

You Can Drive My Car, Otherwise Let it Be:  
Addressing Product Regulations in the EU's Asia-  
Pacific Trade Agreements

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# **You Can Drive My Car, Otherwise Let it Be: Addressing Product Regulations in the EU's Asia-Pacific Trade Agreements**

Alasdair R. Young

This paper is under review as part of a volume edited by Johan Adriaensen and Evgeny Postnikov on *The Geo-Economic turn in FTA Negotiations? EU Trade Policy in the Asia-Pacific*.

## **Abstract**

As tariffs have fallen and transnational production has proliferated, regulatory differences have become increasingly significant impediments to trade in goods. As a result, regulatory cooperation has become an important element of free trade agreements (FTAs), particularly those negotiated by the European Union. A common assumption in the regulatory cooperation literature is that governments seek to eliminate regulatory obstacles to trade by aligning their rules. This raises the prospect of geopolitically fueled regulatory competition and potentially conflict among regulatory great powers, particularly the United States and the European Union. Based on an analysis of the EU's agreements with Korea, Japan, Singapore and Vietnam and its textual proposals for agreements with Australia, Indonesia and New Zealand, this chapter demonstrates that this is not the case. With the notable, yet partial exception of motor vehicles, these agreements do not seek regulatory alignment beyond what the parties had previously committed to under the Uruguay Round Agreement, which created the World Trade Organization. Analysis of the EU's recent, publicly available negotiating texts strongly suggests that the limited extent of regulatory cooperation in its FTAs largely reflects what the EU anticipates are the limits of acceptable cooperation, rather than the negotiating power of its partner. The US pursues an even less assertive strategy. Moreover, partner countries strive to preserve their capacity to pursue regulatory cooperation with multiple regulatory great powers. Therefore, the EU is not securing a first-mover advantage in the Asia-Pacific region with respect to trade in goods. Regulatory competition, therefore, is limited to automobiles and even there third parties' actions avoid regulatory conflict.

## **Acknowledgements**

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The governance of trade has changed dramatically since the start of the 21<sup>st</sup> Century. Trade governance has changed in both form and substance. It has shifted away from multilateral negotiations to talks among select countries. Trade governance has also become more about addressing the adverse effects of domestic policies – such as regulations – than about reducing traditional, at-the-border trade barriers, such as tariffs (Dür and Elsig 2015: 8). The European Union’s efforts to address the trade effects of goods regulations with its trade partners in the Asia-Pacific are the focus of this chapter.

Contrary to the conventional wisdom, I have argued elsewhere (Young 2015) that the EU does not seek to export its regulations through trade agreements. This chapter extends this analysis with respect to goods regulations in the EU’s ‘new generation’ trade agreements – those with Japan, Korea, Singapore and Vietnam – and its proposals for regulatory cooperation in its negotiations with Australia, Indonesia, and New Zealand. Revisiting my argument is appropriate, because in response to the popular opposition to the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the United States, the EU reiterated and re-emphasized its commitment to exporting its rules. The EU’s ‘balanced and progressive’ trade strategy states that the EU would seek to use trade agreements to raise other countries’ standards with respect to ‘human rights, working conditions, food safety, public health, environmental protection and animal welfare’ (Commission 2017: 16). Commission President Jean-Claude Juncker (2017), in his 2017 State of the Union address, stated ‘Trade is about exporting our standards, be they social or environmental standards, data protection or food safety requirements.’ The European Council’s website, declares that ‘promoting the EU's principles and values’ is ‘[o]ne of

the most important aspect of EU's trade policy.’<sup>1</sup> There is thus reason to think that even if the EU was not exporting its goods regulations before, it is now. The EU might be particularly inclined to export its rules now in order to secure a first-mover advantage given the heightened intensity of great power geo-economic competition (see Chapter 1).

This extended analysis, however, finds that my earlier argument still holds. The EU is not exporting its goods regulations through trade agreements, with the partial exception of vehicle standards. Moreover, the same holds for the US (and China). This finding means that it is unlikely that concluding a trade agreement with the EU will complicate the ability of its partners to conclude agreements with other regulatory great powers. The EU is not seeking, let alone securing, first-mover advantage.

In addition, this chapter takes advantage of the Commission’s greater transparency in trade policy in the wake of TTIP to address a question that I struggled to answer in my initial analysis: whether the EU’s lack of rule export is by choice or the result of push back from the EU’s negotiating partner. Analysis of the EU’s objectives for its negotiations with Australia, Indonesia, Japan, and New Zealand supports my contention that the EU has not sought to export its goods regulations, again with the partial exception of motor vehicles, through trade negotiations. Thus, alignment with the EU’s goods regulations primarily occurs inadvertently through the ‘Brussels effect’ (Bradford 2012; 2020), rather than intentionally through trade negotiations.

The EU adopts a ‘pragmatic’ approach to regulatory cooperation. Although the EU has greater bargaining leverage than its partners, there are limits to what concessions they are willing to make to their own policy autonomy in exchange for greater access to

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<sup>1</sup> Available at: <https://www.consilium.europa.eu/en/policies/trade-policy/promoting-eu-values/>. Last updated 4 October 2019. Accessed 16 March 2020.

the EU's market. Recognizing this, the EU moderates its negotiating position by focusing on forms of regulatory cooperation well short of harmonization.

The chapter begins by exploring how regulatory differences affect trade in goods before considering the different ways in which governments might try to address them. The second part of the chapter analyzes the provisions for regulatory cooperation in goods in the EU's 'third generation' FTAs with Asia-Pacific countries and its proposals in its on-going negotiations in the region. The third section of the chapter assesses the implications of the EU's approach for the likelihood of regulatory competition with other trade powers. This assessment also involves considering how China and the US have approached regulatory cooperation in their trade agreements. The chapter concludes by reflecting on the implications of the analysis for the EU's efforts to shape the rules of global trade.

### **Regulations, trade and the potential for regulatory competition and conflict**

All goods sold within a jurisdiction must comply with its regulations. As consequence, differences in regulations between jurisdictions can present obstacles to trade. For instance, a firm may need to produce different versions of the same product for each of the jurisdictions into which it sells, which increases production costs. As tariffs have fallen, in part as the result of successive rounds of multilateral trade negotiations, differences in domestic regulations have emerged as the most significant barriers to trade in goods (Dür and Elsig 2015: 8; WTO 2012).

Because the adverse trade effects of domestic regulations are usually side-effects of realizing other policy objectives, they, unlike tariffs, cannot simply be traded away.

Regulatory cooperation, therefore, focuses on how to liberalize trade while still achieving the underlying public policy objectives (OECD 2013: 15). There is a tendency in the literature on international regulatory cooperation to assume that the means to square this circle is through harmonization – the adoption of a common rule by both parties (Koenig-Archibugi 2010: 416; Winslett 2019: 101). For the EU to export one of its rules through a FTA, harmonization must be based on its rule.

Harmonization, however, is only one form of regulatory cooperation (Drezner 2007: 11; OECD 2013: 22). Parties' rules can become more similar (converge) without necessarily becoming the same. Parties can mitigate the adverse trade effects of their rules by accepting that the other's rule as it stands is equivalent in effect to its own, establishing equivalence, but implying no convergence. Regulatory coordination can also include aligning data and testing requirements and accepting the other party's certifications of conformity.

Most of the literature focuses on the dynamics that shape the choice of the form of regulatory cooperation (Büthe and Mattli 2011: 12; Drezner 2007: 45-7; Krasner 1991: 336; Winslett 2019). These dynamics are shaped heavily by the anticipated domestic political implications of the regulatory choice; whether regulators need to change their rules and producers adapt their products to new requirements. These domestic implications mean that regulatory cooperation choices can have distributional implications between the parties. The domestic implications and distributional effects are greatest with harmonization, with one party having to adapt to a new rule. Mutual acceptance of equivalence avoids these adjustment costs, but is often viewed as deregulatory by civil society organizations that doubt whether the parties' rules really are

equivalent in effect and expect firms of both parties to comply with which ever requirement is less demanding. Regulators may also not be persuaded that the other's rule really is equivalent in effect or enforced effectively. Regulatory cooperation in which actual differences between rules are overcome, therefore, is very rare.

The form of regulatory cooperation in one FTA can also have implications for what kinds of regulatory cooperation can be pursued by the parties with other trade partners. With respect to tariffs, governments can manage different commitments to different trade partners through rules of origin. Regulatory requirements, however, are the same for all products, wherever they come from. As a result, if country A agrees to harmonize its rules with those of country B, it cannot also harmonize its rules with those of country C (assuming they are different from B's). Thus, country B would have a first-mover advantage over country C in their regulatory competition. Melo Araujo (2016:25), consequently, sees regulatory cooperation as having significant potential to discriminate against non-participants, leading to regulatory competition and conflict.

This situation has some similarities with 'rule overlap' (sometimes 'clash') where two jurisdictions impose conflicting requirements on actors operating across them (Farell and Newman 2016), but in this case it is two trade partners that make incompatible demands on a third (common) partner. It also a specific manifestation of 'international regime complexity' (Alter and Meunier 2006: 365). Where trade partners are pursuing regulatory cooperation through harmonization, therefore, there is the potential for 'agreement clash,' in which agreement with one party would preclude regulatory cooperation with another.

Such agreement clash has potentially significant geo-economic implications. It is commonly thought that ‘states with large markets routinely compete with one another to ... export their rules to other jurisdictions, and provide their firms with competitive advantages’ (Kalyanpur and Newman 2019: 1; see also Meissner 2018: 43; Melo Araujo 2016: 25). As China is still primarily a rule taker, rather than a rule-maker (Eckhardt and Wang 2019), and because the EU and the US are commonly identified as the world’s two most important setters of regulatory standards (Drezner 2007: 36; Sapir 2007: 12), rule competition and conflict are most likely to involve the EU and the US. Concern about such competition is evident in the Trump Administration seeking a commitment from the EU in their on-going bilateral negotiations that it will not ‘not foreclose export opportunities to the United States with respect to third-country export markets, including by requiring third countries to align with non-science based restrictions and requirements or to adopt SPS measures that are not based on ascertainable risk’ (USTR 2019: 2). There is, therefore, the potential regulatory competition between the US and the EU in the Asia-Pacific.

Forms of regulatory cooperation other than harmonization, however, do not have the same potential for regulatory competition and conflict. The Uruguay Round, which created the World Trade Organization (WTO), produced two agreements to address regulatory barriers to trade in goods: the Technical Barriers to Trade (TBT) Agreement, which built upon the Tokyo Round’s plurilateral standards code, and the Sanitary and Phytosanitary (SPS) Agreement, which applies to regulations governing animal and plant health and food safety. Both agreements urge WTO members to use international standards as the basis of their own regulations. Thus, any FTA that simply calls on the

parties to use international standards does not go beyond this base-line. If an agreement specifies that the parties should use the standards of a specific international standard setting body, then the potential for agreement clash increases. If, however, country A agrees to consider a particular regulation of country B to be equivalent to its own, it is not precluded from also considering country C's regulation to be equivalent. Commitments to increase regulatory transparency benefits all trade partners, not just those party to the agreement. Thus, the type of regulatory cooperation pursued in one FTA has implications for the potential for conflict with regulatory cooperation pursued with other trade partners (see Table 1). Given this volume's focus on geo-economics, this analysis concentrates on the potential for regulatory conflict.

*Table 1 Regulatory cooperation and agreement clash*

<i>Approach</i>	<i>Potential for agreement clash</i>
Harmonization	High
Adoption of specific international standards	Moderate
Approximation to international standards	Low
Equivalence	None
Increased transparency	None

### **The EU's practice of regulatory cooperation**

Thus, whether the EU is seeking to export its rules through regulatory harmonization in trade agreements has implications for countries not party to those agreements and thus for the likelihood of regulatory conflict. The common perception is that the EU actively seeks to export its rules through harmonization in trade agreements (Kerr and Viju-Miljusevic 2019: 23; Meissener 2018: 6; Piermartini and Budetta 2009: 291; Stoler 2011:

217; WTO 2011: 142). Meunier and Nicolaïdis (2006: 907) characterize the EU as a ‘trade power’ that is able to ‘export’ its laws and standards to other countries by offering improved access to its large and valuable market (see also Garcia 2013: 535; Müller and Falkner 2014: 11-12). For Damro (2012: 695), the ‘externalization’ of EU rules through trade agreements is a key feature of market power Europe.

The Commission’s rhetoric encourages the perception of the EU as a rule exporter. The Commission (1996: 4; 2006: 5) has long emphasized encouraging others to adopt EU standards as a means of liberalizing trade. With the ‘balanced and progressive’ trade strategy it has, at least rhetorically, doubled-down on exporting EU rules (Commission 2015b). There is thus good reason to expect the EU to export its product regulations through its trade agreements.

That expectation, however, does not go unchallenged. The view that the EU exports its rules through trade agreements is heavily influenced by FTAs with countries with particularly close economic and political relations with the EU – countries in its ‘neighbourhood’ and the African, Caribbean and Pacific (ACP) countries (Piermartini and Budetta 2009: 292-3; WTO 2011: 142; 157-8). It also reflects a tendency to equate WTO-esque commitments to use international standards with harmonization to EU rules (see, for example, Piermartini and Budetta 2009: 270). Using a more stringent definition of harmonization – actual alignment with EU rules – Stephen Woolcock (2007: 4) concluded that the EU has ‘not been very aggressive in pushing for harmonization’ based on its rules. I found that this conclusion held even for the EU’s early third-generation

FTAs in which regulatory cooperation was given greater priority (Young 2015).<sup>2</sup> As I shall demonstrate, despite the Commission's rhetoric, the EU has not changed its spots. It still does not pursue harmonization with its rules, with the partial exception of motor vehicles.

*Not exporting rules, except...*

A careful reading of the TBT and SPS provisions of the EU's 'third generation' trade agreements with countries in the Asia-Pacific reveals that the EU has not sought to export its rules (see Table 2). Rather the agreements rehearse the language in the WTO's TBT Agreement about using international standards when adopting regulations, unless those international standards would not be sufficient to achieve a jurisdiction's objectives. The agreements between the EU and Singapore, Vietnam and Japan simply affirm the parties' rights under the WTO's SPS Agreement. The EU's earlier agreement with Korea talks about developing common understandings of international standards. Thus, the EU's concluded FTA's do not advance regulatory alignment beyond the very limited efforts of the WTO's TBT and SPS Agreements.

The EU's proposed TBT texts for its agreements with Australia, Indonesia and New Zealand also echo the WTO's TBT Agreement (see Table 3). The EU's SPS proposals again just reaffirm the parties' rights under the WTO's SPS Agreement. Thus, even the EU's proposals do not seek to go beyond the baseline established by the Uruguay Round Agreement, to which all of the countries are already parties.

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<sup>2</sup> Melo Araujo (2016: 225-7) looking at different provisions – services, investment, government procurement, intellectual property and competition policy in the EU's agreements with a distinct, but overlapping (Korea and Singapore) set of partners also finds that the EU does not export its rules.

Table 2 General TBT and SPS provisions in completed agreements: Carry on WTO

	<i>WTO</i>	<i>EU-Korea</i>	<i>EU-Singapore</i>	<i>EU-Vietnam</i>	<i>EU-Japan</i>
Technical barriers to trade	2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued....	Art 4.4.1 the Parties agree ... to use relevant international standards as a basis for technical regulations including conformity assessment Procedures except when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued....	Art 4.6(b) The parties agree...consistent with Article 2.4 of the TBT Agreement, to use, to the maximum extent possible, relevant international standards as a basis for their technical regulations except when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued....	Art 5.4.1 Each Party shall ... [use] relevant international standards ... as a basis for their technical regulations except when such international standards would be ineffective or inappropriate for the fulfilment of the legitimate objectives pursued by a Party	Art 7.6.3(a) When developing technical regulations ... each Party shall use relevant international standards, guides or recommendations, or the relevant parts of them, to the extent provided for in ... the TBT Agreement, as a basis for its technical regulations ... and avoid deviations from the relevant international standards or additional requirements when compared to those standards, except when the Party developing the technical regulation ... can demonstrate, based on relevant information, including available scientific or technical evidence, that such international standards would be ineffective or inappropriate for the fulfilment of legitimate objectives pursued....
Sanitary and phytosanitary	Art 3.1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.	Art 5.6(a) cooperate ... to develop a common understanding on the application of international standards in areas which affect, or may affect trade between them with a view to minimising negative effects on trade between them	Art 5.6(a) The Parties ... shall ensure consistency of SPS measures with the principles established by Article 3 of the SPS Agreement	Art 6.4.2 Each Party shall apply the SPS Agreement in the development, application or recognition of any SPS measure with the aim of facilitating trade between the Parties while protecting human, animal or plant life or health in its territory.	Art 6.4 The Parties affirm their rights and obligations relating to sanitary and phytosanitary measures under the SPS Agreement. Nothing in this Chapter shall affect the rights and obligations of each Party under the SPS Agreement.

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Free Trade Agreement between the European Union and the Republic of Singapore, initialed September 2013, text available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>. Accessed 16 July 2014.

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*Table 3 The EU's proposed TBT and SPS provisions: Still carry on WTO*

	<i>Australia</i>	<i>New Zealand</i>	<i>Indonesia</i>
Technical barriers to trade	Art X.4.3 The Parties shall use relevant international standards as a basis for their technical regulations except when the Party developing the technical regulation can demonstrate that such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued	Art X.4.3 The Parties shall use relevant international standards as a basis for their technical regulations except when the Party developing the technical regulation can demonstrate that such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursue	Art X.4.3 The Parties shall use relevant international standards as a basis for their technical regulations except when the Party developing the technical regulation can demonstrate that such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued
Sanitary and phytosanitary	Art X.4 The Parties affirm their rights and obligations under the SPS Agreement. In particular, the Parties recall that in cases where relevant scientific evidence is insufficient, a Party may provisionally adopt SPS measures on the basis of available pertinent information, including that from the relevant international organizations.	Art. X.4 The Parties affirm their rights and obligations under the SPS Agreement. In particular, the Parties recall that in cases where relevant scientific evidence is insufficient, a Party may provisionally adopt SPS measures on the basis of available pertinent information, including that from the relevant international organizations.	Art X.3.1 The Parties reaffirm their rights and obligations relating to SPS measures under the SPS Agreement.  2. Each Party commits to apply the principles of the SPS Agreement in the development, application or recognition of any sanitary or phytosanitary measure with the intent to facilitate trade among the Parties while protecting human, animal or plant life or health in the territory of each Party.

#### Sources

The EU's proposals for the Australia FTA are available at:

[http://trade.ec.europa.eu/doclib/cfm/doclib\\_section.cfm?sec=116&link\\_types=&dis=20&sta=21&en=32&page=2&langId=EN](http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=116&link_types=&dis=20&sta=21&en=32&page=2&langId=EN). Accessed 8/27/19.

The EU's proposals for the Indonesia FTA are available at:

[http://trade.ec.europa.eu/doclib/cfm/doclib\\_section.cfm?sec=739&link\\_types=&dis=20&sta=41&en=48&page=3&langId=EN](http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=739&link_types=&dis=20&sta=41&en=48&page=3&langId=EN). Accessed 3/22/19.

The EU's proposals for the New Zealand FTA are available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1867>. Accessed 8/27/19.

Table 4 Pursuing alignment in motor vehicle regulations

<i>EU-Korea</i>	<i>EU-Singapore</i>	<i>EU-Vietnam</i>	<i>EU-Japan</i>	<i>New Zealand</i>	<i>Indonesia</i>
<p>Annex 2-C Art 3(a)( iii) The Parties shall harmonise the regulations listed in Table 2 of Appendix 2-C-2, in case of the [EU], and in Table 2 of Appendix 2-C-3, in case of Korea, with the corresponding UN ECE Regulations or Global Technical Regulations ... within ... five years of the entry into force of this Agreement, unless exceptionally a Party demonstrates that a specific UN ECE Regulation or GTR would be ineffective or inappropriate for the fulfilment of legitimate objectives pursued on the basis of substantiated scientific or technical information</p>	<p>Annex 2-4 Art 3.1(a) The Parties shall ... refrain from introducing any new domestic technical regulations diverging from UN ECE Regulations or Global Technical Regulations (GTR) in areas covered by such Regulations or GTR, or where the completion of such Regulations or GTR is imminent unless there are substantiated reasons, based on scientific or technical information, why a specific UN ECE Regulation is ineffective or inappropriate for ensuring road safety or the protection of the environment or public health</p> <p>Art 3.2 Insofar as a Party has introduced and maintains ... domestic technical regulations that diverge from existing UN ECE Regulations or GTR, that Party shall review these domestic technical regulations at regular intervals ... with a view to increasing their convergence to the relevant UN ECE Regulations or GTR</p>	<p>Annex 2-B Art 3.1 Each Party shall refrain from introducing new domestic technical regulations diverging from the technical requirements of existing UNECE Regulations or UNECE Regulations the completion of which is imminent, in areas covered by those Regulations ... unless there are substantiated reasons, based on scientific or technical information, why a specific technical requirement of a UNECE Regulation is ineffective or inappropriate for ensuring safety, or the protection of the environment or human health.</p> <p>Art 3.3 If a Party has adopted ... and maintains domestic technical regulations that deviate from existing technical requirements, ... of UNECE Regulations, that Party shall review them at regular intervals ... with a view to increasing their convergence with the relevant technical requirements ... of UNECE Regulations</p>	<p>Annex 2-C Art 5.2 The Parties ... shall agree on the dates for applying the UN Regulations specified in Appendix 2-C-2 no later than seven years after the date of entry into force of this Agreement.</p> <p>Art 12.1 The Parties shall refrain from introducing any new domestic technical regulations or conformity assessment procedures which have the effect of preventing or increasing the burden for the importation and the putting into service on their domestic market of products for which type approvals have been granted under UN Regulations applied by both Parties, for the areas covered by those UN Regulations unless such domestic technical regulations or conformity assessment procedures are explicitly provided for by those UN Regulations</p>	<p>X.5.1(a) The Parties shall refrain from introducing or maintaining a domestic technical regulation, marking, or conformity assessment procedure diverging from UN Regulations or GTRs in areas covered by such Regulations or GTRs, including where those Regulations or GTRs have not been completed but their completion is imminent, unless there are substantiated reasons why a specific UN Regulation or GTR is ineffective or inappropriate for ensuring road safety or the protection of the environment or public health.</p>	<p>Art X.5.1a The Parties shall refrain from introducing or maintaining a domestic technical regulation, marking, or conformity assessment procedure diverging from UN ECE Regulations or GTRs in areas covered by such Regulations or GTRs, including where those Regulations or GTRs have not been completed but their completion is imminent unless there are substantiated reasons why a specific UN ECE Regulation or GTR is ineffective or inappropriate for ensuring road safety or the protection of the environment or public health.</p>

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Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *Official Journal*, L127/6, 14 May 2011.

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The EU's proposals for the Indonesia FTA are available at:

[http://trade.ec.europa.eu/doclib/cfm/doclib\\_section.cfm?sec=739&link\\_types=&dis=20&sta=41&en=48&page=3&langId=EN](http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=739&link_types=&dis=20&sta=41&en=48&page=3&langId=EN). Accessed 3/22/19.

The EU's proposals for the New Zealand FTA are available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1867>. Accessed 8/27/19

Those general provisions reveal only so much, however. If the EU were to try to export its rules it would most likely seek to do so through sector-specific annexes. Some of the EU's agreements and proposed agreements do have sectoral annexes that promote regulatory cooperation. For the most part, however, these provisions and proposed provisions focus on matters of regulatory cooperation well short of alignment. The chemicals annex in the EU-Korea agreement, for instance, called for cooperation on good laboratory practices and test guidelines. The electronics annexes in the EU's agreements with Korea and Singapore and the pharmaceutical annexes in its agreements with Korea, Singapore and Vietnam all called for the use of international standards. The motor vehicles annexes in the concluded FTAs and the EU's textual proposals for Indonesia and New Zealand,<sup>3</sup> however, go much further in terms of seeking to align trade partners' regulations with EU rules (see Table 4).

There are three elements to the difference in commitments with respect to motor vehicles. First, the injunction to use international standards is much stronger – 'shall'. For instance, the Singapore and Vietnam agreements stipulate that the parties 'shall refrain' from adopting new regulations that diverge from United Nations Economic Commission for Europe (UNECE) standards. Second, some agreements call for alignment of existing regulations, not just new ones. The EU-Korea and EU-Japan agreements identify specific regulations that were to be aligned with UNECE requirements. Both the Singapore and Vietnam agreements require that the parties periodically review existing standards with a 'view to increasing their convergence' with international standards. The EU's proposals for agreements with Indonesia and New

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<sup>3</sup> The proposal for Australia was not public as of mid-June 2020.

Zealand go further still, prohibiting maintaining domestic regulations that diverge from international standards. Third, UNECE standards are aligned closely with EU regulations. The EU is very influential in the UNECE (Holzinger and Sommerer 2013), where it is able to block standards that it does not like. The EU also incorporates UNECE standards into its own rules and uses the UNECE as the ‘main instrument for the development of revisions and amendments to those regulations with respect to updates according to technological progress’ (Commission 2015a). Thus, to a significant extent, the EU is seeking to use trade agreements to export its motor vehicle rules.

*Power or preferences: Explaining the EU’s approach to regulatory cooperation*

The existing literature on regulatory cooperation suggests essentially two possible explanations for the EU’s success in exporting its goods regulations:<sup>4</sup>

- 1) resistance by the other party leads to an agreement less ambitious than the EU’s objectives (Conceio-Heldt 2014; Harrison et al 2019: 265); or
- 2) the EU pursues only modest objectives, which it secures (MacKenzie and Meissner 2017: 844; Young 2015).

There are two different versions of the power of the partner explanation.

According to

Conceio-Heldt (2014), the EU’s negotiating position and the outcome vary with the power of the EU’s partner, which reflects the relative size of its economy and its

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<sup>4</sup> A third possible explanation for the EU’s reluctance to export its rules (see Young 2015) is that there is disagreement within the EU about whether to do so. This is arguably the case with respect to labor standards where member states disagree about how aggressively to promote them (Commission 2018). With respect to goods regulations, however, this is not an issue. The single market has established a set of rules that the member states and their firms support.

alternatives to an agreement with the EU. She contends that when negotiating with a weaker partner, the EU will pursue an aggressive bargaining strategy – making high opening demands and refusing to make concessions – and will be ‘effective.’<sup>5</sup> The other partner power explanation is that even weaker partners are able water-down the EU’s demands (Harrison et al 2019: 265). If the former explanation is correct we would expect to see variation in the EU’s negotiating positions and outcomes across its partners. If the latter explanation is correct, we would expect to see a substantial gap between the EU’s negotiating objectives for regulatory cooperation and the agreed outcome.

The modest objectives explanation has much in common with the latter power of the partner explanation. The EU, recognizing that some demands would be unacceptable to the partner, and thus jeopardize the entire agreement, tempers its positions so that they are more realistic. For instance, one reason the Commission (2018) gave for not including more legalistic mechanisms for enforcing labor and environmental standards in its future FTAs as part of the ‘balanced and progressive’ trade strategy was that it anticipated that its partners would be less willing to make commitments.<sup>6</sup> The EU’s Trade Sustainability Impact Assessment for its agreement with Japan noted that the EU had adopted a ‘pragmatic approach’ in seeking only to promote the use of UNECE standards, implying that it asked for what it thought it could achieve (Commission 2016: 64).<sup>7</sup> Such pragmatism reflects a general move in international regulatory cooperation

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<sup>5</sup> Bradford (2020: 71) also contends that the EU is better able to impose its regulations on weaker partners, because of bargaining leverage.

<sup>6</sup> MacKenzie and Meissner (2017) contend that EU commercial interests opposed including strong human rights provisions in the EU’s FTA with Singapore, because they were concerned that doing so would prompt Singapore to reject the agreement.

<sup>7</sup> Ignacio Garcia-Bercero, a director in the Directorate General for Trade, described the EU’s ‘demand’ for regulatory cooperation on automobiles with South Korea and Japan as ‘reasonable,’ because it sought only adoption of international standards. The EU sought loser cooperation with Canada because it anticipated that Canada would not compromise its regulatory alignment with the US. Comments during the virtual

away from seeking harmonization given the adjustment costs associated with it (Baccini et al 2015: 173; OECD 2013: 16). If this explanation is correct, one would expect to see modest negotiating proposals from the EU and little variation in provisions across agreements with partners of differing degrees of power.<sup>8</sup>

The consistency of outcomes across the agreements with respect to the general TBT and SPS provisions (see Table 2) argues strongly against the expectation that the outcomes will vary with the power of the EU's trade partner. Likewise, the consistent modesty of the EU's TBT and SPS proposals in its negotiations with Australia, Indonesia and New Zealand (see Table 3) argues against the EU modifying its approach based on how powerful its partner is. For the most part, therefore, power is not an important factor in explaining the EU's limited export of its rules. Rather, the EU seems generally to begin with modest objectives that it subsequently achieves.

A closer analysis of the EU's negotiations on goods regulations with Japan provides a further window on the importance of power. A focus on Japan is appropriate for two reasons: first, and foremost, it is possible. At the time of writing (July 2020), Japan was the only partner for which the Council's negotiating directives had been made public and the negotiations had been concluded. Second, Japan has the largest economy of any of the countries with which the EU has concluded a trade agreement and, therefore, should be the partner most likely to be able to resist the EU's efforts to export its rules.

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panel discussion on 'The EU, WTO and Regulatory Cooperation post-Covid19' organized by NORTIA: Jean Monnet Network on EU Foreign Affairs, 7 July 2020.

<sup>8</sup> The EU's practice of copying text among agreements is part of a widespread tendency (Allee and Elsig 2019; Peacock et al 2019). My analysis, however, contradicts Allee and Elsig's (2019: 606) assumption that the EU is doing so in order to export its rules. Peacock et al (2019: 935) also concluded that power considerations were not the driver of the use of boilerplate language, but their conclusion was based on the pattern of replication, rather than the substance of the agreements.

A comparison of the Commission's negotiating directives (Council 2012) for its agreement with Japan and the agreement itself, makes clear that the EU did not achieve all it wanted to in terms of regulatory cooperation on goods. For a start, the Council identified seven sectors -- automotive, railways, electrical and electronic products, medical devices, pharmaceuticals, chemicals and agri-food products -- in which it considered the removal of regulatory barriers to be of 'utmost importance,' and stated that the agreement should include specific annex to address them (Council 2012: 5). The Council, however, specified objectives only for automobiles, which was the only sector for which an agreement was reached. The extent of regulatory cooperation in the EU-Japan agreement is, therefore, considerably less than the EU had initially envisaged. This outcome is consistent with the power explanation for limited EU rule export, but the lack of specific objectives for the other sectors raises questions about the extent of the EU's commitment.

At first glance, it would appear that the EU did realize ambitious objectives with respect to motor vehicles in its FTA with Japan. The Council's directives stated that

... the Parties will adopt the necessary UNECE regulations to ensure that motor vehicles, parts, systems, and components originating in one side will be accepted on the market of the other side without additional testing, certification, or marking requirements. In particular, a certificate of conformity issued by the exporting side will be considered sufficient proof of type approval (Council 2012:5).

The agreement EU and Japan reached identified UNECE standards that were applied by one party but not the other and agreed that they would bring them into alignment within seven years of the entry into force of the agreement (see Table 4). Thus, the EU would

seem to have achieved its objective with respect to the harmonization of motor vehicle standards in its agreement with Japan.

Strikingly, the EU's agreements with Japan and South Korea require harmonization of specific existing regulations with UNECE standards, while the agreements with weaker parties – Singapore and Vietnam – require only that the parties review their regulations. One possible explanation of this power-contrary finding is that both Japan and South Korea are parties to the UNECE, while Singapore and Vietnam are not.<sup>9</sup> In particular, Japan had already aligned its domestic rules with 40 out of 47 UNECE safety standards (Commission 2016: 130). The EU-Japan negotiations, therefore, focused on addressing the outstanding seven UNECE standards, even though there were regulatory differences not subject to UNECE standards. The EU's proposal for its FTA with Indonesia also called for aligning existing regulations with UNECE standards. Indonesia, while not a member of the UNECE, announced in September 2017 that it would align several auto part regulations with UNECE standards.<sup>10</sup> With respect to motor vehicles, the EU's objectives were more ambitious with more powerful countries, but those countries were also already using the international standards in question. The

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<sup>9</sup> There are actually two relevant agreements within the UNECE. The 1958 Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted to and/or used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions; It has 53 contracting parties, including the 24 EU member states and the EU, Australia, Japan, New Zealand, and South Korea, but not China or the US. (<http://www.unece.org/trans/maps/un-transport-agreements-and-conventions-18.html>). The 1998 Agreement concerning the establishing of global technical regulations for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles. It has 38 contracting parties, including 14 EU member states and the EU, the US, China, Australia, Japan, New Zealand, and South Korea (<http://www.unece.org/trans/maps/un-transport-agreements-and-conventions-20.html>).

<sup>10</sup> Indonesia Investments, 'Automotive Industry Indonesia: EU's UNECE to Become Key Reference,' 19 September 2017. Available at <https://www.indonesia-investments.com/news/todays-headlines/automotive-industry-indonesia-eu-s-unece-to-become-key-reference/item8212>. Accessed 30 September 2019. I am grateful to Poppy Winanti for assistance with finding this information.

EU's approach, therefore, was more consistent with its partners' regulatory preferences than its relative power.

### **The implications for others: Very little prospect for agreement clash**

As the EU's approach to regulatory cooperation in goods does not involve the alignment of rules, except with the partial exception of automobiles, there is little risk that concluding an agreement with the EU would adversely affect China's or the US's ability to conclude an agreement with one of the EU's trade partners; the EU has not secured first-mover advantage. This implication is compounded by both China and the US pursuing very similar approaches to regulatory cooperation in the Asia-Pacific to the EU. The Transpacific Partnership (TPP) and the China-Australia FTA, for instance, both emphasize the use of international standards in their TBT provisions and both affirm the parties' commitment to the WTO's SPS Agreement (see Table 5). Neither of these agreements includes sectoral annexes advancing closer regulatory cooperation, although the US exchanged letters with several countries concerning the equivalence of specific SPS measures and the US and Japan concluded a bilateral agreement on non-tariff measures affecting automobiles.<sup>11</sup>

The greatest prospect for regulatory competition, therefore, concerns automobiles. Porter (2011: 72) identified automobiles as an example of 'policy paradigm clash' between the EU and the US, given the differences both in the specific regulations and in how conformity with those standards is established. Therefore, a closer look at the

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<sup>11</sup> TPP Full Text. Available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>. Accessed 16 December 2019.

implications of the EU's efforts to promote alignment with UNECE vehicle regulations is particularly appropriate.

*Table 8.5 Other trade powers' regulatory cooperation in the Asia-Pacific*

	<i>TPP/CPTPP</i>	<i>China- Australia FTA (ChAFTA)</i>
Technical Barriers to Trade	<p>8.5.1 The Parties recognise the important role that international standards, guides and recommendations can play in supporting greater regulatory alignment, good regulatory practice and reducing unnecessary barriers to trade.</p> <p>8.5.2 In this respect, and further to Articles 2.4 and 5.4 and Annex 3 of the TBT Agreement, to determine whether there is an international standard, guide or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement, each Party shall apply the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 (G/TBT/1/Rev.12), as may be revised, issued by the WTO Committee on Technical Barriers to Trade.</p>	<p>6.5 The Parties shall use international standards, guidelines and recommendations, or the relevant parts of international standards, as a basis for their technical regulations and related conformity assessment procedures where relevant international standards exist or their completion is imminent, unless such international standards or their relevant parts are ineffective or inappropriate to fulfil legitimate objectives</p>
Motor Vehicle Regulations (TPP, Annex 2-D-Appendix D-1-Japan)	<p>3.6.a With respect to requirements of a safety regulation under the Road Vehicle Law ... of Japan ... if the competent authority of Japan finds that a requirement of the U.S. FMVSS is no less stringent than the requirement under the Road Vehicle Law to which it corresponds, originating motor vehicles from the United States classified under heading 87.03 that comply with such a requirement of the U.S. FMVSS shall be deemed to comply with that requirement under the Road Vehicle Law. Such treatment shall apply unless that requirement under the Road Vehicle Law is modified and, as modified, is substantially more stringent than previously. In that event, Japan shall continue to provide such treatment for a period that is usually not less than 12 months after the date on which the requirement under the Road Vehicle Law is modified.</p>	
Sanitary and Phytosanitary	<p>7.4.1 The Parties affirm their rights and obligations under the SPS Agreement.</p> <p>7.9.3 nothing in this Chapter shall be construed to prevent a Party from:</p> <ul style="list-style-type: none"> <li>(a) establishing the level of protection it determines to be appropriate;</li> <li>(b) establishing or maintaining an approval procedure that requires a risk analysis to be conducted before the Party grants a product access to its market; or</li> <li>(c) adopting or maintaining a sanitary or phytosanitary measure on a provisional basis.</li> </ul>	<p>Art 5.4 The Parties affirm their rights and obligations with respect to each other under the SPS Agreement.</p>

**Notes:**

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership retained the TBT and SPS provisions from the TPP agreement.  
The China-Australia Free Trade Agreement is one of China's deepest trade agreements (Eckhardt and Wang 2019: 12)

**Sources**

Transpacific Partnership text available at: <https://ustr.gov/tpp/#text>. Accessed 19 September 2019  
China-Australia Free Trade Agreement available at: <https://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents.aspx>. Accessed 7 September 2019.

As of July 2020, only four countries had concluded agreements with both the EU and the US in which regulatory cooperation on cars was an issue: Canada, Japan, Korea, and Mexico. The US had regulatory cooperation first with Canada and Mexico. The EU was first with South Korea. Japan negotiated regulatory cooperation with the US and the EU simultaneously.

All four countries have addressed agreement conflict by making use of equivalence. In the US-Korea FTA, Korea agreed to accept US safety regulations for up to 25,000 cars per US automaker per year without any additional modification (Song 2011: 9).<sup>12</sup> As this volume is far above existing exports, Korea has effectively accepted the equivalence of US automobile safety standards. The US-Japan agreement on automobiles specified that Japan will consider whether US automobile safety standards are equivalent ('no less stringent') than Japan's requirements and cars that comply with those US standards will be considered to comply with Japan's (USITC 2016: 240-1 and see Table 8.5). In the US-Mexico-Canada Agreement (USMCA), the US and Mexico exchanged letters on regulatory cooperation in cars. In that letter, Mexico stipulated that by accepting US automobile standards as equivalent to its own it was not precluded from

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<sup>12</sup> Korea agreed to accept US vehicles if their emissions did not exceed 119 percent of Korea's emissions limit. This provision also applied to the EU-Korea FTA through its most-favored-nation clause (Song 2011: 9).

accepting other (i.e., UNECE) standards as also equivalent.<sup>13</sup> In the Comprehensive Economic and Trade Agreement with the EU, Canada agreed to accept only some UNECE standards as equivalent to its own (Young 2015), meaning the US largely maintained its first-mover advantage. Australia, New Zealand and Singapore also accept both UNECE and US standards as equivalent (Uthus 2019). For the third parties equivalence enables them to remove regulatory obstacles to trade with multiple major regulatory powers. For the great regulatory powers it means that they ease market access for their producers, but do not secure first-mover advantage.

## **Conclusions**

As I found previously (Young 2015), the EU does not generally export its goods regulations through free trade agreements. The expanded number of cases, however, has revealed that automobile safety standards is a more significant exception to that rule that it appeared in 2015. Subsequent agreements have made clear that the EU has actively promoted alignment with UNECE vehicle standards through its trade agreements.

The consistency of provisions across agreements with countries despite variation in their economic power suggests that the lack of rule export is not due to hard bargaining by the partner country. The greater transparency in EU trade policy, which has made Council negotiating directives and Commission negotiating texts available, reveals that for the most part the EU's opening positions are fairly modest and are reflected in the agreements. Strikingly, EU rule export with respect to cars was greater in its agreements

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<sup>13</sup> Mexico-US Side Letter on Auto Safety Standards. Available at: [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/MX-US\\_Side\\_Letter\\_on\\_Auto\\_Safety\\_Standards.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/MX-US_Side_Letter_on_Auto_Safety_Standards.pdf). Accessed 19 September 2019.

with Korea and Japan, than it was in its agreements with Vietnam and Singapore. This is the opposite of what one would expect if the power of the partner shaped the outcome. This pattern, however, is consistent with the EU modifying its objectives in anticipation of what its partner would be willing to accept, as both Korea and Japan are parties to the UNECE, while Singapore and Vietnam are not. The EU's ambitious negotiating text with respect to New Zealand is consistent with this explanation, although its one with Indonesia perhaps is not. Power, therefore, may not be entirely irrelevant. In addition, the EU was not able to secure closer regulatory cooperation with Japan in as many sectors as it had wanted, although the Council did not specify clear objectives for negotiations in the other sectors. Actual bargaining, however, seems to explain less of the observed outcome than the EU's objectives anticipating objections.

Because the EU does not actively seek to export its goods regulations, it is not generally engaging in regulatory competition. In addition, as the critical case of vehicles illustrates, the EU's trade partners resist being caught up in great power regulatory competition by making use of equivalence, which is non-exclusive. As a result, the EU's FTAs improve market access, but do not secure its firms first-mover advantage.

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