EU-US regulatory coordination.  
A two-level game approach

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1. Introduction
When in late October 2009, the 2007 established Transatlantic Economic Council (TEC) conferred the fourth time, many observers expected little from the high-level body that was established to advance economic integration between the European Union and the United States. According to these critics, the TEC had turned into a pure debating club (e.g. Wettach 2009). In fact, after a frustrating period of sheer endless discussions about a European ban on US chlorinated chicken, many predicted the end of the political body. At the recent October meeting, however, the five EU Commissioners and their US counterparts decided to refocus their future work on the TEC's initial assignment, namely, coordinating regulatory activities on both sides of the Atlantic. TEC Co-Chair and European Commission Vice-President Günter Verheugen explained that “[a]fter a trial and error phase, we have now a clear direction. We do not try to solve trade disputes or trade irritants. Instead, we try to find common ground for regulatory approaches” (quoted in Beary 2009). The international press and media welcomed the move. “Prevention [of trade conflicts], not cure, to be the TEC's future focus,” titled the European affairs daily, Europolitics euphorically (Beary 2009).

The differences between the prevention of trade conflicts and their cure have been outlined in the literature (Mildner and Ziegler 2009b). Less clear to many, however, remain the fine distinctions that can be drawn within the area of preventing regulatory conflicts. A number of concepts can be subsumed under the catchword regulatory coordination, such as harmonization or mutual recognition. Moreover, many observers who criticize the TEC for being ineffective, lack a clear understanding of the obstacles to bilateral regulatory coordination. This article aims at contributing to a better understanding of these aspects. First, the concept of regulatory coordination will be explained in more detail. In a second step, major impediments to coordination, namely interest group pressure and domestic institutions, will be highlighted. The article draws on a classical two-level framework that was developed by IR scholar Robert Putnam (1988).

2. Regulatory coordination
In general, regulatory coordination can be divided into two categories: dealing with differences and achieving common standards (Petriccione 2004). Each type can be grouped into two subunits again (see table 1).

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1 The article is taken from a PhD project on transatlantic regulatory cooperation on environmental and consumer standards.
2 The TEC is chaired by European Commission Vice-President Günter Verheugen and Michael Froman, deputy assistant to the U.S. president and deputy national security adviser for international economic affairs. For further information on the TEC, visit the European Commission TEC website: http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/transatlantic-economic-council/index_en.htm
3 Personal communications with European and US government and business representatives in summer and fall 2008. On the chicken dispute, see Mildner and Ziegler 2009a.
4 According to the 2007 “Framework for Advancing Transatlantic Economic Integration Between the U.S. and the EU,” the TEC was initiated to oversee transatlantic efforts to “achieving more effective, systematic and transparent regulatory cooperation to reduce costs associated with regulation to consumers and producers.” Accessible at http://ec.europa.eu/enterprise/policies/international/files/tec_framework_en.pdf
Table 1: Forms of regulatory coordination

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<thead>
<tr>
<th>Dealing with differences</th>
<th>Achieving common standards</th>
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<tr>
<td>Transparency</td>
<td>Harmonization (ex-post)</td>
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<td>Mutual recognition</td>
<td>Regulatory Cooperation (ex-ante)</td>
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<td>of conformity assessments</td>
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<td>of technical regulations</td>
<td>Promotion-focused</td>
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Based on Petriccione 2004.

Under the first concept, regulatory differences that exist in two or more jurisdictions are taken for granted and the challenge is to find ways to eliminate or reduce costs associated with these differences. The most basic instrument to do so is \textit{transparency} of regulatory processes, that is, including formal publicity requirements and providing opportunities to take into account legitimate concerns by all stakeholders, domestic or international ones. Transparency thus is an action, which does not require bilateral contact but must be achieved domestically. At the next level then, foreign regulators can agree to mutually recognize these known differences, so that products complying with the regulations in one country will be considered to be in compliance with the rules of another country. These agreements have been labeled \textit{Mutual Recognition Agreements} (MRAs) and have become most prominent in the European integration process (Padoa-Schioppa 2005). MRAs can focus on the mutual recognition of testing and certification procedures (\textit{conformity assessment}) or the substantive technical regulations themselves. Under full recognition of standards, companies can market goods, which are legally produced and marketed in one jurisdiction, in another jurisdiction without facing further formalities or duplicative testing requirements. An agreement of conformity assessment is a smaller step, as it requires domestic regulators to trust in the ability of foreign regulators and laboratories (or conformity assessment bodies, as they are called) to carry out development of standards, testing, inspection, and certification. Mutual trust in each others competency thus is the key to the good functioning of MRAs. In any case, there are two major advantages of MRAs: First, they help preserve regulatory diversity, an aspect of great concern to many domestic interest groups; and second, MRAs do not require a full and costly alteration of the entire regulatory system.

The other, complementary avenue for decision-makers to coordinate their regulatory policies is to go beyond these activities and try to achieve a common set of standards. One way of achieving common standards with trading partners, multilaterally or bilaterally, can take place through \textit{harmonization}. This implies that already existing national standards are converted to one single regulatory standard. Harmonization thus is the strongest form of regulatory coordination but, at the same time, also the rarest. Due to the high degree of technical consultations that come along with harmonization processes, negotiations are in general slow, time-, and resource-consuming. Moreover, harmonizing standards or rules that are applied across jurisdictions with the objective to create identical legislation often sparks strong public resistance as certain groups might fear a loss of regulatory autonomy of their national regulators and lawmakers (Quick 2007: 345). Public officials thus often abandon this less promising option from the first. At the recent TEC meeting, for instance, Verheugen expressed his preference for MRAs because “if you try to harmonise, it does not work” (quoted in Beary 2009).
Regulatory Cooperation is a second way of achieving common standards. In contrast to harmonization, regulators do not negotiate already existing standards ex-post but create the conditions for the development of new policies – or the prevention of harmful unilateral action – ex-ante. Regulatory cooperation offers the greatest long-term rewards to prevent technical regulations and standards from creating unnecessary trade barriers. Within the field of regulatory cooperation another distinction can be made between promotion and prevention. Promotion-focused parties are directed toward achieving positive outcomes by promoting a joint set of regulations. By contrast, parties focusing on preventing negative externalities stemming from unilateral regulatory activities of the counterpart foster a prevention-focused approach.

The European Union and the United States share a two-decade old history of regulatory coordination attempts. Throughout the 1990s, both parties made serious efforts to mutually recognize testing and certification procedures as well as prevent each other from taking unilateral regulatory action (Early Warning). Both efforts, however, were of little avail. Over the years, the parties have thus made concentrated efforts to promote joint sets of regulations, for example in the field of nano-technologies. In the following, I will highlight the major reasons for the failure of past coordination attempts, namely interest group pressure and risk governance mechanisms.

3. The interaction between international and domestic politics
Explaining the outcome of bilateral regulatory coordination requires a focus on domestic politics. As one US negotiator aptly put it: “It’s not just governments. We also have to get Congress, independent agencies, and interest groups on board.” Robert Putnam’s two-level game approach (Putnam 1988) offers a useful framework for analysing the way in which domestic politics impacts international bargaining.

The central insight of the two-level game framework is that international negotiations take place at two levels: at one level negotiators of different countries negotiate over the terms of an international agreement (Level I), at the other level each negotiator has to negotiate with his/her domestic constituents (Level II). EU and US decision makers know they have limited room to negotiate on the “international table” as, according to this dichotomy, Level I agreements need to be formally or informally endorsed or implemented at the subsequent Level II. The international and domestic levels are connected by the concept of a win-set, a “set of all possible Level I agreements that would ‘win’ – that is, gain the necessary majority among the constituents – when simply voted up or down” (Ibid.: 437). Each country has its own win-set that is determined by domestic political processes. According to Putnam, three sets of factors are especially important for the size of a win-set: i) negotiators’ strategies on Level I; ii) preferences and coalitions on Level II; and iii) institutions on Level II.

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5 Policy makers from Europe and the United States within the Transatlantic Economic Council (TEC) recently labeled this approach upstream regulatory cooperation (TEC 2009: 2).
6 For an overview, see the respective chapters in Berman 2000 and Petersmann and Pollack 2005.
7 On the Early Warning cases, see Meng 2005 and Decker 2005. The failure to implement MRA agreements in six sectors (telecom equipment, pharmaceuticals, medical devices, electromagnetical compatibility, electric safety, and recreational craft) was described by Shaffer 2005.
8 Personal communication in July 2008.
9 Putnam calls this process ratification but does not only refer to formal ratification processes. He rather uses the term “generically to refer to any decision-process at Level II” (Putnam 1988: 436). The actors at Level II, according to Putnam, “may represent bureaucratic agencies, interest groups, social classes, or even ‘public opinion’” (Ibid.).
3.1. Level I: Intergovernmental negotiations

According to Putnam, the size of the win-set can depend on the strategies of the Level I negotiators. Of particular relevance for negotiations is the role of the chief negotiator. Although widely considered an honest broker or agent on behalf of his constituents, Putnam refers to principal-agent theory in order to illustrate that “the preferences of the chief negotiator may well diverge from those of his constituents” (Putnam 1988: 456). A country’s chief negotiator might refuse possible options that are consistent with the preferences of his/her constituency but are not consistent with his/her very own preferences. On the other hand, the negotiator might show concerns about the state of health of the bilateral relationship with the foreign country and agree to pressure his/her own constituents to consider reservations of the negotiating partner. That is, the negotiator will favor international harmony over domestic regulatory sovereignty. A most recent example is the unsuccessful attempt by Günther Verheugen to lift a decade old European ban on chlorinated chicken imports from the United States. When then United States Trade Representative (USTR) Susan Schwab called the chicken ban a “litmus test” for future cooperation under the Transatlantic Economic Council, Verheugen tried to pour oil on troubled water and (unsuccessfully) tried to convince both the European Parliament as well as the Council to lift the ban (Mildner and Ziegler 2009b). Yet even in the absence of a principal-agent problem, negotiators have available a number of measures to threaten the opponent into cooperation, either by WTO litigation threat or by linking regulatory activities to other issue areas and sectors (cross-issue linkage). Kenneth Oye (1992: 37) calls such situations in which one negotiator acts on threats extortion, “a weapon of political coercion” that might ultimately damage both parties. Last but not least, however, regulatory coordination also opens room for communicative action and arguing, particularly among mid-level officials and experts. As Thomas Risse (2000) has pointed out, arguing particularly matters in the first phase of negotiations, namely the process of “getting to the table.” In regulatory coordination arrangements, it is mainly public officials with the technical knowledge and expertise that serve as agenda setters. By doing so, these public officials might, for example, be able to argue each other out of planned regulatory activities due to reasons of technical incompatibility of new standards (prevention-focused regulatory cooperation).

Yet even though the EU and US have available a dense network of institutionalized dialogues, which provide room for intensive exchange and debate, transatlantic attempts to coordinate their regulatory activities have often failed. The devil, as so often, turned out to be in the detail, particularly, in domestic politics.

3.2. Level II: Preferences and coalitions

Putnam argues that a country’s win-set is particularly determined by preferences and coalitions at the domestic level. He specifies that the negotiating room of the Level I negotiator, that is, the size of the win-set, depends on the size of two groups: isolationists (who oppose international cooperation in general) and the internationalists (who offer ‘all purpose’ support) (Putnam 1988: 443). The same distinction can be made with respect to negotiations on regulatory activities. Mattli and Woods (2009) point out that the outcome of regulatory coordination

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10 An overview is given by Steffenson 2005.
depends on the question which interest group can stand its ground in the domestic arena: those that would lose from international coordination (because they are facing high adjustment costs when altering their pre-existing rules and regulations) or actors who are disadvantaged by the regulatory status quo and stand to gain from regulatory coordination. Given the respective issue area, both groups can consist of corporate actors as well as societal groups such as environmentalists or consumers. According to Mattli and Woods, the question which group prevails can be answered by focussing on the institutional context of the domestic regulatory process (secretive vs. transparent fora, exclusive vs. open access, etc.) as well as the saliency of the respective issue (societal demand).

A pure focus on interest groups, however, can only partially explain the outcome of EU-US regulatory coordination. For example, between 1995 and 2000, large firms, represented by the Transatlantic Business Dialogue (TABD), have enjoyed unique access to decision makers (Cowles 2001, Coen 2001). However, despite intense lobbying efforts on both sides of the Atlantic, the influential body could not prevent the European Union from unilaterally initiating a large number of regulatory activities in the environmental and social domain.11 We thus need to find a second domestic determinant for the outcome of regulatory coordination. Again, Putnam’s twenty-year old model leads the way.

3.3. Level II: Institutions

According to Putnam’s two-level game, a country’s win-set is also determined by its domestic institutions. Whether ratification of international agreements by domestic institutions requires a two-thirds vote or a simple majority clearly affects international negotiations.12 With respect to bilateral regulatory coordination, it can be argued that it is particularly the institutional structure of the regulating bodies that affect the win-set, especially with regard to the governance of risks and uncertainties. Some countries leave decisions on technical regulation and product or process standards to experts, scientists, and bureaucrats (administrative rule-making) while others have the final decision-making process assigned to politicians. Regarding environmental and social regulation, for example, independent regulatory agencies in the United States, such as the Food and Drug Administration (FDA) or the Environmental Protection Agency (EPA), are in charge not only of the assessment of risks and uncertainties (based on sound science and cost-benefit analysis) but also of their management. While in Brussels, it is politicians in the European Parliament and the Council of the European Union who get the last word on most new regulations. For good or ill, the separation of risk assessment and risk management opens the door for politicized decisions that can be in the public interest but can hamper regulatory coordination. It thus significantly reduces the win-set of a negotiator at the international table. At the same time, regulation based on pure economic analysis runs the risk of neglecting legitimate social and environmental concerns and might be equally unqualified for successful bilateral regulatory coordination.

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11 For example, the Waste Electrical and Electronic Equipment Directive (WEEE) in 2003, a Europe-wide ban on the use of animals to test cosmetic products in 2003, or the 2006 Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

12 To underline his argument, Putnam quotes former US President Jimmy Carter: “Because of the effective veto power of a small group, many worthy agreements have been rejected, and many treaties are never considered for ratification” (Putnam 1988).
negotiations. Diverging risk governance mechanisms thus notably reduce the likelihood of regulatory coordination.

4. Conclusion
The reason for the moderate success of the Transatlantic Economic Council is twofold: The TEC’s chief negotiators, on the hand, focused too long on the cure of already existing trade conflicts, particularly the chlorinated chicken dispute. On the other hand, the TEC suffers from typical (domestic) impediments to regulatory coordination, namely interest group pressure and differences in risk governance mechanisms. Quick results can thus not be expected. However, with respect to the differences in risk governance, both sides are about to meet halfway. According to Michael Fitzpatrick, associate administrator of the White House Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA), the Obama-Administration is engaged in reviewing its regulatory methods. Among other things, the basic methodology for cost-benefit analysis is under review, as the administration intends to consider possible effects on consumers and future generations (RGIT 2009). At the same time, the European Commission has initiated a new impact assessment program as a tool for minimizing politicized decisions and guaranteeing the quality of regulatory proposals.13 Such progress might not make the headlines. However, EU-US regulatory coordination will only become a success story if and only if pro-change groups prevail at the domestic level and, at the same time, the risk governance mechanisms of both negotiating parties converge.

Literature

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13 See the EU Commission website on impact assessment: http://ec.europa.eu/governance/impact/index_en.htm


RGIT (2009), Washington News, 38, October 29.


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