

# **How international trade agreements affect domestic regulation: The TTIP regulatory activities in their wider context and the likely consequences**

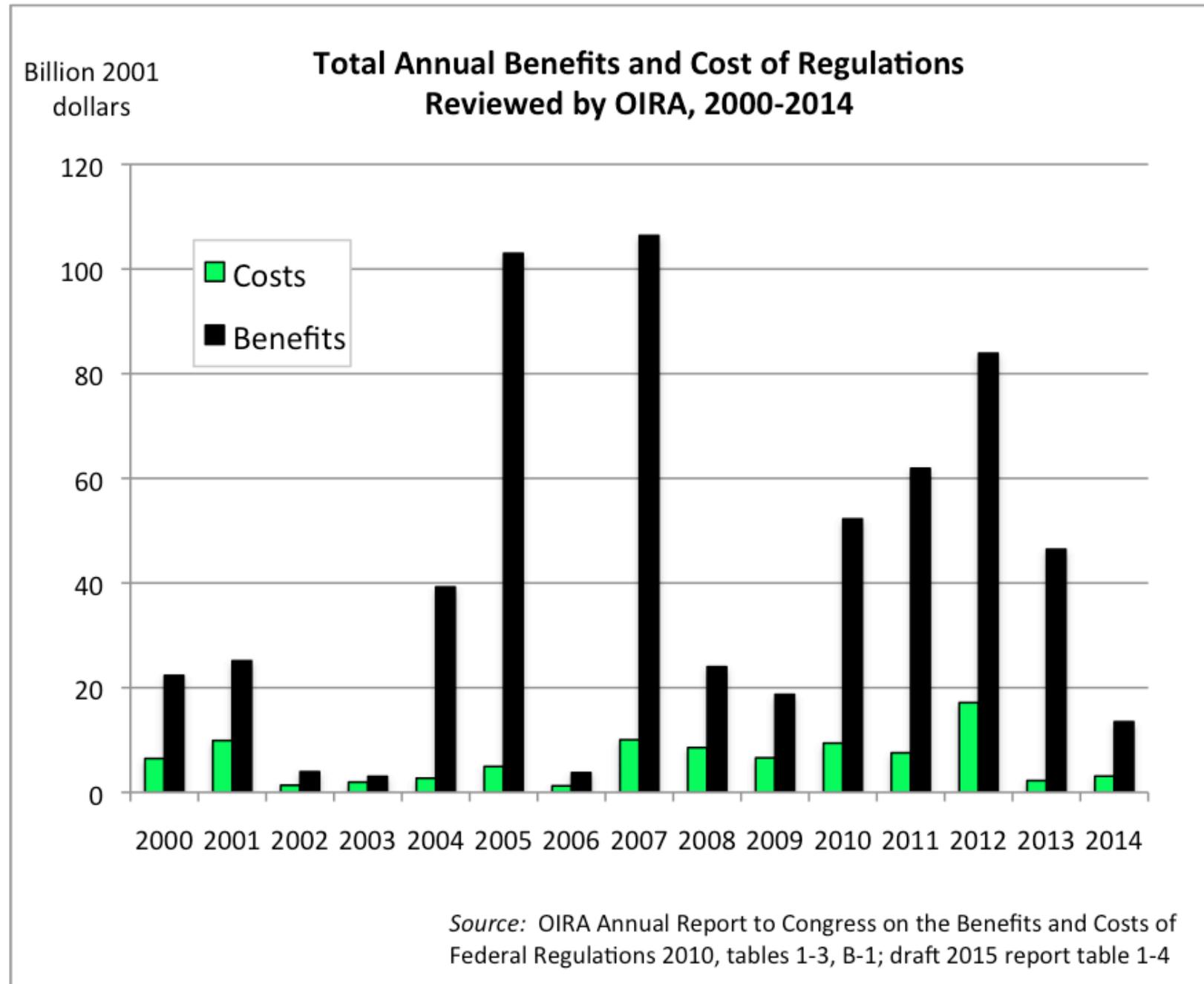
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## Introduction & context

- WTO multilateral negotiations: Doha 'Development' Round:
  - Before and since Nairobi (Dec. 2015): Rich countries have said it is over, now time to concentrate on the 'new' issues
  - These are the same issues the developing countries resisted inclusion in the Development Round, arguing that they put them at a major disadvantage:
    - Competition, public procurement, services, intellectual property, etc.
    - 'Kicking away the ladder' for the developing countries (Ha-Joon Chang, F. List)
- The '**coalition of the willing**' to advance these: TTIP, TPP, TiSA. Others can join later, but have to agree to rich countries' terms
- EU's 'Trade for All' takes the coalition of the willing approach
- Pressure on regulation from two sides: trade and domestic
- Crucial issue for the whole discussion:  
**Regulatory benefits are far bigger than the costs** on aggregate [slide: graph]

## Benefits vs. Costs of Regulations



## Disciplining regulations I: International trade law - GATT, WTO, etc.

- GATT - avoiding instability while bringing down tariffs and quotas.
  - Domestic regulations were background institutional features
- 1970s: US trade deficit, slower growth, companies wanted to export - the easy way out
- 1974 Trade Act - institutionalisation of a major system of complaint against other countries' differences: "trade barriers", "unfair"
- WTO: vaguely worded 'disciplines' on regulation -> Dispute settlement system gave precise meaning to these, through case law
- Trade vs. other international law, e.g. human rights, environ. (1990s & later):
  - WTO dispute settlement: eventually decided to consider only trade
- The Precautionary Principle:
  - WTO dispute settlement: "The PP does not override other parts of the agreement"

## Disciplining regulations II: Good regulatory practice (GRP)

- GRP has little prominence in general discussions on TTIP to date. Will be much more during 2016. Very prominent in TPP.
- The EU's TTIP chapter on reg. cooperation: Section II is GRP
  - “As laid down” in OECD 2012
- What is OECD good regulatory practice (2012)?  
(Based originally on US model - Mumford, 2014)
  - ‘Ensure benefits justify the costs’; ‘maximise net benefits’ [=> CBA]
  - Transparency, openness: contribute to draft proposals, to the supporting analysis
  - Oversight across government and all levels [Incl. policing]
  - Regulatory Impact Assessment
  - Review of existing regulations [Costs]
  - Risk assessment, risk management, risk communication
  - Judicial review of regulations
- Perspective: Technocratic process, not political; costs for business
- The role of the OECD - has very great symbolic power:
  - Framing of ideas, categorising. e.g. Jobs Study 1994
  - Is “the enforcer of Western norms” (Foreign Affairs article, 2015)

## Good regulatory practice? The US and UK systems

- **The US system**, rated very highly by the OECD (2015):
  - Robert Weissman, director of Public Citizen, the consumer advocacy group, in written testimony to a Senate Committee, June 2015:
    - “Unreasonable delay permeates almost all aspects of the rulemaking process. ... The problem of protracted delay is pervasive in the rule-making sphere and reflective of a rulemaking process gone askew. ... the source of the problem is ... a thicket of legislatively mandated process and multiple analyses, along with inappropriate influence exerted by and for regulated parties.”
- **The UK system**, rated as top in the OECD/world by the OECD (2015):
  - “a large and unaccountable bureaucracy has been created with the express purpose of making it more difficult for government departments to pass laws which impose costs on businesses ... corporations are being invited to write their own rules.”

(New Economics Foundation, *Threat to democracy: The impact of ‘better regulation’*, report, October 2015)
- **i.e. ‘Good’ = Bad Regulatory Practice**

## The Precautionary Principle

- The EU is backtracking from the PP. It had argued that the PP was part of customary international law (e.g. EU Biotech case)
  - Has now virtually disappeared from Eur Commission's Impact Assessment Guidelines 2015
  - The EDC affair; GMOs; Tar sands; Climate change
- The OECD's GRP work is in effect against the PP – essentially ignores it. The EU (Sec. Gen.) participates in this work. Also review of each of 15 West EU countries (2010-12).
- Can the PP in TTIP survive “good regulatory practice”, Regulatory Impact Assessment (esp. CBA), and regulatory cooperation (mutual recognition etc.)?
- Regulatory cooperation with the US -> hostility to PP
  - US trade complaints
- Not mentioned anywhere in any of the EU's draft chapters for the TTIP. Will the US introduce it?!

## Genuine good regulatory practice

- Stronger assertion in trade agreements of domestic right and **ability** to regulate without burdening with excessive 'disciplines'. Use adequate legal formula, e.g. 'Nothing in this agreement will ...' (Van Harten).
- Give sufficient attention to the **benefits** side of regulation: far greater than costs
- Many regulatory decisions are **political** -> democratic decisions, debate
- Acknowledge gross deficiencies in certain features of US regulatory system
- Do not create institutional mechanisms that look only at the costs/burdens on business
  - Instead, **create institutional mechanisms to identify benefits and how they could be increased**
- Give much greater attention to distinguishing between **private** and **public interest** in regulating
- Give adequate attention to the **PP** in regulating and when it should be invoked
- Avoid mechanisms that impose a very heavy and hence biased **burden on government or civil society organisations** (- overload, but not for business)