Ernest Gnan
Ralf Kronberger (Hg.)

Schwerpunkt Außenwirtschaft 2015/2016

Transatlantische Handels- und Investitionspartnerschaft zwischen der EU und den USA (TTIP)

ÖNB
OESTERREICHISCHE NATIONALBANK
EUROSYSTEM

WKO
WIRTSCHAFTSKAMMER ÖSTERREICH

Schwerpunkt Außenwirtschaft 2015/2016

Vor dem Hintergrund globaler politischer und wirtschaftlicher Umwälzungen (Ölpreisbaisse, Turbulenzen in den Schwellenländern, massive Wechselkursschwankungen, Flüchtlingsbewegungen, Terrorgefahren) wuchs die österreichische Wirtschaft im Jahr 2015 mit nur 0,8% bereits das vierte Jahr in Folge nur schwach. Die österreichischen Unternehmen profitieren von den expansiven Maßnahmen der unkonventionellen Geldpolitik der EZB, dennoch bleibt die Investitionsdynamik verhalten. Für das Jahr 2016 erwartet die OeNB einen Aufschwung, der maßgeblich durch wirtschaftspolitische Sonderfaktoren (Steuerreform, Ausgaben für Flüchtlinge, Wohnbauoffensive, Geldpolitik) gestützt ist. Österreichs Leistungsbilanzüberschuss hat sich 2015 auf 2,7% ausgeweitet und dürfte vor dem Hintergrund einer graduell wachsenden internationalen Nachfrage nach österreichischen Gütern und Dienstleistungen weiter wachsen. Die nun schon einige Jahre andauernde Wachstumsschwäche, eine im Vergleich zum Euroraum höhere Preis- und Lohnentwicklung sowie ein merklicher Anstieg der Arbeitslosenquote werfen die Frage nach der internationalen Wettbewerbsfähigkeit der österreichischen Wirtschaft auf. Bereits über mehrere Jahre sich verschlechternde Standortrankings spiegeln eine ungünstigere Einschätzung der Attraktivität des Wirtschaftsstandorts Österreich bei Managern wider. Die österreichische Wirtschaftspolitik und die Sozialpartner sollten diese Herausforderung gemeinsam aufgreifen.

Seit der einstimmigen Verabschiedung des Verhandlungsmandats durch die 28 EU-Mitgliedstaaten im Juni 2013 verhandeln die USA und die EU in mittlerweile 13 Verhandlungsrunden die sogenannte „Transatlantische Handels- und Investitionspartnerschaft", kurz „TTIP". Der diesjährige Schwerpunkt soll neben sachlichen, wirtschaftswissenschaftlichen und rechtswissenschaftlichen Analysen des TTIP auch den Versuch einer Erklärung der politischen Dynamik zu den TTIP-Verhandlungen unternehmen. Es werden die institutionellen Rahmenbedingungen der EU-Handelspolitik, die möglichen ökonomischen Effekte des TTIP und politikwissenschaftliche Hintergründe aus EU- und US-Sicht beleuchtet sowie einzelne branchenbezogene Auswirkungen auf die Wettbewerbsfähigkeit österreichischer Warenexporteure dargestellt. Die heimische Wertschöpfung durch Handelsverflechtungen mit den USA wird ebenso thematisiert wie das besonders strittige Thema des Investitionsschutzes oder der Vergleich mit der Transpazifischen Partnerschaft (TPP) der USA mit elf pazifischen Staaten.

ISBN 978-3-7089-1380-3

facultas.at/verlag

Ernest Gnan/Ralf Kronberger (Hg.)

Schwerpunkt Außenwirtschaft 2015/2016

Transatlantische Handels- und Investitionspartnerschaft (TTIP)

facultas

Bibliografische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation
in der Deutschen Nationalbibliografie;
detaillierte bibliografische Daten sind im Internet über
http://dnb.d-nb.de abrufbar.

Copyright © 2016 Facultas Verlags- und Buchhandels AG
facultas, 1050 Wien, Österreich
Alle Rechte, insbesondere das Recht der Vervielfältigung und der
Verbreitung sowie der Übersetzung, sind vorbehalten.
Satz: SOLTÉSZ. Die Medienagentur.
Druck: Facultas AG
Printed in Austria
ISBN 978-3-7089-1380-3

The Politics of TTIP: Negotiating Behind the Border Barriers[1]

Vinod K. Aggarwal, Simon J. Evenett

While much of the economic gains from concluding TTIP are thought to come from regulatory convergence, serious difficulties have arisen in advancing negotiations in a number of salient regulatory matters. The purpose of this chapter is to examine the factors responsible, thereby shedding light on the degree to which mega-regional trade deals, such as TTIP, can really go "beyond the border" and establish templates for 21st century global trade rules.

1 Introduction

Proposals for transatlantic trade reform go back at least 25 years. Yet only in June 2013 did the US and the EU commence negotiations of a bilateral free trade agreement – the Transatlantic Trade and Investment Partnership (TTIP). Since then, despite thirteen rounds of negotiations, the original deadline for completing the talks has been abandoned and, perhaps not surprisingly given the significant range of interests implicated, disagreements between the US and EU over negotiating ambition have emerged[2]. The TTIP negotiations relate to three broad categories of public policy: Markets access in goods, services, and agriculture; regulatory issues involving a host of industries as well as general procedural approaches; and rules on investment, intellectual property, labor, the environment, along with "new" issues such as state-owned enterprises and so-called localization requirements[3].

With the decline of traditional trade restrictions such as tariffs or quotas, since the 1970s trade negotiations at the regional and multilateral level have begun tackling other impediments to cross-border commerce, including those

1 For research assistance we are indebted to Katheryn Sehyen Lee, Charles Joy Li, Taylor Pilossoph, and Kevin Ratana Patumwat. We thank Chris Ansell and participants at conferences in Berkeley and Brussels for comments on earlier drafts of this paper. All remaining errors are our own.

2 Officials from both sides have pledged publicly to complete the talks in 2016. However, on 8th February 2016 the Deputy White House Press Secretary, Mr. Josh Earnest, noted that an agreement before President Obama leaves office was unlikely. See https://www.whitehouse.gov/the-press-office/2016/02/09/daily-press-briefing-press-secretary-josh-earnest-282016

3 For an overview from a US perspective, see Akhtar, S., & Jones, V. (2014), Transatlantic Trade and Investment Partnership (TTIP) Negotiations. Library of Congress, Congressional Research Service. For information from an official EU perspective, see http://ec.europa.eu/trade/policy/in-focus/ttip/

that arise from regulation. On paper at least, such regulation often serves important non-mercantilist purposes and this complicates trade negotiations as opponents can contend that any proposed changes seek to "gut" state measures that have substantial public support.

The agreements concluded during the Uruguay Round on sanitary and phyto-sanitary standards for food and on technical standards for manufactured products show that nations can agree on rules on the implementation of important regulatory functions of the state. Still, as the ongoing debate in Europe on the merits of Investor State Dispute Settlement (ISDS) mechanisms has shown, fears that trade talks could result in steps being agreed that threaten cherished regulatory goals have gained much currency among the public[4]. These contrasting examples motivate the central research question addressed here: what factors determine the scope of regional trade agreements, including mega-regional trade agreements? Alternatively put, what commercial, bureaucratic, and other factors determine which elements of the modern regulatory state are likely to be subject to the binding trade rules?

All too often scholars have emphasized the presence of cross-border spillovers as the primary rationale for binding a policy in trade accords. This overlooks much that is relevant in the negotiation of actual trade accords – and may conflate the normative ("what should be") with the positive ("what is"). Moreover, in discussions of the divergent positions taken by the EU and US during the TTIP negotiations, analysts have often discussed the "US position" or "EU position" on particular issues. More in-depth analysis has pointed to lobbying by specific interests within the US and EU. This shifts the focus away from the typical assumptions of unitary state actors common in economics and realist theories of political science based on an aggregate preference function. Robert Putnam notes that international negotiations involve win sets at both the international and domestic level, which must to be reconciled to achieve a successful negotiation[5].

In our view, a significant aspect of TTIP negotiation process harkens back to earlier work by Graham Allison on bureaucratic politics, which focuses on how the evolution of the 1962 Cuban missile crisis was driven by bureaucratic rivalries[6]. Subsequently, Robert Keohane and Joseph Nye emphasized the internationalization of this phenomenon when examining how the creation of trans-governmental coalitions accounts in part for the complexity of international negotiations[7]. Moreover, drawing on the work of Karl Kaiser and oth-

---

[4] According to press reports a petition signed by 3,263,920 persons opposing TTIP was handed into the European Commission in early October 2015. The proposed inclusion of ISDS provisions was an argument employed by supporters of this petition. See, for example, "TTIP: Three million people sign petition to scrap controversial trade deal," *The Independent*, 5th October 2015.

[5] *Putnam, R.* (1988), Diplomacy and domestic politics: the logic of two-level games. International Organization 42, no. 3: S. 427 ff.

[6] *Allison, G.*, (1971), Essence of Decision: Explaining the Cuban Missile Crisis, NY: Little Brown.

[7] *Keohane, R., Nye, J.*, (1974), Transgovernmental Relations and International Organizations. *World Politics*, Vol. 27(1), S. 39 ff.

ers[8], they showed how a multiplicity of actors coordinating across borders or trans-national relations would influence interstate bargaining outcomes. Such outcomes include defining the scope of the negotiating agenda, which is the specific focus of this chapter. In our view, both views provide insights into the factors limiting the extent to which TTIP can tackle the behind-the-border regulatory matters that many contend are so important to business in the 21st century[9].

To give substance to our exploration, we draw some lessons from TTIP negotiations in three commercially significant and politically salient regulatory areas: financial regulation, genetically modified organisms (GMOs), and rules about cross-border data transfer[10]. While this paper does not contain a general theory of the scope of the negotiation of regional trade agreements in the 21st century, few – if any – of the factors raised are specific to the TTIP negotiation. Therefore, our findings may be of relevance to other trade talks, including those at the multilateral level[11].

This paper does *not* address the broader political and economic motivation for the negotiation of TTIP, one of three major mega-FTAs being negotiated at the moment, the other two being the Trans-Pacific Partnership (TPP) (the negotiation of which has, in principle, been concluded) and the Regional Comprehensive Economic Partnership (RCEP). Nor is our goal to estimate the impact of TTIP's regulatory and other provisions on its signatories and on other nations. Instead, our goal is to examine both the agenda setting and negotiation process to better understand the determinants of the scope of the TTIP talks.

The remainder of this chapter is organized as follows. The next section identifies key insights from the extant literature on the wide range of factors affecting intergovernmental negotiations. Particular attention is given to factors that might be relevant to trade talks. Next we draw lessons from the negotiations on financial regulation, genetically modified organisms, and rules about cross-border data transfer in section three. Conclusions and caveats are presented in section four.

2 Implications of the existing literature for the scope of trade negotiations

The study of the scope of international negotiations is not new. Our purpose here is not to offer a comprehensive survey, but rather to highlight three

---

[8] *Kaiser, K.* (1969), „Transnationale Politik: Zu einer Theorie der multinationalen Politik", Politische Vierteliahresschrift, (Special Issue, No. I), S. 80 ff, Keohane and Nye 1971.

[9] *Fisher, R., Ury, W., Patton, B.,* (1991), Getting to Yes: Negotiating agreement without giving in. New York, N.Y.: Penguin Books.

[10] A longer version of this paper with detailed case studies of these three issues is forthcoming.

[11] Indeed those versed in the literature on the failure of the Singapore Issues to be taken up for negotiations during the Doha Round will see some of the same factors at work; see: *Evenett, S.*, (2007), "Five Hypotheses Concerning the Fate of the Singapore Issues in the Doha Round," Oxford Review of Economic Policy.

strands of literature that point to factors likely to influence the scope of a mega-regional trade negotiation, such as TTIP.

2.1 Beyond market access in trade negotiations

That National Treatment has been a principle of the world trading system since the founding of the General Agreement on Tariffs and Trade (GATT) in 1947 reflects recognition of the possibility that foreign commercial interests could be treated worse than domestic rivals by a government agency ostensibly pursuing some non-trade-related public policy objective. However, it was only with the creation of the Single Market in the European Union and the negotiation of the North American Free Trade Agreement in the early 1990s that concrete steps were taken in far-reaching regional trade agreements to limit or discourage such discrimination. These examples demonstrate that there are circumstances under which governments will allow certain regulations to fall within the scope of regional trade agreements.

Once trade negotiations start to address regulatory matters the characteristics and traditions of national regulatory states become relevant. It is worth recalling that legislatures typically empower an agency to pursue certain non-mercantilist regulatory objectives within the jurisdiction in question. Such objectives may differ in their saliency with the public, with non-governmental organizations, and the press. When a regulation's objectives reflect cherished societal goals, pressures for changes to the status quo – from any source – may be viewed dimly, in particular if corporate power is viewed by large segments of the population as being too strong. As Pascal Lamy has argued, much of modern trade negotiations concerns the "administration of precaution" or of risks to health, the environment, safety, and physical security[12].

Moreover, profound, unanticipated events can reinforce the support among national publics, legislators, and elites, such as the enhanced focus on financial stability and steps taken to limit risk-taking in the financial sector in the aftermath of the global financial crisis. The central point here is that the salience of a policy is not fixed – some issues suddenly gain public prominence with consequences for the launch and conduct of trade negotiations.

Although an enforcement agency faces resource constraints – and may be dependent on, and accountable to, other parts of government for their budgets – it may retain expertise on the matter being regulated that gives it an advantage over other government bodies. The legal mandates of such agencies may afford them discretion in the manner in which they seek to attain the goals prescribed by law and, by implication, any changes in regulation that are negotiated in a regional trade agreement and codified in law. Put simply, the role of the regulatory agencies simply cannot be ignored.

When it comes to the decision to include a regulatory area in trade negotiations, the first question that arises is "who decides?" On the face of it, a central government could trump a regulatory agency. But if that agency is the best

[12] *Lamy, P.,* (2015), Looking ahead: The New World of Trade. Jan Tumlir Lecture. ECIPE. 9th March 2015.

source of expertise on the matter in question then, practically speaking, its cooperation would be needed during and after the conclusion of the negotiating process. This, in turn, begs the question why a regulator would spurn the status quo in favour of a negotiation with an unknown outcome.

On the assumption that a regulator cares only about outcomes within its national jurisdiction (and therefore cannot be swayed by the possibility of better access for domestic firms operating abroad), a regulator would support inclusion of their policy domain in a regional trade agreement if the negotiation results in a **risk-adjusted expected improvement** in domestic regulatory outcomes **net of any opportunity costs**. On this logic the agency compares the potential outcomes of a negotiation with the likely trajectory of the regulatory regime that is expected at the moment of the inclusion decision[13]. The latter provides a path-dependent benchmark and would take into account any costs arising from refusing to participate in the regional trade negotiation. Refusal costs may be significant if the trading partner puts considerable weight on inclusion of the regulatory area in the trade negotiation.

In interpreting evidence on whether a matter is included in a regional trade negotiation account should be taken of tactical considerations. A government may propose negotiations on a regulatory area precisely because it knows its trading partner will refuse. That refusal may provide a pretext for claims of compensation in other areas of the negotiation and, in the limit, for ending the overall negotiation. Regulatory agencies may spurn such issue-linkage but other government bodies need not.

2.2 Beyond the Unitary State: Bureaucratic Politics

Economists and realist political scientists analyze intergovernmental negotiations using a simplified model that focuses on aggregated preferences. When doing so, economists assume policymaking outcomes at the domestic level follow what political scientists have labeled a pluralist model. Put concisely, one simply needs to sum a collection of vectors representing interest groups, with the direction of the vector representing policy preferences and the magnitude of the vector indicating political strength. The government or state is thus taken to be a preference aggregating mechanism[14]. By contrast, realists in political science pay more attention to the position of countries in the global system, arguing that state preferences are a function of its power position in this system.

The literature on bureaucratic politics challenges the assumption of a unitary state, acting either in the best interest of the country, based on its position in the global system, or in response to interest group pressures. This view suggests that governments are collectives of often-competing agencies and departments, with more or less autonomy from the executive. If such conflict takes places in the

---

[13] One factor influencing the opportunity cost perceived by an agency are the venues for cooperation with counterparts abroad that existed before trade talks are launched. Agencies can choose which, if any, venues to cooperate in.

[14] *Grossman, G., Helpman, E.*, (1995), Trade wars and trade talks. Journal of Political Economy. 103(4): S. 675 ff.

case of "high politics" of a US-Soviet crisis, it is hardly surprising that we would find such conflict in the area of trade policy, with bureaucracies and agencies both pushing their own agendas, fighting for turf, and responding to interest group lobbies by advancing their own views with their own trade negotiators.

The utility of the unitary state assumption is particularly questionable in matters relating to the European Union where, in addition to intra-Member State dynamics, there are a range of supra-national actors (such as the European Commission, European Court of Justice and the European Parliament) that jockey for influence and seek to implement what their mandates.

2.3 Bringing in transgovernmental and transnational relations

Going beyond a purely domestic focus on interest groups and fragmented state politics to examine the foreign policymaking process, drawing on the work of a number of authors, Robert Keohane and Joseph Nye have pointed to an additional problem with a unitary state actor approach, and emphasized the importance of both transgovernmental and transnational relations[15].

Transgovernmental relations refer to interactions between different aspects of the bureaucracies of states. As a result, the assumption that there is a single decision-maker who binds the country to a particular action and with whom all communication takes place must be relaxed. Examples of this internationalization of bureaucratic politics might be the State Department's dealings with the Foreign and Commonwealth Office in the UK and its attempts to promote certain American policies on international trade. At the same time, the Commerce Department may also be trying to develop a transnational ally in order to bolster its own domestic position within the US.

The second form of interaction, transnational relations, encompasses the cross-border activities of national and multinational corporations, business associations that may represent them and, quite distinctly, of civil society. The process of forming transnational coalitions is an important one. One of the most striking trade-related examples demonstrating the development of such coalitions relates to the restrictions on the imports of color televisions in the US. A quota limiting the number of televisions that would be allowed to enter the US from Japan and Korea was set up in the mid-1970s. Ironically, however, the American television manufacturers who were being protected by these measures (RCA and Zenith) chose to move offshore to produce televisions in other countries in the Far East. Yet at the same time, Japanese manufacturers had set up plants in the US and used American labor. The result was a situation in which the Japanese television manufacturers together with their US subsidiaries lobbied the US Congress to restrict the import of foreign televisions from Taiwan and other offshore locations where American manufacturers had established themselves[16].

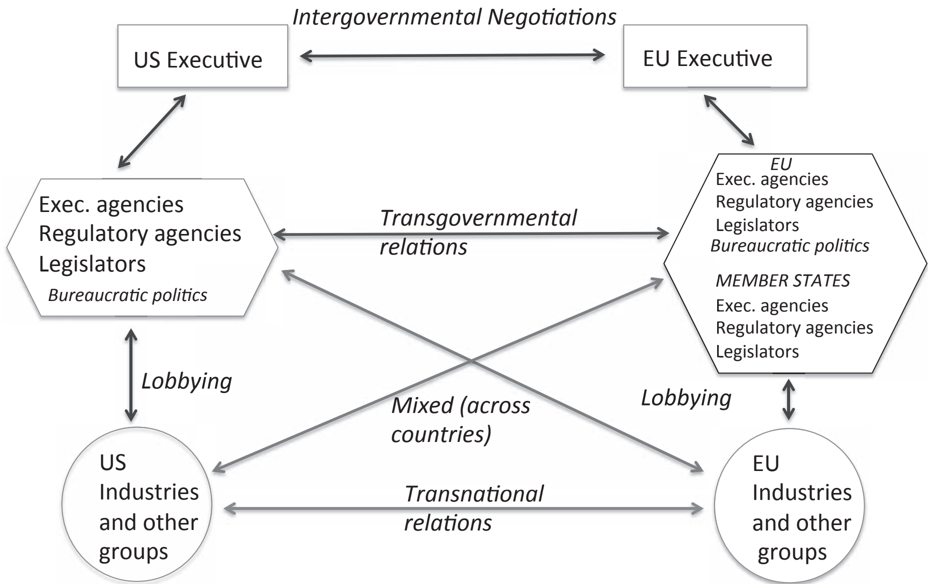
---

[15] *Keohane, R.O., and Nye, J.,* (2012), Power and interdependence: World politics in transition. 2nd ed. Boston: Little, Brown.

[16] *Aggarwal, V.K., Keohane, R.O., and Yoffie, D.B.,* (1987), The Dynamics of Negotiated Protectionism. American Political Science Review, 81 (2).

Figure 9.1 illustrates the many types of interactions that might take place in international negotiations. Thus, we have standard intergovernmental negotiations, supplemented by transgovernmental and transnational relations, as well as combinations of these two. These cross-boundary efforts complement the more complex domestic political negotiations taking place in each entity, with both a multiplicity of interest groups as well as a plethora of agencies and departments or ministries.

Figure 9.1: **A framework to examine TTIP negotiations**



Source: Builds on Keohane and Nye, 1971, p. 334, and Keohande and Nye 1974.

The relevance of these three factors is demonstrated in our discussion of three case studies. Each case study involves a politically salient regulation for which there exists in principle a non-mercantilist rationale. Each regulation implicates transatlantic commerce to such a degree that either the US or EU seeks the inclusion of binding rules in TTIP. Yet resistance to far-reaching, or indeed any, rules in each case has been witnessed, suggesting that there may be limits on the scope of TTIP that is ultimately concluded. The purpose of these case studies, then, is to understand what permutation of factors account for this resistance and why.

3 Negotiating financial services, GMOs, and cross border data flows

Here, we consider three sectors where both the agenda setting process and negotiations between the US and EU has been highly contested. In par-

ticular, these sectors have been marked by aggressive bureaucratic politics and transgovernmental politics, transnational coalitions including both corporate interests and civil society, and ensuing conflict at the intergovernmental level.

3.1 Financial services

Negotiations over market access to financial service sectors have become standard in multilateral and regional trade talks. Carve outs for prudential regulation, apparently motivated by financial stability have long been accepted. At stake in TTIP, however, is whether the process of financial sector regulation and cooperation between associated regulators should be governed, at least in part, by binding trade rules. In this regard, it is worth recalling that financial regulators are typically joined by central banks and national treasuries in overseeing financial sectors and that each of these bureaucratic actors had established formal or informal links with counterparts abroad well before the negotiation of TTIP was mooted. Another important point of context is that, in the wake of the global financial crisis, governments on both sides of the Atlantic, and elsewhere, introduced stricter regulations on banking, insurance, and other parts of what is taken to be the financial sector.

Despite repeated démarches by European representatives, and the negotiating tactic of refusing to make a financial sector market access offer unless its concerns about financial regulation were addressed, as of April 2016 the United States has resisted attempts to include the latter in the formal TTIP negotiating agenda. In fact, in testimony to the US House of Representatives Financial Services Committee on 22 March 2016, US Treasury Secretary Lew argued that over the "past few months" the EU had come to accept the US position:

> "I think we've made some progress with the Europeans…to shift the discussion of prudential financial regulation to the existing international bodies that are set up appropriately to deal with it…I've heard a renewed interest in using the Financial Market Regulatory Dialogue as a place to try and drive those discussions, which we think is the right way to do it, and we are happy to engage in that way[17]."

No official statement from an official European Union representative could be found to substantiate this claim. However, if true, then it would represent a further weakening of the EU position on financial regulations. At first, the EU wanted a framework on such matters as part of TTIP, then it wanted the matter to be "anchored" in TTIP, and now it seems the EU may have to accept that the matter is dealt with "in parallel" to TTIP [18].

Conflict over the negotiation of rules about financial services indicates that transnational coalitions between corporate interests need not prevail in agenda

---

[17] "Lew says EU open to excluding financial sector regs from TTIP," *Inside US Trade*, 25th March 2016.

[18] "Lew says EU open to excluding financial sector regs from TTIP," *Inside US Trade*, 25th March 2016.

setting on trade negotiations. Faced with entrenched opposition from independent regulators with significant clout in the negotiations, the failure to gain acceptance that financial regulations would be part of TTIP raises questions as to how far behind the border regional trade agreements can actually go in the face of opposition from national regulatory institutions.

Timing has also been important: advocates of including this matter in TTIP came forward after salient regulatory reforms were enacted, conferring new hard-won powers on independent regulators. Those regulators were reluctant to see their new freedom for maneuver constrained in subsequent trade negotiations. It is telling that independent European financial regulators did not rush to the defense of financial sector commercial interests, when the latter advocated the inclusion of financial regulations in TTIP.

3.2 GMOs

The issue of GMOs has long been a controversial issue for the US and EU. By contrast with the financial services case, here US demands for changes in a EU regulation whose salience to the European public cannot be understated have been rebuffed. Once again the party advocating new trade rules contends they do not seek deregulation. However, unlike the first case, the shadow of existing multilateral trade rules looms larger and the 2014 change of leadership of the European Commission appears to have played a significant role, the latter being related to a wider division among member states on the acceptability of GMO food.

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

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

The last change of European Commission, which officially took place on 1st November 2014, has materially influenced TTIP-related deliberations on GMOs in negative fashion. On 14th July 2014, in a presentation on his future plans at President of the European Commission, Mr. Jean-Claude Juncker stated:

> “I will make sure that the procedural rules governing the various authorisations of GMOs is reviewed. I would not want the Commission to be able to

> take a decision when a majority of Member States had not encouraged it to do so[19]."

As a result of this announcement, the European Commission proposed a new set of rules for GMO approval that were accepted by the Member States and EU parliament: "the Council of the European Union formally decided in March 2015 that member states should have the ability to ban or restrict the cultivation of GMOs for reasons other than health or safety, a policy that had already been approved by the EP[20]." A significant element of this new Member State prerogative is the right to ban imports of GM crops from within and outside the European Union if a reasonable justification can be given the European Commission[21]. In justifying its move the European Commission noted that this topic was a "controversial area of great public interest," alluding to the salience of the issue area[22].

This move "nationalized" one important part of the decision-making process with respect to GMO approval. By October 2015, 16 Member States, or regions within those Member States, had chosen to ban the cultivation and importation of GMO crops. Concerns have been raised that this decision fragments the European Single Market as well as potentially disadvantaging exporters of GM crops. Moreover, in taking this step, the European Commission gave up its sole control of both approvals and GMO-related market access while retaining its right to be the sole TTIP negotiator on the part of the European Union.

Reactions from US officials and from corporate interests on both sides of the Atlantic have been critical. When the proposal was announced in April 2015, USTR Froman immediately saw the linkage to the TTIP negotiations:

> "We are very disappointed by today's announcement of a regulatory proposal that appears hard to reconcile with the EU's international obligations. Moreover, dividing the EU into 28 separate markets for the circulation of certain products seems at odds with the EU's goal of deepening the internal market. At a time when the US and EU are working to create further opportunities for growth and jobs through TTIP, proposing this type of trade-restrictive action isn't constructive[23].

In October 2015, three EU agricultural industry groups, Coceral, Fediol, and Fefac, published estimates of the impact of banning GMO soya beans and meal on the downstream industry in the EU. Costs would rise by 15%, it was said, or €2.8 billion, and would erode competitiveness and exports of poultry and

---

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

[20] EU Council Formally Oks Law Allowing Member States to Ban GMO Cultivation. *Inside US Trade*. March 5th, 2015.

[21] Much will turn on what constitutes an appropriate reason for banning imports.

[22] "Leak Shows European Commission Pushing GMO 'Opt Out' For Imports," *Inside US Trade*, 17th April 2015.

[23] "US trade negotiator 'very disappointed' at European GM Food Ban," *Euractiv.com*, 28th April 2015.

the like[24]. In a separate intervention, the Deputy Secretary-General of the Coceral association of grain importers stated "We fear that this approach will reverse the achievements of the European customs union and single market. We have a single market, so if you import a product it must be entitled to free circulation[25]."

As of this writing, the stalemate on GMOs in the TTIP negotiation remains. It should be noted that before the nationalization of GMO market access within the EU, it was far from clear that agreement on a negotiating agenda – let alone the outcome of the negotiation – had been reached. Nationalization complicates matters as US firms and negotiators now face 16 import bans and having gained the power to block GMO imports, very generous terms would have to be offered by the US to encourage Member States to give up this new right. Rather, the US may fancy its chances at WTO dispute settlement, a course of action that would cast a pall over any TTIP GMO negotiations for several years.

What are the implications for TTIP and mega-regional trade deals more generally? At a minimum, nationalization will likely complicate the negotiation of any GMO-related changes in TTIP and, indeed, it may effectively exclude the item from further talks. In either case, the manner in which the US reacts will determine whether further collateral damage is inflicted on the TTIP project[26]. Should GMO-related regulations fall off the TTIP negotiating agenda – as financial regulations appear to have done – then there may be other circumstances upon which salient regulatory policies cannot be brought within the ambit of regional trade negotiations.

3.3 Cross-border data flows

Disagreement between EU and US officials on whether and how rules on cross-border data flows should be included in TTIP highlights the importance of contingency (there were at least three unanticipated events that have shaped negotiations) that result in new legislation, of the difficulties in negotiating on salient regulatory matters that can be effectively framed in terms of fundamental human rights, and of alternative cooperative instruments to foster intergovernmental cooperation than trade deals.

Among the most important unanticipated events were the Snowden revelations of June 2013. At the time the TTIP negotiations were launched transatlantic data flows by firms were governed by the so-called Safe Harbor agreement. The US-EU Safe Harbor agreement, implemented in 2000 is a voluntary policy that bridges US and EU policies on data protection, providing a regulatory framework for businesses to transfer private data between the EU and

---

[24] "EU Ag Groups Claim EU GMO Opt-Out Proposal Could Cost 2.8 Billion Euros," *Inside US Trade*, 28th October 2015.

[25] "EU clears path for 17 new GM foods," *The Guardian*, 16th April 2015.

[26] There is, of course, the possibility that some European Commission officials calculated that the adverse knock-on effects on the TTIP negotiations were an additional benefit from nationalization. It would be a mistake to assume in this regard that all Commission officials must have seen the substantive and tactical considerations the same.

the US in a manner thought to be consistent with EU privacy laws[27]. US businesses voluntarily joined the Safe Harbor policy to decrease transaction costs that might arise due to oversight in data privacy legislation and to signal to EU businesses or consumers that their firm operates with the same commitment to data protection offered by EU firms.

One consequence of Snowden's actions was that the Safe Harbor accord was called into question on both sides of the Atlantic – on the European side for failing to protect citizens' privacy when data was transferred and on the US side by NGOs concerned that American firms were not abiding by the terms of the deal[28]. However, more significant, independent legal initiatives were underway. Mr. Maximillian Schrems, an Austrian national, complained to the Irish data protection authority that data from his Facebook account had been transferred to the United States and, given the Snowden revelation, he felt that US law and practice did not afford the protections for that would be accorded to him under EU law. The Irish agency denied his request so he took the matter to the Irish High Court, which referred the matter to the Court of Justice. On 6th October 2015 in a far-reaching judgement the Court invalidated the Safe Harbor accord on several grounds and stated that the European Commission could not take steps that essentially precluded the rights of EU citizens to file such complaints with the data protection agencies of the member states[29].

The latter agencies, collectively meeting as what is known as the Article 29 Working Party, made clear on 16th October 2015 that the transatlantic data transfers under the Safe Harbor Accord were unlawful, requested that the European Commission open discussions with US counterparts to find a solution that met the Court's legal tests, and threatened that if by the end of January 2016 no solution were found they might undertake coordinated enforcement measures[30]. The Court's judgement and this statement by the Member States' regulatory agencies were the second and third unexpected development that overshadowed the TTIP negotiations. Given the importance of transatlantic data flows to the economies of both TTIP parties and the looming end-January 2016 deadline, the need for a quick solution was evident. This timetable was one that the TTIP negotiations could never meet, so an alternative cooperative instrument was needed – one that any eventual TTIP accord would have to accommodate.

In November 2013 the European Commission put forward 13 improvements for the Safe Harbor Accord and, on 2nd February 2016, US and EU officials declared that "in principle" they had come to agreement on a EU-US Privacy

---

27 Federal Trade Commission. 2015. Trans-Atlantic Privacy Protection. *US-EU Safe Harbor Framework.* 9th March 2015. https://www.ftc.gov/news-events/blogs/business-blog/2015/03/trans-atlantic-privacy-protection

28 "Digital Privacy Group Claims Widespread Violations Of U.S.EU Safe Harbor," *Inside US Trade*, 14th August 2014.

29 "The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid," Court of Justice of the European Union, Press Release No. 117/15, Luxembourg, 6th October 2015.

30 *Weiss, M., Archick, K.* (2016), U.S.-EU Data Privacy: From Safe Harbor to Privacy Shield. Congressional Research Service.

Shield. On 13rd April 2016 the Article 29 agencies issued a statement welcoming the negotiation of the Privacy Shield but expressed reservations about its clarity and content. The EU member agencies also stated that it would follow future Court of Justice cases with interest and implied in the conclusion of their statement that the European Commission had yet to convince them that the steps taken by the US were "essentially equivalent" to the protections afforded by EU law[31].

This statement suggests that legal risks remain for firms transferring data across the Atlantic. Since the courts and the digital protection agencies in the EU Member States are unlikely to factor in the give-and-take of trade talks into account when ruling on a matter seen in terms of privacy, potential for further disruption of TTIP negotiations on data transfer cannot be ruled out. It is one thing to argue that such talks are confined to discussions on how to implement existing data protection law (as EU and US trade negotiators and some business interests have), it is another to have such negotiations when the implications of the law are unclear in the first place and when the associated policy matter (privacy) is so charged[32]. Such considerations must cast doubt over how far-reaching TTIP disciplines on cross-border data transfer could ever be.

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

4 Conclusions

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

[31] http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2016/press_release_shield_en.pdf

[32] In an analysis of these developments by the Congressional Research Service it was noted that these negotiations have "been progressing on a track separate from the ongoing T-TIP negotiations." They also noted that "there may also be resistance in Europe to any T-TIP outcome perceived to adversely affect EU data protection and consumer protection rules" see: *Weiss, M., Archick, K.* (2016), U.S.-EU Data Privacy: From Safe Harbor to Privacy Shield. Congressional Research Service.

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

That those costs weren't high enough is remarkable given that the parties to this negotiation represent two of the largest trading powers on Earth. That regulators and official players other than trade negotiators have been able to veto talks in the face of market access-issue linkages and trans-national coalitions of firms is all the more remarkable. Such considerations beg the question – just how much weight do the US and EU really put on regulatory convergence? In sum, then, the incentives and objectives of bureaucratic players outside of trade ministries and the perceived opportunity cost of engaging in negotiations appear to be important determinants of the degree to which TTIP can "tame" the important components of the regulatory state.

Politische Betrachtungen zu TTIP: Verhandlungen hinter den Grenzen

Es wird erwartet, dass die größten wirtschaftlichen Vorteile des ausverhandelten TTIP aus einer stärkeren regulatorischen Kohärenz erwachsen. Dem gegenüber stehen stark unterschiedliche Positionen der beiden Verhandlungsparteien in einigen Regulierungsbereichen. In diesem Beitrag wird untersucht, welche Faktoren die Verhandlungen von Mega-Freihandelsabkommen wie TTIP bestimmend sind. Wie weit können solche Abkommen „hinter die Grenzen“ gehen und für Handelsregeln des 21. Jahrhunderts beispielgebend sein?

JEL codes: F13, F15, F55