Preface
The Transatlantic Trade and Investment Partnership: Making the Right Choices?

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The present book, a rich set of contributions emanating from the excellent conference « Vers un partenariat transatlantique renforcé: une nouvelle donne dans un monde en mutation? » organized at the Université Nice Sophia Antipolis by the University’s Jean Monnet Centre of Excellence and Centre d’études du droit des organisations européennes (CEDORE) on 3-4 April 2014, could not come at a more timely moment. Transatlantic relations seem to be, more than ever, at a turning point. And this turning point takes place against the background of a quickly changing and turbulent international geopolitical landscape.  

The United States (US) and the European Union (EU) are realizing ever more forcefully that, if they want to make a difference in global governance, they need to closely work together. As was already spelled out in the 2003 European Security Strategy, the EU considers the transatlantic partnership as “irreplaceable”: “Acting together, the European Union and the United States can be a formidable force for good in the world” and therefore the EU is searching for “an effective and balanced partnership with the USA”.  

Over the past decade, one has seen this partnership developing, broadening up and deepening in many areas, from cooperation on cyber security, the digital economy, the environment, the chapter of Laurent Estachy in this volume.


See the chapter of Vincent Jouber in this volume.

3 See the chapter of Mai-Anh Ngo and Cécile Zakine in this volume.
non-proliferation of weapons of mass destruction,\textsuperscript{6} personal data,\textsuperscript{7} to name just a few.\textsuperscript{8}

But is the transatlantic partnership evolving in a balanced manner?

At the time this book goes to press, all eyes are on the fate of the Transatlantic Trade and Investment Partnership (TTIP) which is being negotiated between the US and the EU. In this foreword I would like to develop, as an “amuse-gueule” to this precious volume, a number of reflections from a European point of view which point to the need for a stronger “bottom-up” support of the TTIP specifically, and the transatlantic partnership more generally.

Rarely has a treaty that is still being negotiated aroused such a commotion, both within the political and intellectual elites, and in society at large. The TTIP has arduous advocates and equally passionate detractors. A few examples. In December 2013, at a conference in Ghent,\textsuperscript{9} I moderated a panel where Professor André Sapir, for many years a key policy adviser to the President of the European Commission, decried TTIP as a fundamentally flawed attempt by 20\textsuperscript{th} century powers to continue to project their power into the 21\textsuperscript{st} century, and as “the beginning of the end of the multilateral trading system”.\textsuperscript{10} More recently, in April 2015, I chaired a roundtable at the European Economic and Social Committee in Brussels\textsuperscript{11} where a former Head of Cabinet of EU Trade Commissioner Pascal Lamy, Mr. Pierre Defraigne, condemned TTIP as “an impending diplomatic fiasco”, “a major faux pas” and “an FTA gone too far”.\textsuperscript{12}

These are heavyweights among Europe’s intellectual elites who have made major policy contributions themselves to the European integration project. How can it be that they revile TTIP? I have recently come across an interesting hypothesis that might help us to understand their hostility. It is said, especially within the European Commission and with many of its retired officials, that there is the fear of undoing their life-long project: the EU’s internal

\textsuperscript{6} See the chapter of Anne-Sophie Millet-Devalle in this volume.
\textsuperscript{7} See the chapter of Constance Chevallier-Govers in this volume.
\textsuperscript{8} See the overview of the various areas of cooperation in the latest EU-US, Summit Joint Statement, Brussels, 26 March 2014, doc. 8228/14.
\textsuperscript{11} The roundtable was the high-level closing segment of a two-day international conference, \textit{The EU and Emerging Powers: Cooperation and Competition in Knowledge and Technology}. See http://www.usaintlouis.be/iee/1735.html.

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market. To be sure, this is not about the “negative” integration side of the internal market, i.e. the breaking down of barriers for the free movement of goods, persons, services and capital. The concern is rather that TTIP may destroy the achievements (in EU parlour: “acquis”) of “positive” integration in Europe, i.e. the normative preferences which have been carefully developed and crystallized in EU law through many years of harmonization and convergence of policies, from consumer and public health to a vision on public services and social protection.

It is here where, almost as strange bedfellows, those members of Europe’s intellectual elites are joined by what has increasingly become a very broad civil society movement and mobilization against TTIP. It started off in 2014 with skirmishes regarding the proposed Investor-State Dispute Settlement (“ISDS”), dubbed as a “corporate system of injustice”. But the tide has been swelling and it almost appears to have taken the size of a tsunami by now. At the time this book goes to press, there are active platforms against TTIP in more than 20 countries. Trade union federations are mobilizing against it in nine EU Member States, including the UK, France, Germany, Italy and Spain. Many local municipalities are declaring themselves TTIP-free zones. There was even a European Citizen’s Initiative lodged, “STOP TTIP”, inviting the Commission “to recommend to the Council to repeal the negotiating mandate for the Transatlantic Trade and Investment Partnership (TTIP) and not to conclude the Comprehensive Economic and Trade Agreement (CETA).” The Commission rejected the initiative, and right now a judicial procedure is pending before the European Court. There have been demonstrations in many cities in October 2014, in Brussels on 19 December 2014, and across Europe and the world in a “global day of action” on 18 April 2015.

As always, when important policy choices need to be made, one has to consider all points of view, and one has to formulate answers to peoples’ concerns. Maybe it is already too late for TTIP to win the “hearts and minds” of people in Europe. The publication of the negotiation directives by the Council on 9 October 2014 – by itself a highly exceptional decision, especially pending the negotiations – has not calmed down the fears. Neither has the disclosure of “negotiating documents on almost all topics and detailed, straightforward explanations” on the Commission’s website, making, in the words of EU Trade Commissioner Cecilia Malmström, “the TTIP negotiations the most transparent

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bilateral trade negotiations ever”. 17 European Ombudsman Emily O’Reilly has publicly castigated the Commission for blocking access to the consolidated draft text of the agreement and for failing to publish a full list of all public and non-public documents relating to the negotiations. 18 The Commission does not seem able to turn the tide, even with flashy brochures such as its March 2015 folder “The top 10 myths about TTIP. Separating fact from fiction”. 19

Let me address some of the criticism here and try to understand how policymakers have engaged with it, in order for us to better grasp whether concluding TTIP is the right thing to do.

One of the first policy-based arguments against TTIP is that it runs against multilateralism, and in particular the multilateral trading system as embodied by the World Trade Organization (WTO). This goes hand in hand with the fear of a backlash in the relations with other emerging powers, in particular China. Pierre Defraigne, for instance, fears that “the effective substitution of multilateral negotiations at the WTO level by a Euro-American regulatory block setting international standards” will create pressure for China to abide by them and will, in combination with the Trans-Pacific Partnership (TPP), “appear to Beijing no less than a containment strategy”. 20 Now, everybody knows how deeply problematic the state of the Doha Round is and that global multilateral trade negotiations are in a seemingly incurable impasse. Probably for that reason, at the roundtable mentioned above, Pierre Defraigne submitted that he is rather in favour of “open plurilateralism” as a pragmatic proxy for multilateralism. 21 But are we certain that this could work? It has been suggested that in the long run, agreements like TTIP could de facto function that way, provided they contain language and mechanisms that make the inclusion of non-initial parties possible.

It is interesting to read how EU Trade Commissioner Cecilia Malmström addresses this criticism in her blog post of 17 April 2015:

“The rise of China, India and other emerging economies is good news for development. But it means that Europe and the US on their own will be in a weaker position when it comes to setting the trade rules of the future. TTIP changes the game. Because it means that Europe and America will be closer allies when we talk

20 P. Defraigne, supra, note 2, p. 3.
to the rest of the world. The choice is simple – either we work together to shape
globalisation, or we allow others to do it for us. We have to choose whether we are
ready to stand up for European values in the world, or stand still and let others do
the leading in the 21st century”.

So we rely on the Americans to “stand up for European values in the world” –
an interesting contrast with the thoughts of Mr. Defraigne. The blog of Mrs.
Malmström makes surprisingly – one would say, almost naïvely – clear how
TTIP is, in the eyes of the EU’s policymakers in charge, a way of preserving
“normative dominance” in the world. It proves the validity of André Sapir’s con-
cerns. This makes the expectations of the agreement, of course, only higher: will
the TTIP be able to effectively deliver on that?

However, the idea that TTIP would help us to “stand up for European val-
cues” touches precisely on the second main wave of criticism. Both civil soci-
ety and former Commission officials seem to unite in their concern that TTIP
may result in an unraveling of a number of existing EU laws and normative
choices. One of the examples given are the negotiations about pesticides. US
food producers are said to have chosen to downgrade the EU’s 2009 rules on the
control of pesticides through TTIP negotiations23. The EU’s rules are based on
the precautionary principle in order to protect human health and the environ-
ment. In the words of Pierre Defraigne, the choice for this principle reflects the
Europeans’ preference for giving “priority to the law and thus to prevent risk,
whereas America prefers a ‘litigation after damage’ approach”.24

This criticism begs for a deepening of the debate. It is true that in the EU we
have painstakingly constructed a hard-fought “acquis” of Europe-wide regula-
tions that reflect certain normative preferences. What effect will TTIP have on
this? Commissioner Malmström, in the aforementioned blog post, is adamant
that Europeans are not giving up anything:

“TTIP can help us deliver better public services like health, education or
water, by lowering the costs of the goods and services that governments have
to buy – like uniforms, furniture or medicine. TTIP will not force governments
to open public services to any new competition from private providers, it won’t
force the government to privatise any public service and it won’t limit govern-
ments’ freedom to change its mind about public services in the future.

TTIP is also about reinforcing beneficial regulatory cooperation and cutting over-
lapping, unnecessary red tape. We are not discussing cooperation where EU and
US approaches are just too different. That’s why TTIP will not change our regime

22 Supra, note 7.
Jobs, an End to Democracy, February 2015, downloadable on www.waronwant.org, p. 33.
24 Supra, note 2, p. 3.
for genetically modified food or on hormone treated beef, to name two examples. And no product will be allowed on Europe’s market that does not comply with our high EU standards.”

That sounds reassuring, but what the Commissioner does not refer to, is the process of regulatory convergence that TTIP is likely to set in motion. A central part of TTIP – the horizontal chapter on regulatory coherence – will engender a new form of intensive transatlantic regulatory cooperation enabling regulators on both sides of the Atlantic to engage in dialogues with a view to ensure compatible regulatory outcomes. As observed by Alberto Alemanno, this “may result in regulatory processes that gradually appear detached from the policy preferences of the regulated, or from the agreed policy choice, in the case of existing regulations”. 25

This brings us to a third fundamental critique of TTIP: the need to safeguard democratic oversight. On the website “TTIP2015.eu” produced by the Greens in the European Parliament, TTIP is presented – in a very accessible manner, through videos – as nothing less than “a threat to democracy”. Others have called TTIP “the biggest threat to democracy you have never heard of” 26 and even a “monstrous assault on democracy” by institutions “which have been captured by the corporations they are supposed to regulate”. 27 Others, like Ken Clark, have contradicted this passionately, arguing that “the TTIP is much more a deal for the small widget maker from the West Midlands than it is for the multinational corporate giant”, which “often has a vested interest in overly complex regulation”. 28 Whatever the merit of these two opposing arguments, when TTIP creates a forum for regulatory convergence processes, this raises issues of democratic accountability. From an EU point of view, it is clear that the European Parliament has to give its consent with the treaty. We have seen a number of instances after the entry into force of the Lisbon Treaty where the European Parliament has refused to do so (e.g. the SWIFT and ACTA cases). To the extent TTIP becomes a “living agreement” which generates new regulatory convergence dynamics, there will be a need to devise specific parliamentary scrutiny mechanisms. 29

29 See also A. ALEMANNO, supra, note 15, p. 57.