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Food Standards in Trade Agreements

Differing Regulatory Traditions in the EU and the US and Tips for the TTIP

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The European Union is both the largest exporter and importer of agricultural products in the world. Its major trading partners are the United States, Argentina, Brazil, Russia, and China. This trade in agricultural products is influenced by a number of political measures. In addition to tariffs, trade in foodstuffs is increasingly influenced by so-called nontariff measures (NTMs), among which are threshold values for pesticide residues, production standards, and packing- and labeling standards. In fact, such measures can impact the costs of trade much more than tariffs. Reducing these NTMs within the Transatlantic Trade and Investment Partnership (TTIP) offers enormous prospects for economic growth.

The European public is concerned that the TTIP could undermine EU standards and that Europe will soon be importing "chloride poultry" and "hormone beef," both of which have been banned in the EU. Is a race to the bottom inevitable? Will Europe be forced to adopt US standards? And are these really worse than European standards?

Trade in Agriculture: A Classic Trade Conflict

Overall, transatlantic agricultural trade is economically unimportant and has been declining over the last 20 years. Its current share of total EU-US trade in goods is about 5 percent. However, it is of utmost importance for the EU agricultural sector: the United States is the main importer of EU agricultural products, whereas the EU only ranks number five among US export markets for agriculture. Both actors are highly protectionist about their agricultural markets.

- *Tariffs* for industrial products average 4 percent in the European Union (US: 3 percent) but average 13 percent for agricultural products (US: 4.7 percent). And tariffs for strategically important products are even higher: average EU tariffs on milk products are 50 percent, and for individual products about 600 percent (US: 20 percent; tariffs peak at 95 percent).
- Tariff effects of ("tariff equivalent") *nontariff measures* (NTMs) are very difficult to estimate, ranging from 20 to 57 percent for the EU and from 17 to more than 70 percent for the United States. Despite being considered a rather liberal economic actor in terms of tariffs, the United States does

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not use these measures any less than the EU does.

Because the level of protection via NTMs is very high, experts expect large economic gains in the agricultural sector if they were to be removed: most estimates arrive at significant growth in agricultural trade of about 20 percent. With potential growth of up to 400 percent, EU exports of animal products are expected to benefit the most.

Negotiations on agricultural products often reveal critical issues for trade agreements in general: not only do they touch on sensitive consumer interests, but also the interests of the well-organized agricultural lobbies. The Uruguay Round, which took place between 1986 and 1994 and culminated in the establishment of the World Trade Organization (WTO), nearly failed because of a conflict over oil seeds. Even the last round of the Doha Ministerial Conference at the end of 2013 could only be completed with major concession for Indian food subsidies. Many existing agreements explicitly exclude the agricultural sector: agricultural products are either exempt from market access or the negotiating parties agree to slowly phase-out tariffs. Cases in point are the customs union with Turkey and the Euro-Mediterranean Association Agreements; even the European Economic Area, which includes EU and European Free Trade Association (EFTA) states, contains special rules on agriculture.

WTO Rules for Food Safety

States cannot arbitrarily set rules. Member states of the WTO have to adhere to certain rules of the game.

- The General Agreement on Tariffs and Trade (GATT) is based on the notion of free-market access, which applies equally to all states (Art. I). Rules for importers should not be stricter than for domestic producers (Art. III). Quantitative trade restrictions are explicitly banned (Art. XI). However, there are exceptions to all of these rules if justified by protecting human, animal, or plant health (Art. XX [b]).
- The agreement on Sanitary and Phytosanitary measures (SPS agreement) grants states the right to make sovereign decisions on national safety standards (Art. 2). At the same time, it refers to the adherence to international standards, such as those of the Codex Alimentarius Commission of the World Health Organization and the UN Food and Agriculture Organization; the International Plant Protection Convention; and the World Organization for Animal Health (Art. 3). Stricter standards need to be justified by scientific risk assessment (Art. 5).

Equivalence as Alternative to Harmonization

If harmonization in terms of identical standards is not achievable, the WTO recommends equivalence: if different standards achieve the same safety outcome, then they should be mutually accepted (Art. 4 SPS). Such mutual recognition is the result of complex conformity assessments and can either apply to individual standards or the full institutional system for setting standards. This means cost-savings despite different standards and thereby commercial advantages, because expensive quality assessments and border controls can be removed. These savings can constitute more than a third of the product price, as in the case of Moroccan tomato exports to the EU.

The Sinner: The EU in the Dock of the WTO

The interpretation of WTO law is mostly done through WTO dispute settlements. Only 10 percent of all WTO cases refer to food safety. The EU has participated in a third of these. Often, the United States is the opposing party.

At the end of the 1980s, the United States and Canada accused the EU in the "Beef Hormone Dispute" because it had banned the import of American and Canadian beef. Growth hormones are banned in the EU because they are considered to cause cancer. As the EU could not prove

this causality through a WTO-accepted risk assessment, it was convicted in 1998. As the EU continued the ban, the United States and Canada were granted penalty tariffs on European products up to a value of 120 million US dollars. It was not until 2009 that the dispute was finally resolved. The EU offered tariff-free quotas for hormone-free premium beef from Canada and the United States. In return, the United States and Canada lifted their penalty tariffs.

In a dispute on genetically modified organisms (GMOs), the United States, Canada, and Argentina sued the EU in 2003 for a moratorium on approvals it had imposed five years ago, which was equivalent to a market access ban for these states. The EU was convicted in 2006 and lifted the ban. However, till today actually only one type of genetically modified maize has been produced in just five European countries (Spain, Portugal, Czech Republic, Slovenia, and Romania). Yet, the European Food Safety Authority (EFSA) repeatedly ascertained that genetically modified food poses no risks to consumer health.

In 2009, the United States registered a dispute about poultry carcasses treated with certain chemicals; the dispute is on hold right now. The complaint refers to a 1997 EU ban on American poultry that had been decontaminated with chlorine; the EU permits only poultry that is treated with water and cooling. The EFSA again could not find any risks to consumer health.

Regulatory Tradition in the EU Depends on Partner Country and Product

In sum, the EU has concluded more than 770 international agreements concerning trade in agriculture. These agreements range from all-encompassing agreements to very specific ones concerning only one product.

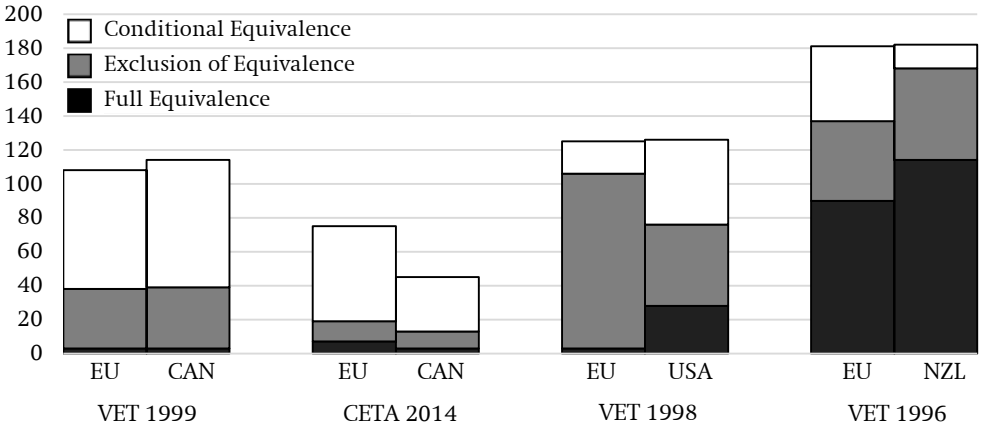
The EU has longstanding experience with harmonization and mutual equivalence, which also lies at the heart of the European Common Market. Approaches differ by partner country and product.

(1) *Gradual harmonization*. For EU accession candidates, full harmonization is required. Countries aspiring to become EU member states need to adopt all EU standards and regulatory systems ("acquis communautaire"). In the case of free trade agreements and customs unions with third countries, agricultural tariffs are not often covered. Nevertheless, the adoption of EU standards is often aimed at. For example, the EFTA states of Norway, Liechtenstein, and Iceland do not face complete liberalization for food and fish. But on the acquis they decided jointly on those areas to be adopted. The national regulatory agencies of Norway and Iceland are to cooperate closely with the EFSA, in which they also enjoy observer status. The Ankara Agreement with Turkey only lowers tariffs for a limited amount of processed agricultural products, whereas food standards are not included at all. Hence, EU standards apply for Turkish goods exported to the EU.

(2) *Flexible equivalence*. The mutual recognition of equivalence is the most common form of cooperation and can again take various forms and shapes. The bilateral agricultural agreement with Switzerland envisages the individual mutual recognition of veterinary standards and relies on positive lists. With the new European Model of Deep and Comprehensive Trade Agreements (DCFTAs), the EU aims to specifically tackle NTMs in neighboring countries. This reveals that there are special difficulties in the agricultural sector. Yet, adjusting the Mediterranean Association Agreements to the DCFTA model could only be started with a few partners. Negotiations with Morocco have been ongoing since spring 2013. Preparatory dialogues are currently being held with Jordan, Tunisia, and Egypt.

The EU approach to standards in agreements with countries that are further away is much different: only a few product-specific agreements define what is considered equivalent in positive lists. The degree of equivalence ranges from full recognition to conditional recognition until complete refusal, and hence, exclu-

Figure 1
Flexible equivalence in EU Veterinary Equivalence Treaties (VET) and CETA (number of contained regulations)



sion of equivalence. The agreements on veterinary standards between the EU and the United States, Canada, and New Zealand define different degrees of equivalence only for different standards on animal products (Figure 1). Once they are completed, comprehensive trade agreements usually replace previous equivalence arrangements. Currently, the EU is negotiating Economic Partnership Agreements with the African Caribbean and Pacific states. Here again, standards play a decisive role in terms of market access to the EU – elimination of full tariffs is useless if market access is denied because standards are not met. Only a few agreements (EU–Pacific, EU–CARIFORUM) address full mutual recognition. Most often they are about the partners' compliance with EU standards, for which the EU offers aid for implementation.

(3) *Special rules for organic products.* The import rules for organic products comprise a whole range of cooperation methods: the EU recognizes competent regulatory control bodies in third countries to verify the equivalence of individual products with EU rules. This is again cross-checked through EU controls. Simpler rules apply to all organic products of a country if the whole production process is considered to be equivalent. Hence, product-specific veryfication is not required anymore. In 2012, there were 11 countries that were included in this category, among them the United States, Canada, Australia, Israel, Tunisia, and India. With some of those countries, the EU concludes individual organic equivalence agreements, for instance with the United States (2012), Canada (2011), Switzerland (2008), and Japan (2010). These agreements further facilitate the EU's importing of organic products because additional EU controls cease to apply.

(4) *Institutionalized cooperation.* Recent trade agreements contain procedural provisions about common decisions on equivalence between the contracting states: the EU agreements with Korea, Chile, and Peru/Colombia integrate joint SPS committees. The EU-Korea agreement and the Comprehensive Economic and Trade Agreement (CETA) with Canada include additionally the aim to cooperate in matters of animal protection, which is a novelty in trade agreements without any binding international standards. Moreover, CETA also contains a higher-ranking regulatory cooperation council in addition to a specific SPS body covering all sectors.

Transatlantic Differences

Food standards in the EU and the United States differ in many respects (Table 1). On the one hand, there are differences in terms of requirements for production processes,

Table 1
Transatlantic regulatory differences:
Procedural rules and risk tolerance (⊘ banned, √ permitted)

	EU	US	WTO case
Procedural rules			
▸ For genetically modified food			
_public license registry	√	Non-existent	
▸ For animal and plant epidemics			
_regionalization approach	Region often differentiated	Region often the state	
_Escherichia-coli test for crustacean animals	In animal meat	In the water	
Principles on risk tolerance			
▸ For genetically modified food			
_approval	√ EU-wide ⊘ **by member state**	√	EU convicted
_labeling requirement	√ If content > 0.9%	–	
▸ For meat			
_Decontamination			
... with chlorine	⊘	√	Still no decision
... with lactic acid	√	√	
_Use of hormones/beta-blockers			
... as performance enhancer	⊘	√	EU convicted
... veterinary use	√	√	
_Use of antibiotics			
... as performance enhancer	⊘	√	
... veterinary use	√	√	
... veterinary use in organic farming	√	⊘	
▸ For cloning			
_marketing of food products	√ New proposal for ban in legislation process	√	
_labeling requirement	–	–	
▸ For milk			
_raw milk product marketing	√	⊘	
_use of performance enhancer (bovines, somatotropin)	⊘	√	

e.g., detecting animal epidemics (procedural rules). On the other hand, there are differences in terms of the principles on the levels of risk (risk tolerance).

Guiding Principles:
EU Precautionary, US After-caring

The guiding principle of the EU is the precautionary principle. Accordingly, there is a duty to protect the population if companies cannot prove that used substances or procedures are harmless. On the contrary, the guiding principle of the United States is the after-care principle. Here, the public administration first has to prove a harmful effect of a product before it can enact a ban. This risk-based approach, which comes close to the approach of the WTO, is further augmented by the legal liability tradition in the United States to compensate for damages once they occur. New substances and prod-

ucts are banned more often in the EU as compared to the United States. These bans lead to levels that are stricter than international thresholds, which usually allow for limited levels of residue. Therefore, EU standards are more likely to be attacked by the WTO and need to be justified through risk assessments. In cases where the United States places a ban on a product (e.g., raw milk product marketing), there are often no international reference standards that can serve as the basis for a complaint at the WTO.

Focus:
Procedures (EU) vs. Final Product (US)
The regulatory focus of the EU is generally on the whole production process rather than on the final product. This approach means high-level requirements for every production step. For instance, the germ load of meat should be minimized through continuous hygiene that starts at the farm and ends on the plate of the consumer ("farm to fork"). This also entails measures that enable backtracking, such as identification chips for animals, but also detailed documentation duties across all production stages. The United States focuses more on the final product, for example, by using chlorine to eliminate all germs at the end of the production.

Decision-making Procedures:
EU More Political, US More Risk-based
Transatlantic regulatory differences are caused by differences in internal decision-making procedures. Since the bovine spongiform encephalopathy (BSE, or "mad cow") crisis, risk management and risk assessment have been institutionally split in the EU. The EFSA reviews the risk assessments brought forward by national agencies or enterprises. For the subsequent political decision on approval, the European Commission, the European Council, and the European Parliament are involved. Often the decision is to not follow the risk assessment of the EFSA – for instance, in the case of GMOs or the chlorine decontamination of carcasses. Decisions concerning rather technical aspects come in the form of so-called delegated acts, for which the European Parliament and member states have less say than the Commission. Among these technical aspects are the use of GMOs and additives. The old EU veterinary agreements with Canada and the United States even passed via Council decisions, which completely excluded the European Parliament and the national parliaments, contrary to the recent trade agreements CETA and the TTIP.

In the United States, such an institutional split between risk assessment and risk management does not exist, but different jurisdictions according to product types do exist. This more integrative approach may explain the higher level of coherence between risk assessment and risk management – political decisions about product approval usually follow the risk assessment.

Tips for the TTIP When Considering Regulatory Differences

(1) Equivalence for procedural rules: definition of epidemics and bacterial testing

A harmonization of procedural measures becomes possible if they are based on similar perceptions of risks and, hence, aim for a similar level of protection.

- *Flexible equivalence.* Since September 26, 2014, the consolidated version of CETA has been publicly available. This allows for tracing the replacement of the previous veterinary agreement (VET) (Figure 1 above). Although the number of regulations addressed by the EU decreased from 108 (VET) to 75 (CETA), the number of fully equivalent regulations increased from 3 to 7. Canada still only accepts 3 regulations as being equivalent. Both sides exclude a number of regulations from equivalence (the EU 12 and Canada 10). Most of the regulations require additional conditions. One can envision similar flexibility for the TTIP, which

will replace the existing veterinary agreement.

▸ *Common decision-making procedures within the "living agreement."* The TTIP also envisages a general regulatory cooperation council and an SPS committee similar to CETA. Although the SPS forum is supposed to be responsible for the implementation of current bilateral equivalence decisions, the regulatory cooperation council will enable ongoing dialogue about measures that are not part of the agreement yet. This would affect plant regulations. A balanced composition of the regulatory council is crucial: besides including representatives from the industry, it should also include representatives from civil society, as recommended by CETA. This would incorporate not only effects on health and trade but also include consumer interests. CETA also stresses the involvement of third states, which should also be emphasized in the TTIP.

(2) Market approach or keeping own standards for diverging risk tolerance: performance enhancers, GMOs, and decontamination

If there are conflicts about how to assess risks and what risks to accept, a mutually agreeable equivalence is not feasible. However, this does not mean that the interests of only one actor will necessarily prevail.

▸ *Keeping standards and packaging*. After the decade-long dispute about hormones in beef, the solution constituted a win-win situation. The EU was able to stick to its standards and grant tariff concessions. Canada and the United States enjoyed tariff-free market entry for a certain amount of beef, which would otherwise have faced high tariffs.

Because of the prevailing chlorine ban in the EU, only about 200 tons of US poultry could be exported to the EU in 2013. There is a quota for lower tariffs, which is rarely exploited. Further decreases in tariffs – up to duty-free – could be an incentive for the United States to produce more chlorine-free poultry. This could happen due to the fact that increases in export returns help to better cover the higher production costs of hormone-free beef. Such tariff incentives could also be a possible solution for other performance enhancers (somatotropin in milk production, beta-blockers in pig fattening) that are banned in the EU.

▸ *Private labeling.* Some WTO disputes indicate that divergences could be solved through private labeling. The United States was convicted by the WTO when it stopped importing Mexican tuna that had been fished using techniques that endangered dolphins. The result of retailers introducing the "dolphin-friendly tuna" label was that the US technique prevailed on the US market, all without any legal obligations, because consumers refused any other types of tuna. However, labels can also have trade-distorting effects and can be addressed through WTO dispute mechanisms: the United States is being accused due to the labeling it uses to indicate the origins of beef, as it is perceived to constitute a disadvantage to Canadian importers.

An EU-wide obligation to label products treated with GMOs or chlorine could also be vulnerable if it had discriminatory effects on trade. But private labeling could be a solution because only states can be sued in front of the WTO appellate body.

A culture of openness and transparency is necessary to solve the dispute

Although differences in procedures and risk assessment between the EU and the United States are obvious, existing agreements show some approaches for resolving disputes in the TTIP negotiations. These approaches constitute viable alternatives to the feared automatic harmonization of standards.

Just keeping own standards is also an option. Retaining own standards implies abstaining from possible welfare-increasing effects due to enhanced trade under the TTIP. However, retaining standards would also have positive effects. First, it would reduce externality costs that are not usually covered by risk assessments such as health

or environmental effects, which are not tested automatically. Methods for risk assessments and experts' decisions on what to test for are constantly changing anyway. That means other risks will be contained in risk assessments in the future and may lead to different political decisions than those being made today. Second, retaining own standards may result in the political benefit of protecting the consumer. Consumers' confidence is based on subjective perceptions, regardless of any scientific risk assessment. That is why the WTO does not consider this argument to be a crucial factor in political decision-making as it can become arbitrary. But risk perceptions – and even risk assessments – always will be subjective and influenced by socio-cultural processes that may differ across countries. Therefore, conflicts between states will continue. This stresses the importance of openness and transparency in such conflicts, which will appear anyhow. Opening the regulatory council to civil society groups should be implemented and also be envisaged for the TTIP.

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