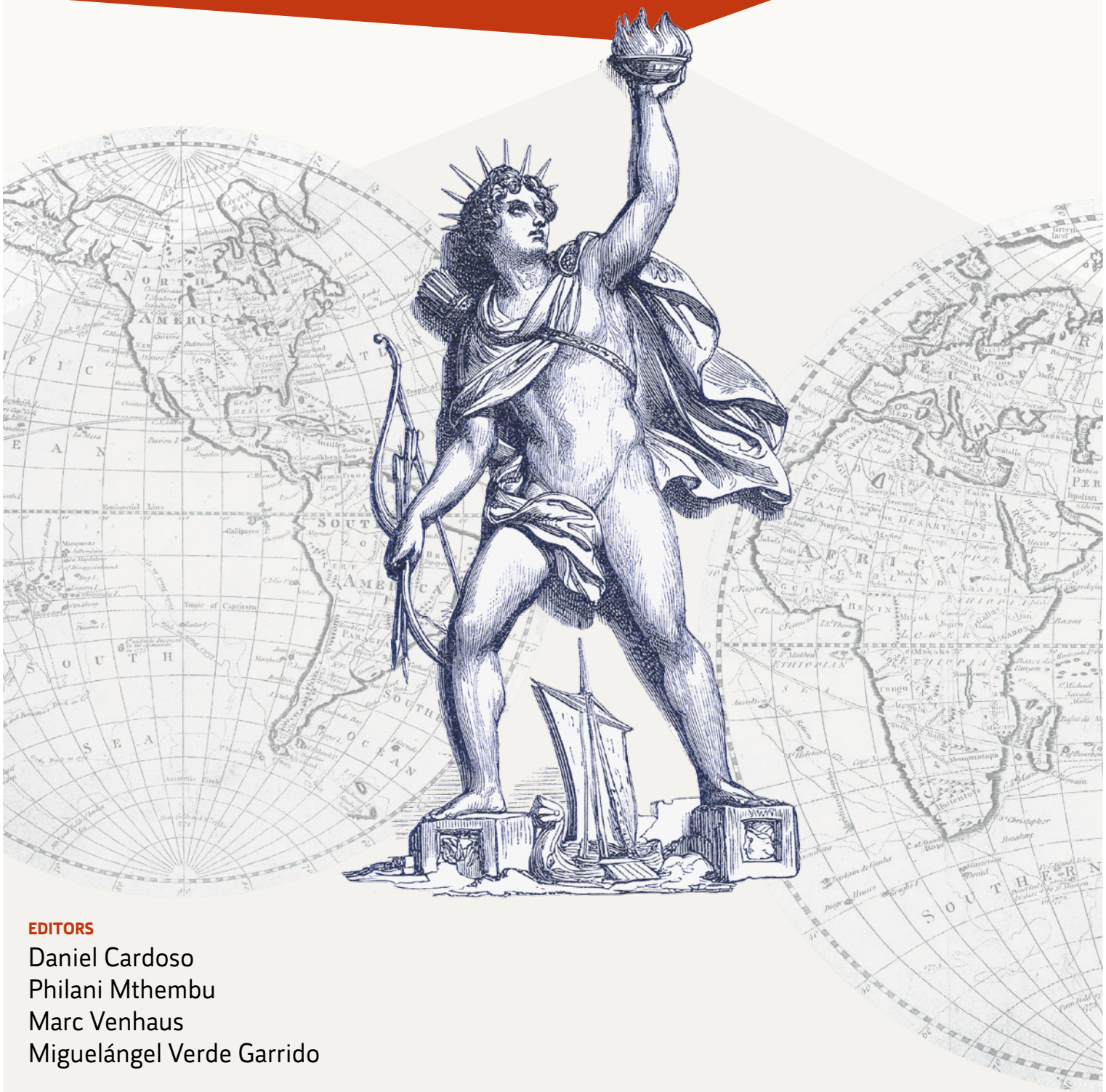
A collaboration between
Berlin Forum on Global Politics
Internet & Society Collaboratory
FutureChallenges.org

THE TRANSATLANTIC COLOSSUS

GLOBAL CONTRIBUTIONS TO BROADEN THE DEBATE ON THE EU-US FREE TRADE AGREEMENT



EDITORS
Daniel Cardoso
Philani Mthembu
Marc Venhaus
Miguelángel Verde Garrido

EDITORS

Daniel Cardoso
Philani Mthembu
Marc Venhaus
Miguelángel Verde Garrido

A COLLABORATION BETWEEN

BERLIN FORUM
ON GLOBAL POLITICS

Internet & Society
Co:llaboratory

BertelsmannStiftung
FutureChallenges

TABLE OF CONTENTS

3

THIRD COUNTRIES AND THE TAFTA | TTIP

4

SPECIFIC POLICIES AND TRADE ISSUES CONCERNING THE TAFTA | TTIP

FOREWORD

TO THE READER,

The European Union (EU) and the United States of America (US) – the largest economic markets in the world – have been officially negotiating the establishment of a common free trade area (FTA) since July 2013. The Transatlantic Free Trade Agreement or Transatlantic Trade and Investment Partnership (TAFTA | TTIP) aims to ease business activities across the Atlantic through the elimination of tariffs and the harmonization of regulatory standards. TAFTA | TTIP is a colossal undertaking that, if concluded, will establish the largest FTA in history.

TAFTA | TTIP is sold as a panacea: an all-encompassing solution for most of the economic problems that the US and the EU face nowadays. The official discourse of the negotiating partners is that the creation of the FTA will boost growth and employment on both sides of the Atlantic. By placing the focus on these vague economic promises, which are – so far – solely based on a study from the Centre for Economic Policy Research, European and US leaders narrow the debate considerably. As recently leaked documents show, the focus on jobs and growth is not the central goal of the agreement; it is merely a discursive strategy that aims to limit criticism and opposition in order to ensure the successful completion of the TAFTA | TTIP.

Against this background, this publication takes a different direction from the one chosen by EU and US decision makers to discuss the free trade agreement. Instead of narrowing the debate, we choose to broaden it. Given the magnitude of the agreement, an account of the far-reaching social, political, and economic consequences for EU and US citizens, as well as for those citizens of third countries, is imperative. To open the debate to a variety of stakeholders throughout the globe is therefore critical. The relevance of this direction is even more pressing for two additional reasons.

Firstly, the negotiations have been taking place mostly behind closed doors. A large section of civil society has not only been kept in the dark, but has also had to rely on limited sources of information. This situation leaves citizens bereft of adequate tools and concrete data to critically engage their elected officials on the potential effects of the TAFTA | TTIP. Problematically, this reinforces the privileges of those that tend to be closer to the

decision making process, such as corporations. However, civil societies within the EU and the US have rights to information and accountability, should be able to publicly discuss and advocate for and/or against specific policies, and should be granted the same levels of participation as corporations.

Secondly, as whistleblowers leak documents on the negotiations to the public, there are increasingly clear and unambiguous signs that other FTAs, which the transatlantic community is negotiating, are in conflict with the interests of a number of stakeholders. The Comprehensive Economic and Trade Agreement (CETA), negotiated between Canada and the EU, applies contents of the previously proposed and rejected Anti-Counterfeiting Trade Agreement (ACTA). Furthermore, the Trans-Pacific Partnership (TPP), which the US and thirteen other Pacific countries are negotiating, proposes even harsher and more restrictive intellectual property and copyright provisions than ACTA and CETA. These precedents, among others, call into question the nature of the transatlantic partners' negotiating mandate and goals.

To ensure that our publication represents the voices of a plurality of stakeholders as well as different geographical areas, academic disciplines, expert knowledge, and addresses a wide range of topics, we decided to open an international call for papers. The response was overwhelming – a clear indication of the interest of civil society in contributing to the discussion and gaining a say in the ongoing negotiation process.

The 22 articles compiled in our publication examine a wide variety of topics that are related to the TAFTA | TTIP: these span from the quality of food to the fair use of cultural and intellectual materials, from the protection of digital consumers and their privacy to the costs of medication, and from the effects on European integration to the impact on the rest of the world. Our goal is to nurture a dialogue between divergent perspectives in order to show that there are different ways to consider the free trade agreement and its consequences. We are certain that this will allow the reader to obtain a broader view of what the agreement may truly entail.

The articles are organized into four thematic sections. The first section sets the stage and deals with general considerations about the agreement. The second one addresses the impact of the TAFTA | TTIP on civil society and consumers. The third section questions the agreement and its relation to third countries, whereas the fourth and final one focuses on specific policies and trade issues included within the TAFTA | TTIP. The reader should note, that unless stated otherwise, the articles represent the opinions, research, and analyses of the authors, and not necessarily the view of the institutions they are affiliated to or those of the cooperating publishers.

The compilation of articles is published under a Creative Commons license to ensure that it is available to as wide a readership as possible. Creative Commons allow for publications to be freely accessible, both in print and digital versions. The emphasis on open science and knowledge is a viewpoint we share among our cooperating institutions: the Berlin Forum on Global Politics, the Internet & Society Collaboratory, and the global blog project FutureChallenges.org of the Bertelsmann Stiftung. We consider that offering the results of our work to the general public is crucial. This provides civil societies with information, invigorates the debate with policy makers, and allows our institutions to live up to shared standards of transparency and accountability.

We would like to thank the contributing authors for their remarkable efforts to further the understanding of critical aspects of the agreement and, thereby, broadening the debate on the TAFTA | TTIP.

A closing reminder: as the Colossus that once stood at the port of Rhodes, the TAFTA | TTIP embodies the image of grandiosity ("the largest trade area"), wealth (economic growth) and prosperity (employment). However, without a proper discussion, decision makers in the EU and the US may be deafened by what ancient Greece called hubris: excessive pride that leads to terrible ruin. Accordingly, this publication broadens the debate in order to caution against simplistic optimism and to provide a lighthouse that guides our societies to the ports of what could be a promising future.

Berlin Forum on Global Politics
Internet & Society Collaboratory
FutureChallenges.org

Berlin, December 2013

LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
AGOA	Africa Growth and Opportunity Act
APIS	Advance Passenger Information System
BIT	Bilateral Investment Treaty
BITKOM	The Federal Association for Information Technology, Telecommunications and New Media
BRICS	Brazil, Russia, India, China, South Africa
CAP	Common Agricultural Policy
CE	Consumer Electronics
CEO	Corporate Europe Observatory
CEPR	Centre for Economic Policy Research
CIS	Commonwealth of Independent States
DCFTA	Deep and Comprehensive Free Trade Agreements
DDA	Doha Development Agenda
DG TRADE	Directorate-General for Trade
EAP	Eastern Partnership
EC	European Commission
EEC	European Economic Community
EP	European Parliament
EP	European Parliament
EPA	Economic Partnership Agreement
ERP	European Recovery Program
ESTA	Electronic System for Travel Authorization
EU	European Union
FDI	Foreign Direct Investment
FISA	Foreign Intelligence Service Act
FISAA 2008	Foreign Intelligence Service Act Amendments Act of 2008
FISC	Foreign Intelligence Surveillance Court
FISCR	Foreign Intelligence Surveillance Review Court
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCHQ	Government Communications Headquarters
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
GI	Geographical Indications
GMO	Genetically Modified Organisms
GSM	Global System for Mobile Communications
HIPAA	The Health Insurance Portability and Accountability Act
HLWG	High Level Working Group on Jobs and Growth
ICSID	International Centre for the Settlement of InvestmentDisputes
ICT	Information and Communications Technology
IIA	International Investment Agreements
IMF	International Monetary Fund

IPCC	Intergovernmental Panel on Climate Change
IPR	Intellectual Property Rights
ISDS	Investor State Dispute Settlement
ITA	Information Technology Agreement
ITAC	Industry Trade Advisory Committee
MEP	Member of European Parliament
MSF	Médecins Sans Frontières
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NLF	New Legislative Framework
NSA	National Security Agency
NSTIC	National Strategy for Trusted Identities in Cyberspace
NTB	Non-Tariff Barrier
NTM	Non-Tariff Measures
NYT	The New York Times
OCR	Office of Civil Rights
OECD	Organisation for Economic Cooperation and Development
PIA	Privacy Impact Assessment
PNR	Passenger Name Records
RCC	Regulatory Cooperation Council
REFIT	Regulatory Fitness and Performance Programme
SME	Small and Medium Size Enterprises
SOE	State Owned Enterprises
SPS	Sanitary and Phytosanitary Standards
SSA	Sub-Saharan Africa
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TACD	Trans-Atlantic Consumer Dialogue
TAFTA	Transatlantic Free Trade Agreement (see TTIP)
TBT	Technical Barriers to Trade
TCE	Transatlantic Economic Council
TDCA	Trade, Development, and Cooperation Agreement
TEC	Transatlantic Economic Council
TFTP	Terrorist Finance Tracking Program
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership (see TAFTA)
UNCTAD	United Nations Conference on Trade and Development
US	United States (of America)
USTR	Office of the United States Trade Representative
WAPO	The Washington Post (also WP)
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

TAFTA | TTIP: NEW DAWN FOR ATLANTICISTS, SUNSET FOR OLD EUROPE?

Matthieu Choblet | *RWTH Aachen University* | *matthieu.choblet@rwth-aachen.de*
Werner Hager | *RWTH Aachen University* | *werner.hager@rwth-aachen.de*

Photo credit: duncan/Flickr

KEYWORDS: EUROPEAN INTEGRATION; ATLANTICISM; TRADE DIVERSION

Abstract: *TAFTA | TTIP negotiations are taking place in the context of what could be a new era of free trade. Both the EU and the US have bolstered their efforts to conclude bilateral free trade agreements all over the world in the last years. Simultaneously however, the EU and the US have sometimes experienced discord, with US-politicians increasingly turning their attention towards the Asia Pacific region and Europeans being seemingly preoccupied with themselves. Atlanticists have perceived this as a weakening of the transatlantic relationship, a critique which has sometimes been made with regards to European integration more generally. To be sure: a politically stable and economically dynamic Europe has always been in the interest of US international politics. Nonetheless European integration has sometimes been described as contrary but not complementary to the ideals of Atlanticists. The euro was notably set up as an alternative leading currency. With TAFTA | TTIP, trade would be diverted from the intra-European area towards more EU-US trade, thus weakening the relative importance of trade within the common market. We argue that TAFTA | TTIP is a project which would lead to a relative decline of traditional European integration to the benefit of transatlantic integration.*

INTRODUCTION: A NEW ERA OF FREE TRADE

TAFTA | TTIP negotiations are taking place in the context of what could be a new era of free trade. With the multilateral Doha Development Round being manifestly stuck, both the EU and the US have recently bolstered their efforts to conclude bilateral free trade agreements all over the world (Dadush 2013). These attempts are currently culminating in the project of a Transatlantic Trade and Investment Partnership (TTIP).

This project can be traced back to a series of agreements in the 1990s that lost some impetus in the meantime (Siebert 2013). The idea was reinvigorated when Germany took over the EU-presidency in 2007. German Chancellor Angela Merkel seized the opportunity to revive the transatlantic project by setting up the Transatlantic Economic Council (TEC) (Techau 2013). Its members are both government agencies, such as the US Chamber of Commerce, and private pressure groups, such as Businesseurope and the Bertelsmann Foundation. The TEC has been doing the preliminary work for the joint High Level Working Group (HLWG), which ultimately laid the foundations for the current negotiations (European Commission 2013b, 5; US Department of State, 2013).

In this essay we argue that the TAFTA | TTIP may turn out to be against the interest of European integration. This is not because Atlanticism and European integration are necessarily contradictory, but because the predicted outcomes of this particular project will lessen the importance of intra-European trade. However intra-European trade has increasingly become the 'raison-d'être' of European integration, which is consequently under threat.

DISCORD: IS EUROPEAN INTEGRATION HARMFUL TO EU-US RELATIONS?

Since the end of the Cold War, the relationship between the EU and the US is in a "period of fundamental reorientation" (Varwick 2008, 520). The US is still the world's strongest individual economic, political and military actor, but economically this position is challenged by the EU. Also, politically, the EU could, if it was acting as one, stand up to the US.

European Atlanticists have perceived the US' move for a Trans-Pacific Partnership (TPP) as a weakening of the transatlantic relationship (Frankenberger 2012; Parello-Plesner 2013). The same criticism has sometimes been made with regards to European integration, which was sometimes described as contrary, but not complementary, to the ideals of Atlanticists. To be sure: a politically stable and economically dynamic Europe has always been in the interest of US international politics. This is why the US supported European integration right from its beginning. While some have seen the Marshall Plan as a means of "dollar imperialism" (Mittag, 2012: 65), creating markets for the surplus production of US industries, the fact that the beneficiaries were required by the US to cooperate in terms of economic policies in order to qualify for Marshall funds, also strengthened political ties between Western European states (Mittag 2010, 64ff).

However, the following steps of European integration, such as the European Economic Community (EEC), were not necessarily in favor of transatlantic trade, as they put more incentives to intra-European trade than to third country trade. It was nonetheless accepted by the US because they rightly assumed that a political order in (Western) Europe, which was oriented on political cooperation and cross-border trade, was strategically in their interest. It should also be noted that since the Maastricht Treaty of 1992 it has always been an explicit aim of European integration not just to tear down economic frontiers within the EU, but also between the EU and third countries (Abelshauser 2011, 273).

Finally, the euro was set up as an alternative leading currency and somewhat of a counter project to the US dollar (IMF 2006, 3ff.). Yet the US dollar continues to dominate foreign exchange markets and remains largely unchallenged as a "currency for borrowers [who require] foreign currency financing" (Goldberg 2010, 5).

In the last two decades the EU has tried to establish itself as an independent and autonomous global actor. It initiated its own free trade agreements, independently of WTO negotiations. Agreements with South Africa, Mexico and South Korea were already concluded, agreements with several Latin American states, Japan, India, and – of course – the US are to come (European Commission, 2013a). The US is doing the same with Asian states among others (Siebert 2013, 14).


Photo credit: European Parliament (Flickr)

The negotiations between the US and Asian states led some observers to believe that the US under Barack Obama had 'pivoted' away from Europe and towards Asia (Marschall 2013; Kupchan 2013). Indeed, the Obama administration is anxious to "deepen its engagement in Asia" (Kupchan 2013), but it would be wrong to think that the US does not have any other interests. The 'Pivot to Asia' in 2011 has possibly been misinterpreted by oversensitive Atlanticists and pessimistic Europeans who were stuck in a deep Euro recession (Marschall 2013). By now, the Obama administration has reassured Europeans that they are a 'first choice' partner (Joe Biden, in: ibid.; Kupchan 2013).

WHAT'S AT STAKE FOR ATLANTICISTS?

The European Commission's Promises

With regards to the aims of TAFTA | TTIP the European Commission is fully supporting Atlanticists and the transatlantic project. It claims that the Partnership would be a budget-neutral measure, favoring economic growth and social gains (European Commission 2013b, 15), provided that the negotiating parties reach a "comprehensive agreement" which extends to sensitive areas and includes "liberalizing trade in services and public procurement" (CEPR, 2013, vii). A central argument of the Commission is that TAFTA | TTIP would "raise the welfare of both parties through lower consumer prices and higher national income" (European Commission 2013b, 50). Similar suggestions were made in a study of the Bertelsmann Foundation, which is a member of the Transatlantic Economic Council (Bertelsmann 2013, 21).

Atlanticists Enthusiasm

In June 2013 many journalists were proud to announce TAFTA | TTIP as a "turning point" (Marschall 2013). Supposedly, the mere perspective of TAFTA | TTIP would bring back to life the transatlantic relationship and bring trust and confidence to Europeans. Indeed, with the Asian economic boom being a number one topic in the media, some in the West may have forgotten that the most important trade bloc in the world still is the North Atlantic-bloc. TAFTA | TTIP would also slow down the relative decline of western political power in the world (Kupchan 2013; Marschall 2013). The following paragraphs will explain why that would be the case.

For some observers TAFTA | TTIP is even more than just trade; it is also about geopolitics. Therefore, it should induce political spillover, thus "[re-invigorating] the Western political partnership and civilization" (Techau 2013) – or at least what Atlanticists like to see as Western civilization. This notion of 'civilization' applies in particular to the primacy of deregulated trade, private investments and property rights over social rights and state intervention. If, from an Atlanticist's perspective, European integration has sometimes taken a turn to statism, then a closer trans-Atlantic trade regime would serve "as a lever for the completion of the EU's single market" (ibid.) in the spirit of radically deregulated capitalism (Rodrik 2012, 76, 184ff.).

Furthermore, "by using the combined leverage of their consumer markets", the US and the EU could "ensure that producers worldwide continue to gravitate toward their joint standards", making TAFTA | TTIP a 'global regulatory blueprint' or 'gold standard' for future trade deals all over the world (Bollyky 2013; Dadush 2013; Techau 2013). Hence transatlantic trade would also "trigger a new wave of [...] bilateral trade agreements by countries trying to avoid exclusion" (Dadush 2013). The Bertelsmann study has also suggested that the risk of losing on trade with the TAFTA | TTIP region would motivate third countries to adopt TAFTA | TTIP-standards in order to stay in the competition (Bertelsmann 2013, 29, 40; Siebert 2013, 18).

A point that has been made very often by authors sympathizing with the partnership is that this could possibly be the last chance. If TAFTA | TTIP were to be concluded in the years to come, the US and the EU might still have enough influence to set "global standards" (Bollyky 2013), either before other regions in the world attain too much global importance (Kupchan 2013; Marschall 2013) or before Atlanticists lose their political influence (Varwick 2008, 523; Frankenberger 2012). The argument that TAFTA | TTIP could become a 'blue print' applies even more from a US-perspective, since it is actually "pursuing two giant regional deals" (Dadush 2013) at the same time: a partnership with the EU and one with the Pacific region (TPP). All together TPP and TAFTA | TTIP "would comprise 60% of world trade" (Dadush 2013). This has some resemblance with the former General Agreement on Tariffs and Trade (GATT) Rounds, which used to be led by the US. Consequently, TAFTA | TTIP might "help [the US] to reassert its leadership in economic relations" (Dadush 2013).

TAFTA AS A THREAT TO EUROPEAN INTEGRATION

Does TAFTA | TTIP threaten European Standards?

In order to profit from liberalization, economies need to be competitive by neoliberal standards. Therefore currently 'hypercompetitive Germany' may be 'enthusiastic' about the deal, but this does not necessarily apply to other European countries, since some of them may have to make far reaching concessions (Dadush 2013). But is it acceptable to give up sanitary or working condition-standards just to achieve an idealistic goal (Stiglitz 2013)? Trade representatives who represent corporate interests on both sides of the Atlantic "will almost surely push for the lowest common standard, leveling downward rather than upward", warns Joseph Stiglitz (2013). What one should bear in mind is that regulatory provisions are often far from being a "problem driver", as the Commission is insinuating (European Commission 2013, 17). On the contrary: take the example of the automotive industry, which is not simply regulated by Europeans in order to "discriminate" US manufacturers, but in order to promote energy efficiency (Stiglitz 2013). The financial sector is another example, where TAFTA | TTIP will hinder any attempt to implement the regulation necessary to avoid a new crisis, as the planned agreement is pushing for deregulation in financial services (European Commission 2013c, 2).

Trade Diversion

Notwithstanding, the most crucial point is that the trade diversion created by TAFTA | TTIP will weaken the relative importance of intra-European trade. The Bertelsmann Stiftung (2013) has published numbers which, though they are to be used with some reserve, show disconcerting results. On the plus side, trade between the US and Germany – for example – could increase by 90% in a "comprehensive liberalization" scenario (ibid., 14). Trade with the UK could increase by about 60% (ibid., 18). However, this is not pure trade creation, in the sense of additional trade being 'created'. Instead the study suggests that new trade relations would only come into place at the expense of currently existing trade. For example goods from the US would replace EU-imports on the German market (ibid., 15). Economists call this phenomenon 'trade diversion'. While trade between individual European countries and the US would increase, trade within the EU would sharply decline just as trade between the EU and many third countries (e.g., BRICS and Maghreb) would (ibid., 16f).

As a result, European integration, which heavily relies on trade relations, would become noticeably weaker. It would particularly lose much of its value for the UK. Even for Germany ties would become weaker, as German trade would decrease by 23% with its traditional partner France and by 30% on average with southern Euro-countries. Under these circumstances countries such as Germany could be led to align their economic policy more with the US than with the euro zone. This in turn would constitute a further backlash for European integration. On the other side of the Atlantic, trade between the US and its partners in the North American Free Trade Agreement (NAFTA) would decline as well (ibid., 14ff).

CONCLUSION

If the objectives of TAFTA | TTIP, as they have been announced, were fully implemented, the result would be nothing less than a transatlantic "mini-single market project" (Siebert 2013, 2). Some economists doubt that TAFTA | TTIP can actually have a significant positive impact (ibid., 10).

With TAFTA | TTIP, trade would be diverted from the intra-European area towards more EU-US trade, which is subjected to lower regulation. European integration would become less attractive, this accounting in particular for the member states that are currently economically strong. These states would have fewer interests in preserving the integrity of the EU. In a worst case scenario, Germany would end up aligning its economic policy more with the US than with the euro zone. Ultimately, without strong economic integration, a main reason for the continued existence of the EU vanishes.

REFERENCES

Abelshauser, Werner (2011): *Deutsche Wirtschaftsgeschichte. Second, revised edition, Bonn: Bundeszentrale für politische Bildung.*

Bertelsmann Stiftung (2013): *Who Benefits from a Free Trade Deal? Available online: http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-7AB2168A-989F783B/bst_engl/xcms_bst_dms_38061_38062_2.pdf*

Bolliky, Thomas Anu Bradford (2013): *Getting to Yes on Transatlantic Trade, Foreign Affairs, 10 July 2013. Available online: http://www.cfr.org/trade/getting-yes-transatlantic-trade/p31077*

CEPR - Centre for Economic Policy Research (2013): *Reducing Transatlantic Barriers to Trade and Investment, Final Project Report, March 2013. Available online: http://trade.ec.europa.eu/doclib/html/150737.htm*

Dadush, Uri (2013): *Cold Water for Hot Trade Deals, National Interest, Op-Ed 13 May 2013. Available online: http://carnegieendowment.org/2013/05/13/cold-water-for-hot-trade-deals/g39c*

European Commission (2013a): *Free Trade Agreements. Available online: http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm*

European Commission (2013b): *Impact Assessment Report on the Future of EU-US trade Relations. Available online: http://trade.ec.europa.eu/doclib/html/150759.htm*

European Commission (2013c): *Trade Cross-cutting Disciplines and Institutional Provisions, Initial EU Position Paper. Available online: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf*

Frankenberger, Klaus-Dieter (2012): *Gemeinschaft über dem Atlantik, Frankfurter Allgemeine Zeitung, 17.11.2012.*

Goldberg, Linda (2010): *Is the International Role of the Dollar Changing?, in: Current Issues, Federal Reserve Bank of New York. vol. 16(1), January 2010. Available online: http://www.newyorkfed.org/research/current_issues/ci16-1.pdf*

IMF - International Monetary Fond (2006): *The Euro's Challenge to the Dollar, IMF-Working Paper, June 2006, WP/06/153. Available online: http://www.imf.org/external/pubs/ft/wp/2006/wp06153.pdf*

Kupchan, Charles / Dassù, Marta (2013): *Pivot to a Trans-Atlantic Market, 13 June 2013, New York Times. Available online: http://www.cfr.org/trade/pivot-trans-atlantic-market/p30929*

Mittag, Jürgen (2010): *Kleine Geschichte der Europäischen Union, Münster: Aschendorff Verlag.*

Office of the United States Trade Representative (2013): *Trans-Pacific Partnership (TPP). Available online: http://www.ustr.gov/tpp*

Parello-Plesner, Jonas (2013): *What is Europe's Role in Asia-Pacific?, European Council on Foreign Relations. Available online: http://ecfr.eu/content/entry/commentary_what_is_europes_role_in_asia_pacific*

van der Pijl, Kees (1996): *Vordenker der Weltpolitik – Einführung in die internationale Politik aus ideengeschichtlicher Perspektive, Opladen: Lese und Budrich.*

Rodrik, Dani (2012): *The Globalization Paradox: Democracy and the Future of the World Economy, New York and London: W. W. Norten & Company.*

Siebert, Horst (2013): *TAFTA - a Dead Horse or an Attractive Open Club?, Kiel Working Papers, no. 1240, Leibniz Information Centre for Economics.*

Stiglitz, Joseph (2013): *The Free-Trade Charade, Project Syndicate. Available online: http://www.project-syndicate.org/commentary/transatlantic-and-trans-pacific-free-trade-trouble-by-joseph-e--stiglitz#D1pdcJYgS3tx1i3Z.01*

Techau, Jan (2013): *The Geopolitics of TAFTA, Carnegie Europe. Available online: http://carnegieeurope.eu/strategiceurope/?fa=50773*

US Department of State (2013): *Stakeholders and Advisors of the Transatlantic Economic Council. Avialable online: http://www.state.gov/p/eur/rt/eu/tec/c33632.htm*

Varwick, Johannes (2008): *Transatlantische Beziehungen, in: Woyke, Wichard (ed.): Handwörterbuch Internationale Politik, Bonn: Bundeszentrale für politische Bildung, pp. 520-528.*

Photo credit: Scania Group(Flickr)

KEYWORDS: REGULATORY CONVERGENCE; MUTUAL RECOGNITION; DEREGULATION; OVERSELLING

WHY THE TAFTA / TTIP WILL NOT LIVE UP TO ITS PROMISES

Ferdi De Ville | *Centre for EU Studies* | *Department of Political Sciences* | *Ghent University*
ferdi.deville@ugent.be | *@FerdiDeVille*

Abstract: *Negotiations on a Transatlantic Free Trade Area, also known as the Transatlantic Trade and Investment Partnership (TAFTA / TTIP) have been officially launched in July 2013. This TAFTA / TTIP is sold by the European Commission with two main arguments and two additional points to reassure potential opponents. In the first category there are the tremendous positive consequences for jobs and growth that are expected from the agreement and that it will set global rules for the 21st century. Furthermore, the agreement will not lower safety, environmental and health standards and will not harm but bring significant benefits for the rest of the world. A critical deconstruction of this rationale shows that these benefits could only be achieved if the agreement succeeded in harmonising a large share of divergent EU-US standards. This, however, is not to be expected based on historical experience and statements by the Commission itself. This article shows that the alternative regulatory convergence strategy that will be pursued: mutual recognition, might contribute to more trade, but will not result in global standards. Instead, it will lead to deregulation and will have no positive effects on the rest of the world.*

INTRODUCTION

The Transatlantic Free Trade Area or Transatlantic Trade and Investment Partnership (TAFTA / TTIP) that was announced in February 2013 has been proclaimed with great fanfare, especially on the European side of the Atlantic. To quote from one of the speeches from Trade Commissioner De Gucht (2013a) on the Agreement:

> A future deal between the world's two most important economic powers will be a game-changer. Together, we will form the largest free trade zone in the world. This deal will set the standard – not only for our future bilateral trade and investment but also for the development of global rules. It will create a tremendous impact on jobs and growth on both sides of the Atlantic. It is estimated that when this agreement is up and running, the EU's GDP will get a half a per cent boost – which translates into tens of billions of euros every year. […] It is probably the *cheapest stimulus package that can be imagined* (emphasis added).

The 'tremendous impact' that is mentioned here has been translated to the 'average European household' that would gain 'an extra €545' – as we can all read on the special page dedicated to the TAFTA / TTIP on the Directorate General for Trade of the European Commission's (2013) website.

In the following weeks, reservations and even resistance vis-à-vis the negotiations were growing among some member states, members of the European Parliament and civil society. The European Commission tried to assuage these fears, while retaining its absolute autonomy to negotiate on all issues, as follows (De Gucht 2013b, 2):

> Our objectives for the negotiating directives are to have a broad text that gives us the necessary negotiating flexibility. […] But let me be clear: this does not mean that there will be no red-lines during the negotiations. No fundamental EU policy is up for being traded away! […] If we add to this the fact that safety, health and environmental standards will under no circumstances be lowered, we should have what it takes to convince those who may still have doubts.

In yet another speech, on the topic of the global impacts of the TAFTA / TTIP, the Commissioner also emphasized that this agreement will not compromise the European Union's priority to the multilateral world trading system governed within the WTO and the eventual conclusion of the Doha Development Round (De Gucht 2013c). He also stated that it will not lead the EU and the US to benefit bilaterally to the detriment of the rest of the world, but that it will boost income in every region as well.

In this article, I will critically review those arguments that are used by – especially – the European Commission to sell this agreement. It will be shown that a more realistic view of the TAFTA | TTIP negotiations unravels the ultra-optimistic story that is told by the European Commission. Expectations should be that, besides a few uncontroversial sectors, the EU and US will not succeed in agreeing to common standards and rules, while mutual recognition[1] will be the chosen approach towards regulatory convergence, the core goal of this agreement. While this might assure the projected bilateral trade gains, it jeopardizes the other proclaimed benefits of the agreement: global standards, regulatory race-to-the-top, and gains for the rest of the world. These more realistic expectations are tentatively acknowledged in the important much-quoted Impact Assessment Report on the TAFTA | TTIP, but not the inevitable conclusions that flow from them (Commission Staff 2013).

WHY MUTUAL RECOGNITION WILL NOT PROVIDE THE PANACEA

It is not the first time that the US and the EU seek to overcome regulatory differences. Regulatory cooperation dates back to the 1990s with the 1990 Transatlantic Declaration and the 1995 New Transatlantic Agenda.[2] The most ambitious attempt was the 1999 Mutual Recognition Agreement. However, regulatory cooperation until now has been very cumbersome and largely unsuccessful. Based on recent history, it is wise to be realistic in our expectations on regulatory convergence in the TAFTA | TTIP. I explain the consequences of this realistic perspective below.

The intention to pursue a transatlantic trade agreement has been officially conveyed at a Summit in November 2011 between Presidents Obama and Van Rompuy. They set up a High Level Working Group on Jobs and Growth (HLWG), led by the European Commission's DG Trade and the United States Trade Representative (USTR), tasked with identifying the right policy to increase trade and investment contributing to job creation, economic growth and competitiveness. Its final report concluded that "a comprehensive agreement, which addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules, would provide the most significant mutual benefit of the various options considered" (ibid., 5).

The preferred comprehensive scenario is divided into a conservative and ambitious variant (ibid.). The conservative variant assumes 98% tariff elimination, 10% reduction of barriers to trade in services, 25% reduction of barriers to cross-border government procurement and a reduction of 10% of non-tariff measures (NTM) for goods. The ambitious option estimates a 100% duty elimination, 25% reduction of NTM barriers to goods, 25% reduction of services barriers and 50% of liberalisation of government procurement. The economic impact of the different scenarios has subsequently been estimated. It includes 'spillover effects', relating to the fact that some of the NTMs resulting from differences in regulations and procedures cannot be altered on a purely bilateral basis. Most importantly, when regulatory convergence is realized by alignment of domestic standards with international standards, this also benefits third countries' exporters as they only have to comply with one standard to access several markets. This spillover effect has been estimated to amount to 20%.[3]

In the conservative comprehensive scenario projected extra Gross Domestic Product (GDP) growth is 0.27% for the EU. This increases to 0.48% in the ambitious scenario, and it is this figure (rounded up to a half per cent) that is always mentioned in EU speeches and communication on the TAFTA | TTIP (ibid.).

Besides the macro-economic analysis, the assessment also estimates the sectoral impacts of a projected agreement. It is interesting to give the most important conclusions (ibid.): As a comprehensive agreement has been launched, I will limit myself to reviewing only the comprehensive options. In case of the conservative variant, the sectors in the EU that will see the largest increase in output are the processed food (0.3%), motor vehicles (0.24%), other machinery (0.4%), other manufactures (0.69%), water transport (0.55%), air transport (0.3%), finance (0.23%), insurance (0.44%) and construction (0.31%) sectors. Decreases in output would be suffered by electrical machinery (3.74%), other transport equipment (0.17%) and the metal and metal product sector (0.71%). In an ambitious free trade agreement (FTA), increases in total production in the EU are expected in processed food (0.57%), chemicals (0.37%), motor vehicles (1.54%), other machinery (0.37%) other manufactures (0.79%), water transport (0.99%), air transport (0.44%), finance (0.42%), insurance (0.83%), business services (0.25%), construction (0.53%), personal services (0.26%) and in other services sectors (0.28%). Decline, on the other hand, is expected for electrical machinery (7.28 %), other transport equipment (0.08%) and metal and metal product (1.5%) sectors.

The impact assessment then looks into detail into some of these sectors, especially the electrical machinery sector where the greatest losses are projected. It concludes that 'the model reveals that regulatory alignment is harmful to EU industry because third countries would also benefit from the bilateral liberalisation in light of their comparative advantages' (ibid., 41). The report then tries to take away the fears of the sector. In light of the arguments of this article, it is enlightening to quote the passage in full:

> For modelling purposes, a horizontal spillover has been assumed across all sectors. However, in the reality of negotiations, the spillover of reduction of NTMs itself is up for negotiations, depending on the agreed implementation (i.e. bilateral vs. erga

1 Mutual recognition can be defined as 'creating conditions under which participating parties commit to the principle that if a product or a service can be sold lawfully in one jurisdiction, it can be sold lawfully in any other participating jurisdiction' (Nicolaïdis, K. & Shaffer, G. 2005, 264). This is a different strategy of regulatory convergence than harmonisation, where diversity is tackled by agreeing to a common rule.

2 The 1990 Transatlantic Declaration formalized EU-US relations. Five year later, a framework for the relationship was outlined in the New Transatlantic Agenda, constituted by four pillars of which one was devoted to contributing to the liberalization and expansion of world trade.

3 A spillover of 20% means that a fifth of the cost reduction also yields gains for third countries, while the remaining 80% delivers a purely bilateral benefit.

> omnes elimination of NTMs). In the view of the different concepts of international standards between the EU and the US, it is not expected that the approach followed would necessarily involve in any case the acceptance of international standards or other measures, which are more likely to have some type of MFN effect and therefore entail spillover effects to third countries. Instead, the expected approach to be followed in the negotiations with the US would focus on regulatory coherence and a degree of mutual recognition between the EU and the US standards, particularly in the field of safety regulation relevant for electrical and electronic equipment (ibid., 41).

Here, the Commission staff is downplaying the fear of losses in the electrical and electronic equipment sector by acknowledging that the approach that will be followed particularly in (but hence not limited to) this sector will be mutual recognition and not the (more ambitious) harmonisation approach. Indeed, this is also what the European Commission has put forward in its 2004 assessment of EU regulatory cooperation activities: 'the "enhanced" type MRA [...] is the one offering the best prospects of implementation and trade facilitation' (Commission Staff 2004, 3).

The reasoning is reiterated for the motor vehicle sector, the largest beneficiary of an ambitious comprehensive agreement, where it is stated that "it can reasonably be assumed that in reality the outcome of negotiations on the NTMs in certain sectors would rather result in bilateral than in erga omnes recognition of safety standards which are also of particular relevant (sic) for the motor vehicles sector [... in that case] the positive effect on output in the car sector could eventually be even bigger" (Commission Staff 2013, 43).

What I want to argue is that there is an incompatibility between the different proclaimed benefits with which this agreement is sold, to reiterate: tremendous impact on growth and jobs; setting the standard for global rules; the upholding and ratcheting up of safety, health and environmental standards; and large economic gains for the rest of the world.

Certainly, at least theoretically, the combination of these gains is possible. However, they can only be achieved by harmonisation of a large share of standards across the Atlantic. This would, first, eliminate the costly diverging standards that force companies to set up different production lines to manufacture goods that comply with different standards, do away with double testing procedures, and result in advantages of scale, efficiency and, consequently, economic growth. Second, one standard covering one third of the global economy and half of global trade would indeed become a de facto global standard. Companies with a global marketing strategy would: be compelled to adopt this standard to retain access to the transatlantic market; for reasons of efficiency, harmonise their total production with this standard; and, subsequently have strong incentives to lobby with their home government to adopt this standard so that the playing field would be levelled with domestic firms on the home market. Third, with harmonisation, a principle could be used in the negotiations to adopt case-by-case the standard (EU, US or international) that most efficiently attains the highest level of protection. Finally, the proclaimed economic gains for third countries via the spillover effect would be limited unless the EU and the US adopt a common standard.

Notwithstanding, instead of harmonisation, the strategy for regulatory convergence that is to be expected is mutual recognition. This becomes clear from the quoted passages in the Commission Staff Impact Assessment (IA) and is, as has been said, the approach that has been advocated in the 2004 review of EU regulatory cooperation instruments. Through enhanced type mutual recognition, the same economic benefits for EU and US companies can be reached. Mutual recognition of substantial standards and testing procedures eliminate double standards and conformity assessment proceedings for exporters at both sides of the Atlantic no less than harmonisation does. And yet, the effect on the other touted benefits is different. First, with mutual recognition, no transatlantic standard is established. Unless specific arrangements are made that once a product of a third country has been approved in one of the entities it can be marketed in the other (but based on the quotes above this is not to be expected), for the rest of the world no positive effects arise – to the contrary, they are competitively disadvantaged on the transatlantic marketplace by the bilateral regulatory liberalisation between the EU and the US. When a third country firm wants to export to the EU and the US, it will have to comply with different standards, and as the spillover effect does not occur in this case, also domestically (as well as in other third countries) different standards will keep existing. Second, 'pure' mutual recognition tends to lead to a race-to-the-bottom, since it institutionalizes regulatory competition. Without minimum requirements, firms profit from the least economically costly standard as they have, through the mutual recognition principle, automatic access to the full transatlantic market. Governments at both sides will therefore have an incentive to adopt the least-burdensome standard.

Moreover, one can even question the feasibility of comprehensive mutual recognition of non-tariff measures. The ambitious scenario assumes that 25% of all NTMs will be reduced. As only half of NTMs are actionable (ibid., 6f.), this means that 50% of all trade barriers that can be affected by policy would be effectively reduced. Keeping in mind the lack of success in earlier attempts at regulatory cooperation between the EU and the US, this seems a very ambitious (and probably unrealistic) goal. Of course, if even mutual recognition would not be attainable in all but a limited number of sectors, also the economic gains for the EU of 0.5% GDP, €545 per household and hundreds of thousands of jobs, the selling point for the agreement, would collapse. The IA does anticipate such a more modest agreement. For example, it states:

> [I]n order to be able to adapt to future evolutions, an ambitious agreement with regard to regulatory coherence would have to be of a "living nature". Regulatory obstacles to trade that cannot be eliminated or reduced in a first phase should continue to be discussed under clear time lines following an institutionalised mechanism. This mechanism could also include disciplines on strengthened upstream cooperation (ibid., 28).

Indeed, in a number of areas, differences in standards or conformity testing between the EU and the US could be uncontroversial, simply resulting from different historical practices. An example is the safety standards for motor vehicles. While it is reasonable to assume that the level of

protection in the US and the EU is equivalent, the exact standards differ as do the procedures for conformity assessment. The EU requires third-party certification (assessment by an independent body), while in the US cars can be lawfully marketed based on a self-declaration of conformity with the standards. In other areas, such as safety of electrical products or machinery, it is the other way around. In these instances, it can be assumed that mutual recognition (and costless conformity assessment procedures as self-declaration of conformity) should be feasible, without touching on the respective levels of protection and with significant economic benefits. But for many other sectors, regulatory philosophies and measures and levels of protection are further apart and divergence on the appropriate level of protection (or about what constitutes the highest level of protection) and the efficient tool for reaching this might be irreconcilable.

CONCLUSION

This article has critically reviewed the arguments that are used by the European Commission to promote the negotiations on a TAFTA | TTIP. In each and every communication, the enormous impact on growth and jobs, estimated to contribute to an extra 0.5% of GDP growth, an extra €545 income per household and hundreds of thousands of jobs, as well as the setting of global standards that will ensure the dominance of western standards in the 21st century are emphasized. To assuage the fears of opponents within the EU as well as without the transatlantic area, the official communication also emphasizes consistently that the FTA would not lead to a lowering of safety, environmental and social standards, and that the gains of the agreement would not be limited to the EU and the US, but that also the rest of the world would benefit to the tune of €100 billion.

However, this ultra-optimistic branding is only possible due to the upholding of a significant degree of 'constructive ambiguity', namely on the exact approach that will be followed in the negotiations, especially as regards to regulatory convergence. As this article has shown, the combination of the four touted benefits is only (theoretically) possible when a large share of regulations on both sides of the Atlantic are harmonised. However, such vertical transfer of competences (leading to transatlantic supranationalism) is not realistic, as is apparent from previous attempts at regulatory cooperation between the EU and the US, as recognized by the European Commission's own evaluation in 2004, and as repeatedly acknowledged in the Impact Assessment Report on the TAFTA | TTIP, partly to reassure those sectors that stand to lose most from (the spillover effects of) the agreement. But the mutual recognition approach that is the regulatory convergence strategy that can be expected cannot provide for the four proclaimed advantages of the agreement. While it is as (and arguably more) beneficial for EU and US firms that are active across the Atlantic and can consequently boost trade and growth, mutual recognition of US and EU standards does not establish global standards, tends to lead to deregulation, and has only bilateral advantages, hence not benefiting third countries.

REFERENCES

Commission Staff (2004): *Priorities for Bilateral/Regional trade related activities in the field of Mutual Recognition Agreements for Industrial Products and Related Technical Dialogue, European Commission Staff Working Paper, SEC(2004)1072, Brussels, 25.08.2004. Available online: http://trade.ec.europa.eu/doclib/docs/2005/february/tradoc_121402.cgi_full_file_name=COMM_PDF_SEC_2004_1072_1_EN_PrioritiesDOCUMENTDETRAVAIL.pdf*

Commission Staff (2013): *Impact Assessment Report on the Future of EU-US Trade Relations, European Commission Staff Working Document, SWD(2013) 68 final, Strasbourg, 12.3.2013. Available online: http://t rade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf*

De Gucht (2013a): *Transatlantic Trade and Investment Partnership: Opening Free Trade Negotiations with the United States, Committee on International Trade (INTA) of the European Parliament, Brussels, 21 February 2013. Available online: http://europa.eu/rapid/press-release_SPEECH-13-147_en.htm*

De Gucht (2013b): *Remarks on the Transatlantic Trade and Investment Partnership, Plenary debate of the European Parliament on the Transatlantic Trade and Investment Partnership, Strasbourg, 22 May 2013. Available online: http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151289.pdf*

De Gucht (2013c): *The Transatlantic Trade and Investment Partnership: Global Impacts, Institute for International and European Affairs, Dublin, 19 April 2013. Available online: http://europa.eu/rapid/press-release_SPEECH-13-343_en.htm*

European Commission (2013): *Transatlantic Trade and Investment Partnership (TTIP): The Biggest Trade Deal in the World, DG Trade. Available online: http://ec.europa.eu/trade/policy/in-focus/ttip/*

Nicolaïdis, K. & Shaffer, G. (2005) Transnational Mutual Recognition Regimes: *Governance without Global Government, Law and Contemporary Problems, vol. 68 (Summer/Autumn), pp. 263-317.*

KEYWORDS: TARIFF ELIMINATION; ECONOMIC GROWTH; NON-TARIFF BARRIERS

MACROECONOMIC EFFECTS OF TAFTA | TTIP

Thieß Petersen | *Bertelsmann Stiftung* | *thiess.petersen@bertelsmann-stiftung.de*

Abstract: *According to a purely macroeconomic perspective, a comprehensive free trade agreement between the US and EU is beneficial for both parties. Although different model calculations arrive at different quantitative conclusions, all calculations share the assessment that TAFTA | TTIP will increase real gross domestic product and employment both in the US and in EU member countries. On the other hand, estimates about the economic consequences for the rest of the world are ambiguous. The first (theoretical) part of this paper explains how the reduction of trade barriers is able to increase economic growth and employment with the help of a simple graphical analysis. The second (empirical) part presents core findings of a recent study of the Munich ifo Institute commissioned by the Bertelsmann Stiftung. This part of the paper also debates the limitations of economic model calculations. For economists the most important aspect of any free trade agreement is the removal of barriers of trade. Dismantling such barriers reduces the costs of trade activities between the contracting economies. And due to the increase of trade flows, economic analysis predicts economic growth as well as an increase in employment.*

ECONOMIC CONSEQUENCES OF TARIFFS

In order to explain the impact of a free trade agreement, let us use a simple graphical example. In this example we have one good and two countries (domestic country and foreign country). The good is produced and consumed in both countries. Domestic consumers determine the amount of the good they want to buy according to the price of the good. Normally consumers have a low demand for any good if the price is high and they increase their demand if the price falls. Domestic companies fix the amount that they want to produce and sell according to the price they receive. If the price is low, they are only willing to produce a small quantity of the good, but if the price is rising, suppliers will increase

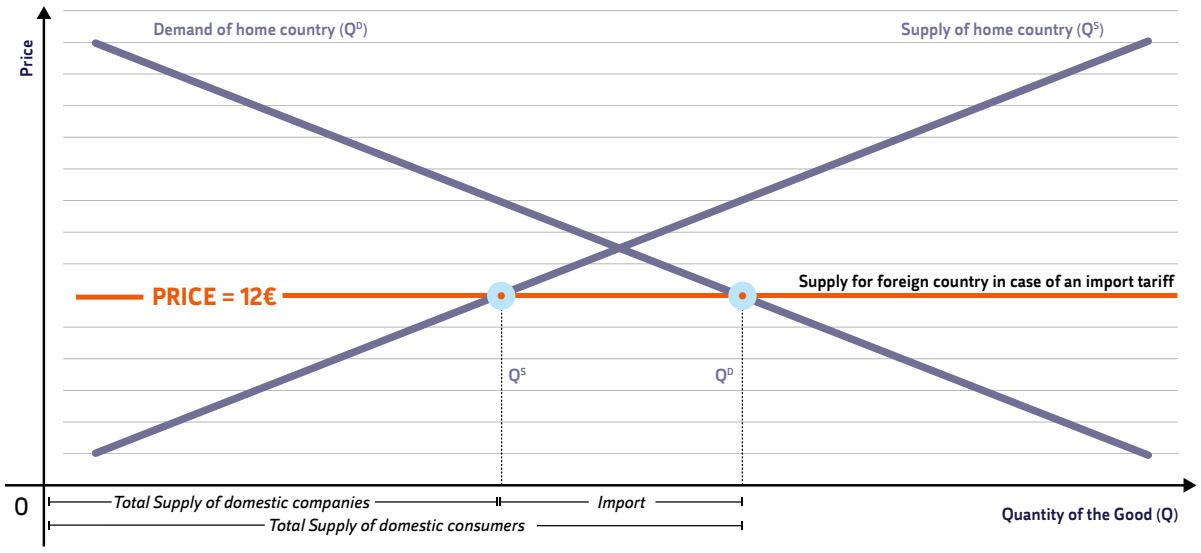


Figure 1: Market equilibrium in case of an import tariff.

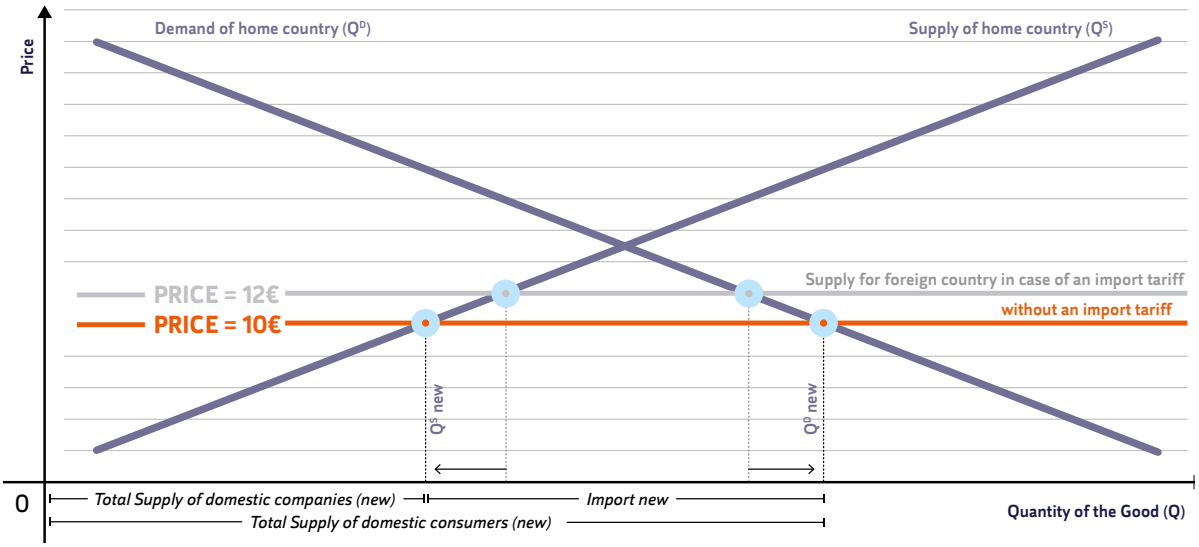


Figure 2: Market equilibrium in case of abolishing the import tariff.

production. Let us denote the amount of goods demanded by the consumers with Q^D and the amount of goods supplied with Q^S. The described relationship between prices, demand and supply can be transferred into a diagram with two axes: one price-axis (P-axis) and one axis with the quantity of goods produced and consumed (Q-axis). In this figure – due to the assumptions we made concerning demand and supply behavior – demand curve slopes downward whereas the supply curve has an upward slope (see figure 1).

Let us assume that the foreign country is a large economy that is able to produce a large amount of the good we are talking about. To be more concrete, we assume that the foreign country is able to provide any amount of the good at a constant price, for example at a price of €10. The domestic country levies a tariff on each single unit of the good imported from abroad in the amount of €2. Thus domestic consumers have to pay €12 for this good. Since we assume that foreign companies can produce any quantity of the good demanded by domestic consumers at a constant price, domestic suppliers cannot claim a price higher than €12. If the price should be higher than €12, domestic consumers would only buy foreign products. In other words: the price domestic companies can charge is determined by the price of the foreign country.

If we incorporate these assumptions into figure 1, the supply curve of foreign companies is represented by a line parallel to the Q-axis. The intersections between the foreign supply curve and the two curves describing domestic supply and domestic demand indicate the amounts of the good supplied by domestic companies and the quantity demanded by domestic consumers. At a price of €12, all domestic companies offer a total quantity which is represented by the line $0Q^S$. The quantity of goods bought by domestic consumers is represented by the line $0Q^D$. Domestic demand is larger than domestic supply, but excess demand is covered by the goods offered by foreign companies. Hence the imports are represented by the line Q^SQ^D.

Now let us assume that both countries decide to sign a free trade agreement which abolishes all tariffs. In that case foreign companies can sell their products at the original price without a tariff. Thus they will offer their products at a price of €10. For the graphical analysis this change implies a downward shift of the supply curve of foreign companies (see figure 2). The intersections of this new foreign supply curve with domestic demand and supply curves once again indicate domestic production, domestic demand and the volume of imported goods. Abolishing the import tariff has four main macroeconomic effects:

1. The price domestic consumers have to pay dropped from €12 to €10. Hence consumers gain purchasing power which they can spend for more units of the good we consider or for any other good.

2. The quantity of this good demanded and consumed by domestic consumers is growing. This is an improvement of material living conditions for domestic consumers.

3. If more units of a certain good are consumed, the entire production of this good has to rise, too. Therefore we observe an increase in production activities and thus economic growth. And since in many cases a larger production implies a higher level of employment, we can expect an increase in employment.

4. The import volume increases whereas the amount of goods produced by domestic companies is shrinking. Thus – not surprisingly – foreign companies benefit from abolishing an import duty whereas domestic suppliers are displaced by suppliers from abroad.

According to a macroeconomic overall reflection, the dismantling of an import tariff is an economically beneficial matter: domestic consumers profit because they can enjoy a larger amount of consumer goods at a lower price. Foreign companies increase their production and thus increase employment.

Of course, domestic companies have to reduce their production and thus reduce domestic employment. But if we take into account that in real economies we do not have just one single good but many different goods, domestic companies will have competitive advantage in the production of other goods. Hence domestic companies – and domestic workers – will lose shares on some markets, but they will profit from larger exports to the partner economy of the free trade agreement on other markets.

One last remark concerning economies which do not participate in the free trade agreement: if the contracting countries intensify bilateral trade activities, they need less goods and services from other economies. Hence economies outside the bilateral free trade agreement export fewer products to the members of the agreement. Fewer exports imply a lower level of production and a lower level of employment. Therefore a free trade agreement decreases production, economic growth and employment in the rest of the world.

RELEVANCE OF NON-TARIFF BARRIERS

Up to now this paper has considered tariff barriers to trade. Since tariffs between the US and the EU are already very low – on average import duties amount to 3% up to 4%– non-tariff barriers are much more important for transatlantic trade. Non-tariff barriers restrict the importation of goods and services from abroad by other means than import duties. Examples are: quality standards, technical requirements for imported products, and labeling requirements. All these requirements constitute an obstacle to export products to another country.

The main economic effect of non-tariff trade barriers is the implication that these barriers increase costs of production for companies that want to export their goods and services. If, for example, technical requirements demand different flashing indicators and anti-shock pads for cars used in the US than for cars driven within the EU, motor industry has to produce different cars for both markets. Producing two kinds of a certain product causes additional costs. Hence in economic analysis we can treat non-tariff trade barriers like import duties. Therefore the macroeconomic effects of abolishing non-tariff trade barriers are equivalent to a removal of import duties. The only difference refers to the aspect of time. If a free trade agreement decides to abolish import duties at the beginning of 2014, prices for imported goods and services decrease immediately. The removal of non-tariff barriers would need more time to be effective. For example, if the exportation of a certain European electronic product to the US requires a cost-intensive process with many technical tests in the US, the dismantling of this trade barrier is only effective if the European producer designs a new product. Hence a comprehensive free trade agreement that removes tariff and non-tariff barriers will display its full effectiveness only after a period of 10 to 20 years.

Now we know the expected macroeconomic effects of dismantling trade barriers in theory. If we want to quantify the growth and employment consequences we need to make use of economic models. Unfortunately using such models implies certain notable constraints.

LIMITATIONS OF ECONOMIC MODELING

Any economic model is a simplified reproduction of the economic reality. Since economic processes are extremely complex no model is able to reproduce this reality perfectly. Hence economic models are just a rough approximation to real economic operations. To illustrate some of these limitations let us suppose the following example: in 2010 a bottle of wine had a price of €10. During this year consumers bought 1,000 bottles of wine. In 2011 the price rose to €11 and total demand dropped to 900 bottles. In 2012 consumers paid €9 and consumed 1,100 bottles. From these observations we could conclude that an increase in prices of €1 implies a decline of demand by 100 bottles. Unfortunately this conclusion might be incorrect due to at least two reasons.

- First of all our observations might be wrong. Maybe in 2011 companies reported wrong sales numbers and were only able to sell 800 bottles. And in 2012 we might have ignored 100 bottles so that the real demand amounted to 1,200 bottles.

- Secondly even if we made correct observations we could draw wrong conclusions. Maybe the changes in demand were not caused by a change in prices but by different reasons. For example in 2011 we noted a reduction of demand by only 100 bottles because at the same time consumers enjoyed an increase in available income. Without the higher income total demand would have been dropped to 800 bottles. In 2012 consumers could have changed their tastes. Maybe they preferred beer to wine and thus bought just 1,100 bottles. Without this change in tastes consumers would have demanded 1,200 bottles.

In both cases we draw an incorrect conclusion: in reality a price increase of €1 does not imply a reduction in demand by 100 bottles but by 200 bottles. Of course economists use much more elaborate models. For example, they consider observations covering many years. Moreover the impact of many other variables is considered. Nevertheless the two basic sources of error – wrong observations and wrong conclusions – are always lurking.

To further complicate the issue, even if we could accurately reproduce economic reality, we still have another problem. In order to estimate future economic developments by using an economic model we have to assume that all economic relationships and behaviors we observed in the past hold true in the future. Of course this is by no means guaranteed. Thus even if consumers reduced their demand for wine by 200 bottles if the price rises by €1 during the last 30 years, they still might change their future behavior.

Due to observation mistakes, wrong conclusions, and possible changes in future behavior of economic actors, estimations calculated with the help of economic models are always affected by potential mistakes. Actually such calculations are not forecasts but projections or a conditional statement: if all assumptions turn out to be true we will have the predicted results. But if only one single assumption concerning the behavior of consumers, companies and governments, and the interplay of all these actors and their decisions (including

the rest of the world) turns out to be incorrect, calculations about future economic developments would be inaccurate as well. Due to the complexity of global economic relationships, misleading assumptions are inevitable. Hence we know that the estimated developments of our model calculation will not correspond to the real future economic developments. Nevertheless such calculations are valuable because they indicate reasonable spans of economic developments.

EMPIRICAL ESTIMATIONS OF MACROECONOMIC CONSEQUENCES OF TAFTA | TTIP

The following results are taken from a study conducted by the Munich-based ifo Institute and published by the Bertelsmann Stiftung in June 2013. The starting point of this analysis is an econometrical estimation of long term trade effects caused by existing free trade agreements such as the North American Free Trade Agreement (NAFTA) or the European Single Market. With the help of these estimates, the study calculates the trade effects of a removal of tariff and non-tariff barriers for the contracting countries – the US and all EU members – and the rest of the world (for methodological details see Bertelsmann Stiftung 2013, 5–12). Since import duties concerning transatlantic trade are already pretty low, I will only deal with the results of a comprehensive agreement which removes import duties and non-tariff trade barriers (ibid., 21–41).

If the US and the EU had signed such an agreement 10 to 20 years ago, this agreement would have been in full effect in 2010. In that case, in 2010 real gross domestic product (GDP) per capita would have been larger in all economies belonging to this agreement. The US and the United Kingdom would be major winners with an increase of GDP per capita by 13.4% and 9.7% respectively. For Germany the calculations estimate an increase of 4.7%. France would be the country with the smallest gain of real income (plus 2.7%). Stronger economic growth is accompanied by a larger level of employment. Due to a comprehensive bilateral trade agreement, the US would have had almost 1,1 million additional jobs. For the United Kingdom, TAFTA | TTIP is supposed to create 400,000 additional jobs. 180,000 new jobs are projected for Germany, 143,000 for Spain and 141,000 for Italy.

For the rest of the world the intensification of trade relations between the US and the EU has negative economic effects. Countries that suffer most are those economies that already have free trade agreements with the US and/or the EU. For the NAFTA members, Canada and Mexico, for example, TAFTA | TTIP is supposed to reduce long term GDP per capita by 9.5% and 7.2% respectively. Other big losers are Australia, those European countries which are not part of the EU, and all developing economies, especially countries in North and West Africa. Nevertheless, according to these calculations, the world as a whole profits from such an agreement: On the average global real GDP per capita increases by 3.3%.

CONCLUSION

According to macroeconomic theory, abolition of trade barriers increases real GDP and employment in all signatory states. Hence TAFTA | TTIP ought to boost economic growth and employment on both sides of the Atlantic. The results of model calculations presented in this article confirm these general theoretical expectations. They also indicate that such an agreement has a negative impact on the economic development for the rest of the world. Due to the outlined limitations of economic models it should be clear that the numerical results of these calculations are dependent on the underlying assumptions. Hence other calculations arrive at different conclusions.

A study provided on behalf of the European Commission in March 2013, for example, concludes that TAFTA | TTIP "would not be at the expense of the rest of the world" (Centre for Economic Policy Research 2013, vii). A comprehensive transatlantic free trade agreement would increase long term GDP in the rest of the world by 0.14%. For the EU the increase is supposed to arrive at about 0.5% and the US GDP is projected to rise by 0.4% (ibid., 82). Although economic growth effects are smaller than calculated by the Munich ifo Institute, TAFTA | TTIP is expected to have economic benefits for the US and the EU according to this study, too.

In summary, economists share the belief that a comprehensive EU-US free trade agreement would have positive effects in terms of economic growth and employment in the contracting countries. Economists might disagree on the exact magnitude of growth and employment effects, but I do not know any study that finds GDP and total employment would decline in the US or the EU. On the other hand, estimates regarding the economic consequences for the rest of the world are ambiguous. According to the study of the ifo institute, intensified trade links between the US and the EU take place at the costs of growth and employment in the rest of the world. According to the calculations of the Centre for Economic Policy Research, such negative impacts could be compensated by a global growth impulse generated by TAFTA | TTIP. From the theoretical point of view both developments are possible. Hence we are unable to decide which scenario is more likely. Unfortunately economists will only be able to answer this question 10 or 20 years after the actual entry into force of TAFTA | TTIP.

REFERENCES

Bertelsmann Stiftung (2013): *Transatlantic Trade and Investment Partnership (TTIP): Who Benefits from a Free Trade Deal? Part 1: Macroeconomic Effects.*

Centre for Economic Policy Research (2013): *Reducing Barriers to Transatlantic Trade and Investment: An Economic Assessment, London.*

KEYWORDS: CIVIL SOCIETY; TRANSPARENCY; PRECAUTIONARY PRINCIPLE; DEREGULATION

TAFTA | TTIP: NO THANK YOU! THAT'S NOT WHAT A TRANSATLANTIC PARTNERSHIP MEANS*

Alessa Hartmann | *German Forum on Environment and Development* | *hartmann@forumue.de*

Abstract: *The elimination of tariffs and the harmonization of standards increases economic power and produces wealth for all – this is the fallacy the negotiations between the US and the EU on the 'Transatlantic Trade and Investment Partnership' (TTIP) also known as Trans-Atlantic Free Trade Agreement (TAFTA) are based on. But the negotiations which aim at creating the world´s largest free trade zone pose troubling risks and side effects. Big companies are massively influencing the negotiations. The interests of consumers and employees fall by the wayside. In Germany a coalition of about 30 NGOs from the field of Environment, Development, Agriculture and Nutrition and Consumer Groups i s closely following the intransparent negotiations on the TAFTA | TTIP and demands active participation in the debate on this new deal. We have developed positions on the relevant issues of the negotiations as Investor-State Dispute Settlement (ISDS), climate and environmental protection, standards and regulations concerning agriculture, health, consumer, labor and human rights, public services, financial sector regulation as well as intellectual property. The partnership cannot be negotiated ignoring people´s needs – that is why we want to make sure the voice of the public will be heard.*

Photo credit: Luke P. Woods (Flickr)

INTRODUCTION

The elimination of tariffs and the harmonization of standards creates more economic power and wealth for all – this is the fallacy that is the basis for the negotiations between the United States (US) and the European Union (EU) on the 'Trans-Atlantic Trade and Investment Partnership' (TTIP), also known as 'Trans-Atlantic Free Trade Agreement' (TAFTA). But the negotiations that would lead to the world´s largest free trade zone pose troubling risks and side effects. Big companies are massively influencing the negotiations. The interests of consumers and employees are falling along the wayside.

The TAFTA | TTIP promises more growth to business in the EU and the US. Political Leaders want more trade and more market freedom for businesses. In reality, this could very well mean unlabeled genetically modified (GM) foods and hormone-treated meat landing on our plates. We are witnessing the previously rejected Anti-Counterfeiting Trade Agreement (ACTA) on copyright coming in through the back door – freedom of expression and data protection will lose out. Only the lowest consumer protection and environmental standards will remain (Hansen-Kuhn & Suppan 2013). Governments and the EU Commission are going for secret negotiations while excluding the public and parliaments.

The promises of more growth and wealth are questionable regarding existing free trade agreements (FTAs). The North American Free Trade Agreement (NAFTA) between the US, Canada, and Mexico clearly shows that their result is decreas-

* The article is based upon the position paper of the German Civil Society Alliance 'TTIPunfairHandelbar' (forthcoming: December 2013). The paper has been signed and published by 23 organizations in June 2013. For more information see: http://www.ttip-unfairhandelbar.de

ing minimum working standards and lower wages (Public Citizen 2013; Seattle to Brussels Network 2013). Existing studies on TAFTA | TTIP predict a Gross Domestic Product (GDP) increase of only 0.01%, but in a period of 10 years (Clive 2013). This is a large discrepancy to the increase of 0.5% promised by the EU (European Commission 2013). These euphoric prognoses are mainly made by studies financed by the industries involved or are carried out by the European Commission itself. Both have a strong interest in a successfully concluded TAFTA | TTIP. Firstly, leading politicians want to establish a counterbalance to emerging economies such as China. Secondly, a comprehensive free trade agreement will give a boost to the expansion course of European and American corporate groups. This is the reason why these calculations are based on an ideal scenario, with all non-tariff barriers removed.

DEMOCRACY AND TRANSPARENCY

A High Level Working Group on Jobs and Growth (HLWG) has prepared the negotiations since 2011. The members of this group are representing the interests of companies. 130 rounds of talks have taken place in advance of the negotiations: 119 with industries and only 11 with consumer groups (Corporate Europe Observatory 2013). As the New York Times and others reported, the industries' lobbyists have been able to place their agenda in the run-up of the negotiations (Hakim 2013).

The negotiations are taking place in secret, since not even the mandate has been made public. On the official website of the European Commission (2013), many important documents are missing and only rudimental information is available. A cornerstone of democracy – transparency – is nullified. EU Trade Commissioner Karel de Gucht (2013) is arguing that "a certain level of confidentiality is needed in the negotiations for the EU to succeed and reach its objectives." But in ongoing comparable WTO-processes the documents are made public and in view of the NSA scandal it is certainly clear that the American side has access to all information on the European negotiating documents (Knowledge Ecology International 2013).

Rather than secret negotiations, a broad public discussion is needed to reach a social and environmental negotiating mandate on both sides. This requires comprehensive and timely information, and a full public disclosure of all negotiation documents. In addition, the Commission must provide an external sustainability check by an independent body. Building on the position paper of the German Civil Society Alliance (2013, forthcoming), this article will now outline a series of positions on various aspects of the TAFTA | TTIP:

Legal Protection for People – instead of Privileged Rights for Corporations: We do not want US corporations to have rights that go against European environmental and social laws. Special legal rights for companies in investor-state arbitration procedures, as promoted by the EU, undermine fundamental principles of the rule of law.

Core Principles of Climate and Environmental Protection: The Rio Earth Summit in 1992 agreed on the precautionary principle and the polluter pays principle. If products or technologies pose risks, these need to be proactively avoided. As a result of pressure from the US export lobby, however, the TAFTA | TTIP would declare existing and planned rules based on these principles as trade barriers. A particular thorn in the side of US lobby groups is the current slow process of approving GM foods in Europe and the requirement to label them, as well as European sustainability standards for biofuels. The further development of the EU Chemicals Directive (REACH) and the EURO standard for car emissions, alongside the EU's strategy to limit the risks of environmentally hazardous plastics, are further obstacles to US export interests. In addition, it is important that the precautionary principle remains in place for new technologies, such as dangerous gas extraction by way of fracking. We need a fair economy that is both climate and resource-efficient on both sides of the Atlantic. The slowest partner should not be allowed to set the pace. To achieve this, prohibitions of particularly harmful products and procedures as well as taxes and duties are required. Obviously, this is not consistent with the TAFTA | TTIP free trade logic.

Protect Small and Environment-friendly Agriculture: For Europe's farmers and consumers, the TAFTA | TTIP carries no benefits (Hansen-Kuhn & Suppan 2013). In the US, the consumption of cloned meat and hormone-treated meat is allowed. The same goes for milk produced by doping cows with genetically modified growth hormones. Poultry meat is treated with chlorine and there is no rigorous and consistent approval process or a labeling requirement for genetically modified plants. Genetically modified salmon is about to be approved (Food and Water Watch 2013). All this would subsequently also be allowed in Europe. Patenting and liability laws greatly differ in both trading zones. The TAFTA | TTIP would open the doors for agricultural exports at dumping prices. Europe's farmers would be subject to even greater competitive pressure. US exporters would push their soy and dairy products onto the EU market and undermine our efforts to replace soybean with indigenous protein crops (BMELV 2013). Instead of more „grow or perish" logics, we need to protect small and environment-friendly farming.

High Consumer and Health Standards: Europe's stricter standards must be the baseline for all negotiations. In addition, comprehensive labeling must be mandatory – even for processed products.

Labor and Human Rights: These must be protected by clear and enforceable rules that are binding. TAFTA | TTIP is sold to the general public as an engine for job creation. However, existing free trade agreements such as the NAFTA agreement between the US, Canada and Mexico have had the opposite effect. Trade unions complain about job losses, declining wages, weakened minimum labor standards, and growing income disparities as labor standards are aligned by their respective lower level (Public Citizen 2013). In the EU, mass unemployment, pressure on wages and the expansion of precarious employment are the result of weak social standards in a liberalized internal market. This is not a model for a transatlantic free trade area.

International Solidarity and Cooperation instead of ever more competitive pressures. Through the TAFTA | TTIP, both the EU and the US want to ensure their global supremacy. Emerging and developing countries will lose important market shares (Corporate Europe 2013).

Safeguard and Develop Public Services instead of more liberalization offensives. Essential public services – e.g., in the areas of education, health, water, energy or transport – should not be privatized. They have to be accessible to everybody, be of high quality and meet high social and environmental standards. This requires a regulatory leeway at the national and local level which the TAFTA | TTIP negotiations threaten to curtail further. This in return means that more pressure for privatization is to be expected (DGB 2013).

Protect and Promote the Diversity of Cultural Expressions instead of more liberalization. UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) secures film, theater, orchestra and other cultural programs as well as local public broadcasting programs. The TAFTA | TTIP negotiations will put this creative space up for grabs (Deutscher Kulturrat 2013).

Financial Sector Regulation and a Reduction of Economic Imbalances instead of more deregulation and free trade. The liberalization of financial markets and economic imbalances within the EU as a result of wage competition are a major cause of Europe's economic crisis (Seattle to Brussels Network 2013). With TAFTA | TTIP financial services are to be further liberalized. The political power of the financial industry would be strengthened, but wages and tax dumping and, thus, decreasing public revenues would be the result.

Innovation, Education and Freedom of Information instead of more exclusive rights to corporations' „intellectual property". Protected „intellectual property" is found in many sectors – technology, pharmaceuticals, agricultural seeds, movies and music. Under the pretext of protecting inventors, we find that big publishing houses, recording labels and entertainment media companies are increasingly trying to control users of culture and information. Science and education are obstructed while more and more works are being orphaned or lost forever as their digitization is not permitted (Deutscher Kulturrat 2013). We need a fair balance of interests between creators, users and re-users. In 2012, the ACTA agreement was stopped by a wave of public outrage as the media industry would have been granted extensive monopoly rights and control of the Internet. TAFTA | TTIP is a new attempt to introduce these monopoly rights.

CONCLUSION

The people in Europe, the US, and the rest of the world do not need a large, de-regulated transatlantic market. The TAFTA | TTIP does not provide answers to many important questions: How do we want to live? What is a 'good life', without the exploitation of people, animals and the environment? How can we work within the planet's natural limits and guarantee good, fairly paid work? How can we achieve food sovereignty for everyone?

We are currently in the middle of an environmental, social and economic crisis. We need more democracy, social justice, climate protection and financial market regulation. We need more economic solidarity, protection of smallholders, and an economy and agriculture orientated towards the common good. We need more effective consumer and data protection as well as protection against the financial interests of international corporations.

Free trade and investor protection strategies dating from the 20th century are not a solution to our current challenges. A transatlantic partnership that deals with the urgent socio-ecological transformation required from the 21st century must look very differently.

REFERENCES

Corporate Europe Observatory (2013): *Busting the Myths of Transparency Around the EU-US Trade Deal, 25 September 2013. Available online: http://corporateeurope.org/trade/2013/09/busting-myths-transparency-around-eu-us-trade-deal*

BMELV (2013): *Eiweißpflanzenstrategie, Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz. Available online: http://www.bmelv.de/SharedDocs/Standardartikel/Landwirtschaft/Pflanze/Acker-Pflanzenbau/Eiweisspflanzenstrategie.html*

De Gucht (2013): *Parliamentary Question - Answer given by Mr. De Gucht on Behalf of the Commission, European Parliament, 23. September 2013. Available online: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-009284&language=EN*

Deutscher Kulturrat (2013): *Kulturelle Ausnahme ist bei geplantem Freihandelsabkommen zwischen EU und USA unverzichtbar, 06 May 2013. Available online: http://www.kulturrat.de/detail.php?detail=2520&rubrik=142*

DGB (2013): *Stellungnahme zu den geplanten Verhandlungen für ein Handels- und Investitionsabkommen zwischen der EU und den USA, Deutscher Gewerkschaftsbund. Available online: http://www.dgb.de/themen/++co++a98b3340-bc89-11e2-bf0b-00188b4dc422*

European Commission (2013): *Transatlantic Trade and Investment Partnership (TTIP) - The Biggest Trade Deal in the World. Available online: http://ec.europa.eu/trade/policy/in-focus/ttip/*

Food and Water Watch (2013): *GE Salmon. Available online: http://www.foodandwaterwatch.org/food/genetically-engineered-foods/stop-frankenfish/*

George, Clive (2013): *What's Really Driving the EU-US trade Deal?, Open Democracy, 8 July 2013. Available online: http://www.opendemocracy.net/ourkingdom/clive-george/whats-really-driving-eu-us-trade-deal*

Hakim, Danny (2013): *European Officials Consulted Business Leaders on Trade Pact, New York Times, 8 November 2013. Available online: http://www.nytimes.com/2013/10/09/business/international/european-officials-consulted-business-leaders-on-trade-pact-with-us.html?_r=0*

Hansen-Kuhn, Karen / Steve Suppan, Steve (2013): *Promises and Perils oft he TTIP - Negotiating a Transatlantic Agricultural Market, Institute of Agriculture and Trade Policy.*

Public Citizen (2013): *NAFTA's Legacy for Mexico: Economic Displacement, Lower Wages for Most, Increased Immigration. Available online: http://www.citizen.org/documents/ImpactsonMexicoMemoOnePager.pdf*

Seattle to Brussels Network (2013): *A Brave New Transatlantic Partnership: The proposed EU-US Transatlantic Trade and Investment Partners hip (TTIP/TAFTA), and its Socio-economic & Environmental Consequences, Corporate Europe Observatory. Available online: http://corporateeurope.org/sites/default/files/attachments/brave_new_transatlantic_partnership.pdf*

UNESCO (2005): *Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Available online: http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html*

PUBLIC PROTESTS AND FTA NEGOTIATIONS WITH THE UNITED STATES: LESSONS FOR THE TAFTA | TTIP

Holger Janusch | *Faculty of Social Sciences - Political Science* | *Bergische Universität Wuppertal* | *janusch@uni-wuppertal.de*

Photo credit: M. Verde

KEYWORDS: CONFLICT OF INTEREST; PARTICIPATION; NEGOTIATION; PROTEST

Abstract: *While the official TAFTA | TTIP negotiations have started relatively quietly, a comprehensive agreement like the TAFTA | TTIP has a potential for deep conflicts of interest which may provoke public protests and prevent the conclusion of the negotiations. In particular, trade negotiations with the US are often accompanied by massive public protests in the partner countries. In this paper, the effects of public protests on trade negotiations with the US will be discussed by analyzing former trade negotiations. In the first section, the structure and process of trade negotiations in general and the options of lobbying will be illustrated. In the second section, it will be analyzed how public protests in former trade talks with the US affected these negotiations. The analysis shows that public protests can increase the intensity of social conflicts and finally lead to a breakdown of negotiations. To prevent social conflicts, public protests and a possible breakdown of negotiations, a broader civic participation could be one possible solution. In the last section, the lessons learned from former FTA negotiations will be translated to the current TAFTA | TTIP negotiations. Thus, a broader civic participation would increase the legitimacy of the TAFTA | TTIP in public and the likelihood of a successful conclusion.*

INTRODUCTION

While the official TAFTA | TTIP negotiations between the US and the EU have started relatively quietly, some media attention on audio-visual provisions and genetically modified foods had already shown that the TAFTA | TTIP negotiations have a potential for deep conflicts of interest. In addition to market access, a comprehensive free trade agreement (FTA) like the TAFTA | TTIP includes many issues, such as public procurement or intellectual property rights (IPRs), which would require far-reaching reforms in different domestic policy areas. Because of that, the negotiated issues of the TAFTA | TTIP can create deep social conflicts at the domestic as well as international level. In particular, the FTA negotiations with the US are often accompanied by massive public protests in the FTA negotiating partner that can increase the intensity of social conflicts. These conflicts can finally lead to the breakdown of negotiations, which was the case of the failed ratification of the Anti-Counterfeiting Trade Agreement (ACTA).

In this paper, the effects of public protests on FTA negotiations with the US will be discussed by analyzing former negotiations. In the first section, the structure and process of FTA negotiations in general as well as the ways of lobbying by interest groups will be illustrated. The second section shows how public protests in former FTA negotiations with the US arose, changed over time, and affected the trade talks. In the last section, the lessons learned from former FTA negotiations will be translated to the current TAFTA | TTIP negotiations.

THE STRUCTURE OF FTA NEGOTIATIONS

When looking at trade negotiations, the two-level game by Putnam (1988) is a useful metaphor. According to the two-level game, domestic actors pressure and lobby at the national level for a favorable policy which could be achieved in the international treaty. At the international level, the national government tries to satisfy these domestic pressures in the negotiations with the foreign government. Both games are interconnected; therefore, the executive is in an advantageous bargaining position because it is the only actor that is playing at both levels. In addition, international negotiations can also be divided in two temporal processes. Before the signing of an international agreement, the main negotiation process is between the executives at the international level so as to reach an agreement. After signing an agreement, the domestic actors will negotiate over the approval at the following ratification process. However, this classification should not be taken too strictly. During the international negotiation process, the executive is already talking with domestic actors – especially the legislature – to ensure the later approval of an agreement. Furthermore, it is not uncommon that the legislature amends an agreement during the ratification process, for which reason renegotiations are necessary at the international level.

In FTA negotiations, the main progress at international level is achieved during the negotiation rounds. In these rounds, the negotiation teams of both sides meet mostly for a week, alternately in a city of the other negotiating partner. The negotiation teams are composed of different groups for the main topics: e.g., market access, investment, IPRs, et cetera. While the direct negotiations between the state actors are secret, there are also constant talks with national stakeholders during these rounds in the so-called 'side rooms'. These side rooms, however, are mostly dominated by business (e.g. see Janusch 2013).

Before the first official negotiation round, in most cases the trading partners would have already held pre-negotiations

in order to check if an FTA is actually possible. Quite often the trade talks get cancelled before they even begin. For example, the US never started official FTA negotiations with Switzerland, Taiwan, or other countries – even though there were a lot of consultations in these directions (e.g. Inside U.S. China Trade 2006a & 2006b). However, the EU and the US have gone through this first hurdle. Once the negotiations have officially started, a successful conclusion is not guaranteed. A lot of FTA negotiations with the US failed for different reasons.

Besides the pre-negotiations, the first negotiation rounds serve often just for the exchange of information that allows the respective teams to get more familiar with the bargaining position of the other side. The more the trade talks proceed, the more the main conflicts of interest become apparent. However, if the negotiation leaders have known right from the beginning that a topic could become a controversial issue, it will be held back and tabled more likely towards the end of the international negotiation process. This strategy could hinder the negotiations; should they fail after all, the negotiation leaders would have already invested too much political capital. While most topics get solved directly in the different negotiation groups at a lower level, the more conflictual an issue becomes, the more likely it will be negotiated at a higher level. In the US, conflictive issues are often negotiated by the Deputy Trade Representatives and sometimes even the US Trade Representative (USTR). In rare cases, even the President becomes involved in the negotiations (Janusch 2013). For example, in the case of the FTA negotiations between the US and Australia, President George W. Bush and Prime Minister John W. Howard made a telephone call to solve the most difficult issue which was the market access for Australian sugar (Krever 2006).

PUBLIC PROTESTS DURING FTA NEGOTIATIONS

Beyond the formal negotiation framework, public protests can arise and affect the negotiation process at the national as well as international level. Public protests can tie the hands of the national government in negotiations, in particular, if the protests come from their own constituency. Furthermore, public protests can increase the intensity of social conflicts that can eventually cause the breakdown of negotiations. Because the more the negotiations proceed, the more likely controversial issues will be negotiated, it can be assumed that public protests are likely to increase over time. In addition, it can be expected that public protests arise more likely during the ratification process. The reason is that the opponents of an FTA know that the executive is unlikely to cancel an already started negotiation because it would cause a huge loss of reputation for future negotiations and attest incompetence of the executive. The legislature, however, does not have to fear a loss of reputation because it did not initiate the negotiations.

While former FTA negotiations of the EU did not receive a lot of attention in the public, a look at the trade policy of the US reveals a different picture. Although FTA negotiations did not lead to public protests in the US itself, they are quite often accompanied by massive public protests in the partner country. The FTA negotiations which caused the biggest protests in the partner country were the cases of Ecuador, Thailand, and South Korea.

After the regional negotiations between the US and the countries of the Andean community broke down, the US Administration began bilateral FTA talks with Colombia, Ecuador and Peru. However, before the US and Ecuador even started the bilateral FTA negotiations in 2006, nationwide protests arose in Ecuador because of an investment dispute with the US energy company Occidental Petroleum Corporation (Oxy). These massive demonstrations flashed over quickly to protests against the FTA, too. The massive protests threatened to destabilize the whole country. After the Ecuadorian government had canceled the investment treaty with Oxy, as a reaction the US administration suspended the FTA negotiations. Later in 2006, the election of Rafael Correa as the new Ecuadorian President excluded a reopening of the FTA negotiations in the end (Janusch 2013).

In Thailand, the FTA with the US was a controversial issue mainly because of IPRs for pharmaceutical products. On the first day of negotiations, there were already small protests against the FTA. These protests grew up over time. In 2006, the protesters against the FTA joined the massive demonstrations against Prime Minister Thaksin Shinawatra because of his authoritarianism and corruption. Later, the Thai military overthrew the government of Prime Minister Shinawatra in September 2006. As a reaction to the coup, the US suspended the FTA negotiations, in addition to several cooperation agreements and financial support. In both cases, Ecuador and Thailand, the protests were one building block which led finally to a breakdown of the FTA negotiations (ibid.).

In the case of South Korea, every negotiation round attracted a lot of media attention in the country. During the international negotiations and the domestic ratification process, there were massive protests organized by coalitions of nongovernmental organizations (NGOs) and trade unions. These protests were not only accompanied by violence between the protesters and the police on the streets, but also between the ruling party and the opposition in parliament. Despite these social conflicts, at the end, the FTA between the US and South Korea was ratified four and a half years after its signing, although this delay was caused primarily by changes of government in Washington. In all these cases, it should be pointed out explicitly that the protests were only partially a reaction to trade liberalization in general, but more likely a response to negotiations with the US in particular. For example, at the same time that South Korea was negotiating with the United States, it also had FTA talks with the EU. However, the FTA negotiation with the EU did not provoke any bigger protests in South Korea (ibid.).

A further example of possible effects of public protests is the ratification process of ACTA. After the signing of ACTA by the EU and most European countries in January 2012, large protests occurred in several cities all over the continent. Thereupon, Poland and other countries regretted the signing, whereas countries like Germany, which had not signed the agreement until then, refused to do so (FAZ.net 2012b). The European Parliament officially rejected ACTA on July 4, 2012, by 478 votes to 39, with 165 abstentions (European

Parliament 2012; FAZ.net 2012a). The ratification process of ACTA has shown that massive protests cannot only arise on short notice due to the social media, such as social networks and blogs, but also may lead to the rejection of an already signed agreement.

LESSONS LEARNED FROM FORMER FTA NEGOTIATIONS

Former FTA negotiations that involved the US have shown that massive public protests against an FTA can occur during the trade talks. The protests can create deep social conflicts, tie the hands of the government or even lead to a change of government which could finally end with the breakdown of negotiations. To prevent massive protests and defuse social conflicts, a broader participation and inclusion of civil society could be a possible solution. However, this does not necessarily mean that the negotiations between the state actors have to be open to the public in every aspect. The reason is that secret or (partially) closed negotiations between the state actors can increase the chance of successful agreements as decision makers are – to a certain extent – freed from public concerns, which again may limit their room to maneuver. Thus, the result of overall public negotiations could be a breakdown of negotiations even if both sides would profit from an agreement (Leventoğlu & Tarar 2005).

Because of that, from a perspective of increasing the likelihood of an agreement, the negotiations between the state actors should be secret, but at the same time, the negotiators should consult different interests of the civil society before, during and after every negotiation round. While secret negotiations between the state actors assure a sufficient room for bargaining to achieve an agreement, an open consultation and inclusion of civil society lowers the intensity of possible social conflicts which could hinder cooperation. Thus, the side rooms have to be more open for different interests of the society to lose their pro-business bias. Furthermore, it is also helpful for preventing social conflicts if the negotiators make all recent negotiation results public after every negotiation round to create a public discourse over the future agreement.

While opening the institutional framework for participation is important, the negotiators of the executive and the members of the legislature could also prevent domestic social conflicts by promoting actively a broad participation and initiating public discussions over the agreement. Like Elmer E. Schattschneider (1935, 293) already recognized related to US trade policy: "To manage pressures is to govern; to let pressures run wild is to abdicate." In this sense, the negotiator and the members of parliament should not only be the target of lobbying by interest groups, they also have the responsibility to manage different interests in order to achieve a balanced policy. To reach this task, the negotiators could also revert to procedures of deliberative democracy and civic participation: for example, such as citizen juries, deliberative polls, round tables or world cafés (see Kersting 2008).

Because to negotiate a comprehensive FTA like the TAFTA | TTIP takes several years, during which a lot of elections can be expected, a broad civic participation increases the likelihood of approval of a signed agreement despite possible changes of government. A transparent and broad participation can also lead to a better understanding between the negotiators of the domestic concerns of the other side, and – thereby – prevent social conflicts at the international level. Regardless of whether the TAFTA | TTIP is desirable or not, civic participation increases the legitimacy of an agreement at national level and leads to better mutual understanding at the international level. Thus, civic participation lowers the risk of a breakdown of negotiations. This is important because a breakdown of the TAFTA | TTIP negotiations could have consequences not only for the trade relations between the EU and the US, but could also strain the political and security affairs of transatlantic relations.

REFERENCES

European Parliament (2012): *ACTA before the European Parliament, European Parliament News, July 4. Available online: http://www.europarl.europa.eu/news/en/news-room/content/20120217BKG38488/html/ACTA-before-the-European-Parliament*

FAZ.net (2012a): *EU-Parlament lehnt Acta ab, Frankfurter Allgemeine Zeitung, Jul. 4. Available online: http://www.faz.net/aktuell/politik/ausland/urheberrechtsabkommen-eu-parlament-lehnt-acta-ab-11809606.html*

FAZ.net (2012b): *Tausende demonstrieren gegen Acta, Frankfurter Allgemeine Zeitung, Feb. 11. Available online: http://www.faz.net/aktuell/wirtschaft/urheberrecht-im-internet-tausende-demonstrieren-gegen-acta-11645851.html*

Inside U.S. China Trade (2006a): *USTR Trip to Taiwan Leads to New Talks, Few Tangible Results, Inside U.S. China Trade, Jun. 07.*

Inside U.S. Trade (2006b): *Hopes for Swiss FTA Dwindle after Portman-Deiss Meeting, Inside U.S. Trade, Jan. 27.*

Janusch, H. (2013): *Das Scheitern internationaler Verhandlungen: Eine vergleichende Analyse der Außenhandelspolitik der Vereinigten Staaten, Ph. D. Bergische Universität Wuppertal [forthcoming].*

Kersting, N. (ed.) (2008): *Politische Beteiligung: Einführung in dialogorientierte Instrumente politischer und gesellschaftlicher Partizipation, Wiesbaden: VS Verlag für Sozialwissenschaften.*

Krever, T. (2006): *The US-Australia Free Trade Agreement: The Interface between Partisan Politics and National Objectives, Australian Journal of Political Science, 41(1), pp. 1–18.*

Leventoğlu, B. / Tarar, A. (2005): *Prenegotiation Public Commitment in Domestic and International Bargaining, American Political Science Review, 99(3), pp.419–433.*

Putnam, R. D. (1988): *Diplomacy and Domestic Politics: The Logic of the Two-Level Game. International Organization, 42(3), pp.427–460.*

Schattschneider, E. E. (1963[1935]): *Politics, Pressures and the Tariff: A Study of Free Private Enterprise in Pressure Politics, as Shown in the 1929-1930 Revision of the Tariff, Archon Books: Hamden.*

SAFEGUARDING CONSUMER RIGHTS AND PROTECTION IN THE TAFTA | TTIP

Katharina Knoll, Michaela Zinke and Jutta Jaksche | *vzbv (Federation of German Consumer Organisations)*
katharina.knoll@vzbv.de | @vzbv_brussels

Abstract: *With negotiations on the Transatlantic Free Trade Area | Transatlantic Trade and Investment Partnership (TAFTA | TTIP), the United States and European Union are pursuing the objective of removing obstacles to trade and fostering economic growth with regulatory coherence. However, consumer protection cannot be measured in numbers and is not a commodity to be traded. Consumers on both sides of the Atlantic risk losses of existing protective measures. The negotiation process has been characterised by a lack of transparency and the lack of inclusion of civil society to contribute and ensure an outcome which benefits all parties. There is a real risk that longstanding and absolutely necessary safeguards will be declared trade obstacles and consequently lowered. Core consumer policy areas in the negotiations concern food production and agriculture, data protection, intellectual property rights, financial services, medical devices, environmental and chemicals regulation. In these areas, the US and the EU apply very different standards as their regulatory approaches, while governmental objectives are often contradictory.*

INTRODUCTION

Both the US and the EU have a legislative framework with a reasonably high level of consumer protection and sophisticated legal systems. However, these current legislative frameworks often differ considerably in terms of approach and underlying values.

While in Europe consumers often seem to serve as 'guinea pigs' for medical devices, the US imposes much stricter safety requirements and a strong pre- and post-marketing surveillance system. On data protection, there is no statutory recognition of privacy in the US, contrary to the EU's stipulation of it as a fundamental right.

When it comes to food products, the US uses genetically modified products, the labelling standards of which many European stakeholders fear will be lifted after negotiations. Equally, US consumers worry that the EU could target the Dodd-Frank Act – which created the Consumer Financial Protection Bureau and the Volcker Rule limiting banks from investing consumer deposits in the stock market (BEUC et al. 2013). Standards have been acquired as a consequence of lengthy democratic processes and struggles by civil society to improve consumer rights in the EU and the US for more than 50 years (The journal of Consumer Affairs 2012). Therefore it is reasonable to think that EU and US legislation will only become better for consumers in the future: "TTIP could be an opportunity for the US and the EU to increase welfare and well-being by raising standards that protect citizens and advance their established rights" (BEUC et al. 2013).

However, the TAFTA | TTIP negotiations may result in the opposite. Consumer groups are concerned that the agreement would roll back important regulations. This is primarily because with tariffs on transatlantic trade at historic lows, the joint negotiators will seek to remove "regulatory issues and non-tariff trade barriers" with the focus being on protection and labelling rules, safety and regulatory standards in order to achieve regulatory convergence. This concerns a range of economic sectors at both national and international levels which will affect all aspects of citizens' daily lives.

The EU and US are each other's most important trading partners and with the negotiations on TAFTA | TTIP they are striving to become the world's biggest trading area bloc. Five years after the collapse of the Lehman Brothers investment bank, both remain in a critical economic, financial and social condition. The goals of a new free trade area are driven by the fundamental hope for more jobs and growth (Centre for Economic Policy Research 2013) and thus both parties are keen to connect their markets by promoting a far-reaching agreement.

But will positive forecasts be met and would consumers benefit? What role will consumer protection play as the EU and US strive for growth and jobs?

CONSUMER PROTECTION AS AN ESSENTIAL COMPONENT FOR SUSTAINABLE GROWTH IN THE TAFTA | TTIP

"Consumer expenditure accounts for 56% of EU GDP and is therefore essential to meeting the Europe 2020 objectives of smart, inclusive and sustainable growth" (European Commission 2012, 2013c). "As a lesson learned from the economic devastation created by the reckless conduct of financial institutions, US and EU policymakers are finally recognising that consumer protection as a 'vital ingredient' for sustainable growth must be a central component of regulation" (TACD 2013b). Viviane Reding, European Commission Vice-President and the EU's Justice Commissioner states: "Growth in the European Union needs both competitive supply and strong demand. Consumers, therefore, must be as much centre stage of EU policies as businesses. We need confident consumers to drive forward the European economy."

However, the current negotiation process does not reflect Europe's objectives. It lacks democratic transparency and the possibility for consumer organisations, civil society and the democratically elected members of the European Parliament to engage. In addition, the European Commission has even asked the Member States to communicate the agreement in a partially positive and beneficial manner to their citizens (CEO 2013c)

The Commission's plan to establish an "advisory group" (7:7:1, industry: civil society: standardisation organisation) to promote transparency and participation in the process is still questionable as to its representative nature and as to when and how the outcome will feed into the process. However, one thing is certain – it comes much too late in the process. The negotiations have in fact been led since the first round on 8 July, 2013 (and beforehand among the High-Level Forum) by non-elected EU representatives from the European Commission Directorate-General for Trade and are mainly kept secret (CEO 2013ab).

THE REGULATORY IMPLICATIONS OF TAFTA | TTIP

As announced by the European Trade Commissioner Karel de Gucht, the goal of negotiations is to enhance "growth and jobs". The aim is to establish a transatlantic single market based on harmonisation and "mutual recognition" in which products and services can be sold freely on both sides of the Atlantic without further review and approval (European Commission 2008/13,a; USTR 2013; BMWi 2013). An additional objective is to create the Commission's Transatlantic Regulatory Council to "guide and monitor the implementation of regulatory commitments and to tackle new regulatory challenges in the future". It will have the right to comment on revisions of legislation, thereby giving the US the avenue to shape EU legislation (The Greens / EFA 2013, ETUC 2013). This would go far beyond current consultative processes and "could also limit the scope of future-decision-making" (BEUC 2013).

According to published protocols, industry lobbyists see TAFTA | TTIP as an opportunity to renew Europe's regulatory framework – many of their proposals have been positively evaluated by the Commission (The Greens / EFA 2013). "There are also concerns that the scale of TAFTA | TTIP means that it is likely to become the benchmark, not only for any future domestic regulations (in the EU and the US), but also for the future agreements between the EU and the US and third parties" (BEUC et al. 2013). In addition, the European Commission is currently undergoing a "regulatory fitness and performance" (REFIT) check to review its "entire stock of EU legislation". This represents a supplementary risk of undermining or ridding of consumer standards and principles such as the precautionary approach in a legal way (European Commission 2012/13).

In addition, the proposition of an Investor State Dispute Settlement (ISDS) arbitration procedure would be an attack on national judicial systems by allowing companies to litigate against Member States outside the court system and demand compensation for alleged threats to their property rights or investment gain limitations due to consumer, health or environmental protection policies or because of social and economic policies (Forum Umwelt & Entwicklung 2013 et al.; OECD 2012; Public Citizen 2013; Euractiv 2013).

Therefore, the overall goals raise serious concerns as to the implications of TAFTA | TTIP on European law making. It also raises doubts about the ambition to improve consumer and societal wealth on both sides of the Atlantic as in the EU's stated 'Europe 2020' objectives.

It seems instead that the economic well-being and interests of the respective governments, investors and corporations are at the forefront. "An unbalanced trade agreement would thus boost trade at the expense of society at large. This would be the wrong approach to address current financial, economic, social and climate crises" (BEUC et al. 2013). "EU and US consumer groups are therefore concerned that one vital ingredient for sustainable economic growth - consumer protection - will not just be overlooked but actively undermined in this free trade deal (TACD 2013ba).

FOOD AND AGRICULTURAL CONSUMER POLICY IN TAFTA | TTIP

One of the most sensitive issues is the regulation of food safety, agricultural, and animal products. Food legislation frameworks in the EU and US often differ considerably in

terms of hygiene and control systems, labelling standards, underlying cultural, ecological and ethical values.

For example, the US utilises "strict performance standards for potentially deadly pathogens in the food supply, such as Listeria monocytogenes and pathogenic strains of E.coli. Similarly, European consumers enjoy labelling of genetically modified foods and ingredients, but no similar labelling scheme exists in the US" (TACD 2013c).

Issues include the EU bans on genetically modified (GM) foods, EU raw milk cheese, hormone-treated beef, antimicrobial resistance, chlorine-washed poultry and food products from cloned animals. While the EU lifted the ban for lactic acid before the negotiations, the US followed with lifting the ban on EU beef in advance of the second round of trade talks. The first example shows how consumer standards are aggregated in TAFTA | TTIP. Regulations have been in place for years to protect consumers, but basic principles of protection are at risk (Glyn Moody 2013; Sierra Club 2013; US Food and agricultural producers, processors and exporters 2013).

Despite their different systems, EU and US consumer organisations share similar approaches when it comes to the risks and opportunities for consumer's health and wellbeing in the framework of the negotiations (TACD 2013c).

SAFEGUARDING THE PRECAUTIONARY PRINCIPLE AND CONSUMER CHOICE

According to the European Commissioner for Consumer Protection, Neven Mimica (TACD conference, 29 October 2013), and recent model calculations (e.g. ifo-Institute 2013; Centre for Economic Policy Research 2013; Bertelsmann Stiftung 2013), consumers would benefit from more product diversity and lower prices due to increased competition in the market. In general, "everybody in the EU should benefit – by some €545 for an average EU household" (European Commission, 2013a). What these assumptions mean has not yet been precisely elaborated upon by the European Commission, nor have consumer organisations been consulted.

Past experiences with other trade agreements are sobering and instructive (EPI 2013). "There are concerns it could simply increase the market share of larger companies at the expense of smaller ones and local economies. It is also very much to be feared that attempts to boost jobs and growth will happen through a reduction of health, safety and environmental standards or the "mutual recognition of standards that are not of equal protection level" (BEUC 2013).

It is questionable whether these welfare effects will materialise (Berger 2013) and if they are in fact desirable from a consumer perspective. Tariffs are mainly low and an extension of the product range is not necessarily desirable: "Consumers often prefer a smaller range of products with recommendations from independent third parties to a larger diversity of products in the market" (Infas 2013).

In addition, there is already a problem of "information asymmetry" and "information overload", making markets non-transparent for consumers (European Commission 2012). New, innovative goods imported from the US might be criticised because they do not always fit European standards or consumer values, in particular when it comes to ethical and ecological aspects (TACD 2013c). One example of many trade battles between the EU and the US concern the precautionary principle or the "risk approach" (Institute for Agricultural and Trade Policy 2013). In the US, for instance, hormone-treated beef and genetically modified foodstuff can be sold, something European consumers completely refuse: "The majority of European consumers regard gene technology with scepticism" (European Commission 2005). Chlorinated chicken, hormone-treated beef and "clone-meat" are also seen as undesirable for imports (Ministry of Agriculture, Food and Consumer Protection of Lower Saxony 2013). Research in the UK, for example, has found that only 37% of people would be happy to buy chlorine-washed chicken even if it meant they were less likely to suffer from food poisoning. 82% thought that if treatments were used, they should be labelled. Only 14% said they would be likely to buy chicken treated with chlorine based washes and only 21% in the case of washes or sprays which use mild acid (TACD 2013c) Chemical treatments, such as lactic acid or chlorine-based treatments "have been banned by the EU in preference of a greater focus on controls to minimise contamination at each stage of the production process - the so called "farm to fork approach" (TACD 2013c).

In response, cross-cutting issues during negotiations include the preserving of the precautionary principle, which is explicitly recognised in the EU General Food Law Regulation (EC Regulation 178/2002) and goes to the heart of many EU-US trade disputes on food issues. "Food issues have arisen where there is a potential risk to health, but there remains scientific uncertainty. In these cases, it is necessary to apply government policies that remain on the side of caution and protect consumer health - as the Bovine Spongiform Encephalopathy (BSE) crises most clearly illustrated" (TACD 2013c).

EU legislation generally recognises that food has a broader dimension of social, ethical and economic aspects which need to be considered. This applies to food technologies, such as animal cloning. In this case, regardless of the scientific risk assessment, ethical issues are raised for some consumers including animal welfare concerns. These "other factors legitimate to the matter under consideration" are not explicitly acknowledged within the US legislation in the same way (TACD 2013c) and need to be taken into account in negotiations to enable consumers to make informed choices (Mühlleib, 2010)

In addition, consumer information about the use of new technologies in food production (e.g. animal cloning or nanotechnology) and processing (e.g. chemical decontamination) of food should be made available – a precondition to informed choices (Institute for Agricultural and Trade Policy 2013). Measures aimed at providing consumers with information, such as labelling regulations for GM food, are necessary consumer safeguards and cannot be weakened as "obstacles to trade" (TACD 2013c, vzbv 2005).

Photo credit: simonleuf (Flickr)

"MUTUAL RECOGNITION" LOWERS STANDARDS IN THE LONG TERM

To eliminate such "barriers to trade", negotiation partners often agree to "mutual recognition" of standards. For example, US products and services would be permitted to enter and be sold in the European market as long as they meet US requirements. If this happens, consumers would not be able to rely on uniform health, food and safety standards and producers who need to meet stricter domestic rules could suffer from a competitive disadvantage.

As a consequence, stricter national standards would be watered down in favour of international competitiveness. That would be a major setback for those producers who rely on a resource-efficient value chain or on regional and ecological production instead of industrial production methods. A free trade agreement which relies on "mutual recognition" of consumer protection rules would restrict the development of consumer protection instead of enhancing progress. "Unless safeguards are adopted to make sure that partners are free to enact higher standards than the ones agreed in TAFTA | TTIP, there is a risk attempts by the EU and national governments to regulate in future beyond the terms of the TAFTA | TTIP will be very difficult" (BEUC et al. 2013). Consumer organisations therefore call for the higher of the standards to be applied in the negotiations (vzbv 2013a)

DATA FLOW TACITLY INCLUDED IN TAFTA | TTIP

Although agreeing a mutually shared data protection framework is not explicitly part of the negotiations, the leaked negotiation mandate shows that European negotiators proposed to include "data flows". However, the free flow of information which benefits companies and consumers alike should not be confused with the flow of commercially valuable personal information regulated under data protection and privacy frameworks.

Consumers are subject to increasingly invasive methods of commercial surveillance on- and offline and this facilitates enormous, secretive profiles which compromise individual privacy. Furthermore, sensitive personal data is also more likely to be stored in the cloud governed by a US company, thus removing a significant part of the European data protection provisions applying to citizens and exposing consumers to data security breaches, unauthorised disclosure and unwarranted government surveillance – as recent revelations of National Security Agency (NSA) and Government Communications Headquarters (GCHQ) practices have evidenced.

DATA PROTECTION AND DATA FLOWS

According to the above mentioned leaked negotiation mandate (European Commission 2013b), negotiators proposed to include data flows in the negotiations to find means to transfer data during commercial activities of all kinds. The Transatlantic Business Council (TBC) also commented on 10 May 2013 that "seamless flows of data are the oxygen of our modern economies" and that the TAFTA | TTIP should be used to "promote maximum interoperability" between the US and EU (TBC 2013).

However, provisions touching in any way upon data protection should be omitted from the trade negotiations, especially as data flows – such as personal information – cannot be addressed without also affecting data protection laws (vzbv, 2013cd). This is particularly true as long as the European Data Protection law remains not yet adopted.

A broad trade agreement is not the right framework in which to settle this sensitive topic. A specific agreement between the EU and the US on data protection is needed instead. Additionally, without adequate supervision and transparency of the negotiating process, any attempt to include data protection provisions in the transatlantic trade negotiations could result in a significant weakening of consumer protection with little or no public input. The recent NSA mass surveillance scandal has highlighted how important it is that the EU and the US negotiate common data privacy standards, but also that they do so outside the proposed TAFTA | TTIP (vzbv, 2013be).

UNIFORM EUROPEAN DATA PROTECTION BILL NEEDED BEFORE STARTING NEGOTIATIONS

The current European data protection legislation is implemented differently in each of the EU Member States due to its status of Directive (Directive 95/46/EC), which has led to a fragmentation of the data protection level across Europe. A uniform framework is urgently needed as the digital world knows no national boundaries.

In January 2012, the European Commission proposed a comprehensive reform of existing data protection laws (Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, General Data Protection Regulation, 25 January 2012) which was significantly strengthened after the vote of the European Parliament's Committee for Civil Liberties, Justice and Home Affairs on 22 October 2013. This proposed EU law will replace the Directive mentioned above and regulate how personal data can be used by companies and authorities when consumers shop, email, use social networks, etc. The provisions will apply to all companies doing business with EU consumers, even if they are registered outside the EU.

In addition, a proposed Directive will apply the general data protection principles and rules to the processing of personal data for the purposes of prevention, detection, investigation or prosecution of criminal offences. Consequently, uniform rules for dealing with user data must be set first in Europe before starting negotiations with the US on the matter.

DIFFERENT DATA PROTECTION STANDARDS

It is impossible to address the issue of data flows when data protection regimes in the US and EU are so different. Those large structural differences have a major impact on consumer rights. The US has no federal data protection law and only a few cases have been settled. For example, the Video Privacy Protection Act (codified at 18 U.S.C. § 2710 (2002)) states that nobody may know what movies a user has borrowed. But this is a very limited, narrow piece of legislation. Individual states have other provisions on top, such as the obligation for a website to publish its data protection policy (State of California Department of Justice 2013).

The US relies mostly on self-regulation. In the EU however, privacy is a fundamental right (Charter of Fundamental Rights of the European Union, Article 8, Official Journal of the European Communities, No. C 364/1).

There are two opposing principles at work here: in the EU, data processing is prohibited unless it is expressly allowed, whilst in the US, it is the inverse.

The privacy frameworks recently and independently proposed by the European Commission, the White House and the Federal Trade Commission seek to enhance consumer protection. However, without a common foundation, the privacy regimes on opposite sides of the Atlantic exhibit fundamental differences in approach and substance.

The EU is undergoing a major revision of the data protection framework, while the US administration has pledged to implement – for the first time – a Privacy Bill of Rights. What form that will take and how it would compare to data protection rights in the EU remains unclear. A trade agreement cannot resolve the fact that the two systems are divergent and not interoperable, nor should it be used to circumvent ongoing legislative processes.

PROSPECTS

Chlorinated chicken, data protection, investor state dispute settlement: These are the current central topics when looking at the potential risks of consumer protection of the planned TAFTA | TTIP. At the heart of this lie fundamental questions over whether consumer protection and current legislation systems on both sides of the Atlantic, including the precautionary principle of consumer protection for health, value-oriented and political reasons, will be maintained or whether standards will be weakened.

Furthermore, fundamental ideas of democracy and transparency are in question. It is inconceivable that any final agreement will contribute to long-term social welfare without the participation of civil society. The current negotiation process does not at this stage allow consumer organisations to ensure an outcome which benefits consumers.

Despite efforts from civil society to highlight the necessity for a transparent negotiation process, in practice relatively little has been done to strengthen the consumers' voice within the negotiations.

There is a real risk that longstanding and absolutely crucial consumer safeguards will be declared trade obstacles and consequently lowered. As outlined above, core consumer policy areas concerned include food production, agriculture and data protection. However, other important areas such as financial services, intellectual property rights (IPR), public health, cultural and environmental protection are equally concerned (TACD 2013; BEUC et al. 2013; Forum Umwelt & Entwicklung 2013; Deutscher Kulturrat 2013). This is why an essential demand from the consumer perspective is for the process to be made transparent to ensure European consumer standards are safeguarded or improved. Civil society should not be forced to rely on regular leakages of information.

Formal social stakeholder engagement is needed to highlight the potential risks as well as opportunities for improvement on both sides of the Atlantic. These demands should be considered if negotiators wish for the outcomes to be accepted and not rejected by democratic bodies such as the European Parliament and national governments as happened with the ACTA (Anti-Counterfeiting Trade Agreement) in 2012. Most importantly, society's approval is essential.

With the third round of TAFTA | TTIP negotiations starting on 16 December 2013 in Washington DC, consumer organisations are aware of the need to put further pressure on negotiators and will gather their forces to protect consumer interests. An agreement which dismantles existing EU and US consumer protection will be vigorously opposed.

REFERENCES

BEUC (2013): *Joint Call for the Transatlantic Trade and Investment Partnership (TTIP) Mandate. Available online: http://bit.ly/18q0GUT*

BEUC, FoEE, EPHA, TACD (2013): *Transatlantic Trade and Investment Partnership, Questions & Answers. Available online: http://www.beuc.eu/BEUCNoFrame/Docs/2/IOPJGIJCIEPJJJLFEEKDMIOBPD-W69DB32N9DW3571KM/BEUC/docs/DLS/2013-00756-01-E.pdf*

Bertelsmann Stiftung (2013): *Who Benefits from a free Trade Deal. Available online: http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-DE660E4B-3AA07A46/bst_engl/xcms_bst_dms_38061_38062_2.pdf.*

Berger Jens (2013): *Freihandelsstudie - Scharlatanerie im pseudowissenschaftlichen Gewand,Nachdenkseiten. Available online: http://www.nachdenkseiten.de/?p=17671#more-17671*

BMWi (2013): *Rösler: Handelsabkommen mit den USA eröffnet enorme Chancen. Available online: http://www.bmwi.de/DE/Themen/aussenwirtschaft,did=577566.html*

Centre for Economic Policy Research (2013): *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment, Final Project Report. http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf*

Corporate Europe Observatory - CEO (2013a): *European Commission preparing for EU-US trade talks: 119 meetings with industry lobbyists, "It shows that more than 93% of the Commission's meetings with stakeholders during the preparations of the negotiations were with big business", http://corporateeurope.org/tags/transatlantic-trade-and-investment-partnership.*

Corporate Europe Observatory – CEO (2013b): *Who's scripting the EU-US trade deal?, http://corporateeurope.org/trade/2013/06/who-scripting-eu-us-trade-deal*

Corporate Europe Observatory – CEO (2013c): *Leaked European Commission PR strategy: "Communicating on TTIP": http://corporateeurope.org/trade/2013/11/leaked-european-commission-pr-strategy-communicating-ttip*

Deutscher Kulturrat (2013) http://www.kulturrat.de/pdf/2520.pdf.

EPI (Economic Policy Institute) (2013): *Transatlantic Free Trade Agreement: Job Claims Are Pure Baloney. Available online: http://www.epi.org/blog/transatlantic-free-trade-agreement-job-claims/*

ETUC (2013): *European Parliament Hearing on the Regulatory Dimension of TTIP, Speech given by Judith Kirton-Darling, Confederal Secretary. Available online: http://etuc.org/a/11648*

Euractiv (2013) : *http://www.euractiv.com/specialreport-eu-us-trade-talks/litigation-boom-clause-looks-fut-news-530694*

European Commission, DG TRADE (2013a): *Häufig gestellte Fragen zu TTIP. http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/index_de.htm*

European Commission (2013b), Draft Mandate from 12.06.2013. Available online: *http://blogs.r.ftdata.co.uk/brusselsblog/files/2013/06/TTIP-Rev-2-Mandate.pdf*

European Commission (2013c): *Europe 2020 Annual Growth Survey, http://ec.europa.eu/europe2020/index_en.htm*

European Commission (2012): *A European Consumer Agenda - Boosting Confidence and Growth. Available online: http://ec.europa.eu/consumers/strategy/docs/consumer_agenda_2012_en.pdf*

European Commission (2008): *Über die Außenpolitische Dimension der Lissabon-Strategie für Wachstum und Beschäftigung: Bericht über den Marktzugang und Festlegung des Rahmens für eine wirksamere internationale Zusammenarbeit bei der Regulierung. Available online: http://www.bmwi.de/BMWi/Redaktion/PDF/E/eu-kom-marktzugangsstrategie-lissabon-strategie,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf*

European Commission (2005), Eurobarometer 66: *http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_highlights_en.pdf.*

Forum Umwelt & Entwicklung et al.(2013): *„TTIP" Nein Danke" Transatlantische Partnerschaft geht anders, Positionspapier deutscher Nichtregierungsorganisationen zum geplanten Freihandels- & Investitionsabkommen EU-USA (TTIP), http://www.forumue.de/fileadmin/userupload/AG_Handel/pospap_ttip_fin.pdf.*

Ifo Institut on behalf of the Federal Ministry for Economics and Technology (BMWi)(2013): *„Dimensionen und Auswirkungen eines Freihandelsabkommens zwischen der EU und den USA", http://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/Studien/dimensionen-auswirkungen-freihandelsabkommens-zwischen-eu-usa-summary,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf*

Infas Institut on behalf of vzbv(2013): *„Wie Verbraucher entscheiden", http://www.vzbv.de/cps/rde/xbcr/vzbv/Verbraucher-Entscheiden-Tabellenband-Ergebnisse-Befragung-infas-Verbrauchertag-2013.pdf*

Institute for Agricultural and Trade Policy (2013): *Karen Hansen-Kuhn, Notes from TTIP/TAFTA Stakeholder Presentation July 10, „Food, Emerging Technologies, and the Precautionary Principle"(not published).*

Ministry of Agriculture, Food and Consumer Protection of Lower Saxony (2013): *Freihandelsabkommen nicht zu Lasten des Verbraucherschutzes, http://www.ml.niedersachsen.de/portal/live.php?navigation_id=1810&article_id=117353&_psmand=7*

Moody, Glyn (2013): *http://www.carta.info/65784/glyn-moody-das-ttip-freihandelsabkommen-ist-ein-angriff-auf-das-vorsorgeprinzip/*

Mühlleib, Dr. Friedhelm (2010): *Lebensmittelsicherheit und Prozessqualität von Lebensmitteln in Europa, Was sind unsere Ansprüche? Wie können sie gesichert werden?, Dossier im Auftrag des Verbraucherzentrale Bundesverbandes.*

OECD(2012): *Investor-State-Dispute-Settlement, Public Consultation 16 May – 23 July 2012, http://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf*

Public Citizen, Lori Wallach (2013): *„Trade" Agreements 101; Introduction for Consumer Organizations and Advocates as U.S.-EU TAFTA Negotiations Start (not published). Further information: http://www.citizen.org/Page.aspx?pid=6039.*

State of California Department of Justice (2003): *http://oag.ca.gov/privacy.*

TACD (2013a): *response to Transatlantic Trade and Investment Partnership, http://www.tacd.org/index2.php?option=com_docman&task=doc_view&gid=354&Itemid=40.*

TACD(2013b): *Summary of resolutions on TTIP / TAFTA, http://www.tacd.org/.*

TACD(2013c): *Resolution on food and agricultural products, http://www.consumersinternational.org/media/1402104/tacd-food-resolution-on-the-approach-to-food-and-nutrition-related-issues-in-the-ttip.pdf.*

TACD(2013d): *Resolution on data flows, http://www.consumersinternational.org/media/1396104/tacd-resolution-on-data-flows-in-the-transatlantic-trade-and-investmemt-partnership.pdf.*

TBC (Transatlantic Business Council), (2013): *http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-us/dv/43_tbc_/43_tbc_en.pdf, S.21*

The Greens/EFA (2013):, *MEP, Ska Keller, http://www.ska-keller.de/de/themen/handel-und-entwicklung/politikkohaerenz/neues-online-tool-zeigt-bedrohung-durch-eu-us-handels-deal-ttip.*

The Journal of Consumer Affairs, Special Issue on Product Literacy (2012): *Special Issue Editors: Steven W. Kopp and Anastasia E. Thyroff, vol. 46(2), pp 171-189, Summer 2012.*

US Chamber of Commerce, USTR, European Commission (2013): *Notes from TTIP/TAFTA Stakeholder Presentation July 10, 2013, "Presentation on behalf of the US Chamber of Commerce" (not published).*

US Food and agricultural producers, processors and exporters (2013): *Position letter to Mr Froman, Deputy National Security Advisor for International Economic Affairs (not published).*

vzbv (2013a): *Freihandelsabkommen: Verbraucherschutz nicht aufweichen, http://www.vzbv.de/12494.htm*

vzbv (2013b): *Verbraucherschutz ist keine Verhandlungsmasse, http://www.vzbv.de/11815.htm.*

vzbv(2013c): *Das Transatlantische Freihandels- und Investitionsabkommen, Fragen und Antworten rund um die Verhandlungen zwischen EU und USA, http://www.vzbv.de/ttip.htm.*

vzbv (2013d): *Datenschutz: Bundesregierung muss endlich reagieren, http://www.vzbv.de/12014.htm.*

vzbv (2013e): *PRISM zeigt: Europäische Datenschutz muss gestärkt werden, http://www.vzbv.de/11879.htm.*

vzbv (2005): *No risk – no trade? Verbraucherschutz im globalen Lebensmittelmarkt (not published).*

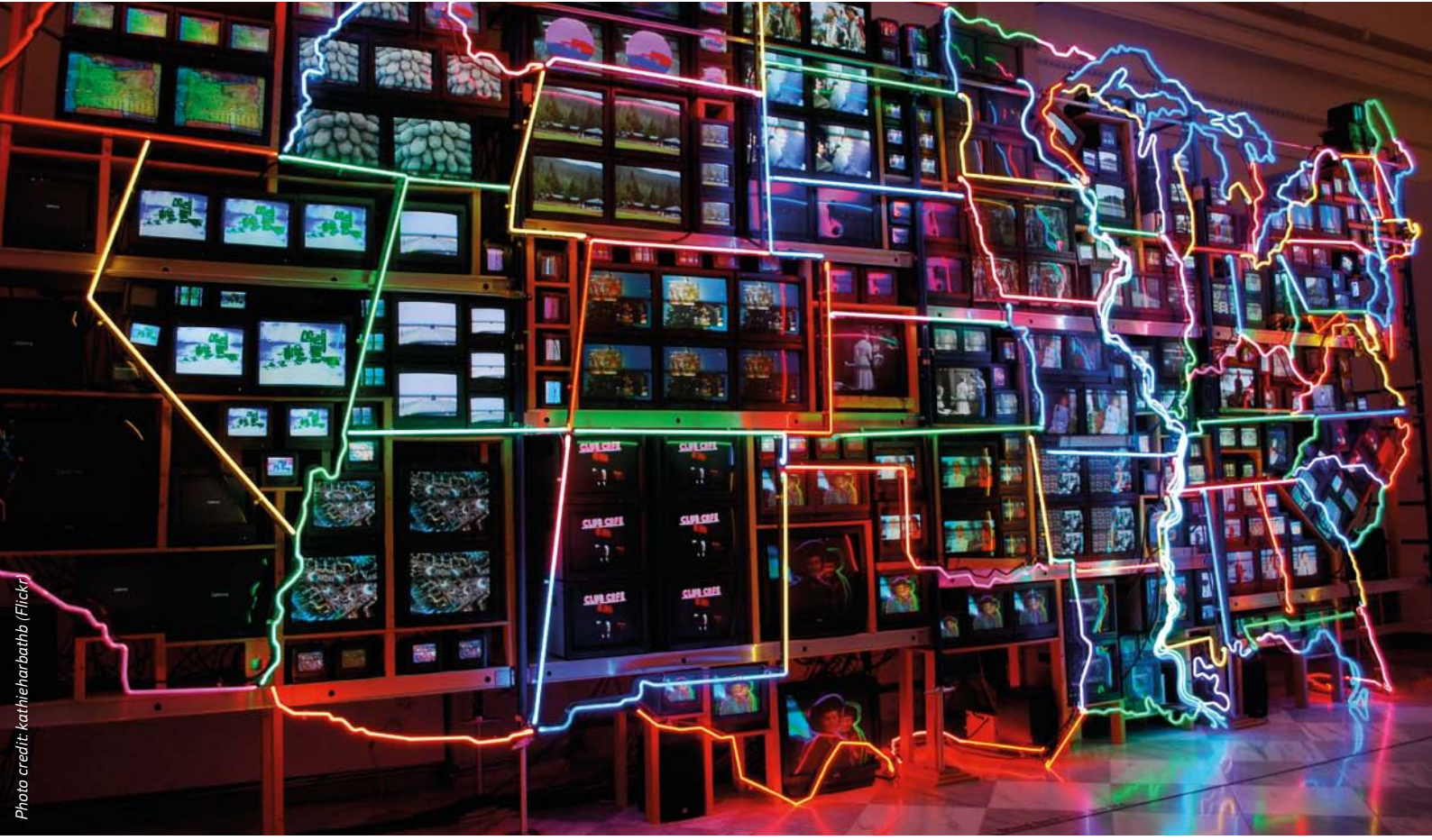


Photo credit: kathieharbathb (Flickr)

COUNTING ON THE AMERICAN PUBLIC TO BE INFORMED ON THE TAFTA | TTIP TALKS?: DON'T HOLD YOUR BREATH

Curd Knüpfer | *Graduate School of North American Studies*
JFKI Department of Political Science
Freie Universität Berlin | curd.knuepfer@fu-berlin.de

Abstract: *This essay discusses American mainstream news coverage of the TAFTA | TTIP negotiation process between the US and the EU in three consecutive steps: First, it tests the hypotheses that coverage will be very limited, both in overall references to the topic, as well as the qualitative content of news reports. An empirical analysis of news content generated by leading US news organizations subsequently reveals that both of these hypotheses can be empirically verified. Secondly, various media biases are presented as possible explanations for this lack in news coverage. Thirdly, the essay offers suggestions for how to increase news media interest and public awareness of the TAFTA | TTIP negotiation process.*

INTRODUCTION

In regard to the American public and US foreign policy two truisms exist, which perhaps come as close to empirical laws as anything political science and communication research has to offer:

1. Americans are not particularly interested in foreign policy – unless American lives or vital national interests are perceived to be at stake; and,

2. Elite perspectives typically shape media representation of foreign events[1]

While the root causes, nuances and implications of these two assumptions were and are hotly debated, and at times even spill over into other disciplines focused on demo-

1 The term "elites" in this case would refer to policy elites and parties directly involved in the negotiation process.

cratic theory, international relations or normative models, it seems relatively safe to assume that they are applicable in the case of the Transatlantic Free Trade Agreement, also known as Transatlantic Trade and Investment Partnership (TAFTA | TTIP) negotiations.2 Americans – and this very much includes American newsrooms and editorial boards – will generally be unlikely to be well-informed about the negotiation process, which can be expected to be both protracted and complex, in addition to international contract negotiations' general propensity for a lack of transparency. From what we know of mainstream media coverage of foreign policy, when an issue does become salient, this can be expected to have been caused by policy elites purposefully calling attention to select aspects of the process (Bennett 1990; Entman 2004; Robinson 2008).

Accordingly, the following set of hypotheses can be derived from these general assumptions:

1. Initially, US public interest in the TAFTA | TTIP talks will be low, which, in the market-liberal press environment of the US means that mainstream media will not be incentivized to cover the topic;

2. When the TAFTA | TTIP does receive press coverage, elite sources will be primarily referenced and mainstream media outlets and journalists will favor elite framing.[3]

This second assumption requires further explanation. Apart from market or public interest factors, a good indicator for predicting spikes in press coverage has usually been dissensus among elites, meaning that when elites disagree on a given subject, news media will become interested in presenting the conflict (Baum & Groeling 2009). As we can expect American elites, such as the two political parties, to generally agree on the terms of this agreement or to have no political incentive in formulating opposing views – as a lack of an informed public equals a lack of constituency – we can expect media coverage to remain not only low, but also fairly one-sided (for instance, it would be reasonable to expect a lot of focus to go into the ever-popular and bi-partisan frames of "the benefits of free-trade" and "job creation").

For the purposes of this essay, these assumptions were put to the test through an analysis of mainstream American media coverage of the TAFTA | TTIP negotiations.

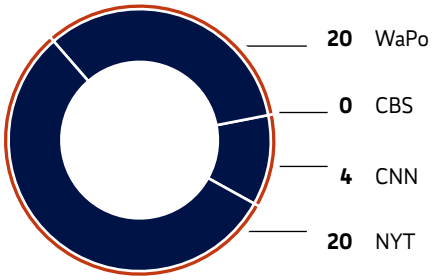


Figure 1: News reports found through LexisNexis 01/01/2013 – 08/15/2013

Figure 2: Perspectives in analyzed sources

MEDIA COVERAGE OF TAFTA | TTIP IN EMPIRICAL ANALYSIS

A combined sample of the cable news network CNN, which traditionally has the greatest focus on international events in comparison with its direct market competitors, the news division of the television network CBS, as well as the two national, daily newspapers The New York Times (NYT) and The Washington Post (WaPo), initially produced 62 results within a timespan of eight and a half months (from January 1 2013 to 15 August 2013).[4] A qualitative analysis of these results revealed that only 36 of the retrieved news reports were actually valid hits constituting unique news reports which mentioned the TAFTA | TTIP negotiations, with the overwhelming majority of the pieces coming from the two papers (NYT = 20; WaPo = 12), CNN only marginally reporting on the topic (=4) and with CBS News not covering the agenda item at all.

As a qualitative analysis revealed, within the 36 relevant news pieces, 20 were directly focused on matters concerning TAFTA | TTIP. The other 16 results only touched the topic marginally; meaning the main focus of the report was a different topic (such as Obama's foreign policy agenda, for example). Out of the 20 pieces that were primarily focused on the negotiations,

2 While discussions on the role of the public in regard to foreign policy mostly focus on what role the public should play (Page 1996; Robinson 2011), due to a shift in journalistic practices over recent years (marketization, fragmentation), discussions within communication scholarship and journalism itself seem to have shifted more towards observing the source of news, rather than the recipients, in regard to their ability to provide adequate levels of information. Several trends are observable in this regard, including the closing of foreign bureaus by leading news organizations (Kumar 2011), as well as the overall focus of foreign news coverage, which is, for the most part, catastrophe and conflict driven (Pew Research Center for the People and the Press 2012).

3 The term "framing" refers to the way a news story is presented: A frame can be understood as an interpretative tool, which promotes a specific viewpoint or perspective.

4 The search was conducted through the LexisNexis Academic database and focused on the terms and connectors: "TAFTA or TTIP or 'free trade agreement' w/p U.S. or US and Europe or E.U. or EU." This source and coding data will be made available to anyone interested. Contact email: curd.knuepfer@fu-berlin.de.

16 dealt with the topic at depth, meaning that more than one viewpoint or aspect was reported on. Furthermore, only six news pieces out of the collected sample featured non-elite sources or viewpoints. This means that actors were quoted or featured that would not be directly involved in the negotiation process, or could be considered as being "non-official." Two of these were members of the industrial sector, both of which w ere strongly in favor of a possible TAFTA | TTIP agreement, one was the Washington Post's editorial board (also in favor of TAFTA | TTIP), and merely three sources were cited as being critical of a possible trade agreement. These consisted of European farmers, European filmmakers and Non-Governmental Organizations (NGOs).

WHAT MIGHT THIS TELL US?

First of all, both of the hypotheses articulated can be tentatively verified.[5] Accordingly, both of the initial general assumptions may be at work simultaneously: public interest in this topic might truly be limited. However, in most of the coverage a one-dimensional, matter-of-fact report was presented. These news stories lack in context, contextualization, and deeper problematization of the topic. This sort of media coverage is therefore unlikely to generate an increased and sustained interest in the TAFTA | TTIP negotiations.

This, in turn, relates directly to the second factor, that is to say, elite sources and framing: While it might seem like a good start to demand more media coverage of the debates in order to spark public interest, a simple increase in media coverage is likely to lead to an increase in reports that lack depth and in framing of the TAFTA | TTIP talks by elites already involved or affiliated with the ongoing negotiations. These sources are, by definition, unlikely to be fundamentally critical of a process they themselves are a part of. Accordingly, we must be aware that publicity is not synonymous with a truly informed or even critical public. As some research on media effects has suggested (Nyhan & Reifler 2010; Nyhan 2012), more interested and nominally informed members of the public might also be more susceptible to misinformation and misperception. Accordingly, a demand for "better" journalism, in this case, would entail both a quantitative as well as a qualitative component.[6]

The latter aspect leads to the, admittedly, thorny question of evaluating content quality and considering what sort of information would be desirable for the public to obtain in order to behave a certain way. The point of this essay, however, is not to come down on one side of a philosophical debate on the question of when and under which circumstances an informed public can best be mobilized. Instead, the point here is to problematize the fact that very concrete and important news items such as the TAFTA | TTIP seem to either not make it onto the news agenda at all or if they do, they will be strongly limited and one-sided.

5 To make these initial findings conclusive, a greater sample of news outlets and more open search terms would be required. The current analysis also lacks in inter-coder reliability. As a first tentative result, however, it serves to illustrate the points addressed within this essay.

6 While quantitative refers to the sheer amount of news reports, qualitative pertains to the content of news reports and their level of analysis, depth, sources quoted, etc.

HOW CAN WE EXPLAIN THE LACK OF MEDIA COVERAGE?

Apart from the quite obvious answer that foreign news is often times not viewed as directly relevant to the personal lives of most US citizens, one might point out that this is only a valid argument if the TAFTA | TTIP is in fact framed as a foreign policy issue with little or no effect on the lives of the average American. This sort of framing would not just make the topic less interesting for media organizations, it would arguably also be inaccurate if not downright false: a trade agreement leading to the world's largest economies merging their trade zones can be expected to have an enormous impact on millions of, if not even all, Americans.

The argument that this news topic is inherently uninteresting to the public and, by extension, the news media can and should therefore be dismissed. Instead, other biases might serve as more convincing explanatory factors.

As Lance Bennett notes in his comprehensive work on the American news media environment (2012), mainstream media generally adhere to four types of biases: the personalization (45), dramatization (46), fragmentation (47), and authority-disorder (47) biases.

While personalization will focus on human interest aspects and individual actors, rather than structural or institutional problems, dramatization will lead to news items framed in terms of conflict, which will draw the focus on specific news events while ignoring others. Fragmentation in the depiction of news events means that news items will be presented in an all too short and isolated form, which will lack context and therefore fail at truly informing news consumers or allowing them to properly assess and classify newly received information. Lastly, the authority-disorder bias leads to a strong focus on chaos and dysfunction, in which authorities either succeed at restoring order or, increasingly, are portrayed as failing to do so.

All of these have to do with the inherent need for forms of narration in mediated communication: i.e., the need for journalists to tell stories and frame events. Bennett (2012) argues that in an increasingly mediated political environment, with ever-faster news cycles and cheaper, more market-oriented production forms, these biases not only shape most forms of news in the US, they may also have various negative effects on democratic processes and public deliberation.

In respect to all of these four categories, the TAFTA | TTIP negotiations so far make for a decidedly unsexy news item to look into. The authority-disorder bias, for example, might come into play as soon as the negotiations are either a success or a failure – by which time it will be too late for the public to become actively involved, and who up to this point may have only received isolated bits of information pertaining to the topic (fragmentation bias). Likewise, the personalization and dramatization biases will likely portray success or failure as being attributable to the legacy of individual policy elites.

Far from any plot or conspiracy to neuter the public sphere and civil society by keeping an unwitting public uninformed

and thereby uninvolved, it is these typical modes of operation, inherent to mainstream journalism, which may be primarily responsible for keeping the TAFTA | TTIP talks off the media's agenda.[7]

Therefore, the bad news is that, as the media system is unlikely to change any time soon, these mechanisms will largely remain in place. The good news, however, is that these biases might be taken into account and possibly even utilized when crafting media strategies geared towards greater public involvement.

HOW COULD ALL OF THIS BE COUNTER-ACTED? SOME CONCLUSIONS AND MEDIA POLICY RECOMMENDATIONS

As demonstrated, it is unlikely that the TAFTA | TTIP talks will receive much media attention. The American public is therefore very likely to not be involved in the negotiation process. From the perspective of democratic theory in an American context, this is not necessarily troublesome, as the powers and responsibilities to make treaties and trade agreements are constitutionally vested with the Congress – i.e., democratically elected officials (the question of democratic legitimacy might arguably therefore be more problematic within the context of the EU). However, it may also be claimed that a lack of public knowledge about the ongoing negotiation process might mean that citizens will not receive an adequate amount of information on the topic in order to inform their electoral choices.[8]

Additionally, when one calls for more involvement of the public and media representation thereof, it may be important to explain in more detail what this might entail: It will be highly unlikely for "the public" as such (i.e., as a political actor) to articulate its views within mainstream media. In respect to mediated debates on this topic, dissensus will need to arise from within elite circles, meaning that either clear policy standpoints must be demanded from potentially critical political representatives or that civil society actors such as critical NGOs or unions must be promoted in order to be presented as "elite opposition" within the media. This in turn might lead to a virtuous cycle of increasing media coverage, which will sustain public awareness, which then raises public interest. This, in turn, will increase the incentive for elites to make their voices heard, which would generate more media coverage, and so on and so forth.

For actors of civil society wishing to lobby or inform the public, it will be important to consider the systematic biases involved in mainstream media coverage of protracted events such as international treaty negotiations. It will be vital to craft public campaigns, which acknowledge and try to counteract these biases. Such campaigns will be well advised to play into the media's known shortcomings. As a guideline, press statements or public protests might therefore aim to:

1. Explain the agenda in terms of domestic policy and possible precedents (such as NAFTA and its consequences, for example),

2. Craft a narrative geared towards the media's personification and dramatization biases;

3. Present an easily recognizable and authoritative affiliation.

While this might not guarantee success (i.e., favorable media coverage of a given perspective), the main goal behind this would be to offer media outlets and journalists a reason to cover a specific viewpoint or frame. Should such campaigns manage to be picked up by mainstream media, policy elites in turn may be forced to engage the narrative, which will generate more media coverage of a "problematized" agenda item and might therefore raise public awareness and interest; thus fostering the foundations of what might be considered critical public debate.

7 This is not to say that there might not in fact be powerful interests at work, which will not have a desire to make the negotiation process transparent. But for our concerns here, this might well be considered to be secondary obstacle.

8 Accordingly, a next research step in this direction might involve campaign rhetoric and political platforms, and the question of whether goals and stances in regard to TAFTA | TTIP are articulated.

REFERENCES

Baum, Matthew A. / Groeling, Tim (2009): *Shot by the Messenger, Partisan Cues and Public Opinion Regarding National Security and War, Political Behavior, 31(2), pp. 157–186.*

Bennett, W. Lance (1990): *Toward a Theory of Press–State Relations in the United States,Journal of Communication 40(2), pp. 103–125.*

Bennett, W. Lance (2012): *News: The Politics of Illusion, 9th ed, Boston: Longman.*

Entman, Robert M. (2004): *Projections of Power: Framing News, Public Opinion, and U.S. Foreign Policy; Chicago: University of Chicago Press.*

Kumar, Priya (2011): *Foreign Correspondents: Who Covers What, AJR.com. American Journalism Review, Dec. 2011. Available online: http://www.ajr.org/article.asp?id=4997.*

Nyhan, Brendan (2012): *Political Knowledge Does Not Guard Against Belief In Conspiracy Theories, YouGov Model Politics, November 5, 2012.*

Nyhan, Brendan / Reifler, Jason (2010): *When Corrections Fail: The Persistence of Political Misperceptions, Political Behavior, 32(2): pp. 303–330.*

Page, Benjamin I. (1996): *Who Deliberates? Mass Media in Modern Democracy, Chicago: University of Chicago Press.*

Pew Research Center for the People and the Press (2012): *Interest in Foreign News Declines, People-Press.org., 6 June 2012. Available online: http://www.people-press.org/files/legacy-pdf/06-06-2012%20NII%20FINAL.pdf.*

Robinson, Piers (2008): *Media and US Foreign Policy, in: Michael Cox, Doug Stokes (eds.): US Foreign Policy, Oxford: University Press, pp. 163–182.*

BUSINESS AS USUAL: ON UNTRANSPARENCY, LACK OF PARTICIPATION, AND UNACCOUNTABILITY IN FREE TRADE NEGOTIATIONS

Miguelángel Verde Garrido | *Graduate School of Global Politics (GSGP)* | *Freie Universität Berlin* | *verde.m@gmail.com* | *@M_Verde*

Abstract: *Much is spoken and written about the liberal nature of global trade and its relation to democracy and freedoms. Trade representatives of the transatlantic free trade agreement (TAFTA | TTIP) have talked about the importance of the negotiations being transparent, accountable, and participative. However, a number of leaked draft texts of other free trade agreements being negotiated by the United States (US) and the European Union (EU) indicate that these promises are mostly empty. A leaked European Commission (EC) communiqué further evidences an attempt to establish a "mainstream media narrative" about the TAFTA | TTIP in order to reduce the "anxiety" of EU citizens and consumers. This article carefully analyzes the manners in which the negotiations of the TAFTA | TTIP are proving to be untransparent, lacking in participation, and unaccountable. The purpose of these analyses is not merely to present evidence that this is actually the case at hand, but also to clarify why transparency, accountability, and participation are crucial to the negotiations on transatlantic trade. Lastly, the article suggests that the TAFTA | TTIP negotiations learn from the World Intellectual Property Organization's (WIPO) Marrakesh Treaty, characterized as an "exemplary exercise of transparency, civil society participation, and multilateral cooperation".*

INITIAL REMARKS

What complicates the discussion on the transatlantic free trade agreement (TAFTA | TTIP) the most is the fact that, because it is intentionally shrouded in secrecy, almost none of the actual content of the negotiations, including – but not limited to – official documents, is available to the general public. This article attempts to solve this complication by focusing on those documents which are available: for example, the study commissioned to the Centre for Economics and Policy Research by the European Commission (EC), public speeches of EU and US decision makers and trade representatives, a memorandum on the EC's communicational strategy towards EU member states (leaked), the publicly available curriculum vitae of US Trade representatives, and the reports and statements of non-governmental organizations (NGOs) and civil society organizations (CSOs).

‚Business as usual' is a turn of phrase that has come to mean either complacency, unconcern for imminent danger, or determination to carry on despite danger (Safire 2008, 90). The manner in which information about the TAFTA | TTIP is offered and in which governments communicate about it to their citizens could be understood as ‚business as usual'. In this sense, consider a passage from the speech that Michael Froman, the US Trade Representative, delivered in Brussels during September 2013, scarcely two months before the second round of the TAFTA | TTIP negotiations. Froman states:

> Our devotion to democratic ideals serves as a beacon for the world to follow. And our shared commitment to free and open markets is a driving force for economic growth, innovation and jobs, not just in Europe and the United States, but across the globe. […] But we know that we can do more. We can do more for economic growth. We can do more to create jobs. We can do more to strengthen rules-based trade that supports the entire global trading system. (Froman 2013)

Froman continued his speech by explaining that because of the relation between "democratic ideals" and "free and open markets" and the areas of "economic growth, employment, and rules-based trade" is "precisely why we launched the Transatlantic Trade and Investment Partnership, or T-TIP […] [t]ogether with the Trans-Pacific Partnership, or TPP" (ibid.). Certain principles and processes, Froman added, could contribute significantly to the intended outcomes of the transatlantic ‚partnership'. To be clear, he indicated three:

Transparency: Providing adequate advance notice of specific regulatory measures, not just preliminary, general papers on the subject, but the actual rule being proposed

- Participation: Providing meaningful opportunities for input from a broad range of stakeholders, public and private, foreign and domestic.

- Accountability: Providing responses to that input, a rationale for the final regulatory decision, based on evidence, science, including an impact analysis of the proposed regulation. (ibid.)

Months after Froman's speech in Brussels, transparency, accountability, and participation continue to be empty promises concerning TAFTA | TTIP. Consider the fact that the only draft text from the TPP available so far is the intellectual property rights chapter that was leaked through WikiLeaks on 13th November 2013. What transparency exists when only a leaked draft text „contains annotations detailing each country's positions on the issues under negotiation" (WikiLeaks 2013)? What accountability is there when „particular measures proposed include supranational litigation tribunals to which sovereign national courts are expected to defer, but which have no human rights safeguards" (ibid.)? And, what participation is there when the TPP is considered almost concluded, but consultation with national parliaments and with civil society is yet to occur (ibid.)?

In the sections that follow, we will briefly reconstruct the way in which democratic ideals are made vulnerable by the manner in which the TAFTA | TTIP is being negotiated and show why. Were there to be transparency, accountability, and participation, in the negotiation processes, they would contribute significantly to a transatlantic partnership.

TRANSPARENCY

Corporate Europe Observatory (CEO) is a European NGO that exposes the power of corporate lobbying in the EU. On 25th November, 2013, CEO leaked a version of the EC's communications strategy. The document refers to an informal meeting with member states to be held in Brussels on 22nd November, 2013, convened in order to explore „possibilities for greater cooperation and coordination of respective communication activities around TTIP". The document emphasizes the importance of defining „at this early state in the negotiations, the terms of the debate". Among others, the EC's strategy involves „monitoring of public debate, producing targeted communications material and deploying the material through all channels including online and social media" (CEO 2013).

The EC notes with concern the „anxiety about the potential impact on the European social model" of TAFTA | TTIP. In that sense, the EC considers that the negotiating process "needs to be transparent enough to reduce fears and avoid a mushrooming of doubts", mostly because „negotiators have a greater need for stakeholder input during the process to make sure that proposed solutions to difficult issues are effective." However, the EC also insists that „negotiations demand a degree of confidentiality if they are to succeed" (ibid.).

So far, the EC considers that it has proven able to „produce and disseminate communication materials on the narrative of the negotiations as a whole", for example, „a detailed defence of the economic analysis behind the TTIP and a detailed rebuttal document on why the agreement is not ACTA." Furthermore, the EC considers that is communicational approach has allowed it to „keep a handle on the mainstream media narrative on the negotiations", but is also realistic about the fact that „there is much more work to be done" (ibid.).

The leaked TPP draft text serves to disprove the „detailed rebuttal" of why the TAFTA | TTIP is not the Anti-Counterfeiting Trade Agreement (ACTA). La Quadrature Du Net, a French digital activism group, has also leaked and analyzed a draft text of the Comprehensive Economic Treaty Agreement (CETA), the FTA negotiated between the EU and Canada. Their side by side analysis of the leaked draft text of the CETA with the draft text of the ACTA evidences that „the worst repressive bits of ACTA were copy/pasted into CETA" (La Quadrature Du Net 2013). Hence, so far, leaked draft texts of FTAs negotiated by the US and the EU show that the intellectual property provisions of ACTA continue to be desirable in international treaties.

Similarly, the „detailed defence of the economic analysis" behind the TAFTA | TTIP can be as easily disproven. The EC explains that the launch of the TAFTA | TTIP negotiations was built upon documents such as „the report of a High-Level Working Group on Jobs and Growth" (HLWG) and „an in-depth independent study on the potential effects" of the agreement (EC 2013). In this section we will examine the study commissioned by the EC to the Centre for Economic Policy Research (CEPR), while we will examine the HLWG report in the following section.

The CEPR can be referred to as an independent study inasmuch as it is not an EU institution per se. However, the CEPR website states their core income is provided by their corporate members, which not only includes firms such as „investment banks, consultancies, asset managers and government agencies", but also "all European Union Central Banks" (CEPR 2013a). To be clear, two thirds of their membership base is currently made up by the financial sector (idem). "Platinum membership", explains the CEPR website, is:

> Specifically designed for companies whose business success depends upon being at the forefront of Europe's economic policy formulation and who wish to have an active influence on CEPR's research and policy direction (CEPR 2013b).

Platinum members also receive an invitation for one of their senior representatives to sit on CEPR's Executive Committee (CEPR 2013b). These clarifications should not be understood as an accusation that CEPR reports are biased per se, but as an elucidation as to why the term „independent study" is misleading, more so when we consider that the CEPR's backers include the EU Central Banks.

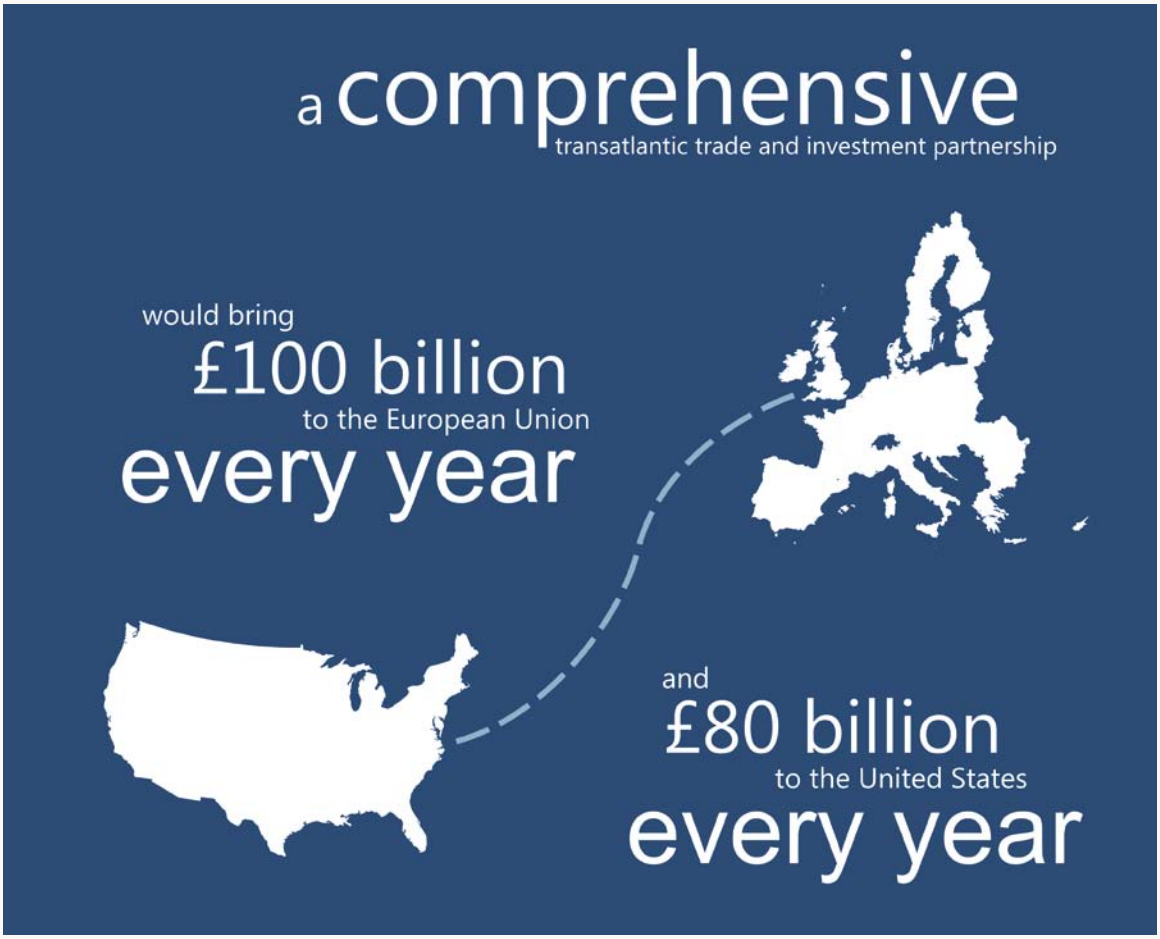


Figure 1

Figure 2

Equally misleading is the way in which the EC's Directorate-General for Trade (DG Trade) and EU member state governments disseminate information regarding the CEPR's estimations for TAFTA | TTIP. For example, the British Embassy in Washington D.C. used its Twitter account, @UKinUSA, to narrate the TAFTA | TTIP (see figure 1) as: „A comprehensive transatlantic trade and investment partnership [that] would bring (pounds) 100 billion to the European Union every year and (pounds) 80 billion to the United States every year" (British Embassy in Washington 2013).

The CEPR report, which calculated changes in GDP for the year 2027, (CEPR 2013, 46), states: „the estimated impact on GDP for the EU and US range between 0.2% and 0.5%, for the less ambitious and ambitious scenarios respectively" (CEPR 2013, 45). The image above, hence, glosses over the fact that the estimated impact is calculated over the next 13 years for best and worse case scenarios, as well as over the fact that any amount, from €68.274 to €119.212 billion for the EU, and from €49.543 to €94.904 billion for the US, could be equally stated. The numbers, the reader will observe, could differ in the tens of billions of euros and, regardless of the amount that would be stated, continue to be argued as a reasonable interpretation of the study's estimations (ibid., 45–46).

Constrained by a narrative that is based upon promises of more wealth and more employment, the UK Embassy is sufficiently savvy to not disseminate information in the CEPR study that refers to the estimations for the contraction of a number of employment sectors (see figure 2). To be clear, although the study indicates that in the EU, the motor vehicle sector could expand employment by 1.28% for skilled labor, and 1.27% for less skilled labor, it also states that there could be a significant contraction in the electrical machinery and metals sectors. In the US, on the other hand, it could be the already struggling motor vehicle sector that contracts, while the metals and metal products sector could expand (ibid., 72). Furthermore, in the EU, the more skilled labor in some parts of the primary sector, other transport equipment than motor vehicles, business services, communications, and personal services would also contract – even in the best case scenario (ibid., 73). In the US, there would also be contractions, even for the best case scenario, in agriculture, forestry and fisheries, other parts of the primary sector, electrical and other machinery, wood and paper products, air transport, finance, insurance, business services, communications, personal services, and other services (ibid., 74).

Untransparency refers, thus, to communicational strategies that attempt to establish only a narrative of growth and employment, easily dismissed refutations to concerns over ACTA and socio-economic implications of the agreement, the questionable independence of studies, and the choice to silence information that estimates negative impact on the transatlantic community's citizens.

ACCOUNTABILITY

We have shown the lack of transparency with which the transatlantic partners are negotiating the agreement. This, in turn, calls into question the accountability of representatives from both sides of the Atlantic. For this sense, and as mentioned in the preceding section, we will now examine the HLWG. DG Trade explains the HLWG was established in November 2011 to "identify and assess options for strengthening the US-EU trade and investment relationship, especially in those areas with the highest potential to support jobs and growth" (DG Trade 2011). European Commissioner for Trade Karel De Gucht and the then US Trade Representative Ron Kirk co-chaired the HLWG, which – in its six-page final report – recommended to US and EU decision makers that they launch "negotiations on a comprehensive, ambitious agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules" (HLWG 2013).

CEO researcher and campaigner Pascoe Sabido wrote to the DG Trade in March 2013 in order to publicly request information about the members of the HLWG. The DG Trade replied that it could not do so because "there is no full membership list of High Level Working Group on Jobs and Growth". Sabido continued his query by asking for a list of the authors of the reports presented by the HLGW, to which the DG Trade replied with an already known fact: the EU Trade Commissioner and the US Trade Representative represented the reports that were coordinated, on the EU side, by Jean-Luc Demarty, Director General for Trade. Further requests, based on the EC's Code of Good Administrative Behaviour only provided an additional name, that of Miriam Sapiro, Deputy US Trade Representative. The DG Trade's final statement, signed by Jean-Luc Demarty himself, explained that no further information would be provided, since they had "fully respected" their duties according to the EC's Code. The rationale behind the explanation is that the HLWG was not "an expert group", but rather a "joint working group", and that "its role was not to provide advice and expertise" to the EC (Sabido & DG Trade 2013; Demarty 2013).

Obvious questions are: how are the identification and assessment of options for "strengthening the US-EU trade and investment relationship" not considered advice or expertise? Why was an expert group not established to determine the viability and desirability of such a colossal undertaking? Did only De Gucht, Kirk, Demarty and Sapiro constitute the joint working group?

Besides the accountability of ad hoc groups, there is that of trade negotiators themselves to consider. Timothy Lee (2013) wrote in the Washington Post that the leaked TPP draft text shows that US trade negotiators have a bias "toward expanding the rights of copyright and patent holders". There are two reasons for this. The first is that a dozen US trade officials, at least, have left the Office of the United States Trade Representative (USTR) for pharmaceutical, media entertainment, and technology corporations since the year 2000. Critics argue that the close ties between USTR officials and the corporations mentioned above, and that provide them with 'revolving doors', have a corrupting influence on the agency. The second is that USTR has always worked closely with US exporters, attempting to remove barriers so that US goods can be sold abroad. However, this becomes a problem when copyright and patent law lead exporter's interests "run directly counter to those of American consumers" (ibid.).

Furthermore, consider that USTR has established 16 trade advisory committees (ITAC) to provide advice about complex issues that come up during negotiations. This means that the industry representatives within the ITACs have information on US negotiating positions that is not available to the general public (ibid.). Since neither public interest groups nor independent experts can access the proposed legislative language, industry groups advice make the provision of interpretations of US law that favor their employer's interest – which can lead USTR to export warped interpretations of US law at a global level. Lee clarifies that neither is USTR well connected to the portions of the US technology sector that favor less extensive and restrictive copyright and patent protections (since their connections are with older, more established companies, so stronger legal protections are favored) nor are the latter included within the ITACs in the same numbers as USTR's older connections. Unfortunately, concludes Lee, „the interests of specific exporting industries are not necessarily the same as the interest of the US economy as a whole" (ibid.). The consequences of addressing the demands of a specific sector of US industries, as the TPP exemplifies, are clear when carefully analyzed.

Obligatory questions are: why would US trade negotiators deal with intellectual property and copyright in the TAFTA | TTIP differently from the manner in which they do in TPP, especially if they consider the manner in which the EU trade negotiators has done so in the CETA? Why are the legal interpretations of industry representatives considered more important than those of CSOs and NGOs? Who is to be considered responsible for the consequences of an agreement that will affect almost 820 million transatlantic citizens and consumers when neither who offers what recommendations nor with what interests those recommendations comply remains to be disclosed?

PARTICIPATION AND CONCLUDING REMARKS

Governmental lack of accountability and untransparency make more difficult the attempts of civil societies to participate in any kind of public debate or multi-stakeholder policy- and decision-making process. However, in vitiated processes that are closed to the public, other stakeholders' voices and interests may more easily be heard and considered.

Danny Hakim (2013) wrote in The New York Times about the newspaper obtaining EC internal documents that evidenced how European trade negotiators had already requested and allowed corporate lobby groups to set the agenda for the TAFTA | TTIP in October 2012, almost nine months before the negotiations' officially started in July 2013.

The documents indicated that the business community sought „an active role in writing new regulations" and wanted to propose „a regulatory oversight group that would have the authority to continue to ensure that any new or existing trans-Atlantic rules are compatible, even after trade negotiations formally conclude" (ibid.). It comes as no surprise that the proposal also recommended that „business and other stakeholders would be able to propose regulatory changes to the council". European trade officials approved, explains Hakim, of regulators on both sides of the Atlantic consulting each other when they develop significant new regulations on either side of the Atlantic, so as to avoid future regulatory divergence. Hakim concludes and reports that, despite the approval of these above-mentioned proposals, EU officials did not warm up „to the idea of industry and other stakeholders becoming involved in the process of writing regulations from the beginning", for the reason that „additional explanations why the existing systems do not suffice" were required (ibid.).

No matter the fact that the EU and the US constantly involve corporate stakeholders in different aspects of the negotiations, the participation of their civil societies is glossed over with the explanation that, in Froman's words, the discussion about standards and regulations is "mind-blowingly technical" (Froman 2013). However, it is misleading to frame civil society as incapable of offering sophisticated and technical solutions on matters related to trade – or any other matters – and that are of governmental and corporate concern.

Sean Flynn (2013), Associate Director of American University Washington College of Law, writes about the letter that over 80 US university professors and experts on intellectual property law and related disciplines addressed to US President Barack Obama about the leaked TPP intellectual property chapter. The professors, despite having a plurality of opinions about the TPP, shared the concern that the agreement is negotiated in a manner "even more secretive than ACTA, which is amplifying public distrust and creating an environment conducive to an unbalanced and indefensible final product" (ibid.). The manner in which the negotiations occur, they reason, "is inconsistent with the with core United States democratic values" and "should be changed" (ibid.). The exact same could be written about the TAFTA | TTIP negotiations. The professors also offered specific suggestions as to the way in which the negotiations could be done in a democratic manner, namely, by offering the US public "the same information given to corporate advisors through the [Industry Trade Advisory Committees] process." An example of transparency and participation is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, the last successful international intellectual property agreement, which was negotiated through a highly participatory and inclusive process, and which the professors reminded the president was one "where all proposals for text for the agreement were shared openly with all stakeholders" (ibid.).

The Trans-Atlantic Consumer Dialogue (TACD), a forum of US and EU consumer agencies, participated in the World Intellectual Property Organization's (WIPO) Diplomatic Conference for the Marrakesh Treaty. The Diplomatic Conference was not only open to governmental delegations, but also to NGOS and inter-governmental organizations (IGO), besides a number of other invited participants (WIPO 2013). The TACD (2013), in their closing address, stated that the treaty had set a constructive precedent with its "exemplary exercise of transparency, civil society participation, and multilateral cooperation". Similarly, its "democratic process, application of human rights, and the extension of new user rights with regards to access to knowledge" were to be acknowledged.

Lastly, the TACD indicated that both the TAFTA | TTIP and TPP "would greatly benefit from the level of transparency, democratic participation and multilateralism that [*they*] enjoyed in this WIPO process" (TACD 2013).

The various matters that were examined throughout this article attest that there are significant efforts to be made so that free and open markets can be established by means of processes that are democratic, that is to say, transparent, accountable, and participative. There is nothing free about dubious proposals of economic growth, employment, and rules-based trade, especially when they are thrust upon citizens and consumers without their consent. That would simply be business as usual.

REFERENCES

British Embassy in Washington (2013): *TTIP Offers a Once in a Generation Opportunity. Available online: http://visual.ly/ttip-offers-once-generation-opportunity*

Centre for Economic Policy Research (CEPR) (2013): *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment. Available online: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf*

Centre for Economic Policy Research (CEPR) (2013a): *About CEPR. Available online: http://www.cepr.org/about-cepr*

Centre for Economic Policy Research (CEPR) (2013b): *Corporate Membership. Available online: http://www.cepr.org/content/corporate-membership*

Corporate Europe Observatory (CEO) (2013a): *Who's Scripting the EU-US Trade Deal?, 17 June 2013. Available online: http://corporateeurope.org/trade/2013/06/who-scripting-eu-us-trade-deal*

Corporate Europe Observatory (CEO) (2013b): *Leaked European Commission PR Strategy: Communicating on TTIP, 25 November 2013. Available online: http://corporateeurope.org/trade/2013/11/leaked-european-commission-pr-strategy-communicating-ttip*

Demarty, J.-L. (2013): *Your Application for Access to Documents - Ref GestDem No 1192/2013, 27 May 2013. Available online: http://www.asktheeu.org/en/request/410/response/1532/attach/4/Reply%20letter%20Pascoe%20Sabido%20signed.PDF.pdf*

Directorate-General for Trade (DG Trade) (2011): *EU and US Boost Economic Partnership, 29 November 2013. Available online: http://trade.ec.europa.eu/doclib/press/index.cfm?id=757*

European Commission (EC) (2013): *Countries and Regions: United States, 19 November 2013. Available online: http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/*

Froman, M. (2013): *Remarks by U.S. Trade Representative Michael Froman on the United States, the European Union, and the Transatlantic Trade and Investment Partnership, United States of America State Department's Bureau of International Information Programs (IIP), 30 September 2013. Available online http://iipdigital.usembassy.gov/st/english/texttrans/2013/10/20131001283902.html*

Flynn, S. (2013) Law Professors Call for Public Process for Trans Pacific Partnership (TPP) Intellectual Property Chapter, InfoJustice, 14 November 2013. Available online: *http://infojustice.org/archives/31217*

Hakim, D. (2013): *European Officials Consulted Business Leaders on Trade Pact, The New York Times, 8 October 2013. Available online: http://www.nytimes.com/2013/10/09/business/international/european-officials-consulted-business-leaders-on-trade-pact-with-us.html?pagewanted=all*

High Level Working Group on Jobs and Growth (HLWG) (2013): *Final Report, 11 February 2013. Available online: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf*

La Quadrature Du Net (2013): *ACTA, CETA, TAFTA: Is De Gucht Again Trying to Impose Anti-democratic Repression?, 7 February 2013. Available online: https://http://www.laquadrature.net/en/acta-ceta-tafta-is-de-gucht-again-trying-to-impose-anti-democratic-repression*

Lee, T. (2013): *Here's Why Obama Trade Negotiators Push the Interests of Hollywood and Drug Companies, Washington Post, 26 November 2013. Available online: http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/26/heres-why-obama-trade-negotiators-push-the-interests-of-hollywood-and-drug-companies/*

Public Correspondence between Sabido, P. and Directorate-General for Trade (Sabido & DG Trade) (2013): *High Level Working Group on Jobs and Growth - A Freedom of Information request to Trade (TRADE), 4 March - 27 May 2013. Available online: http://www.asktheeu.org/en/request/high_level_working_group_on_jobs*

Safire, W. (2008): *Safire's Political Dictionary, Oxford University Press: New York. Available online: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf*

Trans-Atlantic Consumer Dialogue (TACD) (2013): *TACD Closing Statement at WIPO Diplomatic Conference for Treaty of Visually Impaired, 27 June 2013. Available online: http://tacd-ip.org/archives/1041*

WikiLeaks (2013): *Secret Trans-Pacific Partnership Agreement (TPP). Available online: https://wikileaks.org/tpp/pressrelease.html*

World Intellectual Property Organization (WIPO) (2013): *Background to the Diplomatic Conference. Available online: http://www.wipo.int/dc2013/en/about.html*

TAFTA | TTIP AND TPP IN COMPARISON: SIMILAR INTERESTS, UNKNOWN OUTCOMES

Ulli Jamitzky | *University of Münster* | *ullijamitzky@gmail.com*

Abstract: *2013 is a critical year for global trade policy. The ongoing trend of proliferating bilateral and multilateral trade agreements has entered into a new stage with Japan's decision to join the Trans-Pacific Partnership (TPP) negotiations and the launch of negotiations between the EU and the US to reach a comprehensive trade and investment agreement (TAFTA | TTIP). On top of that, the EU and Japan also started negotiating a bilateral trade agreement in April 2013. Due to their sheer size, these trade blocs have the potential for significant economic and geopolitical implications. However, the negotiations have been surrounded by a lack of transparency, making it difficult to access their effects. In order to understand the issues that are currently under negotiation, this paper aims at providing a comparative perspective on the TAFTA | TTIP and the TPP as well as the EU-Japan agreement. Such a comparative perspective will help to pinpoint recurring patterns and interests in the trade policy of the current three leading trade powers. By carving out similarities and overlapping developments between these negotiations, the paper ventures to identify the direction that global trade policy is heading to.*

INTRODUCTION

Since US President Barack Obama announced that the US would start negotiations with the EU to reach a comprehensive Transatlantic Trade and Investment Partnership (TTIP), also known as Transatlantic Free Trade Area (TAFTA), in his State of the Union address in February 2013, the TAFTA | TTIP is the talk of the town for anyone concerned with global trade policy. Covering around 30% of global trade, the TAFTA | TTIP would become the world's largest free trade area. In addition to lowering common trade barriers such as tariffs, the TAFTA | TTIP also aims at establishing new rules, standards and procedures in manifold areas that have not been covered by former multilateral trade liberalization rounds of the WTO. It is truly an unprecedented mammoth task that deserves the full attention of politicians, scientists, journalists, and last but not least, the general public.

However, the TAFTA | TTIP is not the only bilateral trade agreement with global dimensions that is currently under way. The negotiations on the Trans-Pacific Partnership (TPP), which started already in 2006, reached a new milestone when Japan, after a long time of hesitation, decided to join the ongoing talks earlier this year and already took part in the 18th round held in Malaysia in late July (VerWey 2013). The TPP has been dubbed the first 21st Century trade agreement due to its ambitious trade liberalization agenda and is seen as the centerpiece of the US trade strategy (Barfield 2011). However, only now with Japan onboard does the TPP have the potential to become the new standard for bilateral and plurilateral trade agreements around the globe. Both, the TAFTA | TTIP and the TPP, are at the forefront of global trade policy and are likely to determine the future of global trading patterns and rules not only for the participating countries, but also for the rest of the world as will be demonstrated throughout this paper.

The article's argumentation is based on the belief that in order to understand a single agreement – whether the TPP or the TAFTA | TTIP – it is indispensable to analyze and compare both agreements. Countries are usually engaged in several negotiations at the same time and progress in one negotiation might have important ramifications for other trade talks as well. Preferential treatment and concessions given to one negotiation partner have to be extended to others. This can easily result in what economists call 'a race to the bottom', where mutual peer pressure leads to a situation where everybody is worse off afterwards. Weaker environmental laws and deteriorating labor rights are probably the most typical examples of such a downward spiral. Matthew Rimmer (2013) comes to the following conclusion regarding the concurrence of TPP and TAFTA | TTIP: "Both treaties will be mutually reinforcing. The United States Trade Representative will use the twin treaties to play participants and regions off against one another, and push for higher standards and obligations". This statement clearly shows the need to consider both agreements in a comparative perspective to pinpoint similar patterns and interests as well as differences in the trade policies of the US, the EU and Japan.

TPP AND TAFTA | TTIP – TWIN AGREEMENTS WITH SIMILAR OUTLINES

The governments of the US and Japan as well as the European Commission have been promoting bilateral and plurilateral trade agreements for a mix of political, strategic and economic reasons and motives. Clyde Prestowitz (2013), a former adviser to the Reagan and Clinton administration, argues that this is also the case with the TPP and the TAFTA | TTIP: "As with most trade deals, both the TPP and TAFTA have geopolitical as well as economic significance". However, the similarities between the TPP and the TAFTA | TTIP are particularly high when looking at the economic dimension of the agreements. Like most other trade agreements, they both aim at abolishing common tariffs to increase the trade volume between the partner countries. But they also aim at reducing so-called non-tariff barriers (NTB) to trade such as technical barriers, sanitary measures, or in general, red tape. And even though many industries around the globe, for example the Japanese agricultural sector, are still highly protected by traditional import tariffs, NTBs are seen by many trade experts as the real obstacle to freer global trade (WTO 2012). Harmonization and mutual recognition of standards, procedures and regulations across industries have been identified as the most promising method to further facilitate trade relations (WTO 2012, 150). Therefore, it is no surprise that the further reduction of NTBs is currently at the core of these major negotiations (Sunesen et al. 2010).

Another outstanding similarity between these trade talks is their lack of transparency and the secrecy that has surrounded each round of negotiations so far. News coverage on the ongoing TPP negotiations has been particularly limited. Unfortunately journalists and scientists have been very slow to pick up the obvious overlap that exists between both agreements and investigate this matter more deeply. The TAFTA | TTIP itself however has drawn some more attention as a result of the National Security Agency (NSA) surveillance scandal and the resulting fear that an agreement dominated by US business interests would further increase the grip of the US government on the internet. The fact that the EU started negotiations with Japan a few months earlier on the other hand went mostly unnoticed (Pourzitakis 2013). This underlines the challenge for ordinary citizens to stay informed about these ongoing negotiations.

But as mentioned earlier, trade agreements are also driven by political interests and it would be misleading to explain such major trade projects mainly from an economic perspective. Geopolitical and strategic motives usually constitute a crucial impetus as well. The TPP for example is the most important trade policy project of the current US administration and at the same time the cornerstone of Obama's pivot towards Asia, making it therefore highly political and symbolic. In a similar manner, Japan has expressed its desire to forge closer political relations with its Asian neighbors and the TPP is seen as a perfect platform to achieve this goal (Stein & Vassilev 2013). However, these kinds of free trade agreements are not only about building or improving ties between negotiation partners. By nature, all bilateral and plurilateral agreements are discriminatory towards non-signatories. The important thing to note here is that their discriminatory economic effects are often accompanied by political discrimination. What does this mean with regard to the TPP and the TAFTA | TTIP? The political and strategic motives behind each trade agreement are intertwined with the national interests of each state, as well as its broader foreign policy strategy, and naturally, these national interests are more diverse than sole economic benefits. The administration of George W. Bush (2001 – 2009), for example, rewarded political allies in their 'war against terror' by quickly signing bilateral free trade agreements with them. Japan's agreements so far also seem to be more symbolic than result-oriented, as most of them were concluded with smaller economies (Katsumata 2010).

Photo credit: Caelie_Frampton(Flickr)

There is, however, one noticeable aspect in both the TPP and the TAFTA | TTIP that might indicate a significant shared geopolitical goal of the US and EU. China, despite being the second largest economy of the world and the biggest trade partner of Japan and the second biggest trade partner of the EU as well as the US, is not included in the two most influential global trade talks.[1] So what are the reasons behind China's exclusion? Is this a deliberate move of the old trading powers to protect their challenged position at the top? Or is this just the normal procedure in which a group of advanced and open economies that share a similar understanding of the workings of trade policy get together and try to push for further liberalization? Against the background of the WTO's dysfunctional Doha Round and low economic growth rates, this seems like a convincing argument, particularly when considering that China only joined the WTO in 2001 and discussions about its treatment of state-owned enterprises among other trade issues continue to complicate matters (The Economist 2012). Politicians and

1 China, however, is part of the ASEAN+3 talks and therefore at least indirectly engaged with Japan on issues of trade policy. The ASEAN+3 negotiations are still at a very early stage and its liberalization agenda is not as ambitious as the TPP.

trade bureaucrats in the West on the other hand are looking for quick progress in the ongoing negotiations and, because Japan's participation in the TPP will likely slow down further talks from now, are not too keen to invite another 'difficult' negotiation partner (Muscat 2013).

However, it could also be argued that the TPP and TAFTA | TTIP negotiations provide the EU and the US with a limited window of opportunity in which they can advance and establish their positions in trade policy as global standards before China becomes the dominating actor in global trade. Both the EU and the US want to set up certain industry, labor and environmental standards, hoping that other countries will follow those in order to stay competitive in the global market. This first-mover advantage of the US and the EU would force China to comply with their rules. Because even though China is rapidly catching up to the US, the EU and Japan in terms of 'hard' economic indicators, such as GDP growth and trade volume, its capability as a rule setter in global trade is still lagging behind. And against this background "America is trying to design a trade regime which China will eventually have to join – rather than getting to set its own rules as its clout increases" (The Economist 2013).

CONCLUSION

The landscape of global trade policy is changing rapidly. With the TPP and the TAFTA | TTIP there are two trade projects under way that are unprecedented in their ambitious and comprehensive trade liberalization agenda. This paper showed that TPP and TAFTA | TTIP, as well as the agreement between the EU and Japan, share similar economic goals, but tellingly their most significant similarity is their choice of negotiation partners, which is clearly politically motivated: deliberately or not, they exclude the world's second largest economy, China, from their trade strategy. But China is not only absent from the current negotiations: many of the provisions and rules that are part of the tentative agreements will make it very difficult, if not impossible, for China to join in the near future. The next negotiation rounds will show if this strategy will be successful in counterbalancing China's growing influence in trade policy or even pressure China to adopt certain rules and provisions promoted by the US and the EU.

However, these agreements actually all share one bad habit, which they even have in common with China's agreements: their being negotiated mainly in secrecy.

REFERENCES

Barfield, C. (2011): *The TPP: A Model for 21st Century Trade Agreements?, East Asia Forum. Available online: http://www.eastasiaforum.org/2011/07/25/the-tpp-a-model-for-21st-century-trade-agreements/*

Katsumata, N. (2010): *Political Determination and Promoting EPAs. Keidanren Economic Trend. Available online: http://www.keidanren.or.jp/english/journal/201011.html*

Muscat, S. (2013): *Free Trade with Asia and the EU – American Objectives and Positions, Friedrich Ebert Stiftung. Available online: http://library.fes.de/pdf-files/id/10058.pdf*

Pourzitakis, S. (2013): *EU-Japan FTA Negotiations: Ready for Prime Time, The Diplomat. Available online: http://thediplomat.com/pacific-money/2013/08/19/eu-japan-fta-negotiations-ready-for-prime-time/*

Prestowitz, C. (2013): *A Tale of Two Trade Deals: Never mind Asia, Time to Pivot to Europe, Washington Monthly. Available online: http://www.washingtonmonthly.com/magazine/march_april_2013/features/a_tale_of_two_trade_deals043317.php?page=all*

Rimmer, M. (2013): *The two Treaties: Obama, Trade, and the State of the Union, The Conversation. Available online: http://theconversation.com/the-two-treaties-obama-trade-and-the-state-of-the-union-12197*

Stein, A. / Vassilev, M. (2013): *The TPP, Abenomics and America's Asia Pivot, The Diplomat. Available online: http://thediplomat.com/2013/08/06/the-tpp-abenomics-and-americas-asia-pivot/*

Sunesen, E. R. / Francois, J. F. / Thelle, M. (2010): *Assessment of Barriers to Trade and Investment between the EU and Japan, Copenhagen Economics.*

The Economist (2013): *Trade, Partnership and Politics. With Negotiations Secret, Optimism about a Path-breaking Trade Deal is Hard to Share, 24 August 2013.*

The Economist (2012): *State-owned Enterprises: The State Advances, 6 October 2012.*

VerWey, J. (2013): *Japan Faces Hurdles in Next Round of TPP Talks, The Diplomat. Available online: http://thediplomat.com/pacific-money/2013/08/22/japan-faces-hurdles-in-next-round-of-tpp-talks/*

World Trade Organization (WTO) (2012): *World Trade Report 2012: Trade and Public Policies: A closer Look at Non-tariff Measures in the 21st Century.*

KEYWORDS: REGULATORY APPROACHES; DCFTA; THIRD STATES; TRADE NEGOTIATIONS

DIFFERENCES IN REGULATORY APPROACH BETWEEN THE EU AND THE US: TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) AND ITS IMPACT ON TRADE WITH THIRD COUNTRIES

Tamara Kovziridze | *Free University of Tbilisi, Georgia*
Former Coordinator and Negotiator of EU-Georgia DCFTA in 2009-2012 | t.kovziridze@freeuni.edu.ge

Abstract: *Most writing on TAFTA | TTIP has focused on its impact on the two involved economies, the EU and the US. The present article brings to the analysis of the transatlantic free trade agreement those third countries which will soon have Deep and Comprehensive Free Trade Agreements (DCFTA) with the EU such as Moldova, Georgia, Ukraine and Morocco. It is noteworthy that whereas the US requests from its FTA partners to implement World Trade Organization (WTO) commitments and respective domestic legislation, the EU's precondition in DCFTA negotiations is approximation of partner country's trade related legislation to that of the EU. The EU and US have different regulatory approaches to key areas covered by FTAs such as sanitary and phyto-sanitary measures (SPS) or geographical indications (GIs), which means that some US-originated products, such as Californian champagne or mozzarella, face trade restrictions in the EU. Interestingly, the EU requests its DCFTA partners to apply the same restrictions on US products. The article explains these different approaches and argues that unless the EU and US find a compromise on non-tariff barriers where systemic differences exist between the two, the EU's DCFTA partners (Eastern Partnership and Southern Mediterranean countries) will be forced to introduce trade restrictions on some US products once DCFTAs are implemented.*

Photo credit: mac_ivan (Flickr)

TAFTA | TTIP AND ITS ESTIMATED BENEFIT

During the summer of 2012, the US and the EU decided to start negotiations on a Transatlantic Trade and Investment Partnership (TTIP) agreement, also referred to as a Transatlantic Free Trade Agreement (TAFTA), with each other. This will be a comprehensive trade agreement between two partners which together account for half of global output in goods and services as well as 30% of global trade. Bilateral trade in goods between the EU and US amounts to approximately €500 billion (DG Trade Statistics 2013).

After the final report of the specially created High Level Working Group on Jobs and Growth (HLWG) studied the possibility of TAFTA | TTIP and made a recommendation to the EU and US in February 2013 to embark on the TAFTA | TTIP, both sides started to prepare the negotiations. The first round was held in July 2013 in Washington. The objective is to finalize trade talks and sign the agreement within approximately two years, after which ratification procedures will start and once these are completed, the agreement will enter into force.

The HLWG recommended to conclude a comprehensive trade agreement with the objective to entirely liberalize tariffs and cover non-tariff barriers (NTBs), the so-called 'behind-the border' measures (High Level Working Group on Jobs and Growth 2013, 1-2). As the tariffs between the two partners are already relatively low (on average only 4%), the main emphasis of the TAFTA | TTIP will be on the removal of non-tariff barriers to increase trade and boost investment.

To evaluate the impact of the TAFTA | TTIP, an independent study by the Center of Economic Policy Research in London was commissioned by the EU Commission and completed in March 2013. The study analyzes the potential impact of the agreement and concludes that an ambitious and comprehensive trade pact, once fully implemented, will bring significant gains both for the EU and the US – change in Gross Domestic Product (GDP) is estimated to be annually €119 billion and €95 billion respectively. EU exports to the US are estimated to grow by 28% (€187 billion) and US exports to the EU by €160 billion (Center for Economic Policy Research 2013, 3).

Photo credit: President of the European Council (Flickr)

According to the study, EU and US trade with the rest of the world would also increase by over €33 billion. Overall, the extra bilateral trade between the two blocs, together with their increased trade with other partners, would represent a rise in total EU exports of 6% and of 8% in US exports. This would mean an additional €220 billion and €240 billion worth of sales of goods and services for EU and US based producers, respectively.

DIFFERENCES IN APPROACH BETWEEN THE EU AND THE US

It is noteworthy that most of the writing on the TAFTA | TTIP so far has focused on its impact on the EU and US economies and its sectors, and limited attention has been paid to the benefit or disadvantage that the TAFTA | TTIP will bring to third states. The present article brings to the analysis of the Transatlantic Free Trade Area those third countries which will soon have Deep and Comprehensive Free Trade Agreements (DCFTA) with the EU, such as Moldova, Georgia, Ukraine[1], and Morocco.

Being a new approach in the EU's free trade policy, conceptually DCFTA is close to free trade agreements concluded by the US. It means a comprehensive agreement, which covers not only the elimination and/or reduction of tariff barriers in trade (like the so called simple FTAs), but also of non-tariff barriers (NTB). These agreements regulate areas such as investment, customs, intellectual property rights (IPRs), geographical indications (GIs), technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), competition policy and public procurement. This means that, in contrast to simple FTAs which only cover tariff liberalization, parties to comprehensive trade agreements commit to cooperate in regulatory spheres and establish common approaches in the above mentioned NTB areas with the aim to facilitate trade.

1 As a result of pressure from Russia and the apparent piorities of the current Ukrainean leadership, Ukraine decided not to sign the Association Agreement (AA) and the DCFTA at the Eastern Partnership Summit in Vilnius at the end of November 2013. However, unlike Armenia, it did not reject the association agenda entirely. EU emphasized that the door for Ukraine is still open and western politicians hope that AA and DCFTA will be signed in 2014. The prospects and timing of signing the agreement are still unclear.

It is noteworthy that the EU and US have different approaches when concluding such agreements with third countries. Whereas the US mainly requests from its FTA partners to implement WTO commitments/regulations and respective domestic legislation which should be in place, the EU's precondition and most difficult requirement is approximation of partner country's legislation to that of the EU. For this purpose DCFTAs with the EU have extensive lists of legislative approximation tables which require the EU's partners to adopt and implement regulations similar to the EU within the agreed timeline. This EU requirement is comparable to the one towards accession candidate countries and is connected with regulatory costs for the state as well as private sector.

Most importantly, the US and EU have different approaches to a number of key areas such as SPS, TBT and GIs, which means in practice that some US-originated products are either not allowed to be imported in the EU or face restrictions and specific regulation. This has as a consequence that the states which have DCFTA with the EU, and consequently have harmonised their legislation, will have to introduce restrictions towards some products originating in the US once they start to implement their legislation approximated with the EU.

The above-described means, in practice, that unless the EU and US find a compromise on key non-tariff barriers where systemic differences exist between them, an increasing number of DCFTA partners of the EU will be forced to introduce restrictions on trade with the US. Non-agreement on systemic differences will have as a consequence that the higher the number of countries which have DCFTAs with the EU, the more restrictions US exports to these countries will face.

Moreover, a country that aims to have a free trade agreement with both the EU and US is caught in between opposing approaches of the two partners in some key non-tariff related areas of trade.

The issue becomes more relevant since, after the obvious failure of the Doha liberalization round in the WTO framework, the EU's trade policy became increasingly focused on bilateral free trade agreements. The EU is currently engaged in a number of FTA negotiations – including with countries such as India, Japan, Canada, Thailand, Vietnam, and Malaysia. The EU is concluding DCFTAs with extensive legislative approximation requirements with countries of the Eastern Partnership (EaP) initiative in its eastern neighborhood and Southern Mediterranean countries.

Since the so-called DCFTA is a new concept in the EU and most of such agreements are still under negotiation, there is no DCFTA in force yet. As of today, the EU has concluded negotiations on a DCFTA with Ukraine, Georgia, Moldova, and Armenia (however, Armenia recently declared that it wants to join the Customs Union, composed of Russia, Belarus, and Kazakhstan, and consequently the process related to the DCFTA between the EU and Armenia stopped). In addition, the EU launched DCFTA talks with Morocco in April 2013 and there is a declared objective to embark on negotiations with Egypt, Jordan, and Tunisia in the near future (EU Commission Memo 2013, 3). Other EU-negotiated free trade agreements, although comprehensive, are not referred to as DCFTA and regulatory approximation requirement is not a key component of such FTAs.

Once the countries mentioned above introduce and start implementing requirements of EU regulations according to DCFTAs, they will have to introduce restrictions in trade with the US and prohibit or limit imports of certain US products. To better illustrate this, I will provide a number of examples:

Geographical indications (GIs)
EU regulations protect geographical indications and product protection is tied to their geographical origin. The US approach is different and oriented towards the protection of trademark rather than geographical origin of the product. For example, whereas the EU only acknowledges champagne produced in the respective area of France called Champagne and prohibits sale of any products called champagne not produced in this region of France, it is perfectly fine in the US to produce and sell Californian or other sparkling wine called champagne. In this case, not geographical origin but trademark is subject to protection under intellectual property rights regulations. The EU not only prohibits the import of such US products, but also requires from its DCFTA partners that they do the same. Because the EU strictly requires its DCFTA partner countries to adopt an EU approach in GI protection, these countries are forced to prohibit the import and sale of respective US products on their markets.

Sanitary and phytosanitary measures (SPS)
The EU strictly regulates and limits the production and sale of genetically modified organisms (GMOs) as well as hormone-treated products. The US, on the contrary, has a science-based approach in agriculture and a more liberal attitude in this respect. In reality this difference in approach means that genetically modified and hormone treated agricultural products produced in the US face import restrictions in the EU. If no common ground is found between the US and the EU in this area, US products will face similar restrictions in all countries which will have DCFTAs with the EU and will have harmonized their regulation with the EU in the SPS area.

Whereas the EU aims to keep GMOs as an exception from the TAFTA | TTIP, the US seems to be determined to negotiate an acceptable deal with the EU, aimed at liberalizing GMO import from the US to the EU.

Technical barriers to trade (TBT)
EU regulations prohibit the circulation of industrial products not produced according to EU's technical regulations on its market. This means that only products which satisfy specifically EU technical requirements and parameters and have the respective CE mark can be imported and sold in the EU. The EU extends this same requirement towards its DCFTA partners, some of which mainly trade with their neighboring Commonwealth of Independent States (CIS) countries – where Soviet-time standards still apply. In practice, this means that these countries have to restrict imports of all products without CE marking. Therefore, there continues to be the need to study in detail what specific consequences the TAFTA | TTIP will have in the TBT area and with regard to trade with industrial products between the EU and US.

THE CASE OF GEORGIA

Georgia's example is a notable case because it finalized negotiations on the DCFTA with the EU and has also declared its objective to negotiate a free trade agreement with the US. An exploratory process with this purpose started in 2012 and the High Level Dialogue on Trade and Investment between the US and Georgia was launched.

Both the EU and the US are important and strategic partners for Georgia not only economically, but also and most importantly politically. Restricting import regulations for US products could become an issue in US-Georgian relations. Georgia would have to find a way not to apply its EU-negotiated regulations to US products, which – in turn – would seriously upset the EU. The same can be said about other states referred to throughout this article.

CONCLUSIONS

To summarise, the differences in regulatory approaches in the EU and the US in key trade related areas, as well as the growing trend in the EU to conclude DCFTAs with third countries with substantial regulatory harmonization impact, result in the following situation: states in Eastern Europe and the Southern Mediterranean harmonise their trade related regulation with the EU acquis, which means that:

a) US imports into those states will face non-tariff barriers after harmonization is done, and, b) possible future negotiations on FTAs between the US and these states will be substantially complicated – since these states apply legislation harmonized with the EU acquis in areas where the EU and the US have substantially different approaches.

Negotiation on the EU-US free trade agreement is a unique opportunity to bridge the above-mentioned and other systemic differences in approach. Accordingly, it is recommended that separate research be conducted about the impact of the TAFTA | TTIP on thirds states that are harmonizing their legislation with that of the EU, as well as how it will impact their trade with the US. TAFTA | TTIP negotiators on both sides of the Atlantic are advised to analyze and take into account the relevant conclusions of such research.

REFERENCES

Center for Economic Policy Research (2013): *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment, London.*

EU Commission Memo (2013): *The EU's Bilateral Trade and Investment Agreements – Where We Are?, 18 October 2013. Available online: http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf*

High Level Working Group on Jobs and Growth (2013): *Final Report. Available online: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf*

DG Trade Statistics (2013): *United States: EU Bilateral Trade and Trade with the World, Available online: http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf*

A TRANSATLANTIC PARTNERSHIP WITH RIPPLES ACROSS THE OCEANS: WHAT DOES AFRICA STAND TO GAIN OR LOSE?

Philani Mthembu | *Graduate School of Global Politics (GSGP)* | *Freie Universität Berlin* | *philani@zedat.fu-berlin.de*

Photo credit: World Bank Photo Collection (Flickr)

KEYWORDS: AFRICA; TRADE DIVERSION; EMERGING POWERS; MUTUAL RECOGNITION

Abstract: *The Transatlantic Free Trade Agreement (TAFTA) – currently known as Trade and Investment Partnership (TTIP) – may be negotiated in Brussels and Washington, but the ripples will be felt throughout the global political and economic landscape. Of particular concern to developing countries and Africa in particular is the potential for the TAFTA | TTIP to have trade diversion effects, thus making entry into the transatlantic market even more difficult. To minimise this potential for negative spillover effects, the EU and the US have the option of adopting a mutual recognition policy applicable to third countries with flexible rules of origin. While this decision lies with the EU and the US, African countries can also take steps towards minimising their vulnerability by expanding intra-Africa trade through further regional integration and expanding trade with emerging powers, who have strengthened their political and economic relations in recent years.*

INTRODUCTION: AFRICA'S CHANGING ECONOMIC LANDSCAPE

In an address at the University of the Witwatersrand, Deputy Director General of the World Trade Organization (WTO) Valentine Rugwabiza (2012) noted that Africa remains the most fragmented continent in the world, with 54 countries and very low levels of intra-regional trade. She stated that intra-Africa trade stood at approximately 10%, comparing unfavourably with the EU (70%), Asia (52%), North America (50%), and South America (26%). To compound this, Africa's share of world trade was a mere 3%. This combination of factors ensures that African countries remain vulnerable to external trade patterns and regulations.

Within this context, emerging powers have increasingly become of importance for African nation states, with recent economic growth across the continent partly attributed to these growing ties and demand for primary commodities and investment in mining, infrastructure, and other sectors (Carmody 2013). As a bloc, the BRICS have become Africa's largest trading partners, with trade expected to reach more than US $500 billion by 2015, of which 60% will come from China. In 2012, trade with the BRICS had risen to $340 billion, which is 10 times higher than the value of trade in 2002 (Ncube 2013).

Despite these developments, trade with the EU and the US continues to be of great importance, heightening the relevance of the ongoing TAFTA | TTIP negotiations. The biggest threat to African countries lies in the potential for the TAFTA | TTIP to have trade diversion effects, making it more difficult for their goods and services to access the transatlantic market. This would essentially mean less trade with the transatlantic partners, further marginalising a continent that already plays a minimal role in global trade.

In order to minimise these negative effects, the following article argues that the transatlantic partners must ensure the benefits are not exclusive to TAFTA | TTIP signatories, but also extend to third countries. This could be achieved through a policy of mutual recognition of standards extended to third countries with flexible rules of origin. This action would help reduce trade diversion concerns in Africa and the developing world while sending a signal that the transatlantic partners are still committed to an open global trading system despite the ongoing deadlock at the Doha round of multilateral negotiations.

Since the direction of the TAFTA | TTIP largely depends on the political and economic intentions of the transatlantic partners, it is arguable that African countries cannot afford to idly wait for the final agreement and should, in the meantime, remain committed to increasing intra-Africa trade through regional integration – while continuing to expand their trade with emerging powers. A combination of these actions reduces Africa's vulnerability, ensuring that fears of trade diversion in the TAFTA | TTIP are minimised.

TRADE DIVERSION VERSUS TRADE CREATION IN THE TAFTA | TTIP

One of the main concerns in any preferential agreement is the discrimination against third countries. Jacob Viner demonstrated that "trade diversion occurs when the dismantling of trade barriers gives goods and services from the partner country a competitive advantage and consequently trade with third countries is diverted to the partner country even if the third country can produce the relevant goods and services more efficiently" (Mildner & Schmucker 2013). A proliferation of FTA's also leads to a growing number of different rules of origin, which determine the economic nationality of products (Kommerskollegium National Board of Trade 2012), thus preventing non-signatories from benefiting without making concessions. This increases the obstacles to trade for non-signatories to a preferential trade agreement, especially for smaller businesses not able to comply with different regulatory frameworks (Mildner & Schmucker 2013).

Basing its assessment on a study by the Centre for Economic Policy Research (CEPR), the European Commission (EC) predicts that a TAFTA | TTIP would have a positive impact for the rest of the world, even to the amount of €99 billion (European Commission 2013). However, a different study conducted by the ifo-Institute comes to different conclusions. Both examine two scenarios: the first with an elimination of tariffs in trade and a second consisting of a comprehensive liberalisation scenario, which also includes the reduction of non-tariff trade barriers (Felbermayr et al. 2013, 8).

Photo credit: US Army Africa (Flickr)

While the CEPR estimates gains to non-signatories (€99 billion), these are mostly distributed within the OECD countries (€39 billion) (European Commission 2013). Thus, even under this optimistic study, the gains would be shared disproportionally, with Africa likely getting the least gains. Using a different methodology, the research conducted by the ifo-Institute is more explicit about the global distribution of gains and losses, making it vividly clear that exports from African countries would be negatively affected, while the impact on welfare also shows a decline.

According to the study, countries of the Maghreb, with which the EU has an FTA called the Euro-Mediterranean Agreement, would lose under both a limited (tariffs only) and a comprehensive scenario (reduction of tariffs and non-tariff barriers). European companies would become more competitive, while EU imports from the Maghreb would decrease as "traditional trade diversion effects predominate" (Felbermayr et al. 2013, 16). Given the political turmoil in the region and added need to bring about stability and improve their economic outlook, this scenario is worrying for the region. North and West Africa are especially affected, since they traditionally have extensive trade relations with Europe. The Ivory Coast and Guinea are the biggest losers as their exports into the EU are affected by the USA. While East Africa may fare a little better due to its closer proximity to larger markets such as China; Uganda and Tanzania record big loses (ibid., 28).

As the largest economy in Africa, South Africa's trade into the EU would also suffer the effects of trade diversion, as South African companies face increased competition with US companies in the EU. This would mean that South Africa's current FTA with the EU, in the form of the Trade, Development, and Cooperation Agreement (TDCA) signed in 1999, would now have fewer benefits. With these results, the ifo study is unequivocal: African countries stand to lose access to the transatlantic market (ibid., 27).

The picture painted is particularly worrying at a time when the EU puts pressure on African regional economic blocs to sign comprehensive Economic Partnership Agreements (EPA's), which cover areas such as intellectual property rights (IPR's), sanitary and phytosanitary standards (SPS), public procurement, investment, and services. Fears in African countries partly stem from analyses that the losses in customs duty would surpass the gains of a free trade agreement with the EU (Patel 2007, 4).

The TAFTA | TTIP also comes at a time where Africa's preferential trade regime with the US faces uncertainty due to the Africa Growth and Opportunity Act (AGOA) expiring in 2015. Initiated by the Clinton Administration in 2000, it grants preferential access to 39 African countries. Since it relies on Congress for extension, it remains essentially a one way preferential agreement. Of concern for African countries is the growing eagerness on the part of the US to exclude countries it feels have graduated from this scheme, thus following the logic of making it a stepping stone for a fully fledged FTA (Naumann 2013).

A lot is clearly at stake: an open TAFTA | TTIP might yet convince African countries that the EU and US are still sensitive to the needs of developing countries, while a closed agreement will only cement the view that developed countries are not supportive of the developmental goals and needs of the global South. This is likely to nudge them politically and economically closer towards emerging powers. The manner in which non-tariff barriers are regulated will thus have a bearing on perceptions towards the transatlantic partners. "Non-tariff barriers assume various forms, but one important way to liberalise them is to unify product standards or allow automatic domestic acceptance of products that are allowed for use abroad. That can also assist third countries: if a product satisfies the standards of one member country in a free trade zone, it may then be allowed for sale in all countries of the zone, even if it comes from a third country. With the adoption of standards, third countries can minimise the trade diversion effects that are harmful to them" (Felbermayr et al. 2013, 27)

COUNTERING THE NEGATIVE EFFECTS OF THE TAFTA | TTIP

In order to reduce the negative spillovers, the transatlantic partners have the option of adopting a policy of mutual recognition of standards with flexible rules of origin extended to third countries. Researching the impact of standards and the reduction of non tariff barriers in regional agreements, Aaditya Mattoo and Maggie Xiaoyang Chen (2008, 838ff.) find that "such agreements increase the trade between participating countries but not necessarily with the rest of the world. Harmonization of standards may reduce the exports of excluded countries, especially in markets that have raised the stringency of standards. Mutual recognition agreements are more uniformly trade promoting unless they contain

restrictive rules of origin, in which case intra-regional trade increases at the expense of imports from other countries." This means if the TAFTA | TTIP adopts a policy of mutual recognition with flexible rules of origin, negative spillovers may be minimised.

Mattoo (2013) argues that "with mutual recognition, the EU and the US would accept each other's standards or conformity-assessment procedures, allowing firms to adhere to the less stringent requirements in each area. If the policy were extended to third-country firms, it would have a powerful liberalising impact.[...] If however, the [TAFTA |] TTIP excluded third-country firms from the mutual recognition policy, their competitiveness vis-à-vis European and American companies would diminish substantially." With this option ultimately relying on the transatlantic partners, it would be sensible for African countries to be proactive and take pre-emptive steps to minimise the potential negative effects.

This would mean remaining committed to increasing intra-Africa trade. This is important since Sub-Saharan African countries continue to have higher non-tariff barriers between themselves than on trade with third countries. Such an effort must involve continued efforts to harmonise regional technical regulations and standards, sanitary and phytosanitary measures as well as rules of origin, which have all added significant costs to doing business in Africa (Rugwabiza 2012).

Tony Elumelu and Jonathan Oppenheimer (2012) argue that a new generation of African entrepreneurs and businesses is emerging, challenging traditional incumbents with new models and strategies. Examples include Kenya's information and communications technologies companies, and Nigerian banks such as the United Bank of Africa. In telecommunications, South African companies such as MTN now operate in 21 countries, while Glo, a Nigerian mobile operator, has also increasingly expanded in its region. These companies are all increasingly breaking down regional barriers and expanding intra-Africa trade. In 2009, South Africa invested $1.6 billion (FDI outflows) into other African nation states. Despite these positives, intra-Africa trade still remains too low. Regional economic blocs will play a central role in further breaking down trade barriers, to unlock the full potential of African economies, and to reduce the vulnerability to external changes.

Lastly, African countries must seize opportunities provided by the growing role of emerging powers. This means using the added revenue to invest in trade related infrastructure while moving away from primarily shipping raw materials towards the beneficiation of goods and building local value-adding industries. This will take political will but ensure that African countries increasingly become less vulnerable to the constant changes of the global trading system (Elumelu, Oppenheimer 2012).

The BRICS account for 40% of the world population, one fifth of global output and nearly a fifth of all trade and FDI flows, while their development cooperation across Africa is also growing rapidly. These trends are likely to continue in the coming years (United Nations Economic Commission for Africa 2013), putting African countries at a position to make strategic decisions that impact their economic landscape. While trade with emerging powers cannot replace trade with the transatlantic partners, a combination of intra-Africa trade with increased trade with emerging powers allows African countries to be less vulnerable to trade diversion effects in the TAFTA | TTIP, while ensuring that they are not purely at the mercy of negotiators in Brussels and Washington.

REFERENCES

Africa-BRICS Cooperation (2013): *Implications for Growth, Employment and Structural Transformation in Africa, United Nations Economic Commission for Africa (UNECA), Addis Ababa.*

Carmody, Padraig (2013): *Brics in Africa: Prizes and Pitfalls of Building a New Global Order, 12 September 2013. Available online: http://www.theguardian.com/global-development/2013/sep/12/brics-africa-global-order*

Chen, Maggie Xiaoyang / Mattoo, Aaditya (2008): *Regionalism in Standards: Good or Bad for Trade?, Canadian Journal of Economics, vol. 41(3), pp. 838-863.*

European Commission (2013): *Transatlantic Trade and Investment Partnership: The Economic Analysis Explained.*

Elumelu, Tony / Oppenheimer, Jonathan (2013): *Intra-Africa Trade, Investment Key to Continent's Development, 22 March 2013. Available online: http://www.thisdaylive.com/articles/intra-africa-trade-investment-key-to-continent-s-development/142860/*

Felbermayr, Gabriel / Heid, Benedikt / Lehwald, Sybille (2013): *Transatlantic Trade and Investment Partnership: Who Benefits from a Free Trade Deal?, Global Economic Dynamics, Bertelsmann Stiftung.*

Kommerskollegium National Board of Trade (2012): *The EU's and the US's Preferential Arrangements - a Comparison, Sweden, January 2012.*

Mattoo, Aaditya (2013): *Transatlantic Trade for All, Project Syndicate, 2 October 2013. Available online: http://www.project-syndicate.org/commentary/aaditya-mattoo-2protecting-developing-economies-from-the-transatlantic-trade-and-investment-patnership*

Mildner, Stormy-Annika / Schmucker, Claudia (2013): *Trade Agreement with Side Effects? European Union and Unites States to Negotiate Transatlantic Trade and Investment Partnership, Stiftung Wissenschaft und Politik (SWP) Comments.*

Naumann, Eckart (2013): *AGOA Forum Concludes in Addis Ababa, Amid Growing Uncertainty Around its Long-term Future, 14 August 2013. Available online: http://www.tralac.org/2013/08/14/agoa-forum-concludes-in-addis-ababa-amid-growing-uncertainty-around-its-long-term-future/*

Ncube, Mthuli (2013): *African and the BRICS: a Win-Win Partnership?, African Development Bank Group (AfDB), 10 July 2013. Available online: http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/africa-and-the-brics-a-win-win-partnership-12098/*

Patel, Mayur (2007): *Economic Partnership Agreements between the EU and African Countries: Potential Development Implications for Ghana, Realizing Rights, The Ethical Globalization Initiative.*

Rugwabiza, Valentine (2012): *Africa should Trade more with Africa to Secure Future Growth, 12 April 2013. Available online: http://www.wto.org/english/news_e/news12_e/ddg_12apr12_e.htm*

Photo credit: tuija (Flickr)

THE STRATEGIC IMPLICATIONS OF TAFTA | TTIP: WILL IT ENGAGE OR CONTAIN CHINA?

Vasilis Trigkas | *Pacific Forum CSIS, Tsinghua University* | *trigkasv10@mails.tsinghua.edu.cn*[*]

* The author would like to express his compliments to the Dean of the Department of International Relations of Tsinghua University, Shi Zhiqin, for his atypical advice and commentary. In addition the fascinating events of the Carnegie-Tsinghua Center for Global Policy in Beijing have provided the intellectual stimulus for many of the author's ideas.

KEYWORDS: 21ST CENTURY TRADE NORMS; TRADE & SECURITY INTERDEPENDENCE; BRETTON WOODS INSTITUTIONS; LIBERAL GLOBAL ORDER

Abstract: *As China is moving up the value chain, both the EU and the US have seen their export shares declining in markets that they have traditionally dominated. This quantitative and qualitative evolution of Chinese exports has been to some extent attributed to China's mercantilist national industrial policy and its leading industrial conglomerates: the State Owned Enterprises (SOEs). An inquiry of China's strategic calculations vis-à-vis the TAFTA | TTIP would thus provide a better understanding of the EU and US impetus for a grand trade agreement which could shape the norms of the 21st century commerce, and secure the future of a liberal economic order. Chinese elites view the TAFTA | TTIP both as an opportunity and a threat. On the one hand, an exclusive agreement may force China to follow a balancing strategy and form competitive regional trade blocks. On the other hand, an open and transparent TAFTA | TTIP may well engage Beijing to liberalize its economy, and seek to constructively reform rather than expel the current liberal global order. The latter option has been the ultimate end of the US deep engagement strategy towards a rising China.*

TAFTA | TTIP - THE 5TH TECTONIC SHIFT IN CONTEMPORARY POLITICAL ECONOMY

In the recent history of economic integration and globalization three dates may well capture the attention of economic historians:

The first is December 1978, during the third plenary session of the 11th CPC Central Committee, when Deng Xiaoping presented the opening up and reform policy. Under his transformational leadership, China, the world's most populous nation, would open up its market to foreign investors and gradually embrace the "invisible hand" of the market albeit with strong state supervision.

Eleven years later, on the 9th of November 1989, the collapse of the Berlin Wall and the degeneration of Marxist-Leninism, made the Bretton Woods Institutions - the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank - the movers and shapers of a liberal economic order; that is, of a model of interstate relations shaped by post-WWII US strategic interests and priorities (Ikenberry 2011).

In 2001, China, "a diva of gigantic proportions" (Allison 2012), joined the WTO and espoused free trade and commerce. The world seemed to be moving towards a liberal economic end. Yet, seven years later, the unforeseen collapse of Bear Sterns, a "triple A" Wall Street investment bank, triggered the "great recession" (Grusky & Western et al. 2011), and paused a 17 year process of seemingly teleological liberal integration.

Following five years of economic and political uncertainty, a new initiative may well cause a fifth tectonic shift. The TAFTA | TTIP could shake the world, for the size of the EU and US commercial relationship fully outperforms any other. In addition, such a broad and deep agreement between the two biggest and most technologically advanced markets in the world will set a precedent that can hardly be matched by any other regional initiatives, and – thus – coerce other countries to follow the EU and US commercial imperatives.

STRATEGIC CALCULATIONS PREDOMINANTLY SHAPE GREAT ECONOMIC SHIFTS

The causes of the first three tectonic shifts were shaped by mostly strategic and political, rather than technical, calculations. The fourth shift (the great recession), clearly an outlier, was caused by regulatory and other institutional deficiencies of the US political establishment.

- In 1979, China embraced the markets, since its economy and political system were too weak to protect her from Soviet imperialism. Industrialization and the subsequent build up of a strong military had monopolized the strategic calculations of Chinese elites since the era of the opium wars.[1]

- In 1989, the collapse of the Berlin Wall was the outcome of a long and fierce antagonism for world hegemony between two blocks adhering to diametrically opposing ideological paradigms: communism vs. liberalism.

- In 2001, the entry of China in the WTO was greatly facilitated by Washington's strategic belief in the effects of free trade on China's political system as well as by China's decision to go global and import technology. The 1995 Pentagon's East Asia Strategy Report[2] (FAS 1998) predicted that the trade of goods would lead to a trade of ideas (Shi 2013). Eventually, trade and commerce would liberalize the opaque and authoritative one party system of governance. This "deep engagement" (Nye 1995) would soften the fear that a rising power inspires to a status quo power, and ultimately motivate China to become a liberal partner in peace. "By the time China would be strong enough to challenge the system, she would have already become reconciled with it"[3]. Treat China as an enemy and it will become one, Nye would famously proclaim (Nye 1995).

1 Interestingly, in his recent visit in China, Ford's CEO made public a letter sent by Sun Yat-sen, the father of modern China to Henri Ford back in 1924. Sun asked Ford to visit China and with the support of the government, to industrialize the southern part of the country. For Sun, China's agricultural economy had created a power vacuum that could attract potential predators and lead to a new great war in Asia and beyond. His ominous prediction would be confirmed by history thirteen years later with imperial Japan's invasion of China, see: The Atlantic (2013): When the Father of Modern China Offered Henry Ford a Job. Available online: http://www.theatlantic.com/china/archive/2013/10/when-the-father-of-modern-china-offered-henry-ford-a-job/280730/

2 For a comprehensive commentary of the report see Bandow (1999)

3 The argument that the trade of goods will lead to the trade of ideas is a version of Kant's perpetual peace theory, expressed by the Wilsonian foreign policy tradition of the United States. In modern political theory, it is reflected in the so-called democratic peace hypothesis. For a comprehensive review of the US dogma towards China see the 1999 Rand classic report: Khalilzad & Shulsky et al. (1999). For a more recent assessment of the US strategy towards a rising China see Friedberg (2011). Friedberg uses the term "congegement" to describe the current US policy towards China and supports a new strategy that would upgrade containment without however eliminate engagement.

It is thus not an exaggeration to examine the decision of the European Union and the United States to promote the TAFTA | TTIP as a vehicle advancing a strategic end: to liberalize the Chinese economy further and integrate China into the Western shaped liberal global order. Indeed there have been many voices arguing that Beijing has taken advantage of its WTO position to promote à la carte liberalization, hijacking market shares from European and American companies. The most vocal criticism focuses on the cornerstones of China's economic expansion: the State Owned Enterprises (SOEs) (Macgregor 2012). American and European analysts support that the state has offered a constant flow of subsidies to these economic behemoths and has thus distorted fair play (Haley & Haley 2013; Macgregor 2012). It should therefore not be seen as a mere coincidence that an important principle of TAFTA | TTIP is the "level playing field" and the full transparency of state support and market intervention.

CHINA'S COMPREHENSIVE ECONOMIC ASCENDENCY AND THE WEST'S REACTION

In 2001 Chinese exports accounted for less than 5% of world exports. By 2012, their share had more than doubled to 12%. In 2013, 95 Chinese companies are included in the fortune 500 (the 10th consequent year-on-year increase).[4] 88 of them, almost nine out of ten, are SOEs representing more than 14% of the list's aggregate revenues (Caijin 2013). Although correlation does not imply causation, many Western economists and politicians view the sharp increase of Chinese exports with suspicion. The ownership regime of many of China's economic champions reveals a strong connection with the state and possible access to "abundant" sources of support. A newly published report on Transatlantic Trends (German Marshal Fund 2013) underlines that the majority of the public in the United States and Europe now see China as a rising economic threat.

Hence, it comes as no surprise that the US Congressional Research Service (Akhtar & Jones, 2013) supports that TAFTA | TTIP will also "seek new or expanded commitments in areas such as regulatory coherence and '21st century' issues, including state-owned enterprises-issues either not discussed or only modestly discussed in prior FTAs".

AN 'ECONOMIC NATO'?

Even before President Barack Obama's January 2013 State of the Union address, David Ignatius (2012) cited the strong commitment of the then secretary of State, Hillary Clinton, to form a version of 'Economic NATO' and shape the trade norms of the 21st century. General James L. Jones (2012), the former Supreme Allied Commander in Europe, went even further and directly linked a possible TAFTA | TTIP with the willingness of the Atlantic partners for a strong North Atlantic Treaty Organization (NATO) in the 21st century. Almost a year earlier, the German Marshall Fund had called for an economic 'coalition of the willing' to enforce the new trade norms decided by the United States and Europe since "the rise of Asia has eroded the trade leadership role played by the transatlantic partners in the past decades".

Fred Kempe (in: Nolan 2012) argued that the future challenges of the transatlantic community should be looked at much more through an economic and a security prism. Accordingly, an economic version of NATO would enhance the EU-US security and foster more integration. Ian Bremmer (ibid.) had expanded the concept of Economic NATO to Asia to include Japan and other Asian countries through the Trans-Pacific Partnership (TPP). Michael Froman (2013), US deputy national security advisor, is directly involved in the negotiations for the TAFTA | TTIP and has openly stated that the TAFTA | TTIP has broader goals than a traditional free trade agreement. It aims to shape the global multilateral trading system and set new global norms, Froman argued. Last, but not least, the Congressional Research Service in its July 2013 report (2013, 1) on the TAFTA | TTIP clearly supported that:

> The two sides also seek to use eventual TTIP commitments on the global scene: to advance multilateral trade liberalization, set globally-relevant rules and standards, and address challenges associated with the growing role of China and other rising economic powers (REPs) in the global economy.

In a nutshell, the TAFTA | TTIP can be seen as the economic pillar of Washington's security strategy addressing the challenge of a rising China. As Ignatius (2012) has put it, the TAFTA | TTIP along with TPP form the great vision of President Obama to set the norms of world trade in the 21st century and pressure China to open up its economy and limit the support to SOEs. If successful, this will be "Obama's lasting legacy" in reinvigorating the liberal global order.

During a personal discussion with the author in Beijing, an economist from a leading American think tank stated that President Clinton's decision to permit China's entry into the WTO without a full commitment to liberalize and open up its economy was a grave mistake for the American and European prosperity. The TAFTA | TTIP would somehow correct this mistake, he insisted; in addition, China would finally find a strong reason to open up its financial sector to US investments, an issue high on the bilateral agenda of negotiations between the two sides.

At first glance, the US seems to be the most aggressive promoter of TAFTA | TTIP; however, the EU has also been vocal promoting "a level playing field". Even Germany, which currently enjoys record trade flows with China, has grown increasingly uncomfortable with Beijing's protectionist drive to high value-added products (Spiegel 2013). For some Germans, China may limit its dependency on German technology and thus turn into a fierce competitor. Arguably, the recent solar panel dispute can be seen against this backdrop, even though, in the end, Germany opted for pragmatism and aligned with Beijing against the European Commission (Bondaz & Trigkas 2013; Dalton 2013).

TAFTA | TTIP AS SEEN IN BEIJING

While the United States and Europe form their grand economic and security strategy and negotiate TAFTA | TTIP, China has also searched for a counter-strategy. Before examining the concrete steps that China has undertaken, it is crucial to focus on the rhetoric behind the country's trade and investment

4 For a detailed analysis on market shares and the evolution of Chinese exports see: Susted & Nishioka 2013; Li 2012.

policies that the West observes with increasing suspicion. Chinese elites argue that the post-Cold War global order was shaped at a time when China was weak and absent from the global stage. As Tsinghua's Yan Xuetong (2013) has put it, the United States is not willing to renegotiate the Potsdam and Yalta agreements with China. John Mearsheimer (2013) in a conference at Tsinghua University argued that China is the most realist power in the world. The country is thus gradually liberalizing following a pace that optimizes its own strategic, security and economic goals.

Many Chinese recall America's early to mid-19th century economic strategy as inspired by Alexander Hamilton's Economic Report on Manufactures (Carey 1827) and applied by Henry Clay's American System (Clay and Hopkins et al. 1959), to justify their own economic imperatives. The American system was based on three protectionist pillars: tariffs, a national investment bank and subsidies for infrastructure5. Chinese policies in many ways reflect similar tactics. State-owned banks have provided liquidity to large SOEs en masse and thus facilitated their "going global" (走出去战略) strategy (Macgregor 2012).[6] In addition, Beijing has funded major projects of infrastructure, housing, and research and development (R&D). Even though at first glance such policies can be seen as pure dirigisme, in many cases subsidies and accessible low cost capital increase economic efficiency. In that sense, the infant industry argument7 and the need for large economies of scale can provide a reasonable justification for China's economic strategy. After all, back in 2001, Beijing used similar arguments to successfully tame some of Washington's fears and facilitate China's WTO entry. Yet China's recent assertiveness in Asia combined with its going global economic strategy 2.0 (CSIS 2012; Campbel 2013) have led Washington to seek a new approach to reignite liberalization. The TAFTA | TTIP should thus be seen as the cornerstone of such strategy.

Yet, Chinese economic planners will not easily allow an economic encirclement by the US and the EU. They have instead pursued a sinocentric trade system promoting their own bilateral free trade agreements (He 2013). In March 2013 Iceland became the first European country to enter an FTA with China; Switzerland followed four months later (Chinese Ministry of Commerce 2013). In addition China has expanded its foreign direct investment in Europe and has now built strong relations with major economic actors across Southern Europe. On the Asian front, China promotes the Comprehensive Economic Partnership as a direct competitor to the TPP (Zhang 2013).


Photo credit: Remko Tanis (Flickr)

As Shi Zhiqin (2013) has put it, China has the economic leverage to play the game of the 'trade noodle bowl'[8] and to some extent balance a US-EU trade agreement. However, according to Shi, such an outcome would undermine the global economic recovery. The best scenario would be the negotiations for the TAFTA | TTIP to be as open and transparent as possible and pay attention to other major trade actors and the concerns of the public. An open process in the Atlantic that would allow China and other countries to voice their worries could potentially facilitate the reform of large SOEs and subsequently increase the efficiency of the global economy. Unfortunately, as of today, negotiation texts are not even open to legislators, and this raises uncertainty and mistrust not only within civil society on both sides of the Atlantic, but also in China and other emerging economies (Venhaus 2013).

Overall, Chinese elites look to the TAFTA | TTIP with scepticism. The public statements of leading EU and US decision makers and intellectuals on the necessity for an Economic NATO to counter China's increasing economic clout have been well noticed in Beijing's elite circles. China in principle does not object to bilateral negotiations and also looks to the TAFTA | TTIP as a catalyst to boost the efficiency of its economy. The factor, however, that will strongly determine the trajectory of China's strategy on the TAFTA | TTIP is the transparency and openness of the agreement. It is thus up to the EU and the US to build a responsible, transparent, and inclusive 21st century free trade agreement that will attract, rather than coerce, China. Such an engagement will define the quality of European and American statesmanship.

CONCLUSION

The Chinese view of TAFTA | TTIP reflects a realist school of thought that sees commerce as crucial for the welfare of the nation. Contrary to the liberal hypothesis of rising multinationals and non-state actors as the movers and shapers of globalization, the state remains the fundament of high-politics. Following the paradigm that first the United States set; the Chinese state is both the consumer of first resort and the investor of last return.[9] It provides the necessary demand and liquidity to strategic industries and aim to make China an equal commercial power with the EU and US. Beijing

5 For an insightful non-technical analysis of how protectionism has been employed by the US, England, and Germany, see: Janeway (2013).

6 The going global strategy was initiated back in 1999 and aimed to diversify the large Foreign Exchange Reserves that China accumulated through years of trade surpluses. In addition it looked to acquire shares in high-tech Western firms and thus facilitate the transmission of leading technologies to Chinese companies. Technological convergence with the West has been a matter of national pride for the country. For a comprehensive review see: CSIS (2012); Campbel (2013).

7 The infant industry argument supports that a country will be more efficient in producing specific product once it achieves the economies of scale (size of production) that the leading exporter of that good currently enjoys. It is an argument that has been used repeatedly from developing economies to justify protectionism.

8 The idea of "noodle bowl" comes from the proclamation of Jagdish Bhagwati that preferential trade agreements are so complicated that look like a spaghetti bowl. In the case of Asia, it could thus be said that PTAs can be seen as a "noodle bowl".

9 The consumer of first resort, in the sense that it buys emerging technologies and products that are not yet mature to attract market demand. the investor of last return; for it funds many R&D projects that remain unprofitable but nonetheless eventually produce highly innovative technologies.

supports that the country is following historical precedent and copying the commercial models of the West while at the same time respects its WTO obligations. Even though China has achieved the greatest liberalization during peacetime, its recent assertive trade policy has greatly worried Washington and Brussels. The TAFTA | TTIP is thus the commercial balancing of the transatlantic community to the increasing Chinese economic clout and to China's faltering liberal democratic political reform.

In the early 20th century, John Hay, then US Secretary of State, eloquently proclaimed that the Mediterranean had been the sea of the 19th century, the Atlantic Ocean is the sea of the 20th century, and the Pacific Ocean will be the sea of the 21st century. The TAFTA | TTIP has the potential to make the Atlantic important and relevant well into the 21st century. Its success, however, will be judged on the broader vision of forming one greater "sea" together with the Pacific and peacefully engaging, rather than containing, China.

REFERENCES

Akhtar, S. / Jones, V. (2013): *Proposed Transatlantic Trade and Investment Partnership (TTIP): In Brief. Available online: http://www.fas.org/sgp/crs/row/R43158.pdf*

Allison, G. (2012): *Avoiding Thucydides's Trap, Harvard: Belfer Center for Science and International Affairs. Available online: http://belfercenter.ksg.harvard.edu/publication/22265/avoiding_thucydidess_trap.html*

Bandow, Doug (1999): *Old Wine In New Bottles The Pentagon's East Asia Security Strategy Report, Washington DC: CATO.*

Bondaz, A. & Trigkas, V. (2013): *Caution can Avert Downward Spiral in Sino-EU Trade Ties - OP-ED, Globaltimes.cn. Available online: http://www.globaltimes.cn/content/788649.shtml*

Caijing (2013): *95 Chinese Companies Make Fortune 500 Global List 2013. Available online: http://english.caijing.com.cn/2013-07-09/113013450.html*

Campbel, J. (2013): *Becoming a Techno-Industrial Power: Chinese Science and Technology Policy. Available online: http://www.brookings.edu/~/media/Research/Files/Papers/2013/04/29%20china%20science%20technology%20policy%20campbell/29%20science%20technology%20policy%20china%20campbell.pdf*

Carey, Mathew (1827). Alexander Hamilton's Report on the Subject of Manufactures, Philadelphia: *Printed by William Brown.*

Ciis.org.cn (2013): *A Historic Opportunity to Establish a New Type of Great Power Relationship between China and the United States, China Institute of International Studies. Available online: http://www.ciis.org.cn/english/2012-12/31/content_5638120.htm*

CSIS (2008): *Freeman Briefing: Issue in Focus: China's "Going Out" Investment Policy. Available online: http://csis.org/files/publication/080527_freeman_briefing.pdf*

Clay, Henry / Hopkins, James F / Seager, Robert (1959): *Papers. Lexington: University of Kentucky Press.*

Chinese Ministry of Commerce (2013): *China's Free Trade Agreements. Available online: http://fta.mofcom.gov.cn/english/index.shtml*

Dalton, M. (2013): *EU Seeks Better Shield Against China Subsidies. Available online: http://online.wsj.com/article/SB10001424127887324010704578414673612252346.html*

Fas.org (1998): *DefenseLINK Publications, East Asia-Pacific Region Security Strategy. Available online: http://www.fas.org/man/docs/easr98.html*

Friedberg, Aaron L. A (2011): *Contest for Supremacy, New York: W. W. Norton & Co.*

German Marshal Fund of the United States (2012): *A New Era for the Transatlantic Relationship: A Report from the Transatlantic Task Force on Trade and Investment. Available online: http://www.gmfus.org/wp-content/blogs.dir/1/files_mf/tatf_report_2012.pdf*

German Marshal Fund of the United States (2013): *Transatlantic Trends Key Findings 2013. Available online: http://trends.gmfus.org/files/2013/09/TT-Key-Findings-Report.pdf*

Grusky, D. / Western, B. / Wimer, C. (2011): *The Great Recession, New York: Russell Sage Foundation.*

Haley, U. & Haley, G. (2013): *Subsidies to Chinese industry, Oxford: Oxford University Press.*

He, Weiwen (2013): *China must Brace for Impact of Possible EU-US Free Trade Agreement, Global Times, 2 February 2013. Available online: http://www.globaltimes.cn/content/764321.shtml*

Husted, S. / Nishioka, S. (2012): *China's Fare Share? The Growth of Chinese Exports in World Trade, Review of World Economics, 1-21.*

Janeway, D. (2013): *The Two Innovation Economies. Available online: http://www.project-syndicate.org/commentary/china-and-the-frontiers-of-innovation-by-william-janeway*

Ignatius, D. (2013): *A Free-trade Agreement with Europe?, The Washington Post. Available online: http://www.washingtonpost.com/opinions/david-ignatius-a-free-trade-agreement-with-europe/2012/12/05/7880b6b2-3f02-11e2-bca3-aadc9b7e29c5_print.html*

Ikenberry, J. (2011): *A World of Our Making, Democracy Journal, vol. 20. Available online: http://www.democracyjournal.org/20/a-world-of-our-making.php*

Jones, J. / Donohue, T. (2013): *NATO Needs Strength Of Robust European And US Economies. Available online: http://news.investors.com/ibd-editorials-viewpoint/110812-632769-strong-american-and-european-economies-ensure-security.htm?p=full*

Li, X. (2013): *China as a Trading Superpower. Available online: http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR012/li.pdf*

Mcgregor, J. (2012): *No Ancient Wisdom, No Followers: The Challenges of Chinese Authoritarian Capitalism, New York: Prospecta.*

Mearhseimer, J. (2013): *Beyond Geopolitics, Conference at the Institute for Modern International Relations, Tsinghua University, Beijing, 03 November 2013.*

Nolan, R. (2012): *An Economic NATO Would Strengthen the US and Europe. Available online: http://www.usnews.com/opinion/blogs/world-report/2012/12/06/an-economic-nato-would-strengthen-the-us-and-europe*

Nye, J. (2013): *East Asian Security: The Case for Deep Engagement. Available online: http://www.foreignaffairs.com/articles/51210/joseph-s-nye-jr/east-asian-security-the-case-for-deep-engagement*

Spiegel Online (2013): *The World from Berlin: ‚It's Worth Promoting Economic NATO'. Available online: http://www.spiegel.de/international/europe/german-media-commentators-on-the-trans-atlantic-trade-agreement-a-883410.html*

Shi, Z. (2013): *Is the US-EU Trade Pact a Way to Balance China?. Available online: http://carnegietsinghua.org/2013/06/17/is-u.s.-eu-trade-pact-way-to-balance-china/gand*

The Atlantic (2013): *When the Father of Modern China Offered Henry Ford a Job. 2013. Available online: http://www.theatlantic.com/china/archive/2013/10/when-the-father-of-modern-china-offered-henry-ford-a-job/280730/*

Ustr.gov (2013): *Transcript: Briefing by USTR Ambassador Ron Kirk and Deputy National Security Advisor Michael Froman on US-EU Trade Negotiations | Office of the United States Trade Representative. Available online: http://www.ustr.gov/about-us/press-office/press-releases/2013/february/transcript-briefing-us-eu*

Venhaus, M. (2013): *TAFTA | TTIP and the Story of Inclusiveness: A Transatlantic Fairy Tale, Bertelsmann Future Challenges. Available online: http://futurechallenges.org/local/taftattip-and-the-story-of-inclusiveness-a-transatlantic-fairy-tale/*

Yan, X. (2013): *China Foreign Relations Research Group, Tsinghua University, Xin-Zhai 353, 1 June 2013.*

Zhang, C. (2013): *4 Things To Know About The Trans-Pacific Partnership, International Business Times. Available online: http://www.ibtimes.com/trans-pacific-partnership-tpp-trade-agreement-you-should-care-about-1425468*

KEYWORDS: BRICS, FREE TRADE, WARRING TRADE BLOCS, HEGEMONY

THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AS A NEW STRATEGY TO MARGINALIZE EMERGING POWERS: A DIVIDED FREE TRADE ORDER IN THE MAKING?

Marc Venhaus | *Graduate School of Global Politics (GSGP)* | *Freie Universität Berlin & Fudan University Shanghai*
marc.venhaus@fu-berlin.de | *@MVenhaus*

Abstract: *The global financial crisis abruptly ended the golden age of neoliberal globalization (1990s–2008) for both the European Union (EU) and the United States (US) and caused a relative loss of their economic power. Simultaneously, the BRICS not only continued to catch up with an impressive pace (6% average GDP-growth), but also expanded their influence in multilateral organizations and intensified their mutual relations. Now, times seem dire enough for the old transatlantic partners to close the ranks by creating the biggest preferential trade agreement ever. The Transatlantic Free Trade Agreement (TAFTA) or Transatlantic Trade and Investment Partnership (TTIP) currently negotiated between the EU and the US has the potential to become a game changer: 1) TAFTA | TTIP offers a way to set up new rules and norms (first mover advantage) based on EU and US interests that, due to the deadlocked Doha Development Round, could no longer be carried through within the framework of the World Trade Organization (WTO) (withdrawal from multilateralism), 2) TAFTA | TTIP provides a strategy to contain the rise of China and other emerging powers by manifesting a new trench system of global trade, undermining production networks and diverting the flow of goods. Hence, TAFTA | TTIP is a reactionary move in the global geo-economic game and a warning that our world might become more divided than united.*

INTRODUCTION

Soon our globalized system of free trade may reach a decisive turning point: TAFTA | TTIP would create by far the largest free trading zone in history. It will put the vast markets of the EU and the US under one common umbrella yet, at the same time, it nurtures concerns among emerging powers that they might be left standing in the rain (Doody 2013). The BRICS[1] which are still situated at the economic semi-periphery, largely dependent on demand from the Western core, and, besides other negative implications, might face trade diversion and a disruption of their production networks if TAFTA

Photo credit: GovernmentZA (Flickr)

| TTIP is signed. So, it is not surprising that leading politicians of the BRICS have – at best – mixed feelings about what is currently negotiated in Washington and Brussels. But, why are the former economic champions on both sides of the Atlantic suddenly among the least supportive of global free trade and aspiring to create a new bilateral closed club? The reasons are manifold: TAFTA | TTIP has to be analyzed against the background of a deadlocked World Trade Organization (WTO) and a corresponding standstill of multilateral trade liberalization since 2001, an accelerated power shift towards the BRICS due to the global financial crisis of 2008, as well as eroding competitiveness and a lack of economic growth in the West vis-à-vis the emerging powers. Hence, from a geo-economic perspective[2], TAFTA | TTIP is a reactionary move of the pressured West with the aim to turn the tables on the BRICS. However, since it is particularly signified by exclusion rather than inclusion, it inherits the risk that it may trigger unanticipated reactions from the affected emerging powers. A dangerous division of the global trade order may be the outcome.

THE IMPERATIVE OF 'FREE TRADE'

Stephen D. Krasner (2000, 20) prominently argued that the structure of global trade is strongly linked to the interest and power of states that aim to maximize their national goals: i.e., to aggregate a nation's income, to obtain social stability, to

1 BRICS is the acronym for the five major emerging powers Brazil, Russia, India, China and their junior partner South Africa.

2 Geo-economics is understood as the analysis of the relationship between economic aims and political interests in an international arena.


Photo credit: caitriana (Flickr)

gain political power, and to foster economic growth. Accordingly, the structure of global trade is anything but stable over time, yet may significantly vary in between periods of closure and openness as an ultimate response to alterations in the international distribution of state power and diverging national interests (ibid., 36). Historically speaking, the past proneness to free trade rather appears to be an exception than a norm and can be explained by the rare supremacy of a single state (ibid., 20). This so-called 'global hegemon' is said to have a strong preference for an open trade structure, since it is in an advantaged position to reap most of the benefits and has the capacity to either convince or, even, force other nations to join the prevalent trade order (ibid., 23).

This had particularly been the case under the rule of the British Empire (using a mix of attraction and gunboat diplomacy), until it was contested in the early 20th century, and is surely true for US hegemony (with a focus on international institutions) since the Second World War – until most recently. Even though, these two prominent cases should not obscure us from the fact that our current system of global free trade, which is taken for granted without being anything like the "natural order of things", could quickly dissolve (Rodrik 2011, 47). In fact, the historic pendulum might soon swing back from the currently open to a more divided and protectionist trade structure, as it has already been the case during the 1930s, when Great Britain proved to be unable to uphold its hegemonic position and a new distribution of power was unclear. Now, the hegemonic US together with its European allies have come under pressure for which reason trade-based globalization, as we know it, may be at stake. To go even further, the case of TAFTA | TTIP might prove that we are already at the beginning of a transitional period that will result in a return to warring and fiercely competing trade blocs, in which brute power politics and national egoistic interests may prevail.

In any case, the award-winning South Korean economist Ha-Joon Chang (2007, 23) provided evidence that the "conviction that free trade [...] is the key to global prosperity" is far from being a reality, but has to be seen as an imagined history which so far helped to sustain the dominance of the West and the dependency of the 'rest'. As a matter of fact, the concept of free trade developed out of a two centuries-old historical narrative that repeatedly had the purpose to justify and solidify the respective global hegemons' pursuit of power (Magnusson 2004, 7). Thus, what is now widely accepted as an economic doctrine is to a large extent based on an invented tradition that goes back to the (mis)reading of Adam Smith, David Ricardo, and other worldly philosophers, and was later backed up by – often disputable – empirical evidence from the Western-dominated economic discipline. However, the free trade doctrine "barely lived up to its theoretical claims", as compliant weaker nations remained largely exposed to strong competition from the West, which secured its place at the commanding heights of the global economy (Shaikh 2007, 51; 57). However, in the past it was both leading European states and the US that belonged to the worst defectors of the hegemonic doctrine: They "relied heavily on trade protection and subsidies, ignored patent laws and intellectual property rights and generally championed free trade only when it was to their economic advantage"; yet later on prohibited others from repeating their path of success (ibid., 50; Ha-Joon 2007). That is to say, the given rules of the trade game are not only biased towards the nations of the West, which leads to an asymmetrical distribution of global wealth and welfare, but are also repeatedly ignored by them (Nayyar 2007, 80).

Nonetheless, some rather maverick countries – now referred to as emerging powers – managed to rapidly catch-up in this system of double standards and have come to challenge the West's prerogative of making and interpreting rules. Consequently, the hegemon and its Western allies are increasingly reluctant to maintain a globalized free trade order in which others become more influential and start to similarly benefit. Thus, the EU and the US not only choose to slowly retreat from their once created free trade order, but – by means of TAFTA | TTIP – try to remix the cards in the global geo-economic power game (Rodrik 2011, xiv).

THE TRANSATLANTIC URGE TO SUSTAIN POWER

In spring 2013, President Obama's sudden announcement of trade talks between the EU and the US took many observers by surprise; even though the idea of TAFTA | TTIP is far from being new and rested in the drawers since the 1990s, when it was first considered but soon failed due to political hesitancy in Washington and because of strong opposition coming from some European member states. Hence, what we see right now could be described as the return of TAFTA | TTIP, yet under far better global conditions of completion. This is the case since two decisive moments in the last decade have significantly raised the stakes for the West:

2001: China – the former politico-economic pariah – not only joined the Western-dominated WTO but quickly ascended to one of its biggest stakeholders and became an advocate of the interests of emerging powers. In addition, the arising stalemate in the Doha Development Round started to send a strong (and lasting) signal that the 'rest' was no longer willing to bow its head to the West and its ambivalent policies.

2008: The global financial crisis, which unexpectedly spread from the heartland(s) of the global economy, abruptly caused a significant loss of power and influence for the transatlantic allies vis-á-vis the BRICS, and ended what can be called the golden age of Western-dominated and institution-based neoliberal globalization (1990s-2008).

Today, in late 2013, we may have reached a critical juncture: The 'heretical' BRICS (6% average GDP-growth) have not only continued to be highly successful in their catch-up process,

but have also started to offer veritable alternatives to the – so-far – dominant neoliberal dogma championed by the US (2% growth) and core EU-states (nearly no growth) (Gusenbauer 2013). Moreover, based on the most recent trends, the BRICS might relatively soon reach the point that they even surpass the joint economic power of the EU and the US (IMF World Economic Outlook 2012). As a matter of fact, the latter two have come to realize that their historical preponderance is significantly endangered by the urge of emerging powers to rebalance the global economy after a long period of Western domination (Alcaro & Alessandri 2013, 3-5; Campanello 2013). So, a re-strengthening of the transatlantic ties and further bilateral integration seems to be the only viable way for Brussels and Washington to at least slow down – if not even reverse or stop – this epochal transformation by "sending a strong signal to China and the rest of the BRICS that there is still life in the good old nations of the West" (Techau 2013).

Hence, TAFTA | TTIP is an attempt to alter the geo-economic dynamics by: 1) putting the transatlantic partners back in the driver's seat of a global trading system they had once created and solely dominated, and 2) by containing the rise of China and of other emerging powers (Ash 2013). No doubt about it, TAFTA | TTIP – if signed – will surely become a game-changer in the global trade order. Yet, the crucial question is: in what specific way? Is it going to exert enough pull-capacity and force emerging powers to once more swallow the bitter pill of adapting to Western rules and standards or will it rather push the BRICS into forming a balancing trade coalition that will be joined by the weak and disappointed? Among the proponents of the former outcome is Richard N. Rosencrance (2013), who stresses that TAFTA | TTIP will reconsolidate the still-advantaged position of the West (still reflecting 50% of global output) by forcing China and other economically highly dependent powers, with low value-adding production capacities and limited innovative capabilities, back into line. However, this may turn out to be short-term thinking.

Even if TAFTA | TTIP will buy some time tor the transatlantic partners by creating a short economic resurgence and first-mover advantage, we should not underestimate the negative psychological effects on dynamic emerging powers (Felbermayr 2013, 11). Not unlikely, the BRICS will react by further intensifying and deepening their mutual bonds in order to increase their global leverage and joint negotiation power. So, the idea that TAFTA | TTIP will become something like a 'circuit-breaker' that may render possible a return to Western-led multilateralism by providing an attractive benchmark for others seems rather naïve, as it does not reflect the increased role and self-image of proud emerging powers (Suominen 2013). Instead, the BRICS may perceive the transatlantic trade initiative as an attempted blackmail as well as an instrument to marginalize them in the global economy (Mildner & Schmucker 2013, 5).

THE GLOBAL DIVISION OF TRADE

It does not come as a surprise that the insurmountable confrontation of the West and the 'rest' and the related paralysis of the WTO have led to an unprecedented increase in the popularity of bilateral FTAs; a precarious development which Jagdish Bhagwati (1995) once coined as the 'spaghetti bowl effect'. Today, this effect has indeed materialized: more than 200 FTAs have been signed since 2001 in order to insure nations against the ongoing crisis of multilateralism and to prepare them for insecure times of increasing global competition and a return to power politics (Dieter 2013, 48; Suominen 2013). According to Joseph E. Stiglitz (2013) it is therefore an utter misunderstanding to believe that TAFTA | TTIP is about the (re-)establishment of a beneficial-for-all free trade system; instead he characterizes it as a 'charade' since we will see the creation of a managed trade system that – once more – is going to serve the special interests of the West. Hence, in the end, TAFTA | TTIP may neither become a 'stepping stone' nor a 'stumbling stone' – as some might argue – but the tombstone for the WTO and multilateralism in our still globalized trade order. What may happen afterwards is fully open to imagination. In the worst case scenario, the WTO could end up becoming something like the 21st century economic counterpart to the miserably failed League of Nations[3] in a rapidly de-globalizing world. This is actually what economist Douglas A. Irwin (2009, 3; 23) refers to when he states that our world is on the brink of a severe 'globalization backlash'.

It becomes obvious that the transatlantic partners are now in the defensive and need to prove that they are still capable to shape and lead the global trade order. However, in this regard, TAFTA | TTIP is both an ambitious and a risky undertaking. On the one hand, TAFTA | TTIP is surely ambitious in the sense that it should enable the US and its junior partner EU to better work around the WTO and "regain regionally the ground they have lost multilaterally", besides being a means to achieve fundamental concessions from the BRICS "in terms of market access, compliance with intellectual property rights, access to government procurement, and subsidies to state companies" (Laidi 2013; Berger & Brandi 2013). Yet, on the other hand, TAFTA | TTIP is extremely risky as it will bereft the WTO of its formerly biggest supporters and could turn out to become the final straw that may break the neck of multilateralism in trade and change the face of globalization as we know it (Dieter 2013, 50). Especially so because the US "has no real interest in revitalizing multilateral trade negotiations" since bilateralism is "more effective in extracting concessions from emerging powers" wheres TAFTA | TTIP offers an eligible way to prepare the EU and the US "for the economic battle with the BRICS" (Laidi 2013; Sapir 2013).

Consequently, it does not surprise that particularly China is worried: it has committed itself strongly to the WTO and now observes the slow withdrawal of the US and the EU with utter disappointment (Razeen 2008, 104). Momentarily, decision-makers in Beijing express their concern that TAFTA | TTIP (in interaction with TPP[4]) may harm China's growth and prosperity by cutting the country off from the global economy (interruption of production chains, trade diversion, decrease in competitiveness) on which it so depends to continue its unprecedented success story (Li 2013; Doody 2013). Thus, as a direct reaction to TAFTA | TTIP, discussions gained momentum shortly before the 5th BRICS Summit in March 2013 that BRICS members should likewise "create a free trade agreement to increase

3 The League of Nations (1919-1946) was an international organization with the target to ensure world peace after the horrors of the First World War. It failed in its mission due to the lacking commitment or withdrawal of leading nations.

4 TPP stands for the Trans-Pacific-Partnership and connects the US with countries in the Pacific Rim like Australia and Japan. TPP and TAFTA | TTIP could be seen as the sister trade agreement with Washington at its centre.

the power and voice of emerging economies in the world economy" (ibid.). To go even further, Chinese state media already sees a potential trade Cold War in the making (Grant 2013). Even if this appears highly exaggerated at this point in time, such negative perceptions could quickly spread among other emerging powers and may turn current projections of a BRICS-trade bloc into a soon to come reality. Admittedly, the highly dissimilar BRICS so far mainly concentrate their efforts on gaining further ground in multilateral organizations whereas not a single bilateral FTA has been concluded among them (Doody 2013). Yet, TAFTA | TTIP could trigger dynamics and create new challenges for our globalized world that are not yet sufficiently taken into account: what is surely doubtful is that the BRICS will allow the West to endanger their ascendancy for which reason they finally are going to react in one way or the other. In this regard, the emergence of a divided free trade order in which at least two large trading blocs will confront each other in fierce competition or even brute conflict does not appear to be the most unlikely future.

CONCLUSION

To conclude, TAFTA | TTIP is a reactionary move of the West in an intensifying geo-economic power game and a warning that our world might soon become more divided than united (again!). In general, the moment might already have passed that a bilateral agreement between the waning global hegemon and its troubled partners will succeed to halt or even reverse the further rise of the BRICS. More likely, it will only slightly reduce the pace of the ongoing process by buying some additional time for the West to prolong its global preeminence. Meanwhile, globalization as we know it may wane as emerging powers might feel the urge to create a veritable counter-force in trade to free themselves from centuries-old Western domination. This again may not only result in a fiercely competitive trench system of free trade zones (e.g. alike the 1930s) but will prove that globalization is not a historical one-way-street yet is always based on man-made decisions and strategic choices.

REFERENCES

Alcaro, Riccardo / Alessandri, Emiliano (2013): *A Deeper and Wider Atlantic, Italian Ministry of Foreign Affairs. Available online: http://www.gmfus.org/wp-content/blogs.dir/1/files_mf/1360337936A_Deeper_and_Wider_Atlantic.pdf*

Ash, Timothy Garton (2013): *The Dialectics of Global Free Trade, The Globe and Mail. Available online: http://www.theglobeandmail.com/globe-debate/the-dialectics-of-free-trade/article13161523/*

Berger, Axel / Brandi, Clara (2013): *The Global Trading System at a Turning Point, German Development Institute (DIE). Available online: http://www.die-gdi.de/CMS-Homepage/openwebcms3_e.nsf/%28ynDK_contentByKey%29/MRUR-99EA5H?Open*

Bhagwati, Jagdisch (1995): *U.S. Trade Policy - The Infatuation with Free Trade Agreements, in Jagdish Bhagwati and Anne O. Krueger: The Dangerous Drift to Preferential Trade Agreements, AEI Press.*

Dieter, Heribert (2013): *Festung Atlantik - Eine Transatlantische Freihandelszone würde die WTO schwächen, Internationale Politik 3 (May/June), pp. 48-53. Available online: https://zeitschrift-ip.dgap.org/de/ip-die-zeitschrift/archiv/jahrgang-2013/mai-juni/festung-atlantik*

Doody, Justin (2013): *Shutting Out the BRICs? Why the EU Focuses on a Transatlantic Free Trade Area, Global Economic Dynamics (GED). Available online: http://www.ged-project.de/viz/articles/shutting-out-the-brics-why-the-eu-focuses-on-a-transatlantic-free-trade-area/*

Felbermayr, Gabriel / Larch, Mario / Berend Diekmann, Berend & Langhammer, Rolf J. (2013): *Transatlantische Handels- und Investitionspartnerschaft - Welche Effekte sind zu erwarten?, ifo Schnelldienst 66(06). Available online: http://www.cesifo-group.de/ifoHome/publications/docbase/details.html?docId=19081450*

Grant, Dan (2013): *Transatlantic Trade - Is China in or out?, The Hill. Available online: http://thehill.com/blogs/congress-blog/foreign-policy/312613-transatlantic-trade-is-china-in-or-out*

Gusenbauer, Alfred (2013): *The Transatlantic Free-Trade Imperative, Project Syndicate. Available online: http://www.project-syndicate.org/commentary/the-transatlantic-free-trade-imperative-by-alfred-gusenbauer*

Ha-Joon, Chang (2007): *Kicking Away the Ladder - The 'Real' History of Free Trade, in: Shaikh, Anwar (ed.): Globalization and the Myths of Free Trade - History, Theory, and Empirical Evidence, pp. 23-50, Routledge: London and New York.*

Irwin, Douglas A. (2009): *Free Trade under Fire, Princeton University Press: Princeton and Oxford.*

Krasner, Stephen D. (2000): *State Power and the Structure of International Trade, in Frieden, Jeffrey A. / Lake, David. A. (eds.): International Political Economy: Perspectives of Global Power and Wealth, pp. 19-37, 4th edition, Routledge: London and New York*

Laidi, Zaki (2013): *Europe's Bad Trade Gamble?, Project Syndicate. Available online: http://www.project-syndicate.org/commentary/the-eu-turns-away-from-trade-multilateralism-by-zaki-laidi*

Li, Jiabao (2013): *Experts Call for BRICS Trade Pact, China Daily. Available online: http://www.chinadaily.com.cn/china/2013-03/27/content_16347695.htm*

Magnusson, Lars (2004): *The Tradition of Free Trade, Routledge: London and New York.*

Mildner, Stormy-Annika & Schmucker, Claudia (2013): *Abkommen mit Nebenwirkungen, Stiftung Wissenschaft und Politik (SWP). Available online: http://www.swp-berlin.org/de/publikationen/swp-aktuell-de/swp-aktuell-detail/article/eu_und_usa_handels_und_investitionspartnerschaft.html*

Nayyar, Deepak (2007): *Globalization and Free Trade; Theory, History and Reality, in: Shaikh, Anwar (ed.): Globalization and the Myths of Free Trade - History, Theory, and Empirical Evidence, pp. 69-85, Routledge: London and New York.*

Razeen, Sally (2008): *New Frontiers in Free Trade: Globalization's Future and Asia's Rising Role, CATO Institute: Washington DC.*

Rodrik, Dani (2011): *The Globalization Paradox - Why Global Markets, States, and Democracy Can't Coexist, Oxford University Press.*

Rosencrance, Richard N. (2013): *Want World Domination? Size Matters, The New York Times. Available online: http://www.nytimes.com/2013/07/28/opinion/sunday/want-world-domination-size-matters.html?_r=0*

Sapir, André (2013): *The Transatlantic Trade and Investment Initiative - Hope or Hype? Bruegel. Available online: http://www.bruegel.org/nc/blog/detail/article/1034-the-transatlantic-trade-and-investment-initiative-hope-or-hype/*

Shaikh, Anwar (2007): *Globalization and the Myth of Free Trade, in: Shaikh, Anwar (ed.): Globalization and the Myths of Free Trade - History, Theory, and Empirical Evidence, pp. 50-69, Routledge: London and New York.*

Stiglitz, Joseph E. (2013): *The Free-Trade Charade, Project Syndicate. Available online: http://www.project-syndicate.org/commentary/transatlantic-and-transpacific-free-trade-trouble-by-joseph-e--stiglitz*

Suominen, Kati (2013): *The Case of TAFTA, Foreign Policy. Available online: http://www.foreignpolicy.com/articles/2013/02/13/the_case_for_tafta_us_europe_free_trade*

Techau, Jan (2013): *The Geopolitics of TAFTA, Carnegie Endowment. Available online: http://carnegieeurope.eu/strategiceurope/?fa=50773*

World Economic Outlook (2012), International Monetary Fund (IMF). Available online: *http://www.imf.org/external/pubs/ft/weo/2012/02/weodata/index.aspx*

KEYWORDS: AGRICULTURE; POLICY PARADIGMS; FOOD & ENVIRONMENTAL CHALLENGES; SUSTAINABILITY

THE TAFTA / TTIP AND AGRICULTURE: MAKING OR BREAKING THE TACKLING OF GLOBAL FOOD AND ENVIRONMENTAL CHALLENGES?

Gerry Alons | *Institute for Management Research* | *Radboud University Nijmegen* | *g.alons@fm.ru.nl*

Abstract: *The recently commenced negotiations on a transatlantic free trade area (TAFTA / TTIP) are likely to have an impact on transatlantic and global agricultural and environmental regulation. The potential for developing a global trade regime that is able to face the pressing global food and environmental challenges of today and tomorrow, such as food security and climate change, depends to a large degree on whether the two major global players are able to arrive at concerted efforts to address them. This article will show how EU and US values and policy paradigms related to food and agriculture have developed over the last decade and are likely to affect the prospects for a TAFTA / TTIP. The more convergent the developments on either side of the Atlantic, the better the chances of (1) arriving at a TAFTA / TTIP, without agricultural issues such as genetically modified organisms (GMO) and non-tariff barriers impeding the endeavour, and (2) the trade agreement being conducive to tackling global food and environmental challenges. This way the article investigates whether a TAFTA / TTIP is likely to enhance the prospects that the world can be fed in the future and a sustainable planet is possible.*

INTRODUCTION: SETTING THE SCENE

Negotiations on a transatlantic free trade agreement commenced in July 2013. These are expected to be comprehensive, covering virtually all aspects of EU-US trade. Economists are now commenting on the great benefits this will entail for industries on both sides of the Atlantic. At the same time, it is an issue of debate whether the TAFTA / TTIP is an alternative for multilateral negotiations or rather complements them. The optimistic view is that the negotiations will result in global standards for trade and investments and solve a range of issues that are currently stalling the multilateral negotiations within the World Trade Organization (WTO). TAFTA / TTIP would then provide a basis for future multilateral cooperation. This view will only hold though, if the negotiators succeed in tackling sensitive issues, such as agriculture. Furthermore, these solutions subsequently have to be acceptable to their trading partners in the WTO if they are to affect the prospects for future multilateral solutions.

This article will focus on agriculture. First of all because experience to date indicates that the interconnected fields of agriculture and trade have been the subject of intense transatlantic conflict-potential. Secondly, because it is particularly through concerted agricultural trade policy that major societal challenges at a global level, such as food security and environmental sustainability, can be effectively addressed.

The idea of a transatlantic free trade agreement is not new. It was also considered in the 1990s. However, sharp differences in EU and US agricultural support measures and major transatlantic disputes over export subsidies, beef hormones and GMO seeds and foods, proved to be insurmountable obstacles at the time (Schott & Oegg 2001, 745). Currently, agricultural issues are again expected to complicate the negotiations (Grueff 2013; Trachtenberg 2012). A question of major importance, therefore, is whether the contentious agricultural issues of the 1990s are still likely to pose similar problems now. Much will depend on the degree to which EU and US agricultural paradigms and policies have converged over the last two decades. Both actors reformed their agricultural policies repeatedly since the 1990s. If these measures have resulted in substantial convergence, then the odds of arriving at a successful TAFTA / TTIP agreement increase, as

well as the prospects that the EU and the US could set powerful precedents that can be followed at the multilateral level.

In the remainder of this paper I will first compare and contrast agricultural policy paradigms and reforms on both sides of the Atlantic. I will subsequently elaborate on a number of major outstanding issues, such as hormone beef and GMOs. The final section will reflect on the consequences of these developments on both sides of the Atlantic for the prospects of and potential effects of a successful TAFTA | TTIP.

TWO DECADES OF AGRICULTURAL POLICY REFORM IN THE EU AND THE US

In the area of agriculture, three important paradigms need to be distinguished. These paradigms are frameworks of cognitive ideas about how the world is put together and normative ideas of what implications these should have for public policy. The dependent agricultural paradigm advocates state intervention and special treatment of the agricultural sector, while the rivaling competitive paradigm promotes subjecting agricultural trade to market-forces. Finally, the multifunctional paradigm emphasizes the multiple environmental and social functions of farming for which farmers should be rewarded (Garzon 2006; Daugbjerg & Swinbank 2009). The three different paradigms implicate different farm policies, which are illustrated by the development of agricultural policy on both sides of the Atlantic.

After World War II, the dominant view was that agricultural production needed to be stimulated to ensure food security. In line with the dependent paradigm, it was argued that the farm sector deserved governmental intervention and support, because it had to cope with unpredictable natural conditions and inelastic prices. Over the years, the US started to move toward a more competitive paradigm (Skogstad 1998). It allowed market-forces to operate to a larger degree in the sector and replaced the trade-distorting price support with direct income support. By completely decoupling such income support from production in the 1996 Farm Bill, farmers' production decisions became less dependent on governmental policy and instigated by market prices instead. The policies were partly reversed in the 2002 Farm Bill. This bill did not only maintain the (originally transitory) direct income payments at a constant level, but also extended them to more crops. Furthermore, the ad hoc emergency payments granted to farmers in 1998 were now institutionalized through the introduction of so-called coun-

Photo credit: World Bank Photo Collection (Flickr)

ter-cyclical payments: payments that automatically increase when market prices drop. The trend to lower farm subsidies was thus curtailed. Robert L. Thompson (2005) argues that this represents a complete ideological turnaround away from market-orientation, increasing the trade distorting impact of US agricultural policies. Naturally, this weakened the US negotiating position in the WTO Doha Development Round. Currently, the US Senate and House of Representatives are trying to reach agreement on a new Farm Bill. While the exact outcome is not yet clear, budget pressures ensure substantial cuts and are likely to result in a scaling down of support measures.

The EU's Common Agricultural Policy (CAP) moved in the direction of the multifunctional paradigm in the 1990s, rather than the competitive paradigm (Skogstad 1998; Garzon 2006). Two decades after the US transition to income payments, the EU followed suit in the 1992 MacSharry reforms. It was particularly the Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT) that instigated this shift from price to income support. In this GATT agreement, price support and export subsidies were labelled 'trade distorting' and had to be reduced. Income payments, however, were not subject to reductions, because they were not assumed to have a substantial negative impact on trade. By shifting to direct income payments, the EU could thus make its agricultural policy GATT-proof. The EU's legitimization of the direct payments reflects a multifunctional paradigm. The agricultural sector does not only provide food production, it was argued, but also performed multiple environmental and social functions (supporting rural culture, animal welfare, etc.). These services were not reflected in market prices and should therefore be rewarded through public policy. Subsequent CAP reforms further decreased export subsidies and price support, while decoupling the direct income payments from production. Market-forces thus also became increasingly important in EU agriculture. Considering the Commission's focus during the latest CAP post-2013 reform debate on the public goods that European agriculture provides and for which it should be rewarded, the multifunctionality paradigm is still very much alive in the EU though.

The increasing global importance of the issue of sustainability resulted in the introduction of the first agri-environmental measures in the 1980s and 1990s on both sides of the Atlantic. But US and EU policies differ in two important respects. First, US policies are aimed at reducing negative externalities of agriculture, such as soil erosion and water pollution by compensating farmers for taking land out of production. The EU, alternatively, focuses on expanding positive externalities of farming (the multiple environmental functions and services mentioned earlier) and argues that this is best achieved by expanding agricultural activity. Secondly, US policies are more targeted than EU policies. Specific programs in the US focus on soil erosion and water pollution and compensation is related to output. To receive agricultural payments in the EU, it is sufficient to apply certain agricultural inputs or farming practices that are considered environmentally friendly (Baylis et al. 2008). The Commission's 'greening' proposals in the Post-2013 CAP reform sought to introduce a more transparent link between direct income payments and the delivery of environmental public goods, making 30% of the payments dependent on implementing certain environmental measures. Their likely environmental effectiveness is questionable though (Matthews 2013). These measures, just like the multifunctionality argument used by the EU to include non-trade concerns such as environmental standards in the WTO Doha Development Round, are therefore often regarded as smokescreens for policies that are primarily aimed at transferring money to farmers, while distorting international trade (Baylis, Rauser & Simon 2005).

While EU and US agricultural policies thus clearly converged over the last two decades, reducing governmental intervention and allowing market-forces to operate, important differences remain, both in terms of their policy paradigms and their policies. A number of specific issues are further likely to complicate the TAFTA | TTIP negotiations, to which I will now turn.

OUTSTANDING ISSUES

Two of the issues that stifled negotiations on a free trade area in the 1990s are still problematic: hormone beef and GMOs. These biotech and sanitary and phyto-sanitary (SPS) issues in WTO-speak are considered to be a potential deal-breaker (Trachtenberg 2012). Several WTO panels have decided in favour of the US in the hormone beef case. The EU rather accepts the US WTO-approved retaliatory measures, though, than lifting its import ban. The existing WTO's SPS agreement allows measures taken to protect human, animal or plant life or health on the basis of science-based evidence. The US claims there is no scientific evidence that hormone beef or GMOs endanger human or plant life or health. The EU, however applies the precautionary principle, arguing that when the possibility of harmful effects exist but scientific uncertainty remains, states are allowed to take action, such as implementing an import ban. They furthermore refer to "other legitimate factors" for such policies, including consumer concerns (Grueff 2013).

Clearly, different cultures with respect to food safety exist on both sides of the Atlantic. In the US, scientific and technical innovations are welcomed. GMOs are considered a solution to deal with the global challenge of food security (producing sufficient food to meet increasing global demand), because GMO seeds and crops enable increased production output on the same amount of land. In the EU a widely shared aversion exists against genetically engineered food and consumers prefer product labeling to know where their food has been produced and in what way (ibid.). While EU producers do not seem to be most critical of GMOs, environmental and consumer lobbies exert great pressure to bar GMO products from EU land and markets. These factors will make it difficult for the European Commission to make substantial concessions on this issue. Its discourse in public documents reflects this tough stance: "Our high level of protection here in Europe is non-negotiable" and "Tough EU laws, like those relating to hormones, or those which are there to protect human life and health, animal health and welfare, or environmental and consumer interest will not be part of the negotiations" (European Commission 2013). This will undoubtedly result in a clash in the negotiations, as the United States Trade Representative, Ron Kirk, already

indicated that an ambitious SPS chapter will be a major US demand (Corporate Europe Observatory 2013).

A new issue of discontent concerns the so-called Geographical Indications (GI). GIs represent a kind of intellectual property right based on the product's originating in a certain region within a particular country. Well-known examples are Parma ham and Roquefort cheese. The EU claims that the quality and reputation of these products are inextricably linked to the regions they originate from and cannot be transferred elsewhere. The EU demands protection of these GIs to prevent their usage by other producers. GIs proved to be an important contentious and unresolved issue in the Doha Round. However, in recently concluded free trade agreements with countries such as Korea and Singapore, the EU succeeded in ensuring a certain level of protection for GIs. Negotiations with the US, who are more critical of GIs, is likely to prove more difficult. But acceptance of GIs as an intellectual property right while excluding products that can actually be seen as generic could prove to be a way forward (Trachtenberg 2012).

THE PROSPECTS FOR AND EFFECTS OF A SUCCESSFUL TAFTA | TTIP

Compared to the 1990s, current conditions are more conducive to the successful conclusion of a TAFTA | TTIP in several respects. First of all, the multilateral Doha Development Round is totally blocked, which increases the sense of urgency for at least reaching a transatlantic agreement. Secondly, with respect to agriculture, US and EU policies have converged in the sense that they have both become increasingly market-oriented. Thirdly, EU usage of agricultural export subsidies, a major bone of contention in the 1990s, decreased so significantly that they will no longer complicate the negotiations.

As elaborated above, SPS issues are likely to become the major potential deal-breakers. Keeping the issue out of the TAFTA | TTIP seems highly unlikely, considering the US drive to have this issue resolved. Since both the EU and the US defend very strong positions on the matter, only concessions from both sides are likely to enable agreement. A potential solution suggested by Trachtenberg (2012) is that the EU accepts the science-based method, while the US allows product-labeling.

Agri-environmental measures could also cause complications given the very different regulatory regimes on both sides of the Atlantic. To the extent that the measures are decoupled from production – which is increasingly the case – the EU and the US are likely to reach agreement relatively easily, as these measures would also be considered 'green box' measures in the WTO. It is unlikely though that the US will accept all EU measures to promote environmental public goods, as these are at least in part perceived as concealed protectionism. Since both parties will particularly aim at defending existing policies in the TAFTA | TTIP, an eventual agreement is also unlikely to raise transatlantic environmental standards. However, as these standards are relatively high in global comparison, they could be a powerful precedent for the rest of the world.

This, however, raises the question of whether an agricultural agreement in the TAFTA | TTIP is likely to provide a solution for the debate on agriculture in the WTO. On the one hand, since the EU and the US are both considered relatively protectionist in the area of agriculture, the outcome of the TAFTA | TTIPP in this domain is unlikely to satisfy their WTO partners. Furthermore, the successful inclusion of its potential agri-environmental measures in the Doha Development Round would depend on their acceptance among developing states in particular, as these states opposed the inclusion of such non-trade concerns. On the other hand, considering that the other WTO trading partners can only benefit from the trade concessions in the transatlantic agreement if they to some extent accept it as a template for a multilateral agreement, they may be compelled to make concessions on agriculture. The odds of a TAFTA | TTIP enabling agreement in the Doha Development Round on agriculture thus remains uncertain, but whatever the outcome, it is unlikely to significantly contribute to global challenges of environmental sustainability.

REFERENCES

Baylis, K. / Rausser, G.C. / Simon, L.K. (2005): *Including Non-trade Concerns: The Environment in EU and US Agricultural Policy, International Journal of Agricultural Resources Governance and Ecology, vol. 4(3/4), pp. 262-276.*

Baylis, K. / Peplow, S. / Rausser, G.C. / Simon L.K. (2008): *Agri-environmental Policies in the EU and United States: A Comparison, Ecological Economics, vol. 65, pp. 753-764.*

Corporate Europe Observatory (2013): *An Open Door for GMOs (?): Take Action on the EU-US Free Trade Agreement. Available online: http://corporateeurope.org/trade/2013/05/open-door-gmos-take-action-eu-us-free-trade-agreement*

Daugbjerg, C. / Swinbank, A. (2009): *Ideas, Institutions and Trade: The WTO and the Curious Role of EU Farm Policy in Trade Liberalization. Oxford: Oxford University Press.*

Garzon, I. (2006): *Reforming the Common Agricultural Policy: History of a Paradigm Shift, Houndsmills: Palgrave Macmillan.*

Grueff, J. (with contributions from S. Tangermann) (2013): *Achieving a Successful Outcome for Agriculture in the EU-U.S. Transatlantic Trade and Investment Partnership Agreement, Food & Agricultural Trade Policy Council, Washington. Available online: http://www.agritrade.org/Publications/documents/FINAL_US_EU_FTA_fordistribution.pdf*

Matthews, A. (2013): *Greening CAP Payments: A Missed Opportunity?, The Institute of International and European Affairs, Dublin. Available online: http://www.iiea.com/ftp/environmentnexus%20papers/Greening%20CAP%20Payments_A%20Missed%20Opportunity-IIEA-environex_project-2013.pdf*

Schott, J. J. / Oegg, B. (2001): *Europe and the Americas: Toward a TAFTA-South?, The World Economy, vol. 24(6), pp. 745-759.*

Skogstad, G. (1998): *Ideas, Paradigms and Institutions: Agricultural Exceptionalism in the European Union and the United States, Governance, vol. 11(4), pp. 463–490.*

Thompson, R.L. (2005): *The US Farm Bill and the Doha Negotiations: On Parallel Tracks or a Collision Course?, Food & Agricultural Trade Policy Council, Washington. Available online: http://www.wto.org/english/forums_e/ngo_e/posp52_ifatpc_e.pdf*

Trachtenberg, E. (2012): *A Transatlantic Partnership: Agricultural Issues. Different Visions, a Common Destiny, The German Marshall Fund of the United States, Washington. Available online: http://www.gmfus.org/wp-content/blogs.dir/1/files_mf/1349879071Trachtenberg_AgIssues_Oct12.pdf*

KEYWORDS: DIGITAL AGENDA; DATA PROTECTION, INFORMATION AND COMMUNICATIONS TECHNOLOGY, INTELLECTUAL PROPERTY

TAFTA | TTIP IN THE LIGHT OF THE MODERN DIGITAL AGE AND ITS SIGNIFICANCE FOR THE FUTURE OF THE ICT INDUSTRY

Joachim Bühler | *Member of the Executive Board, Politics & Business, BITKOM | J.Buehler@bitkom.org | @BITKOM*

Abstract: *The negotiations for the TAFTA | TTIP agreement encompass a broad spectrum of issues. Because of the far-reaching importance of ICT topics, the TAFTA | TTIP must include a Digital Agenda. BITKOM welcomes the High Level Working Group's (HLWG) proposals and emphasizes the imperative to pay special attention to the needs of the information and communications technology (ICT) business. The world of the 21st century, its economies and societies are strongly influenced by ICT topics, increasingly dependent on working ICT-structures, and based on improvements of ICT technologies. The Digital Agenda – if TAFTA | TTIP is to become a succes – should discuss ICT-regulations such as technical test provisions, the proper defining of standards as well as issues like intellectual property and data protection.*

Photo credit: Ars Electronica (Flickr)

Introduction[1]

In 2011, the leaders of the European Union (EU) and a United States (US) delegation met at a summit to talk about their future common goals and pending world challenges, especially in the economic area. With the continuing crisis of the world economy, both sides decided to open talks and negotiations on a mutually beneficial free trade agreement. For this purpose, the EU and US representatives authorized the Transatlantic Economic Council (TEC)[2] with the establishment of a High Level Working Group on Jobs and Growth (HLWG). The Working Group has been tasked to formulate policies and measures to increase EU-US trade and investment, to support mutually beneficial job creation, and to aid economic growth and international competitiveness (European Commission 2013a).

BITKOM[3] and its members welcome the HLWG's proposals and emphasizes the imperative to pay special attention to the needs of the information and communications technology (ICT) business, because the world of the 21st century, its economies and societies are strongly influenced by ICT topics, increasingly dependent on working ICT-structures, and based on improvements of ICT technologies.

The first round of the TAFTA | TTIP-negotiations started in July 2013 and took place in the same secrecy as the negotia-

1 Thanks to Daniela Spahlholz for the great support with this article.

2 The Transatlantic Economic Council (TEC) is a common transatlantic instrument that has the purpose of finding and setting joint norms and standards in the field of future technologies and aims to strengthen American and European companies' positions on the international market.

3 The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 2,000 companies in Germany. They include providers of software and IT services, telecommunications and Internet services, manufacturers of hardware and consumer electronics, and digital media businesses. BITKOM campaigns in particular for a modernization of the education system, for an innovative economic policy and a future-oriented Internet policy.

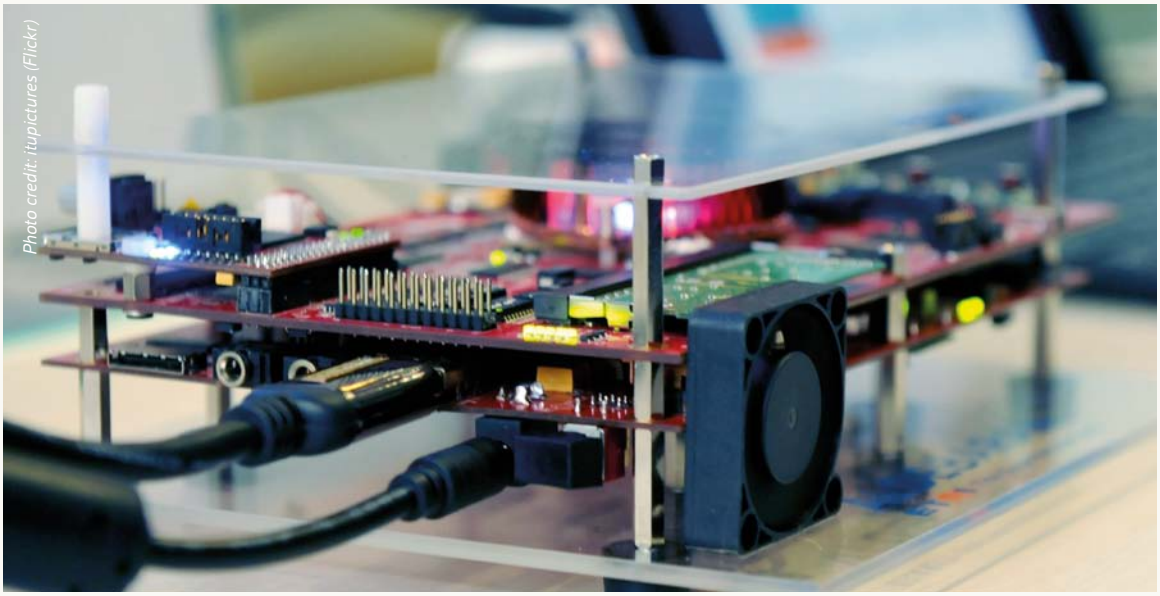


Photo credit: itupictures (Flickr)

tions for the Anti-Counterfeiting Trade Agreement (ACTA)[4], which, in the end, was rejected by the European Parliament (No: 478, Yes: 39, Abstentions: 165) after comprehensive and international protests against the agreement occurred all over the continent (BBC 2012). Looking at the issues at stake, both sides of the negotiations would be well advised not to make the same mistakes again, but should henceforth try to guarantee more open, transparent and, thus, democratic procedures. This should start right away, especially with the running negotiations of the intended treaty.

TAFTA | TTIP AND THE ICT INDUSTRY

The realization of TAFTA | TTIP would be the biggest trade deal in the world. Today, there are close relations between the EU and the US which are and will continue to be an element of stability in Europe and a precondition for development in general. These relations, built on the foundation of shared values and goals, have been developed steadily and were an important, stabilizing factor for the creation of the EU as a whole.

Looking at current economic statistics, the EU and (North) America have the strongest economic ties of all trade areas across the globe. The US and the EU only represent 10% of the world population, but together generate around 40-50% of world GDP (Auswärtige Amt 2013) and 30% of world trade (European Commission 2013a). In 2011, approximately 17% of all European exports went to the American market and 19% of total American exports were destined to the European market (European Comission 2013b).

ECONOMIC IMPORTANCE OF THE ICT SECTOR IN THE EUROPEAN AND AMERICAN ECONOMY: NUMBERS, GROWTH, JOBS

The ICT sector is not only one of the several sectors generating growth; it is also a cross-sectional technology enabling processes of production growth and innovation in various sectors of the value chain. A prosperous ICT sector has the potential to assure continuing growth in national Gross Domestic Product (GDP) and to safeguard jobs, while reducing the unemployment rate and providing the necessary product and service infrastructure. In a nutshell: the flourishing of aforesaid sector can help to ensure a sustainable economic growth for big, medium, and small companies alike and could contribute greatly in the creation of reliable modern infrastructures: for example, in public administration institutions (E-Government), in the health business (E-Health) or in the optimization of public transfer structures (smart grids) (European Commission 2013c; Executive Office of the President 2011).

The American and European ICT markets are globally leading markets, inasmuch as they represent a share of 27% (US) and 23% (EU-25) respectively, which combines to represent half of the global ICT market. Furthermore, the US and the member states of the EU maintain good and growing trade relations in the field of the ICT industry as well as in ICT products. The German ICT industry is one of the most important European trading partner for the American ICT industry (Statistisches Bundesamt Wiesbaden 2012).

STRONGER CONSIDERATION FOR REGULATION IN ICT RELATED AREAS

The trade in ICT products is regulated through a multilateral World Trade Organization (WTO) agreement, the Information Technology Agreement (ITA), signed in 1997 by 29 countries with the objective of eliminating tariffs on a broad list of information technology (IT) and telecommunications products (WTO 1996). Today the ITA regulations are accepted by 46 members (states or separate customs territories) and represent 97% of global trade in the specified products.

The HLWG identified areas for potential closer cooperation through: a) the elimination, reduction or prevention of tariffs, tariff-rate quotas and various kinds of non-tariff barriers to trade, b) enhanced compatibility of regulations and standards, and c) enhanced cooperation for the development of rules

4 The ACTA agreement is an intended multilateral trade agreement with the aim of setting binding international standards to fight plagiarizing of merchandise and copyright infringements.

and principles on global issues of common concern (European Comission 2013a).

BITKOM welcomes these proposed measures, but would prefer stronger consideration in the following areas related to the ICT business: adjustment and specifying regulation of the customs, technical test provisions and standards, data protection and questions related to the protection of intellectual property rights.

CUSTOMS

The list of products under the rules of the ITA covers computer hardware, computer software and peripherals, telecommunications equipment, analytical instruments, semiconductor manufacturing equipment and other electronic components (WTO 1996).

During recent decades, there have been rapid advancements in the development of devices and in the range of functions of these, which have opened up new features and applications in communication methods (Facebook, Twitter, social media, etc.). One important result of these developments was the idea to combine different functionalities in one device – the most common features and advances nowadays are evident in the integration of the Internet into telephones ("smart phones"), television sets ("hybrid or smart TV") or, currently under rapid development, glasses ("smart glasses").

The new devices – usually called Consumer Electronics (CE) – are not part of the low or non-tariff regulations of the ITA (except smart phones, which are classified as mobile devices) so when procuring them, they are liable to duties which constitute a new barrier to trade. Just as important is the fact that is it nearly impossible to decide, in which category (IT product or CE device) hybrid devices should be classified into. To eliminate this obstacle and, thus, to ease trading activities and procedures in this product area, the EU member states and the US would have to decide what kind of product each new hybrid device is, so that each one could be adequately categorized and put under suitable customs regulations.

TECHNICAL TEST PROVISIONS AND DEFINING OF STANDARDS

In the area of setting standards, norms, and a broader harmonization of technical test provisions for the market access of new IT hardware, a growing trade volume could easily be achieved by agreeing on the usage of the European approach – the so called "New Legislative Framework" (NLF)[5], – which constitutes the basis for a free movement of IT goods within the European market. On the legislative level there is no need for a myriad of new laws dealing with questions of technical details for each new IT product: it is just necessary to define basic product requirements. The second step – the technical realization of the product – is guided by a collective setting of norms that would take existing statutory laws into account.

Having identified the European approach as not only a successful one with regards to trading activities and trading volumes, but also as a simple way of setting standards and norms in the IT hardware business, it should be preferable to insert this working approach – by taking working American standards and norm setting schemes into account of course – into the procedures that have to be formulated under a common free trade agreement.

Another area that should be more strongly integrated and harmonized under the TAFTA | TTIP agreement is the field of European and American mobile telecommunication networks, especially in the field of Global System for Mobile Communications (GSM) frequency bands, which are cellular frequencies for the operation of GSM cell phones. Currently, there are various GSM frequency ranges used in different parts of the world. This variety creates a mixture of usage that requires travelers not only to pay (sometimes quite expensive) roaming fees, but also obliges them to check if their mobile devices are compatible with the band of networks available at their destination. More harmonization, in order to achieve greater interoperability between mobile telecommunication networks, is a further key towards reaping the benefits provided by ICT structures, devices, and applications.

INTELLECTUAL PROPERTY

In our digital age, an increasing number of non-physical products that can be sold, such as expensive cinema productions, can also be shared easily without any charge via a growing number of online platforms that are (usually) maintained by illegal providers (mostly located in unregulated countries). As a result, violations of intellectual property (IP) rights are on the rise.

A common free trade agreement between the EU and USA should try to reverse this trend by: a) fostering international cooperation to pursue those illegal providers even when they are located in non-regulated countries, b) conserving and (re-)strengthening existing IP-regulations like another WTO agreement, for example, the so-called Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, and c) establishing timely data sharing platforms where users can buy and legally stream content without violating any intellectual property rights. Furthermore, to increase the geographic coverage of a new agreement, its structure and norms should be agreeable to further potential participating states.

The economic, as well as the industrial, sector are important areas where IP-rights should find special protection under the rules of a common agreement. In the phase of an expansion to new markets, companies not only need the safety, but also the certainty that they do not have to disclose any intellectual property to gain access to a new market. Any

5 One important pillar of the Single European Market is the free exchange of goods and services, which is provided through the definition of European guide lines that are homogeneous and binding for members of the European Union. The market access of IT hardware to the European Market is mainly regulated through the "New Approach" and the "New Legislative Approach" which went into force in 1985 and 2008 respectively. They are the basis for defining the appropriate European guide lines. Both approaches are based on special common principles to define basic product requirements regarding safety, health or technical issues.

spying – especially promoted by governments – should be banned under these new rules.

DATA PROTECTION

The emergence of spying allegations has spurred a general opposition against a free trade agreement with the United States. But not only against the background of the various spying activities in Europe, the issue of data protection is of crucial importance. The global and increasingly digital economy needs robust data protection rules that provide a trustworthy basis on which companies can act and citizens' rights can be protected effectively. Therefore a trade agreement that is not accompanied by data protection considerations would not be adequate.

At this stage European companies are allowed to exchange personal data with American companies that are self-certified under the Safe Harbor agreement, which was accepted by the European Commission to provide an adequate level of data protection. The two other legal justifications for such data transfers are the use of standard data protection clauses – also allowed by the commission – and the existence of binding corporate rules that provide an adequate level of protection within internationally operating groups of companies. Especially the Safe Harbour Agreement is being significantly discussed at the moment, as there is a feeling that it might not live up to the expectations in guaranteeing an adequate level of protection. It is discussed whether there is a need for a better implementation and control of it or for a whole new approach on such transfers in order to strengthen European citizens' rights.

BITKOM supports an evaluation and a renegotiation of the Safe Harbor agreement with the aim of a stronger emphasis and adherence of European data protection standards and more reliable mechanisms of self-regulation

The issue of data protection must be treated carefully, but must not become an imposition for the TAFTA I TTIP negotiations in general. The exchange of data must be possible, for example, between companies located in Europe and their American daughters (e.g., to afford unobstructed business connections within one company). Nonetheless, the issue of data protection and a high standard for the protection of personal data is required and should be dealt with in the course of the TAFTA I TTIP negotiations.

CONCLUSION

The negotiations for the TAFTA I TTIP agreement encompass a broad spectrum of issues. Because of the far-reaching importance of ICT topics, structures, and technologies nowadays by means of the broadening of business activities and the restructuring of social activities and personal communications, the negotiations for the TAFTA I TTIP agreement should not end like the negotiations for the ACTA agreement. A free trade agreement between Europe and the United States should follow modern, equilateral and transparent procedures to safeguard the needs of the ICT business. Through the successful realization of the TAFTA I TTIP negotiations the desired outcomes of the agreement – more investment, more growth and more jobs on both sides of the Atlantic – can be achieved.

A multi-stakeholder approach with the inclusion of economic and civil society actors, which ensures the required transparency, seems to be a constructive negotiating framework to rebuilding lost trust. Moreover, a broad and open negotiating approach could not only foster a closer cooperation between Europe and the United States, but should enable the participation and cooperation of further regions and states like for example the Asia-Pacific Region. Although the TAFTA I TTIP agreement would primarily be an agreement to reach economic goals, it also could become an important starting point to tackle questions of development policies. ICT technologies and structures are playing a growing, important role in this context; the most recent example is the role of the internet in the "Arab Spring", which has been the core for coordinating protest activities and communications.

REFERENCES

Auswärtiges Amt (2013): *Beziehungen EU und USA. Available online: http://www.auswaertiges-amt.de/DE/Aussenpolitik/RegionaleSchwerpunkte/USA/EU-USA_node.html*

British Broadcasting Corporation (BBC) (2012): *Acta Protests: Thousands Take to Streets Across Europe. Available online: http://www.bbc.co.uk/news/technology-16999497*

European Commission (2013a): *Final Report - High Level Working Group on Jobs and Growth. Available online: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf*

European Commission (2013b): *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment. Available online: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf*

European Commission (2013c): *Enterprise and Industry: ICT Competitiveness. Available online: http://ec.europa.eu/enterprise/sectors/ict/competitiveness/index_en.htm*

Executive Office of the President (2011): *United States-European Union Trade Principles For Information and Communication Technology Services. Available online: http://www.ustr.gov/about-us/press-office/press-releases/2011/april/united-states-european-union-trade-principles-inform*

Statistisches Bundesamt Wiesbaden (2012): *Außenhandel: Rangfolge der Handelspartner im Außenhandel der Bundesrepublik Deutschland. Available online: https://http://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Aussenhandel/Handelspartner/Tabellen/RangfolgeHandelspartner.pdf?__blob=publicationFile*

World Trade Organization (WTO) (1996): *Office of Technology and Electronic Commerce: Ministerial Declaration on Trade in Information Technology Products. Available online: http://www.wto.org/english/news_e/pres97_e/inftech.htm*

KEYWORDS: TRIPS; TRIPS-PLUS; PHARMACEUTICAL PATENTS; INTELLECTUAL PROPERTY RIGHTS

THE TAFTA | TTIP AND TREATMENT ACCESS: WHAT DOES THE AGREEMENT MEAN FOR INTELLECTUAL PROPERTY RIGHTS OVER ESSENTIAL MEDICINES?

Faisal I. Chaudhry | *University of Pennsylvania* | *faisalc@sas.upenn.edu*

Abstract: *Issues surrounding patent protection for pharmaceuticals and access to essential medicines have long been a source of controversy in the context of multilateral trade agreements. Even as the battles that crystallized over anti-retroviral therapies for HIV/AIDS treatment and the implementation of the WTO's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) have subsided, new fault lines have opened up in recent years. The increasing proliferation of regionally based regimes for trade/investment liberalization has created new opportunities for the pharmaceutical lobby to re-open what were on their way to becoming settled issues. In the process, the fragile consensus that was beginning to emerge regarding TRIPS-compliant methods of creating exceptions to excessively strict standards of patentability in the pharmaceuticals context has come under great pressure. While such matters have started to attract significant attention among civil society actors monitoring the ongoing talks concerning the Trans Pacific Partnership (TPP), they have been less visible in discussions of the TAFTA | TTIP. In this article I consider the potential risks the TAFTA | TTIP poses to the hard-won exceptions to patentability in the pharmaceuticals context through functioning as a Trojan horse for advancing a so-called TRIPS-plus agenda.*

INTRODUCTION

The relationship between strict patent protection for pharmaceuticals under free trade agreements and the crisis faced by the world's poor in accessing essential medicines has become increasingly controversial since the launch of the World Trade Organization (WTO) in 1995. By the late 1990s, concern crystallized around the impact of the WTO's agreement on Trade Related Aspects of Intellectual Property (TRIPS) on the availability of generic versions of anti-retroviral therapies for HIV/AIDS patients in the developing world. In the years that followed, global civil society actors and popular forces achieved a major victory, with the WTO Ministerial Conference's November 2001 Doha Declaration on the TRIPS Agreement and Public Health.[1] By affirming the ability of developing countries to take a flexible approach to patent rights under the TRIPS in order to ensure access to life-saving drugs, the Doha declaration seemed to conciliate the worst fears about the impact of corporate-led globalization on the health of the world's poor. Yet soon after the Ministerial had issued its declaration, it became plain that the increasingly assertive stance of developing countries was leading the advanced economies to attempt to bypass the newly chastened WTO framework altogether. In place of the broad multilateral approach to trade and investment liberalization, and especially with the stalling of the Doha Development Round of WTO negotiations after 2005, bilateral/regionally-based treaties took on renewed prominence.

By the end of the first decade of the new millennium, the move beyond WTO channels had clearly created new opportunities for the pharmaceutical lobby to re-open issues around patent flexibility once more. In the process, the fragile consensus that was beginning to emerge regarding TRIPS-compliant methods of creating exceptions to pharmaceutical patentability/patents (through devices like compulsory licensing and parallel imports) has once more come under threat. While

1 The Doha texts are available at: http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#top

Photo credit: Rico Gustav (Flickr)

concern over this push for so-called "TRIPS-plus"[2] protection has garnered significant attention among civil society actors that monitor ongoing negotiations relating to the Trans-Pacific Partnership (TPP),[3] this has not necessarily been the case in the context of the major transatlantic liberalization agreements that are now being negotiated between the US and EU. To date, concern over the incipient Transatlantic Free Trade Area (TAFTA), more recently referred to as the Transatlantic Trade and Investment Partnership (TTIP), has focused primarily on specific issues such as data protection or the general tendency toward downward regulatory harmonization that these agreements portend.

What, however, are the specific concerns the TAFTA | TTIP framework raises as a mechanism for pushing TRIPS-plus protections in the global intellectual property rights (IPR) context? This question is particularly important given that the TAFTA | TTIP negotiations may not seem to be as immediately connected to issues of treatment access as the TPP talks, which more directly implicate the developing-developed country divide. Such a view, however, is misguided. In fact, the relatively greater parity between the US and its EU partners may make careful scrutiny of the implications of TAFTA | TTIP for issues of treatment access all the more necessary. This is because discussion between equals is likely to become a more effective channel for pushing TRIPS-plus standards and, thereby, for normalizing patent rules that are liable to prove draconian for the world's poor and infirm.

TAFTA | TTIP AND THE NORMALIZATION OF TRIPS-PLUS AGENDA

With negotiations having begun only in July 2013, concrete details about the precise rule content of the TAFTA | TTIP are yet to emerge. However, based on leaked EU documents (many of which since their leak have been released officially), it is clear that the TAFTA | TTIP agenda is meant to be broadly inclusive of a range of issues, including bolstering bilateral intellectual property (IP) rules. The desire to "go beyond the regulations and aspects covered by the WTO" agreements on Technical Barriers to Trade (TBT) and Sanitary and Phyotosanitary (SPS) standards, for example, is made explicit in the EU's initial position paper (European Commission 2013a, 2), including as relating to the pharmaceuticals sector (ibid. 3; 5). In addition to the proposed TBT-plus and SPS-plus chapter, in its February 2013 final report, the US-EU High Level Working Group on Jobs and Growth (HLWG) proposes negotiations in three other areas. Most important among these are discussions about "cross-cutting disciplines on regulatory coherence and transparency" to create "efficient, cost-effective, and more compatible" regulations (US-EU HLWG 2013, 4). Provision for such cross-cutting disciplines is to be made as part of the text of a proposed 'horizontal' chapter, which the HLWG proposes to cover issues requiring 'non-sector specific' regulations (ibid., 5). While it remains to be worked out what, more precisely, these so-called cross-cutting disciplines will entail, in general they are meant to encode a commitment toward regulatory harmonization in accord with the TAFTA | TTIP's most basic goal of "elimin[ating], reduc[ing], and prevent[ing]" rules that are deemed to be "unnecessary regulatory barriers" (European Commission 2013a, 1). As such, they are expected to focus on unifying approaches to regulation, first, through elaborating "regulatory principles, best practices, and transparency;" second, through creating mechanisms for the "assessment of the impact of draft regulations or regulatory initiatives on international trade and investment flows;" and, third, through guaranteeing "cooperation towards increased compatibility/convergence of regulations" (ibid., 3).

While the TBT, SPS, and horizontal chapters may appear narrowly focused in their proposed rule content, the HLGW also advocates a broader mandate for discussions between the EU and US. As it explains, the opportunity to broach other key issues follows naturally from "the size and influence of the transatlantic partnership" (US-EW HLGW 2013, 5). Under this mandate, the HLGW specifically recommends that the TAFTA | TTIP negotiations be used to engage in further discussions about areas such as labor, environmental regulation, and intellectual property rights (IPR) issues. While a later position paper adds the relationship between trade and sustainable development to this mix of broader issues (European Commission 2013b), significantly, the HLGW is yet to call for independent consideration of the TAFTA | TTIP's implications for public health safeguards.

With specific reference to IPR standards, the HLGW urges that the US and EU explore their "commitment to maintaining and promoting a high level of intellectual property protection, including enforcement." The negotiating parties are thus encouraged to "explore opportunities to address a limited number of significant IPR issues of interest to either side" (US-EW HLWG 2013, 5). Much the same general message has been since reiterated in more explicit terms. In a resolution passed on 14 May 2013, the European Parliament endorses a negotiating mandate "stress[ing] that intellectual property is one of the driving forces of innovation and creation and a pillar of the knowledge-based economy, and that the agreement should include strong protection of precisely and clearly defined areas of IPRs, including geographical indications, and should be consistent with existing international agreements." It further expresses the Parliament's "belie[f] that other areas of divergence relating to IPRs should be resolved in line with international standards of protection" (European Parliament 2013, par. 12). Similarly,

2 TRIPS-plus is a term used to designate the increasing push, especially by the advanced economies, to secure more strict intellectual property standards than those provided for under the TRIPS. The call for TRIPS-plus evolved out of the controversies that engulfed the TRIPS after coming into force in January 1995 concerning the agreement's impact on developing countries. During the next several years civil society actors led the charge to demonstrate that there was still ample room within the TRIPS for developing countries to create intellectual property regimes that would remain responsive to public health and other priorities. The efficacy of these campaigns was made manifest at the 2001 Ministerial meeting of the WTO in Qatar, where the so-called Doha Declaration reaffirmed the ability of developing countries to use various legal mechanisms to create deviations from strict intellectual property rights, especially in the context of patents. While the Doha declaration was thus a major victory, it was also impetus for the advanced economies to look to regional and bilateral trade agreements as the preferred vehicle for restoring and even bolstering the intellectual property agenda the TRIPS was thought to originally have paved the way toward.

3 The TPP negotiations bring together the US with a diverse array of states in Asia, the Middle East, and South America, as well as Australia and New Zealand.

an even more significant document outlining the European Commission's express directives for negotiation – also leaked – instructs that:

> 27. The Agreement shall cover issues related to intellectual property rights and should complement and build upon the TRIPS. The Agreement will reflect the high value placed by both Parties on intellectual property protection and build on the existing EU–US dialogue in this sphere. (European Commission 2013c).

And that:

> 28. Negotiations should, in particular, address areas most relevant for fostering the exchange of goods and services with IP content, with a view to supporting innovation. Negotiations should provide for enhanced protection of EU Geographical Indications through the Agreement. Both sides should explore opportunities to address other significant IPR issues. (ibid.)

THE KEY ELEMENTS OF TRIPS-PLUS

While negotiating guidance thus clearly points to using TAFTA | TTIP talks to reopen "significant IPR issues"; what, more specifically, will these include? If the overall shape of TRIPS-plus regimes that the advanced economies, led by the US, have pushed in other contexts is a guide, these are likely to be several. Four such IPR issues in particular are worth highlighting.

THE FIRST POTENTIAL ELEMENT OF A TRIPS-PLUS PUSH THROUGH TAFTA | TTIP

The first IPR issue of significance that the push for TRIPS-plus is likely to reopen involves a desire to make standards for patentability for 'new' inventions even more lax. Given the already broad scope of the TRIPS' basic rules on the scope and availability of patents,[4] the aim of further reducing barriers to patentability has been made manifest through pushing for new rules that would facilitate the practice of 'evergreening' existing drugs. In the pharmaceutical context, evergreening refers to the practice of extending a firm's legal monopoly over an existing drug by obtaining a new patent on a substance based on minor modifications to its existing composition or dosage level. Because evergreening measures do not typically require the demonstration of new therapeutic efficacy, the assortment rules that can be classed under this heading function to effectively prohibit the market entry of generic competitors at the end of the original patent period.

The specific means by which TRIPS-plus frameworks have or are seeking to make evergreening easier center on elaborating new requirements obligating countries to adopt set approaches to defining when an invention is patentable. While expansive with respect to the class of inventions and fields of technology for which patentability has to be made possible, the TRIPS does not define precise criteria for evaluating the patentability of any given invention. This inherent flexibility within the TRIPS approach has allowed countries to overhaul domestic patent regimes in TRIPS-compliant ways while limiting the possibility of evergreening through mandating more or less rigorous approaches to defining the requisite novelty, applicability, and the like needed for an invention to be awarded patent monopoly. A long-running case, involving the rejection by Indian authorities of an application by Swiss pharmaceutical giant Novartis for a patent on the life-saving cancer drug Gleevec, illustrates these points well. In Novartis v. Union of India & Others[5] after seven years of litigation the Indian Supreme Court upheld the rejection of a patent application on Gleevec (imatinib mesylate). In April 2013 it ruled that absent any demonstration that Novartis' new form of the existing imatinib compound had novel therapeutic effects, the company had failed to meet the requirements for patentability under section 3(d) of India's revised patent Act (Kapczynski 2013). In the years after the initial rejection by Indian authorities of Novartis patent claim in 2006, the opening of Gleevec to generic competition witnessed the drug's price decreasing from $2400 per patient per year in India to a mere $200 per patient per year (Médecins Sans Frontières 2012, 10).

A SECOND POTENTIAL ELEMENT OF A TRIPS-PLUS PUSH THROUGH TAFTA | TTIP

The intellectual property chapter of the leaked draft of the TPP suggests a second major element that is likely to be part of a push for a TAFTA | TTIP-based TRIPS-plus framework. This involves creating new rules to effectively extend patent terms beyond the two-decade minimum mandated under the TRIPS. Under Article 8(6)(b) of the TPP's draft IPR chapter, at the request of a patent owner, signatories are to be required to "adjust the term of a patent to compensate for unreasonable delays that occur in the granting of the patent." Without clarifying what constitutes an "unreasonable" basis for delay after the application's filing, the draft provision suggests that a minimum of four additional years could be added to the life of the patent in the event that such a delay was deemed to have taken place (TPP Draft). Likewise, Article 8(6)(c) of the leaked IPR chapter of the TPP draft requires signatories to allow patent owners to require "an adjustment of the patent term of a patent which covers a new pharmaceutical product" or "a method of making or using a pharmaceutical product" as compensation for delays in the "marketing approval process" (TPP Draft).

A THIRD POTENTIAL ELEMENT OF A TRIPS-PLUS PUSH THROUGH TAFTA | TTIP

A third avenue along which TAFTA | TTIP negotiations may be likely to push a TRIPS-plus agenda involves so-called data exclusivity rules. Beyond the direct limitations to market entry imposed by patent monopolies, generic manufacturers must meet further registration requirements even as pat-

4 The most basic provision on patentability occurs under Article 27.1 of the TRIPS, which states that: "Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. (5) Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced" (WTO 1994: sec. 5).

5 The text of the decision is available at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=40212

ent expiration approaches. With the patent owner's clinical data demonstrating safety and efficacy already available, generic registration has remained a fairly straightforward process, only requiring competitors to demonstrate that their non-brand version of a drug is the biological equivalent of the patented entity. As Médecins Sans Frontières (MSF) explains, the relative ease of this process is contingent on the existing TRIPS framework, which only requires that member states protect a patent owner's clinical data and not that patent holder be given legal exclusivity over that data's use (Médecins Sans Frontières 2012, 11). Given access to already extant clinical data, regulatory agencies have needed only to make a determination about the generic composition's bio-equivalence. By creating monopoly rights to the use of clinical data under a TRIPS-plus agenda, this would no longer be the case. Regulatory agencies would instead be locked out of the patent holder's data vault, leaving generic manufacturers stymied until the period of data exclusivity comes to an end. Moreover, what is effectively the secondary patent that a data exclusivity right would grant to its holder would be separate from the actual patent. That is to say, there is no reason why the period of data exclusivity could not persist beyond the life of the original patent, being that it would be a distinct measure of time.

A FOURTH POTENTIAL ELEMENT OF A TRIPS-PLUS PUSH THROUGH TAFTA | TTIP

A final way in which the TAFTA | TTIP could function as a Trojan horse for a TRIPS-plus regime involves creating rules to limit the ability to challenge patent applications. Under the current rules of the TRIPS there are no restrictions on member states to prohibit or limit procedures for filing such opposition, whether before or after a patent is actually granted. Pre-grant opposition procedures have generally enabled any party – whether NGOs, researchers, or competitor firms – to submit information and analysis to a patent examiner in opposition to pending applications (Public Citizen 2011, 1). They have thus been crucial in fighting frivolous or otherwise suspect filings. However, US support for eliminating so-called 'pre-grant opposition' in the TPP context became public in July 2011, with the leak of a document circulated to negotiating parties that strongly implied American disfavor of such procedures (Public Citizen 2013). The position of US negotiators now casts pre-grant opposition as a form of "harass[ing] the examiner and/or applicant" in order to "delay or confuse the examination process" or otherwise "overburden" patent offices (ibid., 1).

CONCLUSION

The first decade after the WTO agreement came into force witnessed a remarkably quick and effective effort by developing countries and civil society groups to ensure that the TRIPS would not entirely forestall member states from designing intellectual property regimes responsive to concerns about health, public safety, and the like. In the period since, however, there has occurred just as marked an effort to push this victory back. Insofar as advanced countries have used bilateral and regional trade agreements like the impending TAFTA | TTIP to do so, civil society actors may face a more severe challenge than they did in the late 1990s. This is because battle lines are now drawn less around the challenge of exposing the interpretive ambiguities within the TRIPS than they are around the wholesale institutionalization of new and more exacting TRIPS-plus requirements. Given that the TAFTA | TTIP is, like its trans-Pacific counterpart the TPP, still being negotiated, however, ample opportunity exists to call attention to the most glaring potential negative consequences of TRIPS-plus patent rules. Reducing standards for what counts as a "new" invention through facilitating evergreening of patents, effectively extending patent terms beyond the period designated in the TRIPS, data exclusivity rules, and limiting the ability to challenge patent applications are just four of the most prominent areas of concern.

REFERENCES

European Commission (2013a): *EU-US Transatlantic Trade and Investment Partnership: Trade Cross-Cutting Disciplines and Institutional Provisions: Initial EU Position Paper. Available online: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf*

European Commission (2013b): *EU-US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development. Available online: http://trade.ec.europa.eu/doclib/html/151626.htm*

European Commission (2013c): *Annex. Available online: https://netzpolitik.org/wp-upload/DS1353_13_REV1_Annex.doc*

European Parliament (2013): *Resolution on EU Trade and Investment Negotiations with the United States of America, (2013/2558(RSP). Available online: http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0187&language=EN*

Kapczynski A. (2013): *Engineered in India: Patent Law 2.0, New England Journal of Medicine, vol. 369 (August 8, 2013), pp. 497-499.*

US-EU High Level Working Group on Jobs and Growth (2013): *Final Report, February 11, 2013. Available online: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf*

Médecins Sans Frontières (2012): *Trading Away Health, MSF Access Campaign Issue Brief, August 2012. Available online: http://aids2012.msf.org/wp-content/uploads/2012/07/TPP-Issue-Brief-IAC-July2012.pdf*

Public Citizen (2011): *Risks of the Trans-Pacific Free Trade Agreement for Access to Medicines, July 7, 2011. Available online: http://www.citizen.org/documents/analysis-of-leaked-US-paper-on-eliminating-pregrant-opposition.pdf*

Public Citizen (2013): *US-TPP Paper, Pre-Grant Opposition (Leaked: 14 November 2014). Available online: http://www.citizen.org/documents/Leaked-US-TPPA-paper-on-eliminating-pre-grant-opposition.pdf*

TPP Draft (2011): *Chapter on Intellectual Property Rights, in Leaked TPP Draft Text. Available online: http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf*

WTO (1994): *Agreement on Trade-Related Aspects of Intellectual Property Rights. Available online: http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm*

KEYWORDS: INVESTMENT; ARBITRATION; PUBLIC INTEREST; HUMAN RIGHTS

THE TREATMENT OF NON-INVESTMENT INTERESTS IN INVESTOR-STATE DISPUTES: CHALLENGES FOR THE TAFTA | TTIP NEGOTIATIONS

Ciaran Cross | *Independent Researcher* | *ciarancross@gmail.com*

Abstract: *Current TAFTA | TTIP negotiations are expected to provide US investors with the capacity EU governments through international investment arbitration. This field of international law is experiencing a huge surge, with record numbers of investor-state disputes being filed. However, investment claims brought by investors disadvantaged due to policies promoting the environment (Vattenfall v. Germany), economic equality (Foresti et al v. South Africa), and even the human rights jurisprudence of domestic courts (Chevron v. Ecuador), have dramatically altered perceptions of investment law, and provoked criticisms of bias and of a democratic deficit inherent in this regime. For many host-states facing arbitration, the scope of some current claims was unprecedented at the time of treaty negotiation. This paper seeks to provide an overview of current trends in investment arbitration and of the treatment by tribunals of states' non-investment law obligations. This analysis will show that in the absence of an express agreement in the treaty to allow host-states to pursue legitimate policy objectives, the TAFTA | TTIP negotiations risk producing an unintended, costly and undemocratic burden on EU member states who may become a target for arbitration claims.*

INTRODUCTION: INVESTOR-STATE DISPUTE SETTLEMENT

Current TAFTA | TTIP negotiations are expected to provide US investors with the capacity to sue EU governments through international arbitration.[1] The TAFTA | TTIP negotiating mandate aims to deliver the highest possible level of legal protection for investors, including an 'effective and state-of-the-art investor-to-state dispute settlement mechanism'.[2]'State-of-the-art' is a term rarely heard in descriptions of investor-state dispute settlement (ISDS) to date. International Investment Agreements (IIAs) usually offer a wide range of protections to foreign investors against the actions of states in which they invest. ISDS provisions enable foreign investors to enforce these protections by suing host-states directly at ad-hoc arbitral tribunals, established under the aegis of arbitration centres such as the International Centre for the Settlement of Investment Disputes (ICSID). These mechanisms are particularly attractive because they often allow investors to initiate litigation before an international tribunal without first exhausting remedies available in the host-state. As a result, investors are able to 'leapfrog' domestic courts. However, ISDS has been accused of inherent bias towards investors and of a democratic deficit (Choudhury 2008; Sornarajah 2010); of lacking core judicial safeguards of transparency and independence (Brower 2002; Van Harten 2010); and of investing immense power in a small core of professional arbitrators who dominate the ISDS circuit (Eberhardt & Olivet 2012). One recent report labelled ISDS the "world's worst judicial system" (Khor 2013).

Such criticisms have had little impact on the system's growth. According to the United Nations Conference on Trade and Development, there are over 3,200 IIAs in existence (UNCTAD 2013a); in 2012, a record 58 ISDS claims were filed and the total number of known treaty-based claims reached 514

1 Any ISDS arrangements are likely to be reciprocal. This article focuses on the challenges to EU member states of maintaining domestic regulatory space in the face of investor-state arbitration claims from foreign investors.

2 The Mandate was adopted by the EU Foreign Affairs Council on 14 June 2013. The document is officially confidential (European Commission 2013), but has been leaked online and is available here: http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU-TTIP-Mandate-from-bfmtv-June17-2013.pdf

Photo credit: Rainforest Action Network (Flickr)

(UNCTAD 2013b).[3] This explosion of claims has been driven in part by the wide interpretations given to vague IIA provisions. Investors are protected not just against direct expropriation of their investments by host-states. Regulatory and policy measures taken by host-states that interfere with or impact on foreign investments can amount to 'indirect expropriation', or breach standards of 'fair and equitable treatment'.

Over the past fifteen years, interpretative trends in ISDS jurisprudence have permitted tribunals to review a range of measures, including economic and environmental policies, and measures taken for the protection of human rights (Peterson 2009; Reiner & Schreuer 2009; Sornarajah 2011). One of the objectives of the TAFTA | TTIP mandate is to establish an ISDS mechanism that will not prejudice the right of EU member states to adopt or enforce domestic measures 'in pursuit of legitimate public policy objectives'. The growing body of ISDS case law therefore provides compelling grounds for ISDS to be treated with the utmost caution. With no system of binding precedent, it is impossible to determine what weight future tribunals will give to previous decisions. However, experiences of investor-state disputes to date show that policies implemented in pursuance of 'legitimate' public objectives often have direct or tangential impact on investments, and that such effects can and do give rise to costly litigation before arbitral tribunals.

REGULATORY CHILL

Even when ISDS claims are unsuccessful, there is widespread concern that the vast cost of defending ISDS cases may deter states from pursuing future policy goals or taking regulatory measures that may have a potential impact on foreign investors – often described as "regulatory chill". Investors have made claims of up to USD$114 billion, and 2012 saw the highest ever award for an ISDS claim, of USD$1.77 billion (UNCTAD 2013a).

In *Piero Foresti v. South Africa* (ICSID Case No. ARB(AF)/07/1), South Africa was sued by European investors who claimed to be disadvantaged by economic policies aimed at redressing the enduring legacy of apartheid. The resulting settlement effectively exempted the investors from the legislation and landed South Africa with a legal bill of over €5 million (Brickhill & Du Plessis 2011). In 2009, the energy company Vattenfall initiated ICSID proceedings to challenge Germany's new environmental regulations on coal-fired power stations, claiming over €1.4 billion in compensation. Germany was persuaded to water down the regulations, and Vattenfall are now suing Germany again over its atomic energy policy (Bernasconi-Osterwalder & Hoffmann 2012). In 2011, Ecuadorian courts ordered Chevron to pay USD$18 billion in compensation for damage to the environment and public health. In response, Chevron are suing Ecuador, claiming that the judgment breaches their protection under the US-Ecuador Bilateral Investment Treaty (Johnson 2012).

Such cases raise serious concerns not only about the ability of states to maintain domestic regulatory space, but also about the accountability of foreign investors for the damage they cause in their investment operations.

PUBLIC PURPOSE MEASURES

Most IIAs provide for general 'public purpose' exceptions to the protections offered to foreign investors. However, these have often proven an insufficient safeguard. When they are invoked, there is continuing legal uncertainty as to how a 'public purpose' effects the level of compensation payable, whether compensation is payable at all, and even whether states have the right to determine what their own public interests are.

In *Methanex v. United States* (UNCITRAL,[4] Final Award 3 August 2005), investors challenged a ban on the manufacture of an environmentally harmful gasoline additive. The tribunal found that if a regulatory measure is for a public purpose and non-discriminatory, the state should not have to pay compensation unless the investors' 'legitimate expectations' are frustrated – that is, if the state reneges

3 Since many ISDS centres publish no case records, the actual figure is likely to be much higher.

4 UNCITRAL arbitrations are claims brought under the arbitration rules of the United Nations Commission on International Trade Law.

Photo credit: -shutterbug- (Flickr)

on prior guarantees made to the investor.

However, other tribunals have found the 'public purpose' to be wholly irrelevant to the question of compensation. In Metalclad v. Mexico (ICSID Case No. ARB(AF)/97/1), the motivations behind a decree to establish an ecological reserve were regarded as peripheral to the effect of the decree on the company's property. The tribunal ordered Mexico to pay the company USD$16 million in compensation. In the Vivendi v. Argentina litigation (ICSID Case No. ARB/97/3) – one of more than forty investment claims initiated against Argentina in the wake of the 2001-2002 financial crisis – Argentina argued that it had to take actions against investors to ensure the availability of water to the population. The tribunal ruled that the actions amounted to unlawful expropriation, irrespective of any public purpose. In *Tecmed v. Mexico* (ICSID Case No. ARB(AF)/00/2), the tribunal found that public opposition to a controversial landfill site, and related health and environmental concerns, did not justify the measures taken. The tribunal did allow Mexico "due deference" to determine whether the matter was truly in the public interest, but then weighed this interest against the investors' legitimate expectations.

THE 'MARGIN OF APPRECIATION' DOCTRINE

Burke-White and von Staden (2010) argue that states should always be entitled to find their own balance between IIA obligations and other public policy considerations, as they are better suited than international arbitrators to determine what measures are in the 'public interest'. This deference – known as the "margin of appreciation" doctrine – is not assured in ISDS cases and has had a mixed reception to date.

In *Biwater v. Tanzania* (ICSID Case No. ARB/05/22), which concerned the operation and supply of water services in Dar Es Salaam, Tanzania requested a margin of appreciation, but this was implicitly rejected; the tribunal found no public purpose to justify Tanzania's interference with the investor's property. Conflicting opinions were given in two further cases arising from emergency measures taken by Argentina in response to the financial crisis. The tribunal in Continental Casualty v. Argentina (ICSID Case No. ARB/03/9) accepted that the doctrine was an established principle of investment treaty arbitration; arbitrators in Siemens v. Argentina (ICSID Case No. ARB/02/8) however found no support for the principle in the treaty or customary international law.

The tribunal in *Chemtura v. Canada* (UNCITRAL, Final Award 2 August 2010) also rejected the margin of appreciation doctrine, on the grounds that such an assessment is too abstract. However, arbitrators recognised that the environmental regulations objected to by investors were implemented in order to meet Canada's environmental treaty obligations. These international obligations, along with other factors, led the tribunal to rule that no compensation was payable.

CONFLICTING OBLIGATIONS UNDER INTERNATIONAL LAW

With few exceptions such as *Chemtura*, tribunals have generally avoided looking at states' other international legal obligations and have confined themselves to settling disputes by reference to the relevant IIA alone. Indeed, persisting uncertainty concerning the applicability of non-investment law, such as human rights law, in investor-state disputes has often prompted observers to eagerly anticipate forthcoming arbitral awards (such as *Biwater, Vivendi, Piero Foresti*) in the hope that they might finally shed light on this issue. But over the past ten years such rulings have repeatedly failed to materialize, due either to out-of-court settlements between the parties, or tribunals' tactical avoidance of the issue.

As a result, the fact that measures taken by a state are motivated by a public purpose which is enshrined in international human rights law is still no guarantee that a tribunal will find the measures to be lawful within the terms of the dispute. In the '*Biwater and Vivendi'* cases, both governments and petitioning NGOs sought to highlight that the host-state population's right to water is a human right. Although these arguments received cursory attention in the awards, in neither case did the existence of an international human rights obligation significantly affect the tribunals' findings.

In two ICSID cases against Hungary, the EU Commission submitted petitions arguing that Hungary's actions were taken in order to comply with EU competition law. In *Electrabel v. Hungary* (ICSID Case No. ARB/07/19), the tribunal explicitly rejected that it was under any obligation to interpret the relevant investment law in light of the state's other duties under international law.[5]

More concerning still is the ongoing case of Border *Timbers / Bernhard von Pezold and others v. Zimbabwe* (conjoined ICSID Cases No. ARB/10/15 and ARB/10/25). In 2012, indigenous communities living on lands which are central to the dispute asked the tribunal to consider their rights under international law. The tribunal rejected the applicability of human rights law, because neither state nor investors had mentioned the issue. Peterson (2012) notes that this approach encourages states and investors to mutually contract-out of their international human rights obligations; as long as neither party raises such issues, ISDS tribunals may simply turn a blind eye.

CONCLUSION: CHALLENGES, AND OPPORTUNITIES

The current treatment of non-investment interests by arbitral tribunals gives rise to many conc erns. Any hasty inclusion of ISDS provisions in TAFTA | TTIP may therefore risk producing an unintended, costly and undemocratic burden on EU states. In the absence of explicit and comprehensive treaty

5 This approach is referred to as the 'systematic integration' or 'harmonization' of international law. It is widely encouraged that all international courts and tribunals that adjudicate disputes adopt such an approach to prevent the fragmentation of the international legal order (Koskenniemi 2006; Simma 2011).

provisions[6] that enable host-states to pursue legitimate policy objectives, prior ISDS cases suggest that the progressive realisation of environmental, economic or human rights policies can become a target for arbitration claims. For many, the scope of such claims was unprecedented at the time of previous IIA negotiations.

The occasion of the TAFTA | TTIP negotiations might however provide an opportunity to address such criticisms, and to effect much needed changes in ISDS. Indeed, the 'Statement of the European Union and the United States on Shared Principles for International Investment' expresses commitments not only to preserve the authority of states to regulate in the public interest, but also to increase transparency and public participation, and encourage responsible business conduct (European Commission 2012). Clearly, replicating the standard provisions of IIAs currently in force will not achieve such goals. But careful drafting of TAFTA | TTIP investment provisions could make a significant contribution to the evolution of international investment law in these areas. To date, limited avenues for public participation in investor-state disputes have failed to have any significant impact on ISDS awards (Blackaby & Richard 2010; Cross & Schliemann Radbruch 2013). And major developments in the field of corporate social responsibility – such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises – have largely failed to coalesce into enforceable legal standards, either in ISDS or other fora (Mann 2008; Muchlinski 2008). Given the projected increase in investment that the TAFTA | TTIP is expected to produce, the inclusion of ISDS provisions is likely to eventually result in a significant body of case law. If it does, the raising of such standards might have a welcome impact on future trends in investment law, beyond the treaty itself.

6 For examples of such provisions, see the Model Bilateral Investment Treaty Template, produced by the Southern African Development Community (2012).

REFERENCES

Bernasconi-Osterwalder, N. / Hoffmann, R.T., (2012): *The German Nuclear Phase-Out Put to the Test in International Investment Arbitration?, Background to the New Dispute Vattenfall v. Germany (II), International Institute for Sustainable Development. Available online: http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf*

Blackaby, N. / Richard, C. (2010): *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?, in: Waibel, M. et al. (eds.): The Backlash Against Investment Arbitration: Perceptions and Reality, The Netherlands, Kluwer Law International, pp. 253-274.*

Brickhill, J. / Du Plessis, M. (2011): *Two's Company, Three's a Crowd: Public Interest Intervention in Investor-state Arbitration (Piero Foresti v. South Africa), South African Journal on Human Rights, vol. 27(1), pp. 152-166.*

Brower, C.N. (2002): *A Crisis of Legitimacy, National Law Journal, October 7, 2002.*

Burke-White, W. / Von Staden, A. (2010): *The Need for Public Law Standards of Review in Investor-State Arbitrations, in: Schill, S. (ed.): International Investment Law and Comparative Public Law, Oxford: Oxford University Press, pp. 689-720.*

Choudhury, B. (2008): *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?, Vanderbilt Journal of Transnational Law, vol. 41, pp. 775-832.*

Council of the European Union (2013): *[Leaked] Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, Brussels, 17 June 2013, Seattle to Brussels Network. Available online: http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU-TTIP-Mandate-from-bfmtv-June17-2013.pdf*

Cross, C. / Schliemann Radbruch, C. (2013): *When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations, The Law and Development Review. Available online: http://dx.doi.org/10.1515/ldr-2013-0021*

Eberhardt, P. / Olivet, C. (2012): *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom, Corporate Europe Observatory / Transnational Institute. Available online: http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf*

European Commission (2012): *Statement of the European Union and the United States on Shared Principles for International Investment. Available online: http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf*

European Commission (2013): *Member States endorse EU-US Trade and Investment Negotiations (MEMO/13/564, 15/06/2013). Available online: http://europa.eu/rapid/press-release_MEMO-13-564_en.htm*

Khor, M. (2013): *The World's worst Judicial System?, Southcentre.org. Available online: http://justinvestment.org/2013/07/the-worlds-worst-judicial-system*

Johnson, L. (2012): *Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority, International Institute for Sustainable Development. Available online: http://www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/#_ftn1*

Koskenniemi, M. (2006): *Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law, Report of the Study Group of the International Law Commission, UN-Doc. A/CN.4/L.682, 13 April 2006.*

Mann, H. (2008): *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development. Available online: http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf*

Muchlinski, P. (2008) Corporate Social Responsibility, in: *Muchlinski, P. (ed.) The Oxford Handbook of International Law, Oxford: Oxford University Press, 367.*

Peterson, L.E. (2009): *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-state Arbitration, Montreal, Rights & Democracy.*

Peterson, L.E. (2012): *Analysis: Tribunal's Reading of Amicus Curiae Tests could make Life difficult for Antagonistic Amici – and those Seeking to Raise Novel Concerns such as Human Right Law, IA Reporter. Available online: http://www.iareporter.com/articles/20120628*

Reiner, C. / Schreuer, C. (2009): *Human Rights and International Investment Arbitration, in: Dupuy, P.M. et al. (eds.): Human Rights in International Investment Law and Arbitration, Oxford: Oxford University Press, pp. 83-96.*

Simma, B. (2011): *Foreign Investment Arbitration: A Place For Human Rights?, International and Comparative Law Quarterly, vol. 60(3), pp. 573-596.*

Sornarajah, M. (2010): *The International Law on Foreign Investment, Cambridge: Cambridge University Press.*

Sornarajah, M. (2011): *Mutations of Neo-Liberalism in International Investment Law, Trade Law & Development, vol. 3(1), pp. 203-232.*

Southern African Development Community (2012): *Model Bilateral Investment Treaty Template and Commentary. Available online: http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf*

United Nations Conference on Trade and Development (2013a): *Research and Policy Analysis. Available online: http://www.unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Research-and-Policy-Analysis.aspx*

United Nations Conference on Trade and Development (2013b): *Recent Developments in Investor-State Dispute Settlement, IIA Issues Note No.1, May 2013 (UNCTAD/WEB/DIAE/PCB/2013/3). Available online: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf*

Van Harten, G. (2010): *Five Justifications for Investment Treaties: A Critical Discussion, Trade Law & Development, vol. 2(1) pp. 19-58.*

IN BETWEEN CURIOUS ECONOMICS AND L'EXCEPTION CULTURELLE: *IMPLICATIONS OF TAFTA / TTIP FOR THE CULTURAL SECTOR*

Markus A. Kirchschlager | *Participating Expert at Internet & Society Collaboratory e.V.* | *markus.kirchschlager@collaboratory.de* | *@extraverbal*

Abstract: *The special role played by the cultural sector in free trade agreements is as old as trade liberalization itself. Informed by current negotiations on a transatlantic free trade area (TAFTA / TTIP), this article reviews the culture and trade debate and explains the economic characteristics of cultural products called "curious economics". It argues that cultural products exhibit some distinct features that clearly distinguish them from other goods or services and highlights the "home market effect", which gives a competitive advantage in international trade to the producers of cultural products in countries with large domestic markets. The second part briefly illustrates the genesis of the "cultural exception" in free trade agreements affiliated with the World Trade Organization (WTO) and touches on the background to the UNESCO Diversity Convention. In the light of France's recent much publicized move for inclusion of l'exception culturelle in the TAFTA / TTIP negotiations, the article gives a critical examination of the usefulness of the special role of cultural products. It concludes by saying that, irrespective of whichever measures are preferred, the most important factor seems to be the preservation of cultural plurality as the basis for a well-functioning democratic society.*

INTRODUCTION

Berlin, the capital of Germany, is one of the most popular cities in the world right now because of its flourishing vibrant art, culture, and media sector, real engines of growth for the whole region. Besides the particular historical and structural features of Berlin, which are certainly one of the main reasons for the favorable conditions it offers, the German system of cultural promotion has been a major force behind the present boom of the city. But key tools for cultural promotion like fixed prices for books and a reduced rate of *value-added-tax (VAT) for books, magazines and film funding* could be revised in future.

In the current negotiations between the EU and the US for the Transatlantic Free Trade Agreement (TAFTA) or Transatlantic Trade and Investment Partnership (TTIP), both negotiating parties are seeking extensive trade liberalization in all sectors. Since a reduction in already low tariffs can hardly be expected to produce any economic growth (Felbermayr, Heid & Lehwald 2013), the agreement aims primarily at reducing so-called non-tariff barriers to trade. Thus, in the advent of a comprehensive liberalization of trade, there could well be legal grounds for contesting the promotion of the cultural sector by those companies, arguing that such promotion places them at a disadvantage.

THE CULTURE AND TRADE DEBATE

The cultural sector is a highly complex but significantly increasing economic sector, although its contribution to the gross domestic product of a country (OECD approx. 5%, EU 2.6%) is far less than that of other sectors. Between 1980 and 1998, the global import of cultural products jumped by 347%, while between 2000–2005 the creative industry showed an average annual growth rate of 8.7% (Disdier et al. 2009, 576; Grant 2011, 337–338).

Every effort to liberalize the cultural sector has been met by controversy, as many states see the funding of cultural forms of expressions and cultural assets as a key resource of their societies. The discussion of the special role of cultural products in free trade is referred to as the "culture and trade debate". Cultural products are seen as goods of a double character: they have both a tangible element, such as the platform of product format, and an intangible element, which determines their content and makes them reproducible as many times as desired. (UNESCO 2005b, 18). Hence, they are both creative performances and tradable goods (Schulz 2013a). In a special way, they facilitate self-reflection and discourse within society (Hahn 2006, 524). The trading of cultural products may be expected to have a substantial influence on the perceptions, values and norms of the importing society (Disdier et al. 2009, 592). At the same time, trade in cultural products also contributes to cultural diversity within a society, because it increases the range of available cultural products (Hahn 2006, 520).

Even if in principle cultural products are subject to the same economic factors as other goods, they still have a number of particular features which can be aggregated as the "curious economics of cultural goods" (Crook & Micklethwait 2001).

To start with, there is the difficulty of finding definitions: Are cultural products services or goods? Can the intangible value of cultural products be put in monetary terms? The UNESCO Institute for Statistics has found that only very few of current statistics give adequate expression to the intangible value of cultural products (UNESCO 2005b, 18). Even the place of origin of a cultural product is often hard to ascertain. Which is most relevant – the country where the intellectual value was created or the country where the final product, perhaps a data carrier, was produced (Grant 2011, 337)? On top of this, there are also difficulties in demarcating the borderline between the cultural sector and the more broadly defined creative industry. After all, doesn't every product bear the imprint of culture in some way or another?

The audiovisual sector is a good example of the economic peculiarity of cultural products. Basically, it is characterized by three main special features: Firstly, the theory of comparative advantage generally won't work in the field of cultural products. The theory is based on the assumption that products are not only comparable but substitutable and that the efficiency of production can be derived from comparing the marginal costs of one unit. Both assumptions cannot be applied to cultural products because their culture-specific content renders them non-substitutable, their value is linked to their intellectual content, and the marginal cost for each additional copy tends towards zero (Grant 2001, 341-342; Sauvé & Steinfatt 2000, 331 -332).

Secondly, due to the low marginal costs, producers who can rely on a large number of customers have at their disposal much larger production budgets and can cover their production costs more easily. This phenomenon is also called the "home market effect" (Sauvé & Steinfatt 2000, 329-330; Rauch & Trindade 2005, 1; Grant 2011, 338-340). In the case of the US, the English language home market is large enough to allow producers to offer audiovisual products at dumping prices abroad, even though their productions are usually more expensive and lavish than those of countries with a smaller domestic market. Consumers in the importing countries reinforce this effect as they usually tend to favor high budget audiovisual products like movies with high-tech special effects (Sauvé & Steinfatt 2000, 329-330).

Thirdly, unlike many other goods, cultural products are meant for social consumption. This means that the consumption of cultural products can affect the attitude or behavior of consumers and these in turn influence other consumers. This is the principle on which all forms of advertising are based (Sauvé & Steinfatt 2000, 333; Rauch & Trindade 2005, 2-4). From an economic perspective, this means that networking effects (externalities) are especially prevalent in the consumption of cultural products. From a social perspective, these effects can be both positive and negative – either enhancing welfare or causing costs. In both cases, however, the exporter of the cultural product is not affected by the network effects. Consequently, in the case of negative network effects, producers can fix the price of a cultural product below the price of overall social or economic costs it actually causes (Sauvé & Steinfatt 2000, 333-334).

This is the point at which the need for regulatory measures which a state needs to take for the benefit of society first becomes apparent. At the same time it becomes clear that government measures to protect cultural identity or preserve cultural diversity are not easy to implement in the context of globalized communication flows and can indeed have unintended effects. Rauch and Trindade (2005) show that barriers impeding market access do not necessarily lead to the preservation of cultural diversity, since in their advent domestic producers rather let themselves be guided by the style of the dominant culture induced by network effects, which inevitably leads to a loss of local cultural assets. What they recommend in place of market access barriers is a concerted policy of subsidies for domestic producers which can contribute to the conservation of hallmark cultural properties (ibid., 35).

This covers the two basic ways in which states can choose to protect their audiovisual sector from domination by foreign cultures: subsidies or market access barriers. In both cases some producers of the audiovisual sector are favoured and some are restricted. This should make it abundantly clear that the main argument against such measures must be the safeguarding of universal human rights such as freedom of speech and freedom of information.

L'EXCEPTION CULTURELLE

Given the vital role the audiovisual sector plays in terms of aiding social cohesion and constituting national identity, it is hardly surprising that the "cultural exemption" has been around ever since talk of trade liberalization first began. Article IV of the very first version of the General Agreement on Tariffs and Trade (GATT) in 1948 gave states the possibility of introducing quotas for "films of national origin" in the audiovisual sector (WTO 1986, 8; Hahn 2006, 522). Furthermore, Article XX sanctions government measures "necessary to protect public morals" and "national treasures of artistic, historic or archaeological value" (WTO 1986, 37). Even though the GATT has never enshrined any general exemption for cultural products, it is visible that the cultural sector does indeed play a special role in free trade agreements. As an example, one can look at how most states used the provisions of the General Agreement on Trade in Services (GATS) to leave their cultural sectors out of the scope of free trade regulations (Hahn 2006, 525-526 & 531-533; Grant 2011, 342).[1]

Despite the special status enjoyed by the cultural sector, the WTO has been involved in repeated attempts to overturn its barriers or protective measures. Such attempts are justified by invoking the GATT which in principle covers all kinds of cultural goods except movies which enjoy special protection under Article IV. Some US media corporations have been particularly aggressive in their attempts to overthrow Canadian regulations and their efforts have received legal blessing from the arbitration courts of the WTO. The special economic characteristics of the cultural sector and the vital role they

1 GATS is based on a fundamentally different mechanism to that of the GATT because it does not automatically apply to all sectors of the economy but only to those opened up voluntarily by governments

play in promoting cultural diversity were not recognized by the WTO side (Grant 2011, 343). Canada seized this as the opportunity to initiate a worldwide campaign that culminated in the adoption of the "UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions" – a legally binding international agreement that entered into force in 2007 and assures the right to an independent cultural policy for all signatory states (UNESCO 2005a; Grant 2011, 342–348; Hahn 2006, 533–538). To date the Convention has been ratified by 132 states and the European Union[2]. To avoid obvious incompatibility with the equally binding international free trade agreements of the WTO, Article 20 of the Convention points out that rights and obligations under previous agreements remain unaffected and that the UNESCO Convention should be considered when interpreting these rights and obligations and when contemplating the form of new agreements (UNESCO 2005b: 10). The UNESCO Convention is also exposed to the risk of being instrumentalized to justify disregard of basic human rights. It would indeed achieve the very reverse of its intentions if freedom of speech and information were restricted under the guise of protecting cultural diversity. This is why Article 2 of the Convention takes care to state that "cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed." (UNESCO 2005a, Article 2). Nevertheless, in practice it may be difficult to distinguish between preservation and restriction of cultural diversity.

Photo credit: Emre Ergin (Flickr)

The cultural sector has once more come in for special attention during the current rounds of TAFTA | TTIP negotiations. Aurélie Filippetti, the French Minister of Culture has forged an alliance with ministers of culture from 14 more EU states including Germany's Bernd Neumann (CDU) to take the audiovisual sector off the negotiating agenda (French Embassy in London 2013; Schulz 2013a). The EU Parliament underscored these demands in a resolution calling for "exclusion of cultural and audiovisual services, including those provided online" (European Parliament 2013, No.11). Ultimately France made its approval of the European Commission's negotiating mandate dependent on adoption of l'exception culturelle and won the day to the delighted plaudits of Germany's cultural sector (Zeit Online 2013; Kämpf 2013). Leaked one day after the official resolution, the present mandate explicitly excludes audiovisual services (Council of the European Union 2013: No. 21) and in various places also commits itself to the safeguarding of cultural diversity with direct reference to the UNESCO Convention. (Council of the European Union 2013, No. 6, No. 9).

So do we really need to worry about the cultural sector? Many politicians and cultural producers think that we do. They criticize the lack of explicit exceptions for the whole cultural industry, not just for the audiovisual sector alone (Deutscher Bundestag 2013, 4; Schulz 2013b, 1) And in particular they fear the prospect of large US corporations gaining unrestricted access to domestic markets through deregulation of new media and modern digital transmission technologies which are not covered by existing protection regimes. Again, the lack of transparency in the TAFTA | TTIP negotiations coupled with the vague formulations of the German Federal Government are generating concerns (Deutscher Bundestag 2013). Apart from which, TAFTA | TTIP is explicitly keeping open the prospect of further liberalization. After exclusion of the audiovisual sector, EU Trade Commissioner Karel de Gucht was at pains to emphasize that it could be reintroduced at any later date (Zeit Online 2013). And even now there is no shortage of initiatives for further liberalization: Since early 2012 representatives of the EU and the US have been deliberating in a group called "Really Good Friends of Services" on how to effect further openings in the service sector (Mildner & Schmucker 2013, 8).

Against this backdrop, we now need to ask whether exclusion of the cultural sector from any free trade agreement really does make sound sense. One key supporting argument here is the sector's relatively low economic performance in comparison to other sectors of the economy and its obvious greater relevance for society. The audiovisual sector – the most important part of the cultural sector – accounts for a mere 2%t of the trade volume between the EU and the US (Hayer 2013). Referring to the film industry, Francois and Ypersele (2000) have pointed out that trade barriers between two countries can actually increase welfare gains. In their investigations of the curious economics of cultural products, both Rauch and Trindade (2005), and Sauvé and Steinfatt (2008) have shown the unintended effects market access barriers can have in today's communicative globalized world. They suggest liberalization of markets in combination with concerted subsidies.

Apart from the danger of restricting fundamental human rights for the sake of protecting cultural diversity, there are other arguments against l'exception culturelle, especially with regard to TAFTA | TTIP. Firstly, the EU audiovisual and cultural market is already relatively open for US companies while US market access is still very limited for European companies (Lambsdorff 2013). Second, EU foreclosure in cultural matters vis-à-vis global markets stands in contradiction to the relatively advanced liberalization of the EU internal market (Formentini & Iapadre 2007, 5–6). Besides which, Hollywood movies still enjoy huge successes with audiences in Europe, even under the present cultural protection regime. And the German sys-

2 See: http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E&order=alpha

tem of subsidized public-service broadcasting, for example, has often shown its resilience in the face of frequent attempts by private broadcasters to paint the license fee as illicit and market-distorting (Schulz 2013; Hanfeld 2013). What's more, trade with cultural products mostly takes place over short distances between countries with strong cultural ties (Disdier et al 2009, 577). In this light, the very notion of cultural "assimilation" appears dubious and built on shaky foundations.

One really fascinating aspect of the culture and trade debate is the positions taken by NGOs and civil society. All are in agreement when it comes to rejection of the supposedly excessive power yielded by an imperial United States and threatening cultural diversity. Yet when it comes to l'exception culturelle, at least in terms of quotas and market access barriers, opinions diverge as they do in the debate on copyright. The strongest advocates of l'exception culturelle and stricter regulation of intellectual property rights are to be found in the ranks of culture producers and spokespersons for the cultural sector– after all, such issues have a direct impact on their professional earnings. Both network savvy consumers and NGOs working for free and uncensored internet access rightly criticize restrictions on online services and regulation of intellectual property rules – interestingly with the same argument put forward by advocates of the exception culturelle: Both groups wish to preserve the plurality of information sources as the basis for a well-functioning democratic society.

REFERENCES

Bala, Venkatesh / Long, Ngo Van (2005): *International Trade and Cultural Diversity with Preference Selection, European Journal of Political Economy, vol. 21, pp. 143-162.*

Council of the European Union (2013): *Directives for the Negotiation on a Comprehensive Trade and Investment Agreement, Called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America, Brussels, 17 July 2013. Available online: http://power-shift.de/wordpress/wp-content/uploads/2013/06/EU-TTIP-Mandate-from-bfmtv-June17-2013.pdf*

Crook, Clive & Micklethwait, John (2001) Globalisation: *Making Sense of an Integrating World, The Economist Series (Book 56), London: Wiley.*

Deutscher Bundestag (2013): *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Petra Sitte, Dr. Lukrezia Jochimsen, Ulla Lötzer, Dr. Kirsten Tackmann und der Fraktion DIE LINKE: Das geplante Freihandelsabkommen TTIP/TAFTA zwischen den USA und der Europäischen Union und seine Auswirkungen auf die Bereiche Kultur, Landwirtschaft, Bildung, Wissenschaft und Datenschutz, Drucksache 17/14734, Berlin, 09/11/2013.*

Disdier, Anne-Célia et al. (2009): *Bilateral Trade of Cultural Goods, Review of World Economics, , vol. 145(4), pp. 575-595.*

European Parliament (2013): *Motion for a Resolution to Wind up the Debate on the Statements by the Council and the Commission on EU trade and Investment Negotiations with the United States of America, B7-0187/2013, Strasbourg, 05/140/2013. Available online: http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0187&language=EN*

Felbermayr, Gabriel / Heid, Benedikt / Lehwald, Sybille (2013): *Die Transatlantische Handels- und Investitionspartnerschaft (THIP). Wem nutzt ein transatlantisches Freihandelsabkommen, Teil 1: Makroökonomische Effekte, Bertelsmann Stiftung, Gütersloh. Available online: http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-072C5B36-5B71E62B/bst/xcms_bst_dms_38052_38053_2.pdf*

Formentini, Silvia / Iapadre, Lelio (2007): *Cultural Diversity and Regional Trade Agreements: The Case of Audiovisual Services, UNU-CRIS Working Papers, W-2007/4. Available online: http://www.cris.unu.edu/fileadmin/workingpapers/20070411163922.W-2007-4.pdf*

Francois, Patrick / Ypserle, Tanguy van (2002): *On the Protection of Cultural Goods, Journal of International Economics, vol. 56, pp. 359-369.*

French Embassy in London (2013): *EU-US Free Trade: France not alone in Upholding Cultural Exception, London, 14 May 2013. Available online: http://www.ambafrance-uk.org/France-not-alone-in-upholding*

Grant, Peter S. (2011): *The UNESCO Convention on Cultural Diversity: Cultural Policy and International Trade in Cultural Products, in: Mansell, Robin / Raboy, Marc (eds.): The Handbook of Global Media and Communication Policy, Blackwell Publishing, pp. 336-352.*

Hahn, Michael (2006): *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law, Journal of International Economic Law, 9(3), pp. 515–552.*

Hanfeld, Michael (2013): *Lasst die Kultur leben, FAZ, 19 June 2013. Available online: http://www.faz.net/aktuell/feuilleton/freihandelsabkommen-lasst-die-kultur-leben-12235318.html*

Hayer, Björn (2013): *Kultur als Ware? FAZ, 1 June 1st. Available online: http://www.faz.net/aktuell/feuilleton/freihandelsabkommen-mit-amerika-kultur-als-ware-12203251.html*

Kämpf, Andreas (2013): *Europa eine Seele geben? Eine halbwegs funktionierende europäische Zivilgesellschaft wäre ja auch schon etwas, Politik & Kultur, Nr. 5/13, p. 11. Available online: http://www.kulturrat.de/dokumente/puk/puk2013/puk05-13.pdf*

Lambsdorff, Graf Alexander von (2013): *Interview with Alexander Wolkers, TTIP-Verhandlungen: Pro und Contra, ARTE Journal, 31 May 2013. Available online: http://www.arte.tv/de/ttip-verhandlungen-pro-und-contra/7532172,CmC=7532074.html*

Mildner, Stormy-Annika & Schmucker, Claudia (2013): *Abkommen mit Nebenwirkungen? Die EU und die USA stehen vor Verhandlungen über eine Transatlantische Handels und Investitionspartnerschaft, SWP-Aktuell 26. Available online: http://www.swp-berlin.org/fileadmin/contents/products/aktuell/2013A26_mdn_schmucker.pdf*

Rauch, James E. / Trindade, Vitor (2005): *Neckties in the Tropics: A Model of International Trade and Cultural Diversity, NBER Working Paper No. 11890, Cambridge. Available online: http://www.nber.org/papers/w11890.pdf*

Sauvé, Pierre / Steinfatt, Karsten (2000): *Towards Multilateral Rules in Trade and Culture.:Protective Regulation or Efficient Protection?, in: Productivity Commission and The Australian National University (eds.), Achieving Better Regulation of Services (Conference Proceedings Canberra 26-27 June 2000), pp. 323-337.*

Schulz, Bernhard (2013a): *Austausch und Ausnahme: Was sind Kulturgüter wert? Tagesspiegel, Berlin, 12 June 2013. Available online: http://www.tagesspiegel.de/kultur/was-sind-kulturgueter-wert-austausch-und-ausnahme/8341116.html*

Schulz, Gabriele (2013b): *Der alte Kontinent und die kulturelle Vielfalt: Zum Freihandelsabkommen zwischen den USA und Europa, Deutscher Kulturrat, 29 June 2013. Available online: http://www.kulturrat.de/pdf/2583.pdf*

UNESCO (2005a) Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005. Available online: *http://unesdoc.unesco.org/images/0014/001429/142919e.pdf*

UNESCO Institute for Statistics (2005b): *International Flows of Selected Cultural Goods and Services: Defining and Capturing the Flows of Global Cultural Trade, Montreal. Available online: http://www.uis.unesco.org/Library/Documents/culture05_en.pdf*

Weber, Henri (2013): *Interview with Yannick Cador, TTIP-Verhandlungen: Pro und Contra, ARTE Journal, 31 May 2013. Available online: http://www.arte.tv/de/ttip-verhandlungen-pro-und-contra/7532172,CmC=7532074.html*

WTO (1986): *The General Agreement on Tariffs and Trade (GATT 1947), Geneva. Available online: http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf*

Zeit Online (2013): *EU ebnet Weg für Freihandelsgespräche, June 15th. Available online: http://www.zeit.de/wirtschaft/2013-06/freihandelszone-verhandlungen-usa-eu-mandat*

Photo credit: JAXPORT (Flickr)

KEYWORDS: ECONOMIC GAINS; REGULATORY COOPERATION; TRADE BARRIERS

TACKLING REGULATORY TRADE BARRIERS IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

Simon Lester | *Trade Policy Analyst* | *Cato Institute* | *slester@cato.org* | *@snlester*
Inu Barbee | *Graduate Associate* | *Center for North American Studies at American University* | *ibarbee@cato.org* | *@ibarbee*

Abstract: *In the recently launched Transatlantic Free Trade Agreement, also known as Transatlantic Trade and Investment Partnership (TAFTA | TTIP) negotiations between the US and the EU, President Obama has indicated that the talks will make reducing regulatory barriers a signature issue. The emphasis on tackling these barriers has generated some excitement, with large figures being thrown around as estimates of the resulting economic gains. However, a good deal of uncertainty exists as to how the US–EU trade talks can address these issues, which remain largely undefined. This paper examines the problem of regulatory barriers and offers an assessment of what can be achieved. It concludes that while some claims of potential benefits are overstated, this does not mean that facilitating regulatory cooperation is not worthwhile. Negotiators should go after the low-hanging fruit, putting aside some of the more contentious regulatory disputes, and be responsive to the needs of industry and consumers by focusing their attention on issue areas where they can have the greatest impact.*

INTRODUCTION

In his 2013 State of the Union speech, President Obama announced that the US would launch negotiations on a Transatlantic Trade and Investment Partnership (TTIP) – also known as the Transatlantic Free Trade Area (TAFTA) – with the EU (C-SPAN 2013). Beyond the important news that the world's two largest economies would be negotiating to liberalize trade, there was also a significant development in terms of the substance of the proposed talks. While past trade negotiations have dealt with domestic regulation as a trade barrier in only narrow and limited ways, these talks would make reducing regulatory barriers a signature issue (The White House 2013).

Traditional trade barriers, such as tariffs, are relatively low between the two economies, and regulatory barriers are an area that offers great potential economic gain. One widely cited study suggests some substantial benefits from addressing "non-tariff measures," including regulatory divergence issues, within the context of US-EU trade. After noting that the "total elimination" of such barriers would amount to a 2.5 – 3.0% increase in Gross Domestic Product, the study then tries to identify those barriers that could realistically be eliminated. Doing so, the report says it would boost EU GDP by 0.7% per year, leading to an annual potential gain of US$158 billion in 2008; it would boost US GDP by 0.3% or US$53 billion per year (Berden et al. 2009).

However, a good deal of uncertainty exists as to how the US-EU trade talks can address these issues. A brief explanation is included in the report of the US-EU High Level Working Group (HLWG) that provides a framework for the talks (High Level Working Group on Jobs and Growth 2013). However, the report, as well as the study noted above, refers to many regulatory issues which cannot easily be solved. Thus, some caution and realism needs to be maintained in the face of claims of such large economic gains.

This paper examines the problem of regulatory barriers and offers an assessment of what can be achieved. It concludes that some of the simpler regulatory divergences between countries can be handled. However, more challenging regulatory issues, where there is strong policy disagreement between the US and EU, may need to be taken off the table. As a result, while there are potential gains here, they may be smaller than some hope. This does not mean that facilitating regulatory cooperation is not worthwhile, however. Removing unnecessary regulatory differences can be well worth the effort, if the focus is on aligning regulations that are arbitrarily different rather than changing the substantive nature of the regulation. In addition, this paper examines a model of successful regulatory cooperation which sheds light on a possible approach to addressing regulatory divergence.

PROBLEMS ARISING FROM REGULATORY DIVERGENCE

Regulatory divergence across countries can arise for a number of reasons. For one thing, policy objectives may vary. If countries are trying to achieve different goals, their regulations are unlikely to correspond. But even where policy objectives are similar, regulating through an isolated process, in which national agencies make decisions without thinking about what their foreign counterparts are doing, can lead to differences in regulation. These differences impose substantial costs on businesses and consumers. The following examples help illustrate the kinds of divergences that exist, how they raise costs, and the potential difficulties in resolving them:

CAR HEADLIGHTS

In 1968, the US implemented a regulation related to automobile headlights, requiring two settings: one for high-beams, and one for low-beams. Recently, some automakers have developed new technologies that allow for more sophisticated lighting variations, involving a gradual dimming of the lights rather than a separate "high" and "low" setting. To date, these new headlights are permitted in the EU, but have not been approved for sale in the US on the basis that gradual dimming conflicts with the requirement that there be two settings (Keane 2013 & Nelson 2013). Here, consumers are denied new and improved technology because of outdated regulations.

VEHICLE CRASH TESTS

Individual crash tests for new vehicles can cost anywhere from US$120,000-150,000 per test (in Canada and the US), but it is rare these tests are done just once, and it is even rarer that the same test will not be replicated in another country before it is cleared for import. What does this mean? The company trying to get its car to market will have to go through the same safety tests, even though they produce the same end result. This duplicative testing not only delays the release of the product to market, but it also adds significant costs.

GENETICALLY MODIFIED FOODS

Genetically modified (GM) foods face different regulatory regimes in the EU and the US. The EU relies on what it refers to as the "precautionary principle," which in practice means that in the EU, producers have to demonstrate the safety of GM crops and food products before they can be approved for sale. By contrast, US regulators generally see GM foods as "substantially equivalent" to unmodified products, and give them no additional oversight in the absence of scientific proof that any harm is caused by their sale and consumption (Kysar, 2004: 557). EU policy is, in part, reflective of strong feelings among its citizens. With policy preferences that come into conflict in this way, it may not be possible for regulations to converge, even though the divergence can be costly.

REGULATORY COOPERATION

How should international cooperation work in practice? There are two common methods, both of which are referred to in the TAFTA | TTIP working group report, which have been used to deal with regulatory divergence: harmonization and mutual recognition.

Harmonization implies the alignment of regulations to a single best practice. It could be based on international standards from a standard-setting body, or simply involve coordination

among nations. Countries basically agree to converge on a single standard or regulation. This is usually the most difficult way to achieve regulatory cooperation.

Mutual Recognition can be achieved through mutual recognition agreements or the acknowledgement of regulatory equivalence. Mutual recognition agreements approve testing and certification processes of other countries as acceptable for allowing sale in the importing country. This method is especially useful in eliminating duplicative testing and certification processes. Equivalence simply acknowledges that different technical regulations can still achieve the same objectives or outcomes; sometimes there are just different methods of doing the same thing, and they should be treated as equivalent.

In connecting the various divergences with the possible solutions, the reason for the regulatory difference matters. Addressing minor, unintentional differences in regulations between countries is the easiest way to improve efficiency. Others are more difficult to resolve, but can often be bridged through equivalence or mutual recognition, allowing consumers to decide which products they prefer by increasing their access to items which otherwise would not be available. However, strongly conflicting policy views – such as on GM foods – may not be solvable this way. They would nevertheless benefit from more international dialogue on the causes of the divergence.

THE US-CANADA REGULATORY COOPERATION COUNCIL

Regulatory cooperation may be a desirable objective, but there is a question about whether trade agreements are the best place to address it. Clearly these issues can affect trade, and thus could fit conceptually within the scope of trade agreements. But are trade negotiations an effective way to deal with the problem? There is a long history of trying to do so, but without much success. As a result, it may be worth looking outside the traditional trade negotiating model for answers.

Attempts at regulatory cooperation between Canada and the US have been numerous over the years. Through trial and error both countries have been able to identify ways to successfully foster cooperation. The Regulatory Cooperation Council (RCC) is the latest effort, which operates outside the context of a trade agreement. Though a complete replication of previous models may not be sufficient, or desired, in the context of US-EU trade negotiations, there are certain aspects of the RCC that may be useful to inform the TAFTA | TTIP talks.

The RCC is supported by numerous private interests, business and industry, which are often better situated to recognize the barriers that impede market access than the government. The RCC addresses regulatory issues in a non-legalistic way that seeks to find modest solutions to specific regulatory divergence problems by providing a mechanism through which "bilateral and horizontal coordination and the generation of ideas" can take place among the lead agencies in each country (Canada-US RCC Progress Report 2012, 3-4). Its main focus is on limiting inefficiencies in existing regulations, not in creating new ones.

For example, Canada and the US recently recognized each other's zoning measures with regard to highly contagious foreign animal disease outbreaks (Canadian Food Inspection Agency 2013). Such action will help prevent substantial disruption to live animal and animal products trade, as happened during the bovine spongiform encephalopathy (BSE) or 'mad-cow' outbreak in 2003. The fact that this plan was developed with broad engagement from both the public and private sector should not be overlooked – in fact, it is probably the key reason for its success. Not only is this vital to provide legitimacy to the project, but it also prevents industry and special interest capture by opening up these issues to comment by as large a pool of actors as possible. Furthermore, it serves to limit the development of a top-down process, which most often results in overregulation or bureaucratic inertia.

Motor vehicle standards have also been addressed, because vehicle production is a major supply chain in North America. In November 2012, certain Canadian-certified vehicles were made eligible for importation in the US because safety standards were either harmonized or had an equivalent effect (Federal Register 70538, 2012). There is still more work to be done, as this only applies to certain recently produced vehicles, but it paves the way for a more integrated and efficient supply chain in the future, eases the burdens on businesses from having to comply with different manufacturing and safety requirements, and provides greater choice to consumers by allowing new vehicles to enter the market.

At this early stage, it is difficult to fully assess the work of the RCC, but it does seem to be making progress. The most important feature of the RCC process is the pragmatic approach to dealing with regulatory divergence, coupled with regular input from private interests. The idea is not to bridge all regulatory divergences, but rather to find practical solutions to resolvable problems in those sectors that are most vital to the trading relationship. A transparent, inclusive, and open process that involves all stakeholders, from businesses to consumers, is a good model for achieving regulatory cooperation going forward.

INTERNATIONAL REGULATORY COOPERATION IN THE TAFTA | TTIP AND BEYOND

Although resolution of regulatory differences between the United States and the EU is likely to be more difficult than for Canada and the US, the RCC nonetheless provides useful insights into how regulatory cooperation can be addressed in the TAFTA | TTIP. The early successes of the RCC make clear that promoting regulatory cooperation does not need an extensive legal framework or dispute process. At the most basic level, it simply provides a mechanism for the two countries to address regulatory divergence through input from business and consumer groups, and cooperation between government agencies.

The best approach for the US and EU would be to focus attention on the views of the private sector, which faces the responsibility of meeting multiple government requirements, and which is in the best position to identify the costs and inefficiencies of regulatory divergences for trade. One of the main goals of the regulatory cooperation process should be to facilitate the involvement of producers, distributors and consumers in a process which provides for direct contact with the relevant government agencies.

Private sector involvement could come at two stages. First, during the initial rule-making process for new regulations; this could be helpful in preventing new regulations from diverging to begin with. Second, with regard to existing regulations, it is essential to have private sector input on how divergent rules hamper trade so that a discussion can even begin. Since regulatory convergence will be a long-term process, there needs to be a permanent forum where the private sector – businesses, consumers and other groups – can raise concerns with both existing and potential divergence.

While the TAFTA | TTIP offers a good starting point, regulatory cooperation should eventually be done on a multilateral basis. The need for this is amplified by the growing trend of "21st Century trade agreements" that include issues outside the traditional scope of trade negotiations. This simply means that if regulatory cooperation is included in multiple trade agreements with different participants, the risk of creating more layers of contradiction and confusion greatly increases.

Multilateralizing regulatory cooperation may not be possible at the moment, but since the US and EU make up almost half of world GDP and 30% of total goods and services trade, any agreement both sides can come to on regulatory issues could help set the tone and trajectory of future regulatory cooperation efforts involving other parties. The greater the number of countries involved in eliminating costly and duplicative regulatory processes, the greater the potential gains for consumers and producers alike. The TAFTA | TTIP negotiations can play an important role in leading the way on regulatory cooperation efforts, and their success or failure will determine how this issue is addressed in the future,

REFERENCES

Berden KG et. al. (2009): *Non-Tariff Measures in EU-US Trade and Investment - An Economic Analysis, European Commission, Directorate-General for Trade OJ 2007/S 180-219493. Available online: http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145613.pdf*

Canada-United States Regulatory Cooperation Council (2012): *Progress Report to Leaders. Available online: http://actionplan.gc.ca/en/blog/regulatory-cooperation-council-progress-report*

Canadian Food Inspection Agency (2013): *Canada and the United States sign agreement on animal disease zoning. Available online: http://www.cfia-acia.agr.ca/about-the-cfia/newsroom/news-releases/2013-01-16/eng/1358284644570/1358284687351*

C-SPAN (2013): *Remarks of President Barack Obama - As Prepared for Delivery, State of the Union Address. Available online: http://www.c-span.org/uploadedFiles/Content/Documents/State-of-the-Union-2013.pdf*

Europa (2013): *Summaries of EU Legislation, Precautionary Principle. Available online: http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_en.htm*

European Commission, DG Health and Consumers (2013): *Rules on GMOs in the EU-Labeling. Available online: http://ec.europa.eu/food/food/biotechnology/gmo_labelling_en.htm*

Federal Register (2012): *Final Decision That Certain Canadian-Certified Vehicles Are Eligible for Importation, vol. 77(227) November 26, 2012, at 70538.*

Keane AG (2013): *Audi Headlights Seeing Around Corners Banned by US Rule. Bloomberg, 20 March. Available online: http://www.bloomberg.com/news/2013-03-20/audi-headlights-seeing-around-corners-banned-by-u-s-rule.html*

Kysar DA (2004): *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice, Harvard Law Review, 188(2): pp. 525-642.*

Nelson G (2013): *Toyota Puts High Beams on Headlight Regulation. Automotive News, 20 May. Available online: http://www.autonews.com/article/20130513/OEM11/305139967#axzz2aAoST9yD*

The White House (2013): *Remarks by the President at Meeting with the President's Export Council. Available online: http://www.whitehouse.gov/the-press-office/2013/03/12/remarks-president-meeting-presidents-export-council*

US-EU High Level Working Group on Jobs and Growth (2013): *Final Report. Available online: http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg*

KEYWORDS: SUSTAINABILITY; GLOBALIZATION; CONTINENTALIZATION; CLIMATE CHANGE

THE TAFTA / TTIP AGREEMENT: 'OLD' AND UNSUSTAINABLE?

Andrea Licata | *Independent Researcher* | *andrea.licata@gmail.com* | *@andrea_licata*

Abstract: *The TAFTA / TTIP agreement, if approved, will significantly intensify the economic cooperation and trade between two of the most developed and powerful actors of the world, the United States of America and the European Union. As such, it will modify the current political, but also economic scenario, and this in of the context of worldwide climate change and the overconsumption of natural resources. It could even lead to a new global paradigm. Saying this, the question is, whether it can be guaranteed that the TAFTA / TTIP agreement will be strong and sustainable in the medium and long term also from an environmental point of view. Or whether it will require more energy and resources and therefore contribute to the future costs of climate change – and therefore be unsustainable.*

THE CRITICAL ENVIRONMENTAL BACKGROUND

Is the TAFTA / TTIP agreement considering the delicacy of this moment in which the latest report of the Intergovernmental Panel on Climate Change (IPCC) released on 27 September, 2013, urges a global response to the clear message from scientists that climate change is human-induced and asks for significant action to cut emissions? It does not seem to be the case. If so, would the political leaders opt for intensified trade over thousands of kilometers (Berlin, for example, is 9000 kilometers away from Los Angeles)?

This article calls for the urgent need to analyze the possible impact of the agreement in environmental terms, both at a local and global level. Nobody can say for sure whether the agreement on TAFTA / TTIP will be approved in the end, in which terms, what kind of new regulations it will involve or whether it will work (and, if so, for how long), since the negotiations have only started recently and they seem complex. What is sure, however, is that the basis of the agreement – to increase trade and spur growth on both sides of the Atlantic, – in the current environmental context and considering the global issues we are dealing with right now, can be regarded as outdated or "old".

One of these global issues is the process of global warming and climate change, which is already happening (i.e., in the shrinking of the Himalayan glaciers and the Arctic ice, the rise of the sea level, progressive desertification, and the greater frequency of extreme weather events as the IPCC reports in their Special Report on managing the risks of extreme weather events). The agreement on TAFTA / TTIP seems to ignore these dramatic current developments. It shows that the developed world has not changed its problematic environmental practices (air, water and soil pollution; resource extraction; deforestation, etc.), even though there is a general consensus that these practices are a growing concern for the global environment today and in the future (e.g., confirmed by a study led by John Cook at the University of Queensland published in IOP Publishing's journal). This could lead to a new paradigm, a critical global situation that has not been there before and that puts in danger future generations and the whole planet.

Against this background it is questionable that the agreement on TAFTA / TTIP will be sustainable in the medium and long-term from an environmental, but maybe also from an economic, point of view. The Stern Report on the Economics of Climate Change by Nicholas Stern stated already in 2006 that the benefits of strong, early action considerably outweigh the future costs – also the economic cost – of climate change. In 2013, Nicholas Stern states in the Guardian on 24 September, 2013, that he underestimated the risks of climate change, such as the melting of permafrost, and that he should have been more "blunt" about the threat posed to the economy by rising temperatures.

HOW TRADE GOT GLOBAL

International trade was significantly intensified after the Second World War and has globalized with the creation of the WTO in 1995. Taking this into consideration, the objective of this new agreement must be to increase trade and therefore economic growth with all its consequences, one of the

Photo credit: Oxfam International (Flickr)

issues an EU-US High Level Working Group was tasked to identify as stated in the European Parliament resolution on EU trade and investment negotiations with the United States of America. According to a European Parliament resolution (2013) on the EU trade and investment negotiations with the US, EU exports to the US are expected to increase by 28% and total EU exports by 6% thanks to TAFTA | TTIP.

Whether scepticism towards commercial agreements or free trade in terms of the environmental footprint (i.e., of the car industry) exists or not, all of these agreements must be analyzed in the overall context. One thing is if intercontinental trade is the exception, another thing is if it becomes the rule, the need and the plan for the future. This intercontinental agreement is opting for making intercontinental trade the rule and will, therefore, lead to even more energy and resource consumption than the current system of production and trade. The possible consequence is an even bigger contribution to climate change and resource consumption in production as well as transport. That is why the agreement looks out of context.

This is also true for the local production. The agreement seems to be constructed in a way that it brings advantages primarily to big industries (i.e. the car industry), because the local producers are generally not acting on the global markets. The big, multinational actors are in a better position to organize intercontinental economic trade. If the multinational companies benefit, however, what does this mean for the local economy in general? Will it still be competitive? The economic system of today is too complex to be reduced to the "big industries", the multinational players. It includes – particularly in Europe – tens of thousands of small and medium size enterprises (SME) that produce locally (national or EU), rather than the international or even global, markets. The European Commission's (EC) SME Performance Review of 2012 stated that small and medium enterprises stood their ground as the backbone of the European economy whereas the EC's Study on the level of internationalisation of European SME's of 2010 concluded that although 25% of EU 27 SME's export or have exported at some point, their international activities are mostly geared towards other countries inside the internal market and only about 13% of EU SME's are active in markets outside the EU.

RISKS AND CONSEQUENCES

Considering the environmental risks that we are facing as well as the importance of the SMEs, not least in terms of job creation, future developments should be in favor of an energy and resource efficient local production. Choices like the agreement on TAFTA | TTIP seem to push in the opposite direction, however, although it could be more rational to reduce the intercontinental trade. Without local production, the foundations of the current economic system are at stake, and so is the environment. That is why it is more than

necessary to make a serious evaluation of the environmental footprint of the agreement to see if these worries are justified or not. After all, the parties of the agreement are the two most industrialized – and, therefore, at least "historically" ,most polluting and consuming – regions in the world.

This is particularly important, as the governments involved often promote contradictory initiatives with regard to environmental issues: some in favor of the reduction of resources and consumption, others promoting de facto the opposite. In some cases the governments pass laws in favor of energy efficiency, but at the same time they sign agreements that request large-scale energy consumption. Germany, for example, despite its efforts to improve energy efficiency (i.e. by the Renewable Energy Sources Act), blocks European initiatives to regulate the car industry – at least by delaying the introduction of caps on carbon dioxide emissions. Again, let us analyze the context: why, despite the alarming reports, do governments not come to terms about climate protection (e.g., by signing a follow-up agreement to the Kyoto Protocol, an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its parties by setting internationally binding emission reduction targets)? Why do they intend to quickly agree on the promotion of the polluting industries through agreements such as the TAFTA | TTIP without considering the consequences? Why are the governments not giving priority to the justified public concern (see the 'Stop TAFTA' protests, for example, in Europe) that the agreement on TAFTA | TTIP will threaten food safety, small scale farmers, internet freedom, workers' rights, access to medicines, financial regulation and last, but not least, the climate? It could be because the agreement on TAFTA | TTIP, though veering towards an intensified globalization, does not imply a greater global cooperation in general terms (e.g. towards a global climate regime), but only economic benefits for the big industry. Instead, commerce and trade should be repositioned from globalization to continentalization or forms of sustainable trade that could speed the formation of continental economies and political unions and help political decision making (i.e. towards a climate agreement).

WHAT COULD BE A WAY OUT?

After the publication of the IPCC report, it is confirmed that climate change is human induced and that action to stop the rising of temperatures is necessary. The fifth IPCC report states, with 95% confidence, that humans are the main cause of the current global warming.: "Human influence on the climate system is clear. This is evident from the increasing greenhouse gas concentrations in the atmosphere, positive radiative forcing, observed warming, and understanding of the climate system" (IPCC 2013, 13).

Hence, climate change demonstrates the negative aspects of the current economic model which is based on large-scale energy consumption which again is the main cause for the temperature rises. It is true, that there are many things to do urgently, but also many things not to do anymore. Will we have to rethink the current economic model? Before the conclusion of any kind of agreement, the true impact and consequences in terms of emissions and pollution and – hence – the sustainability of this agreement have to be analyzed and evaluated. Any for of international cooperation will not be able to ignore environmental problems such as climate change. Only this will in the end lead to a more sustainable production and trade.

REFERENCES

John Cook et al. (2013): *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature, IOP Publishing's Journal, vol. 8(2), pp. 1-7. Available online: http://iopscience.iop.org/1748-9326/8/2/024024/pdf/1748-9326_8_2_024024.pdf*

IPCC (2012): *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Summary for Policymakers. Available online: http://ipcc-wg2.gov/SREX/images/uploads/SREX-SPMbrochure_FINAL.pdf*

IPCC (2013): *Fifth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policymakers. Available online: http://www.ipcc.ch/report/ar5/wg1/#.Uo82aI0hjfI*

Rifkin, Jeremy (2011): *The Third Industrial Revolution: How Lateral Power Is Transforming Energy, the Economy, and the World, New York: Palgrave Macmillan.*

European Commission 2012): *EU SMEs in 2012: at the Crossroads, Annual Report on Small and Medium-sized Enterprises in the EU, 12 September 2011. Available online: http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/annual-report_en.pdf*

European Union (2010): *Internationalisation of European SMEs: Final Report. Available online: http://ec.europa.eu/enterprise/policies/sme/market-access/files/internationalisation_of_european_smes_final_en.pdf*

European Parliament (2013): *European Parliament Resolution on EU Trade and Investment Negotiations with the United States of America (2013/2558(RSP)). Available online: http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0187&language=EN*

Stern, Nicholas (2006): *The Economics of Climate Change: The Stern Review, Cambridge: Cambridge University Press.*

The Guardian (2013): *Lord Stern: It Would be Absurd to Underestimate Climate Change Risks, 24 September 2013. Available online: http://www.theguardian.com/environment/2013/sep/24/lord-stern-climate-change-risks*

REGIMES GOVERNING THE RE-USE OF PERSONAL DATA IN THE US AND THE EU: A PRIMER ON MASS SURVEILLANCE AND TRADE

Thomas F. Ruddy | *Independent Scholar* | *thomas@thomasruddy.org*

Photo credit: Thomas leuthard (Flickr)

Abstract: *Like others before them, the negotiators of the Transatlantic Trade and Investment Partnership (TAFTA | TTIP) must observe differences in the regimes of their respective trading blocs. The international trade regime, for instance, is an EU competence, but national security is not. As for the re-use of personal data, some of that data is processed in ways relating to trade such as airline records and financial data. Other ways of re-using personal data, though, concern national security in EU member states, and hence cannot be part of TAFTA | TTIP negotiations. This paper offers a look at such distinctions as they exist in the critical time where the European public is calling on its leaders to take action to better protect the populace from surveillance after the Snowden revelations. Critics of the status quo must provide realistic alternatives on the basis of their more complete understanding of the background. Coincidentally TAFTA | TTIP negotiations were scheduled to begin at the same time, but for which of these issues would TAFTA | TTIP be an appropriate venue? Any efforts to address surveillance in the US and the EU must also reflect the different ways that data protection measures are organized in these blocs: In the US they are structured by sectors of the economy, and in Europe by "blanket" legislation; in the US there are regimes ranging from the federal to the university level, and in Europe a new EU regulation is supposed to harmonize the disparate regimes that have evolved in member states.*

INTRODUCTION

Governments have always wanted to know more about their enemies and their own citizens. In the late 20th century, rapid advances in information and communication technologies (ICT) accelerated governments' means for surveillance of both groups, and through the Internet are used on a global scope for reaching the putative enemies or citizens wherever they might be.

After Bradley Manning and Wikileaks, it was in 2013 Edward Snowden who revealed the alarming extent of US surveillance activities in the PRISM and – with the British – TEMPORA programs.[1] As a result, Viviane Reding (2013a), Vice-President of the European Commission, threatened to derail the TAFTA | TTIP because her confidence in the negotiating partner (USA) had been shaken by the Snowden revelations.

Perhaps the trade negotiators will leave data protection regulated as it is currently. Perhaps they will take the issue up – on the initiative of the Europeans – and look to outstanding problems. The Congressional Research Service, an influential US government think tank, has conjectured: "Data privacy issues also may receive greater scrutiny following the publication of classified information related to National Security Agency (NSA) surveillance activity in June 2013" (Akhtar & Jones 2013, i). That certainly appears likely, although "the topic raises a host of unbounded, complex, difficult, and contested legal and constitutional issues" (Gellman 2010, 273). The next section will look at the two foremost outstanding issue areas of this type: airline records and financial data.

THE INTERNATIONAL TRADE REGIME AS AN EU COMPETENCE

International trade policy has the advantage of involving real law, not just aspirational pronouncements, backed up by legal recourse to an appeals board and a dispute settlement mechanism. For any data protection provisions in a trade agreement to be taken seriously by privacy advocates, great transparency in how they are worded would be important. Such transparency is not straightforward during negotiations with a partner for fear of being taken advantage of. Instead, metaphorically 'one keeps one's cards close to one's chest'. The negotiating mandate has to be secret, and can be revealed only gradually (George 2010, 15). At the same time, to maintain good relations with civil society is the challenge.[2]

Long-standing controversies that could be taken up and renegotiated in TAFTA | TTIP as "21st century issues" (Akhtar & Jones 2013, 9) involve the Passenger Name Records (PNR) maintained by airlines and the financial data handled by the Society for Worldwide Interbank Financial Telecommunication (SWIFT). Tyson Barker (2013, 3), an analyst writing for the Bertelsmann Foundation in Washington, however, is pessimistic about success in solving these controversies after the Snowden revelations.

Both of these controversies were addressed by the Safe Harbor Agreement in 2000, a self-regulatory commitment by US companies, which continues in a program of the same name.[3] However, they have continued to cause debate in the European Parliament with a plenary vote coming up in

1 In 2012 the number of communications surveilled increased by 27% over the previous year per Glenn Greenwald (2013). The NSA is cited by the Guardian as saying the British GCHQ "produces larger amounts of metadata collection than the NSA", Ewen MacAskill et al. (2013).

2 The author has personal experience in this matter, which is documented at http://www.wsis.ethz.ch/seri.htm and in: Ruddy & Hilty 2007.

3 For more information, consult: export.gov/safeharbor/eu

autumn 2013. The European Parliament (EP) has recently acquired new powers and, henceforth, its approval would be required to ratify any TAFTA | TTIP (Archick, 2013). PNR and SWIFT (TFTP) are only two of a total of seven agreements that could be consolidated into one by TAFTA | TTIP according to Statewatch.4 Negotiations on such a general agreement to consolidate them have been running since 2010.

TRAVEL DATA, SUCH AS PASSENGER NAME RECORDS (PNR), MAINTAINED BY AIRLINES AND BIOMETRIC IDS TO FACILITATE ENTRY TO THE US

In April 2012, a US–EU agreement was approved and adopted by the European Parliament on the use and transfer of PNR to the US Department of Homeland Security. Even before adoption of the agreement, the lack of a recourse for passengers was criticized by Europe's Article 29 Working Party, a body consisting of representatives of the different national supervisory Data Protection Authorities, which in most cases cooperates well with the EU Commission.[5]

The Visa Waiver Program gives priority to those non–US–persons desiring entry to the US who come from certain partner countries and have biometric passports. Applicants are advised to go through the Electronic System for Travel Authorization (ESTA). There are privacy implications from both PNR and the Advance Passenger Information System (APIS), as pointed out by journalist Ryan Singel (2007) and German Data Protection Supervisor Peter Schaar (2005). Many European tourists use the Visa Waiver Program each year, and the biometric data in European passports is a result of the EU governments complying with US requirements.

FINANCIAL DATA SUCH AS THAT HANDLED BY SWIFT

Financial data may also be covered by TAFTA | TTIP, as conjectured by analysts Akhtar & Jones (2013, 7). The US government was accessing Europeans' financial data through the Society for Worldwide Interbank Financial Telecommunication (SWIFT), and claimed successes in finding terrorists by those means. This process, however, was perceived in Europe to be a violation of EU privacy legislation. The conflict was resolved in 2010, at least temporarily, when the European Council concluded with the US an agreement on the processing and transfer of financial messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (TFTP). After the Snowden revelations it is likely that the TFTP will be up for reconsideration by the EU. Several parties in the European Parliament have called for renegotiation.[6]

4 "There are currently seven EU-US agreements covering justice and home affairs issues: 1. Europol (exchange of data); 2. Extradition; 3. Mutual assistance; 4. PNR (passenger name record); 5. SWIFT (all financial transactions, commercial and personal); 6. Container Security Initiative (CSI); 7. Eurojust.", Statewatch 2012.

5 "However, in other cases, the EU Commission proposals have been severely criticised by the Art. 29 W.P., notably as regards the Passenger Name Record (PNR) and/or the Safe Harbour issues, when the political agreement reached by the EU Commission with the US administration did not correspond with the point of view of the Art. 29 W.P." (Yves Poullet & Serge Gutwirth 2008, 8).

6 Zorz (2013) and European Parliament (2013).

REGIMES INVOLVING SURVEILLANCE AND DATA PROTECTION COMPLEMENTARY TO THE TRANS-ATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TAFTA | TTIP)

Attempts to reconcile data protection with security have repeatedly come up against the fact that national security is considered quintessential to sovereignty. Sovereign states reserve national security issues for themselves; this is referred to as the "national security exception", which applies in multilateral trade law (Sofaer et al. 2010, 195). Furthermore, national security is thought to require clandestine agencies working in a sphere not subject to public scrutiny. Here one has to establish clarity on concepts like terrorism and its relation to cybercrime. Then one can see which government levels are held to be competent. Since the threat is global in nature, international cooperation is essential in addressing it. Likewise, the scope of the current section of this paper will become progressively more global, starting with regimes at the EU level (such as data protection) and advancing to regimes at plurilateral institutions (such as human rights).

In the EU, data protection is a competence shared between Brussels and the member states. On the EU level there is a directive dating back to 1995. A new regulation has been proposed to replace that directive with a new, more directly applicable regulation; however, even the new regulation leaves room for member states to manage their respective police and intelligence services guided only by an updated directive.

Unlike international trade policy, national security is not a competence of Brussels in the EU, but rather one reserved by member states for themselves. There will be a new EU grouping tasked with harmonizing any actions taken by member states: "Permanent Representatives of the EU member states at Coreper [the Committee of Permanent Representatives] have agreed on July 18 on the remit and composition of the EU side in the ad hoc working group tasked with discussing questions of data protection." (European Council Presidency 2013; Gardner 2013). However currently, as of this writing in September 2013, the working group still carries in its name the restrictive descriptor ad hoc.

In the US, national security areas include cybercrime. The revelations by the NSA whistleblower Edward Snowden show that surveillance is being intensified ostensibly to combat terrorism, or perhaps a more mundane threat referred to as "cybercrime".[7] Thus, the US relates cybercrime to national security. The Obama Administration has issued an International Strategy for Cyberspace, which addresses cybercrime in the broader context of cyber security (Finklea & Theohary 2012, 23). The elements of US cybercrime policy also include the following two national strategies:

- A National Strategy for Trusted Identities in Cyberspace (NSTIC) is an attempt to establish an identity ecosystem for better identity management;

7 A distinction is drawn in an official US paper to the effect that "when investigating a given threat, law enforcement is challenged with tracing the action to its source and determining whether the actor is a criminal or whether the actor may be a terrorist or state actor posing a potentially greater national security threat" (Finklea & Theohary 2012, ii.)

- A National Strategy to Secure Cyberspace was passed following the terrorist attacks of September 11, 2001 (ibid, 25).

The EU has a new cyber-security strategy pending passage by the Council. Viviane Reding (2013b) predictably praises the draft directive, while Member of European Parliament (MEP) Sophie in 't Veld is critical calling it a mish-mash (in 't Veld 2013; Bendiek 2012), but offering a more balanced appraisal. Differences between the EU and US approaches have been characterized by Jeremy Fleming (2013a) as light versus heavy regulation. Cybersecurity is a global issue that could hit Chinese manufacturers like Huawei with protectionist exclusion from the EU market, and is affecting trade negotiations with India (Fleming 2013b).

Before the current emphasis on cybersecurity, it was the George W. Bush Administration that set out to increase the surveillance of non-American espionage agencies. Privacy expert Caspar Bowden points out that the Foreign Intelligence Service Act (FISA) Amendments Act of 2008 (FISAA 2008) was focused on neither national security nor criminality, but rather on political surveillance. He describes the FISA-related Foreign Intelligence Surveillance Court (FISC) and the higher Review court (FISCR) in detail.[8]

Bowden also discovered that EU data on servers in the US is not protected by the major regimes (e.g., Council of Europe (CoE), human rights[9]) in cases involving US national security or political and/or foreign policy.[10]

Caspar Bowden and Paul De Hert are two of the authors of the collection listed under Didier Bigo et al. (2013a). They propose that the European Parliament and the US Congress should interact more in the Transatlantic Legislators Dialogue on situations like the PRISM revelations.

OTHER VENUES FOR SEEKING SOLUTIONS IN PLURILATERAL INSTITUTIONS

- **Organisation for Economic Co-operation and Development (OECD)**
  Jennifer Stoddart, Canada's privacy commissioner, has stated that the recent update of the voluntary OECD guidelines for multinational enterprises in 2011 was relevant in the push towards stronger global data protection (Stoddart, 2013).

- **Council of Europe**
  The signatory states to the aspirational Cybercrime Convention of the CoE have a committee (T-CY) that meets yearly.[11] The CoE also has a Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CoE 108).

Photo credit: Julie Rieg (Flickr)

- **'Five Eyes' Agreement**
  EU member state Germany found itself to be an object of surveillance through the PRISM program instead of a subject doing any such surveillance itself. Other states in the alliance of intelligence operations known as Five Eyes (FVEY) are subjects. This secret agreement was first signed in March 1946 by the United Kingdom and the United States and later extended to encompass the three Commonwealth realms of Canada, Australia and New Zealand.[12]

WAYS THAT DATA PROTECTION MEASURES ARE ORGANIZED IN THE US

The common basis of US data protection policy is the Fourth Amendment to the United States Constitution, which comprises part of the Bill of Rights. In 1967 the US Supreme Court held that its protections extend to the privacy of individuals as well as its original object – i.e., to regulate physical intrusion for unreasonable searches and seizures. Most searches require a warrant; exceptions exist for inter alia foreign intelligence surveillance, the Supreme Court decided in 1972, subject to certain requirements (EPIC 2010).

Beyond the theoretical framework of the Fourth Amendment, though, "the US privacy landscape appears wild and unruly", even to researchers at the renowned Institute for International Economics in Washington DC (Mann & Orejas 2001, 15ff.). One reason for that is that it developed organically and differently in multiple sectors; hence it is called sectoral. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a prime example of data protection implemented in only one field (in this case, health care). At the university level, scientific research is governed by Institutional Review Boards (in Europe called ethics committees), which also impact on patient rights. The privacy policies required of companies comprise a third example. These measures are

8 See video featuring Bowden 2013a, part 2, and Bowden 2013b.

9 Nine major international civil liberties groups pin-pointed Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, Gavin Reilly (2013).

10 Bowden 2013a, part 2, 12 min.

11 Council of Europe, Cybercrime Convention Committee - see: http://www.coe.int/TCY

12 Privacy expert Bowden has recently described the FVEY as background to his presentation on surveillance at data centres (Bowden 2013a).

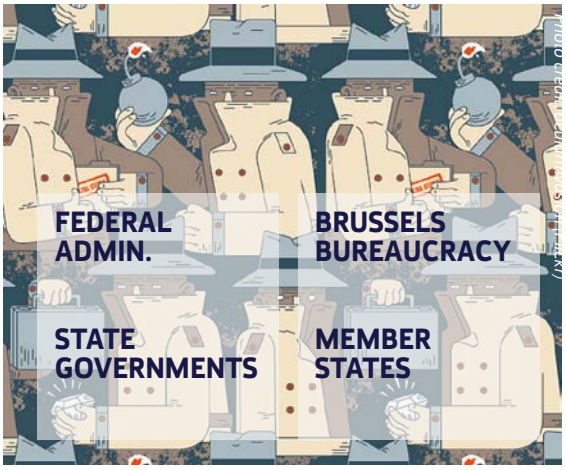


Figure 1: Intelligence services lack the visibility characteristic of government agencies on other levels

separate from each other, not like the more comprehensive "blanket" legislation in the EU described in the next section below. The US sectoral approach has its disharmonies: the privacy aspects of HIPAA are administered by the Office of Civil Rights (OCR); hospitals, though, may resent being monitored by non-medical authorities. Banks are regulated by the Consumer Finance Protection Board, and they dislike the agency as being biassed toward consumers' interests and disrespectful of banks' integrity (Gellman 2013).

Here are some additional features of the US data protection landscape:

- FISA dating back to 1978 was the framework for several developments:

- Warrantless wiretapping by NSA was revealed publicly in late 2005 by the New York Times working with whistleblower Thomas Drake (Government Accountability Project 2010). Warrantless wiretapping was said to be then discontinued in January 2007 according to a letter from Attorney-General Alberto Gonzalez to Senator Patrick Leahy (US Commission on Civil Rights 2010, v).

- The Protect America Act is a controversial amendment to FISA, which expired in 2007 (James Risen & Eric Lichtblau 2009). The FISA Amendments Act of 2008, known as FISAA 2008, replaced the Protect America Act. Both gave Bush-era officials more power, a watershed development analyzed in the video (Bowden 2013a).

- American data protection legislation does exist, but it is sectoral and weak (except for liability issues and the PIAS done by the Federal Trade Commission (FTC) ; see below). The US has had an Electronic Communications Privacy Act since 1986. In 2001 Senator Leahy began an attempt to get it updated. However these efforts have not garnered much support. President Barack Obama set up his own Privacy and Civil Liberties Oversight Board, which has also called for updating the 30-year-old privacy legislation (Roberts 2013). There has been a consumer privacy bill of rights since February 2012, but it is based on only voluntary codes of conduct (EPIC 2013).

- Privacy Impact Assessment (PIA) is a method to analyze measures often applied by companies in the light regulation atmosphere of the Anglo-Saxon world. It is described in detail by David Wright (2011, 89). Security expert Bruce Schneier summarizes a paper co-authored by a well-known US privacy legal scholar Daniel J. Solove (Solove & Hartzog forthcoming) contending that the extensive PIAs currently carried out by the FTC potentially comprise the beginnings of a regulation system (Schneier 2013).[13] This is an explanation that complements the conventional characterization of US data protection law as "sectoral". A form of Anglo-American common law would thus confront Continental European civil law. Privacy expert Gellman (2013) dissents from the praise for the FTC. The Americans may expect privacy to be governed by a commission on trade; in the EU, though, data protection is seldom associated with trade policy.

Given the sectoral nature of US legislation described above, and the additional conflicts between common law and civic law, it becomes clear that EU legislation takes a very different approach (i.e., a coordinated blanket approach). For TAFTA | TTIP to bridge these differences would comprise either a significant hurdle for a trade agreement or a watering-down of European standards.

WAYS THAT DATA PROTECTION MEASURES ARE ORGANIZED IN THE EU

The EU data protection legislation can be described as comprehensive, centralized and "blanket"-like in contrast to the US patchwork approach. The EU's legislation reflects the Charter of Fundamental Rights of the European Union.

There is a data protection supervisor at the European level, Peter Hustinx.[14] In addition, there is a system of data protection supervisors in each member state. They meet in the Article 29 Working Party, named so for its inclusion at that section in the data protection directive. The latter is currently undergoing replacement by a more binding regulation, the General Data Protection Regulation (GDPR), which will replace all existing national laws on data privacy. The regulation will be complemented by a new directive addressed to police matters, which remain a member state competence. The new EU regulation has been subjected to intense lobbying by US companies, and – at least until the Snowden revelations – was bogged down by over 3000 amendment proposals. Many amendments seek to water-down the draft legislation, which contains provisions perceived as hindrances from a business standpoint (such as the right to have data about oneself deleted by third-party providers). This state of affairs can be found documented by an activist (Schrems 2013) and in detail (American Chamber of Com-

13 "The FTC's actions certainly seem to be the stirrings of a much more complete and substantive regime than simply requiring companies to follow their promises" (Solove & Hartzog - forthcoming, 55); "Through a gradual process akin to the common law, the FTC has developed a federal body of privacy law, the closest thing the United States has to omnibus privacy regulation. Unlike the top-down approach of the European Union and many countries around the world, the FTC's approach has been bottom-up - a series of small steps." (ibid., 63).

14 Hustinx is retiring. Applications for the post of his successor were due on 20 September 2013.

merce, 2013, in total 89 pages). One piquant detail is that just before the Snowden revelations, lobbyists had appeared to be successful in removing a clause that would have precluded FISA surveillance; now parliamentarians are calling for its reinsertion of the "Anti-FISA" clause into the draft.[15] Lawyers working at Sidley Austin LLP, a US corporate law firm, doubt whether FISA surveillance would even fall under the draft regulation, as it comprises a policing measure. (Sidley Austin 2013). Analyst Evgeny Morozov goes a step further in his pessimism about using regulation as the solution without addressing the real problem: information consumerism. He points out that even the strict European regulation is no match for the commercialized Internet of Things that is coming about rapidly (Morozov 2013). That futuristic evolution of today's Internet will mean everyday "things" can perform surveillance on consumers, delivering their results to private-sector market "intelligence" firms.

CONCLUSION

There is still much uncertainty about the inclusion of data protection in the TAFTA | TTIP (J. Fleming 2013c).[16] This paper was not intended to speculate about the outcome of ongoing developments, but rather to provide background for a more accurate assessment of developments as time goes on. George W. Bush's war on terror wreaked havoc on EU-US relations, at least as regards data protection. The subsequent Snowden revelations threatened to derail the TAFTA | TTIP negotiations before they even started. Even if the members of the ad hoc working group succeed in coordinating their states' action without violating each other's sovereignty, that accomplishment would remain only one measure at the nation-state level. Intelligence services work covertly, one level removed from democratic structures.[17] It is there that the governance and monitoring of the agencies must be improved. The Electronic Freedom Foundation has described past attempts to reform the FISA Court and current proposals (Jaycox 2013)[18]

Strategically, it will matter whether the EU or the US has the stronger interest in concluding an agreement. Business interests in America may be pushing for trade policy to trump EU data protection.[19] Which side would be more willing to make concessions on data protection? If the Americans are not willing to compromise, the Europeans might find that a trade agreement is not the venue with the best chances of success regarding d ata protection.

15 Article 42 according to Bowden 2013b, page 29ff., referring to the new DP Regulation draft.

16 See also: "EU officials have stated that data protection will not be covered by the [TAFTA | TTIP] agreement, but that (transborder) data flows will. Digital industries have also called for inclusion of personal data flows into this trade agreement, while privacy advocates maintain that international rules for such data transfers already exist, and that the United States should ratify Council of Europe Privacy Convention 108. Meanwhile, there are questions about the adequacy of the EU-US Safe Harbor and plans to review it" (Public Voice 2013).

17 "Security services and several academics working on intelligence - consider that only their own government, and often only the president or the prime minister, has the right to know what they do." (Bigo et al. 2013b, 16).

18 Oversight measures failed: "The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently and systemically violated that it can fairly be said that this critical element of the overall BR [bulk records] regime has never functioned effectively," said Reggie B. Walton, FISC judge as cited in United States (2009, 11)

19 "US could exploit trade deal to expand spying" warns Jeff Chester of Center for Digital Democracy (2013) as cited in Atlantic Community (2013).

REFERENCES[20]

Akhtar, S. I. / Jones, V. C. (2013): *Proposed Transatlantic Trade and Investment Partnership: in Brief. Available online: http://www.bilaterals.org/IMG/pdf/213004.pdf*

American Chamber of Commerce (2013): *AmCham EU Proposed Amendments on the General Data Protection Regulation. Available online: https://github.com/lobbyplag/lobbyplag-data/raw/master/raw/lobby-documents/AmCham_EU_Proposed_Amendments_on_Data_Protection.pdf*

Archick, K. (2013): *CRS Report for Congress Prepared for Members and Committees of Congress, The European Parliament. Available online: http://www.fas.org/sgp/crs/row/RS21998.pdf*

Atlantic Community (eds.) (2013): *NSA Scandal Heightens EU Data Concerns with TAFTA | TTIP: Press Commentary. Available online: http://www.atlantic-community.org/-/nsa-scandal-heightens-eu-data-concerns-with-TAFTA | TTIP*

Barker, T. (2013): *Blown Cover - The NSA and the Unraveling US-EU Intelligence Relationship, Bertelsmann Foundation Brief. Available online: http://www.bfna.org/sites/default/files/BBrief%20Blown%20Cover%20-%20The%20NSA%20and%20the%20Unraveling%20US-EU%20Intelligence%20Relationship%20%283%20July%202013%29.pdf*

Bendiek, A. (2012): *European Cyber Security Policy. Available online: http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2012_RP13_bdk.pdf*

Bigo, D. et al. (2013a): *Open Season for Data Fishing on the Web: The Challenges of the US PRISM Programme for the EU. CEPS Policy Brief, 293. Available online: http://www.ceps.be/book/open-season-data-fishing-web-challenges-us-prism-programme-eu*

Bigo, D. et al. (2013b): *National Programmes for Mass Surveillance of Personal Data in EU Member States and their Compatibility with EU Law, Study PE 493032. Available online: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE_ET%282013%29493032_EN.pdf*

Bowden C. (2013a): *How to Wiretap the Cloud (without almost anybody noticing), Video of presentation at: https://http://www.openrightsgroup.org/blog/2013/caspar-bowden-how-to-wiretap-the-cloud-%28without-almost-anybody-noticing%29*

Bowden C. (2013b): *The US National Security Agency (NSA) Surveillance Programmes (PRISM) and Foreign Intelligence Surveillance Act (FISA) Activities and their Impact on EU Citizens' Fundamental Rights'. Available online: https://buff.ly/1gIAogH*

Center for Digital Democracy (2013): *US/EU Trade Deal Should Keep Privacy and E-Commerce Off-the-Table Until Public Learns about impact of NSA Data Gathering and Role of Online Companies. Available online: http://www.centerfordigitaldemocracy.org/useu-trade-deal-should-keep-privacy-and-e-commerce-table-until-public-learns-about-impact-nsa-data-g*

EPIC (2010): *Foreign Intelligence Surveillance Court (FISC). Available online: https://epic.org/privacy/terrorism/fisa/fisc.html*

20 Also available in clickable form on http://www.thomasruddy.org/bibliog.htm

EPIC (2013): *Electronic Privacy Information Center, White House: Consumer Privacy Bill of Rights. Available online: https://epic.org/privacy/white_house_consumer_privacy_.html*

European Council Presidency (2013): *Presidency Statement on Outcome of Discussions on EU-US Working Group. Available online: http://www.eu2013.lt/en/news/statements/presidency-statement-on-outcome-of-discussions-on-euus-working-group*

European Parliament (2013): *MEPs call for Suspension of EU-US Bank Data Deal in Response to NSA Snooping, Plenary Session Press Release - Fundamental Rights, 23-10-2013. Available online: http://www.europarl.europa.eu/news/en/news-room/content/20131021IPR22725/*

Finklea, K. M. / Theohary, C. A. (2012): *Cybercrime: Conceptual Issues for Congress and US Law Enforcement. Available online: http://fpc.state.gov/documents/organization/196038.pdf*

Fleming, J. (2013a): *EU, US Go Separate Ways on Cybersecurity. Available online: http://www.euractiv.com/specialreport-cybersecurity/eu-us-set-different-approach-cyb-news-518252*

Fleming, J. (2013b): *Cybersecurity Offers Commercial Opportunity, but also Stokes Trade Tensions. Available online: http://www.euractiv.com/specialreport-cybersecurity/cybersecurity-offers-commercial-news-518341*

Fleming, J. (2013c): *EU-US Trade Talks: Moving Forward? TTIP: Data is the Elephant in the Room. Available online: http://www.euractiv.com/specialreport-eu-us-trade-talks/ttip-data-elephant-room-news-530654*

Gardner, A. (2013): *[blog] Through a Prism, Darkly: Preliminary Attempt to Gain Clarification about the Ad-hoc Working Group Created to Extract Clarifications from the US'. http://preview.tinyurl.com/ofwbpdg*

Gellman, R. (2010): *Civil Liberties and Privacy Implications of Policies to Prevent Cyberattacks, in: Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for US Policy (2010), National Academies Press.*

Gellman, R. (2013): *Who Is The More Active Privacy Enforcer: FTC or OCR?. Available online: http://www.concurringopinions.com/archives/2013/08/who-is-the-more-active-privacy-enforcer-ftc-or-ocr.html*

George, C. (2010): *The Truth about Trade, Zed Books.*

Government Accountability Project (2010): *NSA Whistleblower Tom Drake. Available online: http://www.whistleblower.org/action-center/save-tom-drake*

Greenwald, G. (2013): *NSA Prism Program Taps in to User Data of Apple, Google and Others, The Guardian, 7th June 2013. Available online: http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data*

in ,t Veld, S. (2013): *EU Cyber Security: MEP in ,t Veld Laments the Lack of a Clear Strategy. Available online: http://www.vieuws.eu/ict/eu-cyber-security-mep-in-t-veld-laments-lack-clear-strategy/*

Jaycox, M. M. (2013): *How to Reform the Secretive FISA Court: Make It Less Secret. Available online: https://http://www.eff.org/deeplinks/2013/08/how-reform-secretive-fisa-court-make-it-less-secret*

MacAskill, Ewen et al. (2013): *Mastering the iInternet: How GCHQ Set Out to Spy on the World Wide Web, The Guardian, 21 June 2013. Available online: http://www.theguardian.com/uk/2013/jun/21/gchq-mastering-the-internet*

Mann, C. L. / Orejas, D. (2001): *Can NAFTA Forge A Global Approach to Internet Governance?. Available online: http://www.iie.com/publications/papers/mann1101.pdf*

Morozov, E. (2013): *Information Consumerism and the Price of Hypocrisy. Available online: http://www.faz.net/aktuell/feuilleton/debatten/ueberwachung/information-consumerism-the-price-of-hypocrisy-12292374.html*

Poullet Y. / Gutwirth S. (2008), in: *Asinari, Palazzi (eds.): Défis du droit à la protection de la vie privée.Challenges of Privacy and Data Protection Law. Available online: http://works.bepress.com/serge_gutwirth/63*

Public Voice (2013): *Our Data, Our Lives: The 2013 Public Voice Conference in Warsaw, 25 September 2013. Available online: http://thepublicvoice.org/events/warsaw13/*

Reding V. (2013a): *Letter to Eric Holder. Available online: http://www.asktheeu.org/en/request/expert_group_to_assess_prism/*

Reding V. (2013b): *Speech: The EU's Data Protection Rules and Cyber Security Strategy: Two Sides of the Same Coin, Speech/13/436 19/05/2013, NATO Parliamentary Assembly/Luxembourg. Available online: http://europa.eu/rapid/press-release_SPEECH-13-436_en.htm*

Reilly Gavin (2013): *Civil Liberties Groups Claim PRISM Breaches International Human Rights. Available online: http://www.thejournal.ie/civil-liberties-prism-human-rights-950656-Jun2013/*

Risen, James / Lichtblau, Eric (2009): *Court Affirms Wiretapping Without Warrants,January 15. Available online: http://www.nytimes.com/2009/01/16/washington/16fisa.html?_r=2&hp&*

Roberts, D. (2013): *US Surveillance Guidelines not Updated for 30 Years, Privacy Board Finds, The Guardian, 23 August 2013. Available online: http://www.theguardian.com/world/2013/aug/23/us-surveillance-rules-30-years*

Ruddy T. F. / L. M. Hilty (2007): *Impact Assessment and Policy Learning in the European Commission, Environmental Impact Assessment Review, vol. 28(2-3), pp. 90-105.*

Schrems, M. (2013): *LobbyPlag brings Light to the EU Data Protection Jungle: Online Project Evaluates more than 3,100 Amendments. Available online: http://www.europe-v-facebook.org/LP_en.pdf.*

Austin Sidley, PLL (ed.) 2013): *European Parliamentarians Seek Reinsertion of Onerous 'Anti-FISA' Article 42 into Proposed EU Data Protection Legislation. Available online: http://www.sidley.com/European-Parliamentarians-Seek-Reinsertion-of-Onerous-Anti-FISA-Article-42-into-Proposed-EU-Data-Protection-Legislation-07-02-2013/*

Singel, R. (2007): *Government Auditors Find Traveler Threat Rating Program Fails to Comply With Privacy Rules, Wired, 18 May 2007. Available online: http://www.wired.com/threatlevel/2007/05/government_audi/*

Schaar, P. (2005): *Transfer of Passenger Name Records: The Transparent Passenger. Available online: http://www.bfdi.bund.de/EN/EuropeanInternationalAffaires/Artikel/TransferOfPasengersNameRecords.html?nn=408878*

Schneier, B. (2013): *The Federal Trade Commission and Privacy. Available online: https://http://www.schneier.com/blog/archives/2013/08/the_federal_tra.html*

Sofaer, A. D. et al. (2010): *Cyber Security and International Agreements, in: Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for US Policy, National Academies Press.*

Solove, D. J. & Hartzog, W. (forthcoming, 2014): *The FTC and the New Common Law of Privacy'. Columbia Law Review, vol. 114.*

Statewatch (2012): *EU-USA General Agreement on Data Protection and the Exchange of Personal Data. Available online: http://www.statewatch.org/Targeted-issues/EU-USA-dp-agreement/eu-usa-dp-info-exchange-agreement.htm*

Stoddart, J. (2013): *Will the United States be Given a Free Pass on Privacy Again?, in: Public Voice (ed.): Our Data, Our Lives: The 2013 Public Voice Conference in Warsaw, 25 September, 2013, EDRI no. 11.18. Available online: http://www.edri.org/edrigram/number11.18/public-voice-conference-2013*

US Commission on Civil Rights (2010): *Domestic Wiretapping in the War on Terror: A Briefing Before The United States Commission on Civil Rights Held in Washington, DC, page v. Available online: https://http://www.law.umaryland.edu/marshall/usccr/documents/cr12d2010.pdf*

US Foreign Intelligence Court 'FISC' (2009): *Order from the Foreign Intelligence Court. Available online: https://http://www.eff.org/sites/default/files/filenode/br_08-13_order_3-2-09_final_redacted.ex_-_ocr_1.pdf*

Wright, D. et al. (2011): *Precaution and Privacy Impact Assessments as Modes towards Risk Management, European Commission.*

Zorz, Zeljka (2013): *EU Politicians want to Suspend Banking Data-sharing Program, 10 September 2013. Available online: https://http://www.net-security.org/secworld.php?id=15546*

KEYWORDS: HARMONIZATION OF STANDARDS; BEEF; HORMONES; PRECAUTIONARY PRINCIPLE

IS TAFTA / TTIP A RACE TO THE BOTTOM IN REGULATORY STANDARDS? : THE CASE OF HORMONE-TREATED BEEF

Mona vom Endt | *Graduate School of North American Studies* | *JFKI Department of Political Science*
Freie Universität Berlin | *mona.vomendt@gmx.net* | *@mvomendt*

Abstract: *A free trade agreement between the United States and the European Union may seem like a good idea at first glance, being sold as benefitting consumers by promising economic growth and higher employment. However, taking a closer look at the negotiations, it becomes evident that business groups and lobbyists have far more say in the talks than civil society, pushing an agfenda advantageous to the industry while neglecting consumer rights. By abolishing non-tariff barriers and adjusting regulatory standards, both negotiating partners are trying to push certain products into each other's markets. In this article, US beef that has been treated with growth hormones will serve as an example that shows what threats a potential lowering of standards could entail, while government and corporations work out a deal over the consumers' heads. Hormone-treated beef is currently banned in the EU under the Precautionary Principle, however considering American intentions to rebut this ban, it is questionable how long the European market will stay free of hormone-beef, should TAFTA / TTIP become reality. ,*

Photo credit: teamstickergiant (Flickr)

A FREE TRADE AGREEMENT - BENEFITING THE CONSUMERS?

The negotiations about a free trade agreement between the US and the EU entered its second round in November 2013, after the partnership has been debated for over two decades. The Transatlantic Free Trade Agreement (TAFTA), or what is now called the Transatlantic Trade and Investment Partnership (TTIP), promises to raise Gross Domestic Product (GDP) and create millions of jobs on both sides of the Atlantic. A study conducted by the ifo Institute and the Bertelsmann Foundation estimates the creation of 1.1 million new jobs and a rise in per capita GDP of 13.4% in the US. The numbers for the EU look similarly promising, especially for Baltic and Southern-European states whose trade will benefit from lower tariffs (Felbermayr et al. 2013).

These numbers should make consumers rejoice, since a free trade agreement aims at benefiting the economy and at creating jobs. However, contrary to what business-friendly studies have depicted, a free trade agreement could also entail massive downsides. TAFTA / TTIP will have harsh effects on nations not included in the free trade zone (for example, an estimated decrease of per capita income in Canada and Mexico of 9.5% and 7.2% respectively) or negative effects on developing countries (with Guinea and the Ivory Coast leading the group of the disadvantaged) if a lowering of tariffs between the EU and the US exclude them as competitors in the market (ibid. 2013). But, aside from these global consequences related to tariffs, TAFTA / TTIP also has the potential to harm consumers inside the free trade zone by scaling down regulatory standards, thus opening the market

for products and processes considered questionable by either one of the negotiating partners.

HARMONIZING STANDARDS

One of the major concerns that have been voiced by civil society groups and activists in the course of the TAFTA | TTIP negotiations concerns the "harmonization of standards" to eradicate those regulatory standards, or non-tariff barriers. Aside from tariffs that can constrain trade, non-tariff barriers are regulations and rules that apply to goods – for example, licensing and control procedures concerning health, food or environmental matters. Since harmonizing these standards means creating "an identical regulation or standard[s] across two jurisdictions", standards would either be raised by one of the negotiating partners to meet tighter restrictions or lowered by one of them to make the flow of goods easier across the Atlantic (Schlosser & Bull 2013).

Critical voices on TAFTA | TTIP, such as technology journalist Glyn Moody, are confident that it will resemble a race to the bottom concerning regulatory issues, rather than a race to the top, that is to say, reaching a level of higher mutual standards. Moody states that a lowering of standards is a likely scenario for the trade agreement since non-tariff barriers "are just obstacles to making profits" (Braun 2013). As a matter of fact, negotiators have so far invited far more business than civil society groups to the negotiation table, which suggests that corporate interests, and thus profits, play a major role in the trade agreement (Corporate Europe Observatory 2013). A recent article in the New York Times states that for both sides to meet a mutual single standard is "worth hundreds of millions of dollars, if not billions, in savings for businesses particularly if they can persuade negotiators to accept less strict rules in the process", meaning that corporations are the main beneficiaries of this agreement (Lipton & Hakim 2013).

THE CASE OF HORMONE-TREATED BEEF

So what kind of potentially harmful regulatory adjustments are we talking about? A good example is the issue of food regulation, to be clear, the sanitary and phytosanitary (SPS) measures, which include hormone-treated meat, genetically modified organisms (GMOs) and chicken meat that has been disinfected with chlorine. These are standards that are accepted in the US, thus allowing those foods to have a big market share. Hormone-treated beef is a main point of controversy and it is a good instance of a regulatory issue, especially since it has been a topic of dispute for several years. Hormones are used on approximately two-thirds of all American cattle and on about 90% of the cattle on big feedlots. According to a study by the US Congressional Research Service, the percentage of hormone-treated beef in large US commercial feedlots approaches 100% (Johnson & Hanrahan 2010).

By looking at the numbers of the US' agricultural exports to the EU, one can clearly see the American incentive to "harmonize" the SPS standards and to ship more modified foods to Europe: according to US Foreign Agricultural Service, US agricultural imports to the EU "have vastly underperformed" with a current market share of only seven percent, even though the EU is the biggest importer of foreign agricultural goods in the world (USDA Foreign Agricultural Service 2013). This means that the US has a massive market for the hormone-beef that they would like to expand to Europe.

The dispute over the ban on hormone-treated beef between the US and the EU has been going on since 1981 with the EU banning the import of beef that has been treated with hormonal growth promotants. The US reacted to this by imposing retaliatory tariffs on EU agricultural products such as meat, Roquefort cheese, and chocolate through a WTO arbitration case. As a result, the European Parliament banned hormone-treated beef in the EU. The dispute was only partially settled in 2013, with a reduction on the retaliatory sanctions imposed by the US and a raise in the import of hormone-free American meat to the EU (European Parliament 2012). Even though an increase in the global trade of hormone-free meat can be considered a relatively positive development, there are signs that Americans will still try to push SPS measures into the trade talks to ensure that meat grown with hormones will also reach the European market.

In the 2013 Report on SPS Barriers to Trade by the Office of the United States Trade Representative (USTR), it reads that the "USTR is committed to identifying and combating unwarranted SPS barriers to U.S. food and agricultural exports. USTR's efforts to remove unwarranted foreign SPS barriers serve the President's goal of doubling US exports by the end of 2014 through the National Export Initiative" (Office of the United States Trade Representative 2013). What exactly does the US Trade Representative mean by "unwarranted" SPS barriers? The main philosophical point of contention in leveling regulatory standards between the two trading partners comes down to what is called the precautionary principle.

APPLYING THE PRECAUTIONARY PRINCIPLE

The precautionary principle applies when in a policy or action there is a suspected risk to consumers, animals, or the environment that lacks sufficient scientific evidence to prove its harm. Until scientific proof of the hazards of the product has been provided, the precautionary principle justifies the decision to stop the distribution or the withdrawal from the market of certain products. This principle has been ratified by the WTO and has been applied by the EU in the hormone-meat dispute (European Commission, 2000 and Official Journal of the European Union 2003). In contrast to that, the US prefers scientific risk assessment over the precautionary principle as Wiener and Rogers state, where a mere risk hazard is not enough to stop the production or distribution of beef treated with growth hormones (Wiener & Rogers 2002, 9-11). Some analysts attribute this way of thinking to a "risky, reckless" American attitude in doing business, where the precautionary principle is seen as "an antidote to industrialization, globalization, and Americanization" (ibid. 2002).

What is worrisome concerning the current TAFTA | TTIP negotiations is the American push toward eliminating the precautionary principle in the agreement. In a document leaked from the negotiations on regulatory cooperation,

Photo credit: Let Ideas Compete (Flickr)

the US Chamber of Commerce and BusinessEurope[1] call for the removal of statutory barriers to cooperation and state that decisions concerning regulation need to be "evidence based" (U.S. Chamber of Commerce and BusinessEurope 2012). Even though the language of this document is quite cryptic, calling for "evidence based" decisions in regulations can clearly be seen as a call for a rejection of the precautionary principle since some threats – as those posed by hormone-beef – lack sufficient evidence for the US.

In a letter to Michael Froman, formerly US Deputy National Security Advisor for International Economic Affairs, US agricultural companies and organizations expressed their concern about the precautionary principle and explicitly asked for an exclusion of it in the trade agreement, calling European precaution "a pretext for import protectionism under the pretense of consumer safety" (US Food and Agricultural Producers 2013). This also shows that US businesses are strongly pushing towards a lowering of European standards to enter their products in the EU market.

1 BusinessEurope is a lobbying group located in Brussels whose goal is to promote lasting development of companies in Europe and to strengthen Europe's competitiveness. In 2010 they were awarded the "Worst Climate Lobbying" Award by Corporate Europe Observatory and other organizations for effectively undermining the EU plans to cut CO^2 emissions (http://www.worstlobby.eu/2010).

HEALTH THREATS OF HORMONE-TREATED BEEF

So what are the harmful effects of hormone-treated beef that Europe fears and that the US casts aside as not scientific? During the meat production process, sex hormones are injected into the cattle while the animals grow up. These hormones, among them testosterone, progesterone and estrogen, which are approved by the US Food and Drug Administration, are used to promote faster growth (US Food and Drug Administration 2011). Since farmers are paid for the weight of the animal they sell for slaughter, having fast growing cattle is a means of increasing profit due to a shorter period of growth time and lesser feed costs. The issue regarded as most problematic with the hormone-treated cattle is that when the meat is consumed, the sex hormones can create an increase, and thus an imbalance, of human hormone levels. These hormones are believed to cause premature puberty in girls and also to be carcinogenic, with an especially high risk of causing breast cancer (Epstein 2008; Bueckert 1999).

In the legislation prohibiting the use of hormones in European cattle passed in 2003, the European Parliament states that oestradiol 17 used in American livestock "has to be considered as a complete carcinogen, as it exerts both tumour-initiating and tumour-promoting effects and that the data currently available do not make it possible to give a quantitative estimate of

the risk" and that "the avoidance of such intake is of absolute importance to safeguard human health" (European Parliament 2012). Even though there is still a lack of evidence for the harms of hormones from meat, the EU recognizes the risks and applies the precautionary principle here.

This means that there is an urgent need for further studies to prove the link between hormones in beef and cancer, so that the US cannot discard the concerns as non-scientific anymore.[2] Aside from the threat hormones could pose to humans, on a larger scale, one has to also keep in mind that an accelerated growth of cattle is always an indicator that animal welfare is compromised in favor of maximizing profits. In addition to that an increase in beef, or any kind of mass meat production, means an increase in CO^2 emissions and therefore a burden on the environment (The Guardian 2007). Discussing this issue further would be beyond the scope of this article; however, one has to bear in mind that the degradation of the environment that results from a free trade agreement might generate profits for the industry in the short run, but it will eventually backfire on and negatively impact consumers.

2 For an interesting case of the cozy relationship between industry and government on this issue, see how the Canadian public health department filed a gag order on three scientists who uncovered serious health risks related to hormones in beef. Health Canada pressed them not to reveal the information and, as a result, all three scientists were suspended. http://www.environmentalhealth.ca/summer01blow.html

CONCLUSIONS

Since the TAFTA | TTIP negotiations are nowhere near an actual trade deal yet and the newest revelations about US espionage might, hopefully, put another damper on things, there is still enough time to raise public awareness about what is at stake should TAFTA | TTIP become reality. It is crucial that there be a public dialogue about issues that concern consumers and not give business the power to make politics for them. A harmonization of agricultural standards should definitely not be included in the agreement since it is unlikely that the US will raise their standards and that would leave the EU to lower theirs. Furthermore, the import of hormone-treated beef should remain banned, not only because of the threats to consumers and to the environment that cannot yet be foreseen, but also because it will spur factory-farmed meat production on a larger scale and thus add to the degradation of animal welfare and the environment.

REFERENCES

Braun, I. (2013): *Glyn Moody on TTIP: A Concerted Attack. Available online: http://www.carta.info/65784/glyn-moody-das-ttip-freihandelsabkommen-ist-ein-angriff-auf-das-vorsorgeprinzip/#gmint*

Bueckert, D. (1999): *Beef Hormones Linked to Premature Onset of Puberty & Breast Cancer. Available online: http://www.organic-consumers.org/Toxic/hormoncancer.cfm*

Corporate Europe Observatory (2013): *European Commission preparing for EU-US trade talks: 119 meetings with industry lobbyists. Available online: http://corporateeurope.org/trade/2013/09/european-commission-preparing-eu-us-trade-talks-119-meetings-industry-lobbyists*

Epstein, S. S. (2008): *American Beef: Why is it Banned in Europe?. Available online: http://food.gather.com/viewArticle.action?articleId=281474977473748*

European Commission (2000): *Communication from the Commission on the Precautionary Principle. Available online: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0001:FIN:EN:PDF*

European Parliament (2012): *Win-win ending to the „hormone beef trade war". Available online: http://www.europarl.europa.eu/news/en/news-room/content/20120314IPR40752/html/Win-win-ending-to-the-hormone-beef-trade-war*

Felbermayr, G. / Heid, B. / Lehwald, S. (2013): *Transatlantic Trade and Investment Partnership (TTIP) - Who Benefits from a Free Trade Deal?, Gütersloh: Bertelsmann Stiftung.*

Johnson, R. / Hanrahan, C. E. (2010): *The U.S.-EU Beef Hormone Dispute, Washington: Congressional Research Service. Available online: http://www.fas.org/sgp/crs/row/R40449.pdf*

Lipton, E. / Hakim, D. (2013): *Lobbying Bonanza as Firms Try to Influence European Union, New York Times. Available online: http://mobile.nytimes.com/2013/10/19/world/europe/lobbying-bonanza-as-firms-try-to-influence-european-union.html?_r=0*

Office of the Unites States Trade Representative, 2013 (2013): *Report on Sanitary and Phytosanitary (SPS) Barriers to Trade. Available online: http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/SPS-report*

Official Journal of the European Union (2003): *Directive 2003/74/EC of the European Parliament. pp. I. 262/17-21. Available online: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:262:0017:0021:EN:PDF*

Schlosser, A. C. / Bull, R. T. (2013): *Regulatory Cooperation in the TTIP on RegBlog. Available online: https://http://www.law.upenn.edu/blogs/regblog/2013/08/27-schlosser-reeve-ttip.html*

The Guardian (2007): *Meat Production ‚beefs up emissions'. Available online: http://www.theguardian.com/environment/2007/jul/19/climatechange.climatechange*

U.S. Chamber of Commerce and BusinessEurope (2012): *Regulatory Cooperation in the EU-US Economic Agreement. Available online: http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/jobs-growth/files/consultation/regulation/9-business-europe-us-chamber_en.pdf*

U.S. Food and Agricultural Producers (2013): *Letter to Michael Froman, Deputy National Security Advisor for International Economic Affairs. Available online: http://www.arc2020.eu/front/wp-content/uploads/2013/07/Letter-of-US-farm-organisations-on-the-EU-US-FTA-2013-05-20-TTIP.pdf*

U.S. Food and Drug Administration (2011): *Steroid Hormone Implants Used for Growth in Food-Producing Animals. Available online: http://www.fda.gov/animalveterinary/safetyhealth/productsafetyinformation/ucm055436.htm*

USDA Foreign Agricultural Service (2013): *Agricultural Exports to the European Union: Opportunities and Challenges. Available online: http://www.fas.usda.gov/info/IATR/IATR_EU_Trade_Feb_2013.pdf*

Wiener, J. B. / Rogers, M. D. (2002): *Comparing Precaution in the United States and Europe. Available online: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1985&context=faculty_scholarship*

IMPRINT

Editors
Daniel Cardoso, Philani Mthembu, Marc Venhaus, Miguelángel Verde Garrido

Berlin Forum on Global Politics
Co-founders: Daniel Cardoso, Philani Mthembu, Marc Venhaus, Miguelángel Verde Garrido
contact@bfogp.org
More information at: http://www.bfogp.org

Internet & Society Collaboratory
Managing Director: Sebastian Haselbeck
kontakt@collaboratory.de
More information at: http://www.collaboratory.de

FutureChallenges.org
Project Supervisor: Ole Wintermann
ole.wintermann@bertelsmann-stiftung.de
More information at: http://www.futurechallenges.org

Design, layout, art direction
Jan Illmann
More information at: http://www.jan-illmann.de

Print
Oktoberdruck, Berlin in December 2013

Photo Credits
©iStock.com/ZU_09
©iStock.com/ THEPALMER

ISBN
978-3-00-044648-1

BERLIN FORUM
ON GLOBAL POLITICS

The Berlin Forum on Global Politics (BFoGP) is a non-profit organization dedicated to the promotion of academic, expert, and public understanding of global politics. The BFoGP addresses and contributes to the debate on subjects related to global politics in an innovative and critical manner. By engaging with organizations, groups, and individuals from different sectors of society, the economy, academia, and government, the BFoGP aims to establish fluid networking interfaces as well as create and share novel open knowledge through collaborative publications, public events and conferences, research initiatives, and workshops.

Internet & Society
Co:llaboratory

The Internet & Society Collaboratory is a policy venture platform, that seizes and analyses the developments and effects of the continual digitization on society from diverse angles with relevant stakeholders. This transdisciplinary expertise allows for the transformation processes to be comprehended in an all-encompassing scope for the first time, the possibilities and risks to be identified and their implementation to be discussed in direct dialogue with representatives from politics and administration. Its goal is to foster a multi-stakeholder dialogue and contribute constructively to the debate about societal changes in relation to the internet. It is a Berlin-based non-profit organization developed out of a project initiated in 2010 by Google Germany.

BertelsmannStiftung
FutureChallenges

FutureChallenges.org, an initiative of the Bertelsmann Stiftung, is a network of authors from around the world who share a common interest in exploring the personal and community-level impacts of economic globalization. We work to provide our readers both with stories of people who are affected by economic trends and policies, and thoughtful reflections on the local impact of global phenomena. This should broaden the field of vision for policy makers, communities and citizens.

ISBN 978-3-00-044648-1
9 783000 446481 >

More information at: www.bfogp.org