

Vinod K. Aggarwal* and Simon J. Evenett

Resisting behind the border talks in TTIP: The cases of GMOs and data privacy

Abstract: Despite initial intentions to better align transatlantic regulation and associated practices in the negotiation of the Transatlantic Trade and Investment Partnership (TTIP), this was not possible for rules concerning genetically modified organisms and data privacy. By 2016 both matters effectively fell off the TTIP negotiating agenda. This paper identifies the factors responsible, specifically the critical role played by independent regulatory agencies and associated bureaucratic politics, transnational coalitions of private sector organizations, and non-government organizations and contingency. These factors are not exclusive to the two salient regulations considered here, with the implication that the identification of cross-border spillovers is at best a necessary condition for the successful negotiation of binding trade rules on behind-the-border government policies.

Keywords: Mega-FTAs, TTIP, international negotiations, GMO, data privacy

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1 Introduction

Along with the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership, the Transatlantic Trade and Investment Partnership (TTIP) is one of the mega-regional trade negotiations undertaken during the past five years.¹ One factor that makes such trade talks “mega” is that they involve some of the largest trading jurisdictions whose negotiators are ordinarily inclined to

1 At the time of writing, the status of this negotiation is unclear. Statements from officials in the Trump Administration suggest that the TTIP negotiation has been abandoned. Even if this is the case, we contend that much can be learned about the factors impeding the negotiation of binding disciplines on key regulations from the TTIP negotiations conducted during the Obama Administration.

***Corresponding author: Vinod K. Aggarwal**, Travers Family Senior Faculty Fellow and Professor Travers Department of Political Science Director, Berkeley APEC Study Center Affiliated Professor, Haas School of Business University of California, Berkeley Berkeley, California 94720, Tel.: 510-642-2817, e-mail: vinod@berkeley.edu

Simon J. Evenett: Professor, Department of Economics Academic Director, MBA University of St. Gallen Blumenbergplatz 9 CH-9000 St.Gallen, Tel.: +41 71 224 77 97, e-mail: simon.evenett@unisg.ch

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demand that other parties align with their entrenched regulatory practices. While there is a clear commercial advantage for country's own exporters in making such demands of negotiating partners, the risk of being rebuffed cannot be discounted.

Arguably, that risk became a reality in several areas of the TTIP negotiation and is the purpose of this paper. This article sheds light on the factors responsible for the stalemates witnessed in the regulatory areas of Genetically Modified Organisms (GMOs) and data privacy, two examples of nationwide, regulatory policies that are frequently negotiated in contemporary trade deals.² Here we use the multi-level and multi-party framework elucidated in the introductory paper to this Special Issue, highlighting the roles of independent agencies responsible for implementing salient regulations, bureaucratic politics, and transnational coalitions. Specifically, we show how this literature is relevant to understanding the complexities of multi-level bargaining, both within countries and on a transnational basis. Contrary to expectations that negotiations among generally similar, rich developed countries should be relatively uncontroversial—at least as compared to say U.S.-China or E.U.-China negotiations—we find that the strength of independent agencies in both negotiating entities in collaboration with strong interest group lobbying in both, especially on a transnational basis, has hampered and will continue to impede successful conclusion of TTIP.

What follows are case studies on trade in GMOs and on data privacy. Both case studies involve a politically salient regulation for which there exists, in principle, a non-mercantilist rationale. Each regulation implicates transatlantic commerce to such a degree that either the United States or European Union seeks the inclusion of binding rules in TTIP. Yet the resistance to doing so has been far-reaching. The purpose of these case studies, then, is to understand what permutation of factors account for this resistance and why. The paper concludes by drawing broader implications for the inclusion of behind the border regulatory matters in mega-regional trade negotiations.

2 Genetically Modified Organisms

This case study is in many respects the mirror image of the study of financial regulations found in the introduction to this Special Issue. In this case, U.S. demands for changes in an E.U. regulation, whose salience to the European public cannot be understated, have been rebuffed, and where again trade negotiators have played second fiddle to other official parties. Once again, the party advocating for new

² Such regulatory policies, amongst others, are often referred to in the international trade literature as behind the-border policies.

trade rules contends they do not seek deregulation. However, unlike the case of financial regulation, the shadow of existing multilateral trade rules looms larger, and the 2014 change of leadership of the European Commission appears to have played a significant role, the latter being related to a wider division among member states on the acceptability of GMO food.

The principle has been long accepted that derogations from free trade in agricultural products on scientifically justified health-related grounds are allowed and is entrenched in, among others, the World Trade Organization (WTO) agreement on Sanitary and Phyto-sanitary (SPS) measures. While this principle is straightforward to articulate, much of it relies on what constitutes “science” (or rather, proper scientific evidence), acceptable levels of risk, appropriate times to intervene, and the procedures, timing, and costs associated with regulatory approval processes.

Wide differences in the public acceptability of GMO foods add a further dimension. In North and South America, GMO foods are widely accepted and cultivated. In the European Union, this is not the case and certain key bureaucratic players used divisions among member states in 2014 to propose reforms to the approval processes concerning not just the cultivation, but also the trade, in GMOs within the European Union. At present, the European Union imports genetically modified maize, cotton, soybeans, grape seed oil, and sugar beet. Many of these products are used as, or to produce, inputs for sale to buyers further down the agricultural supply chain, implicating a wide range of producer interests in the European Union.

At the beginning of the TTIP negotiations, both parties sought to remove unnecessary barriers to trade and investment. The European Commission’s negotiating mandate, as set by the European Council, specifically listed SPS matters in a chapter on regulatory and non-tariff matters. However, this mandate also made clear that the right to regulate would be protected and employs standards that “each side deems appropriate.”³ For its part, the United States has long had reservations about the manner in which the European Union regulates what it refers to as “agricultural biotechnology.” The United States went so far as to challenge the European Union’s biotech approval system at the WTO, winning a favorable judgment in November 2006. Arguably, this has not addressed all of the U.S. concerns for in its 2014 Report on Sanitary and Phytosanitary Measures⁴, the United States Trade Representative (USTR) observed that “the United States continues to engage the European Commission in an effort to normalize trade in GE products.” That report provides an overview of outstanding U.S. concerns, especially as they relate to the approval process for biotech and have arguably shaped the stance taken by U.S. officials and corporate interests during the TTIP negotiation.

³ Council of the European Union (2014), 11.

⁴ Office of the U.S. Trade Representative (2014). 45.

U.S. domestic politics and GMOs

Bureaucratic politics. The U.S. Department of Agriculture (USDA) has historically taken a strong interest in advancing American agricultural interests in trade negotiations. This necessitates a division of labor within the USTR. In this case, USDA representatives appear to have taken the lead in articulating the U.S. negotiating position.⁵ Of course, Congressional oversight of both federal agencies provides U.S. corporate interests with direct and indirect means of lobbying U.S. negotiators. The U.S. Ambassador to the European Union has also sought to explain the American negotiating position.

The central U.S. objective concerning GMOs in TTIP relates to increasing the speed and efficiency of the EU's GMO approval process so that new U.S. biotech agricultural exports are able to reach the European market sooner.⁶ The approval process for genetically engineered or altered seeds, feeds, and other products take, on average, about eighteen months in the United States as opposed to forty-five months in the European Union.⁷ Speaking to reporters in Brussels on 17 June 2014, U.S. Agriculture Secretary Vilsack stated that: "Our view is that the regulatory process [for approving biotech products] should be synchronized and harmonized."⁸ U.S. officials have stressed that aligning timetables for approval processes does not, in their view, challenge the European Union's right to regulate food. For example, in February 2015, Ambassador Gardner told a conference in Brussels:

There will be nothing in this agreement about GMOs, we don't want to force European consumers to eat food they don't want to eat. ... Our main concern is that in some of its decisions, the E.U. is not respecting the advice of its own scientific bodies, including the European Food Safety Authority.⁹

Perhaps as a means to encourage E.U. engagement on negotiations relating to GMO approval procedures, Secretary Vilsack has acknowledged that the European Union might want to see changes in U.S. procedures. He argued:

I know that if my European counterparts were here [at a June 2014 press briefing], they would have a laundry list of things that the U.S. needs to talk about. And that's fair. That's what a

⁵ A review of the specialist trade press shows that Secretary Vilsack has opined publicly much more often than USTR Froman on the agricultural negotiations in TTIP.

⁶ *The New York Times*, 18 June 2014, "U.S. Calls on Europe to Ease Limits on Gene-Altered Food," James Kanter.

⁷ *Ibid.* Other press reports suggest the average approval time in the European Union is forty-eight months, see Inside U.S. Trade (2014a).

⁸ *Ibid.*

⁹ "Interview U.S. Ambassador to the E.U. Anthony Gardner," *AGERPRES*, 16 October 2015.

negotiation is supposed to be about. It's not about saying 'This is our issue and its our way or the highway.'¹⁰

U.S. interest group lobbying. The U.S. agriculture sector is heavily reliant upon the use of genetically engineered crops. According to a 2013 estimate from the USDA's National Agricultural Statistics Service, over 90 percent of corn, cotton, and soybean acreage in the United States produced GM harvests.¹¹ Meanwhile, the European Union has remained wary of utilizing these innovations in biotech and has been slow in allowing GM food production. In 2012, only 1.4 percent of corn produced in the European Union utilized a Monsanto GM strain of seed and was only cultivated in Spain.¹²

TTIP's potential to open E.U. agricultural markets has attracted the attention of influential producer lobby groups including the American Farm Bureau, The American Meat Institute, American Sugar Alliance, CropLife International (representing Monsanto, Bayer, BASF, CropScience, and Dow Agrisciences, among other firms), Fonterra USA, National Association of Wheat Growers, National Corn Growers Association, USA Poultry and Egg Export Council—to name a few of the most prominent coalitions. These groups have expressed their concerns about current E.U. SPS measures by, among other steps, directly engaging with E.U. regulatory agencies and negotiators. In a letter from the U.S. Biotech Crops Alliance to E.U. Health & Food Safety Commissioner Vytenis Andriukaitis in March 2015, the group stated their grievances about their inability to access European markets and included a list of demands to reform the biotech approval processes by making it more transparent, limiting approvals to a window of eighteen months, and for more accountability to be placed on the European Food Safety Authority (EFSA)'s role in approving biotech.¹³

Some U.S. corporations have been particularly critical of E.U. regulation of biotech. Mr. Brandon Mitchener, Public Affairs Lead for Monsanto Europe, is on record stating:

The E.U. has chosen to fund NGOs that demonize GMOs, even though the E.U.'s best scientists say they are perfectly safe. Years of such political hypocrisy have marginalized GM seeds in Europe to the point that most companies have given up trying to sell there...[Industry] faces nearly impossible hurdles, starting with a regulatory review system that is highly political and costs more than €100 million per biotech traits—with no guarantee of success.¹⁴

¹⁰ Inside U.S. Trade (2014a).

¹¹ Office of the U.S. Trade Representative (2014).

¹² *The New York Times*, 18 June 2014, "U.S. Calls on Europe to Ease Limits on Gene-Altered Food," James Kanter.

¹³ Inside U.S. Trade (2015b).

¹⁴ Michatlopoulos (2015).

Comments such as these reflect the impression among certain U.S. producer interests that considerations other than science influence E.U. regulatory policy, contradicting at least the spirit of the WTO SPS accord. A review of the specialist trade press indicates that U.S. producer interests have passed on their concerns to elected and appointed U.S. officials accounting for, perhaps, the alignment between their interests and stated the U.S. negotiating position in TTIP.

E.U. domestic politics and GMOs

Bureaucratic politics. The range of U.S. bureaucratic interests impinging upon TTIP negotiations on biotech approvals pales in comparison to that of the European Union. The E.U.'s twenty-eight member states retain some responsibility for food safety and promotion of agriculture and are not shy about making their preferences heard. In addition to these national-level factors, there are at least five important supranational players: the EFSA, DG Trade, DG Sanco (responsible for health and food safety,) DG Agri (responsible for agriculture and rural development), and the Presidency of the European Commission.¹⁵

Until 2014, approval of new biotech traits rested with the EFSA, which was supposed to make decisions on a scientific basis; however, E.U. member states were consulted for their views on potential approvals. In what appears to have been a pivotal decision in February 2014, EFSA approved a strain of GM maize referred to as Pioneer 1507, despite nineteen member states opposing the decision and only five in support.¹⁶ This strain was developed by Dupont and Dow Chemical. Earlier in January 2014, the European Parliament had voted against authorization by 385 to 201. This particular exercise of independent regulatory power would become significant later.

If the European Commission's trade negotiators had wanted to preserve options by adopting a comprehensive negotiating agenda in SPS, then this did not come to pass. Replying to Secretary Vilsack's comments made during a visit to Brussels in June 2014 (and reported above), E.U. Trade Commissioner DeGucht reiterated the European Commission's opposition to "inclusion of GMOs in TTIP."¹⁷ In a "fact sheet" explaining the Commission's approach to negotiating food safety in TTIP, DG Trade states:

¹⁵ One indication of the large number of Commission-level stakeholders is that a 12 March 2015 letter from U.S. business groups about GMO-related matters was sent to no less than 6 European Commissioners. See Inside U.S. Trade (2015c).

¹⁶ BBC News (2014). This strain was developed by Dupont and Dow Chemical.

¹⁷ dpainsight E.U. (2014).

Growing genetically modified organisms is subject to an authorization process in line with E.U. law. TTIP will not change this law. E.U. countries must also agree to any growing of GM plants. This will not change through TTIP.¹⁸

These blanket statements are not that different from those reported in the financial regulation case study by U.S. representatives concerning financial regulation. Of course, these E.U. statements may still be consistent with a negotiation on the administrative implementation of GMO regulation (which the United States seeks); however, some might interpret the E.U.'s statements as ruling that out as well. However, the formal mandate given to E.U. trade negotiators by the European Council does not specifically mention GMOs, which muddies the water further.

E.U. lobbying. European civil society organizations with a stake in the issue have, for the large part, opposed negotiations on GMO-related matters in TTIP. For example, in a 6 May 2014 position paper the European Consumer Organisation (BEUC) stated that GMO labeling requirements must not change and that the European Union's "precautionary principle" for assessing food risks and "other legitimate factors" in food regulation were non-negotiable.¹⁹ A representative of Greenpeace has claimed that the very negotiation of TTIP was putting pressure on E.U. officials to speed up biotech authorizations.²⁰

In contrast to the consumer interests outlined above, E.U. producer interests, have been divided. Copa-Cogeca, Coceral, Fediol, Fefac, and avec represent the major agriculture industries in the European Union and share some of the same concerns as U.S. agriculture producers. These E.U. firms have expressed their concern to the Commission that if it continues to rigidly object to approving more biotech, an integral component to U.S. agricultural exports, or continues to delay the approval process, it will create economic losses for both sides' firms.²¹ As a result, these European firms and interest groups have lobbied the Commission to expedite their approval processes to further liberalize trade relations and to prevent significant costs ranging from €1 billion for the operations of E.U. farmers to €5 billion for the E.U. agri-food industry who would have to locate alternative feed suppliers if thirteen new biotech strains are not approved.²²

Small and medium sized farmers and agricultural enterprises have taken a particular stand against the negotiations of GMO rules in TTIP. For example, Gottfried Härle, a fourth generation brewer from Luetkirch, Germany, was quoted as stating "Consumers won't be able to tell anymore which product is

18 European Commission (2015).

19 dpainsight E.U. (2014).

20 *The Guardian*, 16 April 2015, "E.U. clears path for 17 new GM foods."

21 Inside U.S. Trade (2015d).

22 Ibid.

made from genetically modified organisms and which isn't. For me as an organic producer, that's a big problem."²³ A January 2016 study, published by UnternehmensGrü, a German group of companies and managers supporting the "green economy," contended that small European farmers would be unable to compete with low cost U.S. GMO crops.²⁴ The report also contends that the European Commission ignores the interests of small and medium sized farmers.

Negotiations blocked

The start of the Junckers-led European Commission, which officially took place on 1 November 2014, has materially influenced TTIP-related deliberations on GMOs. On 14 July 2014, in a presentation on his future plans as President of the European Commission, Mr. Jean-Claude Juncker stated:

I will make sure that the procedural rules governing the various authorizations of GMOs is reviewed. I would not want the Commission to be able to take a decision when a majority of Member States had not encouraged it to do so.²⁵

As a result of this announcement, the European Commission was to propose a new set of rules for GMO approval that were accepted by the Member States and European parliament (EP). According to one specialist press report:

"the Council of the European Union formally decided in March 2015 that member states should have the ability to ban or restrict the cultivation of GMOs for reasons other than health or safety, a policy that had already been approved by the EP."²⁶

A significant element of this new Member State prerogative is the right to ban imports of GM crops from within and outside the European Union if a reasonable justification can be given the European Commission.²⁷ In justifying its move, the European Commission noted that this topic was a "controversial area of great public interest," alluding to the salience of the issue area.²⁸

This move essentially "nationalized" one important part of the decision-making process with respect to GMO approval. By October 2015, sixteen Member States, or regions within those Member States, had chosen to ban the cultivation and importation of GMO crops. Concerns have been raised that this

²³ Deutsche Welle (2016).

²⁴ Sarmadi (2016).

²⁵ "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change," Opening Statement in the European Parliament Plenary Session, Jean-Claude Juncker, 15 July 2014.

²⁶ Inside U.S. Trade (2015e).

²⁷ Much will turn on what constitutes an appropriate reason for banning GMO imports.

²⁸ Inside U.S. Trade (2015f).

decision fragments the European Single Market as well as potentially disadvantaging exporters of GM crops. Moreover, in taking this step, the European Commission gave up its sole control of both approvals and GMO-related market access while retaining its right to be the sole TTIP negotiator on the part of the European Union. Reactions from U.S. officials and from corporate interests on both sides of the Atlantic have been critical. When the proposal was announced in April 2015, USTR Froman immediately saw the linkage to the TTIP negotiations:

We are very disappointed by today's announcement of a regulatory proposal that appears hard to reconcile with the E.U.'s international obligations. Moreover, dividing the E.U. into 28 separate markets for the circulation of certain products seems at odds with the E.U.'s goal of deepening the internal market. At a time when the U.S. and E.U. are working to create further opportunities for growth and jobs through TTIP, proposing this type of trade-restrictive action isn't constructive.²⁹

Secretary Vilsack is reported to have made similarly critical comments in testimony before the Finance Committee of the U.S. Senate on 16 April 2015.

In October 2015, three E.U. agricultural industry groups, Coceral, Fediol, and Fefac, published estimates of the impact of banning GMO soyabeans and meal on the downstream industry in the European Union. Costs would rise by 15 percent, or €2.8 billion, it was said and would erode competitiveness and exports of poultry and the like.³⁰ In a separate intervention, the Deputy Secretary-General of the Coceral association of grain importers stated, "We fear that this approach will reverse the achievements of the European customs union and single market. We have a single market, so if you import a product it must be entitled to free circulation."³¹

At the conclusion of the Obama Administration, the stalemate on GMOs in the TTIP negotiation remained. It should be noted that before the nationalization of GMO market access within the European Union, it was far from clear that agreement on a negotiating agenda—let alone the outcome of the negotiation—had been reached. Nationalization complicates matters as U.S. firms and negotiators now face sixteen import bans and having gained the power to block GMO imports. In negotiating parlance, very generous terms would likely have to be offered by the United States to encourage Member States to give up this new right. Rather, the United States may fancy its chances at WTO dispute settlement, a course of action that would cast a pall over any TTIP GMO negotiations for several years.

²⁹ Jacobsen (2015).

³⁰ Inside U.S. Trade (2015f).

³¹ *The Guardian*, 16 April 2015, "E.U. clears path for 17 new GM foods."

It is worth pondering why the European Commission gave the right to set market access terms for GMO crops to member states, an unusual move for a body that has successfully sought to expand its mandate over time. Contemporary news reports point to dissent within the European Union over GMO approval processes, with one interpretation that Member States were unwilling to accept scientific rulings on a matter upon which much of the European electorate hold strong views. The 1507 decision was the straw that broke the camel's back and the appointment of a new Commission created the opportunity for bureaucratic entrepreneurship.

Now our attention turns from a salient regulation in what might be characterized as an "old economy sector" to a high-profile regulation of the burgeoning digital economy.

3 Cross-border data flows

Disagreement between E.U. and U.S. officials concerning whether and how rules on cross-border data flows should be included in TTIP highlights the importance of three factors. Namely, contingency (there were at least three unanticipated events that have shaped negotiations) that resulted in new legislation; difficulties in negotiating on salient regulatory matters that can be effectively framed in terms of fundamental human rights; and the impact of alternative cooperative instruments to foster inter-governmental cooperation to trade deals.

The Internet has transformed trade and commerce worldwide. According to a UNCTAD estimate, by 2009 the digital economy facilitated about one-half of the global trade in services.³² In a more recent study, economists forecast a bright future for the E.U. Internet economy, which is expected to grow seven times faster than the E.U. GDP.³³ According to the International Trade Commission (ITC), digital trade has been responsible for 3.4 to 4.8 percent of GDP growth and creating 2.4 million jobs in the United States.³⁴ The proliferation of technology and e-commerce has also yielded significant positive externalities for other sectors. A 2011 report by the McKinsey Global Institute estimated that 75 percent of the economic value created by the Internet accrues to non-technology industries.³⁵

As the digital revolution has eroded conventional barriers to trade, legislators and policymakers have struggled to keep up. On the one hand, owing to their

³² UNCTAD (2009).

³³ European Commission (2012).

³⁴ United States International Trade Commission. 2014.

³⁵ McKinsey Global Institute (2011).

participation in certain WTO accords and other international cooperative arrangements, the United States and E.U. Information, Communications, and Technology (ICT) markets are already relatively open. On the other hand, two salient issues have recently emerged: data localization barriers and data privacy and protection. According to industry representatives surveyed by the USITC, these barriers reduce market access and impose costs and uncertainty on firms, particularly small and medium size enterprises (SMEs).³⁶ The USTR defines the term “localization barriers to trade” to include “measures designed to protect, favor, or stimulate domestic industries, service providers, and/or intellectual property (IP) at the expense of goods, services, or IP from other countries.”³⁷ Localization barriers can take the form of domestic policies that require foreign ICT firms to locate data servers in country or use local content or technologies as well as state procurement biases that favor local firms.³⁸ Countries requiring local storage of data include Argentina, Australia, Canada, China, Greece, Indonesia, and Venezuela.³⁹ For example, Greek Law No. 3817/2011, Article 6, requires that, per the E.U.’s Data Retention Directive, data collected from subscribers by telecommunications service providers remain within Greece’s borders.⁴⁰ A number of E.U. member states also impose local content requirements in inputs of production.⁴¹

Data protection regulatory regimes differ widely across the Atlantic. European governance of data protection is strict and institutionalized, with independent government data protection agencies.⁴² A slew of privacy laws mandate firms to register their databases with those agencies and, in some cases, require agency approval before allowing the processing of personal data.⁴³ American data governance, by contrast, is decentralized, less comprehensive, and weakly institutionalized, preferring a “sectoral approach” that mixes legislation, regulation, and a multi-stakeholder approach to self-regulation.⁴⁴

Critics of the European Union’s more stringent data governance and privacy regulations contend that they disrupt trade. Industry groups and federal agencies in the United States have lobbied to include rules on cross-border data flows in the TTIP negotiating agenda. A 2013 trade impact assessment by ECIPE for the U.S. Chamber of Commerce found that “serious disruption” of cross-border data

36 United States International Trade Commission (2013).

37 Office of the U.S. Trade Representative (n.d.).

38 United States International Trade Commission (2013).

39 *Ibid.*

40 Tsolias (2013).

41 United States International Trade Commission. 2013.

42 “U.S.-E.U. Safe Harbor Overview,” export.gov, 8 December 2013.

43 *Ibid.*

44 *Ibid.*

flows (including the dismantling of the E.U.-U.S. Safe Harbor framework) would seriously hamper the competitiveness of E.U. exports, leading to an estimated 6.7 percent drop in services exports and similar effects across the manufacturing industry, with the combined effect of nullifying all the estimated growth contribution from a successful TTIP.⁴⁵

Incentives for collaboration are high, raising the costs for both sides if consensus is not reached. At 150 percent the volume of U.S.-Asia cross-border data flows, and nearly 200 percent of that between the United States and Latin America, the amount of data being transferred between the United States and the European Union is the highest in the world.⁴⁶ As of 2014, the United States and European Union lead the global ICT market, with global market shares of 27 percent and 20.7 percent respectively (rounding out the top four are China, with 10.8 percent of the global ICT market, and Japan, with 7.7 percent).⁴⁷ The E.U. digital ICT market is projected to bring in 946 billion euros of revenue in 2015⁴⁸, a number expected to grow to 1.9 trillion euros by 2020.⁴⁹ By 2016, it is estimated that the global ICT market will be worth over 3.6 trillion euros or about the size of the German economy in 2014.⁵⁰ In Europe, Internet penetration is the highest in the world, with an estimated 75 percent of the population online.⁵¹

At the time the TTIP negotiations were launched, transatlantic data flows by firms were governed by the Safe Harbor agreement. The U.S.-E.U. Safe Harbor agreement, implemented in 2000 (see [Table 1](#)), is a voluntary policy that bridges U.S. and E.U. policies on data protection, providing a regulatory framework for businesses to transfer private data between the European Union and the United States in a manner thought to be consistent with E.U. privacy laws.⁵² U.S. businesses voluntarily join the Safe Harbor policy to decrease transaction costs that might arise due to oversight in data privacy legislation and to signal to E.U. businesses or consumers that their firm operates with the same commitment to data protection offered by E.U. firms.

A U.S. International Trade Commission (ITC) survey of 10,000 U.S. businesses in September 2014 found that the European Union was found to have the most problematic policies in creating barriers to trade.⁵³ Surveyed firms also indicated

⁴⁵ ECIPE (2013).

⁴⁶ Brookings Institution (2014), 1.

⁴⁷ BITKOM (2017).

⁴⁸ Statista (2017).

⁴⁹ European Commission (2012).

⁵⁰ International Monetary Fund (2014).

⁵¹ International Trade Centre (2014).

⁵² Federal Trade Commission (2015).

⁵³ Inside U.S. Trade (2014b).

Table 1: Seven Principles of Safe Harbor (SH).

1. Notice	Businesses must disclose to citizens when they are collecting data on them, whom they are sharing the data with, and how the citizen may contact them with questions/concerns
2. Choice	Businesses must allow citizens the option to refuse the transfer of their data to a third party, and if the data is particularly important the citizen has the right to confirm that the data may be sent to a third party
3. Onward transfer	The 1st and 2nd principles must be offered for data to be shared with 3rd parties, and if they are met the business must ensure that the 3rd party abides by Safe Harbor prior to sharing information
4. Access	Citizens will be able to access the data business store on them and can alter or delete info as necessary
5. Security	Burden is placed on the business to protect/store data safely
6. Data integrity	Data must be valid and serve a purpose
7. Enforcement	There must be recourse for individuals to protect their rights and expose violations of SH, procedures to ensure SH is upheld, and in instances where these principles are upheld the organizations need to solve the problems that arise

Source: Federal Trade Commission. 2015. Trans-Atlantic Privacy Protection. U.S.-E.U. Safe Harbor Framework. (Accessed 21 May 2017) <https://www.ftc.gov/news-events/blogs/business-blog/2015/03/trans-atlantic-privacy-protection>.

the limitations of the Safe Harbor regulatory framework.⁵⁴ At present, only firms under direct FTC regulation can opt into Safe Harbor. This excludes companies that engage in significant digital data transfers, such as the finance and nonprofit sectors,⁵⁵ creating issues of liability and asymmetric regulation. Other problems include firms being uncertain about how to comply with regulatory requirements on Internet Protocol addresses and “cookies,” and European data protection regulators allegedly deeming Safe Harbor compliance insufficient to meet their requirements.⁵⁶ Safe Harbor also included a national security exception that allowed the U.S. government to utilize data collected from businesses to extract personal information.

In June 2013, former NSA contractor Edward Snowden leaked classified files that brought to light the large-scale U.S. intelligence-gathering programs worldwide. This was the first unanticipated event (or shock) that altered negotiations on the inclusion of rules on cross-border data flows in TTIP. The negotiating mandate initially handed down by the European Council to the European

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

Commission makes no mention of “data,” “privacy,” etc. After the Snowden revelations, however, a Vice President of the European Commission, Viviane Reding, felt compelled to state on a trip to Washington, D.C. in October 2014: “Data protection is not red tape or a tariff. It is a fundamental right.”⁵⁷

In the wake of Snowden’s revelations, the United States has faced an uphill battle to regain the trust of its negotiating partners in the European Union. E.U. officials were outraged to learn that the United States had been conducting covert surveillance of E.U. officials’ personal communications and called for a renegotiation of the Safe Harbor regulatory framework.⁵⁸ Moreover, it was revealed that the phone calls of the German Chancellor, Angela Merkel, a strong proponent of TTIP, had been tapped. The implications for transatlantic comity are among the various factors that impinged on this doomed negotiation highlighted in the sections that follow.

U.S. domestic politics and cross-border data flows

Bureaucratic politics. A number of U.S. federal agencies have sought to influence the negotiations over cross-border data flows. While most U.S. trade- and security-related bodies seem to be in consensus that barriers to free data flows are negative, partisan divides have emerged over the question of which specific issues are most important (e.g., Safe Harbor, TISA, localization requirements, etc.), what sort of rhetoric should be used in framing the costs and benefits, and how much the United States can afford to compromise on the issue of data flows in TTIP. To advance their distinct agendas, U.S. federal agencies have used tactics such as appealing to business federations like AmCham E.U., sending negotiators to TTIP talks, and forging alliances with industry representatives.

⁵⁷ *The Wall Street Journal*, 8 June 2014, “Online Privacy Could Spark U.S. E.U. Trade Rift: French, Spanish Fines Against Google Are Latest Flare Ups in TransAtlantic Disagreement.” Still, the European Council (2015) stated: “As the world’s largest exporter of digitally deliverable services, the EU needs an ambitious and proactive digital trade strategy in order to reap the benefits of digitalisation, in line with the Digital Single Market and relevant policies. This includes addressing new types of trade barriers which European businesses of all sizes face, such as nontransparent rules, undue government interference, and unjustified data localisation and data storage requirements. The Council stresses the need to create a global level playing field in the area of digital trade and strongly supports the Commission’s intention to pursue this goal in full compliance with and without prejudice to the European Union’s data protection and data privacy rules, which are not negotiated in or affected by trade agreements.” This statement highlights the multiple goals the European Union appears to have in these matters.

⁵⁸ Inside U.S. Trade (2015h).

The National Security Agency (NSA), Federal Trade Commission (FTC), and Federal Communications Commission (FCC) have, for example, expressed concerns over Safe Harbor.⁵⁹ In 2013, a top Department of Commerce lawyer cautioned the European Union that any attempt to threaten Safe Harbor would undermine TTIP talks.⁶⁰ Meanwhile, the Department of State has been supportive of TTIP, with Secretary of State John Kerry calling the TTIP a landmark initiative. Yet, U.S. Ambassador to the E.U. Anthony Gardner has taken a robust approach. In a talk given to AmCham E.U., Gardner noted that he supports the EC's Digital Single Market initiative, and warned that an "insular model" would stifle innovation, restrict data unnecessarily, and discriminate against non-European firms. He denounced Europe's attempt to protect its "so-called technological sovereignty" with the "creation of a Schengen cloud leading to a Balkanization of the Internet or digital autarky" as efforts that would ultimately hinder the European Union's competitiveness globally. He suggested that debates over privacy might actually be efforts by European companies to weaken American firms in Europe. He said of Apple and Google, "If they were called Apfel and Googlesmann, they might have an easier time in Germany." Gardner tied open digital trade to innovation and benefits for traditional exports, and to transparency, non-discrimination and the rule of law.⁶¹

In the U.S. Senate, partisan differences have emerged that see senators on both sides partnering with industry groups and nonprofit organizations to push for different compromises on the issue of data governance. Commerce Committee Chairman Sen. John Thune (R-SD) spoke at a conference for developers, designers, and tech industry leaders to make the case for the Republican Senate agenda, which includes granting Trade Promotion Authority to "preserve cross-border data flows." Specifically, he positioned himself against the FTC, which had issued a report recommending broad-based privacy legislation "that did not include any meaningful cost-benefit justifications."⁶²

The U.S. House of Representatives has followed this aspect of the TTIP negotiations with interest. In April 2014, it launched the Congressional TTIP Caucus to establish a communications channel between Congress and TTIP negotiators.⁶³ The Subcommittee on Commerce, Manufacturing, and Trade held a hearing in September 2014 on "Cross Border Data Flows: Could Foreign Protectionism Hurt U.S. Jobs?" Witnesses that testified included the Vice President of

⁵⁹ Inside U.S. Trade (2014c).

⁶⁰ Inside U.S. Trade (2013a).

⁶¹ U.S. Mission to the European Union (2015).

⁶² *The Hill*, 11 February 2015, "Overnight Tech: Congress takes on the FCC."

⁶³ "Bipartisan Members Launch TTIP Caucus" Congressman Erik Paulsen: Minnesota's 3rd District, 4 April 2014.

International Economic Affairs from the National Association of Manufacturers, the U.S. Chamber of Commerce's Center for Global Regulatory Cooperation's Vice President, and a Senior Director from eBay. Chairman Rep. Lee Terry (R-NE) underscored the need to protect U.S. trade competitiveness, and of resisting "protectionism—under the pretext of privacy—to threaten U.S. jobs and U.S. opportunities." The House has sent negotiators with the USTR and ITA to underline the importance of data flows, impinging on the TTIP, Trade in Services Agreement (TISA)⁶⁴, and Safe Harbor talks.⁶⁵

The Office of the U.S. Trade Representative officially expressed a commitment to "appropriate provisions" in enabling data flows to support trade in goods and services.⁶⁶ The USTR's 2015 National Trade Estimate Report on Foreign Trade Barriers classified cross-border data flow and foreign data processing regulations as "services barriers," grouping them with limits on the financial sector and barriers to service provision by foreign professionals.⁶⁷ With respect to the TTIP negotiations, the USTR stated that "the United States is seeking to correct misconceptions about U.S. law and practice and to engage with E.U. stakeholders on how personal data is protected in the United States."⁶⁸

As president, Barack Obama had publicly denounced strict European technology-related regulatory standards as "technology protectionism."⁶⁹ But he had also introduced a privacy protection law, the "Consumer Privacy Bill of Rights," in February 2015 in the United States that seemed to be a middle-of-the-road approach to consumer privacy protection. The Center for Digital Democracy said it was insufficient,⁷⁰ but conservatives in the Senate denounced it as a "European-style baseline privacy bill." Differences in opinion between different federal government bodies are likely to complicate the road to consensus on a U.S. negotiating position for data flows in TTIP.

U.S. interest group lobbying. Industry groups, trade associations, and individual firms have reached out to each other and to both sides of the partisan divide to advance their interests, pouring large sums of money into lobbying, sponsoring organizations and think tanks.

⁶⁴ This accord is being negotiated outside of the WTO by twenty-three mainly industrialized countries.

⁶⁵ The Committee on Energy and Commerce (2014).

⁶⁶ Office of the U.S Trade Representative (2017).

⁶⁷ Office of the U.S. Trade Representative (2015), 1.

⁶⁸ Ibid.

⁶⁹ *The Financial Times*, February 16, 2015. "Obama attacks Europe over technology protectionism," Ahmed, Murad, Duncan Robinson, and Richard Waters.

⁷⁰ Center for Digital Democracy (2015).

The high-tech industry has broadly supported reduced barriers to data flows in TTIP. Lobbying efforts have been led by trade associations such as TechAmerica.⁷¹ It called for cooperation on privacy, cross-border data flows, digital goods and services and cybersecurity in the negotiations, arguing for increased trade between the United States and the European Union.⁷²

Business federations such as the Amcham E.U. and U.S. Chamber of Commerce (USCC) have also thrown their support behind open data flows, albeit in different ways. AmCham E.U. calls for TTIP to include language facilitating international data flows, and to “oppose forced localization requirements.” It argues that free data flows are “essential” for digital trade and many other sectors.⁷³ Similarly, in April 2015, Susan Danger, Managing Director of AmChamEU gave an interview in which she stated:

To assure that TTIP is a modern twenty-first-century agreement, TTIP should also include language enabling crossborder data flows and opposing forced data localisation requirements. The liberalisation of data flows is essential for digital trade, but also underpins various other sectors that rely increasingly on such data flows to grow and develop.⁷⁴

At the April 2014 Transatlantic trade and investment summit, USCC President Thomas J. Donohue called for an end to confusing “government use of data” by national intelligence agencies and the like with the traditional “commercial use of data.”⁷⁵ He argued for the development of rules to enable cross-border data flows to “avoid forced localization requirements for data or related infrastructure, and emphasize flexibility over one-size-fits-all approaches to privacy.”⁷⁶

With substantial amounts of revenue at stake, large American tech players have scaled up their lobbying efforts over time and have used their economic weight to set agendas and act transnationally. Firms like Amazon, Apple, Facebook and startups like Uber, Pandora and Snapchat are spending millions

71 Formed from the merger of the American Electronics Association (AeA), Cyber Security Industry Alliance (CSIA), Government Electronics & Information Technology Association (GEIA), and Information Technology Association of America (ITAA) in 2009. Describes itself as the “high-tech industry’s leading trade association,” with 1,200 companies represented.

72 Politico (2013).

73 “AmCham EU’s response to draft INTA report on the TTIP negotiations,” AmCham E.U., 25 March 2015.

74 Interview with Susan Danger, “AmCham: Parliament’s TTIP recommendations can lead to a robust deal,” Euractiv, 13 April 2015. For similar arguments about the adverse effects of data localization requirements see the testimony of Sean Heather, Vice President, U.S. Chamber of Commerce to the U.S. House Energy and Commerce Subcommittee on 17 September 2014.

75 U.S. Chamber of Commerce (2014).

76 Ibid.

in lobbying.⁷⁷ According to the Center for Responsive Politics, Google spent over \$50.8 million in lobbying in the United States between 2012 and 2014.⁷⁸ In 2014 alone, Google spent \$16,830,000 appealing to groups such as the U.S. Senate, U.S. House of Representatives, U.S. Trade Representative, Department of Justice, Department of State, the Federal Communications Commission, Department of Commerce, and Executive Office of the President.⁷⁹ Google has made no secret of forging broad alliances; as a member of its policy team explains, “One of the things we’ve recognized is that no company can get anything done in Washington without partnerships on both sides of the aisle.”⁸⁰ Google’s strategy also included maintaining a wide network of memberships in membership organizations, trade associations, as well as civil society groups, and sponsoring many think tanks and political campaigns.⁸¹

E.U. internal politics and cross-border data flows

Responsibility for data protection, privacy, and its implications for cross-border data transfer is a shared competence in the European Union. Member States have their own laws on these matters and, since the adoption in 1995 of the European Data Privacy Initiative, these laws have to meet certain E.U.-wide standards. National constitutions may have implications for these matters, in particular when it comes to the state collecting, holding, or transferring data about citizens. In addition, as will become clear, the national regulatory agencies responsible for implementing data privacy laws are not trivial players either.

At the European level, a number of actors are involved in data protection matters in the context of the TTIP negotiations and elsewhere. In addition to representatives from DG Trade, officials in the DG responsible for Justice, Consumers, and Gender Equality, as well as European Commission Vice-President Ansip (who

⁷⁷ Williams (2015).

⁷⁸ OpenSecrets.org: Center for Responsive Politics (2017).

⁷⁹ Filings related to these lobbying activities are available at the Clerk of the House of Representatives Legislative Resource Center: <http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=CF5F1B0B-F8B5-4BF7-A1E5-5C13B166B19B&filingTypeID=51>; <http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=1A0E35CE-E814-4642-A48B-0445555AF330&filingTypeID=64>; <http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=82763EB2-6A98-4AE3-B7DD-39C4A16F7A5F&filingTypeID=69>; <http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=33D2A369-A146-41B4-BFE9-36B60C0F6512&filingTypeID=78>.

⁸⁰ *The Washington Post*, 12 April 2014, “Google, once disdainful of lobbying, now a master of Washington influence.”

⁸¹ Google (2017).

is responsible for the Digital Single Market) have all opined on these matters. Furthermore, the European Court of Justice has also ruled on cross-border data transfer matters since the start of the TTIP negotiation.

Given the salience of privacy and the commercial significance of data transfers in contemporary European commerce, there are, unsurprisingly, significant non-official actors involved in the debate as well. All in all, European politics in this area is both contested and crowded.

Bureaucratic politics. In his account of the enactment of the European Data Privacy Initiative, Newman (2008) shows that national data privacy regulators were able to force reluctant supranational actors to embrace an E.U.-wide initiative:

Using domestically delegated power to ban the transfer of cross-border data flows, they blocked data transmissions to member states with no or lax legislation. National data privacy agencies leveraged authority granted to them nationally to change the cost-benefit analysis of supranational policymakers. These regulatory actions threatened to undermine the free flow of information within the single market, pressuring the European Commission and several powerful member states to lift their opposition to the harmonization of supranational rules.

In 2015, these national regulatory actors were to act collectively and decisively again, as will become clear in the discussion below of the evolution of the negotiations after the Snowden revelations.

Evidently, the European Commission has multiple objectives with respect to cross-border data flows: protection of privacy, creation and completion of the Digital Single Market, and the removal of foreign barriers to data flows that impede the competitiveness of European business. If public statements are anything to go by, it would seem that the former two objectives have been given more weight than the latter in the context of the TTIP negotiations. Even so, the Director-General of DG Trade, Jean-Luc Demarty, noted on 8 November 2013:

We are not and will not negotiate data protection in this negotiation, which is a fundamental right...But it's quite clear that it's possible, while respecting the legislation on both sides of the Atlantic, to have data flows as an element of [a] TTIP agreement, but there is still a lot of work to be done and I'm confident that we can be successful.⁸²

Thus, DG Demarty adopted a formulation—not too dissimilar to the European position on financial regulation—that extant laws and associated values would not be negotiated in TTIP, but rather, that their respective implementations could be discussed.⁸³ In this manner, European trade negotiators have sought to

⁸² Inside U.S. Trade (2013b).

⁸³ The chief U.S. trade negotiator on TTIP, Daniel Mullaney, has made a similar distinction on 12 July 2013: “We are confident that we can put in place provisions that would encourage

preserve some room for maneuver while other bureaucratic actors have overhauled E.U. data protection legislation. On 8 April 2016 the European Council agreed a new “general approach,” which included numerous provisions on the transfer of data to third countries.⁸⁴ Under these new rules, the European Commission will assess if a third party’s data protection rules are adequate.⁸⁵

European Union interest group lobbying. According to Corporate Europe Observatory, a watchdog group for corporate lobbying in the European Union, as of mid-July 2015, of the 597 lobbying encounters with the E.U. Commission relating to TTIP, 88 percent of them involved private sector representatives.⁸⁶ A similar, earlier report in mid-2014 found that telecommunications and IT were the third most active industry in terms of lobbying, after agribusiness and food and cross-sector business groups.⁸⁷ Key groups in lobbying the European Union include DigitaEurope (including big IT firms like Apple, Blackberry, IBM, and Microsoft), BusinessEurope (European employers’ federation), and the European Services Forum (that includes large services companies like Deutsche Bank, Telefonica, and TheCityUK).

A countervailing factor is the vibrant European Union NGO community, which has mobilized broad-based support against what it perceives as negotiations that are dominated by elite politics and corporate lobbying. The European Citizens’ Initiative (ECI) comprises 380 European civil society organizations and trade unions⁸⁸ against TTIP, alleging that it “pose[s] a threat to democracy, the rule of law... as well as consumer and labor rights.”⁸⁹ The ECI, operating through online publicity campaigns and grassroots community mobilization, has secured more than 1.5 million signatories for an online petition against TTIP. Moreover, it has successfully convinced some local city councils to declare their city “TTIP-free.” The ECI brought a lawsuit against the European Commission at the ECJ in November 2014.⁹⁰ The perceived attack on privacy rights has formed one part of the general opposition of these groups to TTIP.

data flows and respect the privacy regimes that each side values so much.” See Inside U.S. Trade (2013c).

84 Those rules were adopted by the European Parliament on 14 April 2016, completing the legislative procedure.

85 See Council of the European Union (2016).

86 Corporate Europe Observatory (2015b).

87 Corporate Europe Observatory (2014).

88 “Alliance” STOP TTIP European Initiative Against TTIP and CETA, n.d.

89 “About Stop TTIP” STOP TTIP European Initiative Against TTIP and CETA, n.d.

90 “Lawsuit at the ECJ” STOP TTIP European Initiative Against TTIP and CETA, 20 November 2014.

Other groups have partnered with elite-level actors to lend legitimacy to their platforms. For example, Statewatch, a civil liberties monitor group in Europe, released a September 2014 memo authored by Ralf Bendrath, senior policy advisor to MEP Jan Philipp Albrecht. Bendrath argues “E.U. data protection rules are *fundamentally* rules for localization” (emphasis in original).⁹¹ He sharply criticizes TISA as “TTIP on steroids,” and underscores the need for protectionism so Europe can cultivate an independent IT industry, also citing concerns over surveillance by the NSA. As he put it bluntly: “In plain English: any trade agreement must not prohibit such a preferential treatment of European ICT companies [i.e., localization laws].”⁹²

Transnational linkages

Individual U.S. firms have lobbied transnationally on data transfer and related matters. According to the European Union’s Transparency Register, Google has eight lobbyists in Europe with direct access to the European Parliament, memberships in various industry associations and bodies (e.g., European Center for International Political Economy (ECIPE), European Policy Center (EPC), European Digital Media Association (EDiMA)), and spent between 1.25 and 1.5 million euros lobbying the European Union in the 2013 financial year.⁹³ Strategies included direct lobbying, “organization of direct lobbying with E.U. institutions,” networking and outreach to trade associations and other organizations, and sponsoring “different policy related events in Brussels.”⁹⁴

Transatlantic partnerships between industry groups have been formed as well. For example, in a position paper on regulatory cooperation, the Information Technology Industry Council (ITI) and DigitalEurope took a stand against local data storage requirements.⁹⁵ Likewise, the Information Technology Industry Council (ITI), a business association representing fifty-two technology companies from around the world, has criticized the spread of “forced localization” policies in testimony before the U.S. Congress⁹⁶ and in a trilateral dialogue in October 2014 with DigitalEurope and the Japan Electronics and Information Technology Industries Association.⁹⁷

⁹¹ Statewatch (2014), 4.

⁹² Ibid., 5.

⁹³ “Google,” europa.eu Transparency Register, 30 August 2016.

⁹⁴ Ibid.

⁹⁵ DIGITALEUROPE and Information Technology Industry Council (2015), 6.

⁹⁶ Information Technology Industry Council (2013).

⁹⁷ Digital Europe (2014); JEITA, ITI, and Digital Europe (2014).

Transnational linkages have also formed in the civil society sector. In February 2015, a group of over 170 civil society organizations released a statement opposing regulatory cooperation under TTIP, arguing that it gives too much power to business lobby groups to write legislation and undermines democracy. Signatory organizations, which include national-level groups like *Economistas sin Fronteras* (Spain), E.U.-level groups like the European Federation of Journalists (EFJ), and international groups like ActionAid, suggest that standardizing regulatory frameworks across the Atlantic will lead to “downward harmonization,” lowering standards on both sides of the Atlantic at both the federal/E.U. and state levels.⁹⁸ These organizations have formed a transnational linkage that works to counter the high-level narratives of security and trade efficiency by drawing connections between TTIP and democratic ideals, and making a populist appeal by evoking the image of a self-interested, callous “big business.”

Developments after the Snowden revelations

Having described the wide range of actors seeking to influence TTIP negotiations on cross-border data transfers, we turn to developments after the Snowden revelations of June 2013. One consequence was that the Safe Harbor accord was called into question on both sides of the Atlantic—on the European side for failing to protect citizens’ privacy when data was transferred and on the U.S. side by NGOs concerned that American firms are not abiding by the terms of the deal.⁹⁹ However, more significant, independent legal initiatives were underway. Maximillian Schrems, an Austrian national, complained to the Irish data protection authority that data from his Facebook account had been transferred to the United States and, given the Snowden revelation, he felt that U.S. law and practice did not afford the protections that would be accorded to him under E.U. law. The Irish agency denied his request so he took the matter to the Irish High Court, which referred the matter to the Court of Justice. On 6 October 2015 in a far-reaching judgment, the Court invalidated the Safe Harbor accord on several grounds and stated that the European Commission could not take steps that essentially precluded the rights of E.U. citizens to file such complaints with the data protection agencies of the member states.¹⁰⁰

The latter agencies, collectively meeting as what is known as the Article 29 Working Party, made clear on 16 October 2015 that the transatlantic data transfers

⁹⁸ Corporate Europe Observatory (2015a).

⁹⁹ For the latter see Inside U.S. Trade (2014d).

¹⁰⁰ This summary is taken from “The Court of Justice declares that the Commission’s U.S. Safe Harbour Decision is invalid,” Court of Justice of the European Union, Press Release No. 117/15, Luxembourg, 6 October 2015.

under the Safe Harbor Accord were unlawful, requested that the European Commission open discussions with U.S. counterparts to find a solution that met the Court's legal tests, and threatened that, if by the end of January 2016 no solution were found, they might undertake coordinated enforcement measures.¹⁰¹ The Court's judgment and this statement by the Member States' regulatory agencies were the second and third unexpected development that overshadowed the TTIP negotiations. Given the importance of transatlantic data flows to the economies of both TTIP parties and the looming end-January 2016 deadline, the need for a quick solution was evident. This timetable was one that the TTIP negotiations could never meet, so an alternative cooperative instrument was needed—one that any eventual TTIP accord would have to accommodate. Hufbauer and Jung (2016) argue that the conclusion of the Privacy Shield implies that matters of data privacy will not be revisited in any future TTIP negotiation.

In November 2013, the European Commission put forward thirteen improvements for the Safe Harbor Accord and, on 2 February 2016, American and EU officials declared that "in principle" they had come to agreement on a E.U.-U.S. Privacy Shield. On 13 April 2016, the Article 29 agencies issued a statement welcoming the negotiation of the Privacy Shield but expressed reservations about its clarity and content. The E.U. member agencies also stated that it would follow future Court of Justice cases with interest and implied in the conclusion of their statement that the European Commission had yet to convince them that the steps taken by the United States were "essentially equivalent" to the protections afforded by E.U. law.¹⁰² This statement suggests that legal risks remain for firms transferring data across the Atlantic. Since the courts and the digital protection agencies in the E.U. Member States are unlikely to factor in the give-and-take of trade talks into account when ruling on a matter seen in terms of privacy, potential for further disruption of TTIP negotiations on data transfer cannot be ruled out. It is one thing to argue that such talks are confined to discussions on how to implement existing data protection law (as E.U. and U.S. trade negotiators and some business interests have), it is another to have such negotiations when the implications of the law are unclear in the first place and when the associated policy matter (privacy) is so charged.¹⁰³ Such considerations must cast doubt over how far-reaching TTIP disciplines on cross-border data transfer could ever be.

101 Weiss and Archick (2016), 8.

102 European Commission (2016).

103 In an analysis of these developments by the Congressional Research Service it was noted that these negotiations have "been progressing on a track separate from the ongoing T-TIP negotiations." They also noted that "there may also be resistance in Europe to any TTIP outcome perceived to adversely affect E.U. data protection and consumer protection rules" (Weiss and Archick (2016)).

Many of the themes of the GMO and financial regulation case studies are present here: saliency of the non-trade regulatory objective (privacy), presence of independent regulatory agencies not afraid of acting independently or collectively in a manner that disrupts commercial activity and trade negotiations, and factors that could not have been anticipated at the launch of the TTIP negotiations (contingency). In addition, there is a mismatch between the needs of business for a fast solution to enable legally-protected cross-border transfer of data and the slow pace of mega-regional trade negotiations. Under these circumstances, it is no surprise that a mega-regional free trade agreement was not viewed by many influential actors as the right vehicle to formulate transatlantic solutions.

4 Concluding remarks

The choice of case studies in this paper (and in the introductory paper to this Special Issue) was deliberate. Given that the barriers to much contemporary cross-border commerce do not involve tariffs, the focus here was on three so-called behind-the-border regulatory policies. This observation is not that remarkable; after all, trade negotiators have sought to tackle non-tariff barriers in the GATT (and in leading regional forums such as the European Union) for decades. Moreover, measures concerning such policies have been included in many regional trade agreements signed over the past twenty years. However, where those measures have had teeth, they have almost exclusively been associated with accords where there are substantial asymmetries in negotiating clout between negotiating partners. The TTIP negotiations, in contrast, involve parties with established regulatory traditions, where firms have formulated their commercial plans and made investments given extant regulatory structures, and where enforcers frequently enjoy considerable autonomy, have legal mandates defined in national terms, and have little need to cooperate in ordinary times with national trade negotiators. Despite these considerations, E.U. and U.S. trade negotiators talk of TTIP as a vehicle to devise new global rules in many areas of economic regulation.¹⁰⁴

A precondition for TTIP being a catalyst to reform worldwide in a regulatory area is that the European Union and United States negotiate new rules in that area or new ways to enforce rules. As the case studies in this paper have shown, regulators on either side of the Atlantic have spurned entreaties to participate in TTIP and precious little has been done about it. The salience among the public and legislators of the policy goals that these regulators say they are pursuing appears to

¹⁰⁴ Akman, Evenett, and Low (2015).

have given them the ability to thwart substantive negotiations of new rules in their issue area. These regulators appear willing to bear any costs of refusing to negotiate rather than allow a negotiation to commence that risks resulting in unwanted changes, compared to some baseline scenario. Alternatively put, the cost of taking matters in their own hands and refusing to allow the matter to be negotiated in TTIP in the two regulatory areas examined here were too low to alter the calculus of the actor that has essentially stymied negotiations.

That those costs weren't high enough is remarkable given that the parties to this negotiation represent two of the world's largest trading powers. That regulators and official players other than trade negotiators have been able to veto talks in the face of market access-issue linkages and trans-national coalitions of firms is all the more remarkable. Such considerations beg the question—Just how much weight has the United States and the European Union really put on regulatory convergence? In sum, then, the incentives and objectives of bureaucratic players outside of trade ministries and the perceived opportunity cost of engaging in negotiations appear to be important determinants of the degree to which TTIP, or indeed any mega-regional trade deal, can “tame” important elements of the regulatory state.

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