How Confidential Negotiations of the TTIP Affect Public Trust

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I. Introduction

"When EU Heads of States and Governments unanimously gave the European Commission a mandate to negotiate the EU-US Transatlantic Trade and Investment Partnership on 17 June 2013, they understood that these talks would become the leitmotiv of a new era in EU trade policy. However, few people would have guessed that it would *primarily* be because of transparency."[1]

The public demands for more transparent EU negotiations have significantly increased, especially with regard to the EU-US negotiations of the Transatlantic Trade and Investment Partnership. For many pundits transparency in negotiations comes as a surprise, as the candid statement by the Commissioner's Malmström cabinet member illustrates, since traditionally EU negotiations almost exclusively take place behind closed doors and with almost no public disclosure of documents.[2] Scholars have also noted how 'remarkable' the TTIP negotiations are for the fact that the negotiating directives were publically released,[3] which was not a common practice before, leading some Members of European Parliament to initiate adjudication for public disclosure of documents.[4] Not least important for the public availability of documents are leaks, i.e. unauthorised disclosure of information, with the most recent disclosure made by Greenpeace Netherlands.[5]

TTIP negotiations take place in a legal context that has been continuously developing and come after a line of EU negotiations of international agreements that have already shifted the legal grounds of acceptable level of confidentiality. For example, the European Parliament vetoed international agreements (partly) due to lack of access to information, such as the Anti-Counterfeiting Trade Agreement and the EU-US Agreement on Passenger Name Records.[6] In addition, a set of cases before the Court of Justice of the European Union (CJEU) has led to an enhanced legal protection of both public and parliamentary access to information regarding international negotiations.[7] Seen in this broader legal context, the TTIP negotiations are another step to more transparent negotiations, especially in light of the active efforts of the Commission to share information with the European Parliament and national parliaments,[8] even if this is done to 'dispel rumour and shape the argument in the face of widespread anxiety and campaigning'.[9]

However, it is problematic that the underpinning argument in favour of secrecy remains unchallenged, i.e. confidentiality, as a tool to build trust between negotiating partners, is more prevalent than trans-

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1 Jolana Mungengová (Member of Cabinet at the EU Trade Commissioner), *The EU Enhanced Transparency in TTIP: A successful Shift in Paradigm* (CERiM blog, 1 March 2016).

2 See generally Deirdre Curtin, 'Official Secrets and the Negotiation of International Agreements. Is the EU Executive Unbound?' (2013) 50 *Common Market Law Review* 423.

3 Marise Cremona, Negotiating the Transatlantic Trade and Investment Partnership (2015) 52 *Common Market Law Review* 351, *361.*

4 See Case C-350/12 P, Council v. Sophie In 't Veld, Judgment of the European Court of Justice (First Chamber) of 3 July 2014, EU:C:2014:2039.

5 See Greenpeace Netherlands, Press Release, Greenpeace Netherlands releases TTIP documents (2 May 2016), available online <http://www.greenpeace.org/international/en/press/releases/2016/Greenpeace-Netherlands-releases-TTIP-documents/> [accessed 30 May 2016] See also in this issue, Ronny Patz, 'Just the TTIP of the iceberg? Dynamics and effects of information leaks in EU politics'.

6 See Christina Eckes, How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures (2014) 12(4) *International Journal of Constitutional Law* 904.

7 See Vigjilenca Abazi and Maarten Hillebrandt, 'The Legal Limits to Confidential Negotiations: Recent Case Law Developments in Council Transparency: *Access Info Europe* and *in 't Veld'* (2015) 52 *Common Market Law Review* 825.

8 Evelyn Coremans, Negotiating TTIP: The Impact of Transparency on Working Practices in EU Trade Policy, Paper presented at the workshop 'The Law and Politics of Confidential EU Negotiations', Brussels, 12 February 2016.

9 Cremona, *Negotiating the Transatlantic Trade and Investment Partnership*, 361.

parency as a means to foster public support in the negotiating process.[10] In the context of the TTIP negotiations, this type of justification in favour of secrecy is particularly disconcerting as the negotiations touch upon issues that have quasi-legislative character and address regulation in the public interest. What is furthermore remarkable is that while some TTIP chapters such as those on regulatory cooperation or technical barriers to trade emphasize public notice and other measures for transparency, the negotiations of the rules of general application lack transparency necessary for public trust. Against this background, the paper maps the salient legal developments that limit confidentiality in negotiations but also critically questions the justification in favour of secrecy.

II. Legal Context of Negotiating TTIP: Limits to Confidentiality

In a post-Lisbon legal context, EU international negotiations take place in accordance with Article 218 of the Treaty on the Functioning of the European Union (TFEU), which stipules different roles for EU institutions. Whereas the Commission acts as the negotiator and ensures the EU's external representation,[11] the Council is entrusted with the power to sign and conclude the agreement. Article 218(10) TFEU affirms the prerogative of the European Parliament to be informed on international agreements, providing a democratic scrutiny role for the only directly elected EU institution. Important for the legal context of negotiations are also Treaty provisions stipulating EU's constitutional commitment to principles of openness and representative democracy that provide an overall framework of how the EU is supposed to act.[12]

In practice, most of the EU's international negotiations take place behind closed doors and with very few publically available documents. Nevertheless, a series of developments both in the case law of the CJEU as well as the institutional practice of the European Parliament in light of its veto powers have shifted the legal limits of accepted extent of confidentiality in international negotiations leading to more accessibility to documents. Salient in this respect is the distinction on whether such access is public or parliamentary, i.e. whether the document is disclosed to the public (and hence is accessible also for representatives) or whether the document is only disclosed to the parliament within the context of their institutional prerogatives of oversight. In the latter case, such access to documents may be desirable from an accountability perspective, however it is less likely to foster public debate and public trust in a particular process.[13] Overall, the legal context of negotiations is shaped by limits deriving from: public access to document based on Regulation 1049/01,[14] parliamentary access to information and powers to veto an international agreement on basis of Article 218 TFEU.

Institutions cannot deny public access to information requests regarding international negotiations without explaining how disclosure could 'specifically and actually' undermine international relations. In the recent case of *Council* v *In 't Veld*, the European Court of Justice for the first time explicitly affirmed that even in international relations the institutions are obliged to explain whether disclosure could 'specifically and actually' undermine a protected interest.[15] The facts of this case are similar to the Council's initial position with regard to the secrecy of the negotiating mandate of the TTIP agreement. Namely, Ms In 't Veld, MEP utilising the public access regime in her personal capacity, requested a document containing an opinion of the Council's Legal Service regarding a recommendation from the Commission to the Council about the initiation of negotiations between the EU and the USA for an international agreement making available to the US Treasury Department financial messaging data to prevent terrorist financing (TFTP agreement). Whereas her initial request was denied in full, her confirmatory request yielded only limited access to the introductory and general parts of the documents, leading her

10 For an elaborate discussion on trust and transparency see, Vigjilenca Abazi and Eljalill Tauschinsky, 'Reasons of Control and Trust: Grounding the Public Need for Transparency in the European Union' (2015) 11 *Utrecht Law Review* 78.

11 In all those areas not covered by the CFSP, see Article 17(1) TEU.

12 See Art. 1 TEU, see also Title II of TEU, particularly Articles 10, 11, 12 TEU.

13 See V. Abazi 'Parliamentary Oversight Behind Closed Doors' (2016) 5 *Cambridge Journal of Comparative and International Law, Forthcoming*.

14 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

15 Case C-350/12 P, Council v. Sophie in 't Veld, para 53, 64.

to take the case to the Court. Significantly, the Court required the Council to demonstrate the claimed risk of the harm in international negotiations if the document is disclosed and it is particularly noteworthy that the Court did not accept broad claims invoked on the basis of the exception in international relations, as used to be the case,[16] and pointed to the relevance of the context of the issues at stake and their possible implications when deciding on disclosure.[17] The Court in this regard maintains the distinction between the specific content of the document relating to the substance of negotiations and the choice of legal basis regarding those negotiations. The latter according to the Court has constitutional significance and hence must be public.

Another set of limits to confidentiality derives from case law regarding parliamentary access. In the landmark case of *European Parliament* v *Council,*[18] the Council did not send the decision for the adoption of the EU-Mauritius Agreement until 17 October 2011 – more than three months after the adoption of that decision and the signing of that agreement, which took place on 12 and 14 July 2011, respectively, and 17 days after their publication in the *Official Journal of the European Union.*[19] Significantly, in this case the Court held that the information requirement laid down in Article 218(10) TFEU applies to any procedure for concluding an international agreement, including agreements relating exclusively to the Common Foreign and Security Policy.[20] Moreover, informing the European Parliament is a mandatory procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure.[21] It is also noteworthy that the Court held that the procedure covered by Article 218 TFEU is of general application and is therefore intended to apply, in principle, to all international agreements negotiated and concluded by the European Union in all fields of its activity, including the CFSP.[22]

Lastly, besides adjudication, the European Parliament in the post-Lisbon context has powers to demand more transparent negotiations and access to information through its veto powers. For example, the European Parliament refused consent to the EU-US SWIFT Agreement and delayed consent to the USA and Australia Passenger Name Records Agreements. Regarding the SWIFT Agreement, the European Parliament gave its consent at a later stage but as some scholars note there were 'no remarkable differences between the first and second SWIFT agreements'.[23] Rather, the difference was that on the second round, the European Parliament was fully informed at all stages of the negotiations.[24]

These legal limits to confidentiality in international negotiations are important; however the institutions continue to defend the necessity of secrecy in international negotiations. For example, the Council's self-perceived need for discretionary space and its institutional design that might necessitate such discretion have been pointed to as Council's significant arguments in favour of secrecy.[25] Yet, a crucial aspect to the rationale for secrecy, according to both the Council and the Commission, is the necessity of trust between negotiating parties.

III. Secrecy and Trust between Negotiating Partners

Secrecy in the conduct of international relations is not unique to the EU. Indeed, historically, international negotiations have always meant that a certain extent of secrecy will be practiced.[26] As it has been noted, 'if an ambassador had to appear in the bright light of the royal court, he became constantly preoccupied by secrecy. He needed to find ways to protect his own secrets from third parties and uncover the secrets of others'.[27] Early studies of diplomacy illustrate the importance of secrecy in international negotiations as well. For example, Frangois de Callieres,

16 See Case C-266/05 P *Sison v Council* (known as *Sison II*), EU:C:2007:75, paras 34-35.

17 Abazi and Hillebrandt, 'The Legal Limits to Confidential Negotiations, 837.

18 C-658/11, EU:C:2014:2025,

19 C-658/11, para 65

20 C-658/11, para 85

21 C-658/11, para 80

22 C-658/11, para 72

23 Juan Santos Vara, 'The Role of the European Parliament in the Conclusion of the Transatlantic Agreements on the Transfer of Personal Data after Lisbon' (2013) CLEER Working Papers 2013/2, <http://www.asser.nl/upload/documents/20130226T013310-cleer_13-2_web.pdf> [accessed 30 May 2016]

24 Ibid., 20.

25 Abazi and Hillebrandt, 'The Legal Limits to Confidential Negotiations, 838.

26 Aurélien Colson, The Ambassador Between Light and Shade: The Emergence of Secrecy as the Norm for International Negotiation, Koninklijke Brill NV, Leiden, 2008.

27 *Ibid.*

in his study on diplomacy, *De la Maniere de Negocier avec les Souverains,* first published in 1716, dedicated an entire chapter to 'Letters in Cypher' explaining secret (coded) letters that were meant to be understood only by very few negotiators. [28]

Some level of *necessary* secrecy in negotiations may be justified on basis of 'positionalism' and strategic bargaining, but also for the confidence it creates between the negotiators. Secrecy in negotiations is defended as important due to the so-called 'limit position' of the negotiators. If negotiating is to be conceived as a series of information exchanges, then each exchange takes the form of 'bids and counterbids'. In this sense, it has been argued that while the exchange of bids and counterbids happens openly, 'each negotiator has a 'limit' position, which has to be kept concealed from the other negotiator(s)'.[29] Besides providing discretion to the negotiators to keep their limit position concealed towards one another, secrecy is also related to candour in the exchanges between negotiators. Secrecy leads to trust between secret-keepers. Confidence as a function of secrecy is accepted in many professional norms, such as the relation between a lawyer and client or a doctor and patient.

Defending trust with an international partner is particularly prominent in the context of EU negotiations. For example, in the case of *In 't Veld* vs *Commission*, the Commission defended the nondisclosure of documents pertaining to the negotiations of the Anti-Counterfeiting Trade Agreement by arguing that

> "It goes without saying that the success of international negotiations requires cooperation among the parties involved which depends to a large extent on the atmosphere of mutual trust."

Ultimately, in the view of the Commission, disclosure of documents in the context of international negotiations would undermine the EU's credibility in the negotiations and the trust of the negotiating partner.[30] The Council presents similar arguments when arguing in favour of nondisclosure of documents due to the trust relation with international partners. For example, in the case of *Jurasinovic* vs *Council*, the Council maintained that nondisclosure of documents is a 'key factor in strengthening trust'[31] in this case more specifically between the EU and countries of the Western Balkans.

However, an argument by the institutions that documents must remain secret because their disclosure would jeopardise the trust relationship with specific partner is liable to rouse suspicions among the uninformed outsiders. What if the institutions only use this confidentiality as a shield against the public interest in transparency?

Transparency is consistently emphasized to be of paramount importance for public trust[32] and EU policy makers see the latter as core to better regulation.[33] Information is a precondition of choice; citizens need a certain amount of information in order to be able to choose from different alternatives, to understand enough of their implications to be able to distinguish among them and hold institutions accountable on this basis. The latter are significant aspects to citizens' trust, yet secrecy obstructs this function of information since citizens do not have the information and hence cannot make an informed choice. It is quite remarkable therefore that the institutions seem to hold public trust of secondary value when trust between negotiating partners is at stake. This is quite evident in the negotiations of TTIP that begun in secrecy as the Council did not release the negotiating mandate. It took the Council a year to do so, arguably until it was too late, as the secrecy surrounding TTIP had already given rise to deep suspicions in the general public about this 'new generation' *preferential* trade agreement. Secrecy gives rise to suspicion and distrust[34]: it separates the institutions, as holders of information, from the citizens, as uninformed outsiders. In fact, even the word secrecy derives from the Latin *secernere* that originally meant to set apart, to separate.[35] The question in the case of TTIP becomes whether this separation and suspicion have become so large that could block the agreement.

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28 L. N. Rangarajan (1998): Diplomacy, states and secrecy in communications, Diplomacy & Statecraft, 9:3, 18-49

29 *Ibid*.

30 In 't Veld vs Commission, para 117.

31 T-63/10 Jurasinovic vs Council, para 9.

32 This is true for both, EU policy documents and (legal) literature. Cf, for example, Com(2016) 117final or Com(2013) 0864 final, see Koen Lennaerts: 'In the Union we Trust: Trust Enhancing Principles of Community Law', 41 *Common Market Law Review* (2004), pp. 317-343.

33 Communication from the Commission, Better regulation for better results, Com(2015) 215 final.

34 See generally Georg Simmel, 'The Sociology of Secrecy and of Secret Societies' (1906) 11 *American Journal of Sociology* 441.

35 Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Pantheon Books 1982), 6.

IV. Conclusions

TTIP negotiations bring the question of citizen trust and transparency to the fore. Not only is the EU institutional practice of closed door negotiations and secret documents no longer acceptable for citizens but it also leads to deep dissatisfaction with the agreement itself. Whereas the legal context in which the TTIP negotiations take place has already moved forward in terms of limitations to confidentiality, as elaborated in public access to information, parliamentary access and parliamentary veto powers, TTIP negotiations are nevertheless bringing a new dimension to transparency. Namely, it is becoming evident that it is not enough for citizens' trust that only their national parliaments or the European Parliament receive information about the negotiations, notwithstanding that such access is partial and does not yield a meaningful public debate. For citizens to build trust in what the EU is negotiating on their behalf transparency and public access to information is crucial. However, when the disclosed information is not coming through authorised disclosure by the institutions themselves, but rather citizens are informed via leaks, the potential for trust is further hindered, as the leaks only become an illustration of the lack of institutional will to disclose information. Overall, TTIP negotiations show that EU institutions disproportionally favour confidentiality necessary for trust between negotiating partners instead of transparency necessary for public trust. It remains highly questionable whether TTIP leaks are able to close this gap of trust.