

1 Vinod K. Aggarwal* and Simon J. Evenett

2 **Resisting behind the border talks in TTIP: The** 3 **cases of GMOs and data privacy**

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

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20 21 **1 Introduction**

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24 Along with the Trans-Pacific Partnership (TPP) and the Regional Comprehensive
25 Economic Partnership, the Transatlantic Trade and Investment Partnership (TTIP)
26 is one of the mega-regional trade negotiations undertaken during the past five
27 years.¹ One factor that makes such trade talks “mega” is that they involve some
28 of the largest trading jurisdictions whose negotiators are ordinarily inclined to
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31 **1** At the time of writing, the status of this negotiation is unclear. Statements from officials in the
32 Trump Administration suggest that the TTIP negotiation has been abandoned. Even if this is the
33 case, we contend that much can be learned about the factors impeding the negotiation of binding
34 disciplines on key regulations from the TTIP negotiations conducted during the Obama
35 Administration.

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37 ***Corresponding author: Vinod K. Aggarwal**, Travers Family Senior Faculty Fellow and Professor
38 Travers Department of Political Science Director, Berkeley APEC Study Center Affiliated
39 Professor, Haas School of Business University of California, Berkeley Berkeley, California
40 94720, Tel.: 510-642-2817, e-mail: vinod@berkeley.edu

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

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

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

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

70 2 Genetically Modified Organisms

71 This case study is in many respects the mirror image of the study of financial reg-
72 ulations found in the introduction to this Special Issue. In this case, U.S. demands
73 for changes in an E.U. regulation, whose salience to the European public cannot be
74 understated, have been rebuffed, and where again trade negotiators have played
75 second fiddle to other official parties. Once again, the party advocating for new
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79 ² Such regulatory policies, amongst others, are often referred to in the international trade liter-
80 ature as behind the-border policies.

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

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

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

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

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

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

U.S. domestic politics and GMOs

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

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

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

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

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

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

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

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

⁸ *Ibid.*

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

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

163
164 *U.S. interest group lobbying.* The U.S. agriculture sector is heavily reliant upon the
165 use of genetically engineered crops. According to a 2013 estimate from the USDA's
166 National Agricultural Statistics Service, over 90 percent of corn, cotton, and
167 soybean acreage in the United States produced GM harvests.¹¹ Meanwhile, the
168 European Union has remained wary of utilizing these innovations in biotech
169 and has been slow in allowing GM food production. In 2012, only 1.4 percent of
170 corn produced in the European Union utilized a Monsanto GM strain of seed
171 and was only cultivated in Spain.¹²

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

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

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

195 **10** Inside U.S. Trade (2014a).

196 **11** Office of the U.S. Trade Representative (2014).

197 **12** *The New York Times*, 18 June 2014, "U.S. Calls on Europe to Ease Limits on Gene-Altered
198 Food," James Kanter.

199 **13** Inside U.S. Trade (2015b).

200 **14** Michatlopoulos (2015).

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

E.U. domestic politics and GMOs

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

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

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

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

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

¹⁷ dpainsight E.U. (2014).

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

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

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

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

271 Small and medium sized farmers and agricultural enterprises have taken a
 272 particular stand against the negotiations of GMO rules in TTIP. For example,
 273 Gottfried Härle, a fourth generation brewer from Luetkirch, Germany, was
 274 quoted as stating "Consumers won't be able to tell anymore which product is
 275

276 ¹⁸ European Commission (2015).

277 ¹⁹ dpainsight E.U. (2014).

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

279 ²¹ Inside U.S. Trade (2015d).

280 ²² Ibid.

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

Negotiations blocked

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

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

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

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

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

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

²³ Deutsche Welle (2016).

²⁴ Sarmadi (2016).

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

²⁶ Inside U.S. Trade (2015e).

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

²⁸ Inside U.S. Trade (2015f).

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

328
 329 We are very disappointed by today's announcement of a regulatory proposal that appears
 330 hard to reconcile with the E.U.'s international obligations. Moreover, dividing the E.U. into
 331 28 separate markets for the circulation of certain products seems at odds with the E.U.'s
 332 goal of deepening the internal market. At a time when the U.S. and E.U. are working to
 333 create further opportunities for growth and jobs through TTIP, proposing this type of
 334 trade-restrictive action isn't constructive.²⁹

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

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

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

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 358 ²⁹ Jacobsen (2015).

359 ³⁰ Inside U.S. Trade (2015f).

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

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

370 Now our attention turns from a salient regulation in what might be character-
 371 ized as an “old economy sector” to a high-profile regulation of the burgeoning
 372 digital economy.
 373
 374

375 **3 Cross-border data flows**

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

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

394 As the digital revolution has eroded conventional barriers to trade, legislators
 395 and policymakers have struggled to keep up. On the one hand, owing to their
 396

397 ³² UNCTAD (2009).

398 ³³ European Commission (2012).

399 ³⁴ United States International Trade Commission. 2014.

400 ³⁵ McKinsey Global Institute (2011).

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

419 Data protection regulatory regimes differ widely across the Atlantic. European
 420 governance of data protection is strict and institutionalized, with independent gov-
 421 ernment data protection agencies.⁴² A slew of privacy laws mandate firms to reg-
 422 ister their databases with those agencies and, in some cases, require agency
 423 approval before allowing the processing of personal data.⁴³ American data gover-
 424 nance, by contrast, is decentralized, less comprehensive, and weakly institutional-
 425 ized, preferring a “sectoral approach” that mixes legislation, regulation, and a
 426 multi-stakeholder approach to self-regulation.⁴⁴

427 Critics of the European Union’s more stringent data governance and privacy
 428 regulations contend that they disrupt trade. Industry groups and federal agencies
 429 in the United States have lobbied to include rules on cross-border data flows in the
 430 TTIP negotiating agenda. A 2013 trade impact assessment by ECIPE for the U.S.
 431 Chamber of Commerce found that “serious disruption” of cross-border data
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433 ³⁶ United States International Trade Commission (2013).

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

435 ³⁸ United States International Trade Commission (2013).

436 ³⁹ Ibid.

437 ⁴⁰ Tsolias (2013).

438 ⁴¹ United States International Trade Commission. 2013.

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

440 ⁴³ Ibid.

⁴⁴ Ibid.

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

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

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

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

⁴⁵ ECIPE (2013).

⁴⁶ Brookings Institution (2014), 1.

⁴⁷ BITKOM (2017).

⁴⁸ Statista (2017).

⁴⁹ European Commission (2012).

⁵⁰ International Monetary Fund (2014).

⁵¹ International Trade Centre (2014).

⁵² Federal Trade Commission (2015).

⁵³ Inside U.S. Trade (2014b).

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

481		
482		
483	1. Notice	Businesses must disclose to citizens when they are collecting data on them, whom they are sharing the data with, and how the citizen may contact them with questions/concerns
484		
485	2. Choice	Businesses must allow citizens the option to refuse the transfer of their data to a third party, and if the data is particularly important the citizen has the right to confirm that the data may be sent to a third party
486		
487		
488	3. Onward transfer	The 1st and 2nd principles must be offered for data to be shared with 3rd parties, and if they are met the business must ensure that the 3rd party abides by Safe Harbor prior to sharing information
489		
490	4. Access	Citizens will be able to access the data business store on them and can alter or delete info as necessary
491		
492	5. Security	Burden is placed on the business to protect/store data safely
493	6. Data integrity	Data must be valid and serve a purpose
494	7. Enforcement	There must be recourse for individuals to protect their rights and expose violations of SH, procedures to ensure SH is upheld, and in instances where these principles are upheld the organizations need to solve the problems that arise
495		
496		
497		

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

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501
502 the limitations of the Safe Harbor regulatory framework.⁵⁴ At present, only firms
503 under direct FTC regulation can opt into Safe Harbor. This excludes companies
504 that engage in significant digital data transfers, such as the finance and nonprofit
505 sectors,⁵⁵ creating issues of liability and asymmetric regulation. Other problems
506 include firms being uncertain about how to comply with regulatory requirements
507 on Internet Protocol addresses and “cookies,” and European data protection reg-
508 ulators allegedly deeming Safe Harbor compliance insufficient to meet their
509 requirements.⁵⁶ Safe Harbor also included a national security exception that
510 allowed the U.S. government to utilize data collected from businesses to extract
511 personal information.

512 In June 2013, former NSA contractor Edward Snowden leaked classified files
513 that brought to light the large-scale U.S. intelligence-gathering programs world-
514 wide. This was the first unanticipated event (or shock) that altered negotiations
515 on the inclusion of rules on cross-border data flows in TTIP. The negotiating
516 mandate initially handed down by the European Council to the European
517

518 ⁵⁴ Ibid.

519 ⁵⁵ Ibid.

520 ⁵⁶ Ibid.

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

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

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

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

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

⁵⁸ Inside U.S. Trade (2015h).

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

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

588 The U.S. House of Representatives has followed this aspect of the TTIP nego-
 589 tiations with interest. In April 2014, it launched the Congressional TTIP Caucus
 590 to establish a communications channel between Congress and TTIP negotiators.⁶³
 591 The Subcommittee on Commerce, Manufacturing, and Trade held a hearing in
 592 September 2014 on "Cross Border Data Flows: Could Foreign Protectionism
 593 Hurt U.S. Jobs?" Witnesses that testified included the Vice President of
 594

595 ⁵⁹ Inside U.S. Trade (2014c).

596 ⁶⁰ Inside U.S. Trade (2013a).

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

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

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

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

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

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

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

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

⁶⁵ The Committee on Energy and Commerce (2014).

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

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

⁶⁸ Ibid.

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

⁷⁰ Center for Digital Democracy (2015).

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

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

653
 654 To assure that TTIP is a modern twenty-first-century agreement, TTIP should also include
 655 language enabling crossborder data flows and opposing forced data localisation require-
 656 ments. The liberalisation of data flows is essential for digital trade, but also underpins
 657 various other sectors that rely increasingly on such data flows to grow and develop.⁷⁴

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

664 With substantial amounts of revenue at stake, large American tech players
 665 have scaled up their lobbying efforts over time and have used their economic
 666 weight to set agendas and act transnationally. Firms like Amazon, Apple,
 667 Facebook and startups like Uber, Pandora and Snapchat are spending millions
 668

669
 670 **71** Formed from the merger of the American Electronics Association (AeA), Cyber Security
 671 Industry Alliance (CSIA), Government Electronics & Information Technology Association
 672 (GEIA), and Information Technology Association of America (ITAA) in 2009. Describes itself as
 673 the “high-tech industry’s leading trade association,” with 1,200 companies represented.

674 **72** Politico (2013).

675 **73** “AmCham EU’s response to draft INTA report on the TTIP negotiations,” AmCham E.U., 25
 676 March 2015.

677 **74** Interview with Susan Danger, “AmCham: Parliament’s TTIP recommendations can lead to a
 678 robust deal,” Euractiv, 13 April 2015. For similar arguments about the adverse effects of data local-
 679 ization requirements see the testimony of Sean Heather, Vice President, U.S. Chamber of
 680 Commerce to the U.S. House Energy and Commerce Subcommittee on 17 September 2014.

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

76 Ibid.

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

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

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

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

⁷⁷ Williams (2015).

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

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

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

⁸¹ Google (2017).

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

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

728
 729 *Bureaucratic politics.* In his account of the enactment of the European Data Privacy
 730 Initiative, Newman (2008) shows that national data privacy regulators were able to
 731 force reluctant supranational actors to embrace an E.U.-wide initiative:

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

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

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

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

753 Thus, DG Demarty adopted a formulation—not too dissimilar to the European
 754 position on financial regulation—that extant laws and associated values would
 755 not be negotiated in TTIP, but rather, that their respective implementations
 756 could be discussed.⁸³ In this manner, European trade negotiators have sought to
 757

758 ⁸² Inside U.S. Trade (2013b).

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

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

766
 767 *European Union interest group lobbying.* According to Corporate Europe
 768 Observatory, a watchdog group for corporate lobbying in the European Union, as
 769 of mid-July 2015, of the 597 lobbying encounters with the E.U. Commission relat-
 770 ing to TTIP, 88 percent of them involved private sector representatives.⁸⁶ A similar,
 771 earlier report in mid-2014 found that telecommunications and IT were the third
 772 most active industry in terms of lobbying, after agribusiness and food and cross-
 773 sector business groups.⁸⁷ Key groups in lobbying the European Union include
 774 Digitaleurope (including big IT firms like Apple, Blackberry, IBM, and
 775 Microsoft), BusinessEurope (European employers’ federation), and the
 776 European Services Forum (that includes large services companies like Deutsche
 777 Bank, Telefonica, and TheCityUK).

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

790
 791 _____
 792 data flows and respect the privacy regimes that each side values so much.” See Inside U.S.
 793 Trade (2013c).

794 **84** Those rules were adopted by the European Parliament on 14 April 2016, completing the leg-
 795 islative procedure.

796 **85** See Council of the European Union (2016).

797 **86** Corporate Europe Observatory (2015b).

798 **87** Corporate Europe Observatory (2014).

799 **88** “Alliance” STOP TTIP European Initiative Against TTIP and CETA, n.d.

800 **89** “About Stop TTIP” STOP TTIP European Initiative Against TTIP and CETA, n.d.

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

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

812 Transnational linkages

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

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

834
 835 **91** Statewatch (2014), 4.

836 **92** Ibid., 5.

837 **93** “Google,” europa.eu Transparency Register, 30 August 2016.

838 **94** Ibid.

839 **95** DIGITALEUROPE and Information Technology Industry Council (2015), 6.

840 **96** Information Technology Industry Council (2013).

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

841 Transnational linkages have also formed in the civil society sector. In February
 842 2015, a group of over 170 civil society organizations released a statement opposing
 843 regulatory cooperation under TTIP, arguing that it gives too much power to busi-
 844 ness lobby groups to write legislation and undermines democracy. Signatory orga-
 845 nizations, which include national-level groups like Economistas sin Fronteras
 846 (Spain), E.U.-level groups like the European Federation of Journalists (EFJ), and
 847 international groups like ActionAid, suggest that standardizing regulatory frame-
 848 works across the Atlantic will lead to “downward harmonization,” lowering stan-
 849 dards on both sides of the Atlantic at both the federal/E.U. and state levels.⁹⁸ These
 850 organizations have formed a transnational linkage that works to counter the high-
 851 level narratives of security and trade efficiency by drawing connections between
 852 TTIP and democratic ideals, and making a populist appeal by evoking the image
 853 of a self-interested, callous “big business.”

854 **Developments after the Snowden revelations**

855
 856
 857 Having described the wide range of actors seeking to influence TTIP negotiations on
 858 cross-border data transfers, we turn to developments after the Snowden revelations
 859 of June 2013. One consequence was that the Safe Harbor accord was called into
 860 question on both sides of the Atlantic—on the European side for failing to protect
 861 citizens’ privacy when data was transferred and on the U.S. side by NGOs concerned
 862 that American firms are not abiding by the terms of the deal.⁹⁹ However, more sig-
 863 nificant, independent legal initiatives were underway. Maximillian Schrems, an
 864 Austrian national, complained to the Irish data protection authority that data from
 865 his Facebook account had been transferred to the United States and, given the
 866 Snowden revelation, he felt that U.S. law and practice did not afford the protections
 867 that would be accorded to him under E.U. law. The Irish agency denied his request
 868 so he took the matter to the Irish High Court, which referred the matter to the Court
 869 of Justice. On 6 October 2015 in a far-reaching judgment, the Court invalidated the
 870 Safe Harbor accord on several grounds and stated that the European Commission
 871 could not take steps that essentially precluded the rights of E.U. citizens to file such
 872 complaints with the data protection agencies of the member states.¹⁰⁰

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

876 ⁹⁸ Corporate Europe Observatory (2015a).

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

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

881 under the Safe Harbor Accord were unlawful, requested that the European
 882 Commission open discussions with U.S. counterparts to find a solution that met
 883 the Court's legal tests, and threatened that, if by the end of January 2016 no solu-
 884 tion were found, they might undertake coordinated enforcement measures.¹⁰¹ The
 885 Court's judgment and this statement by the Member States' regulatory agencies
 886 were the second and third unexpected development that overshadowed the
 887 TTIP negotiations. Given the importance of transatlantic data flows to the econo-
 888 mies of both TTIP parties and the looming end-January 2016 deadline, the need for
 889 a quick solution was evident. This timetable was one that the TTIP negotiations
 890 could never meet, so an alternative cooperative instrument was needed—one
 891 that any eventual TTIP accord would have to accommodate. Hufbauer and Jung
 892 (2016) argue that the conclusion of the Privacy Shield implies that matters of
 893 data privacy will not be revisited in any future TTIP negotiation.

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

915 ¹⁰¹ Weiss and Archick (2016), 8.

916 ¹⁰² European Commission (2016).

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

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

931 932 933 **4 Concluding remarks** 934

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

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

959
960 **104** Akman, Evenett, and Low (2015).

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

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

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