



INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

IILJ Working Paper 2016/5
MegaReg Series

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and constraint in TTIP's regulatory cooperation**

Joana Mendes



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Institute for International Law and Justice
Wilf Hall, 139 MacDougal Street, 3rd Floor
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ISSN: 1552-6275
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New York University School of Law
New York, NY 10012
U.S.A.



Version of 1 June 2016

Cite as:
IILJ Working Paper 2016/5
(MegaReg Series)

PARTICIPATION IN A NEW REGULATORY PARADIGM: COLLABORATION AND
CONSTRAINT IN TTIP'S REGULATORY COOPERATION

Joana Mendes*

1. A classic theme in a new institutional setting

Regulatory cooperation is a core aspect of mega-regional agreements in liberalizing trade and investment, as it enables the parties to bridge their regulatory divergences beyond what is defined in the text of the agreements. It relies on institutional and procedural structures that entail both the mutual adjustment of domestic procedures of the parties and new international fora where regulators meet to negotiate and deliberate. In the case of TTIP, regulatory cooperation will be the setting in which decisions will be prepared or made on the differences between EU and US regulation that could be usefully overcome; on the technical requirements that are unnecessarily duplicated; on the standards that should remain in place because they contend with public policy objectives in a way that would not be compatible with domestic standards; on the areas that are too distinct to justify attempts at mutual recognition or other forms of regulatory compatibility; on the standards that both parties will promote globally.

This paper focuses on participation, which in addition to information exchanges and regulatory impact assessments, forms part of the trio of “good regulatory practices” that constitute the procedural basis of regulatory cooperation under TTIP.¹ The academic discussion on participation in TTIP has revived interest in the comparison between the US notice and comment system and the EU institutional practices of consultation as largely shaped by the European Commission.² From another angle, writings inspired on experimentalist approaches to regulation stress the importance of the involvement of stakeholders in the joint efforts of bridging the regulatory differences and regulatory gaps arising from domestic sector-focused regulation.³ This paper takes a different approach. Building on the potential transformative effects of regulatory cooperation under TTIP, it analyses the Janus-faced nature of participation to shed light on the ambiguity that the label “good regulatory practice” may conceal. The

* Associate Professor EU Law, University of Amsterdam (j.m.mendes@uva.nl). I am grateful to Paul Mertenskötter and Thomas Streinz for a fruitful discussion on some of the arguments made in this paper.

¹ European Commission, Textual proposal on “Good Regulatory Practices” tabled for discussion with the US in the negotiating round of February 2016 and made public on 21 March 2016, *available at* http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf [hereinafter EU Commission, Textual Proposal on Good Regulatory Practices]. Participation (as well as transparency) are also part of the Textual proposal on “Regulatory Cooperation” tabled for discussion with the US in the negotiating round of February 2016 and made public on 21 March 2016, *available at* http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf [hereinafter EU Commission, Textual Proposal on Regulatory Cooperation].

² Richard Parker & Alberto Alemanno, *Towards Effective Regulatory Cooperation under TTIP: Comparative Overview of the EU and US Legislative and Regulatory Systems* (2014), *available at* www.ec.europa.eu/trade/policy/in-focus/ttip/resources/; Reeve T. Bull, *Public Participation and the Transatlantic Trade and Investment Partnership*, 83 GEO. W. L. REV. 1262 (2015). For previous analyses, see Peter Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn From Europe, and Vice Versa*, 12 COLUMBIA J. OF EUROPEAN L. 645 (2006); Francesca Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARVARD INT'L L. J. 451 (1999).

³ Bernard Hoekman, *Trade Agreements and International Regulatory Cooperation in a Supply Chain World*, EUI WORKING PAPER RSCAS 2015/14 [hereinafter Hoekman, *Supply Chain World*].

ambiguity of participation is a classic theme in public law and political science studies.⁴ Nevertheless, the centrality of participation in an innovative scheme of regulation that may have far-reaching substantive and institutional impacts justifies yet another analysis. Depending on how it is designed and enforced, participation may contribute to the entrenchment of the power of regulators that participate in collaborative arrangements which may be detached from domestic constitutional strictures to a significant extent. At the same time, participation may be one means, among others, to constrain the authority of those regulators, by structuring their discretion in view of the public interests that they ought to pursue and protect.

The analysis starts with a basic characterization of regulatory cooperation and of what it may entail. It discusses its ability to affect the legal spheres of those involved in trade of goods and services, as well as on the way diffuse interests are protected (Section 2). Both these effects and the possibility that regulatory cooperation may lead to a new regulatory paradigm justify a critical look at the institutional model of cooperation that is currently being discussed in the TTIP negotiations. A parallel drawn with the EU's comitology system both stresses the normative concerns raised by a system of collaborative decision-making that needs to ensure sufficient conditions of negotiation and effective deliberation among regulators, and points to the possibilities of closure of the system (Section 3). Opportunities of participation – a core aspect of this institutional model – could *prima facie* deny or counter this possibility of closure (Section 4). Yet, such an effect will depend on the functions that participation is designed to fulfill, and on the way in which it will be practiced and enforced. Against this background, the paper contrasts the functional-instrumental perspective on participation endorsed in the textual proposals of the Commission on the TTIP's chapters on regulatory cooperation and good regulatory practices with a political-legal perspective on participation. Quite apart from those who stress the importance of procedural design as a “precondition for realizing more substantial economic gains”,⁵ the paper claims that procedures of regulatory cooperation ought to be a means to ensure inclusiveness, equal access and public scrutiny, which the democratic conceptions of authority shared within the state would postulate.⁶ If approached in this way, participation may become a catalyst that facilitates a representation of the distributional effects of the outcomes of regulatory cooperation and gives voice to the affected interests that are protected by the legal orders which regulatory cooperation mobilizes. Participation could be a procedural element that would bind the authority of regulators to a composite legal framework, where the

⁴ Among many others, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (for the US); DE-MYSTIFICATION OF PARTICIPATORY DEMOCRACY: EU GOVERNANCE AND CIVIL SOCIETY (B. Kohler Koch & C. Quittkat, eds, 2013) (for the EU); Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 109 AM. J. INT'L L. 211 (2014) [hereinafter Stewart, *Remedying Disregard*] (for global governance).

⁵ Bernard Hoekman, *Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization*, 18 J. OF INT'L ECON. L. 609 (2015), at 611.

⁶ On this premise, see Stewart, *Remedying Disregard*, *supra* note 4, at 212. See also, Ernst-Ulrich Petersmann, *Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*, 18 J. OF INT'L ECON. L. 579 at 586 (stressing the principles stated in Article 21(1) TEU).

legal orders of the parties are intertwined in an overarching legal structure set by the international agreement. There are considerable challenges to concretizing this political-legal approach to participation (Section 5). However, the potential transformative effects of regulatory cooperation, both in substantive and institutional terms, justify approaching participation as one means (among others) to constrain and structure the way authority is exercised via regulatory cooperation (Section 6). Regulatory cooperation under TTIP is the focus of the analysis. The arguments defended in this paper may nevertheless be pertinent in relation to other mega-regional agreements.⁷

2. Regulatory cooperation, substantive effects and a new paradigm of regulation

Regulatory cooperation encompasses various mechanisms through which two or more parties debate their divergences to align their regulatory requirements as far as feasible and desirable. In the context of mega-regional agreements, it deals with technical requirements that may create potentially protectionist barriers to trade. Yet, technical specifications set out in domestic rules also reflect the regulatory preferences prevalent in each jurisdiction. They are decided via decision-making procedures that channel those preferences and they are adopted insofar as they are deemed compatible with the respective political-legal framework. Moreover, regulatory cooperation has at least the ability to re-define the conditions in which goods are traded and services are provided, irrespective of its forms and of whether it may lead to weaker or stronger standards of protection of public goods.⁸ The outcomes of regulatory cooperation may directly determine or influence the conditions of trade of goods and services. Changing those conditions, via the approximation of legal requirements, is the very purpose of regulatory cooperation within the framework of mega-regional agreements. To the extent that they are successful, the outcomes of such efforts affect the legal spheres of those involved in the respective trade chains (providers, intermediaries, consumers) and the conditions under which domestic regulators may protect public goods or facilitate their provision.

Regulatory cooperation implies various degrees of approximation of the legal regimes involved, in a spectrum that ranges from a mere dialogue between regulators on their respective systems, on methodologies and techniques of regulation and supervision and enforcement, to harmonization.⁹ The

⁷ On international regulatory cooperation more broadly, see Reeve Bull et al., *New Approaches to International Regulatory Cooperation: the Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 LAW & CONTEMP. PROBS. 1 (2015), at 8-12.

⁸ On the discussion on the level of protection, see, e.g., Don Elliot & Jacques Pelkmans, *Greater TTIP Ambition in Chemicals: Why and How*, CEPS-CTR project “TTIP in the Balance”, Paper No. 10 (2015); Simon Lester & Inu Barbee, *The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership*, 16 J. OF INT’L ECON. L 847 (2013), at 859 (who argue that the goal of establishing more compatible regulation is independent of weaker or stronger standards). See, also, EU Commission’s Textual Proposal on Good Regulatory Practices, Article x1(2), which, by contrast to the Commission’s previous proposals, stresses the aim of improving the level of protection of public goods.

⁹ On the various degrees and forms of regulatory cooperation, see Bull et al., *supra* note 7, at 10-12; Peter Chase & Jacques Pelkmans, *This time it’s different: Turbo-charging regulatory cooperation in TTIP*, CEPS-CTR project “TTIP in the Balance”, Paper No. 7 (2015), at. 2-5.

Commission's textual proposals on regulatory cooperation and good regulatory practices in TTIP cover this spectrum. Thus, the Commission proposes duties of cooperation prior to specific regulatory process (e.g. on research) and exchanges on various aspects of their respective practices of assessing impacts on international trade and investment and conducting retrospective evaluations.¹⁰ The Commission foresees specific duties of information exchange and indicates possible forms of promoting regulatory compatibility, including "mutual recognition of equivalence" of regulatory measures and harmonization.¹¹ The different forms that regulatory cooperation may take are not self-contained. While the more demanding and difficult stage of harmonization may never be reached, the process set in motion by regulatory cooperation in TTIP is intended to be of a "living nature" progressively leading to deeper forms of regulatory cooperation and, potentially, convergence.¹² In this respect, even if the focus of regulatory cooperation may be on differences in standards and duplicative compliance requirements and *not* on domestic regulatory reform, it seems unlikely that, at least in the long run, regulatory cooperation will not re-define, to a minor or greater extent, the substantive requirements for the trading of goods and services in each jurisdiction.¹³ In addition to the substantive modification that may result from regulatory cooperation, the Commission's textual proposal on good regulatory practices envisages procedural duties of both parties that would not only favor some degree of structural comparability between their domestic procedures (based on existing practices) but also set the foundations of regulatory cooperation activities (e.g. mutual recognition). Public information, stakeholder consultations, impact assessments and retrospective evaluations would serve both purposes.¹⁴

In substantive terms, different degrees of regulatory divergences determine what cooperation may entail. Among other possibilities, it may lead to overcoming what are arguably minor differences not justified by the underlying policy objectives (e.g. the color of the neutral wire in electric circuits);¹⁵ to the recognition that different technical standards (maintained by each party) are equivalent in fulfilling the desired outcomes or public policy objectives, thereby avoiding duplicative tests and certification

¹⁰ Respectively, EU Commission's Textual Proposal on Regulatory Cooperation, Article x5(4) and EU Commission's Textual Proposal on Good Regulatory Practices, Articles 8(6) and 9(2).

¹¹ EU Commission's Textual Proposal on Regulatory Cooperation, Article x5(1) 10(1).

¹² European Commission, *Note for the Attention of the Trade Policy Committee: Transatlantic Trade and Investment Partnership*, DG Trade, Unit E1, 20 June 2013.

¹³ Possibly for this reason, some argue that trade agreements are not the right place for regulatory cooperation, *see* Lester & Barbee, *supra* note 8, at 859ff.

¹⁴ *See*, EU Commission's Textual Proposal, Article 5 (early information), Article 6 (duty to consult); Article 7(2) (by which the parties "reaffirm their intention to carry out impact assessments", but which also includes specific steps in conducting impact assessments that each Party "shall" incorporate in their domestic procedures.)

¹⁵ *See*, Carl Martin Welcker, *Why it's so difficult for my company to sell to the US – and how TTIP could change all that*, 19 February 2016, EurActiv, available at <https://www.euractiv.com/section/all/opinion/publish-on-friday-why-its-so-difficult-for-my-company-to-sell-to-the-us-and-how-ttip-could-change-all-that>.

requirements; or to the acknowledgment that regulatory regimes, cultures and preferences are simply too divergent to engage in regulatory cooperation beyond the mere exchange of information and learning.¹⁶

It follows that the extent to which the outcomes of regulatory cooperation may impact on the legal spheres of those concerned may differ significantly, depending on the level of regulatory cooperation achieved in each instance (as will their impact on the regulatory preferences that prevail in each jurisdiction). This caveat notwithstanding, insofar as regulatory cooperation may ultimately reduce the technical barriers to global trade chains, it will have distributional effects. It will potentially create advantageous positions for some – e.g. the European producers of car components, their suppliers, the workers of such companies, the safety and health of consumers if protection is thereby increased – and disadvantageous positions for others – e.g. other suppliers of car components and raw materials, their workers, the safety and health of consumers if protection is thereby decreased.

Regulatory cooperation either facilitates or determines outcomes directed at changing the behavior of market operators and, in doing so, it may change the conditions under which diffuse interests are protected. It facilitates such outcomes via the exchange of information on the regulatory systems of each party, on their substantive rules and methodologies of regulation, and via the establishment of common procedural rules. It determines such outcomes if, for instance, it leads to the recognition of equivalence of the technical requirements. Such an assessment implies also a value judgment on the equivalence of the normative standards that grounded those technical requirements (e.g. to what extent do give technical specifications enable a suitable level of health protection?), as well as of the mechanisms of enforcement of each party.¹⁷ Regulatory cooperation may also evolve to modify the standards that each jurisdiction applies. While the current Commission's proposal on regulatory cooperation specifies that such modification "shall aim at improving" the level of protection of public policy objectives, it is critical to assess the mechanisms that would be available to enforce possible breaches of this general requirement.

Regulatory cooperation under mega-regional agreements may have additional far-reaching political, socio-economic and legal effects. It may generate a new paradigm of regulation in which regulation would be adjusted to the reality of global trade chains.¹⁸ Such model would overcome the regulatory segmentation typical of domestic settings and of the special-purpose global regulatory regimes that have emerged so far. Segmentation is pointed out as a cause of possibly unjustified obstacles to trade and investment and of coordination failures that generate health and consumer risks. For those who stress the disadvantages of segmentation, both the liberalization of trade and investment and the protection of public goods throughout the global trade chains could justify such a transition. Institutional and

¹⁶ On the benefits of learning through regulatory divergences, see Jonathan Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory*, 78 *LAW & CONTEMP. PROBS.* 103 (2015).

¹⁷ Hoekman, *Supply Chain World*, *supra* note 3, at 4-5.

¹⁸ *Ibid.*, at 6.

procedural design is core to this transformation. The following section will sketch the main lines of the TTIP's model of regulatory cooperation, as reflected in the Commission's textual proposal.

3. Institutional model: collaborative decision-making among regulators

Regulatory cooperation under TTIP is likely to rely on sectorial fora where regulators from the two jurisdictions meet or exchange information under the coordination and supervision of a central regulatory body.¹⁹ Whether the form is bilateral exchanges on regulatory objectives and approaches or more concrete initiatives leading to the examination of regulatory compatibility, regulatory authorities of both Parties will be defining what may or may not be reached via regulatory cooperation.²⁰ The European Commission, on the EU side, and any federal rulemaking authority, on the side of the US,²¹ will be deciding which technical requirements are unnecessarily duplicated, and how health safety and other public policy goals would remain compatible with domestic standards. One could say that they continue at the international level the functions that they carry out internally. The Commission stresses that by maintaining the regulatory authorities of each party responsible for cooperation, by establishing basic duties of information exchanges and non-mandatory initiatives for regulatory compatibility, these new functions of regulatory authorities remain within their respective constitutional structures. Protecting "regulators' autonomy" and maintaining cooperation in their hands is the option preferred by the Commission to avoid constitutional questions. Yet, even in this case, and depending on how the TTIP provisions will be implemented, it is likely that regulatory cooperation will strengthen the position of the domestic executive institutions and bodies at the central level (to use the terminology of the Commission's proposal), which may raise concerns regarding the adequacy of internal accountability mechanisms.

At any rate, the assumption is that regular and recurring exchanges between regulatory authorities fosters learning on their respective approaches and raises awareness to the possible trade implications of their regulatory requirements, thus overcoming the mutual lack of information and the mandate-based limitations of regulatory action (e.g. health, environment, etc.), in a way that would ultimately lead to breaking down existing barriers to trade.²² In one interpretation, the model should be one of

¹⁹ This was the structure delineated in a previous proposal on regulatory cooperation (Textual proposal on regulatory cooperation tabled for discussion with the US in the negotiating round of April 2015 and made public on 4 May 2015 *available at* http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf). While the specific institutional set up of regulatory cooperation under TTIP is still unclear, the Commission maintains that a "coordination structure" should be set up to oversee compliance with the rules on regulatory cooperation and facilitate its application. *See*, EU Commission's Textual Proposal on Regulatory Cooperation, Annex (placeholder for provisions on the institutional set up for regulatory cooperation under TTIP). TPP and CETA have a similar basic structure. *See*, Trans Pacific Partnership (signed on 4 February 2016), Chapter 25, *available at* <https://www.tpp.mfat.govt.nz/text> [hereinafter TPP]; Comprehensive Economic and Trade Agreement, *available at* http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [hereinafter CETA], Chapter 21.

²⁰ *See*, EU Commission's Textual Proposal on Regulatory Cooperation, Articles x3(1)(b), x4(1) and (2) and x5(1).

²¹ *See*, EU Commission's Textual Proposal on Regulatory Cooperation, Articles x2(a).

²² Hoekman, Supply Chain World, *supra* note 3, at 2-3 (stressing that "regulators generally do not think about the trade implications of what they do, but they are the owners of many of the policies that affect trade opportunities").

experimentalist governance, which in the view of its proponents has the flexibility that the technical and dynamic character of regulation requires.²³ Trust among regulators is largely seen to be a precondition of regulatory cooperation.²⁴ While not explicitly mentioned in the current Commission's textual proposal on TTIP, it is named as one of the objectives of regulatory cooperation in the CETA agreement and it appears in one of the official explanatory texts as one of the rationales of good regulatory practices.²⁵ In TTIP, good regulatory practices – transparency, participation, impact assessments and retrospective evaluations – are a means of generating such trust (among other functions they also fulfill). As trust is built, it will create the basis for regulator-to-regulator agreements that bring further the liberalization preconized by TTIP, beyond its written provisions.²⁶ It will be the basis to establish the “common interest”, which the Commission's proposal indicates as a condition to engage in cooperation regarding aspects not ruled by TTIP, while still falling within its areas or sectors that the agreement covers.²⁷

This model of collaborative decision-making among peers, dependent on the progressive building of trust as regulators get acquainted with the regulatory system of the other Party, bears resemblances with practices of cooperation between regulators that have preceded mega-regional agreements.²⁸ The establishment of a central coordinating and supervisory body – a distinguishing feature of mega-regional agreements – does not break with, rather emphasizes, a model in which decision-making is in the hands of regulators. A parallel may be drawn with the committee structures that have underpinned the regulation of the internal market in the EU. A brief overview of some similarities and differences highlights the distinctive features of the regulatory structures that may emerge by force of TTIP and the normative concerns they entail.

3.1. Legal-institutional embeddedness

Comitology committees have enabled since the outset of integration “a dialogue at the administrative level between European and national civil servants”.²⁹ Formally conceived as mechanisms that enable representatives of Member States' administrations to control the Commission's implementing powers (being thus at the core of institutional balance and struggles), these structures have been pivotal to

²³ Hoekman, Supply Chain World, *supra* note 3, at 5.

²⁴ Elliot & Pelkmans, *supra* note 8, at 12.

²⁵ CETA, *supra* note 17, Article 21.3 (“build trust, deepen mutual understanding of regulatory governance and obtain from each other the benefit of expertise and perspectives...”). EU Commission, Good Regulatory Practices (GRPs) in TTIP. An Introduction to the EU's revised proposal, 21 March 2016 (available at http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154381.pdf), p. 2.

²⁶ Chase & Pelkmans, *supra* note 9, at 12.

²⁷ See, EU Commission's Textual Proposal on Regulatory Cooperation, Article x3(1)(b).

²⁸ See Debra P. Steger, *Institutions for regulatory cooperation in 'new generation' economic and trade agreements*, 39 LEGAL ISSUES OF ECON. INTEGRATION 109 (2012). Specifically, on previous practices of regulatory cooperation between the Commission and the US see, e.g., George Bermann, *Regulatory Cooperation Between The European Commission And U.S. Administrative Agencies*, 9 ADMIN. L. J. 933 (1996).

²⁹ Emile Noël, *Comment fonctionnent les institutions de la Communauté Economique Européenne*, 6 REVUE DU MARCHÉ COMMUN 14 (1973), at 20 (my translation).

the pooling of expertise and the mutual accommodation of the positions of national administrations. Throughout integration, they have functioned as “working [groups] [where] colleagues of different nationalities, representing different administrative traditions, meet in the spirit of mutual respect to agree on common solutions to their problems”.³⁰ While often assumed to take decisions purely on the basis of technical and scientific expertise, research on comitology committees has pointed out the possible distributive effects of the outcomes they define as well as the socialization of their members in defining problems and shared approaches in a way that may impact on the preferences of their governments.³¹

Comitology has been criticized for embodying power structures that subvert the formal settings that would guarantee equal representation of governments’ preferences, as well as for lack of transparency and of accountability mechanisms that would be commensurate to the actual policy discretion of committees.³² A lot has changed since the first calls for law to ensure that the common market would be responsive to broader normative concerns and that decision-making within committees would be transparent and accountable, notwithstanding the remaining shortcomings.³³ The embeddedness of comitology in an institutional system composed also of representative institutions (the European Parliament and the Council) and of a court created the conditions to progressively adjust an administrative arrangement, which had been born out of functional necessity without much consideration to the impact it could have on existing institutional balances and guarantees. Comitology committees are subject to highly formalized procedures, to legal duties of proactive transparency, and to oversight by representative institutions.³⁴ Irrespective of the criticisms one may direct at the effectiveness of control by the Parliament and at the interventions of the Court, the presence of these two institutions leaves the door open to institutional scrutiny and contestation of their powers. Accountability links to their national governments (which also have important weaknesses) add to parliamentary and judicial oversight.³⁵ In addition, comitology committees are part of a legal-institutional system that, having evolved out of a project of market integration, is founded on democratic principles (Articles 9-12 TEU) and on constitutional values

³⁰ Carl F. Bergström, *COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM* (2005), at 32.

³¹ Jürgen Neyer, *The Comitology Challenge to Analytical Integration Theory*, in *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* (C. Joerges and E. Vos, eds., 1999), at 226-8.

³² On the insufficiencies of transparency, though referring to data of 2006, see Gijs Jan Brandsma, et al, *How transparent are EU ‘Comitology’ committees in practice?*, 14 *EUROPEAN L. J.* 819 (2008). On the improvements on accountability, see, e.g. Christine Neuhold, *Taming the ‘Trojan Horse’ of Comitology? Accountability issues of Comitology and the Role of the European Parliament*, *EUROPEAN INTEGRATION ONLINE PAPERS* 12 (2008), available at <http://ciop.or.at/ciop/pdf/2008-001.pdf>. (stressing the multi-level gaps of accountability), see Gijs Jan Brandsma, *Accounting for input in comitology committees: an uncomfortable silence*, 17 *JOURNAL OF EUROPEAN PUBLIC POLICY* 487 (2010).

³³ An influential example of such initial calls is the work led by Christian Joerges. See, e.g., Christian Joerges, *Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance*, in *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS* (C. Joerges and E. Vos, eds., 1999), at 16. On transparency and accountability, see references cited in the footnote above.

³⁴ Thomas Christiansen & Mathias Dobbels, *Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts*, 19 *EUROPEAN LAW JOURNAL* 42 (2013); Neuhold, *supra* note 29; Brandsma, *supra* note 32.

³⁵ On the latter, see *ibid.*

(Article 2 TEU). These principles and values provide a normative yardstick of authority exercised via EU decision-making structures and outcomes in line with the constitutional traditions of Member States.³⁶

Transatlantic regulatory cooperation, by contrast, will be bound primarily by the provisions of an international agreement that, becoming in the EU an integral part of its legal order, defines a framework for the liberalization of trade and investment, even if heedful of other public policy objectives.³⁷ As mentioned, in the current design the authority exercised via the outcomes of regulatory cooperation is largely in the hands of executive actors, sitting in working groups and in an overseeing central regulatory body. The reasons why executive actors are functionally suited to exercise the powers TTIP attributes them are well known, largely grounded on their functional expertise. Admittedly, the extent to which they will be constrained by internal constitutional strictures will largely depend on how the TTIP provisions on regulatory cooperation will be implemented. Yet, in a scenario in which they would act in a legal-institutional setting where parliaments and courts would be deferent to the choices made in such fora, regulators would operate in a closed system (even if accountable to their peers), possibly disconnected from the domestic institutional frameworks that bind their action to democratic principles and constitutional values.³⁸ Such a result would be normatively problematic in the constitutional systems of the parties.³⁹

At the time of the writing, it is still uncertain in which terms the outcomes of regulatory cooperation will be subject to parliamentary oversight and judicial review. The Commission's proposal shows commitment to political accountability to legislators, stressing the importance of ensuring their "proper" involvement. Yet, for now, the involvement of parliaments in regulatory cooperation remains a placeholder in the Commission's textual proposal.⁴⁰ The details are unknown. The way these legal-institutional links will be defined and implemented will arguably be decisive to the more or less closed nature of the system and to the establishment of avenues of scrutiny and contestation. The jurisdiction of domestic courts will depend on how and in which form decisions on regulatory cooperation will be made, and on clauses that may condition standing (e.g. provisions precluding direct effect). The Commission's proposal of 2016 indicates that the regulatory authorities of both Parties will be adopting the legal

³⁶ Even the Member States that now explicitly deviate from such traditions have signed the Lisbon Treaty where democratic principles and constitutional values are enshrined.

³⁷ See, EU Commission's Textual Proposal on Regulatory Cooperation, Article x1. The objectives and general principles stated in this provision are drafted in broader terms than those that had been indicated in the previous Commission's textual proposal and seek to emphasize the pursuance of public policy objectives to the benefit of citizens and corporate persons (see Article x1(1)(a)(b)), contrasting with previous versions of the Commission (compare with Article 1(a) of the Textual proposal on regulatory cooperation of April 2015, *supra* note 19).

³⁸ On the composite legal framework that could partially avert this effect, see Section 5 below.

³⁹ On the constitutional limits of regulatory cooperation from a EU perspective, see Anne Meuwese, *Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective*, 78 LAW & CONTEMP. PROBS. 153 (2015).

⁴⁰ See, EU Commission's Textual Proposal on Regulatory Cooperation, Annex.

outcomes of regulatory cooperation.⁴¹ Formally, this would raise little normative concerns. Their acts would be subject to judicial review according to the rules of the domestic legal systems.⁴² Nevertheless, apart from possible standing restrictions, the question is how far reviewing courts may go in scrutinizing decisions of domestic institutions and bodies, the substance of which is defined via international regulatory exchanges that may not be formalized. Answers will in part depend on how the institutional framework will be set up. At any rate, the suggestion that judicial review could be disruptive of regulatory cooperation (because formal litigation could engender the resistance of regulators, subvert the dialogue between regulators that fosters “trust and learning” and, hence, compromise the basis of regulatory cooperation) could not possibly lead, on constitutional grounds, to restrictions in judicial review.⁴³ In a scenario in which there would be obstacles to effective judicial review, and depending on how political accountability will be designed, functional needs of cooperation could lead to a virtually closed system of decision-making.

3.2. Inclusiveness, equality and public scrutiny

Irrespective of whether the conditions could be there to give rise to a “deliberative supranationalism” of sorts that would be effective in transcending protectionist interests while engaging participants in a transatlantic deliberative process, the putative democratic connotations of such process would not obviate problems of inclusiveness, equality and public scrutiny.⁴⁴ Socialization within such working groups may impact on the range of competing interests considered in the dialogue, potentially trumping public interests that, by legal determination, ought to be duly regarded and protected. Interests voiced in consultation procedures may be dismissed as irrelevant if they do not align with the prevailing views of the regulators involved (notwithstanding commitments to take all input into account). The assumption often made that regulatory equivalence that may be reached via cooperation is just a matter of checking technical differences in regulation – an assumption which regulators involved are likely to share – may in itself ignore the possibility of distributional effects stemming from decisions of equivalence and strengthen situations of “structural disregard”.⁴⁵

⁴¹ *See*, EU Commission’s Textual Proposal on Regulatory Cooperation, Article x5(1) states that they will “conduct” “cooperation activities” leading to regulatory compatibility and the proposal indicates at other points the intention to keep decision-making with the domestic regulatory authorities (see in particular p. 10).

⁴² Dispute settlement is explicitly excluded (*See*, EU Commission’s Textual Proposal on Regulatory Cooperation, Article x9 and EU Commission’s Textual Proposal on Good Regulatory Practices, Article 11), as it has also been excluded from matters arising under the TPP’s chapter on regulatory coherence (TPP, *supra* note 18, Article 25.11).

⁴³ On that argument, see Hoekman, Supply Chain World, *supra* note 3, at 15.

⁴⁴ On deliberative supranationalism, *see* Christian Joerges & Jürgen Neyer, *From intergovernmental bargaining to deliberative political processes: the constitutionalisation of comitology*, 3 EUROPEAN LAW JOURNAL 273 (1999). For a critique touching on some of these issues, *see* Joseph Weiler, *Comitology’ as a Revolution – Infranationalism, Constitutionalism and Democracy*, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS (C. Joerges and E. Vos, eds., 1999) at 348-9.

⁴⁵ Stewart, *Remedying Disregard*, *supra* note 4, at 213 & 223 (indicating that structural disregard may be justified insofar as specialized agencies are not required to consider all interests possibly concerned by their decisions.)

The “good regulatory practices” that are part of the model of regulatory cooperation proposed by the successive textual proposals of the Commission could obviate the possible closure of the system that would result from the institutional embeddedness of regulatory cooperation. They may not suffice to ensure inclusiveness and equality of access and treatment, but they could ensure transparency and openness to public input.⁴⁶ In the Commission’s textual proposal, each party would have the duty to make a list of planned acts publicly available and provide related information.⁴⁷ They would need to “offer a *reasonable opportunity* for any natural or legal person on a *non-discriminatory basis* to provide input”, allow opportunities for interested parties to assess how they may be affected, and “consider the contributions received”.⁴⁸ In addition, the parties would “affirm [their] intention” to carry out impact assessments, whose findings would be made public available (as would be the results of retrospective evaluations).⁴⁹

These procedural duties and commitment (in the case of impact assessments) apply domestically. They apply to *any regulatory act* adopted at the central level (i.e. EU legislative proposals and non-legislative acts covered by Articles 290 and 291 TFEU; US draft bills and agencies rules as defined in Article 2 of the Commission’s proposal) “in respect to any matter covered by [TTIP]”. They would apply irrespective of actual instances of regulatory cooperation *stricto sensu*, i.e. of irrespective of regulatory cooperation activities or initiatives.⁵⁰ Building on practices that are, at a general level, common to the EU and the US, they are the basis to establishing trust among regulators, insofar as they graft common duties in their domestic decision-making and possibly lead them to adopt common methodologies to assess impacts and to collect data.⁵¹ The Commission’s proposal provides a basis for mutual adjustment of existing practices. In the case of the EU, upon signature and ratification of TTIP, they would make binding institutional practices that the Commission has thus far refused to formalize via a legislative act. In this case, an international trade agreement would enshrine in formal law the way the Commission has shaped rulemaking procedures, instead of a legislative act which, in view of the constitutional provisions of the Treaty on democracy, arguably should shape rulemaking in a way that would align institutional practices with minimum normative requirements of democratic procedures.⁵²

⁴⁶ See further *infra* Section 4.

⁴⁷ EU Commission’s Textual Proposal on Good Regulatory Practices, Article 5.

⁴⁸ EU Commission’s Textual Proposal on Good Regulatory Practices, Article 6, emphasis added.

⁴⁹ The terms in which impact assessments would be carried out are specified in Article 8. On retrospective evaluations, see Article 9.

⁵⁰ Regulatory cooperation *stricto sensu* includes the regulatory cooperation activities envisaged in the Commission’s Textual Proposal on Regulatory Cooperation, in particular in Articles x4 and x5 (e.g. mutual recognition).

⁵¹ As the Commission puts it “adhering to [good regulatory practices] can help create a better understanding and trust in trading partners’ respective regulatory systems” (An Introduction to the EU’s revised proposal, *supra* note 25, p. 2).

⁵² It should be noted that the European Parliament has excluded rulemaking from a possible law on the EU administrative procedure, mostly on legal basis grounds, but also in accordance with the Inter-institutional agreement on better law-making. See Proposal for a Regulation of the European Parliament and of the Council on the Administrative Procedure of the European Union’s institutions, bodies, offices and agencies, discussed at the Hearing of the Committee on Legal Affairs (28 January 2016), available at <http://www.europarl.europa.eu/committees/en/juri/events.html;jsessionid=D97214D54ADC0B228E1A40245611>

The rules on transparency and participation that apply to decision-making in the international fora of regulatory cooperation (working groups and, possibly, regulatory cooperation body) are defined elsewhere, in the textual proposal on regulatory cooperation.⁵³ The indication that regulatory cooperation activities will be carried out transparently and will be open to public input is a novelty of the text made public in March 2016. The earlier proposals on regulatory cooperation did not specify procedural duties at this level of decision-making.⁵⁴ How effective the procedural rules applied domestically and internationally may be in opening regulatory cooperation to scrutiny and public input will depend on how they will be implemented and enforced, and also on the intricate vertical and circular relations between domestic and global regulatory decision-making.⁵⁵ The Commission's textual proposal on regulatory cooperation is, at the time of the writing, silent on the articulation between decisions possibly adopted by working groups and high-level political bodies established by TTIP (even if only of advisory nature, as indicated in the section on the institutional structure), on the one hand, and the decisions adopted by regulatory authorities domestically in implementation of regulatory cooperation, on the other.⁵⁶

Despite the openness that participation seems to bring into procedures of regulatory cooperation, as now envisaged, a normative assessment of the qualities of participation in regulatory cooperation requires further reflection. As will be argued below, the role of participation is ambiguous and it would be unwise to assume too promptly that the system delineated in the Commission's proposals ensures due consideration of divergent voices.

4. Participation: entrenching power or constraining authority?

4.1. A functional-instrumental perspective on participation

Participation is a core feature of the model of regulatory cooperation because it is a governance tool at the service of the functional needs of regulatory cooperation. The involvement of the so-called

[8936.node2?id=20160128CHE00181](#)); see also point 30 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123/1, 12.5.2016), albeit restricted to implementing acts). On the possible influence of TTIP on the way non-legislative procedures have been regulated in the better regulation agenda, see *infra* note 56 below. On the different meanings of participation, see section 4 below.

⁵³ See Section 4 below, in particular Sub-sections 4.1. and 4.2.

⁵⁴ Commission's Textual Proposal on Regulatory Cooperation, Article x6. On the possibilities of participation that would give access at this level and their assessment, see *infra* Section 4.2.

⁵⁵ See Richard Stewart, *The Global Regulatory Challenge to US Administrative Law*, 37 NYU J. OF INT'L L & POL. 695(2005); Joana Mendes, *EU law and global regulatory regimes: hollowing out procedural standards?*, 10 INT'L J. OF CON. L. 988 (2012) (for the EU).

⁵⁶ What is nevertheless clear is the ability of those provisions to change the domestic procedural rules. A binding duty of consultation has been for a long time absent in the EU legal system, not least due to the resistances of the Commission. This absence was mostly felt at the level of non-legislative rulemaking procedures, where impact assessments (and the ancillary consultation) were rare. Impact assessments (and consultations) in those cases have been now explicitly included in the scope of impact assessment procedures since May 2015, arguably as a way to accommodate EU internal procedures to the possible future requirements of TTIP. This change has been sanctioned in the Inter-institutional agreement on better law-making (point 13).

stakeholders is essential to the success of regulatory cooperation: it is a means of strengthening the evidence basis of the outcomes of cooperation and of ensuring their validation. In technically complex, uncertain and fast-changing environments, regulators may lack the necessary resources to identify the instances where regulatory divergences entail unjustified obstacles to trade and to satisfactorily address the problems that emerge from domestically defined regulatory requirements. Participation of “stakeholders” in decision-making is particularly relevant in a scenario in which regulation would move away from the sector specific basis that has prevailed hitherto and would adopt the perspective of the global trade chains. By contrast to market operators, regulators often lack this perspective.⁵⁷ Participation generates information on how the cumulative effect of different regulations may impact on international trade and investment and generate gaps. It fosters a collaborative process of data and evidence collection, which has a three-fold function: it creates trust and mutual understanding between regulators from different jurisdictions; it provides a basis for the external justification of their decisions; it allows the fine-tuning of regulatory responses to uncertain and fast-changing realities in an experimentalist fashion. For these reasons, the involvement of the regulated industries is considered crucial to the success of the regulatory cooperation efforts, to the point that it may evolve into a “public-private partnership” model of decision-making.⁵⁸

The successive Commission’s textual proposals on regulatory cooperation reflect this functional perspective on participation. Consultation is one of the “good regulatory practices” that the parties should follow domestically, when preparing their regulatory acts. Its main function is arguably to facilitate mutual trust in the parties’ respective decision-making systems, and to open their procedures to input from the companies, associations and citizens of either party and of third parties. That participation will be “non-discriminatory” is important for this reason, apart from the normative connotation of equal access.⁵⁹ Consultation as an instrument of better regulation is the prevailing approach to participation in rulemaking in the EU. Participation in TTIP, as proposed in the text of the Commission, has been largely conceived as a continuation of the Commission’s practices. Arguably, the main concern underlying such procedures is to “target the evidence needed to make sound decisions”.⁶⁰ From this perspective, participation is mainly valued in its ability to enhance problem-solving capacities, process efficiency and policy outcomes. Even if it may also contribute to opening decision-making procedures to the input of

⁵⁷ Hoekman, Supply Chain World, *supra* note 3, at 5-6. Referring to CETA, he considers that “(e)ngagement with stakeholders is arguably critical and should be given stronger institutional foundations” (criticizing the “may” in the provision on consultation of stakeholders, *ibid.*, at 9).

⁵⁸ Hoekman, Supply Chain World, *supra* note 3, at 12-13. Hoekman suggests the establishment of knowledge platforms, as a better alternative to public consultations (*ibid.*, at 10).

⁵⁹ On the instrumental reasons of “good regulatory practices”, including participation, see Commission, An Introduction to the EU’s revised proposal, *supra* note 25, p. 2. The emphasis on non-discrimination between “any” interested natural or legal person would seem to enable also the participation of third parties (Article 6 of the Commission’s Textual Proposal on Good Regulatory Practices).

⁶⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Better regulation for better results – An EU Agenda”, COM(2015) 215 final, Strasbourg, 19.5.2015, point 2.1.

interested parties, it is a means to ask “the right people... the right questions about the right initiatives, so as to feed into Commission decision-making in an efficient manner”.⁶¹ Participation is also a means to assess the willingness of interested persons to comply with the regulatory proposals on which they give input – in the words of the Commission, to “ensure *broadest public validation and support* for an initiative”.⁶² Moreover, they also enable the Commission to strengthen its position vis-à-vis the Parliament and the Member States.⁶³

Another opportunity of participation that TTIP would introduce at the domestic level is worth mentioning. Interested persons would be able to suggest improvements to existing regulatory frameworks (e.g. on their ability to achieve the purported public policy objectives) or possibilities of “simplification or burden reduction”.⁶⁴ The parties would be legally bound to provide such opportunities, seemingly outside specific consultation procedures. Arguably, this duty emphasizes the collaborative model of decision-making that the provisions on regulatory cooperation in TTIP convey

The access points that the parties would need to provide are not limited to domestic regulation, the Commission having proposed input opportunities also in the transatlantic phase of regulatory cooperation. Participation as collaboration by interested parties is also visible here (though other forms of input transcend a purely functional-instrumental rationale, as will be seen in more detail below).⁶⁵ Thus, the possibility that natural or legal persons would submit initiatives for regulatory co-operation, including proposals for regulatory compatibility, to the parties would be mainly geared towards optimizing decision-making in the sense indicated above, thereby “[improving] the regulatory environment”.⁶⁶ Upon assessment by both parties, the initiative may be incorporated in the Annual Regulatory Co-operation Program. No further details or requirements on procedural guarantees of equality of access and treatment are specified in this respect, leaving significant leeway (at present) to the parties on how to regulate this possibility. Only a footnote indicates a commitment to avoid privileged treatment.⁶⁷ The section below will consider in more detail how participation conceived as a means of collaboration differs from participation as a means to voice and ensure the procedural protection of legally protected interests that

⁶¹ Commission Staff Working Document, *Review of the Commission Consultation Policy*, SWD(2012) 422 final, Strasbourg, 12 October 2012, at 10.

⁶² Better Regulation 2015, p. 76, emphasis added.

⁶³ Beate Kohler Koch, *Civil Society and Democracy in the EU. High Expectations under Empirical Scrutiny, DEMYSTIFICATION OF PARTICIPATORY DEMOCRACY: EU GOVERNANCE AND CIVIL SOCIETY* (B. Kohler Koch & C. Quittkat, eds, 2013), at 11.

⁶⁴ Commission’s Textual Proposal on Good Regulatory Practices, Article 7.

⁶⁵ The three access points are foreseen in the Commission’s Textual Proposal on Regulatory Cooperation, Articles x5(2); x6(1) and (2); and Article x6(3). The last two will be analyzed in the section below.

⁶⁶ Commission’s Textual Proposal on Regulatory Cooperation, Article x5(2). The quotation is from EU Commission, *Regulatory Cooperation in TTIP. An Introduction to the EU’s revised proposal*, 21 March 2016, p. 5. By contrast to the previous proposals, which also foresaw this possibility, the new text provides that it is the parties, and not the Regulatory Cooperation Body, that receive and assess these proposals, thus curtailing powers of initiative that such body could otherwise have (even if only in an informal way).

⁶⁷ Commission’s Textual Proposal on Regulatory Cooperation, p. 6, note 10.

may conflict with the possible preferences of regulators and of the more powerful groups on whose collaboration they may rely.

4.2. Collaboration and contestation

Participation procedures created to optimize decision-making in the sense indicated above may be open and inclusive of interests different from those of the regulated industries. If participation is open to the public, without further specification, they also *formally* ensure conditions of equal access.. They may be a means of broadening the expertise available to decision-makers also beyond the circle of the regulated industries. Taking as a reference point the institutional practice in the EU, the 2015 better regulation guidelines indicate that officials should “[seek] the whole spectrum of views in order to avoid bias or skewed conclusions (‘capture’) promoted by specific constituencies”; they specify that “target groups that run the risk of being excluded” should be identified, “balance and comprehensive coverage” should be sought, and “privileged access for some stakeholders should be avoided”.⁶⁸ Empirical research on the consultation practices of the Commission has confirmed that they have indeed opened decision-making. They have taken the collaborative links between EU institutions and interested parties “out of the shadows of opaque lobbying”, facilitating composition of competing interests at an early stage, despite the remaining imbalances in representation.⁶⁹ They entail an element of constraint, since the public commitment to inclusion and openness has a self-binding effect.⁷⁰ Public consultations have widened the spectrum of interests voiced, by enabling weaker groups to participate, even if they have also further empowered the more influential groups.⁷¹

Yet, there are no inbuilt mechanisms that would ensure the due consideration of views that would oppose the prevailing preferences of decision-makers or of the views of those that, for different reasons, are not considered relevant to governance purposes. Equal treatment of the voices heard, in view of the legally protected interests, has hitherto not been ensured by the Commission’s practices. Reason-giving or feedback reports on the results of consultations could play a role in this respect. However, important deficiencies in the Commission’s reports and handling of consultation results are disadvantageous to minority views and strengthen the voice of the most powerful groups.⁷² The rationale for participation is one of collaboration in the achievement of better knowledge-based outcomes, for which inclusiveness may also be important. The rationale of participation is not to create a basis for decision-making that

⁶⁸ Better Regulation 2015, p. 73-76.

⁶⁹ Beate Kohler Koch, *Civil Society Participation. More Democracy or Pluralisation of the European lobby?*, in DE-MYSTIFICATION OF PARTICIPATORY DEMOCRACY: EU GOVERNANCE AND CIVIL SOCIETY (B. Kohler Koch & C. Quittkat, eds, 2013), at 184.

⁷⁰ *Ibid.*, at 185.

⁷¹ *Ibid.*, at 176-82.

⁷² *Ibid.*, at 180. Kohler Koch points out that “the summaries of the positions are for the most part generalized, minority opinions are lumped together, the focus is placed on the statements by political influential actors, and the conclusions by the Commission are vague. (...) the reports do not offer sufficient grounds to force the Commission to justify its decisions”.

ensures in equal terms the due consideration for the legally protected interests and rights potentially affected, the plurality of views heard and contestation to possibly preferred options. Participation is a tool for evidence-based policy-making, and thereby directed at those who may strengthen the evidence basis of the outcomes of regulatory cooperation, as indicated by the mentioned deficiencies in the Commission's practices and by the Commission's understanding of consultation as a means to ask "the right people... the right questions".⁷³ These features of the Commission's practices significantly hinder the ability of participation to serve as a means to address the "problem of disregard".⁷⁴ Article 6 of the Commission's proposal on good regulatory practices, applicable to consultations on domestic regulatory acts, could be an avenue to participation as a means to give voice in equal terms to legally protected interests and to enable the active engagement of interested persons in public decision-making. However, to this effect, it would need to be accompanied by procedural rules and mechanisms of control that would concretize participation in this way and would counter the existing deficiencies of institutional practices. In this model, contestation may be a side effect of opportunities for participation in decision-making in the framework of regulatory cooperation, because of the publicity of consultations.⁷⁵ The mobilization of groups adverse to TTIP during the period of negotiations is indicative of the possibilities of contestation via internet campaigns, media attention and political influence. They might eventually induce change, but do so through mechanisms that are external to established structures of decision-making. Consultations, as currently practiced, would not necessarily bring that contestation into decision-making procedures.

As mentioned above, Article 6 of the Commission's proposal on good regulatory practices would make this model legally binding in the EU. It does not change domestic procedural laws and practices: in giving effect to their duty to consult when preparing regulatory acts, the parties will rely on their "respective rules and procedures". It is not excluded that this duty of consultation would ground an improvement of the deficiencies pointed out above (depending also on how compliance with this procedural duty would be enforced). Yet, at least in what concerns giving reasons on the results of the consultation process, the text as it stands accommodates the perpetuation of the weaknesses of the Commission's consultation practices: the parties "shall endeavor" to make explanations publicly available, they are not legally obliged to achieve this result.⁷⁶

The main novelty would be public consultations on the bilateral regulatory cooperation activities *strictu sensu*, taking place in the transatlantic phase of regulatory cooperation (i.e. not during domestic regulatory procedures upon which these activities impact and on which they rely). The text of the respective provision is drafted in terms that indicate normative concerns different from a purely

⁷³ See, *supra* note 61. These reasons hinder a functional equivalence between institutional practices that convey an instrumental meaning of participation and legal rules that could concretize a political-legal meaning of participation, contrary to the view of the General Court of the EU in Judgment of 12 June 2015, *The Health Food Manufacturers' Association*, Case T-296/12, EU:T:2015:375, para 181.

⁷⁴ Stewart, *Remedying Disregard*, *supra* note 4, at 220.

⁷⁵ Consider also the problems of vertical articulation (*supra*, Section 3.2).

⁷⁶ Commission's Textual Proposal on Good Regulatory Practices, Article 6(4).

instrumental rationale.⁷⁷ Under the heading “transparency and public participation”, the Commission proposes that any interested person would be heard on the progress of existing regulatory cooperation, would be able to submit new initiatives and views on priority setting. These submissions would be made public (subject to the protection of confidentiality and personal data) and “timely information” would be provided on their assessment.⁷⁸ This provision could be an avenue to participation as a means to give voice in equal terms to legally protected interests and to enable the active engagement of interested persons in public decision-making.⁷⁹ If equality of access and treatment would be ensured, it would open decision-making to the input of a plurality of interests, which would be balanced with sufficient guarantees of transparency. However, to this effect, the proposed provision needs to be accompanied by procedural rules and mechanisms of control that, suitable for those purposes, would avoid reproducing at the transatlantic level the deficiencies of domestic institutional practices. Mechanisms of oversight and enforcement will be critical.

Whether these consultations will foster contestation and whether, overall, contestation will stay at the margins of the decision-making system delineated in the Commission’s textual proposals remains to be seen. The consultations of Article x6 of the proposal on regulatory cooperation would be one opportunity of participation that co-exists with other possibilities of access to interested parties informed by a different rationale. These may contribute to the entrenchment of the collaborative links between regulators and interested persons, and thereby to the entrenchment of the power of regulators in relation to other domestic institutions (to the extent that evidenced-based participation adds strength to their decisions). This possible effect is exacerbated if the possibilities of parliamentary oversight are weak and if outcomes of regulatory cooperation are removed from judicial challenge.⁸⁰

4.3. Constraining authority in a new regulatory paradigm

Participation may have a decisive role in shifting the regulatory paradigm from sector-specific to one focused on the global trade chains. In this paradigm, regulatory responses would be adjusted to the socio-economic reality of globalization and regulatory segmentation would be overcome, thus facilitating the circulation of goods and services and avoiding coordination gaps that entail risks to the protection of public goods. Participation would be central to this transition, given the functional advantages indicated

⁷⁷ Commission’s Textual Proposal on Regulatory Cooperation. Article x.6.

⁷⁸ Commission’s Textual Proposal on Regulatory Cooperation, Article x6(1) and (2).

⁷⁹ The Commission complements this provision with a commitment to ensure equality and to reach out to weaker groups reinforces the inference that participation (footnote 13). A concern for balanced representation and inclusion of holders of various affected interests is also present in the proposal to create domestic advisory groups that each party would consult on the Joint Annual Regulatory Co-operation Program (EU Commission’s Textual Proposal on Regulatory Cooperation, Article x6(3)).

⁸⁰ See, further, Eyal Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law*, IIIJ Working Paper 2016/2 (MegaReg Series), at 6-13.

above.⁸¹ This possible long-term perspective calls for a critical consideration of the purpose and design of participation mechanisms in the framework of regulatory cooperation, in particular because this transition may remove decision-making further away from domestic constitutional constraints. Regulatory collaboration endorses a *legal* (not only factual) disconnect between decision-making based on domestic mandates, on the one hand, and procedures that are designed to overcome the limits of those mandates, on the other.

It may very well be that without the involvement of the regulated industries any effort of regulatory cooperation is doomed to fail for the instrumental reasons mentioned above. Yet, accepting this premise requires considering the challenges that a public-private means of transatlantic regulation poses to the equal treatment of affected interests, in particular to the protection of those interests that may be excluded from the schemes of collaboration that underpin transatlantic regulation. The distributional effects of the outcomes of regulatory cooperation, potentially impacting on the way rights and interests are legally protected, as well as normative concerns for equality and dignity, shed light on the insufficiencies of a regulatory model anchored on inter-regulatory and, by and large, on public-private collaboration. In the case of the European Union, these shortcomings are evidenced by the Treaty determination that its external action ought to be grounded in and respect its founding principles, including democracy, rule of law, human dignity, fundamental rights and equality.⁸² Apart from normatively unsatisfactory, such a model may arguably prove empirically unsuited, insofar as public resistances to regulatory outcomes defined in more or less exclusive negotiating fora may build sufficient pressure to prevent regulators from endorsing solutions with verified benefits.

If regulatory cooperation is going to be carried out on the basis of continuous data exchanges and dialogue between regulators and natural and legal persons, in a way that blurs the boundaries between decision-making, implementation and enforcement,⁸³ it will amount to an exercise of authority via collaboration. Collaboration may evolve from opportunities of participation that are restricted to selected interested parties, e.g. when input into decision-making occurs via consultation of advisory groups or “knowledge platforms”.⁸⁴ It may de facto arise from procedures that are open to the public, when the range of participants is not representative of the potentially affected interests and when structural deficiencies strengthen the position of the stronger and politically more influential groups.⁸⁵ Authority expresses itself in the ability to change the relative position of holders of rights, legally protected interests and duties when they establish legal relationships. In this case, authority is exercised via an act that

⁸¹ See *supra* Sub-section 4.1.

⁸² Article 21(1), (2)(b) TEU. See, further, Petersmann, *supra* note 6, at 586-89.

⁸³ Along the lines of negotiated relationships advocated by Jody Freeman, *The Private Role in Public Governance*, 75 NYU L. REV. 543 (2000), at 571-3.

⁸⁴ Hoekman, Supply Chain World, *supra* note 3, at 9-15.

⁸⁵ Collaboration may evolve from situations of “procedural disregard” (Stewart, Remedying Disregard, *supra* note 4, at 224). Reporting such instances in the EU’s consultation practices, see Koch Kohler, *supra* note 71, at 180. In this case, it is more difficult to delimit the borders between what remains (non-decisional) participation and what becomes a form of public-private collaboration.

emerges from a collaborative scheme involving public and private actors.⁸⁶ It changes unilaterally the legal positions of those excluded from the collaborative scheme. This effect requires political-legal mechanisms that incorporate incentives in decision-making to ensure regard for the distributional effects of the outcomes of regulatory cooperation, specifically to the position of those affected interests that are not represented in the collaborative arrangements.

Participation could be one of such mechanisms. However, to this effect, it should be given a political-legal meaning that transcends the functional-instrumental rationale. The grounds for participation should be the ability of the outcomes of regulatory cooperation to impact on one's rights and legally protected interests, and the normative need to give voice to those affected in equal terms, in a process where competing public interests will be considered and weighed. Participation should be valued as an exercise of political freedom - an active engagement in the way one is governed⁸⁷ - or of individual freedom (even if mediated by representative organizations) to voice one's rights and legally protected interests.⁸⁸ While there is a minimum threshold of knowledge that participants need to reach in order to be able to meaningfully influence decision-making,⁸⁹ from this political-legal perspective the reference to delimit relevant participation would be the affected person, not the expert. The qualities of "affected person" and "expert" may overlap in some cases, but they do not in all cases. Participation would be conceived as an instrument to ensure consideration of the range of competing legally protected interests that may be affected by the outcomes of regulatory cooperation, the plurality of the views heard and contestation to the possibly preferred options.

Insofar as participants give voice to interests that the domestic legal systems protect, participation would become more than a means to "target the evidence needed to make sound decisions".⁹⁰ It would be valued in its ability to bring into decision-making a representation of the possible distributional effects of the decisions on regulatory equivalence (one of the possible outcomes of regulatory cooperation). The range of relevant voices to take into consideration would not be chosen in accordance with the preferences of the regulators involved, in view of the knowledge resources that they may lack, "so as to feed into ... decision-making in an efficient manner".⁹¹ It would be defined by reference to legal interests that, being possibly affected by the outcomes of regulatory initiatives taken by regulators to implement an

⁸⁶ Public and private actors act in an interdependent way. The verification of exercise of authority does not depend on the ability to determine when private participation in governance may be considered state action (on three tests used to this effect by the US Supreme Court for purposes of constitutional due process and their critique, see Freeman, *supra* note 74, at 576-81). Defining authority by its impact on collective and individual freedom see Armin von Bogandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, Max Planck Institute for Comparative Public Law & International Law (MPII) Research Paper No. 2016-02 (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770639, at 22.

⁸⁷ Jeremy Waldron, *The Rule of Law and the Importance of Procedure* in GETTING TO THE RULE OF LAW (J. Fleming, ed., 2011), at 20.

⁸⁸ Joana Mendes, *Participation and the role of law after Lisbon: a legal view on Article 11 TEU*, 48 COMMON MARKET LAW REVIEW 1849 (2011), at 1864-65.

⁸⁹ On the structural difficulties of weaker groups, see Stewart, *Remedying Disregard*, *supra* note 4, at 263.

⁹⁰ Communication from the Commission, *supra* note 55.

⁹¹ Commission Staff Working Document, *supra* note 56, at 10.

international agreement, are protected by their respective legal systems. One criterion to assess the pertinence of the input given by participants would be the extent to which they contribute to a better representation and composition of those interests. In this political-legal understanding, participation may create the conditions to avoid biases in decision-making generated by the lack of consideration or disproportionate weighing of competing interests, which deny the material justice of regulatory outcomes expressed in the due consideration of legally protected interests.⁹² Participation also postulates a justification of the regulatory outcomes that explains the reasons why some legally protected interests were given preference to the detriment of others, in view of the standards of protection endorsed in each legal system – justification directed at the affected publics, rather than at the groups that may have been more influential or at a network of peers.

This perspective on participation would arguably diminish the scope for dismissing as unusable input given by participants if it is not framed in a way that deviates from accepted language and prevailing discourses.⁹³ It will not correct the persisting power imbalances between different participants, but may compel the consideration of weaker interests in different terms. Their holders voice legally protected interests that need to be weighed in decision-making by force of legal rules – an aspect that a focus on the functional-instrumental dimension of participation and a predominant concern on evidence-based decision-making may easily overlook.⁹⁴ However, this shift arguably requires, first, that participation procedures are designed in a way that frames the choices of regulators on who are the relevant participants and what are the grounds to value their input, and, second, that there are external mechanisms to ensure respect for inclusiveness, equality, and public scrutiny.⁹⁵ The provision on “transparency and public participation” of the Commission’s textual proposal on regulatory cooperation could be a basis to develop such procedures and mechanisms.

Requirements of inclusiveness and justification ought to constrain the authority of regulators deciding on the equivalence of technical standards insofar as they compel them to form a comprehensive view on the possible effects of their decisions on legally protected interests. Such a comprehensive view is all the more important when the underlying purpose of regulatory cooperation is to confront representatives of regulators and competent authorities with the adverse effects on trade of their silo-division of regulatory requirements, and, thereby, to overcome the disconnect between regulation and the reality of global trade chains. If regulators are invited to move outside the limits of their legal mandates, to be able to fully appreciate the possibility that their rules cause unjustified barriers to trade and, in this light,

⁹² Joana Mendes, *Rule of law and participation: A normative analysis of internationalized rulemaking as composite procedures*, 12 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 370 (2014), at 379-80; 385-87.

⁹³ See Benjamin Farrand, *Trading Information for Influence: Forms of Knowledge and the Power of Legitimacy*, in KNOWLEDGE, POWER AND THE LAW BEYOND THE STATE (M. Bartl and E. Tauschinsky, eds.), Amsterdam Law School Research Paper No. 2016-08, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728148, at 11.

⁹⁴ Arguing that, despite powers imbalances, weaker groups benefit from opportunities of participation, see Stewart, *Remedying Disregard*, *supra* note 4, at 262; see also Joana Mendes, *PARTICIPATION IN EU RULEMAKING. A RIGHTS-BASED APPROACH* (Oxford University Press, 2011) at 234-6.

⁹⁵ Mendes, *Participation and the Role of Law after Lisbon*, *supra* note 88.

assess regulatory equivalence, they also ought to consider – in that same situation – which distributional effects judgments of equivalence may have and what their impacts on legally protected interests may be.

There are limits to how far decision-makers may be required to go in order to consider the interests of those affected by their decisions. In legal terms, these efforts may be confined to the limits of their mandates, specifically to the interests that decision-makers are bound to protect and pursue.⁹⁶ Yet, in the context of regulatory cooperation in mega-regional agreements, they meet their peers to overcome the duplication and gaps that arise from the sector-segmented model of regulation that prevails in domestic settings. Regulatory outcomes will prospectively be the result of aggregate views of regulators with a view both to agreeing on terms of equivalence that reduce barriers to trade and to identifying gaps that may lead to public health, environment, consumer, or labor risks. In this scenario, the argument that decision-makers should be required to take into account only the interests that they are bound to pursue in view of their mandates loses strength. By force of an international agreement, they become participants in collaborative schemes that purposively extend beyond the limits of their mandate-based regulatory action.

5. Inclusiveness: which legal yardsticks in a composite framework?

The claim that regulators engaging in regulatory cooperation should be legally required to pay heed to the distributional effects of the outcomes of their cooperation efforts raises difficult questions. Where should inclusiveness be a normative requirement in regulatory cooperation processes that cut across various levels of decision-making? How far are regulators required to go in order to ensure inclusive decision-making, in particular if one holds that their domestic mandates are limited frames of reference when they engage in regulatory cooperation? What are the yardsticks for inclusiveness and justification? These questions require academic elaboration, which would flesh out participation as a procedural requirement that may constrain or structure the authority of regulators involved in collaboration. They will not be answered here. Yet, some indications may be given on the basic reference points that one should consider when sketching participation in the political-legal sense defended above.

The international agreements that set up the structures and procedures of regulatory cooperation provide the general legal framework that delimits the scope of action of regulators “giving life” to the agreements. While highly complex, these agreements define a basic frame of reference to delimit the public interests that regulators ought to be pursuing and balancing when considering what may constitute unjustified technical barriers to trade. Hence, they delimit the legally protected interests that participants would be called to voice in the fora where regulatory cooperation is decided, at the level of working groups or at the level of horizontal coordination between these groups.⁹⁷ Participation in the political-legal sense defended here would be one of the mechanisms designed to ensure that those interests are duly considered and weighed in decision-making. If this were the model to be followed, the text of the

⁹⁶ Stewart, *Remedying Disregard*, *supra* note 4, at 225-8.

⁹⁷ On TTIP, see, e.g., EU Commission’s Textual Proposal on Regulatory Cooperation, Article x1.

agreement should include norms that would make this function of participation clear, in the line of the provision on consultations now included in the Commission's textual proposal on regulatory cooperation. This provision is drafted in terms that could satisfy requirements of inclusiveness, equality, justification and publicity, the fulfillment of which will largely depend on ancillary procedural rules and mechanisms of enforcement. The way the domestic and transatlantic phases of regulatory cooperation will interact will also be determinant to channel participation in a way that final outcomes may result from a fair balancing of the legally protected interests they may affect.⁹⁸

The shaping of mechanisms and legal rules that structure the authority of the regulators implementing the agreement is in the hands of the political institutions involved in the drafting and signing of these agreements, as well as, more remotely, of the parliaments that ratify them. Negotiators will define the scope of public interests that regulators ought to pursue and the norms that will provide criteria for balancing those interests, thereby delimiting the scope of the relevant interests that should be voiced in decision-making procedures. The diplomatic setting of negotiations is prone to interest group influence, which parliamentary ratification is likely unable to correct.⁹⁹ Nevertheless, as noted above, the EU negotiators are bound by the principles of democracy, rule of law, human dignity, and fundamental rights, among others. These principles provide normative anchors to build an institutional model of decision-making that, even if anchored on the authority of regulators, ought to incorporate countervailing mechanisms that go beyond the functional needs of regulatory cooperation. Insofar as these principles are not exclusive of the EU legal order, parliaments should act as watchdogs of compliance therewith, since ratification will provide the political and legal clout to an agreement against which the actions of regulators should also be assessed.¹⁰⁰

At the same time, the provisions of the international agreement function as a binding element of a *network structure* anchored in the domestic legal orders, which delimit the authority of each regulator. The agreement both defines the common function of regulators and builds upon their domestic roles and mandates. This interwoven structure means that, as members of fora of regulatory cooperation set up by the international agreement, regulators should also be bound by the procedural and substantive rules that delimit and guide their behavior internally. Their internal regulatory functions are the reason why they are

⁹⁸ See further the references in note 55.

⁹⁹ Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV.167 (1999), at 184-7.

¹⁰⁰ Raising constitutional and institutional concerns regarding regulatory cooperation, see European Parliament Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), point 2 (c)(i) (v). See also the following opinions of the Parliament's Committees attached to in the Motion for Resolution of 1 June 2015: Opinion of the Committee on Legal Affairs, 4.5.2015, point 1(j) (p. 75); Opinion of the Committee on Constitutional Affairs, 16.4.2015, point 1(d)(ii), Opinion of the Committee on Legal Affairs, 4.5.2015, point 1(l) (p. 75); Opinion of the Committee on the Environment, Public Health and Food Safety, 16.4.2015, point 5 (available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0175&language=EN>). Emphasizing the importance of transparency and participation during the negotiations, see Benvenisti, *Democracy Captured*, *supra* note 80 at 18-20.

meeting internationally. Their external action is a continuation of those internal functions.¹⁰¹ In the case of TTIP, the binding effect of national legal orders is recognized in the Commission's textual proposal on regulatory cooperation, according to which the provisions on regulatory cooperation do not affect the parties' ability "to adopt, maintain and apply measures without delay (...) to achieve its public policy objectives (...) at the level of protection that it considers appropriate, *in accordance with its regulatory framework and principles*".¹⁰²

The simplicity of this construction is of course deceiving: the problem lies precisely in knowing how the articulation between the domestic legal orders and the obligations stemming from the international agreement may be ensured and how the respective legal orders are coordinated in a way that the international obligations stemming from the agreement do not imperil the domestic standards of protection of public goods. Nevertheless, this network structure arguably engenders procedural duties of domestic actors when acting in an external role. Insofar as international regulatory cooperation leads to deviations from internal rules, these ought to be justified *internally*.¹⁰³ Deviations from domestic regulatory requirements are the very purpose of regulatory cooperation and may therefore be likely. If subject to justification, the way in which regulators strove to reconcile the competing public interests, benefiting some to the detriment of others, will be open to scrutiny and contestation. The possibility of deviations should be fully acknowledged as a legal consequence of an international agreement requiring regulatory cooperation. Justification would function as one of the elements linking the different legal orders upon which regulatory cooperation relies and upon which it impacts. Understood in this way, it would both acknowledge that by virtue of their international obligations under mega-regional agreements, regulators are required to move beyond the strict scope of their domestic mandates; and recall that these mandates ought to still frame and structure their discretion. In this way, justification would be an element of the vertical articulation of the legal orders involved, which could avoid "exit ways" that may lead to instances of unrestrained authority.¹⁰⁴

Taking seriously the argument that the distributional effects imply a change in the legal spheres of persons affected throughout the trade chain has an additional challenge: the consideration of the legal spheres of persons in third countries.¹⁰⁵ Distributional effects will not stop at the borders of the jurisdictions of the parties to mega-regional agreements. The arguments above seem to assume they do. They highlight the composite legal framework that grounds and ought to structure the discretion of

¹⁰¹ Mendes, *Rule of law and participation*, *supra* note 92, at 396.

¹⁰² EU Commission's Textual Proposal on Regulatory Cooperation, Article 1(3)(a) (emphasis added). Also the regulatory cooperation chapters of TPP and CETA refer, respectively, to the goal of "[facilitating the] achievement of domestic policy objectives" (TPP, *supra* note 19, Article 25.2(1)) and of "[promoting] transparent, efficient and effective regulatory processes that support the public policy objectives and fulfill the mandates of the regulatory bodies", presumably their domestic mandates (CETA, *supra* note 19, Article 21.2(4)(c)).

¹⁰³ Mendes, *Rule of law and participation*, *supra* note 92, at 396.

¹⁰⁴ See, Benvenisti, *Exit and Voice in the Age of Globalization*, *supra* note 92 (albeit referring to treaty making and ratification)

¹⁰⁵ Benvenisti, *Democracy Captured*, *supra* note 80 at 13-18.

regulators engaged in regulatory cooperation. They indicate that the text of the agreement and the Parties' legal orders, which become intertwined by force of the agreement, provide the basic references to delimit the scope of relevant participation and justification. However, referring to the positive legal grounds of the activity of regulators may not provide a foundation to address the way third countries and holders of legally protected interests that are outside the jurisdiction of the parties should be treated, unless the composite legal framework in which regulators operate includes norms to this effect. Yet, both factual impacts of outcomes of regulatory cooperation and the normative rationales of participation in the political-legal sense defended in this paper require that decision-making in the context of regulatory cooperation is inclusive also of the legally protected interests of third parties. The ways to concretize this claim are far from clear and merit further reflection.

6. Conclusion

Regulatory cooperation in mega-regional agreements will rely on institutional and procedural structures where decisions defining the legal position of those involved in the trade of goods and services and involving the weighing of competing public interests will either be prepared or adopted (depending on the various forms that regulatory cooperation may have). Importantly, regulatory cooperation may be a step in the transition from a paradigm in which regulation is sector-segmented, as delimited by domestic mandates, to one in which regulation would be adjusted to the reality of global trade chains. Both aspects call for a critical assessment of the role of participation in a model of collaborative decision-making among regulators, in particular given the possibility that participation of the so-called stakeholders may be a factor in operating such a transition of regulatory paradigm.

The successive textual proposals on regulatory cooperation under TTIP put forth by the Commission have thus far delineated an institutional model directed at facilitating, as far as possible, successful deliberative negotiations among regulators. The possibility that participation could disrupt such deliberations, while still having a crucial instrumental value to the success of regulatory cooperation, may explain two aspects. First, participation during regulatory cooperation *stricto sensu* accompanied by sufficient guarantees of inclusiveness, formal equal access and publicity – and not only as a procedural duty to follow in domestic regulatory procedures – is a newcomer in the Commission's proposal on regulatory cooperation of early 2016. At the transatlantic phase of regulatory cooperation, the earlier proposals only mentioned the possibility to submit initiatives for regulatory cooperation to the Regulatory Cooperation Body and yearly meetings with “stakeholders” where this same body would discuss the Annual Regulatory Co-operation Programme.¹⁰⁶ Secondly, it co-exists with access points to decision-making procedures, both domestically and internationally, geared to ensure the collaboration between regulators and private parties. While plausible from a functional-instrumental perspective, these are not

¹⁰⁶ Now also revised (see *supra* notes 66 and 79).

designed to provide equal voice to the holders of legally protected interests potentially affected by the outcomes of regulatory cooperation, contestation to possibly preferred options, inclusive consideration of competing interests, and public scrutiny of the decisions taken.

As much as the institutional and procedural structures underpinning regulatory collaboration need to be fit for purpose, they ought not overlook the normative requirements that, in accordance to the legal orders of the parties, need to ground the exercise of authority in democratic systems.¹⁰⁷ In the case of regulatory collaboration, authority originates in the ability of collaborative schemes of decision-making to change unilaterally the legal positions of those excluded from collaboration – to affect both the legal spheres of holders of rights, legally protected interests and duties, and the conditions in which public goods are protected and provided.

The common traits that the model of collaborative decision-making among peers underlying regulatory cooperation shares with comitology highlighted the normative concerns that the model may raise. The contrast with comitology also indicated that, given its legal-institutional embeddedness, regulatory cooperation as currently envisaged may lead to a closed system of decision-making, depending on two crucial points that remain unclear at the time of the writing: the role of parliaments and of courts in relation to decision-making taking place in the context of regulatory cooperation; and the articulation between the domestic and the international spheres of decision-making. Participation may counter the closure of the system, to some extent, depending on how the current provision on “transparency and public participation” is implemented and enforced. Other forms of participation, also envisaged in the proposal, may instead largely feed into the schemes of collaboration that underline regulatory cooperation and entrench the power of regulators engaging in international collaboration.

The paper proposed a political-legal perspective on participation that could create some of the conditions to constrain and structure the way authority is exercised via regulatory collaboration. Inclusiveness would compel regulators to, as far as possible, have a comprehensive view on the distributional effects of their assessments on regulatory equivalence in the global trade chains (on which they are prompted to focus), and to weigh the competing legally protected interests that may be affected; equality of access and treatment of the results of consultation would formally contribute to avoid biases; justification of the outcomes of regulatory collaboration that accounts for the way in which given legally protected interests may be given preference to the detriment of others (in view of the standards of protection valid in the domestic legal systems) would facilitate public scrutiny of the decisions adopted. Understood in this way, participation may be a core element of a composite legal framework, a way to refer the authority being exercised back to the different legal orders that regulatory cooperation intertwines. At the same time, it could create the conditions to bring contestation within decision-making

¹⁰⁷ The Commission’s textual proposal on regulatory cooperation acknowledges this point, strongly now than in previous versions is not wholly oblivious to these concerns, as indicated by the annex (“placeholder for provisions on the institutional set up for regulatory cooperation under TTIP”). However, these normative considerations should be integrated in the model itself, in addition to informing mechanisms of accountability.

procedures and to frame deliberations in a way that would be responsive to the normative concerns of those legal orders.