

Brexit, Elections and Discourse: The State of Play of the TTIP Negotiations in Europe¹

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Within 2016 and early 2017, both sides of the Atlantic went through a substantial turmoil. In Europe, the decision of the British voters to leave the European Union (EU) shook the entire continent to its core, while the rise of nationalist radical parties in elections from the Netherlands through France up to Germany has been threatening the basic European values and the very existence of the EU. Further to the East, in Central and Eastern Europe, democracy and rule of law has been under attack by governments in Hungary and Poland. In Britain, Prime Minister Theresa May and the Brexit supporters argue that after 'taking control back from Brussels', a 'Global Britain' would do just fine outside of the bloc thanks to a newly and quickly concluded series of free trade agreements with countries all over the world. On the continent, on the other hand, Front National's Marine Le Pen posits that France needs to repatriate its powers back from the EU so that a new French President can better protect the French farmers and craftsmen. Yet both of these ultra-liberal and ultra-conservative political approaches have two things in common: firstly, they use free trade as one of their key political arguments and, secondly, they blame the EU for all the ill-wills, including trade-related matters.

However, it has not just been Europe which is facing a challenging political environment that puts trade center-stage. Across the Atlantic, the election of Donald Trump as President of the United States (US) has caused similar upheavals as in Europe. Throughout his presidential campaign, the presidential candidate has been advocating strong protectionism and chose 'America First' as his main campaign slogan. Despite a lengthy political transition and several policy U-turns, including (so far) on withdrawing from NAFTA, it is clear that President Trump wants to deliver on some of his 'tweetorics': indeed, one of his first executive orders on (work) Day One ditched the Trans-Pacific Partnership (TPP), one of the two mega-deals that the US has been negotiating under the Obama administration. After 100 days in the office of the US President, it is far from certain where Trump stands on the Transatlantic Trade and

¹ The paper is a revised, updated and expanded version of Tereza Novotná, "Four Reasons Why TTIP May Fail and Why It Will be Europe's Fault," in *New Challenges, New Voices: Next Generation Viewpoints on Transatlantic Relations*, ed. Tim Oliver (London: LSE IDEAS).

Investment Partnership (TTIP), the other mega-free trade deal which was supposed to allow the US and EU to set global trade standards¹ and extend their mutually agreed rules across borders.²

Although Donald Trump has not mentioned TTIP once during his election campaign, and Cecilia Malmström, European Commissioner for trade and the EU's chief trade negotiator, declared that TTIP has effectively been 'put in a freezer'², as with a number of other US policies, there have been mixed messages coming out of Washington. On the one hand, President Trump has been questioning the merits of the EU, such as by calling Brexit a 'great thing'³ together with announcements of speedy bilateral trade talks with the UK while Britain remains an EU Member and by floating around names of potential candidates for a US ambassador to the EU who claimed that given Trump's preference for bilateral agreements, TTIP is out of the picture (and who publicly advocated the EU's collapse).⁴ Similarly, early on in the administration's term, Peter Navarro, Trump's economic advisor, blamed Germany for trade imbalances within the EU through manipulating euro to make its exports cheaper and hence rejecting TTIP as a 'a multilateral deal in bilateral dress'.⁵

On the other hand, more recently, in addition to Trump's flip flops on NATO and defense and as a follow up to personal meetings between President Trump and Chancellor Merkel, the US President allegedly agreed to a deal with the EU after Merkel several times explained that, as an EU Member, Germany was not allowed to negotiate separately with the US, putting the EU back 'ahead of the queue', including Britain.⁶ In a similar vein, Wilbur Ross, US Commerce Secretary, talked about negotiations with the EU to 'address trade deficit' where Europe would be in competition with other global players such as Japan and China on who might be most likely (and willing) to do a 'sensible deal'.⁷

To restart the TTIP talks, both sides would need to go back and begin where the previous administration left it off. Despite the heavy four rounds of negotiations in 2016 and efforts to close the deal under Barack Obama,⁸ as it is obvious from the US and EU joint state of play report,⁹ the two sides made progress on less controversial areas, such as removing tariff barriers. But on the most sensitive issues such as geographical indications and public procurement, little or no progress was made. Moreover, as Robert Lighthizer, a nominee for US Trade Representative (USTR) rightly pointed out in his Senate confirmation hearing, due to the elections in France (April/May 2017) and Germany (September 2017), it will be difficult for the EU to resume comprehensive trade negotiations until the end of this year.¹⁰

² *EurActiv*, 11 November 2016.

³ *The Guardian*, 16 January 2017.

⁴ *POLITICO*, 2 February 2017.

⁵ *Financial Times*, 31 January 2017.

⁶ *The Times*, 22 April 2017.

⁷ *Financial Times*, 23 April 2017.

⁸ Jean-Frédéric Morin et al., eds., *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Farnham: Ashgate, 2015).

⁹ European Commission and US Trade Representative, "U.S.-EU Joint Report on TTIP Progress to Date," (2017), http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155242.pdf.

¹⁰ Interestingly, this was the only mention of TTIP in the hearing's responses. Robert Lighthizer, "Responses to Questions for the Record at the Committee on Finance, United States Senate Confirmation Hearing," (2017),

Nevertheless, even if outside-of-the-box solutions are in the end found, such as rebranding TTIP to, perhaps, *Trump-TIP*¹¹ and the US President realizes that TTIP is indeed negotiated between two (rather than twelve as in TPP) sides where the EU is represented by a single entity (the European Commission) and allows for access to a single (rather than EU-28/EU-27 markets), relaunching TTIP negotiations might prove to be a 'poisoned chalice'¹², particularly for the EU. Even under Barack Obama, who enjoyed much higher popularity across Europe than Donald Trump does, TTIP has become one of the most controversial agreements. From anti-TTIP public demonstrations in various European capitals to online and social media campaigns, opponents of TTIP portrayed the agreement as a catastrophic scenario which would dismantle the European social model, lower environmental, health and food standards and sell off the European regulatory systems to the hands of multinationals. Even under newly launched negotiations, it might in the end be the ratification process within the EU that may lead to TTIP's rejection.

This paper therefore focuses on how we got to where we are now in the public debate on TTIP from a European perspective. It explains why a TTIP deal may fail in Europe as a result of weaknesses in the EU's system of governance. Although the Lisbon Treaty was supposed to solve such problems, TTIP (as much as other critical EU trade deals) exposes Lisbon's deficiencies and, in fact, intensifies them. The paper assesses the role of EU leaders, their public discourse on TTIP and how a lack in sense of national ownership may eventually block the agreement. The paper then looks at the institutional turf battles between various EU institutions and actors who are using TTIP to their advantage rather than as a matter of common good. Throughout, the paper will examine several aspects of TTIP, such as questions of transparency and the investor-state-dispute-settlement (ISDS) mechanism; issues that have been taken hostage by various groups in order to press for their own interests.

Moreover, where appropriate, the paper compares and contrasts TTIP's similarities and differences with the Canada-EU Trade Agreement (CETA), particularly those related to the issue of political ownership by national and regional leaders. Finally, the paper points to a lack of 'throughput legitimacy' of TTIP being the cause for why public opinion has shifted from 'permissive' to 'constraining'. Similarly to other political events across Europe and the Atlantic, the paper takes Vivien Schmidt's discursive institutionalism and argues that, as with 'Britain-out and Trump-in',¹³ it is political discourse among European elites and between elites and the publics that is likely to shape TTIP's destiny.

<http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/Lighthizer-QFR-FINAL.pdf>.

¹¹ Tereza Novotná, "Will Donald Trump shoot down TTIP or rebrand it as the 'Trump Trade and Investment Partnership'?", (2016), <http://blogs.lse.ac.uk/usappblog/2017/01/19/will-donald-trump-shoot-down-ttip-or-rebrand-it-as-the-trump-trade-and-investment-partnership/#Author>.

¹² Sebastien Dullien, "Trump's poisoned TTIP chalice," *ECFR Commentary* (2017), http://www.ecfr.eu/article/commentary_trumps_poisoned_ttip_chalice.

¹³ Vivien A. Schmidt, "Britain-out and Trump-in: a discursive institutionalist analysis of the British referendum on the EU and the US presidential election," *Review of International Political Economy* 24, no. 2 (2017).

National Leaders, Public Discourses and Ownership of TTIP

For direct observers, TTIP “has been from the outset, is at present and will have to continue to be a *Chefsache*”³ (a 'matter for the boss'). This has been on display in the TTIP negotiations where the high level of engagement by European national leaders has distinguished TTIP from previous trade negotiations that were conducted by the EU.⁴ However, because of the post-Lisbon Treaty institutional arrangements of the EU, Member States have no direct control over the TTIP negotiation process and, therefore, have less desire and fewer means available to them by which they can ensure the negotiations are a success. Indeed, if TTIP negotiations fail, national leaders can then blame the ‘faceless’ European Commission bureaucrats.

From the EU-US summit establishing a High-Level Working Group on Jobs and Growth (HLWG) in November 2011, TTIP-related meetings at the margins of G7/G8 summits and through to several successive European Council Conclusions,⁵ the attention of EU Member States and their leaders paid to TTIP, particularly in contrast to other trade negotiations, has indeed been extraordinary. It is also true that the impetus to initiate TTIP negotiations with the US came from EU Member States, in particular because European leaders were keen on using a free trade deal with the USA to boost jobs and growth after a protracted financial downturn. The influence of EU Member States was therefore very high, easily overriding the concerns of trade experts on both sides of the Atlantic.⁶

Yet TTIP has run into problems because of the peculiar system of power and competence-sharing within the EU. Because the EU’s ‘common commercial policy’ is an exclusive power of the EU,⁷ once the process of negotiations is set off it is the European Commission, and DG Trade in particular, which sits at the negotiating table with the American counterparts on behalf of all EU-28 Member States. In practical terms, EU Member States can voice their views and concerns as well as obtain regular detailed debriefs by Commission officials on the outcomes of the TTIP negotiating rounds through the Council of the EU’s weekly Trade Policy Committee (TPC) and bi-weekly Working Group on Transatlantic Relations (COTRA) meetings. Despite this, throughout the negotiation process, EU Member States have been more or less passive receivers of information rather than active agents. Given the massive impact of a transatlantic deal, TTIP could increase the clout of the EU’s supranational institutions, and the Commission in particular, vis-à-vis EU Member States more than any other trade agreement.⁸

Although the Lisbon Treaty clarified the EU’s powers and strengthened the influence of the Commission (as well as the European Parliament, see below) in the trade and investment areas, in effect, due to lower input by EU Member States, it decreased national leaders’ sense of ownership of the trade negotiation process and their willingness to risk their political capital on its outcome. This was particularly so since other big issues and crises often loom large at the same time. This would be much less of a problem in other FTA negotiations that create nearly no public reaction, such as that currently ongoing with Japan or the 2011 FTA agreed with the Republic of Korea. However, due to the heated debate surrounding TTIP, and the Commission’s limited ability to conduct its own public diplomacy, the Lisbon set-up has dis-incentivised European leaders to get engaged, explain, and publicly support TTIP while making them more prone to disown what they have themselves previously agreed ‘in Brussels’.

The Commission itself pointed this out in 2013, saying that it would need to work closely together with EU Member States to "collectively manage and coordinate our communication and outreach strategies."⁹ In 2015 Commission President Juncker complained that EU Member States should "stop the 'double-speak' between what is said during meetings in Brussels and what is said in public, and make sure they commit and stick together in the process...talking about the benefits, listening to people's concerns, responding to them."¹⁰ This complaint has been supported by others around the EU, most notably by the House of Lords. The European Union Committee of the British upper house concluded in a report on TTIP that the Commission "cannot be expected to make the case for the TTIP... EU Member States are not bearing their fair share of responsibility for transparency and communication around the project."¹¹

In a sense, the EU faces an 'enlargement paradox': during an EU enlargement it is the EU Member States that lead the accession negotiations while the Commission stands in the background providing wider objectivity to the process through its technical expertise.¹² In TTIP, as with any other trade negotiation, the situation is the reverse: the Commission conducts negotiations but legitimacy of the process is provided by EU Member States and it is their politicians who are now reluctant to do so over TTIP.

From an academic perspective, the TTIP negotiations and debate are good examples of 'discursive institutionalism' and the difference between two types of public discourse: a coordinative discourse among the elites and a communicative discourse between the elites and masses.¹³ In the EU, it is often the case that national leaders agree amongst themselves on an issue at an EU summit only to then condemn the same decision when back home and so shift the blame by saying 'Brussels made me do it.' As a result, the gap between the coordinative and communicative discourse leads to low legitimacy for the decisions taken jointly with other Member States and within a context of ever more critical domestic publics.

The question of transparency and, in particular, the agreement on and publication of the TTIP negotiation mandate provides an illustration. Between March and June 2013, the Commission launched procedures to obtain a negotiating mandate. The Commission's draft was approved unanimously by the Council (and received an input by the European Parliament) within just four months, a record time by EU standards.¹⁴ Despite this short stretch of time, those EU Member States who were keen on certain issues were able to exert pressure on their colleagues to achieve changes to the draft. For example, at France's insistence audiovisual services were removed from the mandate and have thus been considered 'non-negotiable.' The Council's unanimous vote on the mandate allowed TTIP negotiations to begin on 14 June 2013.¹⁵

At the time of the mandate's approval by the Council, no national leader protested against inclusion of ISDS.¹⁶ Yet public opinion on ISDS (if not TTIP as such) has become increasingly contested, in no small part thanks to civil society activists particularly in Austria and Germany.¹⁷ Austrian Chancellor Faymann, who has been in the office between December 2008 and May 2016 and, therefore, during the period leading up to the launch of TTIP negotiations, experienced a change of his heart and became one of the fiercest opponents of ISDS, condemning it as an outdated institution which benefits corporations.¹⁸ Despite agreeing to the mandate, Faymann threatened to file a lawsuit with the European Court of Justice should ISDS become a part of TTIP and made the unusual move of making a unilateral declaration

to this effect during the March 2015 Council meeting.¹⁹ In late 2015, Faymann declared himself to be opposed to the Investment Court System (ICS), the reformed ISDS tribunal proposed by the Commission.²⁰

In a similar vein, growing dissatisfaction with ISDS and TTIP in Germany saw at that time SPD Vice-Chancellor Sigmar Gabriel prevaricate over the old ISDS system.²¹ While he seemed content with its revised version, this may be because TTIP is a part of the coalition treaty with Angela Merkel's CDU²² and thus torpedoing TTIP would have consequences for the unity of the German grand coalition. With Martin Schulz, a former EP President and quiet supporter of both TTIP and CETA, SPD's criticism of trade deals receded and shifted towards protection of losers of globalization. The rhetoric may nevertheless heat up again once the September 2017 elections approach, especially if any talks with the US are back on the agenda. A legitimate debate on the possible reforms of the arbitration system which, in contrast to the proposed scale of EU-US regulatory cooperation, is not the most important aspect of TTIP has therefore become a magnet for other political interests, such as the quest for popularity within the political elite and anti-globalisation sentiments among the activist public (see below).

In fact, the CETA drama from October 2016 paints a very similar picture. Perhaps as a 'trial case' for TTIP, President Juncker declared CETA a 'mixed agreement', where most of the parts can be provisionally applied after its approval by the Council and the EP, while its full application, including ISDS, will be subject to ratification by 38 national and regional parliaments. However, the envisaged smooth path stumbled on a veto by Wallonia's Prime Minister Paul Magnette whose region refused to give consent to the Belgian federal government to approve CETA in the Council. For several days, the remainder of EU Member States (and Canada) held their breaths whether the Walloon region of about 3.5 million, and run by a socialist party which represents about 0.24 per cent of EU voters, will scupper a deal that had been under negotiations for the past eight years.

Yet as with TTIP, Wallonia's veto is as much about CETA's substance as about the Belgian internal political rivalries and a lacking political ownership by its leaders. When the Council approved a revised CETA mandate that included ISDS,¹⁴ it was a Belgian federal government led by the Walloon socialists where Paul Magnette held the post of minister for climate and energy. If Magnette had been as opposed to CETA as his veto seemed to suggest, he had the best change to protest while he was a member of the government approving the CETA mandate. Moreover, although at that time out of the federal government in the post of a mayor of Charleroi, a Walloon city, Magnette's socialist party was still in charge of the Belgian federal government when TTIP's mandate has unanimously gone through the Council vote. Hence it is clear that it is not only TTIP that creates the same tensions between those who run the business in the capitals and Brussels and how they communicate their actions back home.

¹⁴ Council of the European Union, "Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada in order to authorise the Commission to negotiate, on behalf of the Union, on investment," (2011), <http://data.consilium.europa.eu/doc/document/ST-12838-2011-EXT-2/en/pdf>.

However, it has not only been ISDS but also a lack of transparency that have been one of the key criticisms levied by various civil society organizations against TTIP. The demand to publish the negotiating mandate became the first target of public pressure. Aware of the increasing public backlash against TTIP, it was Commissioner De Gucht and DG Trade who early on advocated publishing the mandate.²³ Yet the Commission received most blame for keeping the talks out of public scrutiny despite the fact that this was due to a blocking minority of 11 Member States²⁴ who at a Council meeting in May 2014 prevented the mandate from being published, a particularly ludicrous decision given the fact that the mandate had been leaked and had been available online for several months.²⁵ It took several more months and growing public pressure to reach a unanimous Council decision to publish the mandate in October 2014.²⁶

With the Juncker Commission which has been in power since November 2014, Trade Commissioner Cecilia Malmström made transparency of TTIP negotiations one of her flagship initiatives. This included publishing all the EU's textual proposals, i.e. specific proposals for legal texts for individual TTIP negotiation chapters that set out the EU's negotiating positions, with the first batch made public on 7 January 2015 and the latest set of documents published on 14 July 2016. However, the damage over an alleged lack of transparency had already been done, even if the negotiations were now rightly described, including by some of those who are unhappy with certain aspects of it, as a trade negotiation with an unprecedented degree of transparency.²⁷

The impression of a lack of transparency, of TTIP as a 'behind the closed door' deal and hence a lack of legitimacy, has continued to stick since it is not possible to make the consolidated texts (i.e. legal textual proposals that include concessions and compromises of both sides) public before all the chapters are agreed upon in the expectation that 'nothing is agreed until all is agreed'. As evidenced above, this is exacerbated by two facts: firstly, in line with the contradiction between coordinative and communicative discourses, national leaders are not willing to invest much of their political capital into defending what has been negotiated within TTIP at home, but are happy to absolve themselves from any accountability while shifting responsibility to the Commission. Secondly, the topic of transparency has been taken up by other actors, such as the European Parliament, as a means of establishing itself as an equal partner to the Council within the interinstitutional 'several level game'.

The European Parliament: the New Actor on the Scene and the Battle of TTIP

Following the Lisbon Treaty, where the European Parliament received more or less an equal standing with the Council as a co-legislative body through the ordinary legislative procedure within the EU, any EU FTA must be ratified by the Parliament.²⁸ As with CETA, no matter whether the Commission eventually judges that TTIP falls under the exclusive Common Commercial Policy (CCP), (and thus will be voted at the EU level only) or that TTIP represents a 'mixed agreement' interfering with Member State competences (in which case the national ratification processes will take place as well mostly through national parliaments), the European Parliament will approve or reject it on a simple majority vote.²⁹

In fact, TTIP will be the first EU-US agreement that might be ratified by both the European Parliament and the US Congress.³⁰ Because the Obama Administration managed to secure a fast-track Trade-Promotion Authority (TPA) from Congress in 2015, Congress has in effect moved from a body that was allowed to add amendments both to TPP and TTIP agreements to the same position as the European Parliament: they can both either say yay or nay to the final deal.³¹ The European Parliament's role has therefore been likened to a 'permanent TPA'³² due to the caveat that either the US House of Representatives or the Senate may under certain conditions withdraw their consents to the TPA, while the European Parliament does not have such a power.³³ It remains to be seen whether the Congress with the Republican majorities in both houses may use this nuclear option, particularly if the Congress Republicans are unhappy about any final deal that the Trump administration puts together.

Nevertheless, the fact that the European Parliament enjoys the 'hard power' of thwarting any final arrangement has been portrayed as the basis of its political clout,³⁴ its 'ex-ante power'³⁵ or even its 'trump card'.³⁶ The European Parliament has shown that it can exploit its newly accorded competence by voting down the SWIFT (Society for Worldwide Interbank Financial Telecommunication) and ACTA (Anti-Counterfeiting Trade Agreement) agreements.³⁷ What is perhaps new with TTIP (but not with CETA) is that the European Parliament have tried to exert influence over TTIP from a much earlier stage than during the ratification period, as was the case with SWIFT and ACTA.

During the period of obtaining the TTIP negotiation mandate, MEPs more or less copied the approach of national leaders. In May 2013, a month before launching the negotiations, the European Parliament voted on a resolution that emphasised two main points: exclusion of audiovisual and the Parliament's insistence on being 'immediately and fully informed at all stages' of the TTIP negotiations.³⁸ As with national leaders, the European Parliament did not express any objections to ISDS being included. Yet once ISDS turned into one of the most controversial issues of the negotiations, the newly elected MEPs from both the Left and Right seized on it as the opportunity to show that they were the main guardians of the public's interests. It took them two years to realise this, but they did so with all the more force.

Before voting on a second resolution on TTIP in July 2015,³⁹ MEPs submitted nearly 900 amendments through 14 European Parliament committees, making it the most contested European Parliament resolution of all time.⁴⁰ In an unprecedented move, the initial vote was postponed and amendments that were largely related to ISDS were sent back to the International Trade (INTA) committee. In the end, a compromise was produced in order to satisfy primarily the Socialists and Democrats (S&D) groups. This agreed that the Parliament would approve TTIP only in the case of a revised version of ISDS as a part of the deal. Even so, about a third of the Socialists voted against the resolution⁴¹ which, in a way, parallels the divide within the US Congress that is split on TTIP (and even more so on TPP) not along party lines but across the aisle with mainly Democrats being against it.⁴² This also copies the EP's vote on the CETA's provisional implementation (without ISDS) that was backed by a clear majority of 408 votes to 254 but with the S&D group split and, in some cases, with various S&D MEPs voting against even in traditionally pro-trade countries, such as Poland and the Czech Republic. In any case, TTIP may eventually lose a majority vote in the European Parliament if the Commission's revised ISDS (or ICS) proposal is rejected or watered down due to the objections by the USA.

Even though the Lisbon Treaty strengthened the role of the European Parliament as the only directly elected body in the EU's decision making-processes, MEPs have to some extent started behaving similarly to their national counterparts. They have been quick to drop previously held views once they see they no longer correspond with popular demand back home, as opposed to trying to explain and defend their original positions. The contradiction between the coordinative and communicative discourse is thus being replicated in the European Parliament as well. Moreover, even if pressure by the Parliament to change ISDS might be considered a victory by the Parliament over the Council (and the Commission), paradoxically, it was achieved by using the same 'double speak' method that national leaders practice. As such they have done so through the means that the Lisbon Treaty should have reduced. For the future of the EU-North America relations it is a shame that the ISDS, and TTIP in general, might be the first victim of these post-Lisbon developments and with CETA just about surviving the tipping point.

The European Parliament's tendency to use contentious subjects for its own institutional gain is well illustrated on another issue: transparency and the so-called 'reading rooms'. In contrast to the US Congress where, even under the TPA, the USTR must consult the individual members of Congress at any time they wish and provide them with all classified documents, the European Parliament is in a more passive position in which it is to be 'informed' rather than consulted. Although the Commission has been willing to provide more information than previously,⁴³ by using public pleas for more transparency the European Parliament has pushed for increased access to the consolidated texts through the opening of specially secured 'reading rooms' in the Commission and Parliament buildings.

Since spring 2014, select MEPs (for example, the Parliament's leadership, chairs of key committees and rapporteurs) have been able to access the consolidated texts of TTIP. After several more months of pressing both the Commission and the USA, all MEPs were granted access in December 2015.⁴⁴ As a result, the European Parliament successfully changed the 'institutional asymmetry' that favored the EU Member States who had more access than MEPs. Nonetheless, public criticism directed at the reading rooms as a 'sham transparency' persists, particularly because of complex security rules allowing for handwritten notes but no photocopies that could be taken away.⁴⁵

National parliaments joined the European Parliament's demands for better access to the consolidated texts. That was initially allowed to a small group of MPs in each Member State at special premises in the US embassies in each capital. However, together with the European Parliament, national parliamentarians eventually received the same level of access as MEPs and, for instance, the German Members of the Bundestag may view the documents in a secured room at the German Economics Ministry.⁴⁶ It is one of the few instances where national parliaments have teamed up with the European Parliament in opposition to their own governments in EU member states. Given the high number of actors involved, it was only a matter of time before one of the classified documents is leaked. Despite tight security measures, the Greenpeace published a large bundle of about 248 pages of leaks in May 2016, only about five months after providing an enhanced access to MEPs and MPs.¹⁵

¹⁵ Available at <https://ttip-leaks.org/> (last accessed on 2 May 2017).

It is unclear whether this level of access had led MEPs or MPs to better communicate TTIP to the general public. As the Committee of Regions (whose key members may also access the classified documents in the Commission's reading room) pointed out, it is not clear how this information can be used to improve communication on the ground.⁴⁷ Moreover, some MEPs such as a Swedish Green MEP have been calling for opening up the consolidated texts to all citizens, which is impossible to permit if there is to be anything left for the US and EU to negotiate over.

All in all, there are two lessons that TTIP can teach us about the role of the European Parliament. First, in contrast to the US Congress that voluntarily limited its control through agreeing to the TPA, the European Parliament has used TTIP as a way to increase its powers. In a way, we are witnessing two opposite processes across the Atlantic: in the US TPA contributed to a shift from the congressional to executive actors in handling TTIP, in the EU we have seen a shift from the executives towards the European Parliament. Second, actors who are not formally involved in the negotiations are those who can eventually ditch the deal, particularly if they have the public on their side.

TTIP, Throughput Legitimacy and a Constraining Public Dissensus

TTIP negotiations demonstrate how public opinion can matter in areas of European integration where previously public views were either ignorant or were ignored by elites. Although from the American perspective we can say that TTIP shows nothing much new and Europe is simply experiencing its 'NAFTA moment',⁴⁸ from a European perspective however there has been a significant change. TTIP represents a clear example of Hooghe's and Mark's⁴⁹ post-functionalist argument of the EU and EU policy making moving from a 'permissive consensus' to 'constraining dissensus' among European publics.

Moreover, these developments differ across EU Member States. In the Czech Republic, for instance, where general support for TTIP is relatively high at around 62%,⁵⁰ the 'permissive consensus' still prevails: around 78% of the Czechs have never heard of TTIP or do not know what TTIP is about and, equally, 76% of the Czech citizens are not interested in knowing more.⁵¹ On the other hand, in EU Member States where anti-TTIP campaigners are particularly active through social media,⁵² such as Twitter,⁵³ and which do not experience the same level of online engagement from TTIP advocates, the public 'dissensus' becomes constraining and is translated into the lowest levels of support for TTIP: Austria with 39%, Germany with 39%, and Belgium with 40%.⁵⁴

This goes in line with wider frustrations and feelings of disconnect between ordinary voters and politicians which led to 'Britain-out and Trump-in'.¹⁶ TTIP's weak support is therefore in part the result of the so-called '80:20 society'⁵⁵ where 80% of the population do not see any direct benefits of a trade deal like TTIP, as much as they do not see any benefits that the European integration brings them in general. We can also look at it from a positive angle and see in the anti-TTIP civic activism the creation of a true Europe-wide public sphere and civil society. Or, it can be dismissed as a 'proxy war' by those who fight against globalisation corporate influence, and are anti-American.⁵⁶

¹⁶ Schmidt, "Britain-out and Trump-in: a discursive institutionalist analysis of the British referendum on the EU and the US presidential election."

Nevertheless, there is a silver lining to the problems TTIP faces. Paradoxically, some of those who protest against TTIP do so to defend the rules and regulations that have been achieved throughout the last seventy years of European integration: it is the EU's environmental, health and safety standards that they want to uphold rather than dismantle. In the post-truth world and the 'fake news' era, there is also another commonality between the Brexiteers claiming that the UK could spend much more money on the national health services (NHS) after the Brexit and Donald Trump's unique relationship to facts and 'alternative facts'. In TTIP, the VW scandal points to a paradox between reality and faith in EU standards. In 2014, 91% of Germans trusted EU standards for car safety more than American standards.⁵⁷ But it was the US environmental agency that detected a European (German) car manufacturer's cheating of US emission rules.⁵⁸

Therefore it is 'throughput legitimacy' which is needed to make sure TTIP is agreed in Europe. In other words, it is not enough to focus either on the output legitimacy from delivering the goods (such as 'TTIP will bring jobs and growth', a position advocated by Commissioner De Gucht), or input legitimacy (whereby 'all stakeholders are consulted' in the decision-making process, as often emphasized by Commissioner Malmström). We also need 'Throughput' legitimacy⁵⁹ of the negotiation process as such, i.e. that both national leaders and politicians at the EU level make clear that they take part, trust in and support what goes on in the 'black box' of EU governance. This throughput legitimacy depends however on them resisting the temptation of caving in to public pressure at home by blaming 'the EU' for a bad TTIP deal.

On the other hand, the EU's institutions, especially the European Parliament, should avoid using TTIP and its various aspects, such as transparency and ISDS, as part of the power struggles between themselves. Should TTIP negotiations get underway again but ratification fails in Europe, the EU will be blamed but, in fact, national politicians (and MEPs) might be responsible. Even though there are currently various other free trade deals 'in the oven'¹⁷ and the EU's single market remains an attractive destination for countries from Japan through Philippines to Mexico, if no third party can be sure of the EU's ability to conclude and ratify any agreement, it will be not only the longest standing EU common commercial policy but primarily credibility of the EU as a reliable trading partner which might be at stake.

¹⁷ Cecilia Malmström, "Handle with care: Safeguarding trade in the age of protectionism," (2017), http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155448.pdf.

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⁴ Ibid.

⁵ Ibid.

⁶ Some EU Member States pushed the Commission into the launch of the talks despite the fact that there was no clear consensus within the Commission that the negotiations should commence as quickly as they did. Similarly, Mike Froman, the current US chief trade negotiator, was initially skeptical about launching the negotiations. See Tereza Novotná, "EU Institutions, Member States and TTIP Negotiations: The Balance of Power and EU Foreign Policy," in *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World*, ed. Jean-Frédéric Morin, et al., GEM Series (Farnham: Ashgate, 2015). Claude Barfield, "The Political Economy of TTIP: The View from the United States" (paper presented at the Unpacking TTIP Negotiations ULB-Berkeley Conference, Brussels, 17 October 2015 2015), 3.

⁷ Article 207 of the Treaty on the Functioning of the European Union (TFEU): 'only the EU, and not individual member states, can legislate on trade matters and conclude international trade agreements.' See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E207:en:HTML>

⁸ Novotná, "EU Institutions, Member States and TTIP Negotiations: The Balance of Power and EU Foreign Policy."

⁹ This point of view was actually criticized by the civil society activists and leaked by one of the anti-TTIP groups. See <http://corporateeurope.org/trade/2013/11/leaked-european-commission-pr-strategy-communicating-ttip>

¹⁰ Speech by President Juncker at the BusinessEurope Day event, 26 March 2015, http://europa.eu/rapid/press-release_SPEECH-15-4708_en.htm

¹¹ House of Lords European Union Committee, "Fourteenth Report - The Transatlantic Trade and Investment Partnership," (London: House of Lords, 2014), Point 258.

¹² Tereza Novotná, *Negotiating the Accession: How Germany Unified and the EU Enlarged*, New Perspectives in German Political Studies (Basingstoke: Palgrave Macmillan, 2015).

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¹⁴ Ahnlid, "EU in the TTIP negotiations - some observations on the role of leaders, stake-holder dialogue and transparency," 5.

¹⁵ Council of the European Union, "Council approves launch of trade and investment negotiations with the United States," (2013), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137485.pdf.

¹⁶ ISDS is an arbitration mechanism that was initially devised to protect private investors from abuse and discrimination by interfering governments but is nowadays considered by its critics a tool prioritizing the private interests at the detriment of public regulatory powers. See, for instance, Miriam Sapiro, "Transatlantic trade and investment negotiations: Reaching a consensus on investor-state dispute settlement," (Washington: Brookings Institution, 2015); Romain Pardo, "ISDS and TTIP - A miracle cure for a systemic challenge?," (Brussels: European Policy Centre, 2014); Reinhard Quick, "Why TTIP Should Have an Investment Chapter Including ISDS," *Journal of World Trade* 49, no. 2 (2015).

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¹⁸ Michael Volker, "TTIP: Faymann gegen Schiedsgerichte," *der Standard*, 9 April 2015.

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- ²³ "TTIP : I'm delighted EU governments decided to make the TTIP negotiating mandate public – says De Gucht" European Commission press release, 9 October 2014. http://europa.eu/rapid/press-release_STATEMENT-14-306_en.htm
- ²⁴ The blocking minority included most of the 'new' EU Member States but also states like Denmark which argued that publishing the mandate will set a wrong precedent and weaken the hand of the EU's negotiators. An informal discussion with an EU Member State diplomat, Brussels.
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- ²⁶ See 'Declassification: Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America', European Commission, 9 October 2014. <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>. Nonetheless, even the published mandate does not show any positions of individual EU Member States and thus we can still only speculate which countries pushed for what amendments. In the audiovisual example above, it seems however clear that it was not just France that took a critical stance, but a number of other states were happily hiding behind it.
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- ²⁸ See the Article 218 (TFEU), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E218>
- ²⁹ Magdalena Frennhoff Larsén, "The Increasing Role of the European Parliament in EU FTA Negotiations," (2015).; Directorate General for External Policies European Parliament, "Comparative study on access to documents (and confidentiality rules) in international trade negotiations," (Brussels: European Parliament, 2015).
- ³⁰ Maja Ifland, "Getting Legislatures on Both Sides of the Atlantic Engaged in TTIP," (Washington, DC: The German Marshall Fund of the United States, 2015), 1.
- ³¹ Cf. Ibid.
- ³² David W.F. Huang, "The European Parliament's Role in Trade Agreements and TTIP," *Journal of Business and Politics* (2016).
- ³³ TPA is also time-limited, i.e. valid until 1 July 2018 with a possible extension for another three years. For further details, see Davor Jančić, "The Role of the European Parliament and the US Congress in Shaping Transatlantic Relations: TTIP, NSA Surveillance, and CIA Renditions," *JCMS: Journal of Common Market Studies* (2016).
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- ³⁷ See e.g. European Parliament, "Comparative study on access to documents (and confidentiality rules) in international trade negotiations."
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- ⁴³ Larsén, "The Increasing Role of the European Parliament in EU FTA Negotiations."; Ahnliid, "EU in the TTIP negotiations - some observations on the role of leaders, stake-holder dialogue and transparency."
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