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„The Controversy surrounding the TTIP: A Comparative
Analysis of European and American FTAs “

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INTRODUCTION

In 2013, the European Commission and the United States Trade Representative started negotiations for a Transatlantic Trade and Investment Partnership (TTIP) or Transatlantic Free Trade Agreement (TAFTA) between their respective economies, initiating what could become the largest commercial agreement in the present world. In the words of former Trade Commissioner of the European Union, Karel De Gucht: “*This deal will set the standard – not only for our future bilateral trade and investment but also for the development of global rules*”.¹

Though these negotiations are not made public, their content is already widely controversial in several European Union (EU) Member States. The lists of pros and contras, published by civil movement organizations or even governmental agencies, are long and essentially boil down to the following. Proponents claim the treaty would bring substantial economic growth for both partners, bringing down those barriers that their membership to the World Trade Organization (WTO) did not (could not) erase.² Critics, however, point out that the treaty would give tremendous powers to multinational corporate entities and to a certain extent hollow out the sovereignty of the Member States.

The aim of this master thesis is to analyse these controversial negotiations by studying those preceding the conclusion of earlier free trade agreements (FTAs), concluded by both the EU and the United States of America (U.S.), and the subsequent impact of these treaties on the economies of their parties. By taking a closer look at other FTAs and the pattern their negotiations followed, I believe we can get a better overview of the reasons for the protest.

The North Atlantic Free Trade Agreement (the NAFTA), for example, has had different effects for its three members: the manifestation of which can be seen in the

¹ K. DE GUCHT, “Transatlantic Trade and Investment Partnership: Opening free trade negotiations with the United States”, Document SPEECH/13/147, 21 February 2013, available at http://europa.eu/rapid/press-release_SPEECH-13-147_en.pdf (consulted on 24 December 2014).

² F. BONCIU, “Transatlantic Economic Relations and the Prospects of a New Partnership”, *Romanian Journal of European Affairs*, Vol. 13, No. 3, September 2013, 26-29. For an economic analysis, see the independent report of the Centre for Economic Policy Research: CEPR, “Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment”, Final Report commissioned by the European Commission, March 2013.

debate concerning the post-NAFTA Mexican economy.³ This treaty encountered similar criticism during its negotiations stage, such as misrepresentation of the potential impact of the agreement on the economic growth. Whether the impact on the Mexican economy today is to be considered positive or negative, is far from unanimous. Other interesting treaties include both the EU-South Korea and U.S.-South Korea FTAs, which entered into force respectively in July 2011 and March 2012, and considered by the European Commission as the first one of a ‘new generation’ of FTAs.⁴ These agreements should bring down more barriers to trade than previous agreements, bringing liberalization a stage further. This paper will try to answer the question if a link can be made between these FTAs with the proposed TTIP and what lessons could be learnt from this.⁵

Concerning the structure of the thesis, I will first of all briefly focus on the context of the TTIP and how the idea of a transatlantic partnership came about. The idea is certainly not a new one and several attempts have already been made to create such an alliance, but never was there a greater chance of succeeding in this endeavour than now, according to observers.⁶ The creation of a free trade area between the EU and the U.S. fits into the trend of gradual regionalisation of trade liberalisation, a process running parallel with the global trade forum of the WTO. These concepts are important to understand the implications of the TTIP for global trade and for the WTO system.

From the beginning however, numerous civil movement organizations have brought the issue to the attention of a broad audience, especially in Europe. But what is it they precisely fear? What is the controversy about? Why did the negotiations of the TTIP provoke such an outcry of the public opinion in most large European Member States, and what is the situation in the U.S.? In trying to answer these questions, I will compare situations and opinions from both sides of the Atlantic Ocean.

³ J. FOX, L. HAIGHT (eds.), *Subsidizing Inequality: Mexican Corn Policy since the NAFTA*, Woodrow Wilson International Center for Scholars, 2010, available at <http://www.wilsoncenter.org/publication-series/economic-competitiveness> (consulted on 24 December 2014); For a different point of view see B. RILEY, D. YU, “The Truth about the NAFTA: Lessons for Trade Negotiations”, Issue Brief No. 4236, The Heritage Foundation, 5 June 2014, available at <http://www.heritage.org/research/reports/2014/06/the-truth-about-nafta-lessons-for-trade-negotiations> (consulted on 24 December 2014).

⁴ See the website of the European Commission: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>.

⁵ For an article in this direction, see J. J. SCHOTT, C. CIMINO, “Crafting a Transatlantic Trade and Investment Partnership: What Can Be Done”, Policy Brief 13-8, Peterson Institute for International Economics, March 2013, available at <http://www.iie.com/publications/pb/pb13-8.pdf> (consulted on 30 December 2014).

⁶ F. BONCIU, “Transatlantic Economic Relations and the Prospects of a New Partnership”, 22-26.

That being said, the challenges faced by the negotiators of the FTA are important: sensitive issues include an investor-state dispute settlement system, regulations concerning goods and services, and the right to privacy.⁷ Many of these issues are viewed as ‘regulatory barriers’ and it is the goal of the TTIP to minimise these, leading to enhanced integration between both parties. This section will discuss the major concerns with the content of the proposed TTIP texts, before concentrating more in depth on issues that are not related to content. These include transparency of the negotiations and the process of adoption and ratification by both the EU and the U.S., two subjects that are also presenting some difficulties for the finalisation of the TTIP.

The next part of the thesis will juxtapose the context of the TTIP and the context in which other major recent FTAs were (or are being) negotiated: focus will lie on the NAFTA, the CETA and the South-Korea FTAs. As for all large-scale trade negotiations, each of these agreements faced criticism: the question is whether it was found to be justified or not, and to which extent this is applicable to the TTIP. Throughout the paper, I also intend to point out the difference in the approach adopted by the EU and the U.S. when negotiating such large FTAs, and what their respective focus points are, in an effort to explain both standpoints in negotiating the TTIP.

⁷ B. STOKES, “Challenges to the EU-U.S. free trade deal”, Chatham House, 6 August 2013, available at <https://www.chathamhouse.org/media/comment/view/193841#> (consulted on 30 December 2014).

I. A TRANSATLANTIC TRADE PARTNERSHIP

1.1. History of an idea

As previously mentioned, the idea of a transatlantic trade partnership has not emerged out of nowhere in the last couple of years. On the contrary, the Western world has sought on several occasions to consolidate this plan of creating the largest free trade area in the world. Hopes are that such a market would bring significant prosperity to its actors and give back clear economic leadership to the EU and the U.S.⁸

This agreement fits into the global trend of “regionalism”, i.e. the tendency for countries to have recourse to bilateral trade agreements instead of the multilateral trade negotiations initiated by the WTO. We will therefore start by briefly putting the history of the transatlantic partnership idea in the context of trade liberalization.

1.1.1. Regionalism vs. multilateralism

In the present economic world, international trade liberalization happens in two ways. Either the Members of the WTO participate in multilateral negotiations rounds, which ideally result in an agreement all Members adhere to. The most prominent achievements of this method are the *General Agreement on Tariffs and Trade* (GATT), the *General Agreements on Trade in Services* (GATS) and the *Trade-Related Aspects of Intellectual Property Rights* agreement (TRIPs).⁹

In some cases, however, states do not find a satisfactory solution to trade-related problems in the long and strenuous multilateral negotiations. They then tend to turn to the second way, which happens through concluding regional or bilateral free trade

⁸ CEPR, “Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment”, Final Report commissioned by the European Commission, March 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf (consulted on 8 July 2015).

⁹ All three were signed at the outcome of the Uruguay Round of Multilateral Trade Negotiations, which lasted from 1986 to 1994. For an account of these negotiations, see E. PREEG, “The Uruguay Round Negotiations and the Creation of the WTO”, in A. NARLIKAR, M. DAUNTON, R.M. STERN (eds.), *The Oxford Handbook on the World Trade Organization*, Oxford University Press, New York, 2012, 122.

agreements (FTAs). This method is based on the principle of contractual freedom and is enshrined in articles XXIV of the GATT and V of the GATS themselves.¹⁰ Countries, whether they are members of the WTO or not, can engage in a bilateral agreement to regulate commerce issues solely between them, as long as this does not impose restrictions or higher duties on third parties.¹¹ These FTAs are also exempt from the Most-Favoured Nation principle upheld by the WTO.¹² The TTIP would be such an FTA.

FTAs have known a real surge in the last two decades, almost parallel to the growing and developing of the WTO. Reasons for this are multiple: bilateral trade agreements offer a more flexible and more efficient way to resolve immediate issues, on top of being a quicker negotiation method with only two parties. The agreement will be more adapted and modelled to the interests of both parties, than with a multitude of parties such as in the WTO. BONCIU even states that the recent Doha Round of Negotiations and its failure are one of the main reasons for the proliferation of FTAs.¹³

The question, however, is whether the growth of bilateral trade liberalization instruments has a detrimental effect on the multilateral mechanism. Do FTAs undermine the WTO, and if we apply this question to the present paper, does the TTIP? This issue will come back when we discuss the fears and hopes concerning the TTIP in Chapter 2.

1.1.2. Previous attempts at a transatlantic FTA

A first proposal of starting such negotiations came in 1995. This timing is telling, as it quickly followed on the implementation of the North-American Free Trade Agreement (the NAFTA) in 1994 and the Uruguay Round of Negotiations creating the WTO (from

¹⁰ Art. XXIV, par. 5 of the GATT states: “Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; (...)”. Similar wording is to be found in the GATS.

¹¹ Art. XXIV, par. 5 (b) of the GATT provides for this condition: “Provided that: (...) with respect to a free-trade area, or an interim agreement leading to the formation of a freetrade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be (...)”.

¹² See the above-mentioned articles and S. URATA, “Globalization and the Growth in Free Trade Agreements”, *Asia-Pacific Review*, Vol. 9, No. 1, 2002, 20.

¹³ F. BONCIU, M. MOLDOVEANU, “The Proliferation of Free Trade Agreements in the Post-Doha Round Period: the Position of the European Union”, *Procedia Economics and Finance*, Vol. 8, 2014, 100-105.

1986 until 1994). Both the EU and the U.S. sent representatives to Madrid in 1995 where they agreed on a New Transatlantic Agenda (NTA), followed in 1998 by the establishment of a Transatlantic Economic Partnership (TEP) in London to give substance to the NTA. However, the TEP did not prove to be very successful. Efforts to improve cooperation on trade-related aspects between the EU and the U.S. followed at a regular interval from then on, ranging from the issuance of guidelines and declarations, to the creation of a Transatlantic Economic Council (TEC) in 2007. All these attempts seemed insufficient still to produce an actual common policy and streamlining of goals.¹⁴

It became clear a more substantial approach was needed, which was initiated at a EU-U.S. Summit in 2011, establishing a “*High-Level Working Group to explore how to strengthen EU-U.S. trade ties*”.¹⁵ This subsequently resulted in talks at the G8 meeting of 2013 in Ireland, where European Commission President José Manuel Barroso issued a statement in which the relevant parties committed themselves to launching “*negotiations of a comprehensive Transatlantic Trade and Investment Partnership agreement*.”¹⁶ The President of the Commission recognizes the challenges posed by this endeavour, but also its necessity in the face of the stagnating economies on both sides of the Atlantic. Indeed, the economic crisis of 2008 hit both parties hard and a partnership of this scope would create a significant amount of jobs and reinvigorate the markets, without demanding great investments of the governments’ part.¹⁷

The first round of negotiations officially started in Washington DC, USA, in July 2013. Two years later, negotiations are still on going. The ninth round took place at the end of April 2015 in New York.

¹⁴ G. WORKMAN, J. SMITH, “Bridging the Transatlantic Economy: The Transatlantic Trade and Investment Partnership in Historical Perspective”, Atlantic Council, November 2013, available at http://www.atlanticcouncil.org/images/publications/2013_caplinBackgroundEssay-Workman-Smith.pdf (consulted on 10 July 2015), p. 5-6.

¹⁵ A list of statements and documents related to the initiation of the TTIP negotiations can be found in chronologic order on the website of the European Commission: http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds (consulted on 8 July 2015).

¹⁶ Statement by President Barroso on the EU-U.S. trade agreement with U.S. President Barack Obama, the President of the European Council Herman Van Rompuy and UK Prime Minister David Cameron, G8 Summit press conference/Lough Erne, 17 June 2013, available at http://europa.eu/rapid/press-release_SPEECH-13-544_en.htm (consulted on 8 July 2015).

¹⁷ On this argument, see *infra*, footnote 27.

1.2. Impact of a transatlantic trade partnership

As was briefly explained in the introduction, the debate surrounding this particular free trade agreement has been constantly growing since the announcement of the start of trade negotiations. This section will examine the envisioned impact of the partnership from the two different points of view of proponents and opponents to the TTIP.

1.2.1. According to proponents

The major benefit brought by a free trade area encompassing the two biggest economies in the world, is unsurprisingly economic. The EU and the U.S. are historically important trade partners and together account for almost half of world trade.¹⁸ This is also what the Centre for Economic Policy Research (CEPR) based in London concluded, when commissioned by the European Union to determine the economic growth an extensive transatlantic free trade agreement would generate.¹⁹ This independent study is now widely used by the European Union and the media as a reference, and its findings can be resumed as follows.

First of all, barriers to trade between both markets are already low when concerning the traditional tariffs (with an average of under three per cent) and quotas.²⁰ The most important barriers that need to be addressed are “*divergent or duplicative regulatory policies*”,²¹ which according to the CEPR would account for as much as eighty per cent of the total potential impact of the TTIP on the Gross Domestic Product (GDP) of the EU.²² Unfortunately and unlike tariff barriers, these regulatory barriers are often closely

¹⁸ According to the European Commission, the combined markets account for more than 40% of world trade (http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#economic-benefits (consulted on 10 July 2015)).

¹⁹ For more information about the organisation, see <http://www.cepr.org/about-cepr>.

²⁰ All statistics and numbers related to the EU-U.S. trade relations can be found on the website of the European Commission (<http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> (consulted on 10 July 2015)).

²¹ T. BOLLYKY, A. BRADFORD, “Getting to yes on Transatlantic Trade”, ForeignAffairs.com, 10 July 2013, available at <https://www.foreignaffairs.com/articles/united-states/2013-07-10/getting-yes-transatlantic-trade> (consulted on 10 July 2015).

²² If we analyse the macroeconomic results that the study of the CEPR yield, an agreement limited to reducing tariffs would increase the EU GDP by around 23 billion Euros, whereas an extensive agreement reducing both tariff and non-tariff barriers to trade would generate an increase of around 120 billion Euros. CEPR, “Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment”, p. 3, table “*Summary of Macroeconomic Effect*”. See also European Commission, “The Transatlantic Trade and

related to historical, political and cultural considerations. This makes them tricky and sensitive issues to deal with on such a large scale. For example, the regulatory restraints imposed on genetically modified organisms (GMOs) and their consumption are very different in both markets. This means a common ground must be found in order to facilitate the circulation of such goods. However, European Member States are traditionally less inclined to accept wide circulation of GMOs, especially in relation to their food. For some, this can be explained by the influence of “green” political parties, environmental NGOs and other civil movements, which have a louder voice in the EU than in the U.S., and who portray GMOs as risky and unhealthy.²³ I will illustrate this point more in depth in the second part, when discussing the controversy the TTIP has aroused.

The CEPR estimates that the GDP of the EU would increase with 119 billion Euros a year, and the GDP of the U.S. with 95 billion Euros a year. This means that on average, every household of four people in the EU would benefit from a long lasting increase of 545 Euros of disposable income per year, for households in the U.S. this number would be 655 Euros.²⁴ Not only the GDP of both parties to the TTIP would benefit: the study shows that the worldwide GDP would experience a 100 billion Euros increase, due to the further liberalisation of world trade.²⁵ This would also implicate that an important number of jobs would be created in the growing sectors.²⁶ Moreover, as the Commission points out, this economic boost can be achieved without further major investments. It is the “*cheapest stimulus package*” available to the EU to create a much needed new dynamic in its stagnating markets.²⁷

This brings us to a second major advantage of the partnership: it would not only be the most effective solution to counter the negative effects of the 2008 economic crisis, but

Investment Partnership: The Economic Analysis Explained”, September 2013, p. 6, available at http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf (consulted on 10 July 2015).

²³ S. BONNY, “Why are most Europeans opposed to GMOs? Factors explaining rejection in France and Europe”, *Electronic Journal of Biotechnology*, Vol. 6, No. 1, 15 April 2003, available at <http://www.ejbiotechnology.info/content/vol6/issue1/full/4/> (consulted on 10 July 2015).

²⁴ CEPR, “Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment”, p. 48, table 18.

²⁵ European Commission, “The Transatlantic Trade and Investment Partnership: The Economic Analysis Explained”, p. 2.

²⁶ *Ibid.*, p. 8.

²⁷ See the website of the European Commission, <http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/> (consulted on 10 July 2015).

also of the failure of the Doha Round of WTO talks.²⁸ As discussed above, the Doha Round of Multilateral Trade Negotiations have been going on for almost thirteen years now, with no real perspective on finalisation of an agreement. This means transatlantic trade talks have grinded to a halt, while business goes on as usual. The TTIP revives these talks (albeit limited to the EU and the U.S.), reopens the discussion and presents an opportunity to align transatlantic policies with transatlantic business. Once the TTIP is concluded, being more extensive than the WTO agreements, it might even pave the way for renewed trade talks and serve as a model agreement in adapting out-dated standards to new, more efficient ones.²⁹

1.2.2. According to opponents

Other countries, however, fear that a closer cooperation between the two biggest economies will entail a significant negative impact on trade relations between the TTIP parties and their respective trade partners. As BARYSH and HEISE point out, many critics of the TTIP therefore see a more “geopolitical” strategy than a purely economic one behind the agreement to bind the largest Western economies, or, in their words: “*Faced with the rise of emerging markets, the old West is pulling together one more time.*”³⁰ Without having a seat at the negotiating table, other economic powers would have to comply with new standards decided by the transatlantic partners. Moreover, in those fields where the EU and the U.S. cannot come to an agreement on the same standards, the TTIP endeavours to establish a system of mutual recognition, meaning that it is sufficient for European goods to comply with European standards to be exported to the U.S. and vice versa. This would supposedly put other countries at a disadvantage, as they would still need to comply with all standards applicable in the EU and with those standards applicable in the U.S., and could cost businesses some valuable time.

²⁸ K. BARYSCH, M. HEISE, “Will TTIP Harm the Global Trading System?”, The Whitney and Betty MacMillan Center for International and Area Studies at Yale, January 2014, available at YaleGlobal Online, <http://yaleglobal.yale.edu/content/will-ttip-harm-global-trading-system> (consulted on 20 July 2015).

²⁹ B. HOEKMAN, “The WTO won’t be killed by all these regional trade deals”, opinion piece for Europe’s World, 15 June 2014, available at <http://europesworld.org/2014/06/15/why-the-wto-wont-be-killed-by-all-these-regional-trade-deals/#.VaUSbcYeZUQ> (consulted on 10 July 2015). Bernard Hoekman is Professor in the Robert Schuman Centre at the European University Institute and former head of the World Bank’s international trade department.

³⁰ K. BARYSCH, M. HEISE, “Will TTIP Harm the Global Trading System?”

There are also other ways in which third countries believe they could be adversely affected by the TTIP. This case is especially true for developing countries or Low Income Countries (LIC), as a report by CARIS, of the University of Sussex for the Department for International Development, states.³¹ The report analyses the potential impact of economic integration that goes further than the WTO standards already in place.³² It comes to the conclusion that in certain sectors, trade in goods from those LICs might well drop heavily as a result of lower barriers. This is due to the following: LICs typically specialise in the production or export of particular goods, such as clothing, textiles and raw materials, sectors in which the EU and the U.S. are not particularly each other's close trading partner. In the current multilateral trade system, tariffs for the import of such goods in the EU are on average lower than twelve per cent. At the same time, the U.S. applies tariffs that often exceed fifteen per cent for the same goods.³³ If these tariffs barriers were to be aligned and lowered in the TTIP, the developing countries fear they would potentially lose a significant part of the market to inter-EU-U.S. trade. Moreover, many LICs are specialised in and depend heavily upon the production of goods regulated by the Sanitary and Phytosanitary Agreement (SPS Agreement)³⁴ and the Technical Barriers to Trade Agreement (TBT Agreement),³⁵ again two areas regulated within the WTO. If different standards were to be decided upon in the TTIP, developing countries believe they would face difficulties in trying to compete with the TTIP parties.

This has lead critics to voice out their fear that such a transatlantic partnership could harm the multilateral trade system the WTO negotiations put in place. On this note, I

³¹ CARIS (Centre for the Analysis of Regional Integration at Sussex), University of Sussex for the Department for International Development, "Potential Effects of the Proposed Trade and Investment Partnership on Selected Developing Countries", June 2013, available at <http://www.tradesift.com/news-item.aspx?story=36> (consulted on 10 July 2015).

³² The CARIS report itself refers to such WTO-compliant tariffs as "MFN tariffs", as they are in line with the Most-Favoured Nation principle fundamental to the WTO.

³³ CARIS, "Potential Effects of the Proposed Trade and Investment Partnership on Selected Developing Countries", p. 7.

³⁴ WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), concluded during the Uruguay Round of Multilateral Trade Negotiations, 1986-1994. According to para. 1 of Annex A to the SPS Agreement, sanitary and phytosanitary measures are "(A)ny measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests."

³⁵ WTO Agreement on Technical Barriers to Trade (TBT Agreement), concluded during the Uruguay Round of Multilateral Trade Negotiations, 1986-1994.

have already pointed out that many believe it is exactly the WTO's sluggishness and inability to adapt quickly that has brought both the EU and the U.S. to the table. The fact that it would harm the system in place is not the problem; rather the TTIP is a way of seeking a solution to the problem that is plaguing the current WTO system.³⁶

Finally, the European Commission itself refers to another study on which multiple opponents have based their fears.³⁷ This study, entitled "TTIP: Who benefits from a free trade deal", carried out by the IFO Institute and commissioned by the Bertelsmann Foundation, finds even stronger positive effects for both TTIP parties, but sees a less happy outcome for the third parties to the treaty.³⁸ According to the Commission, this can be explained by the fact that the IFO study omits to factor in the "*direct and indirect spillover effects that result from greater regulatory compatibility between the EU and the U.S.*"³⁹ In short, the Commission believes that, contrary to what opponents argue, greater regulatory compatibility will not complicate matters for businesses from third countries, but improve their market access. The more the two sets of regulatory standards of the EU and the U.S. grow towards each other, the easier it becomes to anticipate them and comply.

³⁶ K. BARYSCH, M. HEISE, "Will TTIP Harm the Global Trading System?".

³⁷ European Commission, "The Transatlantic Trade and Investment Partnership: The Economic Analysis Explained", p. 11.

³⁸ This study can be found on the website of the Bertelsmann Foundation: <http://www.bfna.org/publication/transatlantic-trade-and-investment-partnership-ttip-who-benefits-from-a-free-trade-deal> (consulted on 22 July 2015).

³⁹ European Commission, "The Transatlantic Trade and Investment Partnership: The Economic Analysis Explained", p. 10-11.

II. A CONTROVERSIAL AGREEMENT

2.1. Reaction in the European Union

On the 13th of June 2013, President Barroso expressed his wish to “*call on our legislators on the European side, especially the European Parliament, our regulators, our civil society to play a constructive and engaged part in these negotiations*”.⁴⁰ This call has not remained unanswered: since the start of the negotiations of the transatlantic partnership, there have been several movements and campaigns speaking out against the TTIP, especially civil ones. One can simply visit the EurActiv.com website and type TTIP as a key word, to obtain a list of articles relating to protests and critical opinions.⁴¹ One of the most prominent is the “Stop TTIP”-movement, a “*self-organised European citizens’ initiative*” according to their own website.⁴² Last year, the movement managed to assemble more than two million signatures for its European Citizens’ Initiative (ECI), a petition set up all over the EU by the over four hundred and eighty organisations that participate in Stop TTIP.⁴³

This is but one of the many organisations and campaigns concerning themselves with the TTIP⁴⁴ and sending out petitions in an attempt to block further negotiations, which are considered contrary to democracy. The reason that so many different movements have developed in almost every Member State, is that the focus on certain concerns seems to shift depending on the Member State, says Yannick Jadot, member of the European Parliament (MEP) for the Greens/European Free Alliance.⁴⁵ French citizens fear that environmental standards would be lowered, therefore allowing for the exploitation of

⁴⁰ Statement by President Barroso on the EU-U.S. trade agreement with U.S. President Barack Obama, the President of the European Council Herman Van Rompuy and UK Prime Minister David Cameron, G8 Summit press conference/Lough Erne, 17 June 2013, available at http://europa.eu/rapid/press-release_SPEECH-13-544_en.htm (consulted on 24 July 2015).

⁴¹ <http://www.euractiv.com>.

⁴² <https://stop-ttip.org>.

⁴³ Although it might have started out as such, this petition is not to be confused with the European Citizens’ Initiative program organised by the European Commission itself in an effort to implicate more individuals in the legislative process of the EU (<http://ec.europa.eu/citizens-initiative/public/welcome>). The ECI by Stop TTIP is self-organised and is now campaigning to reach the 2.5 million mark.

⁴⁴ For example, the Global Justice Now movement (<http://www.globaljustice.org.uk/ttip-threat-democracy-standards-and-jobs>), noTTIP (<http://www.nottip.org.uk>).

⁴⁵ A. ROBERT, “Anti-TTIP demonstrations seize European Capitals”, EurActiv.com, 17 October 2014, available at <http://www.euractiv.com/sections/trade-society/anti-ttip-demonstrations-seize-european-capitals-309119> (consulted on 25 July 2015).

shale gas,⁴⁶ German citizens feel more threatened by “*U.S. domination*”.⁴⁷ According to other sources, in Great-Britain people are more concerned with health issues: they fear the TTIP might accelerate gradual privatisation of their national health care system as some parts of it are already in the hands of American healthcare companies.⁴⁸

The surge of civil initiatives voicing out their concerns about the free trade agreement has resonated within other levels of the EU’s political structure. Former Commissioner Karel de Gucht and his U.S. counterpart, U.S. Ambassador to the EU Anthony Gardner, have heavily criticized certain developments in the European Parliament.⁴⁹ The initial response in parliament was largely positive, as a small eighty per cent voted the green light on the start of negotiations in 2013.⁵⁰ The only opposing fractions were those at the radical left and the green side of the political spectrum. Both negotiators argue that through civil movements and their social media campaigns, many falsehoods were spread among the population, creating an unfavourable environment to the TTIP that is not justified. These radical left and green factions have then picked up on this debate, putting it forward as an electoral topic for the 2014 European elections. Through the organisation of campaigns to raise awareness about the dangers of the TTIP, and systematically voting against the furtherance of an agreement that does not meet their views, they have been

⁴⁶ There has been, since 2011, strong opposition in France against the exploitation of shale gas, causing President François Hollande to revoke licences for several hydraulic fracturing operators and impose a ban on the procedure to extract the gas. It is therefore still a sensitive subject to the French citizens, and one they fear might escape their grasp if the TTIP were to pass. For sources on shale gas in France, see <http://shalegas-europe.eu/shale-gas-explained/shale-gas-and-europe/france/> and <http://stopgazdeschiste.org/tag/ttip/> (both consulted on 22 July 2015).

⁴⁷ This was for example the tone of an interview by Sigmar GABRIEL, Deputy Economic Chancellor of Germany, to the German newspaper *Süddeutsche Zeitung* on 21 March 2015; he stated that if the standards proposed by the U.S. did not fall in line with his party’s vision (the *Sozialdemokratische Partei Deutschlands* or SPD), he would consider blocking the TTIP negotiations altogether (<http://www.sueddeutsche.de/politik/freihandel-gabriel-zieht-rote-linie-fuer-ttip-abkommen-1.2402684> (consulted on 25 July 2015)).

⁴⁸ To understand how critics believe the TTIP will lead to such accelerated privatization, see the next Subchapter on ISDS and J. ARMITAGE, “Big Tobacco puts countries on trial as concerns over TTIP deals mount”, *The Independent*, 21 October 2014, available at <http://www.independent.co.uk/news/business/analysis-and-features/big-tobacco-puts-countries-on-trial-as-concerns-over-ttip-deals-mount-9807478.html> (consulted on 25 July 2015); I. FRASER, “What is TTIP and why is it so controversial?”, *The Telegraph*, 11 June 2015, available at <http://www.telegraph.co.uk/finance/11664750/What-is-TTIP-and-why-is-it-so-controversial.html> (consulted on 22 July 2015).

⁴⁹ D. FRANDESCU, “How will EU-parliamentarians vote on TTIP?”, analysis by VoteWatch Europe, 9 June 2015, available at <http://www.votewatch.eu/blog/what-will-eu-parliamentarians-vote-on-ttip/> (consulted on 25 July 2015).

⁵⁰ D. FRANDESCU, “How will EU-parliamentarians vote on TTIP?”

more active in the public debate than the pro-side of the TTIP-discussions.⁵¹ Currently, several members of the socialist faction (S&D) have now also voiced out their anti-TTIP position.⁵²

As we witnessed, the majority of the European Parliament remains in favour of the TTIP as a whole. At the beginning of July a vote was passed to continue the mandate for negotiating the TTIP; the European Parliament voted in the affirmative, but with reservations concerning the Investor-State Dispute Mechanism (ISDS) provisions.⁵³ The next section will go further into the major problem areas that the TTIP is still facing, starting of with the ISDS provisions, then moving on to the issue of socio-economic and environmental standards, to end with a short explanation of why the Anti-Counterfeiting Trade Agreement (ACTA) has been resurfacing in the debates.

2.2. Major substantial issues

2.2.1. *Investor-State Dispute Settlement (ISDS)*

An ISDS provision basically enables investors, who believe their rights were breached by the foreign host state, to bring their case in front of a specialized investment tribunal based on an international treaty.⁵⁴ In the words of the Commission, it is a mechanism to “*ensure that commitments that countries have made to one another to respect mutual investments are respected.*”⁵⁵ This clause is the most fervently debated of the TTIP talks and recently failed to pass the vote in the European Parliament in its current form. More precisely, the European Parliament voted “yes” on continuing the

⁵¹ Such as the “TTIP, beware what lies beneath” campaign and blog of the Greens/European Free Alliance: <http://ttip2015.eu> and <http://www.greens-efa.eu/ttip-beware-what-lies-beneath-12139.html> (both consulted on 22 July 2015).

⁵² D. FRANDESCU, “How will EU-parliamentarians vote on TTIP?”

⁵³ Press release of the European Parliament available at <http://www.europarl.europa.eu/news/en/news-room/content/20150702IPR73645/html/TTIP-ease-access-to-U.S.-market-protect-EU-standards-reform-dispute-settlement> (consulted on 25 July 2015).

⁵⁴ According to UNCTAD, the most commonly used legal bases for bringing an ISDS case are the ISDS provisions contained in the Energy Charter Treaty (ECT), the NAFTA and Bilateral Investment Treaties (BITs). See European Commission, “Investor-State Dispute Settlement (ISDS). Some facts and figures”, report dated 12 March 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf (consulted on 25 July 2015), p. 6.

⁵⁵ European Commission, “Investor-State Dispute Settlement (ISDS). Some facts and figures”, report dated 12 March 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf (consulted on 25 July 2015).

process of concluding the TTIP, but voted against the dispute settlement provisions it contained. It would, however, not be against a reform of these provisions, according to a press release of the European Parliament dated 8 July 2015.⁵⁶

The negotiations have raised many questions. First and foremost, opposing parties fear too much power will be given to large multinational corporations to bring sovereign states in front of a court and litigate for years, especially seeing as how these companies have both the incentives and the funds to do so. Contra-TTIP parties have exposed examples of such investor-state relations gone awry.⁵⁷ A distinctive case is that of Philip Morris, the international tobacco manufacturer. Since 2010, its branch in Switzerland is suing the country of Uruguay because it has implemented laws increasing the mandatory size of health warnings on cigarette packaging.⁵⁸ The company filed its lawsuit based on a Bilateral Investment Treaty (BIT) between Switzerland and Uruguay containing such ISDS provisions. Silvina Echarte Acevedo, head of Uruguay's legal team on the case, maintains as defence that as a country, Uruguay still has the sovereign right and duty to decide on health measures destined to protect its citizens.⁵⁹ It is moreover doing so in accordance with World Health Organisation (WHO) recommendations.⁶⁰ Representatives of Philip Morris claim the measures deteriorate their brand and that they have the right to ask for compensation for the loss of profit resulting from it.⁶¹

This case now finds itself at the heart of the discussion surrounding ISDS in the transatlantic partnership, as opponents to the TTIP see this case as an omen for what EU Member States should expect. They fear U.S. corporations would gain enough power to effectively fight environmental and health standards, consumer protection, etc., in front of

⁵⁶ Press release of the European Parliament available at <http://www.europarl.europa.eu/news/en/news-room/content/20150702IPR73645/html/TTIP-ease-access-to-U.S.-market-protect-EU-standards-reform-dispute-settlement> (consulted on 28 July 2015).

⁵⁷ For recent, also highly mediatised examples, see following cases: *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, 30 March 2009; *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration 6 September 2013.

⁵⁸ *Abal Hermanos S.A. (Uruguay), FTR Holding S.A., Philip Morris Brand Sàrl, Philip Morris Products S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, 26 March 2010. Philip Morris International has started similar lawsuits against the countries of Australia and Norway.

⁵⁹ J. ARMITAGE, "Big Tobacco puts countries on trial as concerns over TTIP deals mount".

⁶⁰ *Abal Hermanos S.A. (Uruguay), FTR Holding S.A., Philip Morris Brand Sàrl, Philip Morris Products S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, para. 158. The respondents cite in this paragraph the WHO Framework Convention on Tobacco Control, published in 2003, entered into force on 27 February 2005 and signed by almost 200 countries in 2014, available at http://www.who.int/fctc/text_download/en/ (consulted on 28 July 2015).

⁶¹ J. ARMITAGE, "Big Tobacco puts countries on trial as concerns over TTIP deals mount".

a tribunal, and in doing so lower EU standards altogether, regardless of what the TTIP standards might be.⁶² A report by the Seattle to Brussels Network even states: “*It is possible that the simple threat of a costly legal dispute would be sufficient to prevent governments from enacting progressive legislation in the future: a serious drawback for any political system that wishes to appear democratic.*”⁶³

However, it is important to keep in mind that such ISDS provisions are a quite common feature of existing international treaties. It is estimated that EU Member States alone account for around a thousand four hundred agreements containing ISDS mechanisms.⁶⁴ According to data by the United Nations Conference on Trade and Development (UNCTAD), EU investors were also responsible for bringing roughly two thirds of all ISDS cases worldwide in 2014, which is a great deal more than American based investors. And such big cases as described above are still the exception; only eight per cent of the ISDS cases are brought by “extremely large multinationals”, says the OECD in a survey.⁶⁵ In another study, commissioned by the Dutch Ministry of Foreign Affairs, it is even affirmed that ninety per cent of ISDS cases are directed at administrative measures (such as revocation of licences and permits, breach of contract...) and a mere ten per cent at general legislative measures.⁶⁶ On top of this, cases in those ten per cent very rarely succeed. This seems to show that in the majority of past cases, ISDS proves to be an effective measure to incentivise and attract foreign investments, as it reassures investors that their legitimate claims will be heard.

It is at this stage therefore very difficult to predict whether the ISDS provisions in TTIP would be a useful tool to encourage cross-border investments, or whether this advantage would be outweighed by the influence of multinational corporations on

⁶² K. BIZZARRI, “A Brave New Transatlantic Partnership”, report published Seattle to Brussels Network (S2B), October 2013, available at <https://www.tni.org/en/briefing/brave-new-transatlantic-partnership> (consulted on 26 August 2015), p. 24-26.

⁶³ *Ibid.*, p. 5.

⁶⁴ This is almost half of the more than three thousand agreements worldwide. See European Commission, “Investor-State Dispute Settlement (ISDS). Some facts and figures”, p. 3.

⁶⁵ D. GAUKRODGER, K. GORDON, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, OECD Working Papers on International Investment, No. 2012/03, 31 December 2012, available at http://www.oecd-ilibrary.org/finance-and-investment/investor-state-dispute-settlement_5k46b1r85j6f-en (consulted on 26 August 2015), p. 17-19.

⁶⁶ C. TIETJE, F. BAETENS, “The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership”, study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html> (consulted on 26 August 2015), p. 127.

national legislation. The decision of the European Parliament to not vote the green light on the ISDS clause, in June, seems a prudent one and shows that concerns about ISDS provisions not only live on the opponents' side.

2.2.2. *Socio-economic and environmental standards*

The issue of standards is very tied to the aforementioned one. The EU is well known for its high standards when it comes to food quality, labour standards, consumer protection, environment, etc. Overall, standards are in many fields more tightly regulated than in the U.S., which is why critics of the TTIP fear that to reach a compromise, EU negotiators will loosen up some of these regulations. This, they fear, would result in a downward trend to the “*lowest common denominator*”.⁶⁷ The European Parliament itself published a study that recognises this risk entitled “Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-U.S. Trade Agreement”, which states that “*there is a risk with regulatory convergence, as well as mutual recognition, that the TTIP could align common standards with the lower level ones.*”⁶⁸ And according to critics it does not end there. ISDS provisions give multinational corporations the possibility – even admitting it is but a slight chance – to contest such legislative regulations as Member States choose to put in place, and in doing so give those corporations unseen leverage.

A sensitive example is that of the use of pesticides. The Center for International Environmental Law (CIEL), based in Washington, estimates that there are at least eighty two types of pesticides that are banned in the EU but frequently used in the American agricultural sector.⁶⁹ Reading these data, it is not surprising people fear that such pesticides would be allowed in the EU under pressure of U.S. companies, despite

⁶⁷ E. SMITH, D. AZOULAY, B. TUNCAK, “Lowest Common Denominator. How the proposed EU-U.S. trade deal threatens to lower standards of protection from toxic pesticides”, report prepared for the Center for International Environmental Law (CIEL), Washington, January 2015; K. BIZZARRI, “A Brave New Transatlantic Partnership”.

⁶⁸ European Parliament, Directorate-General for Internal Policies, “Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-U.S. Trade Agreement”, July 2014, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2014/514007/AGRI_IPOL_STU%282014%29514007_EN.pdf (consulted on 27 August 2015), p. 62.

⁶⁹ E. SMITH, D. AZOULAY, B. TUNCAK, “Lowest Common Denominator. How the proposed EU-U.S. trade deal threatens to lower standards of protection from toxic pesticides”, p. 7, table 1.

representatives from both the EU and the U.S. side having tried to calm the discussion by assuring that convergence of chemical regulations is not on the negotiating table.⁷⁰

But there are a lot of misconceptions circulating as well, which is why it is important to get an objective view on the subject. A prominently featuring example is the very heated debate surrounding GMOs. The World Health Organisation (WHO) defines these as “organisms (i.e. plants, animals or microorganisms) in which the genetic material (DNA) has been altered in a way that does not occur naturally by mating and/or natural recombination.”⁷¹ In many EU countries GMOs are seen as dangerous and a threat, especially when they are used in foodstuffs. There are strict regulations and lists overseen by the European Commission itself.⁷² But in the U.S. they are more frequently used: while it is very difficult to get an exact number, several estimates point out that between sixty and eighty per cent of processed food in the U.S. contains at least one ingredient that has genetically modified origins.⁷³ There is also an entire scientific community vouching for the safety of the use of genetic engineering, advocating that they make crops more resistant and allow farmers to produce more efficiently. According to them, scientific research points to no health risk to humans or plants by the mere use of genetic engineering.⁷⁴ Parties on both sides of the argument are attempting to push for their agenda in the negotiations, making the process not less confusing for laymen.

⁷⁰ D. HAKIM, “A Pesticide Banned, or Not, Underscores Trans-Atlantic Trade Sensitivities”, *The New York Times*, 23 February 2015, available at http://www.nytimes.com/2015/02/24/business/international/a-pesticide-banned-or-not-underscores-trans-atlantic-trade-sensitivities.html?_r=0 (consulted on 27 August 2015).

⁷¹ See the website of the WHO: http://www.who.int/foodsafety/areas_work/food-technology/faq-genetically-modified-food/en/ (consulted on 27 August 2015).

⁷² These registers and legislative measures can be found on the website of the European Commission: http://ec.europa.eu/food/plant/gmo/new/index_en.htm (consulted on 27 August 2015).

⁷³ W. K. HALLMAN, W.C. HEBDEN, H.L. AQUINO, C.L. CUTIE, J.T. LANG, “*Public Perceptions of Genetically Modified Foods: A National Study of American Knowledge and Opinion*”, Food Policy Institute, Rutgers, The State University of New Jersey, publication number RR-1003-004, October 2003, available at

http://foodpolicy.rutgers.edu/docs/pubs/2003_public_perceptions_of_genetically_modified_foods.pdf (consulted on 28 August 2015), p. 1.

⁷⁴ The American Association for the Advancement of Science (AAAS) has published a statement regarding the scientific consensus surrounding the safety of GMOs, in which it refers to studies by the European Commission, the World Health Organization, the American Medical Association, the U.S. National Academy of Sciences, the British Royal Society and other organisations. AAAS, “Statement on Labelling of Genetically Modified Foods”, Statement by the Board of Directors of the AAAS, 20 October 2012, available at http://www.aaas.org/sites/default/files/AAAS_GM_statement.pdf (consulted on 28 August 2015).

2.2.3. Intellectual Property Rights (IPRs) and privacy

Both the EU and U.S. have strong IPR protection policies and it has become clear that they aim at including an intellectual property chapter in the TTIP. There is a lot of discussion about what this chapter would contain. Proponents of a strict(er) IP policy claim this would be necessary to boost innovation in the flailing economies and protect companies from piracy,⁷⁵ while critics fear that including IP in the TTIP would create a back door entrance for the Anti-Counterfeiting Trade Agreement (ACTA).⁷⁶

From 2007 until 2010, ACTA was negotiated by a select club of countries, including the U.S. and the EU, in an attempt to create a new, more adapted framework of IP regulations for the digital age and the Internet. This highly controversial treaty was rejected by the European Parliament in 2012 after the public opinion responded very negatively to it.⁷⁷ According to the UK rapporteur on the matter, David Martin, the agreement proved “*too vague, open to misinterpretation and could therefore jeopardise citizens' liberties.*”⁷⁸ It contained provisions going beyond the minimum standards of protection required by multilateral forums, such as the WTO, thus having the potential of seriously undermining them.⁷⁹ Major criticism was received upon the issues of privacy and freedom of expression of Internet users.⁸⁰ ACTA contains enforcement provisions that would impose on Internet Service Providers (ISP) to “*disclose expeditiously to a*

⁷⁵ See the fact sheet on Trade and Intellectual Property by the European Commission: http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/index_en.htm (consulted on 28 August 2015).

⁷⁶ K. BIZZARRI, “A Brave New Transatlantic Partnership”, p. 17-18.

⁷⁷ European Parliament, “European Parliament rejects ACTA”, press release, 4 July 2012, available at <http://www.europarl.europa.eu/news/en/news-room/content/20120703IPR48247/html/European-Parliament-rejects-ACTA> (consulted on 28 August 2015).

⁷⁸ *Ibid.*

⁷⁹ “*The Indian delegate warned that ACTA risked “completely upset[ting] the balance of rights and obligations of the TRIPS Agreement,” and could “potentially undermine seriously decisions taken multilaterally such as the Doha Declaration on Public Health in the WTO and the Development Agenda in [the World Intellectual Property Organization].” He expressed concern that depending on what ACTA parties finally agree to, they might end up subjecting non-parties to higher levels of intellectual property enforcement than those demanded under the TRIPS, distorting the legitimate movement of traded goods in transit, and weakening the institutional status of the WTO and WIPO.*” International Center for Trade and Sustainable Development (ICTSD), “ACTA faces Criticism at WTO and in the United States”, *Bridges*, Vol. 14, No. 38, 3 November 2010, available at <http://www.ictsd.org/bridges-news/bridges/news/acta-faces-criticism-at-wto-and-in-the-united-states> (consulted on 29 August 2015).

⁸⁰ Two organisations that concern themselves with the protection of rights in the digital world have written articles about the potential threats of ACTA, which are useful reads to fully grasp the concerns of the civil movement against ACTA and ultimately, also of any IP incorporated in the TTIP: the Electronic Frontier Foundation (EFF) (<https://www.eff.org/issues/acta> (consulted on 29 August 2015)) and the European Digital Rights movement (EDRI) (<https://edri.org/ACTAfactsheet/> (consulted on 29 August 2015)).

right holder information sufficient to identify a subscriber whose account was allegedly used for infringement (...)”,⁸¹ a paragraph that did not sit well with the MEPs concerned about the protection of privacy. According to the European Digital Rights organisation (EDRi), that same article would also allow for a system of private surveillance and enforcement by companies to punish alleged infringements of IP rights, a criticism backed by others.⁸²

Seeing as how a crushing majority⁸³ voted against this agreement in the European Parliament, it would seem unlikely that similar provisions would sneak into the TTIP text without passing under the scrutiny of the same MEPs. But, as BIZZARI points out in her study, “*ACTA-like provisions*” have already made their way into the negotiations of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which in its final form will likely serve as model for the TTIP.⁸⁴ On the U.S. side, interest in ACTA is still very much alive. The U.S. has ratified the treaty and is pushing for other trading partners to ratify as soon as possible. In 2013, the U.S.T.R. made information available that showed Canada’s interest in joining ACTA and adopting its IP-protective provisions.⁸⁵ It would seem they want the EU to adhere to such provisions as well. Karel De Gucht, former Trade Commissioner, also hinted in a speech that the Commission would not drop ACTA so easily.⁸⁶ It is not unreasonable to see in TTIP a renewed attempt at creating a regulatory framework for IP.

2.2.4. *Comparison with the reaction in the United States*

On the other side of the Atlantic, the reactions to the negotiations of a TTIP are a little different. First of all, the TTIP debate is currently being overshadowed by the discussion on the Trans-Pacific Partnership, an agreement encompassing the U.S. and its trans-pacific trading partners (Japan, Australia, Peru, Malaysia, Vietnam, New Zealand, Chile,

⁸¹ Art. 27, para. 4, of ACTA (final text published in May 2011).

⁸² Art. 27, para. 3, of ACTA and the website of EDRi, <https://edri.org/ACTAfactsheet/> (consulted on 28 August 2015).

⁸³ The final vote showed 478 negative votes, 39 in favour and 146 abstentions.

⁸⁴ K. BIZZARRI, “A Brave New Transatlantic Partnership”, p. 17.

⁸⁵ M. SUTTON, “US Trade Office calls ACTA back from the dead and Canada complies”, Electric Frontier Foundation, 1 March 2013, available at <https://www.eff.org/deeplinks/2013/03/us-trade-office-calls-acta-back-dead-and-canada-complies> (consulted on 29 August 2015).

⁸⁶ European Commission, “Statement by EU Trade Commissioner Karel De Gucht on European Plenary Vote on ACTA (Anti-Counterfeiting Trade Agreement)”, press release, Strasbourg, 4 July 2012, available at http://europa.eu/rapid/press-release_IP-12-791_en.htm (consulted on 29 August 2015).

Singapore, Canada, Mexico, and Brunei, with the possibility of others joining posteriorly). This is probably due to the fact that the TPP agreement is at a further stage in its negotiations, showing more of its potential impact than the TTIP is currently doing.⁸⁷ Moreover, the TPP will be open to other governments willing to participate, making the debate about the agreement more strained. This is not the case for the TTIP, where only the U.S. and the EU will be parties, meaning it is easier to anticipate who the agreement will take its effects on. There is also significantly less coverage of the TTIP. A participant of the TTIP trade talks expresses it in the following way: “*No one outside Washington cares about TTIP, most Americans think TTIP is a company that makes things.*”⁸⁸

The problems both trade agreements face are very similar though. As Mike DOLAN argues in his paper, published by the Rosa Luxemburg Stiftung, both treaties are the outcome of the Western world fearing the rise in power of the BRICS countries (Brazil, Russia, India, China and South Africa) and trying to keep its supremacy in the global economy.⁸⁹ This means both agreements are facing a lot of criticism about the lack of transparency and the pushing-through of a corporate agenda. While starting off more slowly than in the EU, the U.S. public opinion has recently been voicing out its own concerns about the TTIP specifically.⁹⁰ The comparison with the NAFTA and the current situation of that free trade area is a common one, as we will discuss in the next part.

A particular point, on which U.S. negotiators are reluctant to give in to European demands, is the question of financial services and their cross-Atlantic regulation. According to a report by the Allianz-Center for European Reform, this fear is grounded in the collapse of the financial markets in 2008.⁹¹ Following these events, the American regulator implemented the Dodd-Frank Act in order to ensure better regulation and

⁸⁷ M. DOLAN, “TPP & TTIP: Partners in Crime. Fighting the Corporate ‘Trade’ Agenda in the United States”, published by the Rosa Luxemburg Stiftung, New York Office, January 2015, available at <http://rosalux-europa.info/publications/books/TPPandTTIPen/> (consulted on 29 August 2015), p. 5.

⁸⁸ Allianz-Center for European Reform, “The Biggest Prize? Prospects for a Transatlantic Trade and Investment Partnership”, Allianz-CER European Forum, Brussels, 26 November 2013, available at http://www.cer.org.uk/sites/default/files/eventnotes_allianz_26nov13_0.pdf (consulted on 29 August 2015).

⁸⁹ M. DOLAN, “TPP & TTIP: Partners in Crime. Fighting the Corporate ‘Trade’ Agenda in the United States”, p. 4-5.

⁹⁰ Euractiv and agencies, “TTIP negotiators get an earful from American critics”, Euractiv.com, 24 April 2015, <http://www.euractiv.com/sections/trade-society/ttip-negotiators-get-earful-american-critics-314056> (consulted on 5 September 2015).

⁹¹ Allianz-Center for European Reform, “The Biggest Prize? Prospects for a Transatlantic Trade and Investment Partnership”

compliance.⁹² Critics now fear that including a chapter about financial services in the TTIP would undermine this Dodd-Frank Act and destabilize the financial markets again. The European Commission feels differently about the subject, as it states the following in a brief on the cooperation of financial services regulation: “*The financial crisis showed in stark clarity that financial markets are global and deeply interconnected. The global nature of financial services allows systemic risks to be transmitted across national borders. Financial stability is not served by a fragmented regulatory approach, inconsistent rules and low levels of co-operation.*”⁹³ But the U.S. Ambassador to the EU, Anthony Gardner, explains that the Dodd-Frank Act moves faster than its European counterpart, the Capital Requirements Directive IV,⁹⁴ and the international regulatory framework for banks called Basel III.⁹⁵ The U.S. would therefore be opposed to including the regulation of financial services under the TTIP and is not willing to negotiate on the matter.

2.3. The negotiation process

Before moving on to the comparison with other free trade deals, we will zoom in on the negotiation process as such. There are several issues that have been surfacing during the negotiation talks, without those being necessarily related to the contents of the agreement. These issues are common to many FTAs, not only the TTIP. Examples of such matters are the question of transparency versus secrecy, which parties are or should be involved in the negotiations and which are not, and the adoption process through different competent authorities in each governmental system.

⁹² The Dodd-Frank Wall Street Reform and Consumer Protection Act as explained by the U.S. Commodity Futures Trading Commission (CFTC) available at <http://www.cftc.gov/lawregulation/doddfrankact/index.htm> (consulted on 27 August 2015).

⁹³ European Commission, “EU – US Transatlantic Trade and Investment Partnership (TTIP). Cooperation on Financial Services Regulation”, 27 January 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152101.pdf (consulted on 27 August 2015).

⁹⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0036> (consulted on 27 August 2015).

⁹⁵ Basel III: A global regulatory framework for more resilient banks and banking systems, developed by the Basel Committee on Banking Supervision, June 2011 (revised edition), available at <http://www.bis.org/publ/bcbs189.htm> (consulted on 27 August 2015).

2.3.1. *Secrecy versus transparency: who knows what?*

The issue of the transparency of the negotiations is creating some tension in both parties. As with any large-scale treaty, it would be impossible and counter-productive to release every negotiation talk and document to the public. There must be room to let the internal debate develop itself, without constant interventions that would slow this process down. Moreover, as a trade policy measure, TTIP falls under the Common Commercial Policy of the EU, put in place by the Treaty of Lisbon in 2009.⁹⁶ This means it is the exclusive competence of the EU, excluding competence of the Member States,⁹⁷ and that anything negotiated in this context is subject to limitations regarding transparency.

But this “*cannot let your opponent see your cards*”-mentality is too out-dated for this new world, say critics.⁹⁸ Not only is it not justified anymore, seeing as it is certain that the EU and the U.S. are very much aware of each other’s cards; according to European Ombudsman Emily O’Reilly, social media campaigns have changed the rules of the game.⁹⁹ The amount of information that circulates and the possibility of expressing and sharing opinions have made everyone a commentator of the TTIP. The public, as it has now been claiming loudly itself, has a right to know what its leaders plan on putting into the agreement. Opponents to the TTIP criticize that the ones invited to sit at the table, representatives from private industries as well as from the government, are likely pushing for their self-interest agenda. All the while they’re pointing out how little of the negotiation progress, if any, is shared with those most concerned in the end: the consumer. This problem has been the subject of many a manifestation in recent months.¹⁰⁰ Their slogan: “*Stop secret trade deals.*” Their logo: a Trojan horse.¹⁰¹

⁹⁶ Art. 206-207 of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon, signed 13 December 2007 and entered into force on 1 December 2009.

⁹⁷ Art. 3(1)(e) of the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon.

⁹⁸ H. HAUTALA, MEP Greens/EFA Group, “Lack of transparency in TTIP - a case for the ECJ?”, article posted on the blog of the Greens/EFA Group *TTIP: Beware what lies beneath*, 10 July 2014, available at <http://ttip2015.eu/blog-detail/blog/TTIP%20ECJ%20Transparency.html> (consulted on 28 August 2015).

⁹⁹ Interview of European Ombudsman Emily O’Reilly by EurActiv.com: J. CRISP, “Ombudsman: EU must interrogate US over TTIP transparency”, EurActiv.com, 21 April 2015, available at <http://www.euractiv.com/sections/trade-society/ombudsman-eu-must-interrogate-us-over-ttip-transparency-313928> and [EurActiv.com](http://www.euractiv.com) (consulted on 28 August 2015), and “TTIP Transparency transformed by campaigners, says EU Ombudsman”, at <http://www.euractiv.com/video/ttip-transparency-transformed-campaigners-says-eu-ombudsman-313932> (consulted on 28 August 2015).

¹⁰⁰ Most of these actions were organised by aforementioned civil organisations, among others in Brussels and London. They plan a new mass protest on the 10th of October 2015 in Berlin: <http://www.euractiv.com/sections/trade-society/mass-protest-against-ttip-and-ceta-take-place-berlin-317066> (consulted on 2 September 2015).

The European Commission has put efforts into increasing the transparency of negotiations and the communication with interested parties under new Trade Commission Cecilia Malmström. In January 2014, for example, the Commission organised an online consultation regarding the ISDS clause. Anyone could apply, which resulted in a record number of replies of over one thousand five hundred submissions.¹⁰² The results were then subsequently published on the website of the European Commission and on social media.¹⁰³ Other efforts by the Commission include the creation of ‘reading rooms’, where initially only members of the Trade Committee, but now all MEPs can have restricted access to negotiation documents about the TTIP. More recently, Trade Commissioner Malmström has published a declaration confirming the Commission’s efforts towards more transparency and that it welcomes “*democratic scrutiny of the negotiations and informed debate based on facts.*”¹⁰⁴

Where the EU has tried to find remedies to the criticism, the U.S. remains reluctant to do so. On the website of the Commission, a whole list of documents relating to talks and negotiations of TTIP, also preparatory texts, are made available.¹⁰⁵ But it is indeed only the European negotiation texts that are being made available in this way; the U.S. considers all of its documents as classified. Reading rooms have been installed on the American side, but if anything is divulged to the public this is punished with

¹⁰¹ Personal observation during the anti-TTIP march in Brussels on 18 April 2015. Belgian media coverage of the manifestation: <http://www.lalibre.be/actu/belgique/2-000-personnes-manifestent-contre-le-ttip-a-bruxelles-553276bc35704bb01bd3abff> (consulted on 2 September 2015).

¹⁰² In comparison, a previous record number of reactions to an online consultation, related to the process of fracking to extract shale gas, hovered around twenty thousand. J. CRISP, “Commission swamped by 150,000 replies to TTIP consultation”, Euractiv.com, 24 July 2014, <http://www.euractiv.com/sections/trade-industry/commission-swamped-150000-replies-ttip-consultation-303681> (consulted on 2 September 2015).

¹⁰³ J. CRISP, “Commission swamped by 150,000 replies to TTIP consultation”, and the website of the European Commission: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf (consulted on 4 September 2015). Interesting to note is that an overwhelming majority of the submissions, more than 22 %, came from Austrian nationals, with Belgian submissions following at only little over 6 %. It shows just how much fiercer opposition to the TTIP is in Austria than in any other Member State, causing the new Commissioner for Trade Cecilia Malmström to come to Vienna to deliver following speech, “Why the TTIP is good for Austria”:
http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153054.doc%20web.pdf (consulted on 4 September 2015). In this speech, she also points out the new measures destined to enhance transparency.

¹⁰⁴ C. MALMSTRÖM, “Transparency in TTIP”, blog post on the website of the European Commission, 21 August 2015, available at https://ec.europa.eu/commission/2014-2019/malmstrom/blog/transparency-ttip_en (consulted on 4 September 2015).

¹⁰⁵ The European Commission has a page explicitly dealing with transparency, which contains these documents: http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#transparency (consulted on 4 September 2015).

imprisonment.¹⁰⁶ The U.S. also asked the EU not to make any documents, which contain information on the U.S. side of negotiations, public without their consent.¹⁰⁷ This imbalance between the Commission showing a certain willingness to share information and communicate and the U.S.T.R. keeping its information behind locked doors is not helping accrue transparency and trust. Under pressure, the U.S. has finally decided to open new reading rooms in the EU, accessible to all MEPs, but with only the consolidated texts (and no U.S. negotiation documents, which remain entirely classified).¹⁰⁸

A related matter concerns the people invited to the negotiations and having automatic access to everything that is being discussed. Since the amendments by the Treaty of Lisbon, the European Parliament has to be kept updated about the “*progress of the negotiations*”¹⁰⁹ and “*shall be immediately and fully informed at all stages of the procedure.*”¹¹⁰ In order for this to work, one can argue that the MEPs must therefore have access to the same documents as the negotiators. This is however still not the case, as MEP Hautala and others have pointed out.¹¹¹

Lobbying is also a big topic in the TTIP debate. How much access should industries have to the documents and how much say in the negotiations? On the one hand, they are the people with the expertise, the real ground knowledge, and the incentives. On the other, they might have too much incentives, be biased towards profit-making and pushing for an agenda that could be harmful to other vital concerns such as the environment and consumer protection. Since negotiations happen behind closed doors, civil movements and NGOs feel threatened by what is said and how much influence is being exercised without them being able to do anything about it. If the TTIP wants to pass on both sides

¹⁰⁶ J. CRISP, “Ombudsman: EU must interrogate US over TTIP transparency”. On a side note, it is not entirely clear what can be taken to the public out of a European reading room, as it is forbidden to share information with third parties as well.

¹⁰⁷ Consent that they are not willing to give, as transpires from the lack of U.S. documentation made public. European Commission, “Communication to the Commission on Transparency in TTIP Negotiations”, C(2014) 9052, Strasbourg, 25 November 2015, available at http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf (consulted on 4 September 2015), p. 2.

¹⁰⁸ J. CRISP, “US to open TTIP reading rooms across EU”, EurActiv.com, 29 April 2015, available at <http://www.euractiv.com/sections/trade-society/us-open-ttip-reading-rooms-across-eu-314175> (consulted on 4 September 2015).

¹⁰⁹ Art. 207(3) of the TFEU.

¹¹⁰ Art. 218(10) of the TFEU.

¹¹¹ H. HAUTALA, MEP Greens/EFA Group, “Lack of transparency in TTIP - a case for the ECJ?”

of the Atlantic, these fears must be remedied, which can only be achieved through better communication.

2.3.2. *Adopting the TTIP*

The passing of the TTIP also heavily depends on the structures responsible for adopting and signing the text. The EU and the U.S. both have a very different governmental organisation, in which external trade deals are treated differently. In both structures, the TTIP has encountered obstacles.

(a) In the EU

The European Commission is responsible for the negotiation of the TTIP, as it is the executive body of the EU. By virtue of article 3(1)(e) of the TFEU, trade is also an exclusive competence. However, issues concerning agriculture and fisheries, consumer protection and environment are of shared competence between the EU and the Member States.¹¹² To simplify this procedure, the Commission negotiates on a mandate given by the Council of the European Union, which consists of all twenty-eight national ministers of trade, for subjects of shared competence.¹¹³ At the end of the process, the Council will have to ratify the agreement unanimously, giving each Member State another way to hinder the passing of the agreement.¹¹⁴

The European Parliament has no say in what the TTIP should contain, but by virtue of article 218 of the TFEU, has an ultimate veto-right on the ratification of the agreement together with the Council. On top of this, as the TTIP is qualified as a “mixed agreement” (i.e., an agreement encompassing both exclusive and shared competences), it will have to be ratified by every national parliament of the EU Member States.¹¹⁵ This means that the TTIP has quite some difficulties to overcome: not only do allegiances and factions shift in the European Parliament, every election period in national parliaments can put another

¹¹² Art. 4 of the TFEU.

¹¹³ S. BOLLA, “The European Union and the TTIP; How does it work?”, National Foreign Trade Council (U.S.), February 2014, available at <http://www.nftc.org/default/trade/European%20Union%20and%20TTIP.pdf> (consulted on 3 September 2015).

¹¹⁴ Art. 218 of the TFEU.

¹¹⁵ This was implemented by the Treaty of Lisbon.

political group in the driving seat for that particular Member State.¹¹⁶ And the authority of the democratic organ of the EU is not without its influence: I have already mentioned the example of the European Parliament's influence on the inclusion of ISDS provisions, which are currently being renegotiated. Where the Parliament used to be largely in favour of the TTIP as a whole, support has slightly waned in recent polls. Not only the political factions one would expect to be opposed to TTIP have been fervent in their opposition, groups of MEPs from a more conservative affiliation are voicing out theirs as well.¹¹⁷ However, voting in favour of TTIP seems to be the main position still.¹¹⁸ That should remain this way until the TTIP is presented for the ratification vote; a negative vote from the European Parliament is not just a 'hurdle', as its vote on ACTA has proven in 2012 (even after consent was given by the Council).¹¹⁹

(b) In the U.S.

The negotiator on American side is the U.S.T.R., a cabinet minister at the head of a governmental agency responsible for trade policy issues and negotiations.¹²⁰ As an agency of the executive branch, it falls under the authority of the President's office. For ratification, 'international treaties' such as the TTIP should get a favourable vote from at least two-thirds of the Senate.

¹¹⁶ As it currently stands, TTIP negotiators would like to present the TTIP for ratification in 2016. In the short period up until then, there are no major parliamentary elections taking place in European Member States (only in Poland, Andorra, Estonia and Slovakia). Should the TTIP negotiations take longer, more and more Member States will have parliamentary elections, which could change the outcome of the vote.

¹¹⁷ S. FOWLES, "Can the European Parliament save us from TTIP?", *The Conversation UK*, in collaboration with Queen Mary University, London, 12 June 2015, available at <http://theconversation.com/can-the-european-parliament-save-us-from-ttip-43195> (consulted on 3 September 2015).

¹¹⁸ See *supra*, footnote 49 and VoteWatch.eu, "TTIP mandate makes it through EP plenary. Investors' protection system remains in limbo", 9 July 2015, available at <http://www.votewatch.eu/blog/tag/ttip/> (consulted on 4 September 2015). The main political groups in the Parliament are the European People's Party (EPP), with centre-right political affiliation, and the Progressive Alliance of Socialists and Democrats (S&D), which is of centre-left political affiliation. Both factions support the TTIP, but focus on different issues. Before the elections of May 2014, they represented 61 % of the total seats. After the elections this percentage is just 55 %, as EPP lost 6 % of seats. Other pro-groups are the Alliance of Liberals and Democrats for Europe (ALDE) and the European Conservatives and Reformists (ECR), which account for another 20 % of mainly pro-TTIP seats. However, MEPs can vote independently from their party affiliation. The contra-camp having been more active than the pro-camp, VoteWatch.eu sees an increase in no-voters among MEPs (D. FRANTESCU, "How will EU-parliamentarians vote on TTIP?").

¹¹⁹ See *supra*, footnote 77.

¹²⁰ For more information, see their website <https://ustr.gov/about-us/about-ustr> (consulted on 6 September 2015).

However, there is a particular procedure in the U.S. called the Trade Promotion Authority (TPA), also called fast-track authority, by which Congress gives the President of the U.S. the power to negotiate international treaties more freely. It is important to note that through TPA, the legislative branch does not delegate or grant new powers to the executive branch, the President of the U.S. Congress still has the authority to decide whether the proposed agreement should be ratified or not. What it does entail is that whenever the implementation of a trade agreement should require a change in U.S. laws, Congress disposes of an expedited legislative procedure to consider the measure.¹²¹ The Senate's role is also reduced to a single vote on whether to implement the agreement or not, without being able to propose any amendments.¹²² This is only possible for those matters that are written down in the bill authorising TPA. Proponents of this authority stress that it enables the U.S. to negotiate extensive trade deals in a more efficient way, as well as faster, because it assures other parties that the President and Congress are on the same page regarding the treaty.¹²³ Opponents see another way for the government to pass major trade deals in secrecy.¹²⁴

A particular point about TPA is that the whole procedure must be reauthorized every so often, since its first enactment in the 1970's.¹²⁵ Ever since talks first surfaced about the TPP and now the TTIP, President Obama has been trying to get the TPA re-established, but he has faced difficulties. Both in the Senate and in the House of Representatives, the bill approving the re-enactment of TPA went through "*several close-calls*" and even got resistance from the President's own party.¹²⁶ Public opinion is rather negatively disposed towards the special authority, as demonstrations in front of the Senate buildings and elsewhere show.¹²⁷ The same parties that oppose the TTIP in general also criticize the

¹²¹ I. FERGUSON, R. BETH, "Trade Promotion Authority (TPA): Frequently Asked Questions", Congressional Research Service report, 2 July, 2015, available at <https://fas.org/sgp/crs/misc/R43491.pdf> (consulted on 7 September 2015), p. 1.

¹²² This information is available on the website of the U.S.T.R., <https://ustr.gov/trade-topics/trade-promotion-authority> (consulted on 6 September 2015).

¹²³ I. FERGUSON, R. BETH, "Trade Promotion Authority (TPA): Frequently Asked Questions", p. 1-2.

¹²⁴ RT News, "Senate puts Obama on Fast Track to TPP", *RT News*, 24 June 2015, available at <http://www.rt.com/usa/269497-senate-tpa-obama-tp/> (consulted on 7 September 2015).

¹²⁵ The first enactment of TPA happened on the 1st of January 1975 under the 1974 Trade Act. It was subsequently renewed three times and used for 14 regional free trade agreements and once in the context of the Uruguay Round of Negotiations, preceding the creation of the WTO in 1994. I. FERGUSON, R. BETH, "Trade Promotion Authority (TPA): Frequently Asked Questions", p. 4.

¹²⁶ RT News, "Obama signs bill giving himself fast-track powers for trade deals", *RT News*, 29 June 2015, available at <https://www.rt.com/usa/270517-obama-fast-track-trade/> (consulted on 7 September 2015)

¹²⁷ C. R. GIBSON, T. CHANNING, "Here's how much corporations paid US senators to fast-track the TPP bill", *The Guardian*, 27 May 2015, available at

idea of giving the executive branch an easier way to negotiate and pass trade deals.¹²⁸ Only in May, the Senate voted against the fast-track powers, eliciting headlines that asked whether the TTIP negotiations would grind to a halt. But it retraced its steps and approved it sixty to thirty-eight votes in June. The TPA trade bill was finally approved by Congress at the end of June and signed by President Obama subsequently.¹²⁹ This still means that Congress has to approve or reject the final deal. It cannot, however, amend it.

This seems matter concerning the fast track procedure relatively clear. But seeing as how the negotiations might take longer than President Obama's presidency (ending in January 2017), the future can still hold other hurdles. The other democratic presidential candidates, Hillary Clinton and Bernie Sanders, have either not wanted to take a stand or are against the deal.¹³⁰

<http://www.theguardian.com/business/2015/may/27/corporations-paid-us-senators-fast-track-tpp> (consulted on 7 September 2015).

¹²⁸ The Electronic Frontier Foundation is one of the many organisations to organise campaigns against passing fast-track, such as this EFF Action Center campaign: <https://act.eff.org/action/don-t-let-the-senate-fast-track-tpp> (consulted on 7 September 2015).

¹²⁹ P. LEWIS, "Barack Obama given 'fast-track' authority over trade deal negotiations", *The Guardian*, 24 June 2015, available at <http://www.theguardian.com/us-news/2015/jun/24/barack-obama-fast-track-trade-deal-tpp-senate> (consulted on 7 September 2015).

¹³⁰ *Ibid.*

III. COMPARISON WITH OTHER FTAs

The previous part has tried to outline the major issues of the debate concerning a EU-U.S. free trade agreement. The core of this paper is now to compare the TTIP negotiation process, and the controversy it causes, to the negotiations and impact of other major influential FTAs. In this regard the NAFTA presents itself as an interesting study subject. It was from the beginning highly debated concerning its impact on the economies of all three parties, the U.S., Canada and Mexico and faced civil movement protests as well. In the U.S., TTIP is sometimes even referred to as “*the NAFTA on Steroids*”.¹³¹ Having been in existence for a little over twenty years, its impact can now be observed and could serve as a lesson for the TTIP negotiations.

Not only the NAFTA is interesting. There are also smaller and lesser-known free trade agreements, negotiated in recent years, that show the development of how bilateral and regional agreements are shaping a new liberalised global trade system. The experiences with such FTAs have not always been black-on-white positive, as will be discussed. One might wonder to which extent the TTIP is taking into account such previous experiences and whether it has the necessary tools to avoid some of the problems existing FTAs are facing.

3.1. North-American Free Trade Agreement (NAFTA)

The NAFTA long held the title of being the largest free trade area in the world, encompassing the U.S., Canada and Mexico. Seeing as the negotiations preceding the NAFTA were very controversial as well, I believe a comparison between both documents is an interesting exercise to comprehend the real impact of FTAs, on both the economy and the socio-environmental aspects of the parties. Moreover, it is an early example of a regional FTA developing simultaneously to the WTO, therefore attracting the criticism

¹³¹ See an article by B. GERRITZ, “Protests across North America aim to block ‘the NAFTA on Steroids’”, 29 January 2014, available at <http://www.labornotes.org/2014/01/protests-across-north-america-aim-block-nafta-steroids> (consulted on 26 July 2015).

that it would be detrimental to the global trade system; a criticism that I have previously pointed out concerning the TTIP as well.

3.1.1. *Undermining the WTO?*

First of all, its negotiations ran almost parallel to those of the Uruguay Round, which established the WTO: it is one of the first and most prominent examples of a regional treaty trying to compensate for the shortcomings of the multilateral WTO forum. During the NAFTA negotiations, it was not entirely made clear what the precise hierarchy of norms should be between both trade liberalisation instruments, GATT and NAFTA.¹³² Inherently, the NAFTA was a way for the North-American countries to address certain issues in a more direct way than through multilateral talks. This would exclude supremacy of WTO-rules, as it would void the FTA of its purpose. On the other hand, the WTO organ is a forum that regroups all its Members in an effort to harmonise policies and create a favourable global environment for liberalisation of trade. This requires that all Members follow the norms it decides upon.

The issue is a complex one, as F. M. ABBOTT already explained in 1999 in his paper, “*The North-American integration regime and its implications for the world trading system*”,¹³³ and requires the interpretation of both treaties through the Vienna Convention on the Law of Treaties.¹³⁴ But, as the author wrote fifteen years ago, it could not be foreseen whether the NAFTA would be detrimental to the development of the multilateral forum, as no such comprehensive agreements had ever previously existed. To the author, they are complementary instruments to achieving trade liberalisation, a view which other observers still support. An example of this complementarity can be found are trade-environmental related issues: where the WTO seeks minimum integration to put a maximum of members on the same line, regional agreements go further. This is the

¹³² F. M. ABBOTT, “The North-American Integration Regime and its Implications for the World Trading System”, Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law, 1999, available at <http://www.jeanmonnetprogram.org/archive/papers/99/990201.html> (consulted on 8 September 2015). This paper also constituted Chapter 6 in J.H.H. WEILER (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?*, Oxford University Press, Oxford, 2001.

¹³³ *Ibid.*

¹³⁴ Vienna Convention on the Law of Treaties, signed 23 May 1969 in Vienna and entered into force on the 27 January 1980.

reason that the NAFTA, for example, has developed better regulation on environment, which makes it more environment-friendly than the GATT agreement.¹³⁵

More recently, it appears WTO-related conflicts still arise within the NAFTA, as proven by the 2009 Tuna-Dolphin II case between the U.S. and Mexico. The U.S. demanded that Mexico move a particular dispute from the WTO dispute settlement system to the NAFTA system, which Mexico didn't comply with.¹³⁶ This case was about restrictions the U.S. imposed on all imports of tuna and tuna-derived products. To be able to be sold on the U.S. market as "dolphin safe", the tuna had to be fished with particular nets, which most Mexican fisheries did not use. Therefore, their products could not be labelled "dolphin safe" and saw a considerable drop in sales. On 24 October 2008, Mexico requested consultations with the U.S. under the GATT dispute settlement system on these particular labelling measures, which it considered disproportionate to the goal pursued. The case is in appeal today before the WTO Appellate Body. This situation shows there are still unresolved conflicts between both instruments and as long as the NAFTA parties don't get together to create more clarity, these will keep arising.¹³⁷ Applying the rule of *lex posteriori* between GATT and NAFTA does not always lead to the best solution and certainly does not create predictability.

In the case of the TTIP, the situation is different. Since 2006, the Commission has been negotiating international trade agreements under the label of a "*new generation*" of agreements.¹³⁸ MEPs Edouard Martin (S&D) and Virginie Rozière (S&D) submitted a question for written answer to the Commission on the meaning of this term, and what the implications are for the hierarchy of norms inside the EU.¹³⁹ Trade Commissioner

¹³⁵ R.H. STEINBERG, "Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development", *The American Journal of International Law*, Vol. 91, No. 2, April 1997, p. 236-237.

¹³⁶ For the texts concerning the case, see the website of the WTO: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (consulted on 8 September 2015).

¹³⁷ F. M. ABBOTT, "The North-American Integration Regime and its Implications for the World Trading System", 7. Observations.

¹³⁸ The first agreement in this line of "*new generation*" deals was the EU – South Korea Free Trade Agreement, which we will come back to *infra*, in 3.2.3. For more information, see the website of the European Commission: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/> and http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=6301&lang=en&title=The-EU's-free-trade-agreements---where-are-we%3F (consulted on 9 September 2015).

¹³⁹ Question for written answer to the Commission, E-005160/2015, "TTIP and the Hierarchy of Rules", submitted by Edouard Martin (S&D) and Virginie Rozière (S&D), 31 March 2015, available at

Malmström answered that “(t)he agreements are characterised as a ‘new generation’ as they aim at addressing issues which currently remain outside the WTO, like investment, public procurement, and competition, other regulatory issues and IPR enforcements. (...) The Trade and Investment Partnership (TTIP) falls within this category.”¹⁴⁰ Her answer also stated that these new generation agreements have no different legal status than previous international agreements: in the hierarchy of EU law, they still rank under primary treaty law. We would therefore not see those conflicts that the NAFTA faces when overlapping with WTO rules.

However, I do not see how Trade Commissioner Malmström sees these issues as entirely “outside” of the WTO. One can’t simply discount any overlapping between the TTIP and the WTO. An example was pointed out *supra*, when discussing IPR issues and the resemblance with those in the ACTA. The TTIP aims at including a chapter about IPR that according to its critics goes so much beyond what is set as standards by the WTO, that the risk of undermining TRIPs is all too real. If this is no ‘overlapping’ as such, it is certainly an influence that will have to be addressed, if the Commission wants to retain the EU’s credibility as a Member of the WTO. Even more so, the EU and the U.S. should be endeavouring more towards putting the TTIP forward as a healthy wake-up call for the WTO, and putting new life and discussion in the current round of negotiations.¹⁴¹

3.1.2. Economic impact

Proponents of the TTIP point out the great economic potential it has to re-boost stagnating economies on both sides of the Atlantic, and not only those of the parties.¹⁴² Even some opponents cannot deny that the GDP of the EU and the U.S. would increase. It is after all the main goal of a FTA. The NAFTA is already twenty years further, and its economic impact is still the subject of major debate.¹⁴³ Depending on who is speaking,

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-005160&language=EN>
(consulted on 9 September 2015).

¹⁴⁰ Answer to written question E-005160/2015 by Cecilia Malmström on behalf of the Commission, 18 June 2015, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-005160&language=EN> (consulted on 9 September 2015).

¹⁴¹ K. BARYSCH, M. HEISE, “Will TTIP Harm the Global Trading System?”

¹⁴² See *supra*, 1.2.1. According to proponents.

¹⁴³ Knowledge@Wharton, “NAFTA, 20 Years Later: Do the Benefits Outweigh the Costs?”, The Wharton School, University of Pennsylvania, 19 February 2014, available at

the NAFTA is either an economic success¹⁴⁴ or an absolute catastrophe.¹⁴⁵ Or neither, according to Bloomberg's headline "*Nafta 20 Years After: Neither Miracle nor Disaster*".¹⁴⁶ That last statement is probably the closest to reality: where some sectors have benefitted from the free trade area, others have not.

The car manufacturing industry, for example, used to be a busy sector in the U.S. and rather weak in Mexico. After the implementation of NAFTA, manufacturing mostly moved to Mexico. According to the Knowledge@Wharton platform, this translates to almost forty per cent of all jobs related to the automobile sector in the U.S. that had moved south by 2012.¹⁴⁷ This resulted in a loss of jobs for the U.S. and also Canada, but presented an economic gain for Mexico. Other manufacturing exports from the U.S. to its NAFTA counterparts on the other hand went up by more than two hundred fifty per cent, states the U.S.T.R.¹⁴⁸ One of the more mediatised examples is corn production: subsidised and highly industrialised in the U.S., it put many local Mexican farmers out of their jobs (an estimated loss of just under two million jobs).¹⁴⁹ Then there are also other factors to take into account. There are competing markets that would have taken their share of those jobs anyway; China and India have notoriously booming manufacturing industries. The NAFTA has led to the creation of jobs in other sectors in the U.S. that would compensate for the jobs lost in one particular sector... This makes it very difficult to see what the "net gains" are supposed to be.

<http://knowledge.wharton.upenn.edu/article/nafta-20-years-later-benefits-outweigh-costs/> (consulted on 9 September 2015).

¹⁴⁴ In particular the U.S.T.R. claims that the NAFTA has had a positive economic influence on all three parties: <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>; <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/archives/2004/july/nafta-decade-success> (both consulted on 9 September 2015).

¹⁴⁵ A especially negative picture is shown by the Citizens' Trade Campaign (CTC), "*a broad and diverse national coalition of environmental, labor, consumer, family farm, religious, and other civil society groups founded in 1992 to oppose the North American Free Trade Agreement (NAFTA)*" based in the U.S. See their website, <http://www.citizenstrade.org/ctc/about-ctc/> (consulted on 9 September 2015).

¹⁴⁶ M. GLASSMAN, "Nafta 20 Years After: Neither Miracle nor Disaster", *Bloomberg Businessweek*, New York, 30 December 2013, available at <http://www.bloomberg.com/bw/articles/2013-12-30/nafta-20-years-after-neither-miracle-nor-disaster> (consulted on 9 September 2015).

¹⁴⁷ Knowledge@Wharton, "NAFTA, 20 Years Later: Do the Benefits Outweigh the Costs?"

¹⁴⁸ Information available on the website of the U.S.T.R.: <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>.

¹⁴⁹ S. WEISBROT, S. LEFEBVRE, J. SAMMUT, "Did NAFTA Help Mexico? An Assessment after 20 Years", Center for Economic and Policy Research (CEPR), Washington D.C., February 2014, available at <http://www.cepr.net/documents/nafta-20-years-2014-02.pdf> (consulted on 9 September 2015), p. 13-14; J. FOX, L. HAIGHT (eds.), *Subsidizing Inequality: Mexican Corn Policy since the NAFTA*.

The CEPR issued a report in 2014 looking back on twenty years of the NAFTA in Mexico. It shows a rather sad picture of the supposed growth that the FTA should have brought to the Mexican economy. Admittedly, it does not attribute these feeble results to the NAFTA alone, but it does see a great role played by the agreement.¹⁵⁰ The study compares the evolution and current situation of the Mexican economy with those of countries on a similar socio-economic level, mostly its Latin-American neighbours. It hails OECD statistics to point out that the growth of the GDP per capita has been stagnating, contrary to before the NAFTA, and that the poverty rate has not budged from 1994 to 2012, remaining at around fifty-two per cent.¹⁵¹ In 1999, there had been more optimism about the effects of NAFTA on the Mexican economy; even though Mexico would indeed suffer under the privatisation of its industries, it was arguably still better of than other countries in a similar socio-economic situation worldwide, argued F. M. ABBOTT at the time.¹⁵²

It is very confusing to try to determine the impact of the NAFTA on all of its parties, whether it should be considered as positive and progress, or whether it put more people out of a job than helped them to one. Where one scholar praises the tremendous increase in intra-NAFTA trade flow (from around three hundred billion dollars to over a trillion),¹⁵³ another sees very little benefits for the U.S.¹⁵⁴ All in all, this shows that as Wharton Professor Morris Cohen argues, it is very difficult to paint the full picture of the gains and losses of an overall free trade area. Moreover, “(w)e don’t have the luxury of being able to have done the experiment [to find out] what would have happened had there been no NAFTA.”¹⁵⁵ A situation that could definitely repeat itself in the case of the TTIP.

3.1.3. *Social and environmental impact*

While there is controversy about the economic benefits of the NAFTA, enough studies and scholars point out that there were certainly positive consequences, such as the

¹⁵⁰ S. WEISBROT, S. LEFEBVRE, J. SAMMUT, “Did NAFTA Help Mexico? An Assessment after 20 Years”

¹⁵¹ *Ibid.*, p. 6-7.

¹⁵² F. M. ABBOTT, “The North-American Integration Regime and its Implications for the World Trading System.”

¹⁵³ M. SERGIE, “NAFTA’s Economic Impact”, Council on Foreign Relations (CFR), 14 February 2014, available at <http://www.cfr.org/trade/naftas-economic-impact/p15790> (consulted on 9 September 2015).

¹⁵⁴ Knowledge@Wharton, “NAFTA, 20 Years Later: Do the Benefits Outweigh the Costs?”

¹⁵⁵ *Ibid.*

stabilisation of the exchange rate between the U.S. dollar and the peso.¹⁵⁶ The social and environmental impact of the NAFTA, on the other hand, receives even more criticism. One socio-economic aspect that was already mentioned *supra*, is the division of labour forces over the three parties. The fear that the NAFTA would create “*a giant sucking sound going south*”, as independent presidential candidate Ross Perot predicted in 1992, proved exaggerated.¹⁵⁷ But it is a fact that many jobs were taken over by cheaper Mexican manufacturers, where labour conditions are not of the same standards as in the U.S. or in Canada.

After twenty years, there is also a lot of data collected on the environmental impact of NAFTA. Ilana Solomon is director of Responsible Trade program at the Sierra Club, one of the largest environmental agencies of the U.S.¹⁵⁸ Her program was created following the conclusion of the NAFTA in 1994 to analyse what such large-scale trade liberalisation can have as effect on environment and sustainable development. She is pointing out that where the EU has been more vocal about its concerns for the environment, consequences would be just as important in the U.S. She specifically mentions the rise of number of environmental cases that followed under the NAFTA.¹⁵⁹ She ties this wave of litigation to the inclusion of ISDS provisions in the NAFTA, which according to her have permitted several multinational corporations to bring proceedings against governments.¹⁶⁰

A prominent example is the *Lone Pine Resources Inc. v. The Government of Canada* case, a lawsuit brought by the giant oil and gas company against Quebec for its moratorium on ‘fracking’.¹⁶¹ Fracking, or hydraulic fracturing, is a process used for the extraction of shale gas from the earth.¹⁶² It is highly controversial because it requires a

¹⁵⁶ *Ibid.*

¹⁵⁷ M. GLASSMAN, “Nafta 20 Years After: Neither Miracle nor Disaster.”

¹⁵⁸ For more information about the program and Ilana Solomon, see <http://www.sierraclub.org/other/authors/ilana-solomon>.

¹⁵⁹ Interview of Ilana Solomon by Sophie Chapelle and Olivier Petitjean for *multinationales.org*, 11 July 2014, available at <http://multinationales.org/Ilana-Solomon-In-terms-of-climate>.

¹⁶⁰ I. SOLOMON, “No Fracking Way: How Companies Sue Governments to Get More Resources”, *The Huffington Post Canada*, 10 March 2013, available at http://www.huffingtonpost.ca/ilana-solomon/lone-pine-sues-canada-over-fracking_b_4032696.html (consulted on 10 September 2015).

¹⁶¹ *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, available at: <http://www.italaw.com/cases/1606#sthash.fLxvotCR.dpuf> (consulted on 10 September 2015).

¹⁶² L. GANDOSI, “An overview of hydraulic fracturing and other formation stimulation technologies for shale gas production”, *Scientific and Technical Research series*, report for the Institute for Energy and

tremendous amount of water, it implicates the risk of chemicals flowing into ground water used for consumption and it could potentially cause earth tremors.¹⁶³ In 2013, Lone Pine Resources Inc. brought arbitration proceedings against Quebec because it considered this moratorium to constitute unlawful expropriation of resources that the company had a right to under certain permits.¹⁶⁴ Critics see in this case a great risk for environmental policies all over the NAFTA area, as this lawsuit could potentially cost the Canadian government two hundred fifty million dollars.¹⁶⁵ If this case were to become a precedent, would this not put pressure on many other governments inside free trade areas such as the NAFTA, and of course, the TTIP? To answer this question, I refer back to the previous part and the discussion about ISDS provisions: where this is indeed a risk, the huge mediatisation should not lead to believe that it would become a common situation for multinationals to attack legislative norms.

3.1.4. Conclusion

The consequences of the implementation of the NAFTA are still controversial. Whether economically or socio-environmentally, there have been positive and less positive developments, even also some problems. The NAFTA being the largest of its kind at the time of its enactment, I believe it is fair to acknowledge that its effects were somewhat difficult to predict. However, I do not see this as a valid statement for the TTIP. As public opinion has already taken upon itself to point out, there are some risks and problem areas involved with ISDS, which the NAFTA has proven to be not just threats. When economies move at different paces, integrating them in a free trade area also causes imbalances and shifts that need to be anticipated, as the example of Mexico

Transport, published by the European Commission Luxembourg, Publications Office of the European Union, 2013, available at

[https://ec.europa.eu/jrc/sites/default/files/an_overview_of_hydraulic_fracturing_and_other_stimulation_technologies_\(2\).pdf](https://ec.europa.eu/jrc/sites/default/files/an_overview_of_hydraulic_fracturing_and_other_stimulation_technologies_(2).pdf) (consulted on 10 September). On fracking, see also footnote 46.

¹⁶³ A. ANDREWS *et al.*, “Unconventional Gas Shales: Development, Technology, and Policy Issues”, Congressional Research Service report, 30 October 2009, available at <http://www.fas.org/sgp/crs/misc/R40894.pdf> (consulted on 10 September 2015); L. GANDOSI, “An overview of hydraulic fracturing and other formation stimulation technologies for shale gas production”, p. 3.

¹⁶⁴ *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Notice of Arbitration, 6 September 2013, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf> (consulted on 10 September 2015).

¹⁶⁵ J. BELTRAME, “Quebec Fracking Ban Lawsuit Shows Perils Of Free Trade Deals: Critics”, The Canadian Press, published on the website of The Huffington Post Canada, 10 March 2013, available at http://www.huffingtonpost.ca/2013/10/03/quebec-fracking-ban-lawsuit_n_4038173.html (consulted on 10 September 2015).

has showed. Especially in the EU, not all economies are as stable, proven by the recent Greek fiasco. When reading the Commission's and U.S.T.R.'s articles about the TTIP, one can not but feel that they focus so very strongly on the positive economic boost, that it completely forgets to imagine the scenario of failure. If in a particular area, certain TTIP provisions proved to be unsuccessful, what are the options? Members of Parliament and legislators of all three NAFTA governments filed a letter in 2009 asking for a renegotiation of the agreement, to rework the trade model that they believe is not adequate.¹⁶⁶ Are their considerations taken into account sufficiently to make sure the TTIP does not make the same mistakes?

According to Christopher SANDS, there is hope that the TTIP negotiators could indeed still hear this plea. In his article, he considers a method for the structure of the TTIP that could avoid some of the hardships the NAFTA faced in its battle for ratification. If it were to be shaped as an executive agreement, meaning the decisions could be taken as the free trade area develops, this would silence critics and make the TTIP more flexible.¹⁶⁷ It would, however, miss the security and stability of the legislative text. Maybe a combination of both systems could be envisaged, whereby a solid legislative agreement gives executive parties some leeway in future policy decisions, given certain conditions. SANDS sees it as follows: *“A TTIP regulatory cooperation commission and a customs facilitation working group (...) could be announced before 2017 and in the future the partnership process would address the substantive issues incrementally, and without a return to rancour of the 1990s.”*¹⁶⁸

¹⁶⁶ Letter to Prime Minister Harper and Presidents Obama and Calderón, signed by Senator Antonio Mejía Haro, President of the Working group in charge of evaluating the impacts of NAFTA on the farming sector, Peter Julian, Member of Parliament (Burnaby-New Westminster) and International Trade Critic for the New Democratic Party of Canada (NDP), Marcy Kaptur, Democratic Member of the United States House of Representatives (D-Ohio), Mike Michaud, Democratic Member of the United States House of Representatives (D-Maine), Yeidckol Polevnsky, Mexican Senator with the Party of the Democratic Revolution (PRD) and Vice-President of the Mexican Senate, and Víctor Suárez, former Mexican legislator, and Founder and Executive Director of the National Association of Rural Commercialization Enterprises (ANEC) in Mexico. Available at <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/LettertorenegociateNAFTA.pdf> (consulted on 10 September 2015).

¹⁶⁷ C. SANDS, “Saving TTIP by Learning from NAFTA”, Atlantic-Community.org, 12 January 2015, available at <http://www.atlantic-community.org/-/saving-ttip-by-learning-from-nafta> (consulted on 10 September 2015).

¹⁶⁸ *Ibid.*

3.2. Comprehensive Economic and Trade Agreement (CETA)

The CETA is a free trade agreement negotiated between the EU and Canada. It pursues roughly the same objectives as the TTIP, which is why it is often named in the same breath as the latter. Observers followed the CETA negotiations closely, as it will most likely serve as a model and precedent for the TTIP. Following a breakthrough in the negotiations in October 2013, the consolidated text of the CETA was completed and signed on 18 October 2013 and is available for consultation since September 2014.¹⁶⁹

Surprisingly, many of the provisions that are creating a storm of protest in the TTIP, passed in relatively calm conditions in the CETA: ISDS provisions have been agreed upon in the text, as well as an IPR chapter. However, the agreement still needs to be ratified, and in light of the debate around the TTIP the spotlight moves back to the agreement between the EU and Canada. In January 2015, for example, the French Secretary of State for Foreign Trade, Matthias Fekl, the German Minister for the Economy Sigmar Gabriel, and the State Secretary at the German Federal Ministry for Economic Affairs Matthias Machnig met to express their wish to review the ISDS chapter in the CETA,¹⁷⁰ even though this agreement is technically already closed for negotiations in October 2013. The reason for their meeting was the public consultation organized by the Commission, which generated such massive response on ISDS.¹⁷¹ It should be kept in mind that, just as with the TTIP, the CETA is a mixed agreement: it will have to obtain ratification in the European Parliament and in all twenty-eight national parliaments of the Member States. This is a significant hurdle, since both France and Germany have already stated they want a review of the ISDS chapter. The French Parliament has since then also expressed its concern and adamantly refuses to ratify the treaty until the ISDS provisions change.¹⁷² However, it would seem that Canada does not consider coming back on those provisions, according to a spokesperson for the Canadian

¹⁶⁹ On the website of the European Commission: <http://ec.europa.eu/trade/policy/in-focus/ceta/> (consulted on 11 September 2015).

¹⁷⁰ Joint declaration by Sigmar Gabriel, Matthias Machnig and Matthias Fekl ("*Déclaration commune de Sigmar Gabriel, Matthias Machnig et Matthias Fekl*"), 21 January 2015, available at <http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/actualites-liees-a-la-diplomatie-economique-et-au-commerce-exterieur/2015/article/negotiations-commerciales-117484> (consulted on 11 September 2015).

¹⁷¹ In this regard, see *supra*, "2.3.1. Secrecy vs. transparency: Who knows what?" and footnote 102.

¹⁷² EurActiv.fr and agencies, "France may block EU-Canada deal over ISDS", translated by S. WHITE, EurActiv.com, 2 July 2015, available at <http://www.euractiv.com/sections/trade-society/france-may-block-eu-canada-trade-deal-over-isds-315911> (consulted on 11 September 2015).

government.¹⁷³ The struggle for ratification of the CETA will from now on be parallel to the one for the TTIP.

3.3. EU – Korea and Korea – U.S. (KORUS) Free Trade Agreements

Both the EU and the U.S. have recently concluded trade deals with South Korea, important trading partner in East Asia: in 2011, the country managed to become the ninth country in the world to pass the limit of one trillion USD in trade volume.¹⁷⁴ Not only is this interesting from the point of view of the TTIP, as in the EU both the TTIP and the EU-Korea FTA are considered different from their predecessors. They can also tell us more about their respective impact in the EU and the U.S. and whether their implementation was received differently.

3.3.1. EU-Korea FTA

“The EU is engaged in negotiations of a ‘new generation’ of free trade agreements since 2006. (...) The first of these new generation agreements that entered into force is the EU — Korea Free Trade Agreement,” Trade Commissioner Cecilia Malmström replied to a written question by two S&D MEPs in the context of the TTIP.¹⁷⁵ According to former Trade Commissioner Karel De Gucht, when in office at the time of implementation of the EU-Korea FTA, the treaty is broader, more extensive and ambitious than its predecessors concluded by the EU,¹⁷⁶ in that it includes the reduction of non-tariff barriers. Seeing as the TTIP is also an agreement in this line of ‘new generation’ agreements, it should be interesting to analyse what the EU-Korea FTA has had as an impact on trade between the countries. Also like the TTIP, the EU-Korea FTA

¹⁷³ C. BARBIÈRE, “Paris and Berlin call for review of EU-Canada trade deal”, translated by S. WHITE, EurActiv.com, 27 January 2015, available at <http://www.euractiv.com/sections/trade-society/paris-and-berlin-call-review-eu-canada-trade-deal-311570> (consulted on 11 September 2015).

¹⁷⁴ A. MARX, J. WOUTERS, W. MOON, Y. RHEE, S. PARK, M. BURNAY (eds.), *EU-Korea Relations in a Changing World*, Leuven Centre for Global Governance Studies (KU Leuven) and Graduate School of International Studies (Seoul National University), Leuven, 2013, p. 12.

¹⁷⁵ Answer to written question E-005160/2015 by Cecilia Malmström on behalf of the Commission, 18 June 2015.

¹⁷⁶ European Commission, “The EU-Korea Free Trade Agreement in practice”, Publications Office of the European Union, Luxembourg, 2011, available at http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf (consulted on 15 September 2015), Foreword by K. DE GUCHT, p. 1.

is qualified as “mixed agreement”. This means that the trade deal needed approval from the EU national parliaments.¹⁷⁷

In its third annual report on the EU-Korea FTA to the European Parliament and the Council, the Commission assures them of the positive consequences of the agreement. In three years of provisional implementation, trade between both parties has significantly increased: exports by the EU to South Korea went up by thirty five per cent, imports to the EU from South Korea by twenty-one per cent.¹⁷⁸ Almost all tariff barriers have been removed between both countries.¹⁷⁹ Concerning non-tariffs barriers, these were significantly reduced in certain sectors such as the automobile, electronics and pharmaceutical sectors, which presented the biggest import-export hurdles. These also presented the major challenge in concluding the deal: especially in the auto-industry, the reduction of regulatory barriers was negatively received by mostly France and Italy.¹⁸⁰ The fear was that the European markets would be flooded with cheaper Korean-made cars, whereas the EU would not be able to export its own products. However, this fear is unfounded, said Fredrik ERIXON and Hosuk LEE-MAKIYAMA, co-directors at the European Centre for International Political Economy (ECIPE).¹⁸¹ The report by the Commission equally denies that the European car manufacturing industry has taken a large blow, whilst acknowledging that negotiations on the matter were tense.¹⁸² The brief by the ECIPE also states that in the end, the effects of bilateral treaties are actually minimal.¹⁸³ But overall, the EU-Korea FTA has benefitted from a fast negotiation and

¹⁷⁷ B. FOX, “National MPs could block US trade deal, activists say”, EU Observer, Brussels 24 July 2015, available at <https://euobserver.com/news/129739> (consulted on 14 September 2015).

¹⁷⁸ European Commission, “Annual Report on the Implementation of the EU-Korea Free Trade Agreement”, Report from the Commission to the European Parliament and the Council, COM(2015) 139, Brussels, 26 March 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153271.pdf (consulted on 14 September 2015), p. 3.

¹⁷⁹ According to the explanatory brochure of the European Commission, 98.7 per cent of import duties were removed: European Commission, “The EU-Korea Free Trade Agreement in practice”, p. 3.

¹⁸⁰ The Italian Trade Minister, Adolfo Urso, even threatened to veto the agreement based on the concerns of other Members States relating to the car industry (EurActiv, “EU-South Korea Trade Deal under attack”, 8 September 2010, available at <http://www.euractiv.com/trade/eu-south-korea-trade-deal-attack-news-497580> (consulted on 15 September 2015)).

¹⁸¹ F. ERIXON and H. LEE-MAKIYAMA, “Stepping into Asia’s Growth Markets: Dispelling Myths about the EU-Korea Free Trade Agreement”, ECIPE Policy Briefs, No. 03/2010, 2010, available at <http://www.ecipe.org/publications/stepping-into-asias-growth-markets-dispelling-myths-about-the-eu-korea-free-trade-agreement/> (consulted on 15 September 2015).

¹⁸² European Commission, “Annual Report on the Implementation of the EU-Korea Free Trade Agreement”, p. 5.

¹⁸³ F. ERIXON and H. LEE-MAKIYAMA, “Stepping into Asia’s Growth Markets: Dispelling Myths about the EU-Korea Free Trade Agreement”, p. 13.

ratification process, and is as a whole viewed to have positively influenced trade relations between the EU and South Korea.

3.3.2. Korea-U.S. FTA (KORUS)

The agreement between the U.S. and South Korea, on the other hand, took a while longer to finalise.¹⁸⁴ Unlike the EU, the U.S. has had a more recent experience with a major FTA and is still trying to figure out what the consequences were on its entire economy. It could be that there is a certain disillusionment following the NAFTA, which may have resulted in reluctance on behalf of the U.S. government. But this was not the point of view of all: others considered that the fast implementation process of the EU-Korea FTA should have been an example for the U.S. and a “wake-up call” to further liberalize trade.¹⁸⁵

The study of the impact of previous large FTAs gains more and more momentum as the conclusions of both the TPP and TTIP come closer. In a report by the Congressional Research Service, the authors also affirm that “*perceptions of the KORUS FTA’s economic impact and concerns over its implementation may influence congressional debate in the new FTAs now under negotiation, specifically the Trans-Pacific Partnership (TPP), which South Korea has signaled an interest in joining, and the Transatlantic Trade and Investment Partnership (T-TIP) between the United States and the European Union.*”¹⁸⁶ In any case, the KORUS is a somewhat less comprehensive agreement than the EU-Korea FTA¹⁸⁷ and is facing more criticism on its effects.¹⁸⁸

¹⁸⁴ The KORUS negotiations were completed in 2007 and the agreement was ratified by the end of 2011, whereas the EU-Korea FTA negotiations ran from 2007 until 2009 and the agreement was signed in 2010 and implemented in March 2012 (E. LAURENZA, J. MATHIS, “Regulatory Cooperation for Trade in Services in the EU and US Trade Agreement with the Republic of Korea: How Deep and How Compatible?”, in A. MARX, J. WOUTERS, W. MOON, Y. RHEE, S. PARK, M. BURNAY (eds.), *EU-Korea Relations in a Changing World*, Leuven Centre for Global Governance Studies (KU Leuven) and Graduate School of International Studies (Seoul National University), Leuven, 2013, p. 41-66).

¹⁸⁵ J. M. FREEDMAN, J. STEARNS, “EU, Korea Trade Deal May Be ‘Wake-Up Call’ for U.S.”, *Bloomberg*, 15 October 2015, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a.5iQvR.TQVk> (consulted on 15 September 2015).

¹⁸⁶ B. R. WILLIAMS, M. E. MANYIN, R. JURENAS, M. D. PLATZER, “The U.S. - South Korea Free Trade Agreement (KORUS FTA): Provisions and Implementation”, Congressional Research Service report, 16 September 2014, available at <https://fas.org/sgp/crs/row/RL34330.pdf> (consulted on 17 September 2015), p. 1-2.

¹⁸⁷ E. LAURENZA, J. MATHIS, “Regulatory Cooperation for Trade in Services in the EU and US Trade Agreement with the Republic of Korea: How Deep and How Compatible?”, p. 41-66.

As with any FTA, the good must be weighed against the bad. Which one outweighs the other, is again the source of many debates. In a study, the Economic Policy Institute (EPI), a left-leaning think tank based in Washington D.C., even accuses governments of systematically predicting huge economic progress by means of FTAs, where in reality most of such free trade deals lead to either a very modest positive influence or none at all. The balance between the actual progress resulting from such an agreement, and the costs of it on other factors of society (such as socio-economic and environmental factors) is not justified, says EPI researcher Robert E. SCOTT.¹⁸⁹ Estimates dating from before the implementation of the KORUS, which happened in March 2012, predicted that the economic impact of the FTA would be rather minimal, vacillating around a tenth of a per cent of the total U.S. economy.¹⁹⁰ These estimates are hard to confirm today, but it seems clear that the economic benefits attributable to the FTA are not larger than that. On top of this, the Congressional Research Service report previously quoted also mentions that the trade deficit with South Korea has been augmenting over the last two years of KORUS implementation.¹⁹¹

Why is there such an outspoken apparent difference between the impact of the EU-Korea FTA and the KORUS? There is surely not one reason alone, but I do believe something can be learned from this. The EU-Korea FTA is the largest FTA concluded up until now by the EU, and moreover is the first agreement in the line of regional trade deals seeking further and deeper integration. Therefore, the EU has no real experience with bilateral trade liberalisation and FTAs, but has remained more in the realm of the WTO. This is not the case in the U.S., where after twenty years of implementation, debates and discussions about the NAFTA are still frequently in the news. The overall

¹⁸⁸ This can be experienced when researching both FTAs: the list of critical articles disproving the positive impact of the KORUS is extensive, whereas criticism on the EU-Korea FTA stays relatively disparate.

¹⁸⁹ R. E. SCOTT, "Trade Policy and Job Loss: U.S. Trade Deals with Columbia and Korea Will Be Costly", EPI working paper, no. 289, Washington D.C., 25 February 2010, available at http://epi.3cdn.net/87da5b7ec4f5677422_o9m6bh6nv.pdf (consulted on 16 September 2015), p. 2-3.

¹⁹⁰ United States International Trade Commission (USITC), "U.S.-Korea Free Trade Agreement: Potential Economy-wide and Selected Sectoral Effects", Investigation No. TA-2104-24, USITC Publication 3949, September 2007, available at <http://www.usitc.gov/publications/pub3949.pdf> (consulted on 17 September 2015); K. KIYOTA and R. M. STERN, "Economic Effects of a Korea-U.S. Free Trade Agreement", Korea Economic Institute, Special Studies 4, April 2007, available at <http://fordschool.umich.edu/rsie/workingpapers/Papers551-575/r557.pdf> (consulted on 17 September 2015).

¹⁹¹ B. R. WILLIAMS, M. E. MANYIN, R. JURENAS, M. D. PLATZER, "The U.S. - South Korea Free Trade Agreement (KORUS FTA): Provisions and Implementation", p. 1.

impact of such a trade deal is very difficult to establish, as we have pointed out, and does not let itself be interpreted easily. There is also a different emphasis on the consequences of FTAs, depending on which political faction dominates the government, the economic situation of the members and the activeness of the civil movements and NGOs. The U.S. government might be more aware of the implications of a comprehensive trade deal than the EU, which at this stage has only seen the short-term benefits of its EU-Korea FTA. This awareness probably played a role in the way Congress handled the KORUS, second largest FTA after the NAFTA, and might ultimately have an influence on the TTIP ratification. In the EU, awareness has not come from the governmental side, but has initially grown from the protests of civil movements and NGOs, which have been very active on the subject in recent years. These are two different internal dynamics towards trade liberalisation.

CONCLUSION

The aim of this paper was to give an oversight of the negotiation process of the TTIP on both sides of the Atlantic, and to compare both parties in this respect. A brief timeline of the history of the TTIP shows that it is not a recent idea, but the way it is being worked out is, on the contrary, a new one. The EU has traditionally been more sceptical towards leaving the reach of the multilateral forum of the WTO and venturing into regional trade agreements, considering the latter to be inherently contrary to the former. Indeed, bilateral or regional FTAs are by definition discriminatory to third parties wishing to trade with the signatories.¹⁹² This position now seems to have shifted, as the conclusion of the FTA with South Korea and the negotiations of the TTIP have shown. The European Commission has proven itself pro-active and motivated to engage in deeper, more comprehensive regulatory integration by proclaiming to negotiate a ‘new generation’ of free trade deals. Whether this is in spite of the WTO system or because of it, is the subject of debate.

The U.S. mentality towards regional trade liberalisation has equally changed over the course of the last two decennia. The NAFTA was put in place simultaneously with the WTO system and both grew at a different pace, the former delivering vague results and the latter stagnating in its last round of negotiations. The experiences Congress learned from this have influenced the way it is now engaging in the negotiations and development of other FTAs, such as TPP and TTIP. This might have led the U.S. negotiators to be more aware of the dangers of too much regulatory integration.

However, these two positions towards FTAs are in stark contradiction with the public opinion in each country. In the EU, the civil movements and NGOs have relentlessly raised their voices and organised campaigns to rally national and European parliamentarians to their cause. Social media have had a major impact on the debate, with any information or misinformation about the TTIP potentially shared with millions of people in a matter of hours. The European Parliament is divided, with a growing number of MEPs switching to the opponents’ side. The Commission under Trade Commissioner Malmström has put many efforts in trying to remedy this opposition by releasing more

¹⁹² F. ERIXON and H. LEE-MAKIYAMA, “Stepping into Asia’s Growth Markets: Dispelling Myths about the EU-Korea Free Trade Agreement”, p.

confidential documents and consolidated texts, assuring the public that they were communicating everything they could allow themselves to share. In the U.S., there is no similar surge of civil protests across the country. Specialised forums do initiate discussions on the subject, especially now that the U.S. is also involved in negotiations with its trans-pacific partners. But on the whole, the awareness among the population is not of the same intensity as in Europe. The U.S. government is also not putting extra efforts in augmenting transparency.

The public debate in Europe has shown very clearly on which issues the Member States are hesitant. First and foremost, the ISDS clause proposed for the TTIP did not pass the vote in Parliament. It is the most hotly debated subject of the agreement because it touches on the most obvious criticism of free trade: the power of multinational corporations. Opponents to the deal point to several cases where ISDS provisions were used to sue governments and to try and pressurise them into changing their environmental legislation. Even if these are very rare situations and the majority of cases are part of an effective mechanism, media coverage has led the public opinion to be very negative towards it. This in general has given the impression that Europe's regulatory standards could change and be lowered to a common denominator with the U.S. But despite loud protests, this has not led the European Commission to put the question of the legality of ISDS provisions to the European Court of Justice.¹⁹³

In terms of intellectual property rights, the TTIP is creating controversy as well. Parallels have been made between the rejected ACTA and the chapter on IPRs proposed for the transatlantic agreement. This leads to the same concerns being raised in the current debate: is the balance between the right to privacy and IPRs respected? And seeing as how the perception of privacy are different in the EU and the U.S., is the EU again conforming itself to a situation that is diminishing the rights of its citizens? Those are the fears of the anti-TTIP camp.

The TTIP debate is a healthy test for the negotiators of this and future deals, in that it brings forward the most salient issues of free trade agreements. It also leads to a more

¹⁹³ J. CRISP, "Commission won't ask EU judges to decide on legality of ISDS", EurActiv.com, 8 September 2015, available at <http://www.euractiv.com/sections/trade-society/commission-wont-ask-eu-judges-decide-legality-isds-317445> (consulted 20 September 2015).

equilibrated and transparent discussion. But it should not fall prey to ‘over-democratisation’: it would indeed be unfortunate if the chance of creating a free trade area with the U.S. was thwarted due to the circulation of misinformation on the internet and other media. The ratification of the TTIP is still far off and has many hurdles to overcome, which is why an informed debate is crucial. This can happen through the study of previous FTAs, such as the NAFTA, the closest example of a large regional free trade deal. Even if not all elements are comparable, it should not be underestimated how much it can tell the TTIP negotiators on how tricky trade liberalisation and integration can become.

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ABSTRACT

Im Jahr 2013 begannen zwischen der Europäischen Kommission und der Handelsvertretung der Vereinigten Staaten von Amerika Verhandlungen über ein transatlantisches Freihandelsabkommen (TTIP). Diese Vereinbarung folgt dem aktuellen Trend zu sogenannten „New Generation“ Handelsabkommen welche eine umfassende Liberalisierung des Handels durch Eliminierung von regulatorischen Handelsbeschränkungen zum Ziel haben. Die aktuellen Verhandlungen haben sowohl in der Europäischen Union als auch in den Vereinigten Staaten substantielle Kritik hervorgerufen: Befürworter unterstreichen die Aussicht auf die wirtschaftlichen Wachstumsmöglichkeiten für beide Vertragspartner aufgrund der Beseitigung der Handelsbeschränkungen welche die Mitgliedschaft in der WTO nicht aufgehoben hat, bzw. nicht aufheben konnte. Kritiker befürchten eine Verschiebung der Kräfteverhältnisse in Richtung multinationaler Konzerne und ein Untergraben der Souveränität der einzelnen Mitgliedsstaaten. In dem Bestreben die umstritten Punkte des TTIP und deren Ursachen zu erörtern konzentriert sich diese Erläuterung in erster Linie auf ebendiese; im Speziellen auf die Investor-Staat-Streitbeilegung, auf regulatorische Standards und Rechte an geistigem Eigentum, als auch auf das Recht auf Privatsphäre. Anschließend werden die Verfahrensprobleme wie die Transparenz der Verhandlungen und der Adaptionprozess behandelt. In diesem Kapitel werden auch die unterschiedlichen Situationen in der Europäischen Union und den Vereinigten Staaten einander gegenübergestellt. Die inhaltlichen Schwerpunkte der Arbeit sind folglich Analysen des NAFTA, der CETA und die Behandlung zweier Freihandelsabkommen mit der Republik Süd Korea, Abkommen die ihrerseits ebenfalls substantiell kritisiert wurden. Die Auswirkungen des NAFTA sind bis heute Gegenstand grundlegender Diskussionen auf dem amerikanischen Kontinent. Sind die beiden Freihandelsabkommen vergleichbar und gibt es Wege die Fallgruben der vorangegangenen Abkommen beim TTIP zu vermeiden? Die Fragen sind sicherlich nicht einfach zu beantworten.

SUMMARY

In 2013, the European Commission and the United States Trade Representative started negotiations for a Transatlantic Trade and Investment Partnership (TTIP). This agreement fits into a recent trend of ‘new generation’ trade deals, aiming at more comprehensive trade liberalisation through the elimination of regulatory trade barriers. This agreement has faced criticism and controversy in the EU and in the U.S.: proponents claim the treaty would bring substantial economic growth for both partners, bringing down those barriers that their membership to the WTO did not (could not) erase. Critics, however, point out that the treaty would give tremendous powers to multinational corporate entities and to a certain extent hollow out the sovereignty of the Member States. In an effort to explain which issues are controversial and why, this paper will first focus on the controversial content of the TTIP: more specifically, investor-state dispute settlement, regulatory standards and intellectual property rights and the right to privacy. Next, it will zoom in on procedural problems the agreement faces, such as the transparency of negotiations and the adoption process. All along this chapter, the situation in the EU will be compared to the one in the U.S. The core of the paper then consists of an analysis of the NAFTA, the CETA and two free trade deals with South Korea, agreements that faced a lot of criticism themselves. The impact of the NAFTA is still the subject of major discussion across the Atlantic. Are the situations of both FTAs comparable and is there a way for the TTIP to avoid the pitfalls of its predecessors? Those questions are difficult to answer to.

CURRICULUM VITAE

1. Education

- August 2015: International Professional Summer Program Understanding U.S. Intellectual Property Law at the **University of Stanford, CA**, on a scholarship from the University of Vienna.
- October 2014 – June 2015: LL.M. International and European Business Law at the **University of Vienna**.
- August 2013 – December 2013: exchange at the **National University of Singapore**.
- September 2012 – June 2014: Master of Law at the **KU Leuven**. Major in Economic Law, minor in International and European Law. Master Thesis “De invloed van multilaterale en bilaterale handelsliberalisatie op volksgezondheid en de toegang tot geneesmiddelen” *magna cum laude*.
- September 2009 – June 2012: Bachelor of Law at the **University of Namur**. *Cum laude*. 2011: participant of the *Concours de Droit International Humanitaire* organized by the Red Cross, personal score of 17/20 on the pleading contest in Namur.
- September 2003 – June 2009: Sint-Jan Berchmanscollege Brussel.

2. Languages

Dutch & French: mother tongues (raised bilingually).

English: professional proficiency (TOEFL score of 115 in 2013).

German: good proficiency.