

# THE HUFFINGTON POST

## Let's Be Honest about Trade Agreements and Domestic Regulation

Simon Lester

May 3, 2016

The latest leak of documents related to an ongoing trade negotiation, the Transatlantic Trade and Investment Partnership (TTIP), provides an opportunity for an honest assessment of the question of how modern trade agreements affect domestic regulation. The answer is: Somewhere in between the inflammatory language of certain NGOs and the defensiveness of governments.

Let's start with the NGOs and their overheated rhetoric. Friends of the Earth Europe says the TTIP will “wreak havoc on our democracy and the safeguards that protect people and the environment.” Greenpeace gets more specific and tells us that the current TTIP proposals would “rule out regulating the import of CO2 intensive fuels such as oil from Tar Sands.” Also, the TTIP would mean “the end of the precautionary principle.” The Sierra Club argues that the TTIP would “allow dirty fuel corporations to pollute more.”

Turning to the other side, EU Trade Commissioner Cecilia Malmström responded with this firm, but a bit misleading, statement: “It begs to be said, again and again: No EU trade agreement will ever lower our level of protection of consumers, or food safety, or of the environment. Trade agreements will not change our laws on GMOs, or how to produce safe beef, or how to protect the environment.”

So now to explain the middle ground: What impact do trade agreements actually have on domestic regulation? In fact, the impact is fairly wide-ranging, but limited in some important ways.

First of all, any domestic regulation that is protectionist (in intent or effect, depending on your view of the appropriate legal standard) will likely violate trade obligations, subject to various exceptions and carveouts. So protectionist regulations, at least, are not permitted under international trade disciplines.

But this kind of anti-discrimination trade obligation is not particularly controversial. The problem arises when non-protectionist regulations are challenged. Looking across existing and proposed trade agreements, this is possible in a number of instances, including the following:

- Food safety measures may be challenged when they are not based on scientific evidence. Examples here include the EU bans and restrictions on genetically modified foods and meat treated with hormones.
- Product regulations are subject to a requirement that they not be “more trade restrictive than necessary,” which, roughly speaking, looks at the contribution of the measure to its objectives, its trade impact, and whether there are alternative ways to achieve the same goals with less of an impact on trade.
- In the context of investment rules, there are due process-type obligations that allow investors to challenge regulations they consider arbitrary or unfair.
- And most controversially in the TTIP, there are new disciplines being developed to help improve the regulatory process (e.g., making it more transparent and taking into account the trade impact of new regulations) and to promote cooperation between regulators on both sides of the Atlantic.

If some of these obligations seem to intrude greatly into domestic regulatory affairs, that is because they do. However, keep in mind that the rules here are not like domestic law. A domestic court ruling involving constitutional review of a domestic regulation has to be followed. International trade and investment dispute rulings are not enforceable in the same way.

In the case of trade, the government that brings a successful complaint can get authorization to impose trade sanctions on a trading partner who does not comply with the ruling, but no one can make that country comply. (This is what happened in the WTO case against the EU on hormone-treated meat). And in the investment context, a tribunal can order governments whose regulations or other actions violate the rules to pay compensation, but cannot force a change in the measure.

Of course, in many cases, governments do comply by changing their measure, even where the regulation at issue is a politically sensitive one. For example, recent cases of this sort include U.S. measures on country of origin labeling for meat, U.S. rules that protect dolphins during tuna fishing, and EU regulation of products made out of seals.

Importantly, the particularly sensitive TTIP issues of the regulatory process and regulatory cooperation appear unlikely to be subject to strong disciplines. While the rules are still under discussion, it seems clear that the governments recognize the sensitivity of the issue, and so any steps taken here will be modest in terms of enforceability.

So there you have it: The truth of trade agreements’ impact on domestic regulation lies somewhere in between the two sides’ statements. The issue is nuanced and complex, which makes it hard to explain and thus susceptible to inflammatory rhetoric. As with most domestic and international rules, the trade regime could probably stand some tweaks and improvements in this area. One suggestion in this regard is a better balance of input. Some of the NGO complaints seem to focus on the initial demands of industry as to what should be in the agreement. Perhaps a more open process of defining the trade negotiating mandate at the beginning, opening it to all citizens more than is the case now, would lead to a less controversial negotiation later.

*Simon Lester is a trade policy analyst with Cato's Herbert A. Stiefel Center for Trade Policy Studies.*