

Implications of the Current TTIP Negotiations on Chemical and Environmental Regulations

Cándido García Molyneux
2015 Annual Conference
on European Environmental Law
ERA Academy of European Law
Trier, 17 April 2015

COVINGTON

BEIJING BRUSSELS LONDON NEW YORK SAN DIEGO SAN FRANCISCO
SEOUL SHANGHAI SILICON VALLEY WASHINGTON

www.cov.com

What is TTIP?

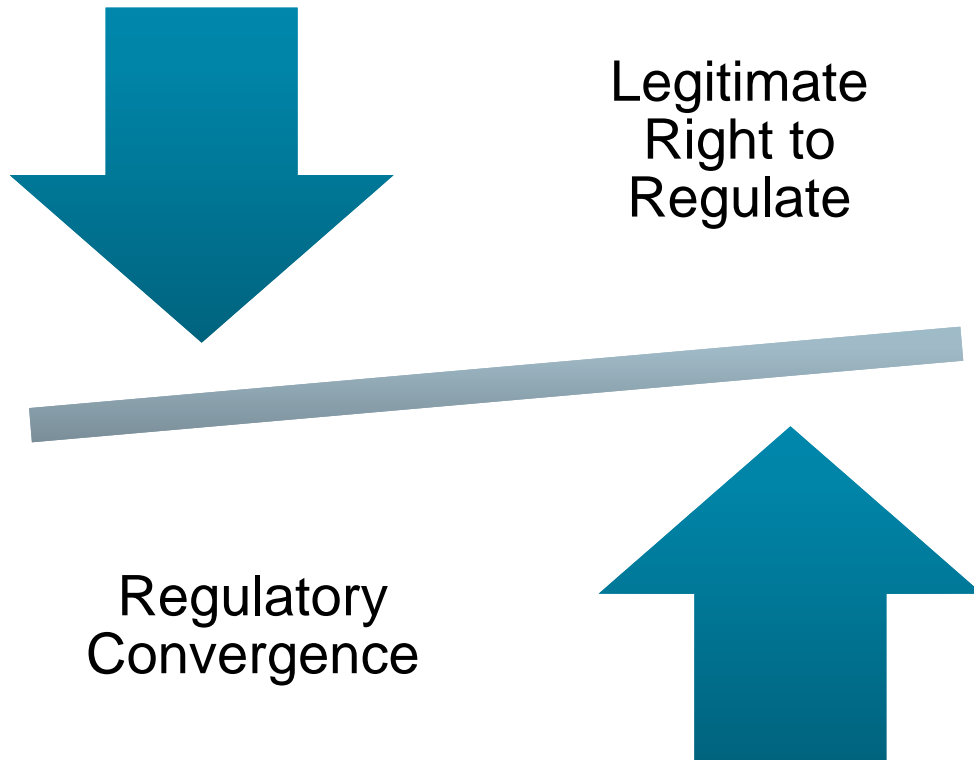
- Three main components
 1. Market access
 2. Regulatory Issues and NTBs
 3. Trade Rules

- Ultimate goal
 - A more integrated transatlantic marketplace
 - More compatible EU and U.S. regulatory systems
 - Setting global standards



The TTIP Challenge

Keep Right Balance



Other Recent EU Bilateral Trade Agreements

EU-Korea Free Trade Agreement (entry into force in 2011)

- General commitments on technical barriers to trade
 - Including cooperation on standards and regulatory issues
- Chapter on trade and sustainable development
- Short Annex on chemicals

EU-Singapore Free Trade Agreement (concluded in 2012)

- Chapter on trade and sustainable development
- ISDS provisions

EU-Canada Comprehensive Trade and Economic Agreement (“CETA”) (concluded in 2014)

- Chapters on: trade and sustainable development / trade and environment
- ISDS provisions
- Often referred to as a blueprint for TTIP

The Commission is also negotiating trade agreements with other countries such as India, Japan and Morocco

The TTIP Negotiation Process (1)

Negotiation Process (Art. 218 TFEU)

- Council negotiating mandate
- Non-binding European Parliament Resolution(s)
- Commission (DG Trade) negotiates on the basis of the Council negotiating mandate
- Regular consultations with Council and European Parliament
- Final text must be approved by Council and ratified by European Parliament

Expected timeline: June 2013 – end of 2015 (?)

National parliaments may be involved in case of mixed agreement

The TTIP Negotiation Process (2)

The Council Mandate

- Regulatory compatibility without prejudice to the right to regulate
 - *“The objective of the Agreement is to increase trade and investment between the EU and the US ...through increased market access and greater regulatory compatibility and setting the path for global standards”*
 - *“The right of the parties to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection of health safety, labour, consumers, the environment ... that they deem appropriate”*
- Commitments to promote high levels of environmental and consumer protection
- A chapter on trade and sustainable development including
 - *“measures to facilitate and promote trade in environmentally friendly and low carbon goods, energy and resource-efficient goods, services and technologies, including through green public procurement and to support informed purchasing choices by consumers.”*
- A specific Annex on chemicals aimed at promoting greater regulatory compatibility
- ISDS
 - *“the Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, including through the possibility of binding interpretation of the Agreement by the Parties”*

The TTIP Negotiation Process (3)

European Parliament Resolution

- TTIP must not undermine the precautionary principle
- TTIP must address the environment aspects of sustainable development
- No diminution of environmental ambitions
- *“recognises that achieving common standards is likely to present both technical and political challenges, and emphasises that the common goal should be to ensure that there is no diminution of environmental ambitions”*
- Enhance compatibility of regulatory regimes without giving up right to regulate
 - *“explore new means of reducing unnecessary costs and administrative delays stemming from regulation, while achieving the levels of health, safety and environmental protection that each side deems appropriate, or while otherwise meeting legitimate regulatory objectives”*

TTIP and the Environment & Chemicals

Commission Proposals

(according to disclosed documents)

Regulatory Chapter

- Mutual recognition, harmonization, cooperation
- Institutional framework

Trade and Sustainable Development Chapter

- Overarching principles
- Promotion of green goods and services

Annex on Chemicals

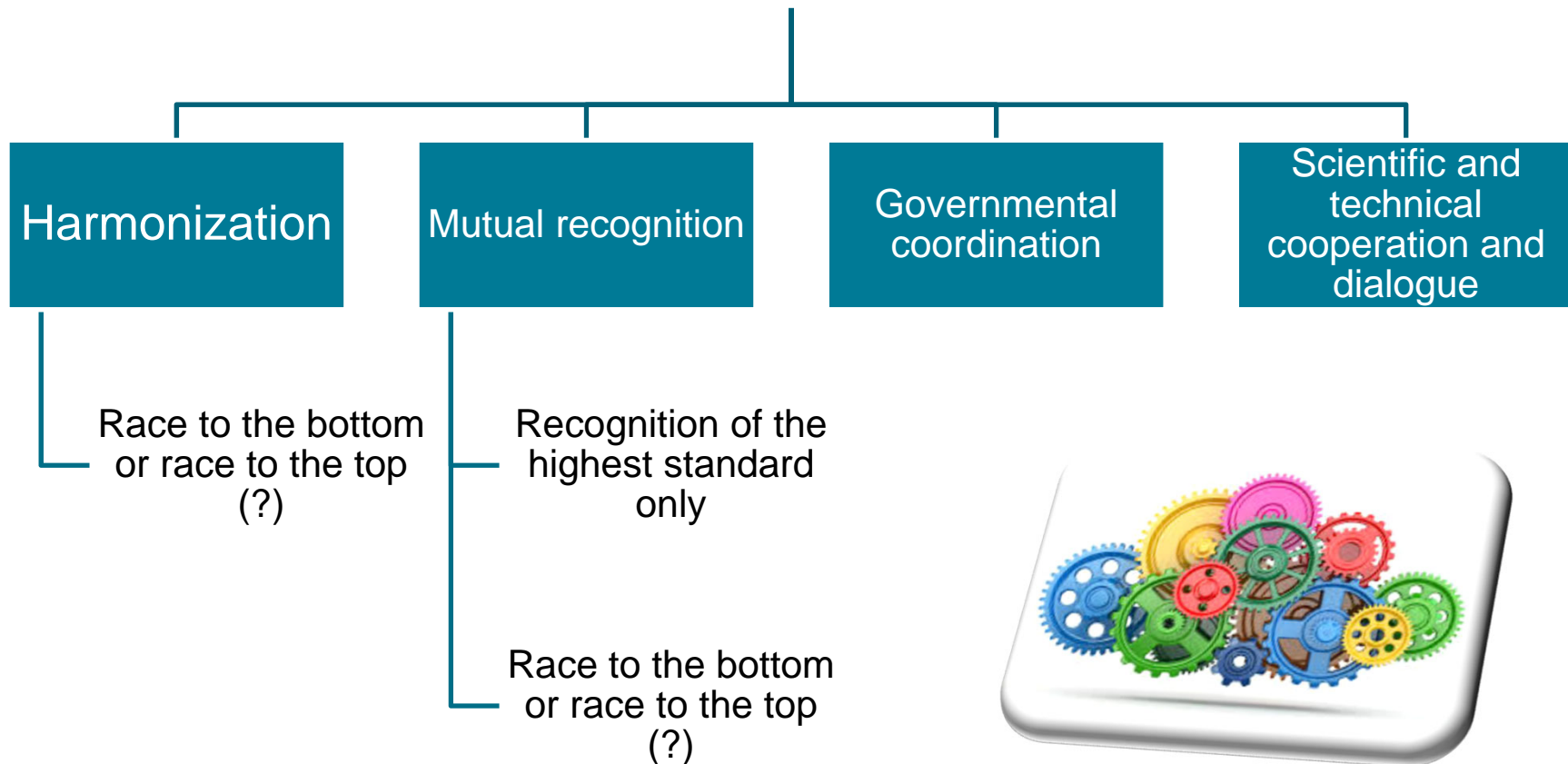
- Specific provisions on regulatory cooperation on chemicals
- Prevail over provisions in Regulatory Chapter

ISDS

- Investment protection provisions

Regulatory Convergence

Four possible approaches



Regulatory Chapter (1)

Procedures for regulatory cooperation

- Early information on planned regulatory acts
- Stakeholder consultations
- Impact assessments shall consider
 - Relevant international instruments
 - Regulatory approach of the other party
 - Impact on trade and investment
- Exchange of scientific and economic data
- Mechanism to identify priority areas for cooperation
- Creation of central contact points
- Joint examination of possible means to promote regulatory compatibility
 - Mutual recognition, harmonization, simplification

Regulatory cooperation should not undermine right to regulate

“The provisions of this Chapter do not restrict the right of each Party to maintain, adopt and apply measures to achieve legitimate public policy objectives”

Regulatory Chapter (2)

Regulatory Cooperation Body (“RCB”)

- RCB’s Members are representatives of regulators
- RCB functions
 - Supervise regulatory cooperation
 - Provide inputs on regulatory cooperation initiatives
 - Participation of stakeholders
 - Prepare joint proposals on international regulatory instruments
 - Prepare Annual Regulatory Cooperation Program
 - Common priorities
 - Timeframes

Trade and Sustainable Development Chapter

General environmental aspects

- *“recognize each party’s right to regulate its own environmental protection at the levels it deems appropriate”*

Promotion of trade and investment in environmental goods and services

- e.g., elimination of non-tariff barriers on renewable energy goods

Sustainable management of forests and trade in forest products

- e.g., encourage trade in timber products from sustainably managed forests

Trade and sustainable management of fisheries and aquaculture products

- e.g., compliance with relevant international instruments on sustainable fisheries

Commitment to achieve a sound management of chemicals throughout their life cycle

Establishment of a joint body in charge of overseeing the implementation of the sustainable development chapter

TTIP Regulatory Convergence on Chemicals

Current Proposed Objectives

Promote efficiencies on the basis of current regulatory frameworks

No intent to change regulations (no dilution of standards)

- No full harmonization nor mutual recognition

Promote alignment primarily by ensuring a common scientific basis for decision making

- Enhance scientific cooperation while allowing management divergence

TTIP Proposals for Cooperation on Chemicals

1. Cooperation on prioritization of substances for assessment and burden sharing
 - *e.g.*, ECHA could consult EPA when updating CoRAP
2. Cooperation and exchange on assessment methodologies
 - *e.g.*, mutual consultation when assessment methodologies are reviewed
3. Alignment in classification and labelling of chemicals
 - *e.g.*, ECHA and EPA would consult in the course of their respective procedures on classification of substances
4. Exchange of information on regulatory plans
 - Periodical publication of regulatory plans
5. Consultation on regulatory processes affecting individual substances and new draft regulations
 - *e.g.*, mutual participation as observers in expert meetings
6. Cooperation on new and emerging issues
 - Exchange of scientific information on *e.g.* nanomaterials
7. Creation of Joint Chemicals Working Group
 - In charge of supervising cooperation on chemicals

Chemicals and CBI in TTIP (1)

Possible Data Exchange between ECHA & EPA

Data sharing allows cooperation and burden sharing on hazard and risk assessment

- May increase reliability and harmonization of outcomes
- Reduce duplicative testing and minimize testing on animals
- Eliminate need to submit duplicate regulatory data
- Cost savings for both industry and authorities

Examples of data that could be shared

- Study reports: US TSCA requires full study reports while REACH accepts robust study summaries
- ECHA interested in substance identity information submitted under TSCA
- EPA interested in REACH Chemical Safety Reports

Chemicals and CBI in TTIP (2)

Risks of Data Exchange Between ECHA & EPA

- Similar CBI definitions under REACH and TSCA
 - But more restrictive interpretation and application in the EU
- Different rules on the use of data for regulatory purposes
- Different rules on the disclosure of data to the public and third parties
- To avoid erosion of company data due to exchange of information
 - Need for adequate safeguards to protect CBI
 - Need for rules on use of data for regulatory purposes

Chemicals and CBI in TTIP (3)

Options to Safeguard CBI

- Scope of data exchange
 - Non-CBI data only (already posted on respective website but disclosure in a privileged format of download)
 - No automatic exchange of CBI
 - Only on a need be and case-by-case basis
- Conditions
 - No further dissemination/disclosure of data by the receiving authority
 - Define strict limits to access to data/information by third parties
 - Strict technical and safety IT measures in place
 - In the case of CBI
 - Requesting authority should provide justification of need for data
 - Data owner should be consulted and entitled to raise objections
- Ensure enforcement remedies in case of non-compliance

ISDS and TTIP (1)

- ISDS mechanisms allow investors to challenge “arbitrary and abusive”
 1. Decisions
 2. Laws
 3. Policy changes
- Claims that ISDS may undermine stronger EU environmental, health and social regulations



ISDS and TTIP (2)

- Corporations have recently made use of ISDS mechanisms to challenge health and environmental reforms around the world

Philipp Morris Vs. Australia

- Tobacco plain packaging requirements

Lone Pine Vs. Canada

- Moratorium on hydraulic fracturing

Vattenfall Vs. Germany

- Phasing-out of nuclear power

- None of these cases has reached a final decision yet and their impact of public regulations remains unclear

Commission's Main Proposals on ISDS

- ✓ Strike a fair balance between investment protection and right to regulate
 - Right to regulate basic underlying principle
- ✓ Clear definition of “investor” and “investment”
 - Exclude “shell” companies from definition of investor
- ✓ Clear definition of “fair and equitable treatment” and “indirect expropriation”
 - Only manifestly abusive conducts would be covered (e.g., measures adopted to protect the environment would not be covered)
- ✓ Transparency provisions
 - All hearings and documents should be public
- ✓ No multiple parallel claims
 - No arbitration and claims before domestic courts
- ✓ Mandatory code of conduct for arbitrators
- ✓ Appellate mechanism
 - To ensure consistency



Thank you!

Questions?



Dr. Cándido García Molyneux
Covington & Burling LLP
44 Avenue des Arts 1040
Brussels Belgium
+32.2.549.5261
cgarciamolyneux@cov.com

Cándido García Molyneux is a Spanish Of Counsel in the Brussels office of Covington & Burling LLP. His practice focuses on EU environmental law, international barriers to trade, and Spanish and Italian food and drug law. He advises clients on legal issues concerning environmental product regulation, chemical law, waste management, climate change, renewable energies, and energy efficiency.

Dr. García Molyneux holds a PhD in Law from the European University Institute, an LLM from the University of Georgetown, and a Law Degree from the Universidad Autonoma de Madrid. He is an external professor of environmental law and policy at the College of Europe.