

REGULATORY COOPERATION IN TTIP: WHAT DOES IT MEAN FOR THE FUTURE OF OUR FOOD AND DEMOCRACY?

- Report from the discussion with Sharon Treat on US legislators' perspectives on the ongoing TTIP negotiations on regulatory cooperation for food policies -

On 14th April as we approached the [Global Action Day](#) on TTIP, MEPs from across the political spectrum welcomed Sharon Treatⁱ, a US lawyer with a degree in public and international policy from Princeton University, working on trade, environment and food policy. In July 2014, Sharon Treat already met with MEPs from different political groups to discuss how US state legislators share many of their perspectives when it comes to issues of organic and sustainable agriculture, promoting farm to school, and protecting pollinators.

She has now been invited back, this time in Brussels, to discuss US legislators' perspectives on the ongoing TTIP negotiations on regulatory cooperation for food policies.

SHARON TREAT'S MAIN MESSAGE:

"U.S. states such as my own State of Maine are successfully recruiting younger farmers to take root and make a life in farming. Programs from apprenticeships to tax and easement policy to government procurement have worked. We have been willing to step out ahead of the federal government for years, establishing organic certification decades before the US Department of Agriculture set standards, and acting to ban some chemicals in food packaging, enact GMO labeling laws, and set tighter rules for pesticide use and disposal.

Now our progressive food standards and policies are at risk from the "Regulatory Cooperation" provisions of the Trans-Atlantic Trade and Investment Partnership (TTIP), and I'm here to tell you that Europe's food quality standards and policies supporting small-scale farming and animal welfare are also targeted.ⁱⁱ

Not only that, but **TTIP's Regulatory Cooperation chapter threatens the authority and independence of democratically-elected parliamentarians in both the EU and US.** Unelected – and unaccountable - trade bureaucrats will oversee and review actions of elected officials based on trade impact criteria -- not quality of life, jobs, food, health or environment.

These proposals promote a multinational corporate food agenda – top down dictates, not bottom-up democracy. These proposals – from both DG Trade and the US Trade Representative (USTR) - will increase the behind-the-scenes influence of

the largest multinational corporations and reduce, not increase, the transparency of government decision-making.

Combined with Investor-State Dispute Settlement (ISDS), which bypasses the independent judicial systems in the EU and US, TTIP poses risks to democracy itself.

As I've said, both the EU and US regulatory cooperation proposals raise concerns. I think it's important to recognize that there are similar elements in both, and that **the EU proposal is just as risky to food policy and to democracy as the US approach.**ⁱⁱⁱ In fact there is a real danger that in the behind-closed-doors negotiation sessions, the two proposals will be merged.

DG Trade has publicly posted much of its proposal, which to summarize, would establish a bilateral, ongoing regulatory cooperation body to monitor and promote: (1) "mutual recognition of equivalence of regulatory acts;" (2) harmonization of regulations and application of international standards; and (3) "simplification" of regulations; would require advance notice of legislation and require detailed trade impact assessments of many regulations; and would apply these requirements to both the central government and to sub-central EU national governments and US states. I note in passing that any proposal to require US states to undergo this centralized oversight of legislation and regulation and comply with the harmonization goals will be very controversial in the US.^{iv}

The US regulatory cooperation proposal is not public, and the USTR has resisted all requests to post any text. It does have a "fact sheet" on its website, and from that – and proposals from USTR's official advisory committee members including the U.S. Chamber of Commerce - we can start to glean what the USTR version of regulatory cooperation may look like.

USTR's fact sheet talks of "transparency in the development and implementation of regulations and good regulatory practices." What does that mean? Likely, US-style notice and comment rulemaking.

USTR's fact sheet also mentions "establishing mechanisms for future progress, and pursuing regulatory cooperation initiatives where appropriate," which is likely a reference to an ongoing regulatory cooperation body, perhaps similar to the DG Trade proposal, and ways to harmonize or establish equivalency of regulations on both sides of the Atlantic.

USTR also seeks to promote "evidence-based analysis and decision-making." What's that? That's so-called US-style "risk based" regulation, which I call risky regulation, where you have deaths first, regulation later (if ever), rather than relying on the precautionary principle in the absence of hundreds of studies and conclusive proof of harm. I'll talk about this more later, because I believe that **undermining the**

precautionary principle is at the heart of this proposal, and that threat to the precautionary principle is real.

USTR's fact sheet also talks about a "whole-of-government approach to regulatory management," which in translation means foisting onto the EU a particularly pernicious part of the US regulatory system, the bottleneck "Office of Information and Regulatory Affairs " or [OIRA](#).

Before getting into a more detailed explanation of how these procedures have worked in the US, and what the implications may be for EU food policy and democracy, we should also quickly look at the US Chamber of Commerce regulatory cooperation and coherence proposal. This [proposal](#) may well form a basis for USTR's actual negotiating offer, and in the absence of any transparency and public posting of actual text by USTR, we would be foolish to ignore the Chamber's detailed plan. The Chamber states that TTIP "must remove obstacles to ... cooperation" and lists five elements to achieve this: (1) TBT commitments; (2) SPS measures, with a focus on the precautionary principle; (3) Sector-specific regulatory arrangements; (4) Regulatory Coherence, and (5) Regulatory Cooperation.

The Chamber's vision of regulatory coherence includes:

- NOTICE & COMMENT RULEMAKING
- IMPACT ASSESSMENTS, including non-regulatory or voluntary alternatives
- Cost-benefit analysis for EACH AVAILABLE ALTERNATIVE including NO REGULATION
- The NECESSITY TEST - identify and select the "least burdensome approach necessary to achieve legitimate regulatory objective"
- Risk based approach "wherever possible"
- Central Domestic Coordination – the OIRA MODEL

The Chamber's Regulatory Cooperation proposal is similar to the EU proposal, but more coercive, and with more direct industry involvement. The elements of the Chamber proposal are also echoed in the joint EU-US "*Final Report, High Level Working Group on Jobs & Growth*," which set the stage for the TTIP negotiations.^v You can see there's a lot of overlap between the Chamber proposal and what we know of the USTR approach, and it behooves us to pay attention to the detailed Chamber of Commerce plan, because US industries will be pushing USTR very, very hard for this proposal and USTR may well incorporate major elements."

WHAT COULD THESE PROPOSALS MEAN FOR THE EU'S FOOD POLICIES?

Here is Sharon Treat's explanation on the issue:

“Evidence-Based” and “Risk-Based” Regulations

“Science” and “evidence-based” are terms used to invalidate policies based on ethical considerations (such as animal welfare) and social and community values (such as food sovereignty, promoting local food, rural landscapes and values).

These community values were targeted for take-down in the recently issued ISDS decision *Clayton/Bilcon v. Government of Canada*. In that case, the majority ruled that a decision by the Nova Scotia provincial government turning down a permit for a massive quarry and marina project in a pristine area with small fishing communities violated the NAFTA investment chapter in part because of focus on community values, and in part because it didn't propose alternatives to denying the project. Tellingly, the investor could have appealed the project denial to the Canadian courts but chose instead to bypass the judicial system and head straight to ISDS arbitration.^{vi}

In addition to taking aim at animal welfare rules and community values, it is also very clear that championing the US “risk-based” approach is intended to undermine the precautionary principle -- regardless of the assurances of DG Trade that such a thing could never happen. Of course, TTIP won't include language clearly endorsing a head-on attack; instead, the principle will be undermined through impact assessments, the necessity test, equivalency determinations, and ISDS cases challenging regulations as “more burdensome than necessary” or objecting to the process used by the EU to set standards by claiming a violation of the trade rule requiring “fair and equitable treatment.”

The focus on multiple impact assessments, evaluation of alternatives, mandatory consideration of voluntary agreements instead of regulation, and the “necessity test” (least trade-burdensome alternative) in the Chamber/USTR regulatory cooperation proposals should raise red flags for all of us. Here we can see a direct link between the supposedly non-coercive “good regulatory practices” of the friendly-sounding regulatory cooperation chapter and the very enforceable investment rules and ISDS system. **When EU regulations are compared to weaker US standards in an ISDS case, they will be deemed excessive regulation that is not “necessary,” because less trade-restrictive alternatives (such as the US rules) exist.**

Rules based on the precautionary principle will be further undermined through the potentially endless alternatives analysis requirements; a failure to consider other regulatory approaches could be the basis for a Bilcon-like ISDS case.

A goal of these regulatory cooperation proposals is to find ways to harmonize standards across the Atlantic or deem rules of equivalent effectiveness. **And where**

is this equivalency to be found between the EU and the US in the regulation of food and farms? It is hard to identify:

- **There's no equivalency** when 82 pesticide active ingredients banned in the EU are allowed and used in the US, and generally higher amounts of pesticide residue allowed
- **There's no equivalency** when the US Food and Drug Administration (FDA) approves new GMO crops in an outdated regulatory system (the FDA just approved new GMO apples that don't turn brown when exposed to the air)
- **There's no equivalency** when there's no GMO labeling in the US (except where enacted in three states; but only in Vermont are the rules in effect, and it is being sued by Monsanto)
- **There's no equivalency** when there are no US federal animal welfare standards (and the State of California battery cage rules appear to be doomed under the proposed DG Trade SPS chapter)
- **There's no equivalency** when "farm to fork" in the EU tracks safety through food growing, processing and marketing, while the US focuses on end-product testing (with few resources to test), leading to chemical washes and industrialized farming

The provisions of regulatory cooperation and coherence will result in undermining the precautionary principle.

Let's listen to two savvy trade lawyers discussing in *The European Journal of Risk Regulation* how to attack the precautionary principle through TTIP:

"No doubt these discussions may be tough and clever drafting will be required to avoid subsequent challenges, as the regional differences in regulatory science and related decision-making procedures are among the most publicly controversial nontariff barriers. But the prize is worth the effort..."^{vii} [emphasis added]

"Clever drafting" means harmonizing the methodology for cost-benefit, compatibility and equivalence. The trade lawyers explain:

"To render procedures for regulatory convergence effective, the PP [precautionary principle] itself must be subjected to risk-based and cost-benefit analysis, so that its adverse and paradoxical effects can be identified and neutralized. ...

Fortunately, as the elusive PP leaves much discretion, the Commission has ample space for agreeing to regulatory processes that are fit for the twenty first century."^{viii}

The full version of the article provides a clear road map for undermining the precautionary principle in TTIP.

The “whole-of-government approach to regulatory management”

The US regulatory review and management model – the Office of Information and Regulatory Affairs (OIRA) - has been disastrous. EU parliamentarians should run as fast as possible away from any provision that would include this in TTIP and impose similar “whole of government” oversight of regulations. DG Trade’s regulatory cooperation text *does include* language endorsing a version of the US approach.

The way this works in the US, is that “significant” federal regulations from any policy area – and even more regulations that are *not* considered “significant” but somehow end up shunted into this process – go through centralized OIRA review and regulatory and cost-benefit impact assessments before the rules can be adopted in final form.

There is a great deal of research into the lack of objectivity in cost-benefit analysis in general, which has been demonstrated time and again to undervalue health and environmental harms while over-estimating industry compliance costs. The fact that the regulated industries control access to much of the information needed to assess compliance costs – by claiming “confidential business information” - further skews this supposedly “scientific” and “objective” exercise into anything but.^{ix}

Moreover, the USTR and DG Trade regulatory cooperation proposals layer additional trade impact assessments on top of issue-specific cost benefit analysis, and separate these assessments from the regulators who developed the rule in the first place and have expertise in the subject. These additional assessments prioritize trade considerations over everything else, including the details of the enabling laws and their focus on food safety and quality and exposure to toxics.

In the US, the OIRA review of proposed rules can happen early in the regulation-drafting timeline, it can occur late in the timeline, and it can take place more than once; and despite a 90-day hard deadline for completion of this review, sometimes rules sit around in OIRA for *years*; indeed, they go there to die.

There have been a number of academic studies analyzing in excruciating detail the impact of OIRA.^x These studies conclude that this process has worked to:

- Enhance the influence of big business and regulated industries in the development (and defeat) of regulations;
- Influence regulatory priorities and outcomes by those with money and resources to participate, while civil society simply can’t keep up with the open door policy of “all you can meet” – a process that never seems to end;
- Insert conflicts of interest both early and late in regulatory process;

- Limit transparency – it is impossible to know who said what, when, and how regulations were altered and at whose request;
- Provide an end run around the public record, the “notice and comment” system that, while it can burden both regulators and civil society, at least provides transparency in the regulatory decision process;
- Disproportionately target health and environmental regulations for review and revision;
- Encourage duplicate submissions and meetings, and multiple bites of the apple, by industry opponents of the proposed regulation

In short, **the “whole of government” regulatory management and review process in the US, as implemented by OIRA over the past 40 years, has created an effective one-way downward ratchet – no matter who has been President, or what political party is in power.**

Paralysis by analysis results in “justice delayed, justice denied”

One of the ways that the OIRA process is most effective – from a regulated industry point of view – is that regulations opposed by an industry can get stuck in OIRA and take years to emerge, delaying the need to comply, occasionally forever.

Sometimes the regulation is withdrawn completely, sometimes it must be re-proposed, or more studies done, with the end result that lives are lost and health compromised in the meantime.

A few examples should suffice to illustrate the point. Regulations that have gone into the OIRA bottleneck only to be delayed indefinitely or merely excessively include workplace silica exposure rules, formaldehyde regulations, chemical regulation generally, and arsenic levels in drinking water and pesticides.

Regulation of chemicals. The European Union has REACH and the US has the Toxic Substances Control Act (TSCA) – an ineffective 40-year old law that does not require review and approval of industrial chemicals before being placed into the stream of commerce, and that has failed almost completely in removing chemicals from the marketplace even when they are well established – based on science - to be dangerous to humans and the environment.

In an attempt to initiate a REACH-like review of a priority list of “Chemicals of Concern,” the Environmental Protection Agency (EPA) submitted to OIRA its proposed regulation in May 2010, where the regulation languished for 3 years, and then was withdrawn. In fact the EPA has withdrawn *two* draft rules it developed under authority of TSCA. Despite a clear requirement that OIRA reviews of draft proposed rules be completed within 90 days, OIRA sat on these two draft proposals

for 1,213 and 619 days, respectively. As Richard Dennison of Environmental Defense has observed, faced presumably with the reality that OIRA was never going to let EPA even propose the rules for public comment, EPA decided to withdraw them.^{xi}

Arsenic drinking water standard. EPA draft rules proposed tightening the standard in 2001; the agency then studied the alternatives and performed cost-benefit analysis over a 5-year period. The rule went to OIRA for review in 2008 where it stalled; then after 3 years Congress intervened at behest of the two herbicide manufacturers still using arsenic in their products – Drexel Chemical Co. and Luxembourg-Pamol – and sent the rule to the National Academy of Sciences for further scientific review. The companies challenged EPA's scientific analysis supporting the rule, claiming that they had found 300 studies published since 2007 that the EPA had not included in its draft scientific study. Of course the reason there were 300 more studies that could be reviewed – never mind the quality of these studies or whether they were duplicative information - was a direct consequence of OIRA sitting on the rule for 3 years.^{xii}

This issue is personal to me. Scientists from Columbia University and the University of New Hampshire recently completed a five-year study of schoolchildren in Maine – children I used to represent in the Maine Legislature - who had been exposed to arsenic in well water. The study showed that even at low levels, 5 or more parts per billion, arsenic consumed in drinking water could correlate to lower intelligence, as much as 5 to 6 points on IQ tests. Yet still we lack an enforceable drinking water standard for arsenic, and herbicides with arsenic remain in the marketplace and continue to contaminate groundwater and the soils we grow our food in.

Summing up

- **The US regulatory coherence model is a deregulation agenda**, leading to delayed and weakened standards, less transparency, conflicts of interest and more industry influence
- **EU regulatory cooperation proposal is also bad**, a top-down plan that will interfere with decisions of democratically elected parliamentarians, and halt evolving regulatory standards
- **Both USTR and DG Trade want multiple impact assessments, harmonization and equivalency** - a certain pathway to a one-way downward ratchet
- Regardless of what DG Trade may say, **the precautionary principle is threatened** (and they must know it)

- **Existing standards are also at risk**, with both USTR and DG Trade proposing look-backs and trade impact assessments for current rules, presumably with the goal of changing those rules they conclude are “more burdensome on trade than necessary”

[Watch More on Sharon Treat’s message in our video](#)

ⁱ Sharon Treat serves on the Maine Citizen Trade Policy Commission. She has been a US state legislator for 22 years, serving in both the Maine House and Senate, where she sponsored trade policy legislation on procurement and also chaired the environment, trade and judiciary committees. She also has worked for the National Caucus of Environmental Legislators (NCEL) on TTIP issues, which has over 1,000 members in US state legislatures who are in both Democratic and Republican parties.

ⁱⁱ For more on Maine’s approach to food and farming, and the potential negative impact of TTIP on Maine food policy, see this report: *2014 Maine Citizen Trade Policy Commission TRADE POLICY ASSESSMENT: Maine Agriculture and Food Systems in the Transatlantic Trade and Investment Partnership*, Karen Hansen-Kuhn, IATP and John Piotti, Maine Farmland Trust (July 2014): <http://www.maine.gov/legis/opla/citpol.htm> . The report pre-dated the release of the regulatory cooperation proposals discussed above, and so focuses on other expected TTIP policies. For more on the Maine Citizen Trade Policy Commission, see this website: <http://www.maine.gov/legis/opla/citpol.htm>

ⁱⁱⁱ For analysis of the DG Trade regulatory cooperation proposal, and food-related impacts, see *CIEL report on regulatory cooperation and pesticides* (January 2015), linked here: http://ciel.org/Publications/LCD_TTIP_Jan2015.pdf, and IATP analysis of the SPS chapter and regulatory cooperation, Dr. Steve Suppan (February 2015), linked here: <http://www.iatp.org/documents/analysis-of-the-european-commission-proposal-for-the-sanitary-and-phytosanitary-measures-s>

^{iv} See *NCEL Fact Sheet: Toxic Chemicals and Trade Policy: How a US-EU Trade Agreement Could Tie the Hands of State Legislators and Stall State-Level Action on Toxics* (February 2015), linked here: <http://www.ncel.net/articles/TTIP%20Fact%20Sheet.pdf>

^v Final Report, High Level Working Group on Jobs & Growth (February 11, 2013): Reduce regulatory differences, “...consideration of approaches relating to regulatory harmonization, equivalence, or mutual recognition...”

- Regulatory coherence and transparency, “...including early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, applications of good regulatory practices.”

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- “...institutional basis for future progress.”
 - SPS-plus “... based on science and on international standards or scientific risk assessments, applied only to the extent necessary...”

^{vi} For more on this case, see this Sierra Club fact sheet, linked here:

http://action.sierraclub.org/site/DocServer/0999_Trade_Bilcon_Factsheet_04_low.pdf?docID=17481

^{vii} “*Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the TTIP*,” Bergkamp & Kogan, *The European Journal of Risk Regulation*, 04/2013, at 496

^{viii} Bergkamp & Kogan, *The European Journal of Risk Regulation*, 04/2013, at 507

^{ix} *PRICING THE PRICELESS: Cost-Benefit Analysis of Environmental Protection*, Heinzerling & Ackerman, Georgetown University Law Center (2002): <http://www.ase.tufts.edu/gdae/publications/C-B%20pamphlet%20final.pdf>

^x See, eg, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment*, Steinzor, et al, Center for Progressive Reform (2011); *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, Lisa Heinzerling, Georgetown University Law Center, *Pace Environmental Law Review* (March 2014): <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1741&context=peir>

^{xi} Richard Denison, EDF Blog Sept. 6, 2013

^{xii} “*How politics derailed EPA science on arsenic, endangering public health*,” Pro Publica (2014): <http://www.publicintegrity.org/2014/06/28/15000/how-politics-derailed-epa-science-arsenic-endangering-public-health>