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The Transatlantic Partnership Agreement: an American perspective

Abstract: This paper discusses the internal dynamics of American trade policy making in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations. The author describes the active role interest groups, the U.S. business community, and representatives on both sides of the political spectrum have played in the passing of Transatlantic Partnership Agreement (TPA), the TPP negotiations, and currently the TTIP debate. Lastly, the author lays out the challenges TTIP will continue to face in light of opposition to specific TPP provisions, trans-atlantic disagreement over ISDS and data flows, and the recent presidential elections.

Keywords: international trade, TTIP, United States, USTR, European Union, trade agreements

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Introduction and key contextual factors

The Transatlantic Trade and Investment Partnership (TTIP) was launched with considerable fanfare in 2013. Like any trade negotiation, its progress and contents were heavily influenced by a range of interest groups bearing upon the governments engaged in the trade talks. The purpose of this paper is to identify the key interest groups and their objectives that have shaped the American government's stance towards TTIP, keeping in mind the sharp break in apparent attitudes towards mega-regional trade agreements witnessed with the conclusion of the Obama Administration and the early months of the Trump Administration.

Before exploring the drivers of U.S. trade policy towards TTIP, the significance of four contextual factors should be acknowledged. First, from the outset, Europe has been seen—at least by U.S. observers and U.S. negotiators—as the demander or at least as exhibiting a greater sense of urgency in quickly and successfully completing the negotiations. One should not forget that United States Trade Representative (USTR) Michael Froman was initially quite skeptical about

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launching negotiations but he seems to have been persuaded by the White House after European interventions at the highest level. This is not to say that Froman, today, is not wholeheartedly committed to the agreement—and indeed, early on uttered an (uncharacteristically) foolish vow to complete the deal “on one tank of gas.” Well into the negotiations, an internal European Commission assessment noted that for almost half of the proposed TTIP chapters, the two sides had not even exchanged views, much less started to negotiate. What this demonstrated is that, despite sincere intentions, the USTR always gave top priority to the Trans-Pacific Partnership (TPP) negotiations.¹

Second, though they extend across varying time spans (five years deep negotiations for the TPP, and only four years for TTIP), the history of the two negotiations is strikingly different: With the TPP, the agenda expanded with the addition of the United States, and this broad agenda largely remained in place to the conclusion of the agreement; with TTIP, the agenda has been challenged throughout, resulting in a game of subtraction in areas such as genetically modified organisms (GMOs), meaningful digital trade liberalization for the European Union, and coastal shipping, financial regulation, and state-controlled government procurement for the United States.

Third, Europe seems to be belatedly experiencing the U.S. North American Free Trade Agreement (NAFTA)-style debate, with much greater opposition from environmental, so-called consumer groups and other issue-related non-governmental organizations (NGOs), as well as political fringe elements from the left and right in member-state politics. This is not to say that the usual opposition suspects in the U.S. political arena—labor unions, national environment organizations, and the inevitable Public Citizen—are not raising hell; but in the United States there are no new arguments, just a trotting out of well-worn (and economically deficient and/or purely demagogic) arguments that have hardly changed from the early 1990s.

Fourth, the TPP has always been embedded in a larger U.S. national strategy for Asia-Pacific and has been defended as a central, crucial component of the U.S. pivot, or rebalancing, to Asia. TTIP on the other hand (at least in the United States) has been largely viewed and defended in economic terms (gains to Gross Domestic Product (GDP), trade volumes, jobs, etc.). Only recently, with the Russian challenge to the post-World War II political order and the increasingly dangerous situation throughout the Middle East, has the TTIP been defended as a necessary element of a future alliance of democracies.”²

¹ *Politico*, 28 September 2015, “TIPP negotiations not even half done” (Available at <http://www.politico.eu/article/ttip-negotiations-not-even-half-done/>).

² *New York Times*, 15 March 2015, “Save Our Trans-Atlantic Order” (Available at http://www.nytimes.com/2015/03/12/opinion/save-our-trans-atlantic-order.html?_r=0).

Having laid out these contextual factors, the analysis now turns to the general issues shaping not only the TTIP talks but also U.S. trade policy overall.

The political dynamics of U.S. trade policy

While there are factors that are specific to the TTIP, the negotiations will also play out against the more general political dynamics of current U.S. trade policy. For instance, in contrast to most other trading nations, the U.S. political system grants final, political decision-making authority to its legislative branch. Thus, while the U.S. executive branch is in charge of actual trade negotiations, it does so under instructions from the Congress and with the knowledge that the legislature has the final affirmative or veto authority over any negotiated agreement.³

Still, presidential leadership is central to the success of any trade negotiation and the subsequent approval of agreements by Congress. This is particularly true when—as is the case in the United States—there is a deep partisan divide over trade policy and trade agreements. Specifically, major constituencies of the Democratic party, such as labor unions and environmental organizations, strongly oppose so-called “NAFTA-type” trade agreements and exert hard pressure on congressional Democrats to vote against them. Congressional Republicans, on the other hand, can generally be counted as supporters of free trade agreements (FTAs).

When campaigning for the presidency, Barack Obama famously boasted that he opposed all of the FTAs negotiated under President Bush and that he would have opposed NAFTA had he been in Congress at the time.⁴ This paper is not the place to detail the president’s “Pauline conversion”: suffice it to posit that both economic and geopolitical realities and pressures were key factors in the about-face. First, his economic advisers argued from the outset that trade could supplement the administration’s program to get the United States out of the economic crisis and recession. This led to the 2010 National Export Initiative and ultimately, to Obama’s support for the passage of three pending FTAs with Colombia, Panama, and South Korea. Further, the administration also inherited an increasingly fraught situation in Asia-Pacific, with China’s new outsized territorial demands and North Korea’s missile and nuclear threats. Declining to espouse the TPP, inherited from the Bush administration, would have made a mockery

³ One of the most interesting contrasts in this project will revolve around the analysis of the long-standing U.S. executive/legislate dance in the trade area, and how E.U. trade negotiators deal with the newly-empowered Parliament.

⁴ For a more detailed analysis of Obama administration trade policy development, see Barfield (2014).

of the president's assertion that the United States was "all in" regarding leadership in Asia-Pacific.

Despite Obama's public commitment to the trans-Pacific and U.S.-E.U. pacts, doubts remained as to whether he would be willing to expend the political capital necessary to bring the negotiations to a successful conclusion; and, of equal importance, whether he could surmount the difficult political challenges—not the least of which involved taking on key elements of his own party. In the immediate post-2012 election period, the signs were mixed. As noted above, in response to urgent pleas from European leaders, the administration endorsed and launched TTIP negotiations. The president also appointed a close White House adviser, Michael Froman, to the post of U.S. Trade Representative. In reality, Froman had made all of the strategic trade decisions from 2009–13, from his joint position on the National Security Council and National Economic Council. On the downside, the White House seemed very reluctant to take on hostile congressional Democratic leaders, particularly Sen. Harry Reid (D-Nev.), the Senate Majority Leader. While TPP negotiations went forward and TTIP talks advanced more slowly, Sen. Reid, early in 2014, defied the White House and ruled that Trade Promotion Authority (TPA) would not be taken up before the 2014 election.

After the November 2014 midterms, however, the president moved to a position of active leadership. In his January 2015 State of the Union Address, the president pressed Congress to give him trade promotion authority, and he underlined his support for the TPP and TTIP. Since then, the White House launched a full-scale lobbying effort, enlisting the entire cabinet to lobby Congress and speak out in favor of TPA and the FTAs around the country. The White House and Froman systematically reached out to key Democratic constituencies (even those, like labor unions, who oppose the FTAs) and to key Democratic Members of Congress. And, in an unprecedented action (at least for Obama, whose retail skills with Congress were minimal), only in 2015 did the president personally call Sen. Hatch (R-UT), chairman of the Senate Finance Committee, and Sen. Ron Wyden (D-OR), a ranking member, to urge them to find a compromise that would break the logjam on TPA.

The politics of trade in the U.S. Congress

The larger battle lines on trade have changed little since the early 1990s, though, as will be noted below, there have been some political shifts in both parties and among major interest groups. The U.S. House of Representatives has been a key barometer on trade policy because representatives face two-year terms in more insular districts. Against this reality, gerrymandering by both major parties has

resulted in many representatives rarely facing major challenges from the other party in general elections.⁵

On the Democratic side, since NAFTA, on most trade agreements, normally one-half to two-thirds of House Democrats have voted in opposition. It should be noted that in 1993, even with strong backing by President Clinton, House Democrats voted 102–156 against the agreement. Flash forward to 2011, when President Obama got behind the three pending FTAs with Colombia, Panama, and South Korea. The administration's lobbying effort largely failed to persuade, as House Democrats voted 59–130 against the Korea FTA, 31–158 against the Colombia FTA, and 66–123 against the Panama FTA. More to the point for this paper, in the fall of 2013, 151 House Democrats signed a letter to the president, opposing TPA, stating that: "Fast track (TPA) is simply not appropriate for 21st century agreements and must be replaced." Thus, the goal of Democratic administrations on trade was to pick off just enough House Democrats to combine with a majority of Republicans in order to reach 218 votes, the number needed for a majority of the full House.

In understanding the shift of the Democratic Party in the area of trade policy, a review of the key factions among House Democrats is necessary, specifically on the various caucuses. For this paper, I will simply point to the anti-trade shift, evidenced by the decline in the New Democrats caucus that backed President Clinton's trade agenda, from 70–80 members, to 30–40 members in the present Congress. Conversely, the Progressive Caucus—that opposes more "NAFTA-style" FTAs—has steadily increased in membership, now numbering over eighty House Democrats.

While divisions among House Republicans have become notorious in recent years, driven by the rise of the Tea Party, on trade policy a durable consensus still remains—at least in votes to date. Though there were predictions that Tea Party House Republicans would be suspicious of globalization and open trade after the 2010 elections, just the opposite occurred. Tea Party House members viewed trade agreements as furthering their goal to downsize the government and deregulate markets. Thus, in 2011, they voted overwhelmingly in favor of the pending FTAs (only eight of eighty-nine freshmen House Republicans voted against Colombia and Panama, and only seven against Panama).

The TPA struggle

The congressional struggle over Trade Promotion Authority offered important lessons about the prospects of congressional approval for future trade agreements.

⁵ For a detailed analysis of the factions on trade in both the Democratic and Republican parties, see Barfield (2016).

Despite fears that Republicans would be unwilling to support anything that granted Obama greater discretion, Republican turnout for TPA was strong, with 190 of 247 Republican Representatives and forty-seven of fifty-four Republican Senators all voting in favor of TPA. Most Republicans that did vote against TPA were non-establishment, hardline conservatives; twenty-four of the fifty Republican Representatives who voted against TPA are part of the Tea Party-sympathizing House Freedom Caucus. Pro-trade Democrats—twenty-eight Representatives and thirteen Senators—provided a small but vital margin. While TTIP's chances of congressional approval will, of course, depend on the details of any eventual agreement, TPA's passage bodes well for TTIP. That said, a shakeup in the partisan composition of the House or Senate during next year's midterm election could dim a prospective TTIP's prospects. Specifically, a Democratic majority in either the House or Senate would likely be the coup de grace for TTIP. Bilateral agreements negotiated during President George W. Bush's tenure (Colombia, Panama, and South Korea) were only ratified after Democrats lost control of the House in 2010, and TPA only moved forward after Harry Reid and the Democrats lost the Senate in 2014.⁶ The TPA victory is best thought of as yet another necessary, but not sufficient, step towards TTIP.

At the time of this writing, what is unknown is the degree to which President Trump's anti-trade themes have penetrated Republicans in Congress. There has certainly been an erosion of pro-trade sentiment, even though the Republican leadership in both the House and Senate remain solidly in favor of traditional conservative free market principles. More stable are Democratic votes: still overwhelmingly antagonistic to U.S. trade agreements, particularly among House Democrats. Ironically, if the Trump administration persists in an anti-global agenda, it will find more support among congressional Democrats than among Republicans.

Interest groups and the TTIP negotiation

As noted above, it is difficult to separate campaigns for support of TTIP from larger efforts for the TPA and TPP. In some cases, however, there are differences in the issues, pros, and cons, between the TPP and TTIP. What follows is a preliminary assessment of the positive and negative campaigns of the most important and politically influential interest groups and sectors. It is meant to be representative, not exhaustive.

⁶ *Wall Street Journal*, 23 June 2015, "Lessons from a Trade Victory" (Available at <http://www.wsj.com/articles/lessons-from-a-trade-victory-1435098146>).

The U.S. business community

With very minor exceptions, U.S. corporations have strongly backed the passage of the TPA, the TPP, and a future TTIP—though, to date TPA and the TPP have received the most powerful push and political activity. Major business coalitions, such as the U.S. Chamber of Commerce, the National Association of Manufacturers, and the Coalition of Service Industries, have mobilized their members to lobby Congress and mount nationwide public relations efforts in favor of the current trade agenda. In addition, a number of trade associations and individual multinational corporations have established the Business Coalition for Transatlantic Trade.⁷ The coalition has produced position papers on the major negotiating issues. While in general, the various business coalitions supported Obama administration positions on TTIP substantive questions, they do go beyond it in pushing for sub-federal procurements rules for states and localities and for liberalized rules of origin. Potential conflicts with current E.U. TTIP positions would include: top priority digital trade and the free flow of data; locking in safe harbor provisions with Europe; geographical indicators; deeper liberalization for trade in services; and investor/state dispute settlement. The pro-TTIP business coalitions also support the goals of the U.S. agricultural sector (see below).

Though they have less influence these days, the U.S. textile industry (represented by the National Council of Textile Organizations) still holds out for protection in various ways, including strict rules of origin; continued high tariff rates; and new rules against currency manipulation.⁸

Silicon Valley comes to Washington

One new and quite strong force in the TTIP negotiations is the combined effort of Silicon Valley internet and telecommunications companies—such as Apple, Google, Yahoo, Facebook, Amazon, Microsoft, eBay, and many smaller firms—to influence public regulatory and trade policies. Many of the companies had little or no Washington presence until quite recently, but over the past few years, they have established large D.C. offices and have spent millions of dollars lobbying Congress and the Obama and Trump administrations (it should also be noted that Silicon Valley has a strong Democratic party bent and had close ties to the Obama administration).

Internet and telecoms companies by no means agree on all elements of a high-tech trade agenda. However, it is likely that, with regard to the TTIP, major

⁷ Business Roundtable (2015).

⁸ Barrie (2014).

companies and high-tech trade associations will press the USTR to champion a so-called “twenty-first-century agenda” which includes the reduction of barriers to e-commerce, common standards regarding data flows, limitations on data localization, transparency in the regulatory process, and increased IP protection for internet-related technology. These goals were largely achieved in the concluded the TPP, resulting in the emergence of strong support for that agreement from Silicon Valley.⁹ The United States and the European Union are more divided on issues relating to internet regulation—not least, security vs. privacy. Thus, U.S. trade demands for the internet and telecoms sectors will present some of the most difficult substantive and political challenges for TTIP negotiators.¹⁰

Agriculture

Most component parts of the U.S. agricultural sector lined up to strongly back passage of the TPA.¹¹ As details of the agriculture negotiations in the TPP leaked or were conveyed to them by the USTR, many key agricultural lobbying associations signaled support for the direction and outcome of the negotiations—including the outcome of crucial bilateral negotiations with Japan. Thus, the American Farm Bureau, the National Cattlemen’s Association, and representatives of grain farmers (wheat, corn) all backed the TPP. Crucially, with regard to Japan, the politically connected National Pork Producers’ Council signaled satisfaction with the bilateral commitments. The completion of the TPP negotiations also had an important impact on the stance of the agricultural organizations. They strongly supported the TPP and argued to the Obama administration that the provisions in that agreement should stand as the model for the future TTIP.¹²

Regarding the TTIP, however, the political situation is much less clear. This is partly because TTIP negotiations were much less advanced when the Trump administration came into office. But even at this stage, the outlook on both sides of the Atlantic is quite uncertain. As with manufacturing, market access issues will be on the table, with the United States holding out for greater openness to the E.U. cereal and vegetable markets, and the European Union pressing on greater liberalization of dairy products. The ability of the negotiators to divide and conquer—trading off products, phased reductions in tariff, with agreeable timetables—is key to success here.

⁹ *The New Yorker*, 7 October 2015, “Silicon Valley’s Big T.P.P. Win” (Available at <http://www.newyorker.com/business/currency/silicon-valleys-big-t-p-p-win>).

¹⁰ Stupp (2015).

¹¹ Joint Letter from 38 U.S. agricultural organizations to USTR Ron Kirk (2013).

¹² Joint Letter from 41 U.S. agricultural organizations to Michael Froman, Deputy National Security Adviser for International Economic Relations (2013).

The most difficult issues revolve around nontariff barriers and differences in regulatory regimes for plant and animal health and SPS, as well as human health (hormones, pathogen reduction treatments (PRTs), antibiotics, and zoonotic diseases). In the cases of GM products and hormones political realities may force “agree to disagree” solutions; in others, such as animal diseases, there is the prospect, given the current position of key agricultural groups, for joint future action. Greater due process provisions, such as pre-notification and possibility to appeal regulatory decisions, can form the basis for compromises that, in the end, are acceptable to interest groups on both sides of the Atlantic.

Labor

The evolving position of the U.S. labor movement on the TTIP will be one of the most interesting and important political economy stories of the negotiations. Labor is faced with a tradeoff specific to the TTIP: does it hold to its adamant opposition to the current trade agenda, or does it modify its truculent opposition, faced with the reality that, with the European Union, the United States is negotiating with countries that generally have wage rates similar to this country and social safety nets that are more abundant than the United States.

Beginning with NAFTA, the labor movement in the United States has fiercely opposed the succeeding FTAs concluded under presidents Clinton, Bush, and Obama. In the battles of recent years over TPA and the TPP, labor unions went all out to block congressional approval. On trade, they openly broke away from the Obama administration despite efforts of the president and USTR Froman to at least achieve a less fervid, even vengeful (regarding Democratic Members of Congress) opposition.

On 18 March 2015, AFL-CIO president Richard Trumka gave a defiant, no-holds-barred speech at the Peterson Institute in Washington in which he attacked ¹³ the TPA, the TPP, and U.S. trade policy in general. Taking direct aim at the Obama administration (which was previously allied with labor on many issues), Trumka blamed NAFTA-style trade agreements for wage stagnation, producing chronic trade deficits, and shipping jobs overseas. Of relevance here, on TPA, he stated: “Fast track is wrong and undemocratic; it’s a rotten process, and the American labor movement intends to kill it.” As for the TPP, it represented “a step backward.”¹⁴ Trumka then presented a litany of “bad” TPP provisions that labor opposed, including: investor-state dispute settlement, weak labor and environmental standards, lack of currency manipulation

¹³ Trumka (2015).

¹⁴ Ibid.

retaliation, and regulatory provisions that weakened health and safety rules, and food safety. To underscore its antagonism, the AFL-CIO has withheld campaign funds from undecided congressmen (mostly Democrats) until votes on TPA and the TPP.

Late in the session, Trumka was asked (by the author) about his preliminary reaction to TTIP negotiations, a prospective bargain with a group of nations with wages and income levels closer to the United States and with deeper and more abundant social safety nets. His response took some in the audience by surprise. He stated that, while it was early days, the labor movement might well view TTIP in a different light: labor protections in Europe were high, and labor-management relations were less contentious, in his view. He particularly cited as a model, the co-determination labor/management regime under German law. He noted, finally, that he wished that TTIP had come before TPP, for it might have served as a better model for future FTAs.¹⁵ The bottom line is that the AFL-CIO is keeping an open mind on the TTIP at the moment, even while mobilizing its full forces against TPA and TPP.

Environmental organizations

It is less likely, though still possible, that major U.S. environmental organizations would view the TTIP in a different light than TPA or the TPP. In the original battle over NAFTA, the environmental movement was split. Groups such as the Sierra Club, Friends of the Earth, and Greenpeace opposed the pact; however, after a diligent campaign by the Clinton administration, several important environment groups supported NAFTA, arguing that, no matter how weak, environmental related provisions were included as side agreements to the legal text. These included the National Wildlife Federation, the Natural Resources Defense Council, Environmental Defense Fund, the World Wildlife Federation, and the National Audubon Society.¹⁶

By the George W. Bush administration, however, virtually all, important U.S. environmental organizations had swung over to oppose FTAs even though some environmental mandates had been included in them. As a result, FTA partners of the United States were required to sign up for a group of UN-based environmental treaties that included ozone protection, marine pollution, endangered species protection, and whaling regulation, among others.

As the battle over TPA, the TPP and TTIP developed, the major environmental organizations—including all of those that had supported NAFTA—have joined the

¹⁵ Personal notes of the author.

¹⁶ Johnson and Beaulieu (1996).

coalition of labor and consumer groups in vehement opposition.¹⁷ And, in the view of many environmental organizations, the TTIP is linked directly with TPA and the TPP, though some of the groups still hold out hope that European negotiators will defend stricter European environmental and health regulations (particularly the precautionary principle).

Still, pending more information on the content of the TTIP, all have adopted a negative stance for now. A detailed pamphlet issued by the Sierra Club zeroes in on what environmental organizations typically characterize as the most damaging potential provisions of the TTIP: the potential to open the floodgates to oil exports and fracking; easing restrictions on toxic chemicals; compromising food safety rules (GM products, beef hormones, etc.); and the potential for undermining climate change legislation and regulations.¹⁸

It is possible, though at this point unlikely, that the TTIP environmental chapters could assuage the opposition of major U.S. environmental organizations. What is certain is that these groups, which do exert great power, especially within the Democratic coalition, will be a force to be reckoned with in the final negotiations and the passage of the TTIP through Congress.

Regulatory reform

A great deal of attention has been focused on the need to negotiate a comprehensive package of regulatory reforms through harmonization, mutual recognition, or some agreement on equivalence. This paper will not attempt to analyze the many sectoral permutations that might develop in a future the TTIP negotiation. Here, only one political economy challenge will be noted: Negotiating advances in regulatory trade liberalization will entail tackling the much-feared iron triangle of interests groups, congressional committees, and the bureaucracy. Furthermore, there are special issues that arise from dealing with the powers of independent regulatory agencies, many of which are subject to statutory obligations and responsibilities. While it is impossible to discern at this point which agencies will prove the most intractable against pressure to give up domestic power, these negotiations are certain to be among the most difficult. The Obama administration and political leaders in the European Union made brave vows that they had begun softening up key regulatory constituencies. At least on this side of the Atlantic, there was scant evidence of this. On health and safety, the Food and Drug Administration agreed to talks with trade negotiators, but to date there is little concrete movement. And so it went with other key U.S. agencies, such as the Security and Exchange Commission,

¹⁷ Citizens Trade Campaign (2015).

¹⁸ The Sierra Club (2015).

the Federal Trade Commission, the Environmental Protection Agency, the Federal Communications Agency, the Consumer Product Safety Commission—and not least, the United States Treasury in the area of financial services regulation.¹⁹

Two representative issues central to a final TTIP deal: investor-state disputes and the internet

To give a flavor of the complexity and difficulty in finding common ground in the TTIP negotiation, in particular on so-called behind-the-border policies, light is now shed on two particularly contentious matters taken up in the TTIP negotiations. The two areas chosen are: investor-state dispute settlement and issues surrounding the internet and data flows. Interestingly, while neither area raised fundamental, “deal killing” threats to the TPP negotiations, it seems likely that both sets of issues will pose very difficult challenges in the TTIP.

Investor-state dispute settlement—Investor-State Dispute Settlement (ISDS) provisions, in one form or another, have been included in the more than 3,000 bilateral investment agreements that have been negotiated by some 180 countries around the world. The United States, in particular, has included fewer such provisions in such agreements, with only fifty-one agreements including ISDS over the last thirty years.

The European Union is in a transition process in which some 1,400 individual bilateral investment agreements by member states will be superseded by E.U.-wide agreements. This was a result of the Lisbon Treaty which made the negotiation of investment treaties an E.U. competence. In 2011, the European Parliament passed a resolution blessing the work of the European Commission in framing a model treaty for the future.

Jumping forward, on 8 July 2015, the European Parliament passed a resolution supporting the TTIP (436–241), but rejected the current versions of an ISDS.²⁰ The vote on ISDS highlighted the fact that across Europe, investor-state arbitration had become a major flash point for NGOs, many of which exerted considerable pressure on European political leaders to exclude a separate investment dispute settlement system from the TTIP. Opposition centers around claims that ISDS allows multinational corporations to override local environmental, health, safety and labor laws, and the public interest in general. Over the past several years, now-famous ISDS-related cases, such as a challenge in Canada by the U.S.

¹⁹ Aggarwal and Evenett (2012). For evidence supporting this negative finding see the papers by Aggarwal and Evenett (2017).

²⁰ EuroActiv (2015).

pharmaceutical company, Eli Lilly and a challenge by the tobacco industry against an Australian anti-smoking campaign, have been repeatedly cited as examples of ISDS encroaching on local regulation. On the other hand, E.U. corporations have been among the most active in utilizing the ISDS process in existing BITs. By the end 2013, E.U. companies had been responsible for more than half of the cases filed under existing investment treaties.²¹

On the U.S. side, both the Obama administration and the most politically powerful business organizations have been adamant that ISDS must be included in the TTIP in some form. Representing a who's who among top U.S. corporate leaders, the U.S. Chamber of Commerce, the National Foreign Trade Council, and the Business Roundtable have relentlessly lobbied the administration and, of equal importance, members of Congress, to insist on ISDS retention as a condition of completing a final agreement. The Chamber stated emphatically:

“While some argue that ISDS need not be part of TTIP given the demonstrated United States and EU commitment to the rule of law, the Chamber insists that the United States and the EU must include these provisions as a signal to the world of our willingness to commit to the same set of rules that we urge other commercial partners to uphold.”²²

Cecilia Malmstrom, the E.U. trade commissioner, had first suggested that ISDS might be dropped from TTIP. After the Parliament vote, however, she doubled down and the Commission produced an elaborate new scheme for a full-fledged multilateral investment court system, based upon a concept paper she had completed in the spring. She stated: “Today, we are delivering on our promise—to propose a new, modernized system of investment courts, subject to democratic principles and public scrutiny.”²³

Under the European Union's initial proposal, a first-instance Tribunal would be created along with an Appeal Tribunal, both with publicly appointed judges. The former would consist of fifteen judges, including five U.S. nationals, five E.U. nationals, and five from other countries. The Appeal Tribunal would consist of six members, with two from the European Union, two from the United States, and two from other countries. The Appeal Tribunal would follow principles and practices based upon the WTO Appellate Body. On individual case, judges would be chosen randomly. There a number of “ethics” restrictions on the judges, including strictures on conflict of interest, independence of governments, and serving as legal counsel on cases before the tribunals.

²¹ *Financial Times*, 7 October 2014, “Trade deals: toxic talk” (Available at <http://www.ft.com/cms/s/0/27b8740e-48ce-11e4-9f63-00144feab7de.html>).

²² Statement of the U.S. Chamber of Commerce to the Office of the U.S. Trade Representative (2013).

²³ *Bridges Weekly* (2015).

As to the mandate and substantive rules for investment challenges, the proposal includes an expansive “right to regulate” for national governments. Article 2 provides that the provisions “shall not affect the right of Parties to regulate within their territories through measures necessary to achieve necessary policy objectives.” The document also contains a series of principles for the treatment of foreign investors, including: guarantee against expropriation without compensation, transfer of funds, “fair and equitable treatment,” respect for obligations to investors that are legally binding, and compensation for losses in situations such as armed conflict. The proposal also allows investors to first take their case to domestic courts and it provides that if there is a conflict with domestic law, a tribunal’s verdict would not be binding on domestic courts.²⁴

On this proposal, the Obama administration was carefully neutral, and the USTR merely welcomed it as a means of restarting talks in investment. The U.S. corporate community, in contrast, reacted quite negatively to the creation of a whole new elaborate and complicated multinational legal system and authority. Speaking for many of the major business trade associations, a U.S. Chamber spokesperson condemned the proposal as “deeply flawed.” She went on:

“While we recognize the EU has a political problem relating to future investment treaties, the U.S. business community cannot in any endorse today’s EU proposal as a model for the Transatlantic Trade and Investment Partnership...The recent European debate around investment treaties—the obligations governments accept in them and the methods they provide for dispute settlement—is not grounded in the facts, and the distortion in this debate cannot be allowed to trump sound policy.”²⁵

The negative substantive reactions to the new European Union proposal centered on the following points. First, the wisdom and practicality of attempting to create an entirely new multilateral system and apparatus just for investment. E.U. leaders had made no secret that this was their ultimate goal. Such a huge leap would need to be carefully weighed and should not be undertaken as a mere adjunct to a bilateral trade agreement. Some also argued that there already exists a multilateral institution to arbitrate investment disputes: the World Bank’s International Center for the Settlement of Investment Disputes.

Second, on substance, there is strong push back from the U.S. side on what is considered an unmoored “right to regulate.” While the right to regulate has appeared in other investment treaties, it had been tied to more specific goals and areas of jurisdiction. As one spokesperson argued: “Lots of questions arise from the commission’s proposal which does not clearly delineate the

²⁴ Ibid; Inside US Trade (2015a).

²⁵ Inside US Trade (2015a).

right to regulate from these other obligations and how they interface together.”²⁶

Third, there is a strong fear that the judges on the tribunals would be too beholden to governments who appointed them and who controlled their future reappointment. There was also the complaint against banning anyone who had tried an arbitration case from being eligible to serve on the tribunals: this would, critics noted, prevent experienced arbiters and lawyers with real international legal knowledge from the appointments.

There is some disagreement on how all of this could affect the TTIP negotiations. One prominent U.S. international trade lawyer, Alan Wolff, is pessimistic, holding that the issue would become a real stumbling block. In his view, it will be “very, very difficult” for the Commission to back down, after spending so much energy and political capital with E.U. parliamentarians and members states. Others think that the issue in the end will not be a “deal killer.”²⁷

One route towards reconciliation may come from the hard-fought compromises that produced an agreement among the twelve TPP nations on a version of ISDS. In that negotiation, the Australians were the leading opponents, having vowed not to allow ISDS provisions in future Australian trade agreements. On the vexatious issue of the “right to regulate,” the TPP attempted to strike a middle ground by firmly establishing governments’ rights to regulate “in the public interest” but also prescribing definitional limits on the scope of regulations. Among the other improvements to traditional ISDS provisions were: explicit clarification that an investor bears the burden of proof for all elements of his claim; clarification that the fact that a government action frustrates an investor’s “expectation” does not itself give rise to an ISDS claim; and limitations on the damages that an investor could collect to those he or she actually incurred. The TPP ISDS chapter also included detailed prescription for arbiter ethics, independence, and potential conflict of interest.²⁸

It remains to be seen whether these upgrades to the traditional ISDS model will satisfy E.U. negotiators. At the same time, it is hard to see the Trump administration agreeing to the creation of a new intergovernmental court system in the furtherance of the goal of successfully concluding a future TTIP negotiation.

E-Commerce and digital trade

TTIP negotiations in digital trade and E-commerce issues headed into stormy weather as large differences between the United States and the European Union impinged on

²⁶ Inside US Trade (2015b).

²⁷ *Ibid.*; Bromund, Roberts, and Dasgupta (2015).

²⁸ USTR (2015a).

the talks. There was big pressure from U.S. information and communications companies (ICT) to take up these challenges in the TTIP negotiations. For this paper, two examples illustrate the challenges faced: the right to be forgotten principle and the judicial fiat ending the U.S.-E.U. safe harbor agreement for personal information.

On the right to be forgotten, in May 2014, the European Court of Justice (ECJ) ruled that European citizens could demand that search engines such as Google delete information under their name that is out of date, inflammatory, or irrelevant. E.U. officials called this “the right to be forgotten,” though it is more accurately labeled “the right to be delisted.” The ruling pertained not only to private information, but to information that originated in the public records such as newspapers, magazines, television, or on the internet. Oddly enough, given fierce European defense of public regulation, responsibility for administering the deletions was placed squarely on Google’s back. Reluctantly, and under protest, Google took up this task and by the spring of 2015 reviewed some quarter of a million requests from politicians, criminals, public figures, and ordinary citizens. It has accepted less than half (41 percent) of these deletion requests and removed them from the European domain (Google.fr, etc.).²⁹

In December 2014, an E.U. advisory group on the ECJ decision upped the ante by recommending that Google be forced to remove the information not only from European domain but from the worldwide Internet. Then, in August 2015, France’s data protection authority, CNIL, demanded that Google and other search engines apply the delisting worldwide, stating that “in order to be effective, delisting must be carried out on all extensions of the search engine,” because “the service provided by Google search constitutes a single processing.”³⁰ Failure to comply with the decision would result in a daily fine of about \$330,000.

Google protested this extraterritorial demand and appealed the decision: “We believe that no one country should have the authority to control what content someone in a second country can access ... As a matter of principle, therefore, we respectfully disagree with the CNIL’s assertion of global authority.” Google went to note that: “If the CNIL’s proposed approach were to be embraced as the standard for Internet regulation, we should find ourselves in a race to the bottom. In the end, the Internet would only be as free as the world’s least free place.”

The Obama administration was reluctant to intervene, wanting first to see how the judicial process worked out. Since the CNIL decision, however, pressure steadily mounted on the administration from large segments of the ICT sector to take a stand—and to utilize the ongoing TTIP negotiations as a level to force the European Union to reverse course.

²⁹ For more details, see Barfield (2015).

³⁰ Ibid.

A similar set of pressures was unleashed as a result of the ECJ decision in early October invalidating the long-standing, so-called safe harbor agreement between the European Union and the United States. On 6 October 2015, the ECJ ruled that the safe harbor framework that permits U.S. companies in the European Union to transfer data to the United States was invalid. Leaning heavily on the Snowden disclosures about the extraordinary exploitations of the NSA, the court ruled that that E.U. citizens were not adequately protected as mandated by European privacy laws and principles. The court also ruled that individual E.U. member states would individually investigate and rule on privacy complaints from their citizens.

Surprised and stung by the ECJ ruling, U.S. government officials quickly slammed the opinion as out of date regarding U.S. privacy and security laws, particularly since this past summer with the passage of the USA Freedom Act, which instituted additional civil liberties reforms and removed NSA from the metadata process). The Commerce Department spokesman criticized the ECJ for needlessly introducing “significant uncertainty” for both business and consumers on both sides of the Atlantic. It was pointed out that over 3,000 U.S. businesses operated under the existing safe harbor agreement.³¹ U.S. officials and U.S. companies operating in Europe were quick to point to a (then) recently enacted French law (in reaction to the Hebdo massacre) that allowed authorities to spy on digital and mobile phone communications of anyone linked to a “terrorist” organization without authorization from a judge. It forced Internet service providers and phone companies to give up the data upon request. Intelligence services also had the authority to place cameras and recording devices in private homes and retain the recordings for up to five years. Finally, even after the strong reaction against the NSA Prism program highlighted in the Snowden revelations, the legislation allowed the French intelligence services to accumulate vast tranches of data for analysis. The metadata would be anonymous, but the intelligence services could then dig deeper upon permission of an independent panel to find the actual identity of the suspected terrorist or criminal.³²

This paper is not the place to explore the complex issues surrounding data flows and privacy protection in the United States and European Union. However, the point here is that ICT companies and associations have pushed for immediate responses as well as an ultimate solution cemented in the obligations of a future TTIP. Subsequently, the United States and the European Union reached a

³¹ Inside US Trade (2015c).

³² *The Guardian*, 5 May 2015, “France passes new surveillance law in wake of Charlie Hebdo attack” (Available at <http://www.theguardian.com/world/2015/may/05/france-passes-new-surveillance-law-in-wake-of-charlie-hebdo-attack>).

tentative framework for the new Safe Harbor agreement. The tentative pact still faces major political hurdles, particularly in the European Union.³³

Digital trade and e-commerce in the TPP

TPP negotiations were completed on 5 October 2015, and the agreed upon texts were published a month later. The USTR Fact Sheets on digital trade and the internet described the most salient features of the chapter. First, the TPP members agreed to strong language against data localization measures, as well as a prohibition on digital customs duties for both products and services. The agreement also barred forced technology transfers, and forced use of local partners in joint ventures as a condition of operating in a TPP country. It also gave support for the use of encryption tools. At the same time, it mandated national consumer protection laws and privacy protections without dictating the exact terms of such laws and regulations.³⁴ Though President Trump withdrew the United States from the TPP, his administration's officials have praised the E-Commerce sections of the agreement. It is quite likely that these provisions would be a starting point for any future TTIP negotiations on digital trade rules.

The emerging trade policy of the Trump administration

Foreshadowed by the 2016 presidential campaign and made real by the victory of Donald Trump in November 2016, the United States has experienced a revolution in trade policy. This final section will attempt to accomplish two goals: first, to describe the stated tenets and emerging policies regarding trade policy in the fledgling Trump administration; and second, to briefly assess what this means for any future U.S.-E.U. TTIP negotiation.

Trump trade policy

Given the perspective of writing some four months into the Trump administration, it is clear that some of the bold—and wrongheaded—policy statements and promises of the campaign have “evolved” as a result of political and foreign policy exigencies. But it is also true that the president and his trade advisers have been

³³ Barfield (2016).

³⁴ USTR (2015b).

remarkably consistent in adherence to their original promises regarding U.S. trade policy in spite of distractions and detours. At this point, the most influential trade policy advisers to the president are: Wilbur Ross, Secretary of Commerce; Robert Lighthizer, U.S. Trade Representative; Peter Navarro, head of the White House Trade and Manufacturing Policy office Gary Cohn, director of the White House Economic Policy Council; and Steven Bannon, White House Chief Strategist.³⁵ What follows is a distillation of the most important economic beliefs driving Trump trade policy (It should be noted that much of so-called Trump trade doctrine is counted as nonsense by virtually all economists: within the confines of this paper, however, we will not attempt to counter these fallacious arguments).

Damaging trade deficits

In a September 2016 campaign policy paper, Ross and Navarro argued that U.S. trade deficits constituted a heavy drag on the economy, depressed workers' income, and drove U.S. manufacturers offshore.³⁶ In his address to a joint session of Congress, President Trump tied U.S. trade deficits to U.S. job losses: "The U.S. trade deficit with the world last year was nearly \$800 billion. We have lost more than one-fourth of our manufacturing jobs since NAFTA was approved, and we have lost 600,000 factories since China joined the World Trade Organization in 2001."³⁷

"Bad" trade deals

The Trump administration will ultimately judge trade deals on the basis of whether they decrease the U.S. trade deficit with the trade partner in question or increase a rare U.S. surplus. The president and his advisers have also stated that they will generally only pursue bilateral FTAs. They give two reasons for this. First, they believe the United States is forced to compromise too much when there are multiple trading partners in the negotiation. Ross has stated: "As someone who has negotiated a lot of transactions, I can tell you that the more complex the environment within which you are negotiating, the less likely you are to get a sensible result."³⁸ There is a second reason the administration will go for bilateral deals: they believe that U.S. market power will overwhelm individual U.S. trading partners. As Navarro

³⁵ For a more detailed analysis of the emerging trade policy of the Trump administration, see: Barfield (2017).

³⁶ Navarro and Ross (2016).

³⁷ Trump (2017).

³⁸ Needham (2017).

and Ross put it in their campaign White Paper: “America’s major trading partners are far more dependent on American markets than America is on their markets.”³⁹

“Unfair” trade

The president and his advisers view the United States as the only nation playing by the rules in trade. As Navarro and Ross have stated: “The global trading system is riddled with cheaters.”⁴⁰ The administration’s 2017 President’s Trade Policy Agenda bluntly affirmed: “The Trump Administration will not tolerate unfair trade practices that harm American workers, farmers, ranchers, service providers, and other businesses large and small.”⁴¹ Since January 2017, the administration has signaled that it will greatly step up the use of anti-dumping and countervailing duties actions and that it will dust off laws passed since the 1930s in which Congress gave the president a good deal of authority to act independently.⁴²

U.S. sovereignty and the WTO

The administration’s February 2017 trade agenda document boldly reaffirmed the presidential campaign theme of “America First.” It stated that the number one priority of the Trump administration would be to “defend U.S. sovereignty over trade policy.”⁴³ It emphasized that under U.S. law, no decision of the WTO judicial bodies would become law unless ratified by the U.S. Congress. Thus: “(E)ven if a WTO dispute settlement panel—or the WTO Appellate Body—rules against the United States, such a ruling does not automatically lead to a change in U.S. law or practice. Consistent with these important protections and applicable U.S. law, the Trump Administration will aggressively defend American sovereignty over matters of trade law.”⁴⁴

Concluding remarks: revived TTIP negotiations?

Though the Obama administration professed serious intentions with regards to TTIP negotiations after they began in earnest in 2013, the truth is that the

³⁹ Navarro and Ross (2016).

⁴⁰ Ibid.

⁴¹ Office of the United States Trade Representative (2017).

⁴² Belin, et al. (2017).

⁴³ USTR (2017).

⁴⁴ Ibid.

negotiations took a back seat to the TPP and the U.S. “pivot” to Asia. As commentator Iana Dreyer noted, the TTIP was an “obsession with the European Union and only an afterthought in the United States under the Obama administration.”⁴⁵

E.U. nations and the TTIP are also directly affected by the tenets of Trump’s evolving trade policy. As with other nations (e.g., NAFTA’s Mexico and Canada), relations got off to a rocky start when both Navarro and the president called out Germany for its alleged “unfair” trade surplus with the United States and incorrectly suggested that Germany could negotiate directly with the United States, bypassing the European Commission. Navarro said: “Germany is one of the most difficult trade deficits that we’re going to have to deal with ... outside the boundaries and restrictions that they claim they are under.”⁴⁶ The president reiterated this view in mid-March 2017 when Chancellor Angela Merkel made her first visit in the new administration. Merkel gently remonstrated: “The European Union is negotiating those agreements for all of the member states.”⁴⁷

The bilateral solution

Despite the uncertain and chaotic opening rounds of trade discussions between the European Union and the Trump administration, as of this writing, there remains a distinct possibility that at some point in the future, TTIP negotiations could resume. After the initial gaffes, Trump administration officials have tacitly conceded that only the European Commission, and not individual E.U. nations, can enter into trade negotiations. As such, the Trump administration could very well accept the TTIP as fulfilling one of its major stipulations for Trump trade policy: that bilateral trade negotiations will take top priority over regional or multilateral negotiations.

Chancellor Merkel first advanced this argument when she visited in March 2017 and E.U. Trade Commissioner Cecilia Malmstrom pressed the issue again when she came to Washington in late April 2017 while meeting with key senators and Secretary of Commerce Wilbur Ross. The Europeans at that point had some reason to think that the attitude in Washington, D.C. toward a revived TTIP might be changing. Speaker of the U.S. House of Representatives, Paul Ryan (R-WI) had given a speech in London in which he pledged to “work closely with our European friends to chart a path forward on the TTIP.”⁴⁸

⁴⁵ Dreyer (2017).

⁴⁶ Lawder (2017).

⁴⁷ Lopez (2017).

⁴⁸ *The Guardian*, 17 April 2017, “Top Republican Paul Ryan assures UK of US trade ties,” Patrick Wintour.

The key voice of at least transactional support has come from Secretary of Commerce Ross. As with Navarro, Ross prioritizes future FTAs on the basis of the size of trade deficits with the United States. He told the *Financial Times* that: “The three big (countries) that are sources of our trade deficit (outside of NAFTA) are China, Japan and Europe. So it is logical that...one should focus on Europe.”

Looking ahead, it is unlikely that the Trump administration will make any decisions regarding the TTIP in the near future. White House trade advisers have made it very clear that renegotiating NAFTA is the first priority, with bilateral negotiations to update the KORUS and fashion an FTA with Japan as the next items on the trade negotiating agenda. While talks with E.U. trade officials may well begin sometime later this year, actual negotiations will not likely begin until 2018 at the earliest—and possibly after the U.S. mid-term elections.

As noted above, support for renewed TTIP talks will come from the U.S. business community, including the service and financial sectors. Labor unions have also signaled that, depending on the actual terms of the agreement, they could very well support the TTIP. The U.S. agricultural community will likely be of a mixed mind. They will support an agreement if markets for U.S. grain and dairy are opened; but given the history here, agricultural negotiations will present very difficult challenges for both sides. Further, there is as yet no sign of compromise on the fraught question of GMOs. Finally, as this paper has recounted, digital trade issues and ISDS are particularly contentious, though the United States is more likely to seek compromise on ISDS than it is on e-Commerce. In the end, as with all bilateral and regional trade negotiations, outside influences—political, diplomatic and security—could exert strong, if not decisive, influences on the final outcome for the TTIP.

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