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Bartl, M.

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TTIP's Regulatory Cooperation And The Politics Of 'Learning'

by [Marija Bartl](#) on 26 November 2015

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Marija Bartl

Recently, the TTIP negotiations have entered a new a phase in spite of wide public criticisms. The European Commission (EC) has made a number of concessions with regard to the main target of criticism – the Investor to State Dispute Settlement (ISDS) – by proposing an **'Investment Court System'** that addresses some of the greatest concerns. The focus on the ISDS has, however, somewhat unfortunately diverted attention from another institutional development, namely, the equally important and equally dangerous **'Regulatory Cooperation'**.

What is Regulatory Cooperation? The TTIP is not meant to be a traditional trade agreement. Along with trade rules agreed in the treaty negotiations, TTIP comes with a set of framework institutions, and mandates future regulatory cooperation regarding those 'barriers to trade and investment' not decided upon in the original agreement. In other words, TTIP is a 'living agreement', an agreement that actualizes itself.

TTIP's Regulatory Cooperation (RC) will be put into operation at two different levels. At a first level, the TTIP requires certain key commitments concerning how states conduct domestic regulatory activities. In particular, the RC requires a broad domestic commitment to stakeholder consultation and impact assessments.

At a second level, the TTIP creates new institutions. Two main mechanisms are envisaged. On the one hand, regulators from both sides of Atlantic are expected to engage in the so-called '**bilateral mechanism**'. At the request of a state party (and their stakeholders), regulators will engage in a bilateral exchange regarding proposed policy activities.

On the other hand, the TTIP puts in place its own principal institution: an expert body called the **Regulatory Cooperation Council** (RCC). The legal force of the decisions made by this body remains unclear. The EC assures us that there will be no enforceable legal effects: no RCC supremacy or changes to the ordinary legislative framework are envisaged.

What unites regulatory cooperation at both levels is a concern with soft tools such as 'learning' and 'exchange' as main drivers of regulatory convergence. The lead political actors suggest these tools are innocuous. Can we be sure?

I would like to argue here that learning and exchange in the TTIP context, placed against a particular *institutional* background, would have a significant impact on the way we regulate in Europe. In particular, we should not understand learning and exchange in this context simply as vertical learning, where the EU and US regulators move from less to better knowledge. In fact, the EU and the US administrations already have access to excellent knowledge and large amounts of information.

Instead, the TTIP's emphasis on exchanging *economic assumptions* and *scientific methodologies* should be understood as directed at changing the way in which knowledge is *used* while regulating. To be clear, the approximation sought by the TTIP is less concerned with cognitive gains and more with aligning normative assumptions that guide regulatory action in the EU and the US.

Which elements of the TTIP's institutional design are going to influence what can be 'learned' in the framework of its institutions?

First, TTIP's main objective – *removing barriers to trade and investment* – will have an

important impact on framing the problems and solutions to be addressed by the TTIP institutions. Remarkably, the importance of this constraint has featured quite prominently in civil society criticisms of TTIP.

Furthermore, TTIP's objective of removing barriers to trade and investment will also influence the *composition* of its main institution. The RCC staff will be mostly *trade officials* and *regulatory affairs officials* instead of, for instance, labour or environmental experts. This will have a significant impact on what kind of concerns (removing trade barriers or red tape as opposed to promotion of green technologies) will be prioritized by the TTIP institutions. Moreover, other regulators summoned to the RCC from time to time to explain their regulatory proposals may find it difficult to argue for different normative concerns in this institutional environment.

Second, the substantive concern with approximating scientific methodologies and economic assumptions between the US and the EU may have a profound impact on the application of the precautionary principle in Europe. The boost to the importance of cost-benefit analysis in the **latest EU Better regulation agenda** is likely to be reinforced through learning in the TTIP institutions. This will come not only through exchanges with US colleagues, who already operate in such a regulatory culture, but through the staffing of the RCC and the substantial voice given there to stakeholders (i.e. industry representatives).

In the US, the reliance on cost-benefit analysis went hand in hand with overstating the costs of regulation and under-estimating its benefits, leading, in general, to considerably less regulation of health and environmental risks stemming from new technologies.

Third, industry reps will have an important role in setting the agenda of learning in the RCC and its sectoral committees, thanks to their direct concern with the TTIP objective of removing barriers to trade and investment. Furthermore, and somewhat paradoxically perhaps, because RCC decisions will lack legal force, the body will be far more effective in bringing approximation between the two legal systems by *discouraging* regulatory action, instead of *encouraging* it, since the soft tools it has at its disposal would fail to support more positive harmonization endeavours.

What demands can civil society invoke in order to lower some of the negative consequences of TTIP's institutional design? First, we should insist that the RCC and sectoral committees have a number of permanent members who possess, for instance, environmental or labour

expertise. Equally, European parliamentarians and US Congressmen/women should be represented in the RCC. Furthermore, an express right to maintain a precautionary approach in Europe should be part of the agreement.

Ultimately, however, if we are already committed to transatlantic market integration, we need to consider changing TTIP's main objective. We should adopt a more holistic objective, which would allow for a balanced development of the common market, taking other normative considerations adequately into account. So, why not, for instance, emphasise the need for sustainable development?

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About Marija Bartl

Marija Bartl is Assistant Professor at the Faculty of Law, University of Amsterdam. Her research focuses on the democratic implications of market integration beyond the state. She was awarded a three year research grant by the Dutch Organization for Scientific Research (NWO) for her project “Bringing Democracy back to Markets: TTIP and the Politics of Knowledge in Postnational Governance”.