU External Relations, Working Paper No. 2011/5, 2011).

an entire chapter on regulatory coherence, which consists of joint principles and procedures for cooperation, if the provisions were not expected to have effects on rulemaking or lawmaking, on both sides of the Atlantic. This article addresses the constitutional aspects of regulatory cooperation in two distinct analyses because the dynamic that lies behind the seemingly technical provisions from the proposed regulatory coherence chapter of TTIP is difficult to capture. First, this article discusses the constitutional implications of horizontal regulatory cooperation under TTIP. Mapping where the effects of horizontal regulatory cooperation are likely to be felt sheds light on the sort of constitutional limitations at play. Second, the article canvasses the constitutional limitations that arise from the EU treaties and the case law. Each of these two exercises is carried out for both the issue of regulatory sovereignty and the issue of democratic accountability. Although the underlying constitutional concerns apply to regulatory cooperation involving the EU generally, the propositions in the negotiation texts<sup>13</sup> of the TTIP regulatory coherence chapter are used for reference. Concrete institutional propositions—even if they have not yet been enacted—bring the concerns into sharper focus.<sup>14</sup> Comparisons to the institutional context in the United States will crystallize these concerns related to the European constitutional aspects of horizontal regulatory cooperation.<sup>15</sup> The conclusion ultimately takes stock and identifies some opportunities for the development of the constitutional regulation of regulatory coherence in TTIP.

## II

### CONSTITUTIONAL IMPLICATIONS OF REGULATORY COHERENCE IN TTIP

An explanatory text on the proposed regulatory coherence chapter from the European Commission contains the promise that “[t]he agreement will not

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13. *Initial Provisions*, *supra* note 5, at 1.

[G]iven that the provisions of this Chapter concern predominantly procedures for cooperation, they may not lend themselves to the application of dispute settlement rules. Alternative mechanisms for ensuring proper application could be explored . . . . As regards the sectoral provisions of the TTIP regulatory cluster, further reflection will be required as regards the most appropriate mechanisms of ensuring proper application.

*Id.*

14. Although important constitutional questions also arise from the Investor–State Dispute Settlement (ISDS) debate, the scope of this article is limited to horizontal regulatory cooperation, which is not expected to fall under ISDS. This is not to say that ISDS, if included, will have no effects on regulation, but the provisions in the regulatory coherence chapter are unlikely to be enforced through this dispute resolution channel.

15. Two extensive comparisons of the two legislative and regulatory systems have recently been made available to the public. See generally RICHARD PARKER & ALBERTO ALEMANNI, CENTRE FOR EUROPEAN POL’Y STUD., NO. 88, TOWARDS EFFECTIVE REGULATORY COOPERATION UNDER TTIP: A COMPARATIVE OVERVIEW OF THE EU AND US LEGISLATIVE AND REGULATORY SYSTEMS (2014); Susan E. Dudley & Kai Wegrich, *Achieving Regulatory Policy Objectives: An Overview and Comparison of U.S. and EU Procedures* (Geo. Wash. Reg. Stud. Working Paper, March 2015), [http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley%20Wegrich\\_US-EU\\_RegOverview\\_20150506\\_Rev.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley%20Wegrich_US-EU_RegOverview_20150506_Rev.pdf).

change the principles and the procedures set out in the EU treaties defining how our regulations should be made.”<sup>16</sup> This reassurance prompts the question: Presuming that the lengthy negotiations are not for nothing, what will TTIP change, then? And, should the regulatory coherence chapter in TTIP be adopted, who will exercise what degree of influence over substantive regulatory outcomes? The following discussion of regulatory sovereignty addresses the scope of the intended regulatory coherence chapter, regulatory principles, regulatory analysis, and the idea for a “Regulatory Cooperation Body.” Then, the discussion of democratic accountability addresses democratic control and institutional balance, multilevel aspects, and transparency and participation.

### A. Implications for Regulatory Sovereignty

International trade law inevitably limits EU decisionmaking.<sup>17</sup> But is there anything in the regulatory coherence plans for TTIP that would prohibit EU institutions from adopting certain types of regulations or that would compel them to adopt others?

#### 1. Scope

One clue regarding the envisaged hierarchy between agreements on specific rules and sectors and horizontal agreements regarding procedures may be found in the EC’s proposal to include a clause stipulating that “[i]n case of any inconsistency between the provisions of this Chapter and the provisions laid down in [specific or sectoral provisions concerning goods and services, to be identified], the latter shall prevail.”<sup>18</sup> This provision clarifies that agreements on procedures flowing from the regulatory coherence chapter are secondary. Yet because the scope of applicability of this latter chapter is potentially very wide, the horizontal provisions on regulatory cooperation may have far-reaching effects on the content of regulations of various formal status.

The EU’s Report of the Eighth Round of Negotiations for TTIP reveals that one point of disagreement between the EU and the United States concerns the scope of the regulatory coherence chapter.<sup>19</sup> What type of law-making procedures are to be affected by approximation efforts? The United States

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16. EUROPEAN COMM’N, TTIP AND REGULATION: AN OVERVIEW 7 (2015) [hereinafter OVERVIEW], [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153121.1.2%20TTIP%20and%20regulation%20overview.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.1.2%20TTIP%20and%20regulation%20overview.pdf).

17. See Gráinne de Búrca & Joanne Scott, *The Impact of the WTO on EU Decision-making, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 29–30 (Gráinne de Búrca & Joanne Scott eds., 2003) (tracing the impact of WTO norms on EU governance and policymaking).

18. *Initial Provisions*, *supra* note 5, at 4 (alterations in original).

19. See *Report of the Eighth Round of Negotiations for the Transatlantic Trade and Investment Partnership (Brussels, 2–6 February 2015)*, at 4 (Mar. 5, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153175.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153175.pdf). This document reveals that when the EU negotiating team presented its draft proposal for a regulatory coherence chapter, it also reiterated its earlier concerns regarding the imbalance of the U.S. proposal, which allegedly sought to include only federal rulemaking on the U.S. side although including both EU and Member State legislation and regulations in its scope on the EU side.

seeks to include only federal agency rulemaking, whereas the EU thinks this limited inclusion amounts to an imbalance. If, on the EU side, legislative acts—rules that require the approval of the European Parliament and the Council—are to be included, a larger share of its rules would fall under the regulatory coherence chapter than is the case for the United States. If the United States gets its way, the EU and member-state legislation and regulations would fall under the scope of the horizontal provisions of the regulatory coherence chapter. The EU proposes this too, adding the clarification that only central government authorities at the member-state level should be covered, not local authorities, for instance.<sup>20</sup> It is uncertain what the EC's position on the EU scope will be if the inclusion of federal statutes on the U.S. side does not make it to the final agreement.

As is apparent from the EU–U.S. disagreement on this point, the issue of the breadth of regulatory coherence is thorny. On one hand, a final treaty that includes federal statutes of the United States seems unlikely. The way in which the U.S. Congress goes about lawmaking is too far removed from the process assumed by the proposed provisions. Who would seriously expect Congress to start carrying out impact analyses as U.S. agencies do by way of compensation for its lack of direct democratic accountability in setting rules? On the other hand, what on its face appears to be a reasonable solution—the exclusion of EU legislation and legislative acts—in reality is quite unreasonable. Much of the EU primary legislation is regulatory; that is, prescriptive and detailed in nature. This is not surprising given that EU supranational lawmaking can be conceived of as a type of delegation, with the member states as principals and the EU institutions as agents. Finally, opting for a substantive criterion only, such as all measures of general application affecting goods and services with significant transatlantic impact,<sup>21</sup> would make the provisions very difficult to enforce even if a strong role were given to a Regulatory Cooperation Body, because significant transatlantic impact is a matter of degree and this will normally only become apparent once the rules are in force.

## 2. Regulatory Principles

The draft preamble from the EU negotiation text states in part, “The Parties having regard to the importance of regulation to achieve public policy objectives, and their right to regulate and adopt measures to ensure that these objectives are protected at the level that each Party considers appropriate, in line with its respective principles.”<sup>22</sup> Similarly, in the proposed Article 1(d)(3) a guarantee is in place that horizontal regulatory cooperation under TTIP will not restrict the right of each side to maintain, adopt, and apply measures to achieve legitimate public policy objectives, and in doing so, to apply the level of

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20. *Initial Provisions*, *supra* note 5, art. 4[c], at 4.

21. *Id.* at art. 3(2), at 5.

22. *Id.* pmb1.

protection that each considers appropriate.<sup>23</sup>

The textual proposal also mentions a “shared commitment to good regulatory principles and practices, such as those laid down in the OECD (Organization for Economic Cooperation and Development) Recommendation of 22 March 2012 on Regulatory Policy and Governance.”<sup>24</sup> If this commitment makes the final text and if the agreement is adopted, this would be the most formal endorsement of these OECD principles by the EU and the clearest step toward codification of better regulation principles and tools, such as transparency, consultation, or impact assessment, which has been signaled as one “indirect avenue” for “*shaping* the respective domestic regulatory process.”<sup>25</sup> At the same time, buried in a footnote, but clearly phrased, the EU maintains that “[t]he provisions as set forth in this Chapter cannot be interpreted or applied as to oblige either Party to change its fundamental principles governing regulation in its jurisdiction, for example in the areas of risk assessment and risk management.”<sup>26</sup> The wording of this proposal raises the question of what sets fundamental principles apart from regular ones. If we are to read “fundamental principles” as “constitutional principles,” the EC accepts the possibility of better regulation principles being at odds with the latter. Concretely, the OECD recommendation includes “net maximization of benefits” as a principle of good regulation. In many instances this principle is at odds with the precautionary principle—the idea that scientific uncertainty should not be a reason to avoid regulating in the public interest—and other objectives for regulation prioritized at a constitutional level in the EU. The EC has explicitly pointed to the constitutional entrenchment of the precautionary principle as a reason why this principle cannot be affected by TTIP.<sup>27</sup> Yet as the precautionary principle already indicates, giving this principle teeth in the daily practice of EU lawmaking has been difficult. This difficulty makes it hard to determine whether a different flavor of regulatory analysis as a result of TTIP will have any impact on the precautionary principle.

### 3. Regulatory Analysis

The United States and the EU have previously attempted to find common ground in the way they approach the ex ante analysis of regulations.<sup>28</sup> However,

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23. *Id.* at art. 1(d)(3), at 3.

24. *Id.*

25. Marija Bartl, *TTIP's Regulatory Cooperation Framework and its Democratic Implications*, ACELG BLOG (Feb. 8, 2015), <http://acelg.blogactiv.eu/2015/02/08/ttip%E2%80%99s-regulatory-cooperation-framework-and-its-democratic-implications/> (summarizing the contribution by Alberto Alemanno to the workshop “Why TTIP? On its rationale, institutions and substantive areas,” that took place at the University of Amsterdam on February 17, 2015).

26. *Initial Provisions*, *supra* note 5, at 2 n.2.

27. Karel De Gucht, European Trade Commissioner, Address at the Aspen Institute Prague Annual Conference: Transatlantic Trade and Investment Partnership (TTIP)—Solving the Regulatory Puzzle (Oct. 10, 2013) (transcript available at [http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151822.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151822.pdf)). The precautionary principle is codified in Article 191 TFEU, *infra* note 50.

28. See, e.g., United States European Commission, High Level Regulatory Cooperation Forum,

important dividing lines remain. For example, the United States would like the EC to make public draft impact assessments so that they can be a basis for consultation, a suggestion the EC regularly dismisses.<sup>29</sup> Similarly, the United States often asserts the EU system contains too much methodological pluralism because the EU's Impact Assessment Guidelines currently allow the official carrying out the assessment to decide how quantitative the analysis should be and how flexible the decision criteria should be.<sup>30</sup> The EU responds to U.S. contentions with these issues by pointing out that some legislative initiatives are ill-suited to narrow economical evaluation, namely cost-benefit analysis, because of the nature of the problems they seek to address. If the EU has its way, impact analyses will have to be performed on U.S. federal statutes, which the EU has proposed to be included in the definition of "regulatory acts at central level"—an unlikely outcome.<sup>31</sup> The EC textual proposal contains some interesting ideas on how to converge the way analytical tools such as impact assessment are applied in rulemaking procedures on both sides of the Atlantic; for instance, by making it obligatory to include information on the relationship between a new regulatory initiative and "relevant international instruments."<sup>32</sup>

What is not yet addressed in the Commission's proposal is to what extent the impact on third-country citizens will be included under the assessment of trade implications expected to appear more prominently in regulatory analyses post-TTIP. Inevitably, if two large power blocks like the United States and the EU enter into regulatory cooperation talks, the results will impact legal systems not present at the negotiations. This mainly occurs when it comes to the voluntary adoption or spill-over effects of standards that result from regulatory cooperation on substantive issues.<sup>33</sup> But as regulatory cooperation becomes proceduralized, meaning that parties defer agreements on regulatory content in favor of agreement on the procedures such as cost-benefit analysis and risk assessment through which regulation will be decided, it matters for third countries whether their interests are accounted for in these procedures. Regulatory analysis is generally meant to provide a counterweight against powerful regulatory rent-seekers, but in a bilateral regulatory cooperation context with multilateral consequences, regulatory analysis could also help

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*Common Understanding on Regulatory Principles and Best Practices* (2011), <http://www.whitehouse.gov/sites/default/files/omb/oir/irc/common-understanding-on-regulatory-principles-and-best-practices.pdf>; Meuwese, *supra* note 6 (discussing previous efforts).

29. Comments of the United States Government on the 2014 Revision of the European Commission Impact Assessment Guidelines, Public Consultation Document (Sept. 30, 2014), [http://photos.state.gov/libraries/useu/231771/PDFs/USAreponseIA\\_final.pdf](http://photos.state.gov/libraries/useu/231771/PDFs/USAreponseIA_final.pdf) (referring to the OECD Recommendation).

30. *Commission Staff Working Document on Better Regulation Guidelines*, COM (2015) 215 final (May 19, 2015), [http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf).

31. Dudley & Wegrich, *supra* note 15.

32. *Initial Provisions*, *supra* note 5, art. 7(2) at 7.

33. See, e.g., Pauwelyn, Wessel & Wouters, *supra* note 10, at 752–53 (explaining the de facto adoption of standards set by the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use by countries like Brazil or China).

“address claims of an emerging gap between regulatory jurisdiction and regulatory impact, which is particularly significant when it comes to the actions of industrialized states.”<sup>34</sup> The Commission mentions in its Better Regulation Guidelines<sup>35</sup> the possibility that EU regulations impact third countries but it is unclear to what extent this occurs.

#### 4. A Regulatory Cooperation Body (RCB)

A final major area of impact on regulatory sovereignty for the EU is the establishment of new bodies. The published negotiation texts mention a “Joint Ministerial Body” at the political level.<sup>36</sup> Though it is unclear exactly what this body would do, it could have a role in enforcing the provisions of the regulatory coherence chapter. Much more detailed are the proposed provisions regarding the RCB, whose most important task is envisaged to be

the preparation and publication of an Annual Regulatory Co-operation Programme reflecting common priorities of the Parties and the outcomes of past or ongoing regulatory cooperation initiatives under section III of this Chapter, including information on the follow-up, the steps<sup>37</sup> envisaged and timeframes proposed in relation to these identified common priorities.

The RCB would also monitor the implementation of the provisions of the entire regulatory coherence chapter and report to the Joint Ministerial Body. Furthermore, it would consider new initiatives for regulatory cooperation “on the basis of input from either Party or its stakeholders,” prepare initiatives and proposals, ensure transparency, and examine other issues.<sup>38</sup> The RCB and the Joint Ministerial Body could also create “sectoral working groups” and delegate certain tasks to them.

Much is unclear regarding the envisaged composition of the RCB, which has caused outcries from several nongovernmental organizations (NGOs) that “business will get a direct seat at the table.”<sup>39</sup> The textual proposal implies that

34. Alberto Alemanno, *Is There a Role for Cost-Benefit Analysis Beyond the Nation-State? Lessons from International Regulatory Cooperation*, in *THE GLOBALIZATION OF COST-BENEFIT ANALYSIS IN ENVIRONMENTAL POLICY* 113 (Michael A. Livermore & Richard L. Revesz eds., 2013) (regarding the term “external accountability gap”).

35. These guidelines contain information on how Commission Services conduct impact assessments. A new version of the Guidelines was adopted as part of the Juncker Commission’s “Better Regulation Package” on May 19, 2015, replacing the Impact Assessment Guidelines.

36. The name “Joint Ministerial Body” does not clearly convey which politicians or officials would take part, because the term “minister” may not mean the same on both sides of the Atlantic.

37. *Initial Provisions*, *supra* note 5, at 11.

38. *Id.* Article 14-3 proposes an exception to the central role of the Joint Ministerial Body: “In the domain of financial services the functions as set out under in paragraph 2 shall be performed by the [Joint EU/US Financial Regulatory Forum (FRF)], which shall ensure appropriate information to the RCB.”

39. To cite one illustrative concern that does not appear to have much basis in the EU’s textual proposals: “The Commissioner wants to farm out the formulation of new regulations and laws to a sort of ‘Secret Council’ composed of those with a direct interest . . . Who would sit on that body isn’t clear . . .” *TTIP ‘Secret Council’ Neither Democratic nor Transparent*, DUTCH SOCIALIST PARTY (Feb. 10, 2015), <http://international.sp.nl/news/2015/02/ttip-secret-council-neither-democratic-nor-transparent> (quoting Anne-Marie Mineur).

the RCB will not receive a stakeholder platform along the lines of the EU's High Level Working Group on Administrative Burdens. Rather, the provision mentions that the RCB "shall be composed of representatives of both Parties." Given that elsewhere in the text the Parties and "its stakeholders" are so clearly distinguished, it appears unlikely that a stakeholder could be a representative. However, the next sentence, "It shall be co-chaired by senior representatives of regulators and competent authorities, regulatory coordination activities and international trade matters," appears to leave some room for members from outside the respective administrations if regulatory coordination activities include platforms such as the Transatlantic Consumers Dialogue and the Transatlantic Business Dialogue.<sup>40</sup> An annual stakeholder meeting with the purpose of exchanging views on the Annual Regulatory Cooperation Program is also proposed, to "be prepared jointly by the co-chairs of the RCB and which shall involve [] the co-chairs of the Civil Society Contact Groups, including a balanced representation of business, consumers, trade unions, environmental groups and other relevant public interest associations . . . ."<sup>41</sup> The Commission's proposal repeatedly states that "[t]he RCB will not have the power to: adopt legal acts" or "interfere with any domestic EU or US regulatory procedures."<sup>42</sup> It appears that two points will be of crucial importance for the constitutional implications of this novel tool for horizontal regulatory cooperation. First, the RCB's interaction with the political Joint Ministerial Body is critical because the permanent status of the RCB may be instrumental in suppressing the tendency within many more political bodies to let activities take place in negotiation mode. Although, if the Joint Ministerial Body receives a heavy role in resolving disagreements, politicization will dominate. Second, the extent to which the RCB will manage to operate in a transparent manner remains critical. As the Commission has stated, the RCB would exist to share knowledge, not to make decisions in any formal sense.<sup>43</sup> But how and with whom this knowledge is shared will be the crucial question, especially if representation by the member states is lacking. A fundamental difference between the EU's constitutional structure and that of the United States, after all, is that the EU institutions do not represent a comprehensive federation of states.

## B. Implications for Democratic Accountability

### 1. Democratic control and institutional balance

Many of the issues of democratic accountability arising from horizontal

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40. *Initial Provisions*, *supra* note 5, at 12.

41. *Id.* Article 15-2 states that "[p]articipation of stakeholders shall not be conditional on them being directly affected by the items on the agenda of each meeting." *Id.*

42. EUROPEAN COMM'N, *Introduction to the EU Legal Text on Regulatory Cooperation in TTIP 2* (2015). Article 14-2(c) repeats "[t]he RCB will not have the power to adopt legal acts." *Id.* at 11.

43. EUROPEAN COMM'N, *supra* note 42 ("A joint body would act as a forum to share ideas and plan cooperation on new technologies and risks and our regulatory responses to them. The body would provide a forum for exchanges between regulators on these types of questions.").

regulatory cooperation are similar to the constitutional concerns associated with networked governance in general.<sup>44</sup> Dutch Members of Parliament tabled a motion asking the Dutch government to promote the exclusion of regulatory cooperation from the Comprehensive Economic and Trade Agreement and TTIP trade agreements. They based this on their observation that these treaties may stipulate mandatory stakeholder consultation, which in their opinion is a violation of the democratic decisionmaking process.<sup>45</sup> Interestingly, mistaken translation—pointed out by the Minister of Trade herself<sup>46</sup>—of “businesses” instead of “stakeholders” in an earlier version of the motion<sup>47</sup> reveal its main underlying worry: regulatory capture by powerful and wealthy companies. The motion was not adopted by the Parliament.<sup>48</sup>

Hesitation regarding open forms of consultation, in which the participants are not pre-selected or filtered in any way and which thereby may give an unfair advantage to those with the greatest resources, exist in continental Europe among several political circles. The most alarming messages come from circles that are skeptical of globalization, but the more moderate alarmists have plenty to say on the matter as well:

This process will take place outside the regular democratic decision-making processes on both sides of the Atlantic, preventing national parliaments and locally elected bodies from being fully involved, and dangerously limiting the public debate. Good ideas for regulation in the public interest could be stopped before they are even discussed by an elected body.<sup>49</sup>

This sort of statement boils down to a complaint that the European Parliament has long had about EU lawmaking in general.<sup>50</sup> The Commission’s textual proposal contains a placeholder for interaction with legislative bodies, no doubt because it is one of the trickiest issues.<sup>51</sup> The possible implications for

44. Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in PROBLEMS, *supra* note 1, at 522–25.

45. Tweede Kamer [Dutch Parliament, Second Chamber], 21501-02, no. 1438 (2014–15), <https://zoek.officielebekendmakingen.nl/kst-21501-02-1438.html>.

46. Tweede Kamer [Dutch Parliament, Second Chamber], 21501-02, Reports (*Handelingen*) no. 26 (2014–15), <https://zoek.officielebekendmakingen.nl/h-tk-20142015-26-8.html>.

47. Tweede Kamer [Dutch Parliament, Second Chamber], 21501-02, no. 1432 (2014–15), <https://zoek.officielebekendmakingen.nl/kst-21501-02-1432.html>.

48. Tweede Kamer [Dutch Parliament, Second Chamber], 21501-02, Reports (*Handelingen*) no. 21 (2014–15), <https://zoek.officielebekendmakingen.nl/handelingen/TK/2014-2015/28/h-tk-20142015-28-21?resultIndex=12&sorttype=1&sortorder=4>.

49. Corporate Europe Observatory, *TTIP: Covert Attacks on Democracy and Regulation* 1–2 (2014), [http://corporateeurope.org/sites/default/files/ttip\\_covert\\_attacks.pdf](http://corporateeurope.org/sites/default/files/ttip_covert_attacks.pdf).

50. The European Parliament is involved in the TTIP negotiations, which are not discussed extensively here because the focus of this article is on what will happen if TTIP is adopted. See Consolidated Version of the Treaty on the Functioning of the European Union art. 207(3) & art. 218(10), Sept. 5, 2008, 2008 O.J. (C 115) [hereinafter TFEU] (information gathering). The Commission is obliged to report to the European Parliament on progress. See Frank Hoffmeister, *The Deep and Comprehensive Free Trade Agreements of the European Union: Concept and Challenges*, in TRADE LIBERALISATION AND STANDARDISATION—NEW DIRECTIONS IN THE ‘LOW POLITICS’ OF EU FOREIGN POLICY 19 (Marise Cremona & Tamara Takács eds., 2014).

51. *Initial Provisions*, *supra* note 5, at 14.

the institutional balance are plentiful: Will de facto regulatory authority migrate to a transatlantic forum of executive governance? And will it cease to be based on EU primary law? As the current textual proposals stand, it is quite likely that the executive branch, comprised of the Commission, will gain power at the expense of the legislature, the European Parliament or Council.

## 2. Multilevel Aspects

Much is still unknown about the extent to which lower levels of regulatory decisionmaking in the EU—member states or even regional and local levels—will be included in the regulatory coherence chapter. The text from December 23, 2014 includes the following wording:

“[R]egulators and competent authorities at non-central level” means:

- i. For the EU, the national authorities of an EU Member State responsible for the preparation of regulatory acts at non-central level;
- ii. For the US, the authorities at State level responsible for the preparation of regulatory acts at non-central level.<sup>52</sup>

In the text from January 23, 2015, that provision had been eliminated and the following wording had been added to the general notes section:

This draft covers regulatory acts at “central” level, understood as EU-level and US Federal acts. However, the draft also envisages the possibility to discuss, upon request, on other regulatory acts, in particular, those adopted by the central national authorities of EU Member States or by US States. Cooperation on those other regulatory acts may need to be addressed further, in order to achieve the objective of enhancing regulatory cooperation, including in light of the discussions in particular in sectors. The EU reserves the possibility of tabling specific proposals in this regard.<sup>53</sup>

In the published version of February 10, 2015, the wording of the general note has been changed to:

[I]n particular, this draft covers regulatory acts at “central” level, understood as EU-level and US Federal acts. It includes also placeholders for regulatory acts of US States and of the central national authorities of EU Member States, which will be covered in a revised version of this draft chapter in order to provide a balanced and comprehensive coverage of relevant regulations.<sup>54</sup>

Ideas to include municipalities and regional authorities, which would further complicate the definition of regulation and possibly broaden the scope of regulatory cooperation, were taken off the agenda conclusively when the EC published its proposal for a definition on “non-central” acts.<sup>55</sup>

## 3. Transparency and a “Right to Lobby”?

Participation and dialogue have been part of transatlantic regulatory

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52. *Initial Provisions for TTIP Chapter [ ] on Regulatory Cooperation 1* (Dec. 23, 2014) [hereinafter *December Initial Provisions*], [http://corporateeurope.org/sites/default/files/231214\\_regulatory\\_coherence\\_draft\\_proposal.pdf](http://corporateeurope.org/sites/default/files/231214_regulatory_coherence_draft_proposal.pdf).

53. *Initial Provisions for TTIP Chapter [ ] on Regulatory Cooperation 1* (Jan. 23, 2015), <http://corporateeurope.org/sites/default/files/attachments/ttip-eu-regulatory-coherence-draft-proposal-23.01.15.pdf>.

54. *Initial Provisions*, *supra* note 5, at 1.

55. See *December Initial Provisions*, *supra* note 51.

cooperation from the beginning,<sup>56</sup> but TTIP has drawn a lot of attention to the phenomenon. The “right to lobby,”<sup>57</sup> a phrase coined by NGOs that despise TTIP, describes the alleged ambition of certain business stakeholders to “essentially co-write regulation.”<sup>58</sup> The worry is that “transatlantic regulation might in the near future be more shaped by political leaders, rent-seeking interest groups, and legislators than by networks of technocrats.”<sup>59</sup> But how much access do stakeholders such as businesses and NGOs get under the Commission’s proposal? Article 6 on stakeholder consultations addresses the extent of this access:

When preparing regulatory acts at central level undergoing impact assessment, the regulating Party shall offer a reasonable opportunity for any interested natural or legal person, on a non-discriminatory basis, to provide input through a public consultation process, and shall take into account the contributions received in the finalisation of their regulatory acts. The regulating Party should make use of electronic means of communication and seek to use dedicated single access webportals, where possible.<sup>60</sup>

Here, the main point of contention between the EU and the United States is not so much about the degree of access as it is about timing and transparency. The U.S. input for the public consultation on the Commission’s consultation guidelines—which is unrelated to TTIP but gives a good idea of the U.S. position on this issue—demonstrated that having draft impact assessments available to contextualize stakeholder input is important to the United States.<sup>61</sup> On this point the EC has recently given in somewhat to the United States—formally outside of the TTIP context—by announcing that it will start publishing “inception impact assessments.”<sup>62</sup>

56. See Tamara Takács, *Transatlantic Regulatory Cooperation in Trade: Objectives, Challenges and Instruments of Economic Governance*, in A TRANSATLANTIC COMMUNITY OF LAW: LEGAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN THE EU AND U.S. LEGAL ORDERS 175 (Elaine Fahey & Deirdre Curtin eds., 2014) (giving an overview of different mechanisms).

57. Corporate Europe Observatory, *supra* note 49, at 4.

58. The allegation is based on this document placed on its website by an anti-TTIP NGO: U.S. Chamber of Commerce & BUSINESSEUROPE, *Regulatory Cooperation in the EU-US Economic Agreement* (Oct. 2012), <http://corporateeurope.org/sites/default/files/businesseurope-uschamber-paper.pdf>.

59. Lütz, *supra* note 4.

60. *Initial Provisions*, *supra* note 5, at 5.

61. *Comments of the United States Government on the European Commission’s Public Consultation Document for Stakeholder Consultation Guidelines 2014* (Sept. 30, 2014), <http://photos.state.gov/libraries/useu/231771/PDFs/USresponseConsultGuidelinesfinal.pdf>; see also Shawn Donnan, *U.S. Pushes for Greater Transparency in EU Business Regulation*, FIN. TIMES (Feb. 23, 2014, 12:03 PM), <http://www.ft.com/cms/s/0/6e9b7190-9a65-11e3-8e06-00144feab7de.html#axzz3VXHWBQIB>.

62. European Commission, *Better Regulation for Better Results—an EU Agenda* (May 19 2015), [http://ec.europa.eu/smart-regulation/better\\_regulation/documents/com\\_2015\\_215\\_en.pdf](http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf). All the *Initial Provisions* mention on the subject is:

Article 5—Early information on planned acts

1. Each Party shall make publicly available at least once a year a list of planned regulatory acts at central level, providing information on their respective scope and objectives.
2. For planned regulatory acts at central level undergoing impact assessment each Party shall make publicly available, as early as possible, information on planning and timing leading to their adoption, including on planned stakeholder consultations and potential for significant

## III

## CONSTITUTIONAL LIMITATIONS OF REGULATORY COHERENCE IN TTIP

When the negotiation documents do consider constitutional aspects of the regulatory coherence chapter, they focus on the possibility that TTIP would undermine the EU treaties or member state constitutions that lay down the right of governments to make laws and regulations in the public interest—and reassure that this will not be the case.<sup>63</sup> This part argues that the treaties and Constitutions involved are not only something “not to undermine,” but they are something for TTIP to actively involve. The limitations discussed below are relevant to TTIP, even quite apart from the question of what a court would do with these limitations after TTIP’s adoption.

The following addresses the principle of conferral, the constitutional limitations regarding regulatory objectives and principles, and the exclusive right of initiative of the European Commission. Subsequently, the democratic-accountability issues of delegation and participation are discussed.

## A. Limitations regarding Regulatory Sovereignty

## 1. The Principle of Conferral

The regulatory powers of the EU are defined vis-à-vis the member states. The principle of conferral<sup>64</sup> means that the EU cannot legislate or regulate without explicit conferral by the member states. Powers not conferred on the EU remain with the member states. The assumption is that whatever the internal distribution of powers between the EU and the member states, together they are sovereign. That is, it is assumed that the EU and member states jointly have the exclusive power to regulate within their territory. Third parties de facto influencing the EU or member-state enactment of legislation or regulations simply do not fall within this scheme. This understanding of regulatory sovereignty means that for full coverage of possible regulatory trade barriers to appear on the radar, regulatory acts at the non-central level would have to be included, because there is no way for the EU to acquire new legislative (and thereby regulatory) powers without treaty revision. This in turn would make it very difficult for the Commission to stave off claims that TTIP is a “mixed agreement,” which means that the member states are co-signatories.<sup>65</sup>

## 2. Regulatory Objectives and Principles

Which principles, provisions, and case law limit the EU legislator’s capacity

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impacts on trade or investment.

*Initial Provisions*, *supra* note 5, art. 5.

63. *Initial Provisions*, *supra* note 5, art. 1(d)(3) at 3.

64. Treaty on European Union and Final Act, Feb. 7, 1992, art. 4-1 & 5-2, 1992 O.J. (C224) 1, (signed at Maastricht), reprinted in 31 I.L.M. 247 [hereinafter TEU].

65. Letter from Maroš Šefovi, Vice President, European Commission, to Presidents and Chairmen of European Commission (Oct. 16, 2014), <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc54c03415b014c09447e0904f0.do>.

to curtail its own regulatory leeway? This section focuses on the EC, self-appointed as the regulator in the published negotiation text at the central level in the EU. In stating that “neither side is going to renounce the right to regulate in [the] future to reach the level of protection that their citizens choose,”<sup>66</sup> the EC ignores that constitutional and self-regulatory limitations on its regulatory sovereignty already exist.

Much literature on comparative regulatory studies discusses diverging regulatory philosophies on either side of the Atlantic. There are constitutional aspects to these philosophies, even apart from the issue of the precautionary principle, in the sense that the Treaty prescribes certain regulatory goals: Article 3 of the TEU lists the general objectives of the Union, which include “balanced economic growth and price stability,” “a highly competitive social market economy,” “full employment and social progress,” and “a high level of protection and improvement of the quality of the environment.”<sup>67</sup> Additionally, the Treaty on the Functioning of the European Union mentions more specific regulatory goals, such as “developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labor markets responsive to economic change”<sup>68</sup> and “the promotion of employment, improved living and working conditions.”<sup>69</sup> The codification of these regulatory objectives in the Treaty in combination with the aforementioned principle of conferral means that these expressions of EU regulatory philosophies are not mere public policy objectives subject to change with the political tide, but constitutionally entrenched directions and limitations for regulation.

### 3. The Commission’s Right of Initiative

The Commission enjoys the exclusive right of initiative in the legislative context at the EU level, which means that no other institution may put forward a legislative proposal. The European Parliament can try to press the Commission through the adoption of resolutions, but it does not share the constitutional right of initiative.

One major constitutional issue to consider is to what extent the EC can limit itself in the exercise of its legislative right of initiative. This is relevant to the TTIP regulatory coherence chapter because committing to a certain type of consultation procedure as standard practice may imply such a limitation. The

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66. Karel De Gucht, European Trade Commissioner, Address at the Aspen Institute Prague Annual Conference: Transatlantic Trade and Investment Partnership (TTIP)—Solving the Regulatory Puzzle (Oct. 10, 2013) (transcript available at [http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151822.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151822.pdf)). The precautionary principle is codified in TFEU art. 191.

67. TEU art. 3.

68. TFEU art. 145.

69. TFEU art. 151. Other examples include culture (Title XIII), Public Health (Title XIV), Consumer Protection (Title XV), and Economic, Social and Territorial Cohesion (Title XVIII). *See also Initial Provisions*, *supra* note 5, at 2 (“[T]he environment; consumers; public health; working conditions; social protection and social security; human, animal and plant life; animal welfare; health and safety; personal data; cybersecurity; cultural diversity; and preserving financial stability.”).

relevant case law originates from previous attempts at horizontal regulatory cooperation between the United States and the EU. In 2004, the European Court of Justice (CJEU) decided a case in which France challenged the legality of the Guidelines for Regulatory Cooperation and Transparency.<sup>70</sup> It held that instruments of regulatory cooperation between the EU and the United States have to respect underlying principles of the division of powers, institutional balance, and the need an adequate legal basis.<sup>71</sup> In this case, these limitations did not result in annulment of the Guidelines. The Court instead accepted the Commission's argument that the right of initiative includes the ability to hold any consultations it considers necessary; and further, that this does not amount to an infringement of the Commission's sole right to initiate legislation, as France had argued.<sup>72</sup> The argument endorsed by the Advocate-General is that when the Commission concludes arrangements to steer the consultation along particular defined paths, it is exercising rather than restricting its right of initiative. The Advocate-General ended his opinion with an emphasis on the "duty to discuss the effects of any rules envisaged with American trading partners before such rules are proposed to the European legislature," which preempts any conclusion that there is an infringement of the Commission's right of initiative.<sup>73</sup>

The EU system for the protection of fundamental rights, specifically the Charter of Fundamental Rights of the European Union, is a further limitation on the European legislator's space to regulate—and thus indirectly the agenda-setting power of the RCB. One example of a concrete limitation is Article 8(3) of the Charter, which requires that personal data be retained by an independent authority. One of the reasons the CJEU repealed the EU Data Retention Directive was that it did not require the data in question to be retained within the EU. Without such a localization obligation, the Court has reasoned, an essential component of the protection of individuals regarding the processing of personal data remained unfulfilled.<sup>74</sup> This illustrates that the Charter contains built-in restrictions on the content of EU legislation. The proposed approach to regulatory coherence in TTIP risks setting up the assessment of trade impacts of regulation as a track separate from regular regulatory scrutiny and thus overlooking the fundamental rights component.

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70. Case 233/02, *French Republic v. Comm'n of the European Cmtys.*, 2004 E.C.R. I-2759.

71. *Id.*

72. There is only one other EU case directly concerning regulatory cooperation that dealt with the Council's exclusive competence to conclude international agreements. *See* Case 327/91, *France v. Comm'n*, 1994 E.C.R. I-3641.

73. Case C-233/02, *French Republic v. Comm'n of the European Cmtys.*, 2003 E.C.R. I-2762 (opinion of Advocate-General Alber).

74. Case C-293/12, *Digital Rights Ireland Ltd. v. Minister for Commc'n, Marine and Nat. Res., Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney Gen., and Irish Human Rights Comm'n*, [2014] E.C.R. I\_\_\_\_ (delivered Apr. 8, 2014).

## B. Limitations regarding Democratic Accountability

The EU's commitment to democracy runs through the text of both EU treaties, starting with the preambles, Article 2 TEU, and the provisions on the legislative procedure and the citizens' initiative. The EU constitutional framework contains elements of parliamentary, deliberative, participatory, and multilevel democracy.<sup>75</sup>

### 1. Delegation

One strand of constitutional limitations concerns the leeway for delegating legislative power to bodies that are not mentioned in the treaties—the TEU and the TFEU. The treaties are silent on the establishment of agencies and networks. Agencies are usually established by secondary law on the basis of a specific treaty provision. Cooperative bodies producing nonbinding regulation are common in the EU; for example, the Article 29 Data Protection Working Party, which is a body of the European Commission that unites all national “data protection watchdogs” and is the European data protection supervisor.<sup>76</sup>

Many recent developments in producing EU regulation have occurred in the area of delegated lawmaking due to the changes brought about by the Lisbon Treaty in 2009.<sup>77</sup> However, what goes into primary legislation and rulemaking<sup>78</sup> is not always clear nor logical nor parallel to the U.S. system. A further problem pertains to the high level of unpredictability surrounding the choice between delegated acts and implementing measures and the resulting regulatory procedure. In 2014 the European Commission brought an action for annulment before the CJEU, arguing that the biocides regulation should have been a formal delegated act and not just an implementing measure.<sup>79</sup> The two types of EU rulemaking represent mutually exclusive categories, or so the Commission argued. The European Parliament and Council won the day, however, when the Court, curiously referring to the Constitutional Treaty, which was never adopted, allowed for a certain amount of discretion on the part of the legislature.<sup>80</sup>

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75. TEU, arts. 9–12; *see also* TEU art. 21:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

76. For additional information on the Article 29 Working Party see [http://ec.europa.eu/justice/data-protection/article-29/index\\_en.htm](http://ec.europa.eu/justice/data-protection/article-29/index_en.htm).

77. C. Boyden Gray, *Upgrading Existing Regulatory Mechanisms for Transatlantic Regulatory Cooperation*, 78 LAW & CONTEMP. PROBS., no. 4, 2015, at 35 (“[D]elegated acts present a vehicle for increased accountability and transparency as well as systematic consideration of transatlantic economic effects. Increasing transparency, accountability, and stakeholder participation in the EC's development of proposed regulations and directives, however, remains even more important to achieving the shared objective of transatlantic regulatory compatibility.”).

78. “Non-legislative acts” in EU legal jargon.

79. Case C-427/12, 18 March 2014, ECLI:EU:C:2014:170.

80. *Id.*

In some U.S. case law, delegation of government authority to a private entity and a nongovernmental arbitrator has been deemed unconstitutional “because such a delegation gave those entities ‘an effective veto’ over government action.”<sup>81</sup> Comparable case law in the EU is lacking, because the constitutional limits formulated by the CJEU over the past decades have been so strict as to prevent attempts to delegate regulatory authority to private entities altogether. In its *Meroni* judgment,<sup>82</sup> the CJEU established that the delegation of powers must be confined to a clearly defined executive power and may not involve a wide range of discretion. Consequently, the delegation of general rule-making powers to agencies is forbidden. In its recent judgment, the CJEU loosened these criteria by accepting that the European Securities and Markets Authority instead of the EC has the power to draft technical rules if the legislative framework is sufficiently detailed.<sup>83</sup> Given the clear requirement of a detailed legislative framework, this case does not directly open any door to de-facto delegation to an RCB, but it does show that the EU constitutional framework is more susceptible to delegation of regulatory powers as a matter of degree rather than kind.

## 2. Participation

Participation and transparency norms, as directly applicable, foundational, and democratic principles upon which the EU is founded, were codified in the Lisbon Treaty.<sup>84</sup> Further, these principles have become operationalized through a myriad of specific procedures. When examined in light of EU receptiveness to international standards, precisely the procedural rules meant to give effect to constitutional norms regarding openness and participation are at risk of being bypassed for lack strong constitutional entrenchment.<sup>85</sup> This situation is at odds with the promotion of “good global governance,” which—inherently vague as it may be—is an objective of the EU external policy.<sup>86</sup> The most tangible protection for participation in a legislative or regulatory context consists of soft law: The Commission’s Minimum Standards on Consultation, which are not judicially enforceable in any way. EU constitutional protections are weak in the area of participation. This may also mean that the TTIP’s regulatory coherence chapter has a large role to play as a catalyst for affecting EU decisionmaking.

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81. See Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735 (citing *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013)) (giving an overview of judicial review of regulatory cooperation efforts by U.S. agencies).

82. Case 9-56, *Meroni v. High Authority*, 1958 E.C.R. [133].

83. Case C-270/12, *United Kingdom v. Parliament and Council*, [2014] E.C.R. I\_\_\_ (delivered January 22, 2014).

84. See TEU arts. 10(3), 11; see also TFEU arts. 15(1), 298(1).

85. Joana Mendes, *EU Law and Global Regulatory Regimes: Hollowing Out Procedural Standards?*, 10 INT’L J. CONST. L. 988, 1010 (2012).

86. TEU. art. 21(2)(h).

#### IV CONCLUSION

The idea behind the current set of proposals on horizontal regulatory cooperation within TTIP is that constitutional implications will be minimal and therefore the constitutional limitations need not be invoked: “Once TTIP is adopted, regulatory cooperation will not change the way each side makes regulation. Both sides are expected to exercise transparency toward each other and to the public in making known their regulatory intentions. This will support more informative interaction among regulators and promote better regulatory outcomes.”<sup>87</sup>

This article demonstrates that even if few direct changes to fundamental aspects of EU legislative and regulatory decisionmaking are embedded in the most recent drafts of TTIP, the drafts’ various implications for regulatory sovereignty and democratic accountability have constitutional implications. On the one hand, TTIP does not formally alter the parties’ adoption procedures for legislation and rules; there is no intention to amend the EU or U.S. constitutional systems or to craft joint decision-making power. On the other hand, in practice, TTIP may erode the Commission’s right to initiate legislation because the case law on horizontal regulatory cooperation actually encourages concluding agreements that dictate how to consult on and analyze regulatory initiatives. The analysis also illustrates how many of the potential erosions and limitations of regulatory sovereignty and democratic accountability are actually self-inflicted on the part of the EC.

Is the Commission still free in the definition and content of legislative measures? On this point, the EU treaties heavily regulate this space due to the principle of conferral and the inclusion of regulatory objectives and principles such as the precautionary principle. The proposed additional institutional structures will likely increase regulators’ awareness of the extraterritorial impact of their decisions for they imply additional analysis in this regard. The RCB and working groups will provide a forum in which regulators can discuss all sorts of regulations and their implementation. There are certainly advantages to this socialization because “[TTIP] will counter the litigious and confrontational culture of the WTO, where the EU and the USA find themselves typically as rivals and antagonists.”<sup>88</sup> However, the resulting de facto deference to transnational experts calls for constitutional regulation.

Can the EU constitutional framework regulate horizontal regulatory cooperation with the United States? The planned regulatory coherence chapter has a unique role in TTIP. One might describe it as one large placeholder in the entire agreement. Specific regulatory approximations that cannot be agreed upon during the negotiations as well as future regulatory initiatives are

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87. OVERVIEW, *supra* note 16, at 7.

88. Joseph Weiler, Editorial, *The International Society for Public Law—Call for Papers and Panels*; Van Gend en Loos—50th Anniversary; *Vital Statistics*; *Roll of Honour*; *Quantitative Empirical International Legal Scholarship in this Issue*, 25 EUR. J. INT’L L. 961, 963 (2014).

subjected to a horizontal cooperative mechanism. This is in line with the idea that TTIP should be a “living agreement,” but it also makes regulatory cooperation, as approached procedurally, particularly difficult for constitutional arrangements to regulate.

A major issue to be solved in the negotiations is whether to include primary legislation, such as statutes and legislative acts, as well as non-central legislation, such as member state laws and regulations. It remains to be seen if the new inception impact assessments do enough to meet the U.S. demand for an increase in timely transparency for the preparation of legislative and regulatory acts. No case law concludes that committing to early publication of draft impact assessments would constitute a violation of the Commission’s right of initiative. This may be different if horizontal regulatory cooperation develops to include substantive decision criteria at odds with the limitative regulatory objectives in the Treaty on the Functioning of the European Union. The largest implications concern the institutional apparatus envisaged. Here, the EU constitutional framework lacks the tools to regulate socialization of regulatory actors involved.

Given the constitutional framework that deals with competence in a fairly formalistic way, and given the uncertainty surrounding the enforcement of the horizontal regulatory provisions in particular, it is worth considering how the EU constitutional framework could be strengthened to better handle structural, horizontal regulatory cooperation.<sup>89</sup> Because the institutional aspect of EU law is under siege by the demands of practical problem solving, namely the economic need for regulatory cooperation, constitutional law should aim to regulate the risk that voluntary convergence *de facto* turns into circumvention of the properly competent legislative or regulatory bodies. Some of these bodies themselves are involved, although as of yet it is not clear which sub-bodies will be active in regulatory exchanges. For instance, will the concrete actors have a trade background? Or will they be regulators—a word that the EU textual proposal uses frequently?

In search of solutions for the lack of clarity regarding the actual impact of horizontal regulatory cooperation in TTIP, it may be useful to view the risks associated with the establishment of an RCB or equivalent body as an information problem and not as a sovereignty problem in the first instance. The Trade Commissioner has argued that “[a]mbitious regulatory cooperation helps us make better decisions because regulators can share expertise and data.”<sup>90</sup> Because the European Commission clearly frames the institutional advantages of TTIP in terms of information exchange, it can be called upon to ground such

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89. Bengt Jacobsson, *Regulated Regulators: Global Trends of State Transformation*, in *TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION* 205–24 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2006); Colin Scott et al., *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 *J.L. & SOC’Y* 1 (2011).

90. Cecilia Malmström, Commissioner for Trade, Address at Berlin-SPD Conference: Transatlantic Free Trade Opportunities and Risks, TTIP: Freedom and Responsibility 3 (Feb. 23, 2015).

sharing of regulatory and other data in sound procedures. Handling regulatory information in such a way that it increases accountability is not self-evident. For example, the former Impact Assessment Board has poor track record in user friendliness—its opinions can only be found in a non-searchable specialized system rather than the regular legislative databases. For the regulatory coherence chapter in TTIP this means that the EC should propose more than public accessibility of RCB meeting agendas.<sup>91</sup> Designing structures to optimize in the interest of citizens, information, and best-practices exchange is one of the urgent challenges for contemporary public law,<sup>92</sup> and a challenge for which regulatory cooperation efforts have an opportunity to be at the forefront.<sup>93</sup> In the EU context there have been some efforts at recognizing the centrality of data or information in the exercise of public power. For example, the Research Network on EU Administrative Law, an academic, administrative law codification project, has devoted two books to mutual assistance between administrative bodies and administrative information management.<sup>94</sup>

Perhaps democratically elected bodies on both sides of the Atlantic can take some inspiration from the influence on European decisionmaking that national parliaments gained over the years. Once deemed impossible, many EU national parliaments now have some degree of direct influence on what their government minister is deciding in the EU Council of Ministers. All of the mechanisms established to facilitate this newly won influence, such as obligatory information notes (impact fiches) and the so-called yellow card that allows a collectivity of national parliaments to force the EC to reconsider a legislative proposal, are information based. Now that the European Parliament and the member states have become more involved through the Council with the Commission's work program, perhaps they should strive to do the same with the Annual Regulatory Cooperation Program.

But the information streams should also be regulated to engage and protect citizens. If the Commission is serious about keeping corporate influence over legislation at bay, it should commit to increased transparency. Part of the implementation phase of regulatory coherence within TTIP—provided that this treaty ever enters into force—will necessarily remain obscured. What is being discussed in regulatory exchanges and RCB meetings will be extremely difficult

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91. *Initial Provisions*, supra note 13, at 12 (“[A]genda and the minutes of the meetings of the RCB shall be made public.”).

92. See generally Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006); Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211 (2014).

93. See generally Kai Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000) (explaining the link between a good regulatory architecture and compliance in a regulatory cooperation context).

94. Inspired by the American “restatement” approach, this project put forward model rules “designed as a draft proposal for binding legislation identifying—on the basis of comparative research—best practices in different specific policies of the EU, in order to reinforce general principles of EU law.” See *Publications*, RENEUAL, [http://www.reneual.eu/publications/main\\_publications.html](http://www.reneual.eu/publications/main_publications.html) (last visited Sept. 13, 2015).

or impossible to make visible—absent in-depth empirical research. Exploring how involved regulators will deal with the accountability–independence dilemma—that they will need on the one hand a sufficient degree of accountability toward their domestic constituencies, while on the other hand, a sufficient degree of mutual trust that they do not arrive to the dialogue table with the exclusive aim of representing their domestic stakeholders and voters—provides a potential research agenda for both socio-legal and public-law scholars.