



TTIP:

Covert attacks on democracy and regulation

“Regulatory cooperation” and how it threatens the democratic ability of governments to regulate

There are good reasons to fear that the outcome of the negotiations between the US and the European Union on the Transatlantic Trade and Investment Partnership (or TTIP) will result in a weakening of democracy and standards to protect us. Controls protecting against everything from toxic chemicals, unhealthy food, downward pressure on wages, to wild speculation by banks – to name just a few – could be under threat from this treaty. TTIP could also transform the shape and function of our existing political institutions, particularly their role in ensuring accountability towards citizens for the decisions taken. Of particular concern is the proposal in TTIP for “regulatory cooperation”, a highly strategic plan to resolve some of the most controversial aspects of the

deal after the treaty has been finalised and the public scrutiny waned.

As part of the TTIP negotiations, the EU and the US are currently discussing proposals for permanent regulatory cooperation that would allow the two partners to broker agreement on hot issues – such as regulating chemicals or banks – over the longer term. While “regulatory cooperation” sounds innocent enough, as it currently stands the proposal moves what could be the most contentious issues under TTIP even further away from public scrutiny and into the realm of opaque dialogues and back-room deals that would be brokered over the coming years, *after* TTIP is agreed. This would give big business lobby groups ample opportunities to influence the result of decision-making, with even less public scrutiny and accountability to citizens.

This process will take place outside the regular democratic decision-making processes on both sides of the Atlantic, preventing national parliaments and locally elected bodies from being fully involved, and

dangerously limiting the public debate. Good ideas for regulation in the public interest could be stopped before they are even discussed by an elected body. Ideas that favour powerful business interests could be presented as a done deal without room for change, based on the premise that business lobby groups, the EU and US authorities, and a restricted group of unaccountable officials have already agreed on them. In other words, regulatory cooperation could severely undermine democratic scrutiny of new laws. With regulatory cooperation in place under TTIP, we are looking at a future of attacks on regulation behind the scenes, with civil servants and business lobby groups as the only protagonists. These innocently named procedures could turn out to be a threat to democracy and efforts to regulate in the public interest on both sides of the Atlantic.

The strategic idea behind regulatory cooperation: a practical escape from public scrutiny

Negotiations on a future free trade and investment agreement between the US and the European Union are entering a crucial phase. So far, one of the difficult issues on the agenda has been “regulatory coherence” – mainly, finding a way to align existing regulations on both sides of the Atlantic to ensure that goods produced on one side can be exported to the other without special additional requirements. This is of course a central issue for business lobby groups, because the harmonisation of standards could lead to a huge reduction of costs for US and EU companies and thus greater profits.

But there are obstacles, and negotiators on both sides currently have an image problem. The more people find out about what’s at stake under TTIP, the less popular the agreement becomes, because they understand that there is potentially a lot to lose. National parliaments, as well as regional and local authorities, are also increasingly challenging the TTIP negotiation process as well as its aims and proposals. Not least,

there is strong resistance to lowering of standards in areas such as food and chemicals.¹

That leaves the negotiators with a big political problem. On the one hand, negotiations are clearly headed towards relaxing standards, for example the US demands to do away with Europe’s precautionary principle (which allows for regulatory action on issues of concern in the face of uncertainty rather than waiting for evidence that they are harmful) and restrictions on GMOs. On the other hand, obvious, upfront concessions to the US on these issues would likely make the TTIP very controversial among the public and national/local decision-makers/regulators in the European Union, given for example the European Parliament’s vow not to accept lower levels of protection. Big concessions by the US, for example on relaxing financial regulation, would be likely to create the same effect in the US. These circumstances would make it much more difficult for TTIP to be passed. In both cases “regulatory cooperation” offers an escape clause for the negotiators. This way, the differences can be sorted out in an ongoing negotiation process that starts after TTIP has been finalized, with less political debate, and with strong participation from business lobby groups.

European Commission proposal on “regulatory cooperation”: corporations in the driving seat

On the European side, regulatory cooperation was clearly pushed by business lobby groups. Initially, the Commission had talks with BusinessEurope and the US Chamber of Commerce. The two powerful corporate lobby groups spearheaded a business campaign to achieve an ambitious and comprehensive agreement on regulatory cooperation.² The two clearly stated

¹ Concerns raised in the EU-committee of the Austrian Parliament, http://www.parlament.gv.at/PAKT/PR/JAHR_2014/PK0336/ Speech from Bernhard Lange, MEP, chair of International Trade Committee in the European Parliament about TTIP, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140715+ITEM-009+DOC+XML+V0//EN&language=en&query=INTERV&detail=2-163-000>

² <http://www.corporateeurope.org/trade/2013/12/regulation-none-our-business>

that their ambition was to make sure business would “essentially ‘co-write regulation’”; through a process “oriented to allow stakeholders as well as regulators to identify entire sectors and regulations within sectors that are potentially ripe for an equivalence evaluation,” and “by which regulators would be required to respond to stakeholder-identified opportunities to examine equivalence”³. Equivalence is trade-speak for not having one side with stricter regulations than the other.

Sure enough, in December 2013, a leaked TTIP document from the European Commission revealed they were seeking specific procedures to iron out any divergences in regulation once the agreement is signed.⁴ The document bears strong resemblance to the ideas put forward by BusinessEurope and the US Chamber of Commerce.

What is in the EU

Commission’s proposal?

The Commission’s proposal is about future, as well as existing, rules. It can be summarised thus:

1. “Dialogues” that would help business have it their way

There are several complaint mechanisms available to business: first, if a company finds that a proposed rule is a nuisance to its business – whether it’s a ban on fracking or a dangerous chemical substance – it can demand a dialogue with regulators to “effectively resolve problems”. Secondly, if an EU member state or a US state adopts, or considers adopting, regulation that could hurt trade, the other party can demand a dialogue to be opened by the Commission or the US federal authorities. This could lead to immense pressure on the state or country in question, and discourage attempts to strengthen regulation.

3 <http://corporateeurope.org/sites/default/files/businesseurope-uschamber-paper.pdf>

4 <http://corporateeurope.org/trade/2013/12/regulation-none-our-business>

2. Regulatory Cooperation Council: regulatory agencies in the driving seat

The body that is to oversee and develop regulatory cooperation will be the “Regulatory Cooperation Council”. It would consist of a handful of officials from the European Commission’s Secretariat General, the US and EU trade authorities, and the US Office of Information and Regulatory Affairs (OIRA).⁵

This transnational state institution would be without historical precedent and would add a completely new and additional layer to the process of legislation and regulation. These officials would have enormous influence, as they could stop or weaken legislative proposals that would regulate business or, on the other hand, promote legislative proposals that would lower requirements for companies. All of that would happen before any democratically elected body, such as national or the European Parliament, would have the opportunity to look at such proposals.

This additional institutional layer would structurally disadvantage those groups with few resources who already have to struggle with the complex interplay of national and EU legislation and regulation. Big business and its lobbyists will thus not only be privileged because of the specific rules of the Regulatory Cooperation Council, but will be able to fully take advantage of in having more (financial) resources compared to those who work for the public interest.

3. Screening for trade impact: no rules detrimental to business

All new relevant proposals for legislation or regulation have to be screened first for their impacts on trade. A report has to be made to that effect, to make sure legislators don’t adopt anything that would be detrimental to the interests of business. This can have immense implications for regulation in the public interest, and prioritises trade impacts over all other policy objectives – such as benefits to communities or ecosystems, for example – in existing or upcoming regulation.

5 OIRA is a notoriously untransparent US government agency whose function is to review regulation drafts in the US. Its posture has been described as “anti-regulatory”, including in a detailed critical report on OIRA by the US-watchdog Public Citizen: <http://www.citizen.org/documents/oira-delays-regulatory-reform-report.pdf>

4. Early warning: don't do anything until you've discussed it with business

Even before a proposal is launched, say by the European Commission, the US has to be notified, and vice versa. This opens the door to intense lobbying should the Commission table legislation that could go against interests in the business community. Also, it opens the door to all sorts of pre-emptive pressure – for example a threat of litigation under the *investor-state dispute settlement* (ISDS) mechanism that allows investors to sue foreign governments – that could effectively block progress for any such legislation in the future. Additionally, if a government or the EU is forced to show, in writing, how a proposed policy could impact trade – as described above – presumably corporations could use this same analysis against these governments in ISDS cases.

5. Consultations and transparency: a “right to lobby” across the Atlantic

The US business community is frustrated that it does not have the same access to decision makers in the EU as European businesses. Hence, the European Commission proposal places an emphasis on “transparency and consultations” which could consolidate and expand the privileged access of businesses to decision makers in the EU, such as the inclusion of more US corporations in the Commission’s advisory groups.

The Commission’s advisory or “expert groups” are powerful bodies which in many cases enable business lobby groups to influence the Commission’s legislative proposals before they are presented to politicians. Expert groups are all too often captured by business lobbyists, thus representing a democratic problem in the EU, which will be exacerbated if US corporations obtain even more opportunities also obtain the right to use these channels of influence.

6. Sectoral dialogue: Privileged access for business lobbyists

In their proposal to the Commission, BusinessEurope and the US Chamber of Commerce expressed interest in securing “privileged access” to decision makers within the framework of regulatory cooperation. BusinessEurope, for instance, urged the Commission at a meeting in November 2012, to award the lobby

group “a formal and preferential consultative role”⁶. The Commission responded that this would be most possible within the framework of sectoral dialogues such as chemicals, food standards, etc. Sure enough, these sectoral dialogues appear in the EC’s leaked proposal. These dialogues can – among other things – be used for elaborating “substantive proposals” on legislation, which will then have to be seriously considered by a “Regulatory Cooperation Council”.

Conclusion: Regulatory Cooperation is a danger to democracy and efforts to regulate in the public interest

The ambitious EU proposal on regulatory cooperation shows that the current political institutions and regulatory systems are at stake in the negotiations between the EU and the US. Regulatory cooperation is yet another scandalous case of corporate capture in the TTIP talks. It is particularly dangerous, because it aims at making the non-transparent EU trade policy even less accountable than it is already. We observe the attempt to shift the most controversial and critical issues in TTIP to a time after the conclusion of the agreement while at the same time ensuring an institutional framework that grants privileged access for business lobbyists to future legislation. It is high time to stop this attack on democracy and make sure we maintain democratic control over regulations in the public interest.

⁶ Minutes from a meeting between the Commission, BusinessEurope and the US Chamber of Commerce



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