

THE POLITICIZATION OF LEGAL EXPERTISE IN THE TTIP NEGOTIATION

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I

INTRODUCTION

In pursuing a Transatlantic Trade and Investment Partnership (TTIP) with the European Union (EU) and the Trans-Pacific Partnership (TPP), the Obama Administration aims to create economic growth while strengthening the Western bloc to contain the rising Chinese power and the regulatory challenges posed by the expansion of the Chinese markets.¹ In entering into such a bilateral, rather than multilateral, negotiating framework, the U.S. and EU administrations are choosing an alternative route to the World Trade Organization (WTO) for international cooperation. Beyond the geopolitical implications of TTIP, the battle turf for its negotiation is embedded in a complex regulatory web of private and public governance mechanisms in which administrative legal experts and their ideological orientation play a large, and often unspoken, role. This article examines legal tools and ideological choices that administrative law experts have put forward to respond to the demands of civil society and politicians regarding the need for greater transparency and participation in trade negotiation. Although trade negotiations happen in secret, negotiators on both sides of the Atlantic have strategically used notions of transparency and participation in administrative law to advance their respective bargaining power and to gain more legitimacy toward the general public.

One of the central goals of TTIP revolves primarily around deepening international regulatory cooperation (IRC); namely, eliminating inefficient and unnecessary incompatibilities created by differing administrative structures that burden industries and trade across the Atlantic. This notion was already present in President Obama's Executive Order (EO) 13,609 issued in 2012, which aimed to promote IRC as a way to ensure that divergent regulatory approaches adopted between U.S. agencies and their foreign counterparts do not impair the

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1. Edward Alden, *With TPP and TTIP, U.S. and EU Reassert Control Over Rules of Global Trade*, WORLD POLITICS REVIEW (Dec. 19, 2013).

ability of companies to export and compete on a global level.² In trying to reconcile the need for regulatory efficiency with safety, health, labor, and environmental standards, the EO portrayed IRC as a mechanism aimed at identifying protective approaches to “reduce, eliminate, or prevent unnecessary differences in regulatory requirements.”³

Led by the European Commission and its trade negotiators, the EU has been willing to partner with the United States on equal footing, rather than simply entering into a free-trade agreement, in order to identify commonalities on horizontal regulatory issues.⁴ Partnering as equals in a regulatory dialogue, however, has created not only numerous tensions between the two administrations but also several roadblocks in the TTIP negotiations.⁵ The Commission faces political and technical pressures from the United States Trade Representative (USTR) that has put forward the advantages of its regulatory system as more efficient and transparent with streamlined cost-benefit procedures.⁶ On the other hand, the Commission prides itself on its methodological pluralism in carrying out impact assessments and its proactive and more democratic attempt to involve large groups of civil society representatives in regulatory processes.⁷

While trade negotiators have been busy reconciling these regulatory differences, TTIP has sparked promises and criticisms from businesses, workers, and nongovernmental organizations (NGOs), as well as from believers of multilateralism in international trade circles, because of the impact of TTIP on third countries left out of the negotiation.⁸ Some have applauded, and others

2. Exec. Order No. 13,609, 3 C.F.R. 26413 (2012).

3. *Id.*; see also Paul R. Verkuil & Reeve T. Bull, *The Administrative Conference's Role in Supporting Regulatory Cooperation*, Administrative Conference of the United States (Dec. 2, 2014).

4. See TTIP Round 9 – final day press conference - Comments by EU Chief Negotiator Ignacio Garcia Bercero, http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153394.pdf.

5. In this respect, ensuring joint transatlantic leadership in the development of global norms and standards goes hand in hand with building progressively a more integrated transatlantic marketplace. Critically these rules and institutions would not be credible if we fail to deliver the concrete and measurable reduction in costs for business through mutual recognition or by other means to avoid the unnecessary duplication of regulatory costs.

Karel de Gucht, EU Trade Commissioner, *Remarks on TTIP Ahead of the Second Round of Negotiations*, DELEGATION OF THE EUROPEAN UNION TO THE U.S., <http://www.euintheus.org/press-media/eu-trade-commissioner-karel-de-gucht-on-ttip-ahead-of-the-second-round-of-negotiations/> (last visited Dec. 31, 2014).

6. When we talk about regulation and standards, we are talking about how to bridge the divergences between two well-regulated markets, not about launching a broad deregulatory agenda. We are focused on reducing unnecessary costs that damage our collective competitiveness in an increasingly competitive global economy, perhaps resulting in what my former colleague, Cass Sunstein, has called “simpler” regulation.

Michael Froman, U.S. Trade Representative, *Remarks on the United States, the European Union, and the Transatlantic Trade and Investment Partnership*, OFFICE OF THE U.S. TRADE REP. (Sept. 30, 2013), <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2013/september/froman-us-eu-ttip>.

7. See Anne Meuwese, *Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective*, 78 LAW & CONTEMP. PROBS., no. 4, 2015, at 160.

8. Michelle Egan, *Is TTIP Really That Different? The TTIP: The Transatlantic Trade and Investment Partnership between the European Union and the United States*, in THE TTIP 19, 25 (Joaquin

criticized, the high economic and employment benefits calculated by experts on both sides to justify the optimistic opening of the negotiation.⁹ While trade liberalization politics are increasingly challenged by politicians in Congress with the approval of Trade Promotion Authority and in the European Parliament, the procedures and ideological choices in IRC are portrayed as a technical realm in which lawyers attempt to extrapolate best practices or pragmatically reconcile conflicting procedures.

The understanding that TTIP will likely revolve around IRC worries politicians and civil society alike because of the constraint that this could create for domestic regulation and a resulting lack of transparency and participation in the negotiation.¹⁰ In response to democratic-deficit and transparency concerns, trade negotiators are using the technical language of regulatory cooperation rather than convergence to show how their respective administrative law regimes best reflect the values enshrined in Western liberal democracies, such as transparency, openness, and participation in decisionmaking. In this process, lawyers are tasked to reconcile administrative law divergences by addressing “best” models or “experimentalist” approaches to overcome the regulatory roadblocks in TTIP.

Part I offers a historical roadmap to understand the initial steps in transatlantic trade and regulatory approximation between the United States and the European Economic Community. With the establishment of a transatlantic dialogue in the 1970s, the European Commission secured a first-mover advantage vis-à-vis the U.S. administration through its ability to regulate a complex multilevel governance regime and the principle of mutual recognition. Rather than an impediment to transatlantic trade, the European regulatory model put forward by the Commission was perceived as an asset to the regulation of complex sectors. Later, with the limited success of mutual recognition agreements (MRAs) and the launch of the High Level Regulatory Cooperation Forum (HLRCF) under the Bush Administration, this new phase of coordination under the leadership of the HLRCF marked the increasing participation of administrative agencies under the lead of the White House. At this point, the U.S. administration was able to secure a first-mover advantage in transatlantic regulatory cooperation. The shifts in bargaining power between the EU and U.S. administrations was based on contingent and often external situations rather than the result of “best” or more “efficient” internal regulatory practices in their respective administrative processes.¹¹

Roy & Roberto Dominguez eds., 2014).

9. See WERNER RAZA, JAN GRUMILLER, LANCE TAYLOR, BERNHARD TRÖSTER & RUDI VON ARNIM, *ASSESS TTIP: ASSESSING THE CLAIMED BENEFITS OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) FINAL REPORT 5–8* (2014).

10. Kal Raustiala, *Domestic Institutions and International Regulatory Cooperation: Comparative Responses to the Convention on Biological Diversity*, 49 *WORLD POL.* 482, 488 (1997).

11. See generally Abraham Newman & Elliot Posner, *Putting the EU in Its Place: Policy Strategies and the Global Regulatory Context*, 22 *J. EUR. PUB. POL'Y* 1316 (2015) (addressing the embeddedness of the Global Regulatory context).

Part II analyzes the regulatory tools and ideological conflicts that trade negotiators need to reconcile to achieve regulatory cooperation in TTIP. The USTR and the Commission have promoted different regulatory tools for IRC (negative versus positive lists, soft versus hard law), as well as different value-based approaches to regulatory practice (democratic participation versus efficiency). Throughout the TTIP negotiation, lawyers have worked closely with trade negotiators to reconcile divergences in horizontal regulatory practices.

Part III shows how the work of scholars has attempted to reconcile IRC under the label of global administrative law (GAL). In light of the critiques to GAL, more recently, scholars have replaced universal approaches with more contingent and pragmatic approaches to what they call global experimentalist governance (GXG). Rather than favoring legal convergence in GAL or legal experimentalism in GXG—on the conflicts arising in IRC, this article suggests a different path. By focusing on each conflict arising in horizontal regulatory issues these should be understood by scholars as the result of an ideological trade-off between lawyers and a bargaining tool for negotiators.¹²

Part IV shows how the general principles of transparency, openness, and participation in administrative law have become a bargaining chip for TTIP negotiators regardless of the principles' distributive consequences. This part compares EU and U.S. regulatory approaches through a "hermeneutic of suspicion."¹³ Rather than a neutral approach geared toward "better" or "experimentalist" forms of governance, it foregrounds the political choices of the negotiators and the distributive consequence of the regulatory practices promoted on different private and public entities ranging from individuals to civil society.

II

THE HISTORY OF TRANSATLANTIC REGULATORY COOPERATION

A. From Multilateralism to Bilateralism

Since the 1930s, trade agreements have been designed to eliminate border measures, lower tariffs, and address "indirect protectionism" as goals carried out by GATT article III—the quintessential national treatment rule which eliminates discrimination against foreign products.¹⁴ In the 1970s, governments were committed to going beyond protectionist regulations and addressing the so-called "increasingly regulatory divergence" and unnecessary barriers to

12. See Giulio Napolitano, *Conflicts and Strategies in Administrative Law*, 12 INT'L J. CONST. L. 35 (2014).

13. See BRIAN LEITNER, *The Hermeneutics of Suspicions: Recovering Marx, Nietzsche, and Freud*, in *THE FUTURE OF PHILOSOPHY* 74–104 (2004).

14. SIMON LESTER, *THE ROLE OF THE INTERNATIONAL TRADE REGIME IN GLOBAL GOVERNANCE* 4 (2011); Simon Lester and Inu Barbee, *The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*, 16 J. INT'L ECON. L. 847, 859 (2013).

trade.¹⁵ The role of international trade agreements was expanded to set, at the global level, the standards adopted by domestic regulators. Through IRC trade, negotiators could directly address the relationship between domestic regulations and international trade.

In the 1980s, conflicting logics of trade liberalization and social market regimes led to an expansion of IRC with a focus on domestic regulation's impediment to international trade.¹⁶ The scope of trade and investment agreements grew beyond border measures such as tariff and quota controls. The main barriers remaining to international trade were alternately referred to as nontariff barriers, "behind the border" barriers, or simply as domestic regulation which has become the center of attention in international trade negotiations.¹⁷ In transatlantic trade relations, multinational businesses were worried about duplicative compliance costs, whereas the United States alleged that the changing European single market would offer a competitive advantage to EU firms at the expense of their competitors.¹⁸

As a response, the European Community (EC) and the U.S. administration set up institutionalized dialogues on different governance levels to prevent unilateral implementation of domestic regulation that could hamper transatlantic trade.¹⁹ The 1990 Transatlantic Declaration "committed both sides to address[ing] and solv[ing] problems of common interest, including regulatory barriers, resulting in annual reports in which each side set forth its trade grievances against the other."²⁰ This Declaration called for mutual information-sharing and cooperation on important political and economic matters. This collaboration was to be achieved through biannual consultations between U.S. and EU officials, briefings by the EU Presidency to the U.S. representatives at the ministerial level, and cooperation between legislators.²¹ When the EC began its internal market program in the early 1990s, the United States was concerned that progress toward EC-wide standards would create a "Fortress Europe" that

15. Alberto Alemanno, *The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation* 5 (2014), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET_ET\(2014\)433847_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET_ET(2014)433847_EN.pdf).

16. George A. Bermann et al., *Introduction*, in *TRANSATLANTIC REGULATORY CO-OPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 1, 14 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000).

17. Suzanne Berger, *Introduction*, in *NATIONAL DIVERSITY AND GLOBAL CAPITALISM* 1, 16 (Suzanne Berger & Ronald Dore eds., 1996).

18. Gregory Shaffer, *Managing U.S.–EU Trade Relations Through Mutual Recognition and Safe Harbor Agreements: 'New' and 'Global' Approaches to Transatlantic Economic Governance?*, 9 *COLUM. J. EUR. L.* 29, 37 (2002).

19. OLIVER ZIEGLER, *EU REGULATORY DECISION MAKING AND THE ROLE OF THE UNITED STATES: TRANSATLANTIC REGULATORY COOPERATION AS A GATEWAY FOR U. S. ECONOMIC INTERESTS?* 68 (2012).

20. DAVID VOGEL, *BARRIERS OR BENEFITS? REGULATION IN TRANSATLANTIC TRADE* 9 (1997).

21. DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION, *THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND THE PARLIAMENTARY DIMENSION OF REGULATORY COOPERATION* 25 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423562.

American businesses would not be able to penetrate.²²

The U.S. administration urged the Commission to permit American-based firms to participate in setting standards and certifying compliance with them.²³ Transatlantic regulatory cooperation began in May 1992 when the Commission agreed to establish procedures for the participation of U.S. firms in the European standard-settings bodies as well as to negotiate MRAs for product safety and quality.²⁴ The Commission released a report in 1992 following the Transatlantic Declaration, urging an “in-depth bilateral dialogue” to reduce trade barriers.²⁵ On both sides, the administrations undertook dialogues, uncovering differences in substantive policy, regulatory style, and procedural obstacles.²⁶

In the aftermath of the Maastricht Treaty in 1993, the newly created EU established the Unit for Regulatory Relations with the United States within the Director-General for External Relations, which, in turn, established the EU–U.S. Inter-Service Group, consisting of representatives from most Directorates-General of the Commission, which was responsible for coordinating, overseeing, and promoting regulatory cooperation with the United States.²⁷

In November 1995, the Seville Conference, under the auspices of the Transatlantic Business Dialogue (TABD) established a Transatlantic Advisory Committee on Standards, Certification, and Regulatory Policy to work jointly toward a new regulatory model based on the optimistic principle “approved once, and accepted everywhere.”²⁸ The TABD was a business-led government–business forum initiated by the U.S. Department of Commerce and aided by the Commission.²⁹ The TABD’s goal was not only to lower trade and investment barriers across the Atlantic but also to achieve a “barrier-free transatlantic market.”³⁰ In December 1995, the Clinton Administration established the New Transatlantic Agenda, aimed to prioritize economic ties and transform the transatlantic relationship from one of consultation to one of joint action.³¹

22. *Id.* at 8.

23. See MICHELLE EGAN, *CONSTRUCTING A EUROPEAN MARKET: STANDARDS, REGULATION AND GOVERNANCE* (2001).

24. Vogel, *supra* note 20, at 9 (quoting George Bermann, *Regulatory Cooperation between the European Commission and U.S. Administrative Agencies*, 9 ADMINISTRATIVE L. J. 972 (1996)).

25. Bermann, *supra* note 24, at 957–58.

26. *Id.*

27. *Id.*

28. *Id.*

29. Vann H. Wilber & Paul T. Eichbrecht, *Transatlantic Trade, the Automotive Sector: The Role of Regulation in a Global Industry, Where We Have Been and Where We Have to Go, How Far Can EU–US Cooperation Go Toward Achieving Regulatory Harmonization?*, in SYSTEMIC IMPLICATIONS OF TRANSATLANTIC REGULATORY COOPERATION AND COMPETITION 165, 176 (Simon J. Evenett & Robert M. Stern eds., 2011).

30. EU–USA Regulatory Cooperation, EUROPEAN COMM’N., <http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/regulatory-cooperation> (last visited Dec. 31, 2014).

31. Alberto Alemanno, *The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation* 25 (2014), <http://www.europarl.europa.eu/>

Trade negotiators then tried to craft mutual recognition agreements that would address technical and other nontariff barriers to trade.³² Essentially, negotiators tried to create TABD's transatlantic marketplace in one swift stroke with what domestic administrations perceived as heterodox legal tools. Critics viewed the list of deliverables as overly bureaucratic and failing to address and solve major trade obstacles in the realm of regulatory cooperation. In addition, more pressing foreign policy issues in the Balkans and China pushed the transatlantic relationship lower on the trade agenda.³³

B. The MRAs under the Leadership of the European Commission

In the late 1990s, regulatory cooperation under the rubric of "harmonization" appeared as a natural outgrowth of EU law, in which a supranational administrative law coordinated the legal regimes of its member states and their regulatory compatibility.³⁴ The EU represents one of the world's most extensive efforts to coordinate regulatory standards across levels of governments that demonstrated wide expertise in creating better cooperation among different regulators. As the evolving supranational regulatory environment in the EU changed the expectations of firms in both the EU and United States, the political institutions on each side of the Atlantic magnified these public pressures for greater cooperative regulation to achieve trade liberalization.³⁵

In 1996, the Chicago Conference issued a declaration stating that "certain regulatory requirements, in particular duplicative testing and certification procedures and widely divergent technical regulations and standards, were no longer sustainable in terms of resources or results and were not suited to the realities of the global marketplace."³⁶ In 1997, TABD issued a priorities paper noting "several sectors consider completion of a [MRA] package to be a key demonstration of the effectiveness of the TABD process."³⁷ In May 1997, an agreement on conformity assessment was released.³⁸ This mutual recognition agreement meant "once a product receives a stamp of approval on one side of the Atlantic, it could be automatically sold on the other side as well."³⁹

In May 1998, the EU and the United States launched the Transatlantic Economic Partnership (TEP) with the aim of furthering bilateral relations with

RegData/etudes/etudes/join/2014/433847/EXPOAFET_ET(2014)433847_EN.pdf.

32. Tyson Barker, *For Transatlantic Trade, This Time Is Different: Why the Latest U.S.-EU Trade Talks Are Likely to Succeed*, FOREIGN AFFAIRS (Feb. 26, 2013).

33. *Id.*

34. See generally PETER LINDSETH, POWER AND LEGITIMACY 150 (2010).

35. VOGEL, *supra* note 20, at 59.

36. *Id.* at 8.

37. *Id.*

38. VOGEL, BARRIERS OR BENEFITS: REGULATION IN TRANSATLANTIC TRADE 12 (1997).

39. *Id.* (citing Brian Coleman, *U.S., EU Draft Pact on Trade-Product Standards*, WALL ST. J. (May 29, 1997)).

an “ambitious” program of regulatory cooperation.⁴⁰ “The TEP Action Plan called for action to address technical barriers to trade in goods, including improving the dialogue between EU and U.S. regulators. On the basis of the TEP Action Plan, the Commission and the U.S. government developed Guidelines for Regulatory Cooperation and Transparency,” encouraging agency-to-agency cooperation between regulatory authorities on both sides.⁴¹ The aim was to achieve greater convergence of technical rules through a number of sectoral or vertical and horizontal regulatory dialogues.⁴² Meanwhile, intense academic discussions on the possibility of borrowing administrative cultures sought to transplant regulatory practices from one side of the Atlantic to the other.⁴³

For instance, in 1997, during the negotiation of several MRAs, lawyers relied on a principle that was directly borrowed from the Commission’s notion of mutual recognition. For the Commission, inspired by the European Court of Justice Judgement of *Cassis de Dijon* (1979), mutual recognition became central to solving the obstacles of transatlantic regulatory cooperation.⁴⁴ Rather than requiring further harmonization, mutual recognition required recognition of each other’s certification of products, focusing on the results of conformity assessment procedures and presupposing equivalence between respective regulatory standards.⁴⁵ If “managed,” mutual recognition entails that products are only tested once for similar processing and can freely circulate between trading partners.⁴⁶

Even though mutual recognition could advance regulatory cooperation, it is not a form of standards recognition, because it does not affect the substance of the regulation.⁴⁷ Even though MRAs covered a broad variety of products

40. Mark Pollack, *The New Transatlantic Agenda at Ten: Reflections on an Experiment in International Governance*, 43 J. COMMON MKT. STUD. 899, 907 (2005).

41. *EU–USA Regulatory Cooperation*, *supra* note 30.

42. Tamara Takacs, *Transatlantic Regulatory Cooperation in Trade: Objectives, Challenges and Instruments for Economic Governance*, in *A TRANSATLANTIC COMMUNITY OF LAW: LEGAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN THE EU AND US LEGAL ORDERS* 158, 170–73 (Elaine Fahey & Deirdre Curtin eds., 2014).

43. Francesca Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L. J. 451, 451–56 (1999).

44. See Case 120/78, *Rewe-Zentral A.G. v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 00649; Gerhard Lohan, *Integrating Regulatory Cooperation into the EU System*, in *TRANSATLANTIC REGULATORY CO-OPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 405–30 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000). Lohan speaks particularly to production methods, performance and design requirements, testing and conformity assessment, labeling, and recycling and waste management.

45. Alemanno, *supra* note 31, at 32.

46. See Kalypso Nicolaïdes, *Kir Forever? The Journey of a Political Scientist in the Landscape of Mutual Recognition*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY* (Miguel Poiares Maduro & Loïc Azoulai eds., 2010).

47. See Tamara Takacs, *Regulatory Cooperation in Transatlantic Trade Relations*, in *TRADE LIBERALISATION AND STANDARDISATION—NEW DIRECTIONS IN THE ‘LOW POLITICS’ OF EU FOREIGN POLICY* 75, 83 (Marisa Cremona & Tamara Takacs eds., 2013).

included in the six sectoral annexes (telecommunications, pharmaceuticals, electronics, electromagnetic compatibility, sport boats, and medical devices), these agreements succeeded in increasing market access for some goods but not for others. As many noticed, a highly managed mutual recognition was “far from automatic” and still required cumbersome procedures in its application.⁴⁸

In several cases, described in great detail in Gregory Shaffer’s work, the failure of implementation of the agreements in areas important for EU exporters (electrical safety, medical devices, and pharmaceuticals) created transatlantic tensions between the trading partners.⁴⁹ As a result, MRAs were not as successful in EU–U.S. relations as was mutual recognition adopted by the Commission within the EU Internal Market.⁵⁰

The lesson was that existing regulatory divergences ought to be taken seriously to show that there are different regulatory regimes, cultures, and preferences at stake, so that rather than a harmonization approach, regulators ought to justify their own choices while being open to experimentation. Through the MRAs and later on with the 2000 Safe Harbor Privacy Principles, the EU model of regulatory cooperation was slowly influencing U.S. regulatory approaches so that regulatory convergence “tended toward EC—and not U.S.—regulatory practices.”⁵¹ Among the reasons, as Shaffer puts it, was the ability of the Commission derived from its practical experience to work in a multiplicity of languages and national administrative cultures, as well as in the growing EU market power.⁵²

The MRAs successfully globalized a model based on the argument of enhanced administrability and allowed flexibility in reconciling cultural and technological challenges. In addition, MRAs rejected the attack from the Left, well-known in European circles, that while mutual recognition alleviated the harmonization burden, it triggered a race to the bottom within the internal market. As scholars have shown, mutual recognition came “in differently shaped bottles” depending on the political and legal elites negotiating the agreements and on the historical meanings of *Cassis* understood as a managed mutual recognition idea.⁵³ Regardless of its success during this round of the transatlantic negotiations, the Commission secured a first-mover advantage with respect to its U.S. counterparts.

C. The High Level Regulatory Cooperation Forum under the U.S. Leadership

With the creation of the EU–U.S. HLRCF in 2005, agencies on both sides of

48. See Nicolaïdes, *supra* note 46, at 453 (explaining how mutual trust and technical harmonization comes in “differently shaped bottles” and also “in shades of red”).

49. See Shaffer, *supra* note 18, at 29; see also Mark A. Pollack & Gregory C. Shaffer, *Who Governs?*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 287, 303 (2001).

50. Alemanno, *supra* note 31, at 31.

51. Shaffer, *supra* note 18).

52. Shaffer, *supra* note 49, at 41.

53. See Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for New Legal Discipline*, 14 *DUKE J. COMP. & INT’L L.* 149 (2004); Nicolaïdis, *supra* note 46, at 447.

the Atlantic aimed to strengthen the exchange of best regulatory practice across specific sectors. “The dialogue helps bridge gaps where responsibilities in the two administrations do not correspond exactly, and allows for early engagement on new emerging regulatory issues.”⁵⁴ The HLRCF was co-chaired by the Director-General of Enterprise and Industry at the Commission and the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) in the White House.⁵⁵ The HLRCF also engaged with stakeholders in public sessions, which now form part of its regular meetings. These sessions informed businesses and consumers about the results of the HLRCF’s work while providing a platform for stakeholders to engage in discussions with officials from both sides.⁵⁶ By referring to horizontal cooperation on cross-cutting issues, as opposed to vertical or sector-specific issues, the HLRCF sanctioned horizontal regulatory cooperation as part of its mission. This dialogue among regulators focused on a variety of bilateral activities to share information, ideas on “better” regulatory approaches, methods of regulatory analysis, and reform.⁵⁷

The Bush Administration sought to break down regulatory barriers in transatlantic trade. Allied with Chancellor Merkel in Germany, the Bush Administration successfully established the Transatlantic Economic Council (TEC). This high-level political body aimed to promote economic integration within the Framework for Advancing Transatlantic Economic Integration.⁵⁸ The TEC was meant to bring U.S. and EU economies together, “primarily through regulatory cooperation in areas from accounting to electric vehicles and nanotechnology.”⁵⁹ Even though TEC has achieved results in select areas, these have not met expectations due to insufficient political support and the effort quickly failed over a dispute on the infamous issue of the United States exporting chlorine-washed chicken.⁶⁰

The road to TTIP began in November 2011 when “the EU–U.S. High Level Working Group on Jobs and Growth (HLWG) established by TEC was tasked to identify and assess options for strengthening the EU–U.S. economic relationship, including opportunities for enhancing the compatibility of regulations and standards.”⁶¹ The Obama Administration was simultaneously reaching out to other trading partners to explore bilateral regulatory cooperation.⁶² In May 2012, the presidential EO 13,609 on IRC was announced

54. *Europe*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/oira_irc_europe (last visited Dec. 31, 2014).

55. Office of Management and Budget, *Europe: United States–European Union High-Level Regulatory Cooperation Forum* (2014), https://www.whitehouse.gov/omb/oira_irc_europe.

56. *Id.*

57. Alemanno, *supra* note 31, at 28.

58. *Id.*

59. Barker, *supra* note 32.

60. *Id.*

61. *EU–USA Regulatory Cooperation*, *supra* note 30.

62. Christopher Sands, *Harmonizing the Border: Increase Jobs by Harmonizing Regulations:*

at the joint Administrative Conference of the United States and the U.S. Chamber of Commerce workshop.⁶³ The order was based in part on ACUS Recommendation 2011-6 and required all executive agencies to consider international cooperation in all of their regulatory functions.⁶⁴

By February 2013, HLWG released its final report; two days later, President Obama, the President of the EC, and the President of the Commission, announced that they would launch a negotiation with the aim of achieving a comprehensive transatlantic trade agreement.⁶⁵ Negotiations began in mid-2013. During the second round of negotiations, concluded on November 15, 2013, “both sides agreed on the importance of horizontal rules and specific commitments in sectors.”⁶⁶ Since then, horizontal cooperation addressing IRC architecture and mechanisms has become an extremely technical issue under the prerogative of administrative lawyers.

The new institutional framework that trade negotiators have put forward for the emerging megaregional free trade agreements ranging from TPP, TTIP, and the Comprehensive Economic and Trade Agreement between Canada and the EU relies on a modest administrative and implementation structure geared toward facilitating regulatory cooperation rather than new regulations. In this respect negotiators and lawyers alike have spent a lot of effort to define the term “regulatory cooperation” as something different from and more flexible than “convergence” or “harmonization” as used profusely by the EU and the WTO.

In May 2015, the EU draft of the horizontal chapter aimed to promote regulatory cooperation through improved regulatory exchange of information, commitment to good regulatory practices, and the creation of a long-term institutional framework.⁶⁷ In its proposal the Commission endorses the creation of a regulatory cooperation body, which would facilitate exchange of information through early warnings in order to avoid unnecessary incompatibilities. The regulatory cooperation body will monitor and review the implementation of regulation in the different sectors included in TTIP and identify new opportunities for cooperation.⁶⁸ Even though such a body will not

Restoring Respect for the Law in Canada–U.S. Commerce: The Regulatory Cooperation Council So Far, 37 CAN.–U.S. L. J. 319, 319–20 (2012).

63. *International Regulatory Cooperation*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES—RESEARCH PROJECTS, <http://www.acus.gov/research-projects/international-regulatory-cooperation> (last visited Dec. 31, 2014).

64. *Id.*

65. *EU–U.S. High Level Working Group on Jobs and Growth*, http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf (last visited Sept 10, 2015).

66. *A Second Round TTIP Concludes*, WASH. TRADE DAILY, Nov. 18, 2013, at 1.

67. *See Detailed Explanation on the EU Proposal for a Chapter on Regulatory Cooperation*, EUR. COMM’N (May 6, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1%20Detail%20explanation%20of%20the%20EU%20proposal%20for%20a%20Chapter%20of%20reg%20coop.pdf.

68. *See* Articles 14–16, Establishment of the Regulatory Cooperation Body in the Commissions’ Initial Provisions for Regulatory Cooperation, <http://trade.ec.europa.eu/doclib/docs/2015/february/>

have the power to adopt legal acts,⁶⁹ scholars and civil society groups have raised all sorts of issues with regard to its composition, its transparency, and its authority vis-à-vis domestic or EU decision-making processes.⁷⁰

III

REGULATORY TOOLS AND IDEOLOGICAL CONFLICTS IN IRC

A. Negative versus Positive List and the Race to the Bottom

For some scholars, IRC consists of a set of instruments for multinational corporations and for small and medium enterprises to reduce the cost of compliance with multiple sets of product regulations and standards across different economies.⁷¹ Through more effective government regulations, IRC exists to allow businesses to more efficiently engage in international trade.⁷² Within this definition, nothing limits the set of means employed to achieve IRC.⁷³ Considered broadly, such means can include the study, design, monitoring, enforcement, and ex post management of regulations, whether in binding or voluntary forms.⁷⁴ In addition, the forms of IRC can vary in type while taking different forms: from regulatory convergence to harmonization, from mutual recognition of regulations across borders to coordination or cooperation in the form of joint study, and from mere information exchange to generally thoughtful consideration of trading partners.⁷⁵

Irrespective of the existence of transatlantic institutions and dialogues for regulatory cooperation, the challenges to overcome regulatory differences remain substantial.⁷⁶ A significant example that has emerged in the TTIP negotiation was the different approach to liberalization used by trade negotiators. The USTR follows a “negative list approach” that explicitly mentions the restrictions that ought to be eliminated: the so-called “list it or lose it” approach often criticized by labor groups.⁷⁷ In contrast, the EU uses a “positive list approach,” which aims to stimulate broader market access commitments that leave open the inclusion of new topics during the

tradoc_153120.pdf.

69. *Commission Introduction to the EU Legal Text on Regulatory Cooperation in TTIP* (Feb. 10, 2015), http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153119.1.1%20Regulatory%20cooperation%20intro%20to%20EU%20legal%20text.pdf.

70. See Meuwese, *supra* note 7, at 10–11.

71. RAYMOND J. AHEARN, CONG. RESEARCH SERV., RL34717, TRANSATLANTIC REGULATORY COOPERATION: BACKGROUND AND ANALYSIS 4 (2009).

72. IRC has also been defined as efficiency gains “without the use of additional resources,” which seems unrealistically limiting, given the obvious investments of government resources in IRC. Adam C. Schlosser & Reeve T. Bull, *Regulatory Cooperation in the TTIP*, REG BLOG (Aug. 27, 2013), <http://www.regblog.org/2013/08/27/27-schlosser-reeve-ttip/>.

73. OECD, *infra* note 101 at 22–25.

74. *Id.*

75. Bermann, *supra* note 16, at 14.

76. Egan, *supra* note 8.

77. *Id.*

negotiations.⁷⁸

In the context of TTIP, the EU has proposed a hybrid approach for trade in services, using positive listing for market access and negative listing for national treatment.⁷⁹ The USTR, however, has used a negative listing for services in the past and appears to support a negative listing in TTIP as well.⁸⁰ One issue of contention was the audiovisual sector, because under the negative list approach, negotiators would not have known what future technological developments may be included in current concessions.⁸¹ Such contention led the European Parliament, influenced by industries as well as governments under the lead of France, to convince the Commission that the audiovisual sector should be excluded from the vertical competences of TTIP.⁸²

Scholars, politicians, and civil society groups in the EU and in the United States, however, have feared that transatlantic regulatory cooperation enhances a race to the bottom scenario in which exporting corporations will be able to take advantage of trade agreements to move their operations freely to the most favorable, or least stringent, of several regulatory jurisdictions, while continuing to export to all.⁸³ At the same time, the affected regulators must compete to reduce the stringency of their standards or risk lost competitiveness or the loss of operations.⁸⁴ In the United States, officials and lawmakers have opposed including provisions regulating financial services into trade agreements such as the TTIP out of the concern that including this sector will weaken existing U.S. safeguards such as the Dodd–Frank Act, resulting in a race to the bottom.⁸⁵

The potential for a race to the bottom is typically explored in the context of corporate interests over environmental regulations, consumer-protections, and public-sector services⁸⁶ but applies to any area in which corporate interests might overwhelm regulatory stringency. In the EU, the privatization of

78. *Id.* at 5.

79. Len Bracken, *EU's Leaked Services Offer for TTIP Seen As Possible Complication in Negotiations*, INTERNATIONAL TRADE DAILY (July 14, 2014).

80. EUROPEAN COMMISSION, UPDATE ON THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)—FIRST NEGOTIATION ROUND 4 (2013), http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151656.pdf.

81. Bracken, *supra* note 79.

82. Monika Ermert, *Brief: Controversial Debate on TTIP Mandate in EU Council of Ministers*, INTELLECTUAL PROP. WATCH (June 14, 2013), <http://www.ip-watch.org/2013/06/14/audiovisual-sector-out-of-eu-mandate-for-ttip/>.

83. See Gabriel Siles-Brugge, 'Race to the Bottom' or Setting Global Standards? Assessing the Regulatory Impact of the Transatlantic Trade and Investment Partnership (TTIP), REAL INSTITUTO ELCANO (Sept. 19, 2014), http://www.realinstitutoelcano.org/wps/portal/web/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari42-2014-silesbrugge-assessing-regulatory-impact-ttip.

84. *Id.*

85. On the exceptionalism of financial services in TTIP, see Inu Barbee & Simone Lester, *Financial Services in the TTIP: Making the Prudential Exception Work*, 45 GEORGETOWN J. INT'L L. 953 (2014). For the position of U.S. Treasury on TTIP, see Jamila Trindle & Tom Fairless, *U.S. Wants Financial Services Off Table in EU Trade Talks*, WALL ST. J., (July 15, 2013), <http://www.wsj.com/articles/SB10001424127887323394504578607841246434144>.

86. Randall, *infra* note 98.

healthcare and public services or utilities has created a great push back against TTIP.⁸⁷ In the United Kingdom, this discussion has focused on the impact TTIP may have on the U.K. National Healthcare Service with the fear that the agreement would “lock-in” the neoliberal reforms introduced by the Cameron Administration.⁸⁸ The Commission’s response through a letter leaked to the public has been to reassure such actors that the provision of public services will be sufficiently protected in TTIP.⁸⁹ Yet scholars have shown that the mobilization of U.K. civil society against TTIP vis-à-vis the health sector was so well-organized due to the prior mobilization under Prime Minister Cameron against healthcare reform.⁹⁰

In essence, the race to the bottom critique warns of the damage of unchecked corporate influence over regulatory processes, with minimal thought to the power of other constituencies, primarily citizens. In response, scholars have argued that the race to the bottom critique simply overestimates the influence of corporations relative to that of the public interest in regulatory processes.⁹¹ Others have argued that with respect to global regulatory standards, exporters “have conformed their goods or services to the most stringent rules” of their largest customers.⁹²

B. Regulatory Efficiency versus Democratic Participation

Whereas in past decades, scholarly debates about the normative desirability of IRC have blossomed among administrative lawyers,⁹³ a difference in the TPP and TTIP negotiations is that politicians and civil society have been much more vocal about the lack of democratic participation in IRC, especially in megaregional free trade agreements. These concerns had been put forward by scholars focusing on how IRC restrains the already limited possibility of public

87. Holly Jarman, *Trade Policymaking Meets Social Policies: Public Statements on Healthcare and the Transatlantic Trade and Investment Partnership*, <http://www.icpublicpolicy.org/conference/file/reponse/1435225750.pdf>.

88. *Id.*

89. See Letter from Ignacio Garcia Bercero to Rt. Hon. John Healey, Chair, All-Party Parliamentary Group on TTIP (July 8, 2014), http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152665.pdf.

90. Jarman, *supra* note 87.

91. VOGEL, *supra* note 20, at 57. After a survey of U.S. and EU trade issues, he states,

There does not appear to be a single instance in which either the United States or the EU lowered any health, safety, or environmental standard to make its domestic producers more competitive. . . . On the contrary, standards have moved steadily, if unevenly, upward on both sides of the Atlantic.

92. See Thomas J. Bollyky & Anu Bradford, *Getting to Yes on Transatlantic Trade*, FOREIGN AFFAIRS (July 10, 2013), <http://www.foreignaffairs.com/articles/139569/thomas-j-bollyky-and-anu-bradford/getting-to-yes-on-transatlantic-trade> (demonstrating how EU rules on privacy and competition have set high global standards, as have U.S. regulations on financial services).

93. Francesca Bignami, *The Challenge of Cooperative Regulatory Relations after Enlargement*, in LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION (George A. Bermann & Katharina Pistor eds., 2004), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1249&context=faculty_publications.

participation in regulatory processes. Transatlantic regulatory cooperation justified by the need for greater efficiency added an international layer to domestic regulatory processes with little basis in democratic procedures. Therefore, many commentators share the view that the central challenge of IRC under the pressure of more effective regulation is to find “new democratic forms to match the new global realities.”⁹⁴

A variety of scholars have proposed solutions to the problem of the erosion of democratic accountability in IRC. Ludger Kühnhardt has suggested that “the development of democratic mechanisms outside the confines of the nation state will, as the EU experience demonstrates, likely be an evolutionary process”—hard to foster in the international context.⁹⁵ Robert Howse suggests instead that “allowing persons in different jurisdictions to test the quality of domestic decision-making against alternative regimes elsewhere” could replace democratic mechanisms to legitimize IRC in a kind of competitive federalism.⁹⁶

From a different perspective, Sol Picciotto offered a “‘directly deliberative’ model of democracy in the face of IRC, based upon forms of active citizenship, political action, and conscious pursuit of such ‘constitutive’ principles as transparency, accountability, responsibility, and empowerment.”⁹⁷ The nature of IRC diluting the democratic accountability of regulatory processes raises additional substantive issues. If “the international factor” consists of maximal corporate influence posited by certain public interest groups,⁹⁸ or the maximal influence of “international elites” (a more common suspicion among academics),⁹⁹ different methods to reconcile accountability with IRC will be required.

For others, transatlantic regulatory cooperation offers the ability to address countries’ common regulatory problems.¹⁰⁰ Many problems that national

94. Bermann, *supra* note 16, at 11; *see also* Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in *TRANSATLANTIC REGULATORY CO-OPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 469–80 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000); Sol Picciotto, *North Atlantic Cooperation and Democratizing Globalism*, in *TRANSATLANTIC REGULATORY CO-OPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 495–519 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000).

95. Ludger Kühnhardt, *Globalization, Transatlantic Regulatory Cooperation, and Democratic Values*, in *TRANSATLANTIC REGULATORY CO-OPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 481 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000).

96. Howse, *supra* note 94.

97. Picciotto, *supra* note 94.

98. Jessica Randall, *International Regulatory Cooperation: Will Harmonization Protect the Public or Prioritize Corporate Profits?*, CENTER FOR EFFECTIVE GOVERNMENT (May 3, 2012), <http://www.foreffectivegov.org/node/12071>. She writes:

In a disturbing example [of corporate influence], “stakeholder presentations”—the only opportunity for public input—were recently eliminated from the meetings surrounding the negotiation of the Trans-Pacific Partnership (TPP), but corporations and industry representatives are still being invited to participate in the TPP talks. In fact, the U.S. Chamber of Commerce—which vigorously supports legislation to undercut public protections—boasts that its recommendations formed the basis for the U.S. negotiating positions.

99. *See* Picciotto, *supra* note 94.

100. *Id.*

regulations attempt to address are either beyond the capability of any individual country to regulate effectively alone or can be controlled more effectively through cooperative processes.¹⁰¹ Pollution or other environmental damage is an obvious example of transnational social costs that are not easily allocated. Pollution that crosses national boundaries is beyond the scope of any national regulation or regulator to address. More subtle collective-action problems also arise within the reach of domestic regulation. As trade scholars have suggested, entrenched deference to technocratic rulemaking by specialized agencies can permanently undercut the development of globally sensitive, normative guidance in the development of international standards.¹⁰²

In other words, even when the subject of regulation is on a domestic scale, it might be hard or impossible for national regulators to remove inefficiencies without a larger normative intent and without formal coordination with other nations cooperating on the same project. Due to rapid technological transformation, however, scholars have shown that more “sustained regulatory exchange can enhance informed decision-making.”¹⁰³ This has become one of the central arguments in the TTIP negotiation, especially in sectors where global standards could diverge, thereby creating losses for businesses and regulatory conflicts. Yet for some scholars an improved transatlantic information exchange in standard-setting could ensure regulatory overlap while avoiding regulatory failures and maintaining democratic accountability.¹⁰⁴

C. Soft versus Hard Law in Administrative Law

Friction has also emerged between the EU and the U.S. approaches to transatlantic cooperation over the choice of regulatory tools. Recommendations and best practices reinstating the relevance of transparency, openness, and participation in rulemaking initially favored the use of soft law.¹⁰⁵ Whether the EU has more frequently used its “soft power” or is an effective global standard-setting actor, many scholars have argued that it does so through a particularly cooperative and soft approach. This approach could be described as a middle ground between laissez-faire and socialism, or what Gráinne de Búrca has described as a “third-way model of social democracy as an alternative means of managing economic globalization.”¹⁰⁶

101. OECD, INTERNATIONAL REGULATORY CO-OPERATION: ADDRESSING GLOBAL CHALLENGES 13 (2013).

102. See Joel P. Trachtman, *Transatlantic Regulatory Cooperation from a Trade Perspective: A Case Study in Accounting Standards*, in TRANSATLANTIC REGULATORY CO-OPERATION 223–42 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000) (examining the inhibiting effect that regulatory diversity in accounting standards has had on international trade).

103. See Pollack & Shaffer, *supra* note 49.

104. Bollyky & Bradford, *supra* note 92.

105. U.S.–EUROPEAN COMMISSION, COMMON UNDERSTANDING ON REGULATORY PRINCIPLES AND BEST PRACTICES (2014), <http://www.whitehouse.gov/sites/default/files/omb/oira/irc/common-understanding-on-regulatory-principles-and-best-practices.pdf>.

106. See Grainne de Búrca, *Europe's Raison D'Être* 11 (N.Y.U. Law Sch. Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 13-09, 2013).

For instance, soft law was at the center of MRAs in transatlantic regulatory cooperation that allowed certain industry sectors to set common procedural baselines for standard settings for their products that initially could not freely circulate among EU Member States.¹⁰⁷ MRAs were in fact based on the willingness of the parties to share information and reach closer cooperation while avoiding hard implementation measures or penalties for the failure to implement them.¹⁰⁸ In addition, the Commission has put forward its preference for Agency-to-Agency cooperation, allowing independent agencies to coordinate and exchange information at different phases and through formal or informal relations.

In contrast to the EU's soft-law approach, the USTR has proposed a centralized supervision of IRC similar to that of the OMB in the White House.¹⁰⁹ This Office, supervising other agencies, would directly bind other operators to function under a set of administrative principles, such as cost-benefit analysis or the notice-and-comment rulemaking processes as a way to allow stakeholders to offer individual feedback to regulation.¹¹⁰

Another example of institutional innovation through hard law is the Office of Information and Regulatory Affairs (OIRA), a federal agency created in 1980 that is part of the OMB and falls under the President's direction.¹¹¹ In practice, however, agencies sometimes use different strategies to avoid OIRA's widespread review to dodge political conflicts or onerous procedures that lead to a complex dynamic of avoidance and cooperation depending on the administrative actors and circumstances.¹¹² In the leaked chapter on regulatory coherence of the TPP, there was a clear attempt by the USTR to encourage other governments to adopt an OIRA-style mechanism. The impulse to create a central body with higher status was geared to better coordinate, under the direction of the executive branch, the development of regulation, the decision-making processes in the agencies, and the implementation of good regulatory practices based on a standardized cost-benefit analysis and Regulatory Impact

107. See Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. I-649; see also EU Position Paper, EU-US Transatlantic Trade and Investment Partnership: Technical Barriers to Trade, http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf.

108. Shaffer, *supra* note 18.

109. See TiIPING Point, The Regulatory Component, U.S. Chamber of Commerce, Feb. 25, 2015, https://www.uschamber.com/sites/default/files/documents/files/021460_TTIP_Regulatory_Paper_FIN.pdf. For an opposite perspective about the increasing and distorting power of OMB, see TACD, *Resolution on Regulatory Coherence in the Transatlantic Trade and Investment Partnership*, Doc. 16/13, (December 2013), <http://test.tacd.org/wp-content/uploads/2014/01/TACD-TTIP-Resolution-on-Regulatory-Coherence-in-the-Transatlantic-Trade-and-Investment-Partnership.pdf>.

110. Takacs, *supra* note 47, at 87.

111. OIRA was created by Congress in the 1980s under the Carter Administration. Later on with President Reagan's EO 12,291, OIRA became an effective centralizing supervisor of agency rulemaking by requiring cost-benefit analyses for a wide range of proposed rules. *About OIRA*, THE WHITE HOUSE—OFFICE OF MGMT. & BUDGET, <http://www.whitehouse.gov/omb/oira/about> (last visited Nov. 28, 2015).

112. Nina A. Mendelson & Jonathan B. Wiener, *Responses to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447 (2014).

Assessments.¹¹³

In both TPP and TTIP negotiations, the USTR has put forward its administrative and regulatory apparatus as exemplary for other negotiating parties due to its centralized and participatory procedures. For instance, the U.S. administration prides itself on its notice-and-comment process to agency rulemaking that ensures a high level of participation ranging from economic actors to civil society at large while requiring agencies to take into consideration the public comments under the threat of litigation. Although in practice this process does not entail “effective” opportunities for participation—agencies are not required to monitor participation and “solicit underrepresented groups”—at least at the negotiation table USTR can put forward its notice-and-comment process as a hard model for regulatory participation.¹¹⁴

Beyond the hard-versus-soft-law divide, IRC requires a high level of administrative law expertise and EU–U.S. comparative studies, which are often sponsored by the main actors. This expertise allows trade negotiators to use technical and neutral tools as a way to avoid more overtly political issues, such as addressing how the costs and benefits of free-trade agreements are redistributed in practice.¹¹⁵

IV

FROM GLOBAL ADMINISTRATIVE LAW TO GLOBAL EXPERIMENTAL GOVERNANCE

A. Global Administrative Law and Its Critics

One of the challenges for IRC remains how to achieve regulatory convergence or cooperation by translating broad global governance principles into divergent administrative cultures. In principle, trade negotiators might have converging aspirations of what appear to be “best” administrative law practices and institutional arrangements. Scholars of GAL have put forward an ambitious set of administrative law principles by taking the regulatory regime created by the WTO as a model. GAL scholars begin with the premise that the forces of globalization are gradually altering the international legal order and

113. TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPP)—REGULATORY COHERENCE, as published by CITIZENS TRADE CAMPAIGN, <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf>.

114. See Wendy Wagner, *Participation in US Administrative Process*, in FRANCESCA BIGNAMI AND DAVID ZARING, *ELGAR HANDBOOK OF COMPARATIVE LAW AND REGULATION* (forthcoming 2016).

115. See RICHARD PARKER & ALBERT ALEMANNI, COMMISSION REPORT—TOWARDS EFFECTIVE REGULATORY COOPERATION UNDER TTIP: A COMPARATIVE OVERVIEW OF THE EU AND US LEGISLATIVE AND REGULATORY SYSTEMS 65 (2014), http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152466.pdf (“The challenge for TTIP negotiators is to find an effective mechanism for enabling these two disparate systems to work more effectively, efficiently, and cooperatively together. That exploration will be aided by a clear understanding of how the two legislative and regulatory systems work currently in their separate spheres.”).

that much of this change is regulatory and administrative in nature.¹¹⁶

For proponents of GAL, areas as diverse as United Nations Security Council decisions on asset freezing, World Bank rulemaking, and Financial Action Task Force standard-setting are all equal evidence that international institutions are aggressively asserting their reach into the domestic realm through general principles such as transparency, accountability, and participation. However, these global administrative law principles trickle down in ways that challenge the traditional distinction between domestic and international law.¹¹⁷ As such, GAL “encompasses procedures and normative standards for regulatory decisionmaking that falls outside domestic legal structures and yet is not properly covered by existing international law, which traditionally governs state-to-state relations rather than the exercise of regulatory authority with direct or indirect effects on individuals.”¹¹⁸

The first set of criticisms raised against GAL focused on the rise in power and influence of international regulatory regimes and the resulting accountability gaps, as well as important changes to domestic law that bypass traditional domestic political and legal limitations.¹¹⁹ This happens when global regimes lacking domestic accountability adopt regulatory norms, which are then implemented through domestic regulation. Changes to domestic regulations often circumvent the traditional requirement of state consent through treaties because they “operate below or outside the treaty system.”¹²⁰

In response, proponents of GAL have put forward a bottom-up extension of domestic administrative law principles to the international level.¹²¹ In reaction to demands for accountability in a globalized world, GAL scholars have proposed to make global administrative decisions more reasoned rather than more democratic,¹²² whereas others have called upon national administrations to respect procedural global standards while reconciling them with domestic standard.¹²³

Another critique leveled against GAL was that it reflected Western

116. See Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 1 (2006).

117. *Id.* at 3.

118. Simon Chesterman, *Globalization Rules: Accountability, Power and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39, 39 (2008).

119. Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 69 (Summer/Autumn 2005).

120. See Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 695 (2005).

121. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 17 (2005) (defining GAL as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make).

122. Chesterman, *supra* note 118, at 39–40.

123. Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 LAW & CONTEMP. PROBS. 109, 110–11 (2005).

conceptions of administrative law, thus dismissing developing nations' legal regimes. The principles GAL embodies have their origins in the rise of the liberal state and the expansion of regulatory functions in the late nineteenth and twentieth centuries, and these origins may be difficult to transplant to other parts of the world.¹²⁴ GAL was similarly criticized for its form of "imperialism" that mainly benefited Northern industrialized countries at the expense of the rest of the world.¹²⁵ B.S. Chimini, for example, argued, "GAL is today being shaped by a [Transnational Capitalist Class] that seeks to legitimize unequal laws and institutions and deploy it to its advantage."¹²⁶ However, even within the West, there is considerable diversity in the ways national regulators approach the basic administrative law principles that form the core of GAL.¹²⁷

Critics and proponents have rejected the assumption that GAL, taken to its logical conclusion, suggests that national administrative procedures will converge over time as general principles of Western administrative law spread through the implementation of agreements negotiated under international regulatory regimes.¹²⁸ Both debates spurred by these concerns about GAL show that the operationalization of global administrative principles entails cooperation and political compromises that are contextual to the specific set of institutions and interests at stake.

B. Experimental and Problem-Solving Approaches to Global Governance

Critics of global regulation argue that regulatory variation allows for experimentation by which states can learn about the impacts of different policies. These experiments might include policy variation in practice, diversification as protection from errors, innovative experimentation, and studying transitions over time from variation to convergence.

A new theory supporting this idea, mentioned briefly in part I, *supra*, is GXG. This is conceptualized as an institutionalized process of participatory and multilevel collective problem-solving, where problems are framed in an open-ended way and subject to review in light of local knowledge.¹²⁹ For GXG to

124. Kingsbury, Krisch & Stewart, *supra* note 121, at 51.

125. *Id.*

126. See B.S. Chimni, *Cooptation and Resistance: Two Faces of Global Administrative Law* 7 (Inst. Int'l Law and Justice, Working Paper No. 2005/16, 2005), <http://www.iilj.org/publications/2005WorkingPapers.asp>; see also Kingsbury, Krisch & Stewart, *supra* note 121, at 51 ("[A]n international order based on individual or economic rights may be too close to a Western, liberal conceptions to be universally acceptable."); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 248 (2006) (arguing that forcing global governance into a coherent and unified framework is normatively undesirable).

127. See Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 193, 208 (2006).

128. See John Bell, *Mechanisms for Cross-Fertilisation of Administrative Law in Europe*, in *NEW DIRECTIONS IN EUROPEAN PUBLIC LAW* 147 (Jack Beatson & Takis Tridimas eds., 1998) (identifying the ways in which administrative law is converging and diverging between countries).

129. Grainne de Burca, Robert O. Keohane & Charles F. Sabel, *Global Experimentalist Governance* 2 (N.Y.U. Sch. Law Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 14-44, 2014).

occur, multiple deliberation-fostering steps must take place.¹³⁰ Proponents of GXG advocate horizontal sectoral agreements to create a transatlantic regulatory laboratory that could be implemented in TTIP. For example, within a country, the federal government can monitor different policy implementations in various states and adopt the best policy to apply to all. However, the international legal community lacks a central government able to monitor, assess, and implement these experimental policies. GXG further argues that “nested institution at multiple levels can, when linked together in particular ways, cohere into an innovative form of learning organization,” placing the burden of monitoring and review on peers in a horizontal structure.¹³¹

If GAL fails to account for the potential mismatch between local preferences and circumstances—because harmonization discounts local governments’ policymaking and preferences—GHX, in contrast, recognizes international-trade gains not only from comparative advantages but also by acquiring skills across different countries. Regulatory variation could increase gains from trade and additional information-sharing by taking into account locally formed opinions. However, proponents of GXG outline some of its underlying and necessary conditions, such as uncertain and diverse environments, commitment of key actors on basic principles, and cooperation among newly formed civil society actors as agenda-setters or problem-solvers.¹³²

In the same vein, Alberto Alemanno and Jonathan Wiener show that regulatory variation can be carried out in many different ways to achieve learning from variation.¹³³ Differences in impact can be observed and thus inform improvement, as in the laboratory of federalism cited by Judge Brandeis.¹³⁴ This approach would be effective on an international scale because of the broad variation of approaches. Further, variation could be examined in purposeful experimentation from a university research setting to practical policies.¹³⁵

Alemanno and Wiener address their experimental approach in TTIP under the presumption that the penalty for noncooperation is a high economic loss and that both the EU and United States share Western administrative law values. They argue in favor of an experimentalist laboratory with a central governing body that should monitor and select best practices for regulatory lawmaking.¹³⁶ The regulatory cooperation body exemplifies this idea through a permanent mechanism that will identify sectors where new regulations may be aligned through monitoring and exchanging information on principles,

130. *Id.*

131. *Id.* at 4.

132. *Id.* at 13.

133. 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, at 132–35.

134. See *New State Ice Co. v Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

135. Wiener & Alemanno, *supra* note 133, at 127.

136. *Id.* at 19–21.

procedures on participation, and impact assessments, with the goal of providing a gateway to manage any regulatory issues impacting trade.¹³⁷ This method incorporates learning from regulatory variation by addressing regulatory divergence as a complex phenomenon. Rather than circumventing representative democracy, new institutional and regulatory mechanisms will allow the creation of a regulatory laboratory and a living agreement that can be modified without reopening the existing agreement between the EU and the United States.

According to these administrative lawyers, experimentalist features will induce regulators in the EU and the United States to consider the extraterritorial impact of their policies and will lead them to align their regulatory outcomes.¹³⁸ This may occur through mutual recognition of existing standards or in relation to new or revised regulations. This transatlantic laboratory will further allow regulators to discuss their solutions to different administrative practices and to gather public input that is essential for the success of their trade and investment partnership at all stages.¹³⁹ Only then will regulators be able to decide whether and how regulations can converge by identifying areas that could become legally binding and thus subject to enforcement. Experimentalist lawyers aim to reconcile conflicting interests by balancing reasons that can universally apply to identify best practices, allowing each country to decide if and how regulatory convergence should occur.

V

POLITICIZING ADMINISTRATIVE LAW EXPERTISE

A. Comparative Law Approaches to Market Regulation

Since its launch, one of the main goals of IRC has been to remove arbitrary regulatory differences in domestic administrative approaches. Lawyers have been enlisted with the goal of achieving better regulatory cooperation and comparing existing differences and the similarities in regulatory approaches that value transparency, openness, and participation. Comparative lawyers have highlighted the existence of different European and U.S. approaches to market regulation. To show these differences, some have used a “law in the books” approach to map the divergence between EU and U.S. regulatory processes,¹⁴⁰ while others have opted for a “law in context”¹⁴¹ or an “intellectual history” approach.¹⁴²

137. See EUROPEAN UNION, TEXTUAL PROPOSAL FOR LEGAL TEXT ON “REGULATORY COOPERATION” IN TTIP 11, http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf.

138. Wiener & Alemanno, *supra* note 133 at 129–30.

139. Wiener & Alemanno, *supra* note 133 at 129–31.

140. See Parker & Alemanno, *supra* note 115.

141. GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

142. See James Q. Whitman, *Consumerism versus Producerism: A Study in Comparative Law*, 117 YALE L. J. 340, 383–84 (2007).

From a law-in-the-books perspective, lawyers have demonstrated a fundamental divergence in administrative law regimes.¹⁴³ Lawyers have focused first on the differences existing between primary legislation that encompasses bills and legislation, and second, on the differences between secondary legislation that encompasses the regulatory process. They have come to the conclusion that in the United States, public participation in primary legislation is haphazard, while secondary regulation is exposed to broad input from individual stakeholders via the notice-and-comment procedure established to make sure that interested individuals can participate in rulemaking.¹⁴⁴ In other words, administrative agencies adopting secondary legislation through informal rulemaking procedures need to offer the public a chance to provide comments to the proposed regulations.¹⁴⁵ Agencies respond to individual comments from stakeholders according to court decisions interpreting the APA or their internal statutes.

In contrast, primary legislation in the EU is the result of broad consultation of stakeholders and institutional actors representing institutional market actors.¹⁴⁶ In the EU, stakeholder input comes much earlier in the process, and the institutional stakeholders are largely involved and offer input at the primary legislation stage; in the United States, in contrast, individual stakeholders play an important role later, during regulatory lawmaking.¹⁴⁷

This divergence in administrative processes also reflects a more “proactive” EU approach to market economies as opposed to a more “reactive” U.S. approach. To explain such divergence, James Whitman’s work shows how European countries, especially France and Germany, have focused on producer interests due to the view that the basic problem of law and politics is reconciling conflicting interests of different producer groups.¹⁴⁸ Consequently, economic legislation in the EU has revolved around the conflicts between producer groups as well as labor law. In the United States, however, the focus has historically been on consumers—members of a universal class sharing a common interest in buying things that are “cheap” and “good.”¹⁴⁹

Another example of the divergence in EU–U.S. administrative processes is apparent in U.S. antitrust law, in which regulators seek to avoid behavior that would undermine individual interests, whereas EU competition law protects

143. See Parker & Alemanno, *supra* note 115 (highlighting fundamental differences in what regulators define as primary versus secondary legislation in the EU and the United States).

144. See 5 U.S.C. § 553 (2012).

145. JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 274 (5th ed. 2012).

146. For example, see the feedback solicited from stakeholders by the European Commission on its White and Green Papers to initiate, stimulate, and propose legislative action. EUROPEAN COMMISSION GREEN PAPERS, http://ec.europa.eu/green-papers/index_en.htm (last visited Nov. 28, 2015).

147. See Susan E. Dudley and Kay Wegrich, *Achieving Regulatory Policy Objectives: An Overview and Comparison of U.S. and EU Procedures* 33 (2015), http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley-Wegrich_US-EU_RegOverview.pdf.

148. Whitman, *supra* note 142.

149. *Id.* at 361.

business interests by preventing distortion of the field by a dominant interest. It can be argued that, as a result of these histories, the EU market is dominated by institutional participants, whereas individual and business participants dominate in the U.S. market.

In a similar way, through a law-in-context approach, Gregory Shaffer has showed how private parties are challenging trade barriers through the WTO regime. In foregrounding the cultural and socioeconomic differences among private litigants and public officials, Shaffer shows different types of access to WTO disputes, with individual businesses in the United States doing most of the work rather than a stronger institutional presence like the Commission in the EU.¹⁵⁰

Even though comparative lawyers have explained in detail the reasons for the existing differences in transatlantic regulatory cooperation, scholars have often facilitated and promoted new knowledge for the TTIP negotiation. Because legal expertise is increasingly relevant to trade negotiators, what initially appeared as a neutral comparison has become a bargaining chip for trade negotiators engaging in regulatory cooperation.

B. Transparency as a Neutral Principle or a Bargaining Tool

EU and U.S. trade negotiators alike continuously strive to achieve greater transparency in the TTIP negotiation in order to increase the legitimacy of a trade negotiation process suffering from an inherent democratic deficit. USTR representative Michael Froman stated that “[t]ransparency, participation, accountability—these are core to the U.S. regulatory system, but they are not uniquely American principles,”¹⁵¹ while his counterpart, EU Trade Commissioner Cecilia Malmström, claimed, “I have transparency in my DNA, and I hope I can inject it also in TTIP negotiations.”¹⁵²

At the declaratory level, convergence exists on the meaning of the principle of transparency that each system uses to make its processes more open and accountable to the public. This includes the availability and ease of access by the public to information held by the government and the ability to observe and become informed about regulatory decisionmaking.¹⁵³ At the abstract level, transparency and public participation can promote democratic legitimacy and economic efficiency by strengthening the connections between government agencies and the public they serve, as well as by enhancing the credibility of

150. See SHAFFER, *supra* note 141.

151. Remarks by US Trade Representative Michael Froman on the United States, the European Union, and the Transatlantic Trade and Investment Partnership (Sept. 30, 2013) (transcript available at <http://iipdigital.usembassy.gov/st/english/texttrans/2013/10/20131001283902.html#axzz3Q4vuU1Am>).

152. TTIP, TWITTER.COM, <https://twitter.com/search?q=ttip&src=typd>.

153. See Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 926 (2009); see also Michelle Limenta, *Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation*, 10 N.Z. Y.B. INT'L. L. 73 (2012) (explaining that transparency is used widely in many different contexts and that there is no generally acceptable definition of it).

trade negotiations.¹⁵⁴

Even though negotiators are committed to transparency and participation through the involvement of the U.S. Congress or the European Parliament, in the realm of regulatory cooperation and its operationalization, ambiguity surrounds the meaning of transparency, openness, and participation in the regulatory processes.¹⁵⁵

A central objective of the USTR concerning transparency “is to obtain broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions.”¹⁵⁶ Under this rationale, the USTR has tried to implement robust transparency initiatives. In 2014, as a result of various pressures from civil society and industries alike, Mr. Froman announced the creation of an innovative forum, namely a Public Interest Trade Advisory Committee (PITAC) for academics and NGOs, as part of the trade advisory committee structure. One of the paradoxical provisions of the PITAC was, however, that every participant was obliged to sign a nondisclosure agreement so that civil society participants could not openly discuss or promote the information they acquired during the PITAC meetings. Some have criticized this institution as adding opacity, rather than transparency, to the whole process.¹⁵⁷ Finally, a new bill for consideration in the U.S. Congress calls for the establishment of a Chief Transparency Officer in USTR who will “consult with Congress on transparency policy, coordinate transparency in trade negotiations, engage and assist the public,” and advise the USTR.¹⁵⁸

Via the notice-and-comment procedure in secondary regulation, the U.S. administration has gained a first-mover advantage position vis-à-vis the EU for being more transparent and accessible to individuals interested in participating in rulemaking.¹⁵⁹ As a consequence, the USTR has questioned its counterpart for lacking transparency in its rulemaking procedures that do not offer individuals a systematic opportunity to comment on the proposed regulations.¹⁶⁰

Additionally, U.S. businesses have attacked the Commission for several reasons, including: opacity in publishing its initial drafts before their

154. Cary Coglianese et al., *Transparency and Public Participation in the Rulemaking Process, A Nonpartisan Presidential Transition Task Force Report, Task Force Report*, v, vi–vii (2008), <http://www.hks.harvard.edu/hepg/Papers/transparencyReport.pdf>.

155. See RESEARCH HANDBOOK ON TRANSPARENCY (Padideh Ala'i & Robert G. Vaughn eds., 2014).

156. 19 U.S.C. § 2901(b)(3) (2012).

157. Maira Sutton, *U.S. Trade Rep on the Charm Offensive—Slight Tweaks to Secret TPP Process is Far from Enough*, ELECTRONIC FRONTIER FOUNDATION (Feb. 24, 2014), <https://www.eff.org/deeplinks/2014/02/us-trade-rep-charm-offensive-slight-tweaks-secret-tpp-process-far-enough>.

158. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, H.R. 1890, 114th Cong. (2015).

159. See Abraham Newman and Elliot Posner, *Putting the EU in Its Place: Policy Strategies and the Global Regulatory Context* (unpublished comment, on file with the European Union Studies Association), <https://eustudies.org/conference/papers/download/42>.

160. See Shawn Donnan, *US Pushes for Greater Transparency in EU Business Regulation*, FIN. TIMES, (Feb. 23, 2014), <http://www.ft.com/intl/cms/s/0/6e9b7190-9a65-11e3-8e06-00144feab7de.html>.

introduction to the European Parliament and the Council under the ordinary legislative procedure and the failure to provide individual comments for the Commission's delegated legislation. Interestingly, this limitation in access has been portrayed by businesses and USTR alike as a lack of transparency rather than as an attempt to limit the influence of corporate lobbies in Brussels.¹⁶¹

The principle of transparency in the EU can be found in Article 15(3) of the Treaty of the Functioning of the European Union.¹⁶² This provides that any citizen or person residing in a member state shall have access to documents of its institutions, agencies, and offices, subject to limitations, operationalized through a regulation.¹⁶³ The Commission publishes an electronic questionnaire for all stakeholders to send in their views; sets up meetings in Brussels for participation from consumer groups, industry associations and NGO's; conducts an independent study to analyze the economic, social, and environmental impacts of agreements; and creates a dialogue with Council, European Parliament, and the member states.¹⁶⁴

Soon after the transparency critiques of the TTIP negotiation came from civil society, the European Parliament, which gained more power in vetoing international agreements after the Lisbon Treaty, similarly voiced its disagreement with TTIP. Not surprisingly, the European Parliament's worries resonated with the European Ombudsman, who feared that the TTIP negotiation was not transparent and disproportionately favored some corporate groups at the expense of other civil society groups.¹⁶⁵

The Commission's reaction to the USTR position did not take long, and in 2014, with the newly elected Juncker Commission, the trajectory of negotiations changed.¹⁶⁶ The "transparency package" put forward by Trade Commissioner Cecilia Malmström has proven, at least at the declaratory level, to be a strong response to Froman's attacks.¹⁶⁷ In her proposal Malmström suggested to fully inform the European Parliament, rather than just the members of Parliament, on the international trade committee about the next steps of the TTIP negotiation.¹⁶⁸ She then put the Commission back in the front seat of the

161. USTR, 2014 Report on Technical Barriers to Trade 46 (2014).

162. TFEU art. 15(3).

163. See Regulation 1049/2001/EC (noting that the regulation only allows access to the documents of "institutions" and not "institutions, bodies, offices, and agencies" as in Article 15(3)).

164. European Commission Factsheet, *Transparency in EU Trade Negotiations*, http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf.

165. *EU Ombudsman Demands More TTIP Transparency*, EURACTIV (July 31, 2014), <http://www.euractiv.com/sections/trade-industry/eu-ombudsman-demands-more-ttip-transparency-303831>.

166. European Commission, *Communication to the Commission Concerning Transparency in TTIP Negotiations* (2014), http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf.

167. *Commission Launches Transparency Initiative for TTIP and Lobbying*, EURACTIV (Nov. 20, 2014), <http://www.euractiv.com/sections/justice-home-affairs/commission-launches-transparency-initiative-ttip-and-lobbying-310183>.

168. See generally *Communication to the Commission Concerning Transparency in TTIP Negotiations* (Nov. 25, 2014), http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf (endorsing Commissioner Malmström's approach).

transparency game through online publications open to the general public on the EU position in each round of the TTIP negotiation.¹⁶⁹ Finally, she launched an open consultation about the controversial Investor-to-State-Dispute Settlement (ISDS) clause in TTIP and provided a report responding to the nearly 150,000 replies.¹⁷⁰

Even though the Commission's approach to the negotiation has been innovative and informative, and has received important media attention while also regaining a first-mover advantage vis-à-vis the USTR, the trade-offs and the political choices made by the trade negotiators remain highly secretive.¹⁷¹

C. Hermeneutic of Suspicion and Distributive Consequences of Transparency

With the apparent goal of making the process more legitimate and democratic, transparency claims in TTIP end up empowering different interest groups. These transparency claims allow public and private interest groups with different constituencies across the Atlantic to form transnational alliances, catalyze the negotiating process, and create more opacity on the meaning of transparency.¹⁷² Members from industry to consumer groups, in particular those affected by some key sectors in TTIP such as automobiles, pharmaceuticals, and medical devices, are very active in stating their position, sponsoring new research, and providing money for academic studies to influence the negotiators' views and generate greater knowledge of transparency in TTIP.

In applying the "hermeneutic of suspicion" to the general principle of transparency, legal scholars question whether "outcomes either follow from particular ideologies or represent compromises of conflicting ideologies, rather than of conflicting universal principles and values."¹⁷³ For example, the underlying political ideologies in TTIP can taint the choices of the negotiators and lawyers drafting the regulatory cooperation provisions. There is an ideological spectrum with an ideology that, on the one hand, protects the decisions by sovereign states to avoid a race-to-the-bottom scenario and to limit free trade regimes. On the other hand, the opposite ideological position stems from the fact that trade liberalization offers gains in terms of economic benefits ranging from efficiency in regulatory governance to setting transatlantic

169. EU Negotiating Texts in TTIP (2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>.

170. See *Commission Report on Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

171. Christian Oliver, *EU Pushes Back Against TTIP Trade Agreement Secrecy*, FIN. TIMES, (Jan. 1, 2014), <http://www.ft.com/intl/cms/s/0/fe54facc-968b-11e4-a83c-00144feabdc0.html#axzz3QaaVX4Fd>.

172. See H. Patrick Glenn, *Transparency and Closure*, in RESEARCH HANDBOOK ON TRANSPARENCY (Padideh Ala'i & Robert G. Vaughn eds., 2014) (addressing what Glenn calls the paradox of transparency, which create insiders and outsiders. For instance, in the case of TTIP transparency is a bargaining tool that paradoxically legitimates a setting, a secret trade negotiation, in which the norm remains closure).

173. See Duncan Kennedy, *Political Ideology and Comparative Law*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 35, 36 (Mauro Bussani & Ugo Mattei eds., 2012).

standards for international trade. These two ideological poles are situated on a spectrum ranging from a more social to a more neoliberal vision of market economies. Along this ideological continuum, trade negotiators make different choices about the meaning and the function of transparency as a central principle in transatlantic regulatory cooperation.

A second type of hermeneutic of suspicion goes hand in hand with the balancing of conflicting considerations that lawyers will have to promote vis-à-vis an *ex ante* or *ex post* approach to regulation. Proponents of regulatory cooperation agree that the EU takes a more “proactive” approach whereas the U.S. uses a “reactive” approach to regulate its markets. As a result, EU economic regulation invites producers and labor groups to the negotiation table early on through institutional channels in a neocorporatist fashion. On the other hand, the U.S. regulatory focus is reactive insofar as it invites, *ex post*, a plurality of stakeholders to participate in the regulatory process after the proposed rule is released. Not only businesses but also consumers, as members of a universal class, are invited to the stakeholder consultation table. As Francesca Bignami has indicated, these different regulatory styles are characterized either by neocorporatism in the EU or pluralism in the United States.¹⁷⁴

In EU and U.S. decision-making processes, the principle of transparency is fundamental in the regulation of market economy. Because of the malleability of the transparency concept, this principle does not have objective functions, nor does it reflect universal values.¹⁷⁵ Transparency is a notion embedded in administrative, economic, and social structures through which it acquires political value. Rather than in opposition to one another, the function of this principle can be explained on a continuum ranging between different institutional choices exemplified by green and white papers aimed at particular stakeholders, agency-to-agency cooperation, notice-and-comment rulemaking, and regulatory impact assessments.

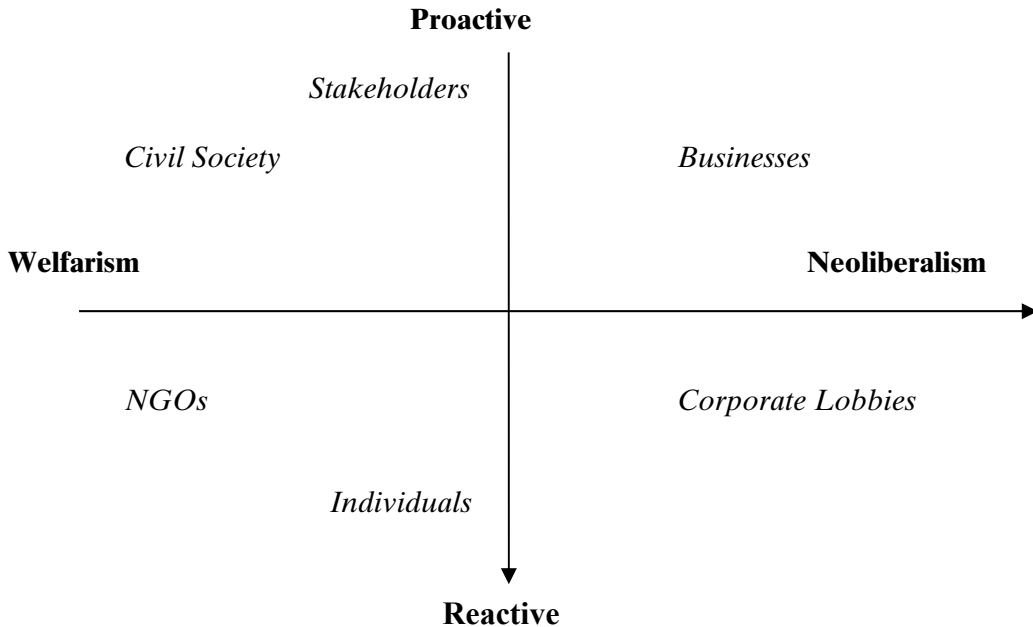
At one end of the spectrum is a “proactive” or *ex ante* pole whereby agencies use transparency to ensure fair and equal participation for different economic actors, such as businesses, unions, consumers, and civil society, in the regulatory process. This pole’s focus is on how to structure *ex ante* access to the regulatory process by soliciting participation of more vulnerable economic groups while controlling excessive corporate lobbying. At the other end of the spectrum is the “reactive,” *ex post* approach to transparency that includes all the interested individuals in secondary regulatory processes. The *ex post* focus is not so much about ensuring that the entire society is on board with the regulatory process, but rather, it is about ensuring that all the interested parties

174. See Francesca Bignami, *Introduction*, in FRANCESCA BIGNAMI AND DAVID ZARING, *ELGAR HANDBOOK OF COMPARATIVE LAW AND REGULATION* (forthcoming 2016) (relying on the diverse approach to pluralism in the United States and the neocorporatism in the EU when mapping differences and similarities in comparative regulation).

175. See RESEARCH HANDBOOK, *supra* note 155.

in a regulatory process can be heard.

Figure 1



In understanding the different functions of transparency, any proposal on IRC becomes a contextual and contingent one—determined by political ideologies such as a more welfarist or neoliberal views of market economics, as well as considerations over proactive or reactive approaches to regulate markets. Each regulatory choice can be positioned on the table above, thus creating benefits or costs to particular groups in markets and societies.

VI

CONCLUSION

Lawyers who have been involved in the TTIP negotiations and made some transparency claims have not openly engaged with the hermeneutic of suspicions in comparative law. While their work is either sponsored or used politically by trade negotiators and lobbyists, the lawyers continue to portray regulatory cooperation as a neutral or experimentalist process that remains technical rather than political.¹⁷⁶

As a result, transparency claims make the TTIP negotiation seem more democratic, when in fact they enable negotiators to leverage their positions vis-

176. Wiener & Alemanno, *supra* note 133, at 128; see also Fernanda Nicola, *The Paradox of Transparency: The Politics of Regulatory Cooperation in the TTIP Negotiation*, SIDIBLOG (Feb. 4, 2015), <http://www.sidi-isil.org/sidiblog/?p=1298>.

à-vis others. Because of this increasing strategic use of transparency claims, the role of legal scholarship is crucial to ensure the production of critical knowledge about transatlantic regulatory cooperation. Scholars have become the manufacturers of legal knowledge that can be effectively used and sponsored by trade negotiations irrespective of its normative backdrops. Instead of comparing administrative legal regimes to find similarities or differences between U.S. and EU regulatory processes, this article suggests foregrounding the distributive consequences of transparency claims for different groups affected by transatlantic trade.