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Addressing climate change under preferential trade agreements: Towards alignment of carbon standards under the Transatlantic Trade and Investment Partnership

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ABSTRACT

With its wide coverage of economic spheres and the variety of trade and investment measures currently under negotiation, the Transatlantic Trade and Investment Partnership opens windows of opportunity for advancing action on climate change. We examine possible avenues and international trade law implications for an alignment of carbon-related standards between the EU and the US. We compare EU and US carbon emissions standards for cars and argue that negotiators should strive for a mutual recognition of their equivalence for a transitional period, while pursuing the goal of full harmonization at the level of the highest standards of two parties at some date in the future. This could be a way to balance between economic and environmental interests and harness economic incentives for the benefit of climate.

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1. Introduction

The European Union (EU) and the United States of America (US) are presently negotiating the Transatlantic Trade and Investment Partnership (TTIP), a bilateral preferential trade agreement (PTA) with a high level of ambition for the liberalization of trade and the promotion of investment between two of the world's most powerful political and economic players. Accounting for nearly half of the world's gross domestic product (GDP) and almost one-third of the world's trade, the TTIP (if concluded) will belong to the family of mega-regionals currently being negotiated outside the multilateral trade forum of the World Trade Organization (WTO). The negotiations were launched in 2013 and cover a wide range of areas of transatlantic economic relations, including trade in goods, trade in services, government procurement, intellectual property rights and investment protection (European Commission, 2013b). They basically comprise three pillars: market access, regulatory cooperation and rules. Through the conclusion of TTIP, the EU and

the US are striving to remove the remaining tariffs and to reduce non-tariff barriers in their bilateral trade. They also aim to facilitate investments in one another's economy by achieving a higher level of investment protection.

Economic benefits from the agreement are expected to be mutual and significant. An impact assessment study conducted by the Centre for Economic Policy Research in London suggests the EU economy could benefit by €119 billion a year and the US economy could gain an extra €95 billion a year (Francois et al., 2013). Although tariffs between the EU and US are already low, with an average of 5.2% for the EU and 3.5% for the US, the combined size of the EU and US economies and their markets means that removing the remaining tariffs would still significantly increase export revenues for EU and US firms (European Commission, 2013b). However, most of the expected economic benefits of the TTIP would come from the reduced costs of bureaucracy and regulations, and from liberalized trade in services and government procurement. Non-tariff barriers, in the form of regulations on the US and EU markets, add the equivalent of tariffs of 10–20% to the price of goods (European Commission, 2014a). While not seeking to eliminate the differences in policy choices regarding health and environmental protection, negotiators consider how to increase regulatory compatibility and coherence between the countries in

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general, and also at some particular sectors, like pharmaceuticals, cosmetics, medical devices, automobiles and chemicals. A cross-cutting chapter on regulatory cooperation in TTIP may contain provisions on regulatory cooperation mechanism, including sharing information on planned regulations and the possibility for the other party to give its feedback at a preparatory stage, cooperation in collecting data and evidence supporting regulatory action, and the assessment of impacts of planned regulations on international trade and investment based on common criteria and methods (European Commission, 2013c; Gerstetter, 2014). Sectorial negotiations on regulatory convergence are primarily aimed to find a common scientific basis for decision-making and develop common methodologies for assessing equivalence of EU and US regulations (European Commission, 2014c).

Besides economic gains, the TTIP presents an opportunity for furthering EU–US cooperation on sustainable development. A horizontal chapter on trade and sustainable development is part of the TTIP negotiating package (European Commission, 2013d). Its content is likely to follow the pattern developed in the standard sustainability chapters of existing EU and US PTAs having commitments on maintaining high level of environmental and social standards in trade and investment activities and promoting technological cooperation and information exchange on environmental and labour matters (OECD, 2007). PTAs, however, provide the possibility to address environmental issues beyond cooperation foreseen under sustainability chapters (Kernohan and De Cian, 2007). Trade and investment instruments promoting sustainable development goals can be adopted under PTA chapters on trade in goods, trade in services, technical barriers to trade, sanitary and phytosanitary measures, government procurement, investment and technology transfer. PTA measures can also be designed to target climate change (Holzer, 2014). With its wide coverage of economic spheres and the variety of trade and investment measures under negotiation, the TTIP opens windows of opportunity for climate change mitigation. While the main objective of trade agreements has little to do with climate protection, and climate change concerns are unlikely to be central to TTIP negotiations, some measures contemplated within the PTA framework could impact the carbon content of bilateral trade, thereby supporting the transition to a low-carbon economy in regions (Meltzer, 2014). One of such measures would be regulatory convergence in carbon (CO₂) emissions standards. Our article looks into the climate change relevance of TTIP's regulatory convergence and examines possible avenues for alignment of carbon emissions standards for cars of the EU and the US in accordance with the objectives of TTIP, the international trade rules of the WTO and the goals of climate policy.

2. Methods and theoretical framework

The article examines the possibility of regulatory convergence in carbon-related standards from a legal perspective and relies on legal methodology. We undertake a normative and comparative analysis of EU and US carbon emissions standards and standards-setting approaches in the automobile sector. We use the case study method to create an empirical basis and testing ground for our recommendations. We also rely on the historical analysis of negotiations of agreements concluded in the past. Furthermore, when exploring the legality of standards' alignment between the EU and the US and the implications for third countries, we draw on existing case law and use elements of hermeneutic analysis for the interpretation of texts of legal provisions.

We base our study on the assumption that regulatory cooperation and regulatory convergence is a welcome process, as it promotes economic integration and efficiency through the enhancement of transparency and compatibility of regulatory

systems of countries, the elimination of unnecessary barriers to trade, the reduction of costs of doing business and the improvement of international competitiveness of firms (Bollyky, 2012). At the same time, we take into consideration the need of balancing between the opposing interests of economic development and environmental protection, and, respectively, those of trade liberalization and domestic regulation (Marceau and Trachtman, 2006). In this respect, we are aware of the current trend to enter into PTAs, which seems irreversible. Trade regionalization has intensified over the last decade and the tendency towards entering in PTAs is likely to preserve for the short and medium term future (WTO, 2011). It is thus important to explore the possibilities of making the process of trade regionalization climate-friendly, while also compatible with the multilateral framework of the WTO and the international climate regime. At the fore of our research is also the relationship between the system of multilateral trade rules of the WTO and various sets of bilateral trade rules of PTAs and sectorial mutual recognition agreements, as well as the related legal questions regarding exemptions from multilateral obligations, jurisdictional overlaps etc. (Davey and Pauwelyn, 2000; Pauwelyn, 2003).

When discussing the perspectives for multilateralization of TTIP carbon emissions standards for cars, we are inspired by the bottom-up approach to tackling global problems, which suggests that bilateral and plurilateral climate change initiatives can stimulate negotiations at the multilateral level and eventually be transformed into international climate policies endorsed at a multilateral forum (Fujiwara and Egenhofer, 2007). We also draw on the 'critical mass' approach to trade negotiations, which posits that once an agreement has been reached among major economic powers or major players in a sector, the benefits under the agreement could be shared with all other countries (Elsig and Cottier, 2011).

We use legal literature on the potential of preferential trade agreements to contribute to climate change mitigation and adaptation (Fujiwara and Egenhofer, 2007; Kernohan and De Cian, 2007; Holzer and Shariff, 2012; Meltzer, 2014). Yet, research in this field is not sufficient. Given the present lack of experience in dealing with the issues of climate change under PTAs, our study follows a normative approach: We suggest measures of regulatory convergence that could be employed within the framework of TTIP to promote climate change policy goals.

The article begins with a brief discussion of the climate change relevance of TTIP and proceeds with the analysis of challenges and possible outcomes of alignment of carbon-related standards between the EU and the US. As a next step, we present a case study of carbon emissions standards for cars and examine ways regulatory convergence in that area could lead to mutually beneficial outcomes for economy and climate change. In the next sections, the analysis of options for an alignment of carbon emissions standards for cars under TTIP is supplemented with a discussion of international trade rules guiding the process and perspectives for multilateralization of agreed outcomes.

3. The climate change relevance of TTIP

It can be expected that the impact of TTIP on climate change will primarily be indirect, as in most cases PTAs impact the environment indirectly (Ghosh and Yamarik, 2006). This means that the TTIP may decrease the negative effects on the environment not because of the environmental provisions it would contain, but because of the increase in income that would result from the liberalization of bilateral trade and would become available for investments in low-carbon technologies and support of climate change and other environmental programmes. This positive impact scenario would reflect the environmental Kuznets curve

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