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Symposium: The Transatlantic Trade and Investment Partnership (TTIP)

TTIP and Beyond: The New Political Economy of Transatlantic Economic Cooperation¹

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The Transatlantic Trade and Investment Partnership (TTIP) initiative has been presented by both US and EU policy actors as a specific and coordinated effort to boost the economic recovery after the global financial crisis - providing what EU Trade Commissioner Karel de Gucht described as the 'cheapest stimulus package you can imagine'. TTIP can also be interpreted as part of a political strategy to use transatlantic cooperation to lay claim to a broader leadership role for the EU and US in a global system, which is increasingly defined by shifting power configurations and corresponding levels of conflict regarding trade, development, finance and global economic governance itself. In this contribution, we eschew consideration of technical and economic elements of TTIP in favour of its wider political and strategic aims.

Perhaps the most obvious referent point for TTIP - that is, from the perspective of its wider political and strategic aims - is the current multilateral trade round, otherwise known as the Doha Development Agenda (DDA). The DDA was launched with great enthusiasm in December 2001, shortly after the terrorist attacks of 11th September, but has since failed to achieve meaningful progress in any of the key negotiating areas in spite of the increasingly diminished expectations of what can be salvaged from the round. In this setting, it is tempting to read TTIP as a 'second best' option for promoting free trade; indeed, supporters of the agreement see it as a means of kick-starting global trade talks and reenergising the DDA. But such arguments tend to underestimate the extent to which the drivers of regional and bilateral free trade - of which TTIP is both a symptom of and response to - are now more or less independent of the negotiating impasse that has marked WTO ever since the collapse of Cancun Ministerial in December 2003. Policy-makers on both sides of the Atlantic claim that, once concluded, TTIP will set the parameters and scope of future multilateral negotiations. From this perspective, the strategic purpose of TTIP is to 'multilateralize' its negotiating precedents through the WTO, possibly via a (another) re-launch of Doha, or subsequent trade round. To achieve this,

¹ This is a shorter and revised version of the paper presented at the EUSA Fourteenth Biennial Conference, Boston, USA, 5-7 March 2015. We wish to thank the department of Politics, University of York for providing priming funding for this research.

however, the EU and US must first confront a number of emergent realities that now define the global politics of trade and development.

First, and most obvious, the launching of TTIP has coincided with, and in large measure can be interpreted as a response to, the rise of the BRICs economies - China especially - that is said to threaten the centrality of the transatlantic power axis in the governance of the global economy. Here scholars have presented the BRICs as a challenge, both individually and collectively, to the Washington Consensus and Bretton Woods institutional order. More tangibly, and specifically related to the global trading system, the rise of the BRICs - as a synonym for the changing distribution of global economic power - has manifested itself in the growing systemic importance, or veto power, of key developing countries, perhaps illustrated most clearly in their rejection of the so-called 'Singapore Issues' (investment, competition policy and government procurement) that precipitated the collapse of the Cancun ministerial in 2003.

The second emergent reality confronting possible EU and US attempts to use TTIP as a means of re-energizing, or even re-imagining, the multilateral trading system is that the long-running stalemate in the Doha negotiations no longer represents a temporary negotiating impasse, but a full-blown institutional crisis. In other words, the deadlock in the negotiations cannot be reduced to rational-actor bargaining and Pareto optimality, since the sources of North-South conflict have been layered institutionally and historically. A reoccurring theme in the Doha Round has been the belief among the majority of developing country delegations that the developed countries have not yet fulfilled promises made in previous trade rounds - what became known as the 'implementation issues' - while at the same time seeking to open up negotiations in new trade areas such as competition policy, investment, trade facilitation and government procurement - what became known as the 'Singapore issues' - without first addressing these grievances. The developed countries, for their part, have sought to persuade emerging economic powers such as Brazil, China, India and South Africa to abandon claims to 'developing country' status and negotiate as equals. What connects these two contrasting positions is that the WTO owes most of its institutional norms and decision making procedures to its predecessor, the GATT, which provided virtually no conceptual or legal means to distinguish between the separate obligations of 'developed' and 'developing' countries, what a 'development' agenda might consist of and how the contracting parties might contribute to or benefit from it

The third emergent reality - which, in many ways, connects the other two - is that the institutional crisis currently afflicting the WTO can be detected (if not quite to the same extent) in its two sister organisations, the IMF and World Bank. By way of contrast, the G20 - an organization that has only existed in any form since 1999 - has emerged in the post-crisis landscape as the self-styled premier organ of global economic governance. Some of the early commentary on the rise of the G20 interpreted it in terms of the politics of cooption, that is, an attempt by the 'great powers', first and foremost the US, to pursue their preferred policies in an updated institutional setting. However, the establishment of the G20 at the apex of global economic governance since the crisis suggests a more profound shift of economic and financial power towards emerging economies. It should also be noted that, in the wake of the crisis, the membership of two other 'club' fora, the Basel Committee of Banking Supervision and the Financial Stability Board, was extended to the G20 countries. International financial regulation - which figured prominently in the early rounds of TTIP negotiations - is characterised by the absence of an overarching focal point because of the existence of a variety of international

agreements, often with overlapping and competing mandates, dealing with the regulation of different segments of the financial sector.

The pattern seen in financial regulation can equally be detected in trade, too, as a result of the proliferations of regional and bilateral agreements. According to Daniel Drezner, this trend presents global policy-makers with three sets of problems – the first is that the proliferation of rules and standards without an overarching focal point serves to dilute previous institutional commitments; the second is that the proliferation of different regimes and regulatory standards carry with them the potential for conflicting, overlapping and incoherent mandates, which serve to weaken actors' commitment to implementation and enforcement; the third, most serious problem, is that what has become known as 'regime complexity' raises the transaction costs for all actors, creating incentives for them to exploit regulatory arbitrage through forum shifting or forum creation. Hence, using TTIP to promote global rule making or standard setting through 'multilateralization' could end up accelerating a process that the whole enterprise is supposedly designed to counter. It looks likely that TTIP - if concluded and ratified - will merely add a further layer of complexity to the global trade system, wherein regionalism and bilateralism have become the dominant drivers of liberalization more or less since the creation of the WTO.

Although the successful conclusion of TTIP is far from certain, TTIP is economically and politically important, not only for the two contracting parties, namely, the US and the EU, but also for the future of global governance. TTIP is partly a transatlantic response to the increasingly complex nature of international rule making and the changing distribution of global economic power. In trade, the drivers of this complexity - that is, the proliferation of regional, bilateral and 'mini-lateral' free trade agreements – are increasingly seen as independent from negotiating impasse in the multilateral trade system. In financial services, by contrast, complexity is defined by the absence of an overarching focal point, or regime. But, even so, the EU and US remain divided over whether or not bilateralism constitutes a viable means of transatlantic regulatory cooperation in finance, as suggested by the EU's attempt to include financial regulation in TTIP and the US' opposition to it. TTIP also reveals the increasingly entrenched nature of regional and bilateral sources of trade regulation – and the degree to which the origins of these agreements cannot be reduced to 'second best' policy responses to the stalling of multilateral negotiations. Understood in these terms – and whatever its political feasibility – TTIP is both a symptom and, in the future, a potential further source of the increasing complexity and fractured nature of global economic governance.



Competitive Interdependence and TTIP²

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The importance of the transatlantic economic relationship for the global economy can hardly be overstated. The most recent and dramatic development in this relationship – the decision to launch negotiations over a Transatlantic Trade and Investment Partnership (TTIP) – raises important questions about the potential implications of this relationship for the global political economy. While in depth scrutiny of the ongoing TTIP negotiations is warranted, their launch is not simply a single data point that emerged from and can be viewed in isolation. Rather, they fit into and hold the potential to shape the broader global political economy and the transatlantic relationship itself.

In the big-picture dynamics, the international trade agenda has long moved away from an exclusive focus on reducing tariff levels to include a variety of non-tariff barriers, especially behind-the-border regulatory issues. Simultaneously, the decade-long stalemate in the World Trade Organization's Doha Round negotiations represents a particularly prominent international development for economic relations between European Union (EU) and United States of America (USA) and how they approach and shape global economic governance.

Largely in response to the multilateral stalemate in the World Trade Organisation negotiations, the EU and USA now prioritise and *compete* in the pursuit of bilateral trade agreements with third countries. These agreements reflect EU and USA regulatory objectives as they typically contain efforts to address non-tariff barriers to trade. But the transatlantic relationship also has a firm basis for *interdependence* and cooperation, especially in the sense that it is managed through a series of framework agreements that encourage – but do not require – bilateral regulatory cooperation.

Given these prominent but potentially counter-purpose dynamics, the transatlantic relationship of today is usefully captured by the notion of 'competitive interdependence' (Sbragia 2010). This concept helps to identify the fundamental dynamics shaping the bilateral relationship between the EU and USA as well as the implications of their relationship for others. According to this understanding, the bilateral transatlantic relationship is one in which the 'EU and US are simultaneously competitors and interdependent because, to a significant degree, each defines success vis-à-vis each other' (Sbragia 2010: 369). When confronted with the stalemate in the Doha negotiations, this competitive interdependence drives the EU and USA to compete for bilateral deals while also advancing their interdependence in ways that promote their individual and common interests throughout the global economy.

² This contribution is based on a working paper for the FP7 TRANSWORLD research consortium (<http://www.transworld-fp7.eu/>). The paper can be downloaded at <http://www.transworld-fp7.eu/?p=1593>.

The competitive side of competitive interdependence arises because both the EU and USA have major stakes in third markets that prompt them to pay attention to and respond to market access granted to each other in those markets. Following the 2003 collapse of Doha negotiations at the Cancun Ministerial, the USA stated its intention to negotiate bilateral deals to pursue its trading interests. The EU has moved more slowly in this direction, but it now also is increasingly pursuing bilateral trade deals. The multilateral implications of these changed preferences are significant as the EU and USA are now individually pursuing and competing over the negotiation of separate bilateral deals – which typically include behind-the-border regulatory issues – across the globe (Meunier and Nicolaidis 2006). This competitive prying open of third markets has as much to do with the economic objective of reducing tariff barriers as it does with addressing behind-the-border regulatory issues. In effect, the EU and USA now compete over the externalization of their preferred domestic market-related policies and regulations to third markets. While this competitive dynamic may promote the interests of each partner, the prioritisation of bilateral deals may also simultaneously reduce EU and US ambitions and ability to conclude a multilateral deal at the WTO (Conceição-Heldt 2014).

Despite the competitive developments detailed above, the EU and USA are not solely competing to sign the most bilateral agreements. Rather, the relationship is driven by the large sizes of their markets and the deep interdependence and economic interpenetration they share. Starting from the 1990 Transatlantic Declaration, a series of ‘framework agreements’ have also helped to institutionalize and regularize relations based upon measures to increase dialogue and cooperation among high-level political actors, regulators and non-governmental actors.

Given the previous liberalization of their sizable markets and the progress made under their bilateral framework agreements, the EU and USA are increasingly focusing on behind-the-border trade issues. While different regulations and approaches to regulation do exist in the bilateral relationship, the goal of increasing dialogue and cooperation is to overcome problems and reduce the costs of engaging in commerce under different regulatory standards. Therefore, the potential costs of these different regulatory approaches and standards, coupled with deep interdependence, encourage the EU and USA to seek regulatory cooperation that can reduce these costs. Of course, despite the potential gains promised, these processes of policy adjustment are not simple matters. Indeed, such potential policy adjustments may be pursued through a number of negotiated processes – for example, convergence, harmonization, mutual recognition, equivalence and approximation – that vary in complexity, duration and success across sectors.³ While the successful completion of a TTIP is far from a foregone conclusion, the negotiation of this agreement highlights a number of factors related to the notion of competitive interdependence. It tends to reflect and bolster the interdependent side of the bilateral relationship by increasing the large size and interdependence of these markets individually and combined, as well as increasing the focus on regulatory issues and the potential gains to be achieved by bilateral policy adjustment. However, the TTIP negotiations also draw on the primary tool (a bilateral trade agreement) employed in the competitive side of the

³ For more on such types of policy adjustment, see Drezner (2001), Gilpin (2001), Holzinger and Knill (2005) and Young (2014).

relationship and provide a crucial case in which two great trade powers compete directly for leverage in a bilateral bargaining game between their respective trade and regulatory objectives.

In effect, the EU and USA may have shifted their drive to address behind-the-border issues away from directly influencing the multilateral trade negotiating agenda. Instead they are now pushing their regulatory standards in bilateral trade deals with other markets. They are also negotiating the pursuit of bilateral regulatory cooperation via TTIP, which may, due to the relative size of their combined markets, allow them indirectly to set global regulatory standards (Damro 2014; Fabry et al. 2014; High Level Working Group 2013). If so, then TTIP can be viewed as the culmination of an increasingly interdependent (and, therefore, increasingly focusing on behind-the-border regulatory issues) bilateral economic relationship. At the same time, TTIP can be viewed as the best way to address EU and USA multilateral aspirations in the face of the Doha stalemate.

But what does TTIP mean, in the context of competitive interdependence, for the global political economy? If the TTIP is concluded, and, indeed, if it helps to promote transatlantic regulatory cooperation and to set global standards in the long run, then it should be easier for the EU and USA to include those new TTIP-generated global standards in future bilateral agreements that each chooses to pursue with third markets. The process of transatlantic regulatory cooperation will not be a simple matter. But if successful, the potential to set global standards follows largely from the market size and institutionalized nature of the transatlantic marketplace. If third markets currently feel pressure to agree EU or USA standards in their respective bilateral agreements with the two partners in order to ensure access to the lucrative European and American markets, then pressure will increase substantially if those standards in question apply in the future to an even larger transatlantic marketplace. And if those standards are becoming global standards, then third markets will have little option but to agree them in their future bilaterals with the EU and USA, which should make it easier for the two partners to negotiate them into the bilaterals. In short, the TTIP will increase the interdependent side of the transatlantic marketplace at the same time that it may create further incentives for the EU and USA to continue competing in the pursuit of evermore bilaterals with third markets.

The transatlantic developments detailed in this contribution suggest a number of important implications for global economic governance. Nevertheless, it is important to point out that these implications are preliminary and depend upon future variation in the conditioning factors within, between and beyond the transatlantic relationship (Tocci and Alcaro 2014). In addition, the outcome of the ongoing TTIP negotiations – and any potential gains from regulatory cooperation – remains a very large question mark.

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The Distinctive Politics of the Transatlantic Trade and Investment Partnership Negotiations⁴

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The Transatlantic Trade and Investment Partnership (TTIP) negotiations, as the world's most ambitious trade agreement between the world's two largest economies, have excited considerable scholarly analysis and commentary. To date that attention has focused overwhelmingly on the issues at stake in the negotiations and has touched on the politics associated with the negotiations only in passing. Little attention has been paid to the distinctive politics of TTIP.

Since the Second World War major trade agreements have been based upon reciprocal concessions of market access. That is, each party has sought to gain access to foreign markets for its exporters by granting greater access to its own for foreign exporters. The negotiating positions of the parties, therefore, reflect the interplay between export-oriented and import-competing interests – firms and their workers within each party (Hiscox 2011: 101). Firms and workers in the different parties are assumed to be rivals. The patterns of political mobilization in the TTIP negotiations diverge from this traditional picture in two striking and significant ways: 1) the negotiations are characterized by transatlantic alliances among firms (and among workers) and 2) the most vigorous opposition to the agreement is coming from non-traditional trade actors, consumer and environmental groups and even the general public. In this short article, I sketch out the distinctiveness of the politics of TTIP, their origins and their implications.

The distinctive politics of TTIP

In contrast to the traditional view of economic interests in the negotiating parties as rivals, one of the most striking features of the politics of TTIP is the overwhelming presence of transatlantic alliances. Leading American and European manufacturing and services associations—including in automobiles, chemicals, pharmaceuticals, textiles, express delivery service, financial services, and insurance—as well as horizontal business groups submitted joint proposals for the negotiations (see Young 2015). The leading trade union confederations of the two sides also adopted a joint position paper (AFL-CIO and ETUC 2014), as did more than 150 consumer, environmental, labor and other civic groups (AFL-CIO et al 2014). There is, however, one glaring exception to this transnationalism: agriculture. There are no transatlantic

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alliances among farmers, and the farm groups on each side advance rival objectives, while rejecting concessions (see Young 2015). With the exception of agriculture, however, the politics of TTIP is distinctly transatlantic.

The other striking feature of the politics of TTIP is the extensive and vigorous mobilization of non-traditional trade actors. In traditional trade politics, individuals' trade policy preferences are assumed to reflect their interests as workers (Mansfield and Mutz 2009: 427), and so unions are the relevant trade actor. In TTIP, however, a diverse array of civic interest groups has adopted positions on TTIP. In May 2014 a coalition of NGOs from both sides of the Atlantic wrote to the lead negotiators to express their concerns about the TTIP negotiations (AFL-CIO et al 2014). The signatories were 73 US NGOs -- including Consumer Federation of America, Consumers Union, Friends of the Earth US; Greenpeace US, Public Citizen and the Sierra Club -- and 90 EU NGOs -- including the European Environmental Bureau, the European Public Health Alliance, and Friends of the Earth Europe. TTIP represents the first time that most US consumer groups have engaged actively in trade policy.⁵ Moreover, there is also an unprecedented level of popular mobilization against TTIP in Europe. As of the end of May 2015 almost two million people had signed a self-organized European citizens' initiative opposing TTIP.⁶ As a result, the most vigorous opposition to the agreement comes from actors that have not traditionally engaged in trade politics.

Sources of TTIP's distinctive politics

Each of these distinctive features of the politics of TTIP has its origins in a different feature of the transatlantic relationship. The alignment of preferences and cooperation among business interests reflects the extensive interpenetration of the US and EU economies through foreign direct investment (FDI). The mobilization of non-traditional trade actors reflects the unique emphasis in the TTIP negotiations of addressing the adverse trade effects of regulatory differences.

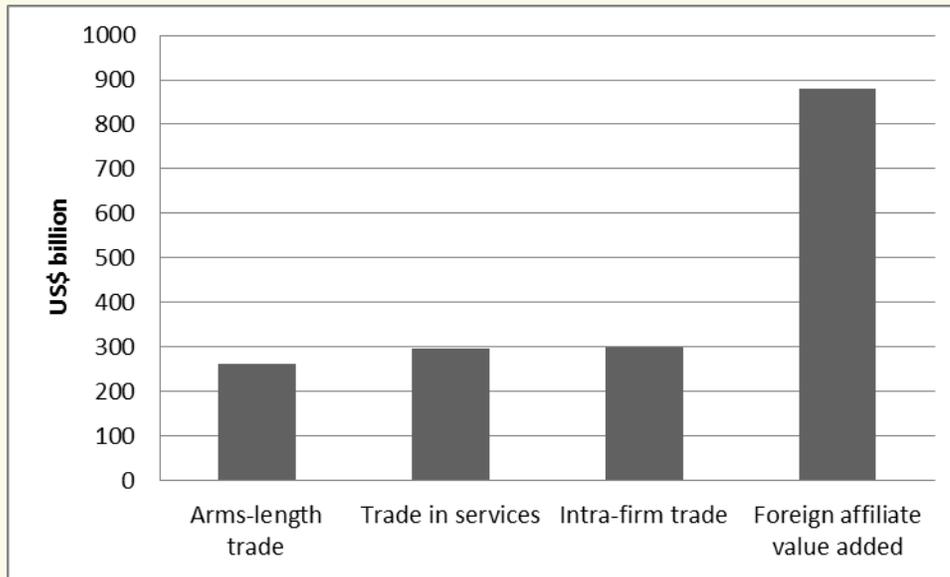
Transatlantic trade is not traditional trade. The transatlantic economy is characterized primarily by foreign direct investment. European companies accounted for 64 percent of the stock of inward FDI in the US and American companies accounted for 46 percent of the inward stock of non-EU FDI in the EU in 2010 (Lakatos and Fukui 2013: 2). As a result, the value-added by foreign affiliates is worth more than the trading relationship and intra-firm trade is central to that trading relationship (see Figure 1). Further, although hard to quantify, a substantial proportion of nominally arms-length trade almost certainly occurs within value chains (see Young 2015).⁷ Due to the extensive transatlantic FDI, there are numerous companies operating on both sides of the Atlantic. This interpenetration is evident the overlapping membership of the associations that comprise the transatlantic alliances (see Young 2015). The prominence of firms with their feet planted firmly on both sides of the Atlantic, therefore, explains the distinctive presence of transatlantic business alliances.

⁵ Interviews with consumer group representatives, Washington 18 May 2015 and via telephone 26 May 2015.

⁶ See <https://stop-ttip.org/>. Accessed 28 May 2015.

⁷ Interview, business representative, Washington, DC, 18 May 2015.

Figure 1: Components of transatlantic economic exchange (2010)



Sources: Own calculations based on Lakatos and Fukui (2013: 2) for intra-firm trade and value-added by foreign affiliates; USTR (2012: 133) for total trade and USTR (2013: 143) for trade in services.

While transatlantic alliances reflect the nature of the transatlantic economy, the mobilization of non-traditional trade actors is a response to TTIP's emphasis on regulatory cooperation. In part because of relatively low tariffs and in part because both the EU and the US have highly developed but distinct regulatory approaches, regulatory differences are the most significant obstacles to transatlantic trade (ECORYS 2009: xiii; HLWG 2013: 3). While traditional liberalization tends to bring only benefits to consumers, regulatory coordination potentially also bringing costs in the form of less safe or more environmentally harmful products. This gives regulatory cooperation greater salience for citizens than traditional trade policy (Evans 2003: 155).⁸ In addition, the expressed intention of both parties to include an investor-state-dispute-settlement (ISDS) mechanism in the agreement is seen as giving transnational corporations an additional mechanism for challenging domestic regulations. Concerns that TTIP might be deregulatory with respect to existing regulations and might make it harder to adopt new rules animate opposition to TTIP on both sides of the Atlantic (AFL-CIO et al 2014).⁹ Absent business opposition¹⁰ to the agreement and organized labor's generally sanguine view of market access liberalization (AFL-CIO-ETUC 2014),¹¹ non-traditional trade actors' (and unions') opposition to regulatory cooperation presents the most serious challenge to the agreement.

⁸ Telephone interview with a representative of US consumer organization, 26 May 2015.

⁹ Interviews with representatives of US consumer and environmental organizations, Washington, DC, 18 and 20 May 2015 and by telephone 26 May 2015. European Citizens' Initiative (available at <https://stop-ttip.org/what-is-the-problem-ttip-ceta/>. Accessed 28 May 2015).

¹⁰ Interviews with representatives of American and European business associations, Washington, DC, 18, 19 and 20 May 2015.

¹¹ Interview with a labor union representative, Washington, DC, 21 May 2015 and a European business association representative, Washington, DC, 20 May 2015. There are some exceptions, but they are exceptions.

Implications of TTIP's distinctive politics

The distinctive politics of TTIP, therefore, mean that the more traditional aspects of the negotiations – tariff reduction – relatively easy, while the newer elements – regulatory cooperation and ISDS – are challenging. Moreover, the existing mechanisms for aggregating trade policy preferences are ill-suited to the pattern of mobilization in TTIP. Traditionally firms (and their workers) were the actors that cared about trade and it was their interests that were accommodated in consultation mechanisms. The lack of public information about the state of the negotiations and the perception that business interests are intimately involved in the discussions contribute strongly to NGO and public opposition to the talks.¹²

The Commission, however, did take the unprecedented step of launching a public consultation on ISDS, which prompted an overwhelming number of critical responses organized by NGOs opposed to TTIP (Commission 2015a), and which is reflected in the Commission's (2015b) 'concept paper' on investment. In addition, the Commission has been much more open about its negotiating positions than has the US Trade Representative.¹³ The problem for the Commission has been that people do not believe that the Commission will deliver the agreement that it says it wants.¹⁴ As a result, popular opposition in Europe does not seem to have been placated by the Commission's initiatives.¹⁵

The significance of popular opposition will be felt most acutely when it comes to ratification and will hinge on how legislatures respond to the concerns. As of late June 2015, TTIP is relatively uncontroversial in the U.S. Congress, even as the Trans-Pacific Partnership and the granting of Trade Promotion Authority are embroiled in controversy.¹⁶ The European Parliament has paid closer attention to TTIP, having adopted resolutions in October 2012 and May 2013 with a third due in early June 2015. Throughout the Parliament has emphasized the need to safeguard European consumer and environmental protections. The draft resolution adopted by the International Trade Committee on 28 May 2015 added language on ISDS that is broadly supportive of the Commission's concept paper. That compromise, however, fell apart when the Socialists & Democrats withdrew their support just before the 10 June plenary. More than 200 amendments were submitted in plenary, and the matter was referred back to the committee. Thus TTIP is more controversial in Europe even though the Commission has taken greater steps to address the non-traditional trade actors' concerns. As the apprehensions concern what might be in the agreement, if the Commission delivers on its promises, ratification may not pose a problem. The negative framing of the agreement thus far, however, may make that an up-hill battle.

¹² Interviews with representatives of US consumer and environmental organizations, Washington, DC, 18 and 20 May 2015 and by telephone 26 May 2015. European Citizens' Initiative (available at <https://stop-ttip.org/what-is-the-problem-ttip-ceta/>. Accessed 28 May 2015).

¹³ Interviews with a European Parliament official and a Commission official, Washington, DC, 19 and 21 May 2015 and a representative of a US consumer organization, 26 May 2015.

¹⁴ Comments by a senior Commission official, Atlanta, GA, 21 April 2015.

¹⁵ Jordan, W. 'Europeans and Americans Ambivalent about free trade,' 20 April 2015. Available at <https://today.yougov.com/news/2015/04/20/americans-and-europeans-ambivalent-free-trade/>. Accessed 14 May 2015.

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The Puzzle of Industry Standards in TTIP: Some Tailored Solutions¹⁷

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The Transatlantic Trade and Investment Partnership (TTIP) negotiations are arguably the most important trade negotiations undertaken by the US and EU in response to the changing geopolitical environment resulting from the stalled Doha Round multilateral trade negotiations, the rise of Asian regionalism, and Europe's economic slowdown and sovereign debt crisis.¹⁸ Although the continuation of negotiations on a possible transatlantic agreement has generated intense scrutiny over the scope and coverage of the mandate that will seek to address the continued prevalence of regulatory barriers to trade that hinder transatlantic trade, investment, and market access, both sides are intent on achieving three goals with the TTIP.

First, both sides have committed to a mega-regional free trade agreement that they hope will trigger economic growth, creating new job opportunities and eliminating unnecessary regulations regardless of the potential redistributive effects. Second, the US and EU want to use their bilateral negotiating framework as a platform for the dissemination of high quality rules on trade and investment to upgrade those that were agreed upon in the last multilateral trade round. Third, they want to address the impact of differences in administrative regimes and regulatory approaches on both sides of the Atlantic that can impact business transactions through enhanced regulatory cooperation. International regulatory cooperation has become a central component of the negotiations, as both the US and EU have sought to find ways to greater uniformity in regulatory practices that would eliminate "inefficient and unnecessary incompatibilities" created by administrative structures and rule-making practices on both sides of the Atlantic. As such, regulatory pluralism may translate into multiple compliance costs, which may simply arise from the lack of coordination rather than explicit applications of differing regulatory requirements, or may be the product of deeply entrenched perceptions about risk management that has resulted in different policy preferences.

Though the negotiations have garnered a lot of attention thus far, about the potential economic benefits, the way that these two global players will address the challenges of regulatory cooperation has focused on ways to overcome conflicts in regulatory practices across multiple

¹⁷ An earlier version was presented at EUSA Biennial Conference in Boston, March 2015. Thanks to the participants on the panel for constructive feedback.

¹⁸ Michelle Egan, *Is TTIP Really that Different?: The Transatlantic Trade and Investment Partnership between the European Union and United States*, 19-34 <http://www.as.miami.edu/media/college-of-arts-and-sciences/content-assets/euc/docs/books/TTIP.pdf>.

sectors. This has often focused on issues of regulatory equivalence, despite the fact that there have been sustained efforts over the past two decades to achieve some regulatory cooperation through a wealth of initiatives from the business-led initiatives promoted by the Transatlantic Business Dialogue (TABD) to the New Transatlantic Agenda (NTA) and the Transatlantic Economic Partnership (TEP), which led to the *Guidelines for Regulatory Cooperation and Transparency* that aimed at increasing agency cooperation and fostering best practices, civil society dialogue, and information exchanges to build mutual trust.¹⁹ This notion was again reiterated in President Obama's Executive Order (EO) 13609²⁰ in 2012 to promote international regulatory cooperation as a way to assure that divergent regulatory approaches adopted between US agencies and their foreign counterparts should not impair the ability of US companies to export and compete on a global level. On the European side, the EU views standards as an instrument of strategic trade policy, supporting the competitiveness of European businesses in the global market.²¹ Yet comparison of the US and EU regulatory systems is complicated by the fact that they are delegated different kinds of powers, leading to calls for administrative reforms such as greater transparency, giving reasons requirements, or notice rule and comment approaches by advocates on both sides. While scholars have focused on "best" administrative models or "experimental" and pragmatic ways to overcome conflicts in the public realm, often touting the benefits of specific regulatory mechanisms, little attention is given to the role played by private industry standards in influencing or changing the choices made to meet the regulatory rules and norms.

In this short piece, we focus on the role played by private industry standards in promoting or impeding transatlantic trade and how private/public agencies and semi-public standard setting bodies provide through implementation and compliance mechanisms a way to achieve or undermine regulatory coherence among the plethora of rules that create barriers to trade. Product standards play a crucial—but overlooked—role in providing institutionalized cooperation among private actors that could provide a means to achieve the objective of reducing multinational corporations' costs in complying with multiple sets of product regulations but also increasing small firms' costs of compliance.²² While trade negotiations aim to balance the need for industry expertise with public participation and access in shaping regulatory outcomes, traditional modes of administrative delegation rarely foreground private standards bodies. States may find it difficult to provide the public goods in question and so may delegate certain functions of the state to designated private actors, in recognition of their technical expertise, while at the same time endowing them with greater authority and legitimacy to promote collective action. Such delegation to meet the goals of fostering greater regulatory

¹⁹ Fernanda Nicola, *Will TTIP Make its Own History? The Paradox of Transparency in International Regulatory Cooperation*; Duke Law and Contemporary Problems, Vol. 78 [2015]; Gregory C. Shaffer and Mark A. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance," 94 *Minnesota Law Review* 706 (2010); Rebecca Steffenson, *Managing EU-US Relations: Actors, Institutions, and the New Transatlantic Agenda* (Manchester: Manchester University Press, 2005).

²⁰ See Executive Order of 13609 of May 1, 2012, Promoting International Regulatory Cooperation, *Code of Federal Regulations*, title 3 (2012): 26413-5, http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf.

²¹ European Commission, *A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020*, COM (2011) 311 final (Brussels: European Commission, 2011).

²² Michelle Egan, *Constructing a European Market: Standards, Regulation and Governance*, (Oxford University Press, 2001).

cooperation in TTIP also raises complex normative questions about accountability, access and transparency.

The devolution of power involved in standard-setting has generated concerns about the impact of private parties in the regulatory process.²³ Practices codified in private standards bodies involving multiple stakeholders generate an increasing number of private and voluntary codes that are the product of contractual agreements between the public and private sphere. Such collaborative governance has often raised concerns about transparency, due to concerns about the accessibility of agency processes and regulations.²⁴ The devolution of power to non-state actors to formulate and enforce standards, which are then accepted as legitimate by government agencies, also raises concerns about democratic legitimacy. Such delegation of law-making to private actors has generated concerns about conflict of interest and anti-competition problems as private actors are empowered to make rules with limited public accountability that may affect market competitors. The anti-delegation debate in both Europe and the US raises the conceptual difficulties that law has with private law-making generally, and the assumption that hierarchical legitimation is only grounded in the state. Private standards highlight how lawmaking is not limited to public institutions so that the traditional pattern of regulatory cooperation needs to be broadened to include law-making beyond the state.²⁵

In some cases, there are concerns in Europe that regulatory cooperation within TTIP will lead to a reduced level of protection as the affected regulators are compelled to compete to reduce their standards to the least stringent due to the threat of lost competitiveness or the loss of operations.²⁶ Public unease over US food standards have drawn criticism from environmental, consumer and industry groups, concerned about perceived differences in assessing hygiene, risk and safety. The potential for a race to the bottom is typically explored in the context of corporate interests over environmental, consumer protections, and public sector services.²⁷ In particular, there are concerns in Germany that rules for service delivery are considered a barrier to trade, and the resulting free trade agreements may restrict the ability of national governments to limit the access to the market for public services. Thus, in the EU, the privatization of healthcare and public services or utilities has created a great push back against TTIP. German social insurance companies are concerned about the prospect that statutory health and safety standards will be subject to investment state-protection lawsuits brought by US companies. Europeans assume that social services are not tradable goods. Such contention

²³ Jody Freeman, "The Private Role in Public Governance," 75 *New York University Law Review* 543 (2000).

²⁴ Emily S. Bremer, "Incorporation by Reference in an Open-Government Age," *Harvard Journal of Law & Public Policy* 36.1 (2013); cf. Christian Joerges and Jurgen Neyer, "Deliberative Supranationalism' Revisited," EUI Working Paper, Law No. 2006/20 (Florence: EUI, 2006).

²⁵ Harm Schepel, "Rules of Recognition: A Legal Constructivist Approach to Transnational Private Regulation," in *Regulatory Hybridization in the Transnational Sphere*, ed. Poul F. Kjaer, Paulius Jurčys, and Ren Yatsunami (Leiden: Martinus Nijhoff, 2013), 192; Gunther Teubner, *Constitutional Fragments* (Oxford: Oxford University Press, 2012).

²⁶ David Vogel, *Barriers or Benefits? Regulation in Transatlantic Trade* (Washington, DC: Brookings Institution Press, 1997). After a survey of US and EU trade issues Vogel states, "[t]here does not appear to be a single instance in which either the United States or the EU lowered any health, safety, or environmental standard to make its domestic producers more competitive.... On the contrary, standards have moved steadily, if unevenly, upward on both sides of the Atlantic" (57).

²⁷ Jessica Randall, "International Regulatory Cooperation: Will Harmonization Protect the Public or Prioritize Corporate Profits?" *Center for Effective Government – Blog: The Fine Print*, May 3, 2012, <http://www.foreffectivegov.org/node/12071>.

over public services is also tied to differences in legal systems, where there is protection against liability in Europe, in contrast to US legal practices.²⁸ The Commission's response through a letter leaked to the public has been to reassure such actors that the provision of public services will be sufficiently protected in TTIP.²⁹

Through the lens of private lawmaking, we map the interplay between voluntary industry standards, public regulation, enforcement, and private litigation in transatlantic relations across several cases. Rather than embracing the economic rationale behind industry standards and their usage, we highlight the adjustments and knowledge production spurred by the continuous interaction between administrative, private and enforcement regimes.³⁰ In our view, the privatization of rule-making affects transatlantic trade negotiations allowing for deeper penetration between public regulatory bodies and transnational private industries. Rather than advocating in favor of a particular institutional design, open or better regulation, we claim that the evaluations and the contextualization of regulatory practice shows the re-politicization of what appears merely a neutral sectoral standard or a more or less scientific practice.

Legal scholars have shown that soft law has played an important role in such privatization of legal regimes at least twice back in history.³¹ First, soft law appeared in the mediaeval legal pluralist *lex mercatoria* with its multi-layered and *hybrid* nature and the constant interdependence of public and private models in law making and enforcement. Its second appearance was during the anti-formalist tradition developed by nineteenth century jurists in the social tradition echoing notions of flexibility and organicism which in international law resulted in the creation of minority treaties as well as less studied transnational networks.³² What is interesting is not so much whether or not states, the US, the EU, or their administrative legal regimes, remain central despite the multiplication of producers of law, but how the executive branches begin to compete with different bodies of norms created by national and transnational private networks. Instead of comparing administrative regimes to find similarities or differences across political systems, which has been used in public discourses to gain bargaining power and leverage, more attention should be given to the web of private and public governance mechanisms that promote regulatory cooperation in mega-regional free trade agreements.

While key sectors such as pharmaceuticals, automobiles, and medical devices are active in promoting their positions often collaboratively through joint proposals, the private sector and governments on both sides have also sponsored new research and academic studies. This is often portrayed as part of civil society engagement and stakeholder input when in fact private

²⁸DGUV and SVLG, "Comments by the statutory accident insurance institutions in Germany on a Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the USA" (Berlin/ Kassel: DGUV and SVLG, March 2014), http://www.dguv.de/medien/inhalt/presse/2014/Q2/ttip_position_german_social_accident_insurance_institutions_en.pdf

²⁹ See Ignacio Garcia Bercero to Rt John Healy MP, July 8, 2014. European Commission DG Trade, http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152665.pdf.

³⁰ Gunther Teubner, "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society?" in *Public Governance in the Age of Globalization*, ed. Karl-Heinz Ladeur (Aldershot: Ashgate, 2004).

³¹ Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society," in *Global Law Without a State*, ed. Gunther Teubner (Brookfield: Dartmouth, 1996); Peer Zumbansen, "Transnational Legal Pluralism," *CLPE Research Paper* 6.1 (2010).

rule-making is more important in shaping public regulatory processes than other forms of engagement and participation. Regulatory cooperation is much more instrumentalist, exclusionary, and political than simply a technical coordination problem that can promote different means of experimentalism. Regulatory cooperation will need to address law's recognition of extra-territorial, private rule-making, which is linked to normative discussions about rule-making beyond the state. So far, TTIP has focused on transparency with regard to negotiating texts not transparency with regard to private modes of rule-making.



The Meanings of TTIP: Reflecting on the Perils and Promises of Transatlantic Negotiations

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This short paper addresses some of the broader implications of the negotiations between the EU and the US, aimed at producing a Transatlantic Trade and Investment Partnership (TTIP). Many of these implications are implicitly or explicitly addressed in other contributions to this symposium, and to that extent this is an overview and attempted synthesis of some of the major themes explored in those papers. My themes are three: first, the ways in which the TTIP process reflects broader developments in the global political economy (GPE); second, the ways in which the process relates to what might be termed the 'power and position' of the EU and the US both separately and together; third, the ways in which the issues on which the TTIP process centres, and the negotiating processes it embodies, tell us something about processes of negotiation in the GPE more generally. In each case, I will raise some general questions and then reflect on the ways in which the symposium as a whole helps us to think about them.

TTIP and the development of the Global Political Economy

How might we think about the TTIP process in the context of more general trends in the GPE? It seems to me that there are at least three ways in which this might be done. One is to see TTIP as a symptom of responses to the current conjuncture in the GPE – in other words, as reflecting the much-discussed processes of power shift and power transition in the global arena, and as representing a transatlantic reaction to the challenges that have emerged from these broader changes. A second and related way in which the process might be evaluated is as an attempt not only to resist or channel the challenges from the GPE, but also to (re)shape the

GPE in terms that express a transatlantic consensus – in other words, as a major investment in agenda-setting at the global level. A third way in which the negotiations might be seen is as an effort not only to achieve shared goals in the areas of trade, investment and regulatory policy, but also to achieve political effects, both within the transatlantic area but also more broadly in the GPE.

It is clear from the other papers that each of these strands is present. Most obviously, Heron and Quaglia present an argument couched in terms not only of the opportunities and obstacles in the negotiating process, but also of the 'world order project' that is at the heart of the TTIP. In this view, TTIP appears as a central response by 'established powers' to the changing distribution of economic power and the emergence of new powers within the GPE. I will return to this below, but at this stage it is enough to note the central role of TTIP in responses to new challenges and opportunities. Chad Damro focuses more on the EU-US relationship as a focus and generator of 'competitive interdependence', most clearly visible in the pursuit of free trade agreements in a number of regions; the exquisite tension at the core of TTIP is thus that it reflects this broader trend whilst at the same time reflecting the growing interdependence and interpenetration between the EU and the US in the transatlantic political economy. The coexistence and co-dependency (at least in the US) of the negotiations for the Trans-Pacific Partnership and the TTIP at least in part reflects this underlying tension. For Alasdair Young, the issue is to be viewed at what appears to be a narrower and more parochial level – that of the engagement and mobilisation of new constituencies in 21st century trade politics – but actually, this has global resonances in the focus on regulatory policies and 'behind the border' issues (which drive the involvement of new types of actor), and in the contrasts between levels of mobilisation within the TTIP negotiations and those characteristic of other free trade negotiations. This might be seen (and Young presents it in this way) as emphasising the distinctiveness of transatlantic economic exchanges, which drive business mobilisation, but that distinctiveness in itself raises issues for the broader GPE, including those noted above. In the paper by Egan and Nicola, the tension between specifically EU-US preoccupations and the broader GPE is also clearly visible: whilst they focus on the tensions created by cultural and institutional differences within the transatlantic relationship, this is juxtaposed with the collective interest in development of the TTIP as a weapon in the face of emerging powers with different cultures, institutions and strategic objectives. In this way, the three themes – challenge and resistance, agenda setting and political aspirations – can be seen as coming together.

Power and Position in the Global Political Economy

Discussion of the broader trends in the GPE to which TTIP might be seen as a response links closely to discussion of 'power and position'. At one level, this discussion relates to the power and positions of the two central protagonists, the EU and the US. A key consideration here is the essential equivalence of the two partners. Does the TTIP process reflect the fact that the EU and the US are to be seen as equals in the transatlantic and the broader global context, and how is this expressed in the way the two protagonists present the negotiating process? A

second consideration is the balance between 'offensive' and 'defensive' positions in the negotiations: is there a discernible pattern of challenge and resistance in what has emerged thus far from the TTIP process? Linked to this is the question of winners and losers: is it possible to identify a pattern of potential gains and losses given the nature of the negotiations as a whole? Finally, there is the question of collective interests: has the process so far demonstrated a core of shared interests between the EU and the US that would cancel out the gains and losses to be experienced in different sectors or issue-areas? One such potential collective interest might be found in the idea that TTIP is amongst other things a route to coordinated growth in the EU and the US, and thus an escape from the politics of austerity that have weakened both in the broader GPE.

The papers here present a mixed picture, but in general there seems to be agreement that there is an essential equivalence between the EU and the US. The key question, though, is how far this essential equivalence extends and how it relates to important areas of difference between the two. For Heron and Quaglia, these areas of difference are largely subsumed in pursuit of an essentially 'western' agenda for the GPE, although they do draw attention to important divergences of preferences and to the impact of regime complexity. Damro emphasises key areas of convergence between the two partners, but again notes the complexity introduced by 'new 'trade issues'. Young underlines the effects of interpenetration between the EU and the US, which in some respects undermines the image of two strategic partners facing each other over the negotiating table, but in others lays bare some of the institutional and other divergences that characterise the relationship. Egan and Nicola with their focus on 'private governance' as well as the broader governmental framework emphasise the important cultural divergences between the EU and the US, not only in broad terms but also in relation to specific industries. The upshot of these arguments in all of the papers is that the complexity of the relationship does not allow for a definitive answer to questions of power and position within the negotiations: on both sides there are important areas of challenge and resistance, whilst it is impossible to arrive at a clear balance-sheet of winners and losers across the range of negotiating issues. As to the questions surrounding consensus and collective interest, it seems clear that whilst at the most general level (and from outside the Atlantic area) there can be discerned a set of collective aims (some of which have been noted above), the reality is considerably more complex and differentiated. To this extent, the early predictions that TTIP could be completed on 'one tank of gas' and that it might be a quick fix for austerity were very wide of the mark, not only because of issues arising from the power and position of the two partners but also because of the impact of factors originating outside the transatlantic area and from non-governmental sources.

Issues and Processes

What can we say about the nature of the TTIP negotiations specifically as negotiations? One seemingly obvious concern is with what the negotiations are about: in other words, what are the scope and the objectives of the process? A second concern is with the negotiating process itself: how have the negotiations grappled with the problems of large-scale and highly technical

issues within a changing GPE? A third concern relates to the possibility of agreement: given the range and scope of the negotiations, and the central focus, how can an eventual agreement be reached? Finally, there is a concern with the potential impact of any agreement and how it might affect the broader multilateral framework. One way of encapsulating these latter concerns is the notion of 'bi-multilateralism', which focuses on the interface between bilateral negotiations in the GPE and the broader multilateral implications – especially on the ways in which externalities can play a positive or a negative role in the outcomes and impact of bilateral negotiations.

There seems no doubt from the other papers that there has been a continuing issue of scope and objectives of the process. At one level, this is a question about whether the negotiations can be handled as an exercise in technocracy, and thus insulated from the broader societal influences that might be affected by them. As Young points out, the answer to this question in many areas is a resounding 'no', because of the mobilisation of private commercial and broader societal interests. Whilst private commercial interests can effectively be subsumed into the technocratic community, it is impossible to contain the broader societal mobilisation – but there is still a major question about how far that mobilisation can affect the outcome, and about how far the negotiating process can be insulated even given the intense concern of non-governmental actors. Heron and Quaglia point to important areas in which there have been disputes over the scope of the negotiations, whilst Egan and Nicola note the important differences that can emerge even within the restricted expert negotiating community. For Damro, the key question is a broader one about the impact of the TTIP process within the broader GPE, an issue that is also taken up by Heron and Quaglia, and which has resonance in all of the papers. There is clearly an element of design in the targeting of the TTIP not only on transatlantic relations but also on the broader multilateral framework, but there is equally clearly a major question about the extent to which the TTIP can be multilateralised and thus used as the basis for a new type of 'western' world order. There will also be unplanned and unforeseen multilateral effects, and effects on the behaviour of those elsewhere in the GPE, that might limit the impact of the TTIP if it is ever concluded in its full form. The creation of a network of free trade agreements, and other elements of a multilateral or 'bi-multilateral' system by China, might be seen as portents of this kind of effect.

Conclusion

Whilst much of the outcome and impact of the TTIP process remains unknowable, especially in the context of a US presidential election campaign and of continued turbulence in the EU political economy, it is clear that the process itself has generated important insights into the nature of trade agreements and broader processes of convergence and divergence in the world arena, as well as within transatlantic relations. We are led by the papers here to reflect on the ways in which TTIP expresses broader processes of change in the GPE, the power and positions of the EU and the US and the nature of negotiating processes in an interdependent and partially globalised world arena. Whether the TTIP process produces a comprehensive agreement or not, these are valuable – indeed essential – insights.



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Best EUSA Conference Paper 2013

Dan Kelemen and Terence Teo, "Law and the Eurozone Crisis: Law, Focal Points and Fiscal Discipline."

Honorable Mention

Mert Kartal, "Accounting for the Bad Apples: The EU's Impact on National Corruption Before and After Accession."

Best Dissertation 2013-2014

Phillip Mansour Ayoub, *When States 'Come Out': The Politics of Visibility and the Diffusion of Sexual Minority Rights in Europe*. Cornell University, 2013.

Best Book 2013-2014

Clifford Carruba and Matthew Gabel, *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union*. Cambridge University Press, 2014.

Ernst Haas Fellowship 2015

Alice Ciciora (University of California, Berkeley)

Martijn Mos (Cornell University)



New Books

The European Union and Global Financial Regulation, Oxford University Press (2014)

Author: Lucia Quaglia



The European Union and Global Financial Regulation examines the influence of the European Union (EU) in regulating global finance, addressing several inter-related questions. Why does the EU 'upload' international financial regulation in some cases, 'download' it in other cases, and 'cross-load' either actively or passively in other instances? Has this changed over time, especially after the third stage of Economic and Monetary Union and the completion of the single financial market, or after the global financial crisis? Under what conditions is the EU more or less likely to upload, download or cross load rules? Through which mechanisms does this take place? Overall, does the EU act as a pace setter in regulating global finance, or is it mainly a follower? Why?

The key explanatory variable used in this research is the concept of 'regulatory capacity', applied to the EU and the US, distinguishing between 'strong' and 'weak' regulatory capacity. The influence of the EU in global financial regulation depends on the combinations of EU and US regulatory capacities. When EU regulatory capacity is weak and US regulatory capacity is strong, the US will mainly upload its domestic rules internationally and/or actively cross load them to the EU, whereas the EU will mainly download international rules. When the EU regulatory capacity is strong and US regulatory capacity is weak, the EU is able to upload its rules internationally and/or actively cross load them to third countries. When the EU and the US regulatory capacities are weak, private sector governance prevails. When the EU and US regulatory capacities are strong, both jurisdictions seek to upload and cross load their domestic rules.



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<http://www.eui.eu/Research/HistoricalArchivesOfEU/News/2015/02-23-The2015EditionofSorensenGrants.aspx>.

The **American-Scandinavian Foundation (ASF)** offers fellowships (up to \$23,000) and grants (up to \$5,000) to individuals to pursue research, study or creative arts projects in one or more Scandinavian country for up to one year. The number of awards varies each year according to total funds available. Awards are made in all fields. Applicants must be US citizens or permanent residents. **Application deadline: 1 November 2015.** More info: http://www.amscan.org/study_scandinavia_details.html.

Fritz Thyssen Foundation Scholarship. The scholarships are intended for junior researchers, generally one to two years after they have received their doctorate. No scholarships are awarded for doctoral dissertations or postdoctoral theses. **Application deadline: rolling.** More info: <http://www.fritz-thyssen-stiftung.de/funding/types-of-support/?L=1>.



Deadline

for submissions to the winter 2015 issue:

- **15 December 2015**

Please direct all correspondence to the editor:

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