Regulatory Coherence and the Implementation of EU Law in TTIP

Alberto Alemanno
HEC Paris
NYU School of Law

caveat

/ˈkavɪat,ˈkeɪ-/

noun

noun: **caveat**; plural noun: **caveats**

1. a warning or proviso of specific stipulations, conditions, or limitations.
   "there are a number of caveats which concern the validity of the assessment results"
   synonyms: warning, caution, admonition, monition, red flag, alarm bells; More

   - LAW

     a notice, especially in a probate, that certain actions may not be taken without informing the person who gave the notice.

Why? How? What?

Why? How? What?

to eliminate, reduce or prevent policies unnecessary

“behind the borders”

obstacles to trade

NTBs

domestic regulatory measures often pursuing legitimate objectives, (environment, health and safety)

regulatory divergence

- obstructs imports and exports
- creates inefficiencies
- increases costs for international business, which in turn
- impedes international trade and

  other things being equal,
- slows global prosperity

NTBs

enemy number 1 today !

High-Level Working Group for Job and Growth, Final Report – February 2013

Why? How? What?

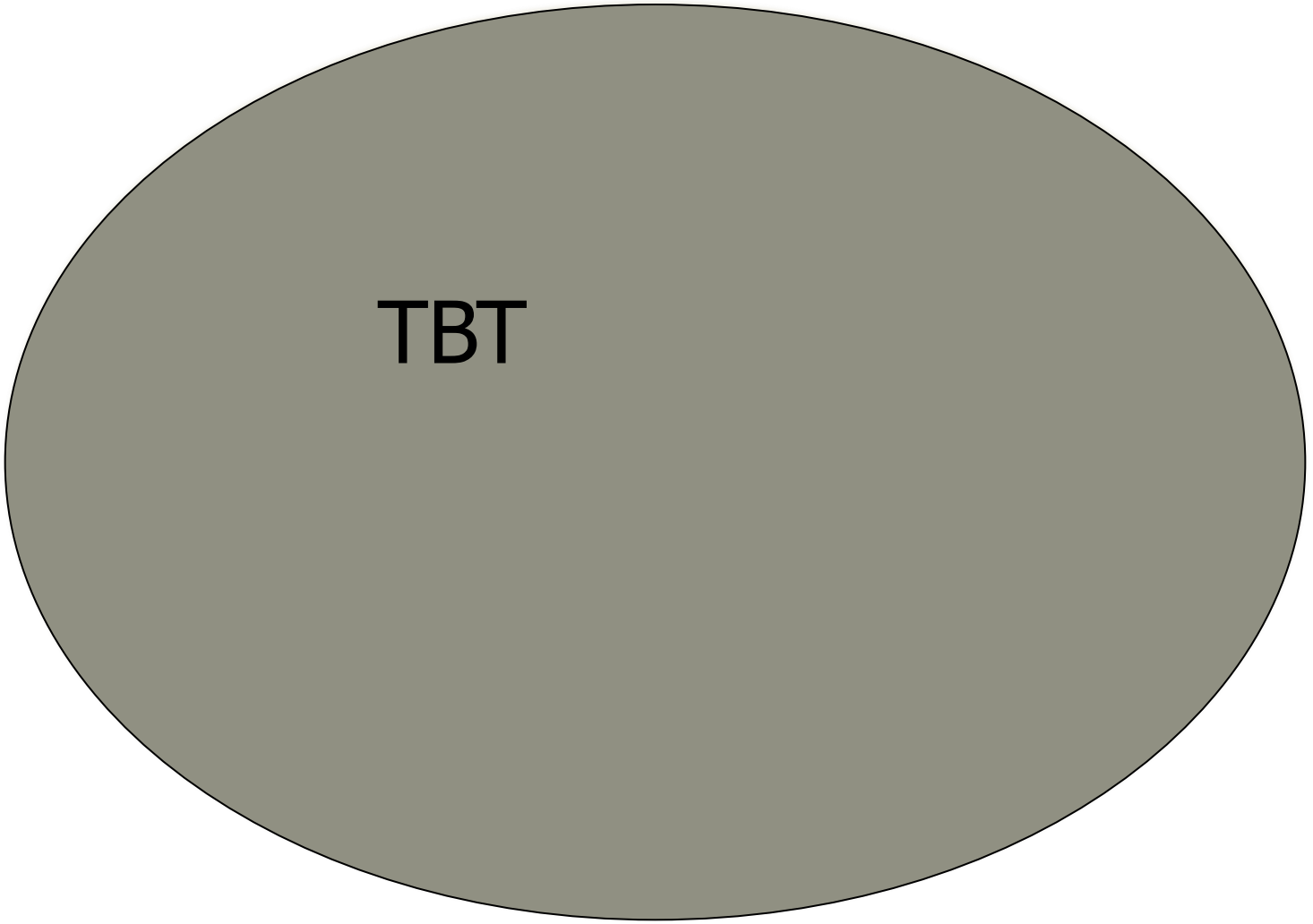
TTIP does not occur

in a vacuum

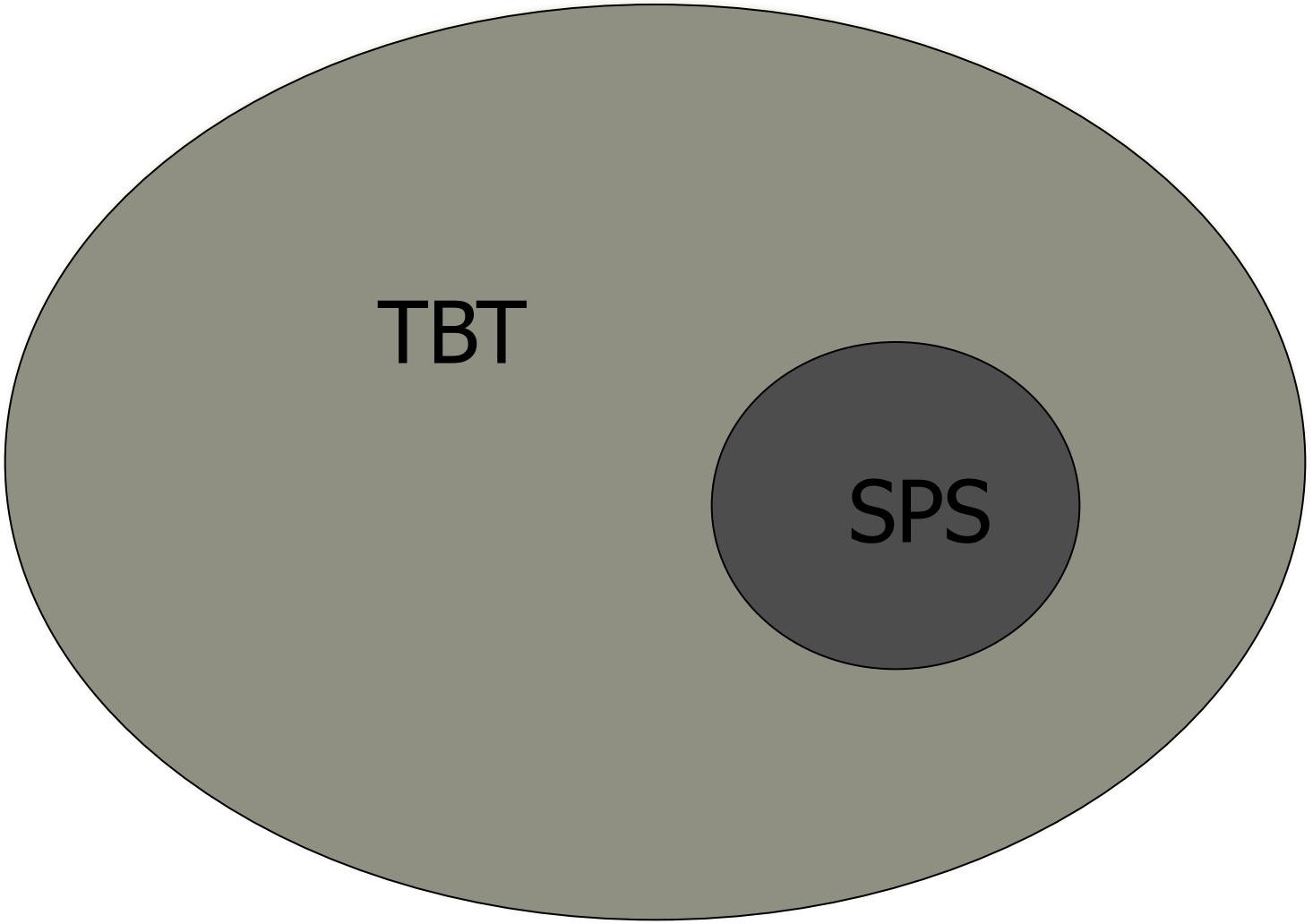

WORLD TRADE ORGANIZATION

NTBs

NTBs



NTBs



WTO regulatory cooperation

- Duty to notify
- Non-discrimination
- International standards
- Scientific evidence
- Necessity

Procedural harmonisation

not enough

to mitigate the negative trade effects stemming from regulatory divergence!

need to develop

NEW

regulatory co-operation mechanisms


TTIP

Why? How? What?

cooperation on **HOW**
and on **WHAT**
to regulate

assumption

convergence around

a shared set of processes

and procedures

may facilitate

substantive regulatory convergence

5 regulatory components in TTIP

- SPS-plus
- TBT-plus
- Sectoral annexes (specific goods/services)

✓ Cross-cutting disciplines

✓ Institutional framework

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TTIP Tool-box

Transparency → early warning: notification

Consultation → dialogue: ‘notice&comment’

Feed-back → duty to take into account

Evidence-based → impact assessment:
extra-territorial impact

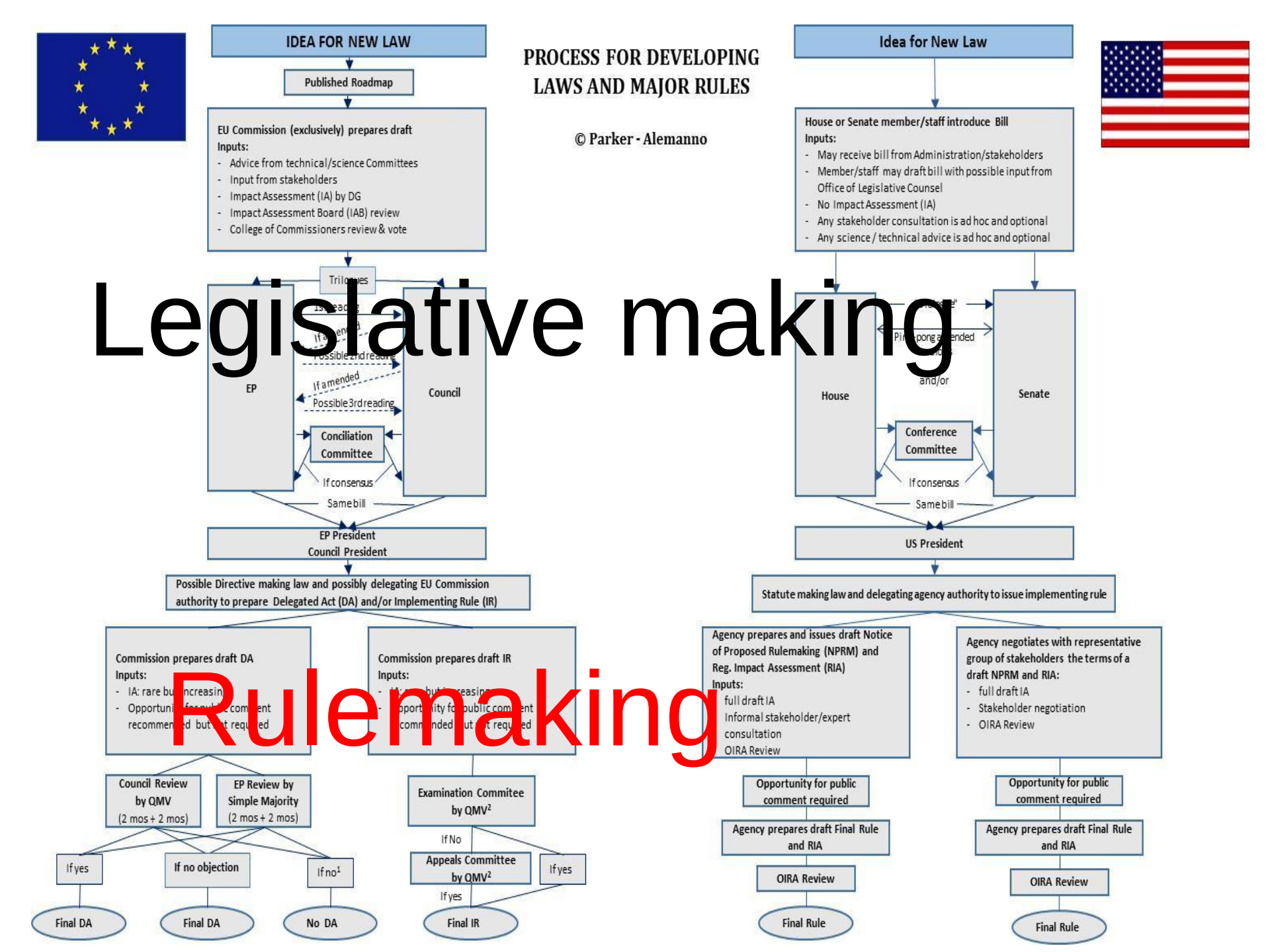
Scope

ie the regulations to which it will apply

all measures of general applications, including both legislative and rules, regardless at which level are adopted and by whom

What are the legal consequences of TTIP on the EU constitutional system?

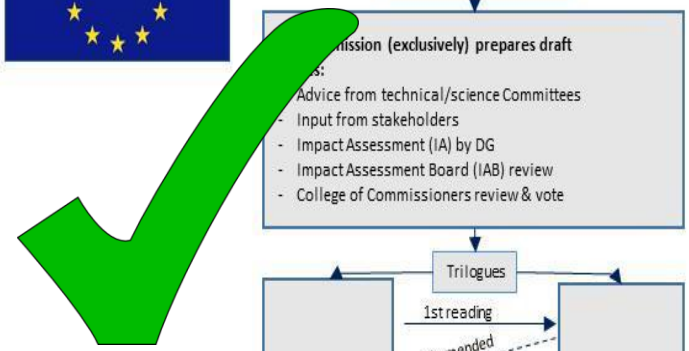
and - in particular - on the EP?



Legislative making

Rulemaking

PROCESS FOR DEVELOPING LAWS AND MAJOR RULES



IDEA FOR NEW LAW

Published Roadmap

[illegible]mission (exclusively) prepares draft
[illegible]s:
- Advice from technical/science Committees
- Input from stakeholders
- Impact Assessment (IA) by DG
- Impact Assessment Board (IAB) review
- College of Commissioners review & vote

Trilogues

EP

1st reading

If amended

Possible 2nd reading

If amended

Possible 3rd reading

Conciliation Committee

If consensus

Same bill

Council

EP President
Council President

Possible [illegible] making law and possibly delegating EU Commission [illegible] Delegated Act (DA) and/or Implementing Rule (IR)

[illegible] draft DA
In[illegible]
[illegible]ing
[illegible]comment
[illegible]mmend[illegible]ired

Council Review by QMV
(2 mos + 2 mos)

EP Review by Simple Majority
(2 mos + 2 mos)

If yes

If no objection

If no[1]

Final DA

Final DA

No DA

Commission prepares draft IR
Inputs:
- IA: rare but increasing
- Opportunity for public comment recommended but not required

Examination Commitee by QMV[2]

If No

Appeals Committee by QMV[2]

If yes

If yes

Final IR

Idea for New Law

House or Senate member/staff introduce Bill
Inputs:
- May receive bill from Administration/stakeholders
- Member/staff may draft bill with possible input from Office of Legislative Counsel
- No Impact Assessment (IA)
- Any stakeholder consultation is ad hoc and optional
- Any science / technical advice is ad hoc and optional

House

"Dialogue"

Ping-pong amended versions

and/or

Conference Committee

If consensus

Same bill

Senate

US President

[illegible]aking law and delegating agency authority to issue implementing rule

Ag[illegible]es and issues draft Notice [illegible] Rulemaking (NPRM) and [illegible]act Assessment (RIA)
[illegible] draft IA
[illegible]nformal stakeholder/expert consultation
- OIRA Review

Opportunity for public comment required

Agency prepares draft Final Rule and RIA

OIRA Review

Final Rule

Agency negotiates with representative group of stakeholders the terms of a draft NPRM and RIA:
- full draft IA
- Stakeholder negotiation
- OIRA Review

Opportunity for public comment required

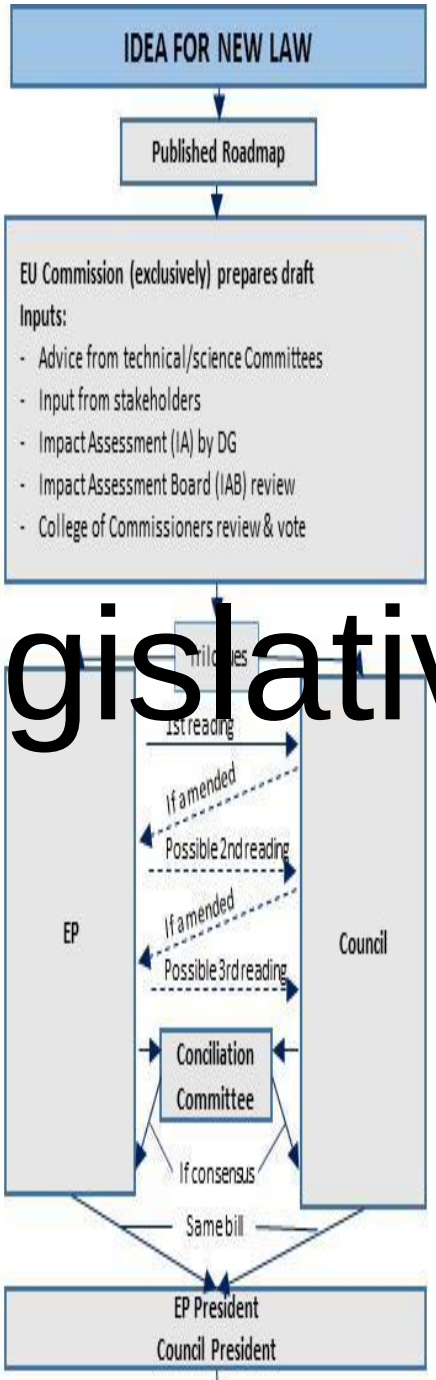
Agency prepares draft Final Rule and RIA

OIRA Review

Final Rule

Let’s zoom in !

Legislative making



PROCESS FOR DEVELOPING LAWS AND MAJOR RULES

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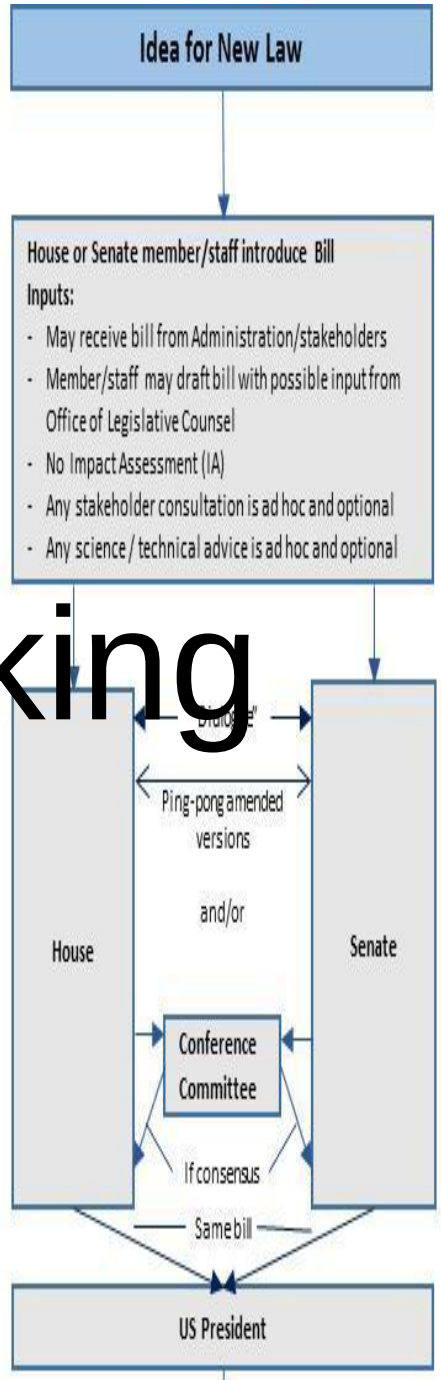
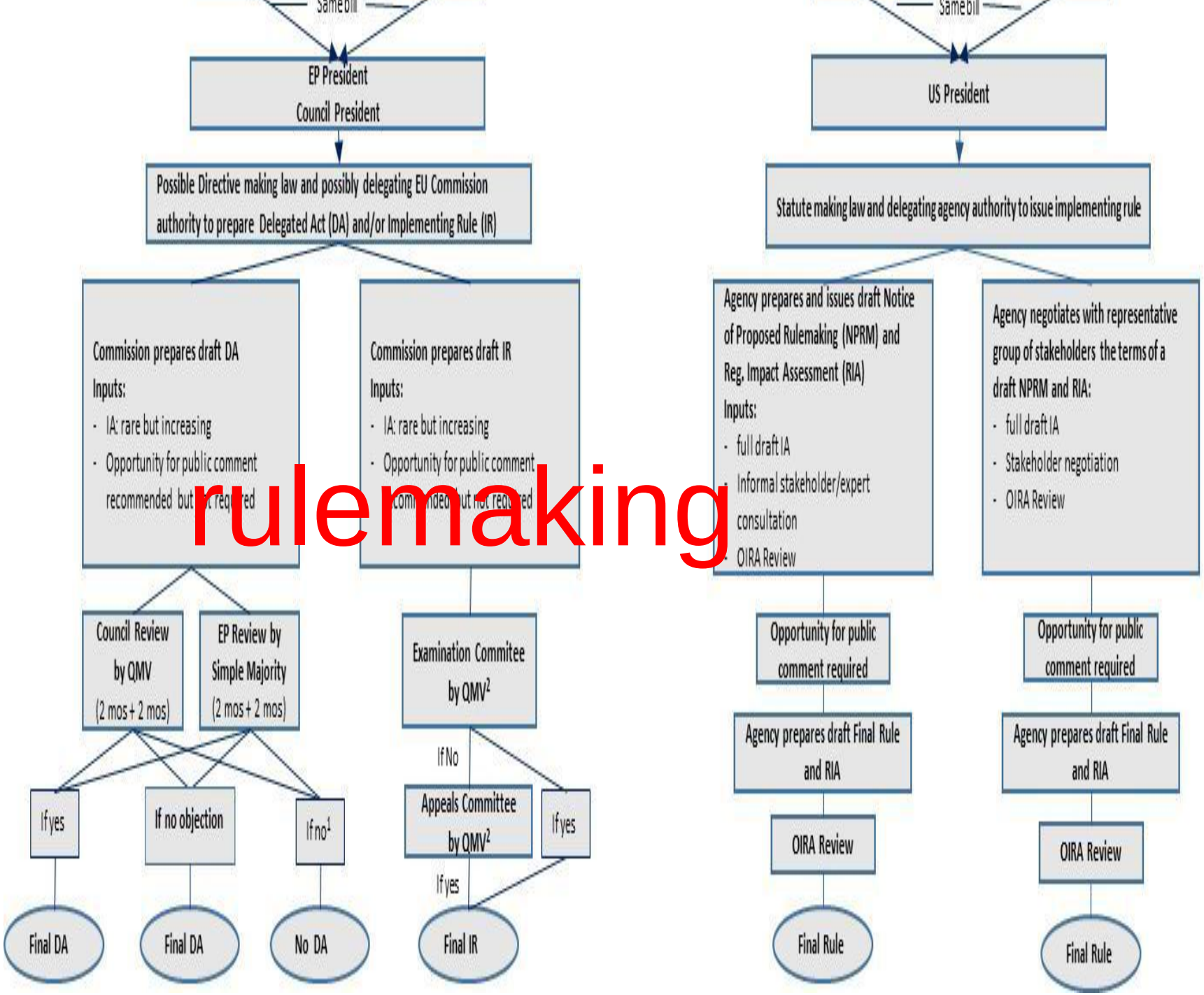


TTIP and EU legislative making

- Consultation required by the Treaty, but not notice-and-comment
- IA not required by the Treaty, what about EP and Council? IIA foresees it, but…

  General concern:
- Notification and equal treatment in WTO?

EU scores better than US


Same Bill
EP President
Council President
Possible Directive making law and possibly delegating EU Commission authority to prepare Delegated Act (DA) and/or Implementing Rule (IR)
Commission prepares draft DA
Inputs:
- IA: rare but increasing
- Opportunity for public comment recommended but not required
Commission prepares draft IR
Inputs:
- IA: rare but increasing
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Council Review by QMV (2 mos + 2 mos)
EP Review by Simple Majority (2 mos + 2 mos)
Examination Commitee by QMV²
If yes
If no objection
If no¹
If No
Appeals Committee by QMV²
If yes
If yes
Final DA
Final DA
No DA
Final IR
Same Bill
US President
Statute making law and delegating agency authority to issue implementing rule
Agency prepares and issues draft Notice of Proposed Rulemaking (NPRM) and Reg. Impact Assessment (RIA)
Inputs:
- full draft IA
- Informal stakeholder/expert consultation
- OIRA Review
Agency negotiates with representative group of stakeholders the terms of a draft NPRM and RIA:
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Opportunity for public comment required
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Agency prepares draft Final Rule and RIA
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OIRA Review
OIRA Review
Final Rule
Final Rule

rulemaking

TTIP and rulemaking

- From a EU perspective:
  - Consultation and IA limited: what sort of IA?
  - Scrutiny requires expertise and consultation
  - Discipline requires clarity 290-291 TFEU

- From a US perspective:
  - Consultation and IA limited, but then n & c

TTIP may induce significant changes – need to maintain institutional balance

OPEN QUESTIONS

- Legal status of horizontal discipline
  - APA (Berlinguer) ?
- What a role for EP in rulemaking
  - Szajer Report on 290-291 TFEU
  - Niebler Report on independence of IA
- What institutional design
  - Regulatory Cooperation Council
  - Decision-making authority

challenges

- institutional balance
  - EP must exercised oversight to ensure democratic accountability
- balance of commitments
  - EU more suitable to envisaged discipline

Comments welcome!