

Opposition to the TTIP in the EU and the US: Implications for the EU's "democratic deficit"

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Abstract

Since ratification of the Lisbon Treaty, the European Parliament's (EP) newly conferred power in international negotiations is being put to the test through the complex and lengthy negotiations between the EU and the US for a Transatlantic Trade and Investment Partnership (TTIP). The TTIP represents a fruitful area to investigate the way in which the EP is utilizing (or underutilizing) its new power as well as implications for the EU's democratic deficit. TTIP represents a particularly fruitful policy to study the EP's power because it offers the ability to directly compare the EP's behavior with that of the US Congress. This is so because both legislatures need to assert their authority during the course of TTIP negotiations given mutual limitations of an up or down vote (consent procedure in the EP, fast-track/Trade Promotion Authority in the US Congress). This paper utilizes three controversial areas within each of the three broad negotiating areas of the TTIP – genetically modified organisms (market access), Sanitary and Phytosanitary Standards (regulations) and Investor State Settlement Disputes (rules) to explore the role of the EP. Preliminary results suggest that powers conferred in the Lisbon Treaty to the EP with respect to international negotiations are positively addressing the EU's democratic deficit, at least in the case of transatlantic economic relations.

Introduction

Simon Hix (1994) famously argued that as European economic and political integration deepened, scholars would find the comparativist toolkit increasingly useful to understand the politics and policies of the EU. A number of scholars, particularly working within a federalist framework, have sought to compare EU politics and policymaking with those of other federalist states (see, for example, Bolleyer & Börzel, 2007; Burgess, 2004; Scharpf, 1988). As European political, economic, and geographic integration (deepening and widening) has continued apace, scholars have increasingly looked to the US as a potential referent for comparative analysis, and doing so through a wide variety of lenses such as the regulatory state (Majone, 1994), federalist organization (Buonanno & Nugent, 2013; Sbragia, 2007; Schütze, 2009), power-sharing dynamics (Bolleyer & Börzel, 2007; Fabbrini, 2007), policy development (Buonanno & Nugent, 2013; Majone, 1996), and even the nature of the polity (Baldwin, 2009; Burgess, 2004; O'Neill, 2015). This paper's methodology draws from this tradition in EU studies.

Our paper takes as its starting point the disparate reaction (and traction) among civil society organizations and politicians in the EU and the US to the Transatlantic Trade and Investment Partnership (TTIP). Specifically, when the EU and the US agreed to begin negotiations on the TTIP, the agreement has been controversial throughout the EU, and has become increasingly so as negotiations have proceeded apace.

In both the EU and the US, the most vociferous opponents of the TTIP are Greens/environmentalists, consumer protection advocates, and the “Radical Left” in Europe and the “Progressive Left” in the US. European opponents to the TTIP attempted to use the European Citizens’ Initiative (ECI) called “STOP TTIP” to end the TTIP

negotiations, which the European Commission blocked as falling “outside the framework of the Commission’s power to submit a proposal for a legal action of the Union” and that “the preparatory Council decisions authorizing the opening of international negotiations or repealing such authorization do not fall within the scope of the ECI Regulation” (EurActiv, 2014).

Interestingly, however, TTIP opposition has been almost exclusively confined to Europe. Indeed, other than the “usual suspects” - environmental and consumer groups (and a few members of the “progressive left” in the US Congress) whose opposition to global trade agreements has become part of these organizations’ DNA, those Americans aware of the TTIP do not seem particularly opposed (see Pew polling results reported in Stokes, 2015). This observation inspires the key question for this paper: *How is it that the TTIP opposition seems so organized and effective in the EU, while being nearly non-existent in the US?* This question is important because in any of the many interpretations of the EU, whether intergovernmental (Hoffmann, 1966; Moravcsik, 1998), multilevel governance (Marks, 1993), or those that see aspects of a quasi-federal state or compound republic (Buonanno & Nugent, 2013; Fabbrini, 2007; Sbragia, 1993; Schütze, 2009), the EU is not a federal state (even if it is in the *process* of moving toward federalism), but rather (as has been occasionally described) is an “unidentified political object.” Evidence to support this interpretation of the EU as a *sui generis* construction (neither state nor IO) appears irrefutable among the widely agreed view of the EU as suffering from a democratic deficit. Observations employed to support this notion of a democratic deficit include low voter turnout for EP elections (as compared to parliamentary elections in EU member states – it should be noted that voter turnout at 42.5 percent in the 2014 EP

elections is higher than in US congressional mid-term elections, which was 36.4 percent in 2014), presumed lack of interest group mobilization (the EU as a construction for business, not the “average” European and certainly not the “engaged” European consumer advocate or environmentalist), and in the 2014 EP election, 25% of the seats captured by anti-EU/system political parties (see Table 1).

The idea of a democratic deficit, then, suggest a conundrum – is European opposition to the TTIP simply a non-conventional political participation (protests, petitions) activity (lending support to the democratic deficit argument), or, rather is opposition to be found among conventional channels (through political parties and interest groups)? If the latter, the TTIP would represent a policy issue in which the EU is behaving much more like a state with a polity than an unidentified political object with only weak linkages connecting the polity and their political leaders.

The purpose of this study is threefold: first, to examine and comment on the nature of opposition to the TTIP in the EU and the US; second, to utilize examples from TTIP “chapters” to illustrate the ways in which opposition has influenced TTIP negotiations, and the sources of such opposition – conventional? unconventional?; and, third, to understand how “domestic” opposition in the EU informs our understanding of the nature of EU integration particularly with respect to the development of a distinctly European polity (nation) operating within defined political institutions (democratic state).

The first part of this paper briefly reviews the benefits of the TTIP for the EU. The second part suggests that there was a great deal of early support for the TTIP among European leaders and decision makers; and, indeed it could be argued that it was Europeans, not Americans, who led the drive to revive the longstanding idea of a

transatlantic marketplace. (This is important consideration because if the EU revived the idea of a transatlantic trade partnership, why then would opposition be associated with Europe?) The third part discusses three cases where opposition to the TTIP has emerged in Europe. These cases are drawn from each of the three general categories that will comprise the TTIP agreement – market access (GMOs), regulations (Sanitary and Phytosanitary Standards), and rules (Investor-State Dispute Settlement – ISDS). The fourth part draws on the findings to explore trust, transparency, and democracy. The paper closes with a preliminary/tentative observation as to the extent to which the TTIP controversy assists us in understanding the state of play in European integration, and particularly whether the controversy surrounding the TTIP can contribute meaningfully to the ongoing debate democratic deficit debate in EU studies.

Benefits of the TTIP for the EU

Economic

Naturally in a geographic area which trades \$2.7 billion/€2.0 billion on a daily basis (US-EU High Level Working Group on Jobs and Growth, 2013, p. 1), one would expect there to be unrealized economic opportunities if barriers to trade could be eliminated. This had long been the position advanced by proponents in the years prior to agreement to begin negotiations on a transatlantic free trade area. Two European-based research groups – the Centre for Economic and Policy Research (CEPR) (Francois, Manchin, Norberg, Pindyuk, & Tomberger, 2013) and Bertlesmann Stiftung (the Bertlesmann Foundation) (Felbermayr, Heid, & Lewhwald, 2013) projected GDP growth, job growth, and welfare benefits as the result of the TTIP achieving its goals of

“comprehensive liberalization” (e.g. elimination of duplicative regulations and 95% tariff reduction).

The eurozone crisis has also changed the dynamics of economic decision-making among the eurozone’s members. Together, the large EU economies – France, Germany, and the UK – have been unable to provide the necessary demand and labor markets to “jumpstart” the GIIPS. Given the projected economic growth associated with the TTIP’s comprehensive liberalization to post-2008 beleaguered EU member states, one might predict a larger reservoir of political will among many EU politicians to complete a successful transatlantic trade and investment agreement.

Geopolitical

Although sometimes overlooked in the predictions of transatlantic economic growth, the TTIP has been also promoted as integral to EU and US power. Along these lines, German Economic Minister, Sigmar Gabriel recently argued: “What I regret in the German debate is that so much is said about 'chlorine chickens' and too little about the geopolitical significance of this accord...If TTIP were to fail, Germany and Europe could come under pressure through developments in other parts of the world” (Reuters News Service, 2015).

Robert Hormats (2013), Under Secretary for Economic Growth, Energy, and the Environment, US Department of State commenting along a similar strain that “periodic strengthening” of US-European ties was necessary “to ensure that current and future generations of Americans and Europeans recognize not only the important legacies we share, but also that at present and in the future our common economic benefits and security relationships are intertwined.”

So, too, Akhtar and Jones (2014, p. 6) observe, the EU and the US “run the risk of being disadvantaged in each other’s market in the absence of their own bilateral FTA, and that negotiations that were underway for the EU-Canada Comprehensive Economic and Trade Agreement (CETA) “makes the absence of a U.S.-EU FTA all the more notable.” The, the so-called “Asian pivot” (which the Trans Pacific Partnership negotiations seemed to provide ample proof), has been further interpreted by Atlanticists as evidence of a weakening transatlantic alliance (Choblet & Hager, 2013, p. 9).

Early Support for the TTIP in the EU

Center-right and center-left EU member state governments and the center-right holding the plurality in the European Parliament (EP) and the Council of Ministers looked to overseas markets as a business-favorable solution to the obstinately high unemployment rates in the wake of the Great Recession. This is nowhere more evident than in British Prime Minister David Cameron’s and German Chancellor Angela Merkel’s suggestion to US President Barack Obama after his re-election to make a commitment to pursue a transatlantic free trade area (Schmitz, 2013).

Within EU institutions, pressures for export-led growth had been quite intense. For example, on the occasion of a TEP conference in May 2012 the governing German CDU/CSU parliamentary group issued a discussion paper that was permeated with calls for the creation of a transatlantic free trade area. Among specific demands addressed by the parliamentary group to the German Government was “pursuing a comprehensive approach in negotiating n a free trade agreement between the EU and the USA, which in

addition to dismantling customs duties and non-tariff barriers also encompasses, *inter alia*, the liberalization of services and the protection of intellectual property” (CDU/CSU Parliamentary Group, 2012). So, too, a resolution put to a vote in October 2012 to open up EU-US trade negotiations easily won in the EP (526 for, 94 opposed, and 7 abstentions) (European Commission, 2013a, pp. 5 - footnote 2).

Market Access, Regulations, and Rules

The TTIP can be distinguished from earlier transatlantic cooperation agreements for its ambitious objectives, which envisage a wide range of issues divided into three categories—market access, regulations, and rules (Akhtar & Jones, 2014, p. 11). Market access covers tariffs on goods and services, government procurement practices, government practices regarding service providers, and the presence and perceived advantages of state-owned enterprises. Regulations deal almost exclusively with non-tariff barriers (NTBs) such as product testing, product specifications, and professional licensing. Finally, a wide range of rules are being negotiated such as a provision for investment-state dispute settlement to intellectual property rights. The next two subsections focus on GMOs (a market access issue) and Sanitary and Phytosanitary Standards (a regulatory issue), both characterized by longstanding transatlantic disputes. The third subsection examines Investor State Dispute Settlement (rules), which only recently has proved to be a controversial chapter for the EU.

Market Access – Genetically Modified Organisms

GMOs have become emblematic of the precautionary principle and a lightning rod for the

TTIP negotiations. This controversy is a longstanding point of disagreement in transatlantic trade, arising in part from the disparate risk assessment frameworks and subsequent regulations adopted by the EU (precautionary principle) and the US (*ex post facto* litigation). Patterson and Josling (2002) explain that with *process* regulation (the EU approach) the end product is not determinant of regulation, but rather the process: thus, if produced by genetic modification, the process and product is regulated differently than traditional agricultural products. The US approach is the opposite – only the end product, not process, is subject to regulation.

This early divergence in regulatory philosophy involving GMOS, even with respect to the locus of regulatory authority (US Department of Agriculture - agribusiness, DG SANCO – citizen health and safety), has had notable effects on EU-US treatment of GMOs. Significantly, the TEFU's safeguard clause enables EU member states to temporarily stop the cultivation or importation of a GMO if the member state determines that the scientific evidence suggests harm to human or animal health, or using the precautionary principle, is inconclusive. Six member states – Austria, France, Greece, Hungary, Germany and Luxembourg –have applied the safeguard clause to prevent GMO cultivation on their soil.

The EU's use of the safeguard clause to prevent importation of GMO products and the cultivation of GMOs triggered trade disputes with leading agricultural suppliers to the EU. As a result, the US, Canada and Argentina brought a case against the EU before the WTO in 2003, citing the lack of scientific evidence used to ban the importation and cultivation of GMOs. By November 21, 2006 the WTO had issued three panel reports determining that the EU was in violation of the WTO Sanitary and Phytosanitary

(SPS) Agreement, citing lack of “sufficient scientific evidence” for harm to human and animal health. This opened the way for the EU’s trading partners to place retaliatory tariffs on the equivalent value of imports from the EU (Europa Rapid Press, 2010; World Trade Organization, 2008). And while the EU has settled the dispute with both Argentina and Canada, the US-EU dispute over GMO cultivation continues (Europa Rapid Press, 2010). Recent legislation permits member states to continue to ban the cultivation of GMOs if they are deemed to present a health hazard, but also on new grounds as well such as “related to environmental or agricultural policy objectives” or “other compelling grounds such as town and country planning, land use, or socio-economic impacts” (European Parliament, 2015)

It is unclear what the impact of this new piece of legislation may be on the ongoing transatlantic trade dispute, but will not likely meet the WTO requirement for scientific evidence. Nor does it satisfy GMO opponents in the EU (Vicenti, 2015).

Another recent development has been Jean Claude Juncker’s appointment to European Commission president, who as Luxembourg’s Prime Minister had banned GMO cultivation (Waterfield, 2014). It is rumored that one of his first acts as European Commission President was to sack the EU chief scientific adviser, Professor Anne Glover for her pro-GM views, and eliminate the post of chief scientific advisor (Specter, 2014; Waterfield, 2014).

The European Food Safety Authority (EFSA), established in 2002, in the aftermath of the BSE crisis, is tasked with providing impartial scientific evidence about food and feed, including GMOs, to the Commission. Since January 1, 2005 products are submitted to national governments for acceptance on the market, in turn, according to

Regulation 1829/2003 the member state must immediately forward the application to EFSA and EFSA must try to give an opinion to the Commission within six months (European Food Safety Authority, 2012). Regulation, however, has stayed firmly in the Commission's comitology committees.

The US regulatory process has evolved quite differently. In 1986 under the Coordinated Framework for Regulation of Biotechnology, it was decided that no new laws were needed for the regulation of GMOs. Instead, the regulations that already existed for traditionally produced products would apply to GMOs. As a result there is no single statute or federal agency to govern the regulation of GMOs. Thus, the main difference in the structure that has evolved in the US is that there are not separate laws dealing with GMOs specifically and regulation is spread across three different agencies, whereas in the EU there is a body of directives and regulations that deal exclusively with GMOs and the Commission has regulatory authority (housed in DG SANCO) with the EFSA serving in an advisory capacity. This difference has also informed the labeling issue – required in the EU, not in the US. (Recently some US states and municipalities have passed GMO labeling laws, but these are facing challenges in federal courts by the agribusiness giants.)

The Commission is fully aware of the European polity's concern regarding the TTIP's possible impact on GMO cultivation and importation into the EU. So, for example, Agriculture Commissioner Phil Hogan, in an interview with a German paper, felt the need to reassure consumers that TTIP would not change EU GMO labeling rules and that

...the European Commission is clear on at least one issue: it will not allow any derogation with regard to the recognisability of genetic engineering.

Only being able to identify a genetically modified product by scanning the barcode on the package, as the Americans are apparently suggesting, is not my idea of clear labeling, nor does it comply with existing rules (Sagener, 2015).

This section illustrates that the cultivation and importation of GMOs for human consumption (little known is that about 90% of the animal feed in the EU comes from GMO crops) has a long history of transatlantic disagreement. So, too, the EP has been an active actor in food safety, dating back to the famous BSE (mad cow) hearings of 1997 (European Parliament, 1997). Indeed, the BSE hearings might be seen as “coming out” party for the EP in which the EP firmly established its legislative co-authority with the Council to regulate food and feed (Buonanno, Zablotney, & Keefer, 2001). Given just deep seated opposition to GMO cultivation among many member states, one would not expect, then, the EP to cede ground on this issue, even if politicians and farmers in some member states (particularly Spain and the UK) favor GMO cultivation.

Regulations – Sanitary and Phytosanitary Regulations

Perhaps the most publicized disagreement in the Atlantic Community (other than the “banana wars”) have been with Sanitary Phytosanitary (SPS) measures, specifically practices on the US side (antibiotics, growth hormones, sanitizing methods) that the EU considers detrimental to human and animal health. Nevertheless, the HLWG’s (US-EU High Level Working Group on Jobs and Growth, 2013, p. 4) report that served as the basis for TTIP negotiations recommended:

an ambitious ‘SPS-plus’ chapter, including establishment of an on-going mechanism for improved dialogue and cooperating on addressing bilateral SPS issues...including the requirements that each side’s SPS measures be based on science and on international standards or scientific risk assessments, applied only to the extent necessary to protect human, animal, or plant life or health, and developed in a transparent manner, without undue delay.

The EU began to ban beef treated with certain growth hormones in 1988, citing concerns over health and human safety. In 1996, the US and Canada, countries most negatively affected by the ban, brought a case to the WTO requesting the creation of a panel to examine the issue. The conclusion of the WTO panel was that “the EC ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with Articles 3.1, 5.1 and 5.5 of the SPS Agreement” (World Trade Organization, 2009). The EU appealed the decision and upon appeal it was determined that the EU had not complied with Articles 3.3 and 5.1. The EU continued the ban and requested more time, but the US following WTO rulings requested from the Dispute Settlement Body (DSB) “suspension of concessions to the European Communities,” or the right to impose trade sanctions. The DSB determined that the nullification suffered was USD 116.8 million, which meant that the US imposed could apply compensatory duties equivalent to that level of loss (World Trade Organization, 2009). US duties impacted EU products such as bovine and swine meat products, Roquefort cheese, chocolate, juices, jams and fresh truffles (European Parliament, 2012). Negotiations continued with a breakthrough in May 2009 when the US agreed to gradually decrease tariffs of EU goods under the condition that the EU increase its quota on high quality cuts of beef that do not contain hormones. The US lifted all sanctions on the EU over the hormone beef matter in 2011. With the lifting of US and Canadian

sanctions certain EU countries benefited such as Italy, with produce worth over US \$ 99 million, Poland, (US \$ 25 million), Greece and Ireland (US \$ 24 million each), Germany and Denmark (US \$19 million each), France (US \$13 million) and Spain (US \$9 million) (European Parliament, 2012).

The EU ban on chlorinated chicken has become a stand in for all that Europeans oppose about American food practices, in general, and opposition to the TTIP, in particular. While the US accounts for about one-third of all world poultry trade, virtually no US exports go to EU countries, the world's second-largest importer of poultry meat, due to US SPS practices (Johnson, 2015, p. 1).

The EU's ban on chlorinated chicken dates back to 1997 with the banning of pathogen reduction treatments (PRTs) (antimicrobial rinses—including chlorine dioxide, acidified sodium chlorite, trisodium phosphate, and peroxyacids, among others) that have been approved by the US Department of Agriculture for use in poultry processing to reduce the amount of microbes on meat) (Johnson, 2015, p. 1).

In the EU, instead of treating food borne illnesses like salmonella after the slaughter, Europe has sought to control illness in live birds through its "farm to fork policy" (Capelouto, 2014). Flocks of chicken are regularly tested for salmonella and if a chicken tests positive the farmer must cull the whole flock, which is credited with reducing salmonella to just two percent.

Part of the divergence is because welfare standards for farmed animals are not regulated in the US as they are in Europe (van Horne & Bondt, 2014). Federal legislation focuses on transport (*US Farm Bill, 1996*), slaughtering methods (update 1958) and

treatment of laboratory animals (1966), with some degree of latitude for state regulations (van Horne & Bondt, 2014).

EU legislation, on the other hand, focuses to a greater degree on animal welfare, the environment and food safety. Significantly, EU practices are estimated to add an additional 5.1% to the total production cost of poultry (van Horne & Bondt, 2014). Naturally, Europeans see American SPS practices as unfair competition at the expense of animal and human health and welfare. And clearly American poultry producers enjoy a cost-price advantage - on average 1 kg of live chicken costs 101.1 eurocents, as compared to 76.7 eurocents in the US (van Horne & Bondt, 2014). However, much of the cost differential can be attributed to lower feed costs in the US, rather than SPS practices. Thus, the American negotiating position is that US poultry production is more efficient than the EU's and that the EU is unfairly using SPS practices to protect its poultry industry from US competition.

The EU ban on PRT treated poultry has had a significant negative economic impact where prior to the ban, U.S. exports of chicken and turkey meat to the EU (15) totaled nearly 38,000 metric tons (MT), valued at \$58 million. In 2011, U.S. exports to the same15 countries were reported to be nearly 9,000 MT, valued at \$13 million. Furthermore, USDA analysts believe that almost all of these U.S. exports represent “transshipments,” meaning that Europe is not the intended final destination and that virtually no U.S. poultry meat is being purchased for the EU market. Losses to the US poultry industry are estimated at between \$200 million and \$300 million annually (Johnson, 2015, pp. 1-2).

A great deal of the opposition in Europe to the TTIP has arisen from fear that the US will use the negotiations to achieve its long standing objectives of opening up the EU to hormone beef and PRT-treated poultry. This is not an unfounded concern because US policymakers have been quite explicit about including SPS in the TTIP. For example, Robert Hormats (2013), the US State Department's Under Secretary for Economic Growth, Energy and the Environment remarked in a speech delivered in the spring of 2013:

We aim to address entrenched obstacles to U.S.-EU trade liberalization...while SPS issues remain highly contentious, TTIP negotiations provide a real opportunity to break down some of the barriers that have kept us from taking full advantage of trade opportunities in the past. Our aim is for commitments to base SPS standards on science and international standards with an emphasis on scientific risk assessments (Hormats, 2013).

Americans sometimes underestimate the depth of the European polity's concern over SPS issues. Certainly Jean-Claude Juncker, the successful candidate for European Commission president (whose EPP group is pro-TTIP) knew the European polity's concern when he quipped during one of the election's presidential debates that "the chicken does not want to be chlorinated either" (Fox, 2014). Naturally, opponents of US slaughterhouse practices would be suspicious of the member state motives because when the Commission sought in 2009 (based on EFSA's evaluation of chlorine's use as a PRT to be safe) for the Council to approve chlorine washed poultry, the Council denied approval (Grueff, 2013, p. 12).

In the first parliamentary debate on the TTIP after the seating of the new EP after May 2014 elections, Trade Commissioner De Gucht addressed the SPS issues specifically stating, "We won't import any meat with hormones. We won't give blanket approval of

GMOs" (European Parliament, 2014). At these debates, David Martin, MEP (European Parliament, 2014) representing the S & D group (whose votes will be needed for the EP to approve the TTIP) stated:

The Socialists were proud to be at the birth of TTIP. We don't want to be the TTIP's assassins. If we have to be, we will be. The Commission must listen to us about issues such as food safety. Regulatory convergence must not lead to chlorinated chickens, hormone treated beef, or GMOs getting access to the EU market. We've had assurances from the Commission on this, and we want to remind you that we're going to continue to watch you.

Given the longstanding opposition to Europeans to the importation of US cattle, swine, and poultry using SPS practices, one can understand the outrage the Council's (2013) TTIP negotiating mandate created when an MEP from the Green group leaked it (the negotiating mandate has since been officially published), and was found to contain Item #25 (Regulatory Issues and Non-tariff Barriers)

The Parties shall establish provisions that build upon the WTO SPS Agreement and on the provisions of the existing veterinary agreement, introduce disciplines as regards plant health and set up a bilateral forum for improved dialogue and cooperation on SPS issue.

As with GMOs, the transatlantic dispute over SPS is long standing and has involved consumer and environmental groups, farmers, the EP, the Commission, and the Council. In other words, it was already an issue with which the EU had been quite responsive to its polity.

Rules – Investor State Dispute Settlement

The *Investor-State Dispute Settlement* (ISDS) is a procedure which allows investors to bring claims against a foreign government instead of requiring their government (state-to-state) to put forth claims on their behalf when the state has acted inconsistently with an investment protection agreement (Akhtar & Jones, 2014, p. 31; Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, 2014). ISDS agreements are mainly negotiated to protect foreign corporations against discrimination and to protect against unlawful expropriation.

ISDS clauses, which the German government began using in the late 1950s, are routinely inserted by the EU and the US in FTAs (Fox, 2014). Indeed, the EU and the US have fully anticipated including an ISDS in the TTIP Agreement and the EU-Canada FTA contains an ISDS (Council of the European Union, 2013, Item 23; de Pous, Dings, Goyens, & Kosinska, 2014).

There are several reasons why foreign companies favor ISDS, including: courts may be biased or lack independence; investors may not have access to local courts in the host country (e.g. countries have expropriated foreign investment and denied access to local courts); and, countries do not always incorporate into local laws the rules made in an investment agreement (European Commission, 2013b, p. 1).

In line with the overall goals of the TTIP for setting global standards, the EU and the US expect that with an agreed ISDS, this system could then be used as a standard in third countries where foreign investment protections are weaker. Other goals drive ISDS inclusion as well. Starting with the US perspective – first, the US is seeking efficiency

for its MNCs with a single rule and the ease of one agreement, which would then replace the current ISDS agreements the US has with nine of the EU's member states; and, second, the US argues that legal protections for investors in the 28 member states are uneven (Vieuws, 2014). From the EU perspective, TTIP is an opportunity to drive uniformity in internal market rules, a long-established pattern of using international pressures as a lever to consolidate the single market.

Within months of the start of TTIP negotiations, however, opposition from Europe's center left parties began to emerge. The opposition in Germany, in particular, could not be ignored. The leader of Germany's Social Democrats wrote a letter to Karel De Gucht warning that Germany might not agree to a TTIP Agreement should an ISDS chapter be included (Pardo, 2014, p. 4). Opposition in the EU to an ISDS chapter in TTIP became so intense that the Commission postponed negotiations on the ISDS chapter in order to carry out an online public consultation, which took place between March 27 and July 13, 2014 and returned 149,399 contributions, some running into hundreds of pages (European Commission, 2014a; A. Gardner, 2015). But interestingly, the Commission's analysis of responses revealed that 97% (120,000) of Europeans who responded to the public consultation were mobilized by eight NGOs opposed to inclusion of ISDS in the TTIP and 70,000 of the responses were "identical or very similar" in their answers to the 13 questions the Commission posed in its public consultation, with another 50,000 responses submitted by just one NGO (A. Gardner, 2015). This prompted a senior US official to comment, "In the US, NGOs publish their finances, but in Europe, we don't really know. We need to understand better; everybody should understand who is behind the NGOs" (quoted in A. Gardner, 2015).

EU policymakers were taken by surprise by the depth of opposition to the ISDS, and this would be understandable given that the EU and all but one of the 28 member states is party to agreements with ISDS (European Commission, 2013b, p. 1) and EU investors have been involved in 53 percent of ISDS cases (Pardo, 2014, p. 1).

Driving the European opposition to the ISDS have been several high profile cases in recent years: the Swedish Energy Company Vattenfall case in Germany challenging that country's law to phase out nuclear power plants, the Philip Morris case in Australia, brought under the Australia-Hong Kong ISDS agreement, and Lone Pine Resources challenging Quebec's moratorium on hydraulic fracturing.

The European public perceptions—whether true or not, fair or not, are quite immaterial—are driving opposition to ISDS. Europeans think Americans are more litigious than Europeans (a perception of American legal culture that much of the world shares), and, that an ISDS chapter in the TTIP Agreement would expose EU member states (and European taxpayers) to multiple lawsuits. Driving European opposition is the fear that US corporations will sue EU member states that pass laws to protect consumers and workers after the ISDS is in effect, on the grounds that such regulations reduce company profits.

The Greens, naturally, opposed the ISDS (one of the items prompting the Greens to leak the Council's negotiating mandate in March 2014). Indeed, “minutes” after the European Commission issues its analysis of the public consultation a spokesman for the EP’s Green Group declared that the Commission was “‘trying to fob off public concerns’ and was showing a ‘total lack of respect for the public and civil society and their concerns’” (A. Gardner, 2015).

But especially troublingly for EU negotiators has been the EP's S&D group's announcement (whose votes are needed for passage of the TTIP) that it will oppose the introduction of an ISDS in the TTIP negotiations on the grounds that ISDS "would mean opening the door for big corporations to enforce their interests against EU legislation. This would deprive states of crucial policy space in important fields such as health or environment" (Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, 2014).

Eliminating ISDS from the TTIP negotiating mandate is no small matter. As Anthony Gardner (2015) points out:

The support of a qualified majority of EU member states – 15 member states, representing 65% of the EU's population – would be needed for any change to the mandate given to the European Commission, which stipulates that an ISDS system should be "without prejudice to the right of the EU and the member states to adopt and enforce...measures necessary to pursue legitimate public policy objectives.

As a result of significant opposition to the ISDS among many MEPs, the Commission has suggested that it can be reformed to satisfy the concerns of its opponents. The Commission has recommended, for example, that arbitrators be selected by both disputing parties, and, if the parties cannot agree, arbitrators would be appointed from lists established by parties to the agreement. The ISDS chapter would also include a "far-reaching" code of conduct. Furthermore, litigation costs could be borne by the losing party (diminishing the incentive for lawyers to file frivolous cases) (European Commission, 2013b, p. 4).

How does the dispute about inclusion of the ISDS inform our understanding of the democratic deficit in the EU? On an issue as esoteric as the ISDS, one would hardly expect widespread interest among the average European voter. However, what should be noted is the extent to which an EU party group (particularly the Greens) and NGOs worked together to force a showdown over the ISDS, which not only included an unprecedented public consultation but a suspension in negotiations of this chapter. This case does seem to suggest that a coalition of the Left and the Greens (admittedly, sometimes one and the same) have been able to influence the TTIP negotiations. And, interestingly, the US Greens and their partners (e.g. consumer and citizen action groups) – while, equally opposed to the TTIP – are most notable for their inability to get any mainstream traction on ISDS.

Transparency, Trust, and Democracy

European Parliament and US Congress

Both the EP and the US Congress must approve the TTIP Agreement. The role of the EP in international negotiations is a relatively new power conferred on the EP in the Lisbon Treaty. Indeed, the TTIP is the EP's first big test of its power as partners and brokers of an agreement that promises to bring major changes in the way goods and services are regulated and the economic life of its citizens – in other words, the “bread and butter” of legislative politics.

The current political configuration, reproduced in Table 1, will be in effect when the TTIP Agreement is presented for “consent” to the EP. Protest parties, naturally, matter in the EP and not in the US Congress, especially if large numbers of the center-left S & D group vote against the TTIP Agreement.

Table 1: Political Groups in the EP

Political Group	Seats	Ideology	Type	TTIP Position
European People's Party (EPP)	221	Center Right	Mainstream	Pro - support ambitious agenda.
Progressive Alliance of Socialists & Democrats (S&D)	191	Center Left	Mainstream	Conditional support -concern over SPS, ISDS, GIs
European Conservatives and Reformists (ECR)	70	Center Right	Mainstream	Pro -support ambitious agenda.
Alliance of Liberals and Democrats for Europe (ALDE)	67	Center/Center Left	Mainstream	Pro, but data privacy a special concern for European liberals.
Non-attached Members (NI)	52			
European United Left/Nordic Greens (GUE/NGL)	52	Far Left	Protest	Con
The Greens/European Free Alliance (Greens/EFA)	50		Protest	Con
Europe of Freedom and Direct Democracy (EFDD)	48	Far Right	Protest	Con
Total MEPs	751			
Total Needed to Pass the TTIP Agreement	376			

Sources: (Alliance of Liberals and Democrats for Europe Group, 2013; European Parliament, 2014)

In term of political groups, the center right European People's Party (EPP) and European Conservative and Reformists (ECR) groups are the TTIP's stronger supporters in the EP. However, looking ahead to the EP's vote, the Progressive Alliance of Socialists and Democrats' (S&D) support will be needed, and possibly the Alliance of Liberals and Democrats for Europe (ALDE) group as well to win 376 of the 751 available votes. "Protest parties" oppose the TTIP. (Fueling some concern over the eventual fate of the

TTIP in the EP is that approximately 25 percent of MEPs come from national “protest parties.”)

But given the Commission’s constant taking of the temperature of the S&D group, it is unlikely that a TTIP Agreement would be signed that does not satisfy the concern of the majority of the S&D. Furthermore, while the EP groups generally tend to vote along ideological lines, member state does matter. Several member states are predicted to benefit considerably from the TTIP, including two countries with a large number of MEPS - Italy and the UK.

The American political climate indicates that the TTIP will not necessarily benefit from deep bipartisan support. The first clue to difficulty for the TTIP is that the Congress had failed to act on President Obama’s request for TPA (fast-track authority) to negotiate both the TTIP and the TransPacific agreements (Hughes, 2014). US Senate Democrats – including the (then) Senate Majority Leader, Harry Reid – indicated they would not give the president this authority prior to the mid-term elections (November 2014) in an effort to keep from alienating its political base. (In January 2014, 12 of the more progressive US senators wrote a letter to the Harry Reid opposing renewal of the TPA for the TPP and the TTIP – neither a groundswell of Democratic opposition - all are Democrats with the exception of Socialist Bernie Sanders of Vermont- nor enough to derail renewal of the TPA.) As a greater percentage of Republicans turn out to vote, especially in mid-term elections, the Democratic leadership had to be especially cautious in upsetting its base (which could jeopardize turnout). The political base of Democrats – environmentalists, consumer protection advocates, and labor unions (which are suspicious of trade pacts, see more on this point, below) – are able to energize their members to vote in mid-term

elections. Therefore, with Democrats fighting to retain control of the Senate in the 2014 elections (a battle they lost), it was not a fortuitous time for the Obama Administration to request renewal of fast-track authority.

Republicans, on the other hand, support fast track authority for the US President because the wishes of the corporate lobbies trump party politics. (But Tea Party groups – the populist wing of the Republican Party – oppose fast-track as well, somewhat complicating the issue for Republicans.) Nevertheless, at the time of this writing with TPP nearing completion and the TTIP negotiations expected to be mainly completed by the end of 2015, Congress is expected to begin debating TPA (Ikenson, 2015).

What emerges as interesting from a comparative perspective is the similar nature of involvement on the part of the EP and the US Congress and particularly the opportunity to observe if identical voting rules (consent and TPA) produces similar behavior among congresspersons and MEPs. The Lisbon Treaty's conferral of power to the EP in this area, it might be cautiously advanced at this point, has gone some way toward reducing the EU's democratic deficit by empowering the EP in vote up or down on trade agreements.

But this analysis also suggests that electoral systems matter. MEPs are elected through proportional representation, making legislative body managed through coalitional politics. Congress, especially the House of Representatives, is organized as a body in which two sides constantly maneuver for advantage over the other in a partisan environment contested by two political parties. The result is that especially with well-publicized initiatives – such as the TTIP – party control matters a great deal.

Public stakeholders, civil society organizations

Public debate and stakeholder involvement has clearly influenced the nature and scope of the TTIP negotiations in many respects – policy exclusions (American consumers and the exportation of natural gas; the audiovisual industry in Europe; the American Left opposing the re-opening of Dodd-Frank), the TTIP chapters dealing with market access (tariff rates, public procurement), regulatory measures (NTBs, SPS measures), and rules (ISDS, geographical indications).

Civil society organizations are formally represented in the EU's TTIP Advisory Group, which is comprised of individuals representing trade unions (ETUC, T & E, Industriall European Trade Union), consumer organizations (BEUC), trade associations (agriculture, automobile, chemicals, food & beverage, financial services, services, Association of German Chambers of Commerce, Business Europe), environmental (European Environmental Bureau), health organizations, as well as independent experts (European Commission, 2014b). The group meets regularly (typically monthly during TTIP negotiations), discussing relevant TTIP chapters (European Commission, 2014c). Likewise, the US has been engaging in extensive consultation prior to and during TTIP negotiations, including fora established during TTIP rounds and the extensive pre-existing advisory groups associated with the USTR (Office of the United States Trade Representative, 2014a, 2014b).

European NGOs opposing the TTIP do so on several grounds – lack of transparency in the actual TTIP negotiations, a perception that the US has lower consumer protection for data privacy, concerns over losing what is thought to be higher environmental, health, and safety protections in Europe, and that the Agreement will

open up Europe to America's lower labor standards. In general, an apt description of the sentiment among opponents of the TTIP in both Europe and the US is that the TTIP is “a new bill of rights for multinational corporations” (Hilary, 2014) and that MNCs have “captured the TTIP talks” (The Greens-European Free Alliance of the European Parliament, 2014). There is also an element of being “pushed around” by the US. The EU’s ombudsman comments seem to hint at such a sentiment: “I am aware that the Commission at times needs to talk to the US confidentially to be able to negotiate effectively. However, US resistance to publishing certain TTIP documents is not in itself sufficient to keep them from the European public” (quoted in Crisp, 2015).

While American opposition groups mirror those in Europe, at least three points explain their weaker ability to mobilize the public. First, the NSA spying scandal was a direct affront to Europeans, while many Americans took it as “business as usual” for a superpower. For them, Edward Snowden was a misguided whistleblower, at best, and a traitor, at worst (the latter view reinforced by his “defection” to Russia). Second, Americans do not have the same level of concern over data privacy as do Europeans. Even in light of multiple credit card hacking scandals, Americans are not any less inclined to use their credit cards, addicted as they are to not only the credit and convenience, but the points, discounts, and cash back offers. Third, Americans have only one target on which they need to focus – Congress, whereas the anti-TTIP forces in the EU need to rally support in all 28 member states as well as put pressure on the EP. This need to rely on politicians to use their bully pulpit has empowered MEPs in the TTIP debate.

A fine line – secret negotiations and the public’s right to know

The EU and the US have attempted to respond to the transparency complaint in several ways. First, within days of a round's closing, the EU "draws up a report of around 60 pages for the EU's member states and EP, which the member states dissect and discuss in twice per week meetings" (Andrew Gardner, 2014b). These reports are restricted, but have been the subject of much speculation and complaints by opponents that the negotiations are not properly transparent. The typical pattern is to "move from a position paper (setting out the EU's aims in a particular area), via an outline of a chapter, setting out the EU's proposed structure and ideas for language, to textual proposals and a consolidated text, which includes both sides' positions in legal language" (European Commission, 2014c, p. 2). All papers the Commission sends to the EU have been discussed with member states and shared with the EP. On the other hand, the US does "not allow its papers to be made available to member states or the EP, as current practice in the US is not to share negotiating partners' documents with Congress or its own advisors" (European Commission, 2014c, p. 2). For the US part, public officials have been meeting with member state officials to try to allay some of the public's concerns (Andrew Gardner, 2014a). Furthermore, the chief negotiators engage in a post-round joint press conference, which is posted to EU and US official websites. There is also a wealth of information available on these websites. So while the intricate details are unknown to the public, the subjects being discussed are in the public record.

Ultimately, however, the EU's ombudsman, Emily O'Reilly, demanded the Commission publish its negotiating documents – the first of which were made available to the public in January 2015 (Crisp, 2015; European Commission, 2015). Notably, the

US is not publishing its negotiating documents and have faced no meaningful pressure to do so.

Naturally, the necessity of secrecy in diplomacy has long been debated – it served as the basis for deTocqueville’s assumption that because secrecy is counter to democracy, only authoritarian governments could be skillful at international diplomacy. Yet when it comes to international negotiations, the majority of the electorate tends to tolerate secrecy. Understanding, perhaps, that “public” bargaining can prevent a country’s leaders from obtaining policy objectives deemed to be in the national interest – regardless of whether these interests are primarily of an economic or security nature. Indeed, this point is demonstrated by Leventoğlu and Tarar (2005, p. 420) in their use of game theory to study the negotiation of trade agreements or treaties:

...when the two negotiators face fairly similar costs for violating a public commitment, a prisoner’s dilemma is created in which both sides make high public demands which cannot be satisfied, and both negotiators would be better off if they could commit to not making public demands. However, making a public demand is a dominant strategy for each negotiator, and this leads to a suboptimal outcome. Escaping this prisoner’s dilemma provides a rationale for secret negotiations (Leventoğlu & Tarar, 2005, p. 419).

In the meantime, the American and European Left claim that regardless of any agreement produced, massive protests will ensure. The basis of this “warning” is extrapolated from the mass protests against the US in free trade negotiations with Ecuador, South Korea, and Thailand (Janusch, 2013); however, the parallel is likely much overblown and should be tempered by the recognition that unlike in the EU and the US, civil society in those countries has limited access to the levers of power.

The transparency issue is also a proxy for “trust.” Timing is everything – and a breach of trust between the EU and the US with respect to the NSA spying scandal,

emerged just as the TTIP talks were getting underway and as Anthony Gardner, the US ambassador to Brussels noted, “trust - or rather the lack of it - is ‘the elephant in the room, particularly when it comes to perceptions about privacy of data’” (Fox, 2014).

Conclusion

If the EP is expected to consent to the TTIP agreement, then the EP must be consulted, kept apprised, and have continuous and meaningful input into the negotiation process. The result of this new power is that the EP’s position in the institutional structure with respect to trade negotiation is remarkably similar to that of the US Congress under TPA. Both the US executive branch (the Office of the US Trade Representative) and the EU’s executive (the European Commission) are heavily invested in keeping their respective legislatures informed and involved in the TTIP progress. And in this respect, it seems that the only directly-elected EU institution has been very engaged in the process, even if this engagement sometimes seems (on the surface) more confrontational than US congressional activity .

In conclusion, this preliminary analysis suggests that the new powers conferred by the Lisbon Treaty to the EP are positively addressing the EU’s democratic deficit in a policy area – economic growth –affecting all Europeans.

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