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Regulatory Convergence – as dangerous as ISDS

One of the central topics of the ongoing negotiations on an EU/US Transatlantic Trade and Investment Partnership (TTIP) is the removal of so called non-tariff measures. The US government has claimed that 85% of efficiency gains and GDP growth are expected from greater regulatory convergence EU and US, as tariffs are on average only 3%.

A lot of the criticism of the EU/US TTIP deal has centered on the ISDS provisions, which allow corporations to sue sovereign governments before ad-hoc arbitration tribunals. But leaked EU TTIP proposals reveal an equally insidious system of regulatory cooperation between the sides that will enable decisions to be made without public oversight or engagement. Business will be involved from the beginning of the secretive process, well before any public debate takes place, and will have excellent opportunities to ditch important initiatives.

Big business groups had been pushing for this corporate dream scenario long before the negotiations began. What they want from regulatory cooperation is to essentially 'co-write legislation' and to establish a permanent EU-US dialogue that will enable them to influence the outcome of new laws, new regulation, and even existing ones and to continue to work towards harmonising standards – long after TTIP has been signed. The agenda is first and foremost about profits – not about securing consumer rights, public health, or any other public policy objective.

Regulatory convergence in TTIP can be broken into three distinct processes:

1. **Mutual recognition** between the two trading blocs of a given set of standards; a US product meeting US standards would automatically be allowed into the EU – even if it does not meet EU standards – and vice versa.
2. **Harmonisation:** After US standards on i.e. pesticides are accepted by the EU for imports, the next step is to get the EU standards down to the same lower level. The pesticide lobby document demands 'significant harmonisation' between US and EU rules in establishing pesticide limits for food and feed products.
3. **Regulatory cooperation:** Under TTIP's chapter on 'regulatory cooperation', any future measure that could lead us towards i.e. a more sustainable food system, could be deemed a 'barrier to trade' and thus rejected before it sees the light of day.

Corporations should be informed of new regulations through an annual report, and be involved through the process of 'early information on planned acts'. Already, at the planning stage, 'the regulating Party' – on the European side, this will be the European Commission, on the US side it will be representatives from the so-called Office of Information on

Regulatory Affairs (OIRA) – must offer business lobbyists an opportunity to 'provide input' which 'shall be taken into account' when finalising the regulation.

So, businesses, at an early stage, can try to block rules intended to prevent, for example, the food industry from marketing foodstuffs with toxic substances or regulations to protect consumers. These would be typical 'non-tariff barriers' (NTBs). New regulations would undergo an 'impact assessment', primarily tilted towards the interests of business and should it go against their interests, the report will have to cite a detrimental impact on transatlantic trade as the rationale.

The EU model gives business many tools that will allow them object to an 'envisaged or planned regulatory act', and even regulations under review. A 'regulatory exchange' must take place if a party is unhappy with the effect of a proposed rule on its trade interests. A dialogue must take place, and the party whose rules are under attack, must co-operate. Business may also propose their own regulations or seek to re-write existing ones.

A Regulatory co-operation Board (RCB) – proposed by the EU – will have the overall responsibility for regulatory co-operation and one of its obligations will be to 'give careful consideration' to businesses proposals on future and existing regulations and legislation.

The RCB must make sure the whole process of convergence between US and EU regulations moves forward, ensuring that rules on harmonisation or 'mutual recognition' are produced and adopted. However, the proposal is not clear on the division of competences between elected bodies – whether parliamentary or governmental – and the RCB itself.

The Commission proposes that, 'the Parties shall endeavour to ensure compliance with this Chapter by authorities at levels of government lower than EU Member State or US State level', i.e. municipalities and regional authorities. This would broaden the scope of regulatory co-operation to affect city planning, public procurement, natural resources, and environmental policies at the local level.

Regulatory co-operation deserves sustained attention from unions and legislators across Europe whose future influence will, be severely limited by regulatory co-operation. The documents known to the public so far tell of negotiators trying to modify decision-making processes to enhance trade and investment with no regard for the consequences for our democratic institutions.

The process is most likely to render ISDS redundant in the long term as business will be able to effectively intervene at the drafting stage of new regulations or legislation, bring forward their own proposals for legislation or regulation and bring forward amending proposals for existing regulations. At the very least, having revealed pending rule changes and 'given careful consideration' to business's response, governments would be susceptible to 'regulatory chill' brought on by the perceived threat of litigation. Of course, this would all go on behind closed doors and on an on-going basis, whereas ISDS will be an infrequent occurrence.