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The Transatlantic Trade and Investment Partnership: Limits on negotiating behind the border barriers

Abstract: This special issue focuses on the difficulties of negotiating the Transatlantic Trade and Investment Partnership (TTIP), with contributions by scholars from different perspectives. This introductory article briefly examines the trend to mega-FTAs of which TTIP is a leading example. It then reviews the contributions to this special issue, drawing on an analytical approach that reflects extant work on transnational and transgovernmental relations. This approach, we contend, helps to understand the stark mismatch between the desire of some parties to negotiate binding trade rules on behind-the-border regulatory policies in certain key sectors of national economies and the progress made in TTIP talks. We then highlight the significance of some key actors in a case study of failed E.U. attempts to include financial sector reforms and associated regulatory processes in TTIP.

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I. Introduction

Proposals for transatlantic trade reform go back at least twenty-five years, but only in June 2013 did the United States and the European Union commence negotiations of a trade agreement, the Transatlantic Trade and Investment Partnership (TTIP). Since then, fifteen rounds of negotiations have been held, but the original deadline for completing the talks has been abandoned. Not surprisingly, given the significant range of interests, disagreements between the United States and European Union over negotiating ambition arose.[1] The TTIP negotiations relate to three broad categories of public policy: market access for goods, services, and agriculture; regulatory issues involving a host of industries, as well as general procedural approaches; and rules on investment, intellectual property, labor, and the environment, along with "new" issues such as state-owned enterprises and so-called localization requirements.[2]

Since the 1970s, with the decline of traditional trade restrictions—in particular, import tariffs and quotas—trade negotiations at the regional and multilateral level have begun tackling other impediments to cross-border commerce, including those that arise from regulation. On paper at least, such regulation often serves important non-mercantilist purposes and this complicates trade negotiations—as well as the ratification of trade accords—as opponents can contend that proposed changes seek to "gut" state measures that have substantial public support.

TTIP is not the only mega-FTA negotiation that we have seen in the last decade that attempts to tackle the host of complex impediments to trade. With problems in concluding the Doha Round of the World Trade Organization (WTO), countries began negotiating a flurry of bilateral Free Trade Agreements (FTA) during the 2000s, with their number growing from forty-seven in 1994 to 270 today.[3] Of course, many of these agreements have been negotiated for security reasons as well, particularly in the case of the post September 11 attacks when the Bush Administration sought accords with countries in North Africa and the Middle East, among others.[4]

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1 As of June 2017 the TTIP negotiation has not been concluded. E.U. officials repeatedly refer to this negotiation as being in "deep freeze." A review of leading newspapers and industry associations, as well as of official U.S. websites, reveals that, as of this writing, the incoming Trump Administration has not taken a definitive position on the status or prospects of TTIP.

2 For an overview from a U.S. perspective, see Akhtar and Jones (2014) and for information from an official E.U. perspective, see http://ec.europa.eu/trade/policy/in-focus/ttip/.

3 Data from WTO website.

4 See Aggarwal (2013) for a discussion of the different factors driving U.S. FTAs.

Driven in part by the ensuing spaghetti bowl of crisscrossing agreements, the United States, along with eleven other countries in Asia-Pacific, pursued the Trans Pacific Partnership (TPP), which is currently on hold as a result of the Trump Administration's withdrawal of the United States from TPP despite the accord having been concluded in 2015. In the Asian region, sixteen countries are currently pursuing the Regional Comprehensive Economic Partnership (RCEP).[5] Thus, at one level, mega-FTAs can be seen as an effort to reduce transaction costs, or what Griffith, Steinberg, and Zysman refer to in their article as "incremental liberalization." As they and others note,[6] American geo-economic and geo-strategic motivations can provide complementary or even alternative explanations of the trend toward mega-FTAs.

The difficulties encountered in both the higher standard TTIP and TPP, as opposed to the less ambitious RCEP, point to the sharp disagreements that can arise when trade negotiations move from border to behind-the-border impediments to trade. Yet as the Uruguay Round on sanitary and phyto-sanitary standards for food and on technical standards for manufactured products demonstrate, nations can agree on rules on the implementation of important regulatory functions of the state. However, as the ongoing debate in Europe on the merits of Investor State Dispute Settlement (ISDS) mechanisms has shown, fears that trade talks could result in steps that threaten cherished regulatory goals have gained much currency among the public.[7]

These contrasting examples motivate the central research question addressed in this special issue: What commercial, bureaucratic, and other factors determine which elements of the modern regulatory state are likely to be subject to binding trade rules?

All too often, scholars have emphasized the presence of cross-border spillovers as the primary rationale for binding a policy in trade accords. Moreover, in discussions of the divergent positions taken by the European Union and United States during the TTIP negotiations, analysts have often discussed the "U.S. position" or "E.U. position" on particular issues. More in-depth analysis has pointed to lobbying by specific interests *within* the United States and European Union. This kind of analysis shifts the focus away from the typical assumptions of unitary state

5 On mega-FTAs more generally, see Aggarwal and Evenett (2013). On the evolution and political economy of TPP and RCEP, see the special issue on these accords, see Aggarwal (2016b).

6 See Aggarwal and Evenett (2013) on strategic and broad economic concerns as well as Aggarwal (2016a) on the overselling of TPP from a strategic standpoint.

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

actors common in economics and realist theories of political science based on an aggregate preference function. As a corrective, work by Robert Putnam on “two level games” is often cited as a superior approach to understanding the dynamics of international negotiations. Putnam (1988) notes that international negotiations involve win sets at both the international and domestic level, which must then be reconciled to achieve a successful negotiation.

In our view, a significant aspect of the TTIP negotiation process harkens back to earlier work by Graham Allison on bureaucratic politics, which focuses on how the evolution of the 1962 Cuban missile crisis was driven by bureaucratic rivalries.[8] Drawing on the pioneering work of Karl Kaiser and others, Robert Keohane and Joseph Nye have also emphasized the internationalization of this phenomenon when examining how the creation of transgovernmental coalitions accounts, in part, for the complexity of international negotiations.[9]

This work shows how a multiplicity of actors coordinating across borders, or trans-national relations, can influence interstate bargaining outcomes. Such outcomes include defining the scope of the negotiating agenda and the complexity of lobbying in a transnational and transgovernmental environment. In our view, such an approach provides insight into the factors limiting the extent to which TTIP can tackle the behind-the-border regulatory matters that many contend are so important to business in the twenty-first century.[10] In a recent article, Young (2016) has highlighted the role transnational corporate coalitions played during TTIP’s negotiation and, importantly, the factors that are likely to have nurtured those coalitions in the first place. Our focus here is on the interplay of such coalitions with the critical role of government bureaucracies, which has resulted in particularly complex negotiations that go beyond standard state to state negotiations.

This Special Issue focuses on examining TTIP negotiations both from a broad E.U. and U.S. perspective, as well as with respect to specific issue areas. In particular, our contributions provide not only a broad discussion of the political economy of mega-FTAs as noted, but also an analysis of European and American motivations and concerns about TTIP. The Special Issue also includes pieces that focus on environmental politics, GMOs, and data privacy, as well as the legal aspects of the digital economy and investor state dispute settlement to better explore the complexity of bureaucratic politics, as well as transnational and transgovernmental relations. While this Special Issue does not contain a general theory of the scope of the negotiation of regional trade agreements in the twenty-first century, few—if any—of the factors raised are specific to the

8 Allison (1971).

9 Kaiser (1969); Keohane and Nye (1974).

10 On this aspect of negotiations, see Fisher, Ury, and Patton (1991).

TTIP negotiation and, therefore, our findings may be of relevance to other trade talks, including those at the multilateral level.[11]

The remainder of this article is organized as follows. Section II identifies key insights from the extant literature on the wide range of factors affecting intergovernmental negotiations, focusing on bureaucratic, transnational, and transgovernmental politics. Section III highlights the interplay of these factors, focusing on the heated debate over the inclusion of financial regulations in TTIP. Concluding remarks and caveats are presented in Section IV.

II. Behind the border issues, bureaucratic politics, and transnational and transgovernmental politics

The study of the scope and complexity of international negotiations is hardly new. Our purpose here is not to offer a comprehensive survey, but rather to highlight three strands of literature that identify factors likely to influence the scope of a mega-regional trade negotiation, such as TTIP. In particular, we emphasize the importance of so-called behind the border issues that bring out the importance of independent bureaucracies in alliance with transnational actors in impeding rapid progress in the negotiation.

To this end, we start with the objective of negotiations: As tariff rates have fallen, domestic regulations have been put on the negotiating table. These regulations are often implemented by agencies independent of the government and have their own legislative and bureaucratic purpose. Crucially, those agencies need not view a trade negotiation as quite the opportunity that officials in trade ministries might. Calling into question assumptions about a unitary state, we examine the way in which corporate, civil society, and official bodies cooperate with their counterparts in other countries creates the potential for transnational linkages. These linkages may result in cross-border coalitions and actions taken to advance the interests of like-minded parties. Clearly, not every coalition is necessarily in favor of including any given regulation in the terms of a binding regional trade agreement. But the fact that we see crosscutting linkages with a multiplicity of actors highlights the difficulty of achieving rapid progress in the negotiations.

11 Those versed in the literature on the failure of the Singapore Issues to be taken up for negotiations during the Doha Round will see some of the same factors at work (see, for example, Evenett (2007) and the references contained therein).

Beyond market access in trade negotiations

"National treatment" or most favored nation treatment has long been a principle of the world trading system since the founding of the General Agreement on Tariffs and Trade (GATT) in 1947.[12] This focus reflects the political reality that foreign commercial interests are often treated worse than domestic rivals by a government agency ostensibly pursuing a non-trade-related public policy objective. However, it was only with the creation of the Single Market in the European Union and the negotiation of the North American Free Trade Agreement (NAFTA) in the early 1990s that concrete steps were taken in what were then far-reaching regional trade agreements to limit or discourage such discrimination. These examples demonstrate that there are circumstances under which governments will allow certain regulations to fall within the scope of FTAs. However, as such accords do not cover every conceivable regulation, it begs the question as to what logic determines which regulations are covered and which ones are not.

The characteristics and traditions of national regulatory states become particularly relevant once trade negotiations start to address regulatory matters. It is worth recalling that legislatures typically empower an agency to pursue certain non-mercantilist regulatory objectives within the jurisdiction in question. Such objectives may differ in their saliency with the public, non-governmental organizations, and the press. Where a regulation's objectives reflect cherished societal goals, pressures for changes to the status quo from any source may be viewed dimly—in particular, if corporate power is viewed by large segments of the population as being too strong. As Pascal Lamy (2015) has argued, much of modern trade negotiations concern the "administration of precaution" or of risks to health, the environment, safety, and physical security.[13]

Moreover, profound, unanticipated events, such as the enhanced focus on financial stability and steps taken to limit risk-taking in the financial sector in the aftermath of the global financial crisis, can reinforce support for regulation among national publics, legislators, and elites. The central point here is that the salience of a policy can change—some issues suddenly gain public prominence with consequences for the launch and conduct of trade negotiations.

Although an enforcement agency faces resource constraints—and may be dependent on, and accountable to, other parts of government for its budgets—it may retain more expertise on the matter being regulated, which in turn gives the agency an advantage over other government bodies. The legal mandates of such agencies may afford them discretion in the manner in which they seek to

12 World Trade Organization (2017).

13 Lamy (2015).

attain the goals prescribed by law and, by implication, any changes in regulation that are negotiated in a regional trade agreement and codified in law. When it comes to the decision to include a regulatory area in a trade negotiation, the first question that arises is, "Who decides?" On the surface, a central government could trump a regulatory agency. Yet, if that agency is the best source of expertise on the matter in question, then, its cooperation would be needed during and after the conclusion of the negotiating process. This, in turn, begs the question of why a regulator would spurn the status quo in favor of a negotiation with an unknown outcome.

Based on the assumption that a regulator cares only about outcomes within its national jurisdiction (and therefore cannot be swayed by the possibility of better access for domestic firms operating abroad), a regulator would support the inclusion of their policy domain in a trade agreement if the negotiation would result in a *risk-adjusted expected improvement* in domestic regulatory outcomes *net of any opportunity costs*. Using this logic, the agency would compare the potential outcome of a negotiation with the likely trajectory of the regulatory regime that is expected at the moment of the inclusion decision.[14] The latter provides a path-dependent benchmark and would take into account any costs arising from refusing to participate in the regional trade negotiation. Refusal costs may be significant if the trading partner puts considerable weight on inclusion of the regulatory area in the trade negotiation.

In interpreting evidence on whether a matter is included in a trade negotiation, tactical considerations should also be taken into account. A government may propose negotiations on a regulatory area precisely because it expects its trading partner to refuse. That refusal may provide a pretext for claims of compensation in other areas of the negotiation and, at the limit, for ending the negotiation of the trade accord. Regulatory agencies may disdain such issue-linkage but other government bodies need not. The critical point here is that with regulatory agencies playing an aggressive role in influencing both the agenda setting process and actual negotiations in TTIP, negotiations become highly complex, the issue we turn to next.

Beyond the unitary state: Bureaucratic politics

Often, economists and realist political scientists analyze intergovernmental negotiations using a simplified model that focuses on aggregated preferences. When

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

doing so, economists assume that policymaking outcomes at the domestic level follow what political scientists have labeled a pluralist model. Put concisely, one simply needs to sum a collection of vectors representing interest groups, with the direction of the vector representing policy preferences and the magnitude of the vector indicating political strength. The government or state is thus taken to be a preference aggregating mechanism.[15] By contrast, realists in political science pay more attention to the position of countries in the global system, arguing that state preferences are a function of its power position in this system.

The literature on bureaucratic politics challenges the assumption of a unitary state acting either in the best interest of the country, based on its position in the global system, or in response to interest group pressures. This view suggests that governments are collectives of often-competing agencies and departments, with more or less autonomy from the executive. In his classic work on the Cuban missile crisis, Graham Allison focused on the importance of competition among U.S. Government bureaucracies to demonstrate how these actors hindered both decision-making and policy implementation at the highest states levels.

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

The utility of the unitary state assumption is particularly questionable in matters relating to the European Union where, in addition to intra-member state dynamics, there is a range of supra-national actors (such as the European Commission, European Court of Justice, and the European Parliament) that jockey for influence and seek to implement their mandates. With the multiplicity of actors involved, it is also not surprising as we see next, that various efforts to create both transgovernmental and transnational coalitions have been a staple of TTIP negotiations.

Bringing in transgovernmental and transnational relations

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

15 Gene Grossman and Elhanan Helpman's well-known model of trade negotiations takes this approach, see Grossman and Helpman (1995).

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

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

Figure 1 illustrates the many types of interactions that might take place in an international trade negotiation. Thus, we have standard inter-governmental negotiations, supplemented by transgovernmental and transnational relations, as well as combinations of these two. These cross-boundary efforts complement the more complex domestic political negotiations taking place in each entity, with both a multiplicity of interest groups as well as a plethora of agencies and departments or ministries. An important element that must be considered in negotiations is the degree of autonomy enjoyed by various agencies from the executive and other branches of government.

The relevance of these three factors is demonstrated in the contributions to the Special Issue. As noted, Griffith et al. focus on the broadest level of the pursuit of mega-FTAs. They emphasize the importance of geopolitical and geostrategic

16 Aggarwal, Keohane, and Yoffie (1987).

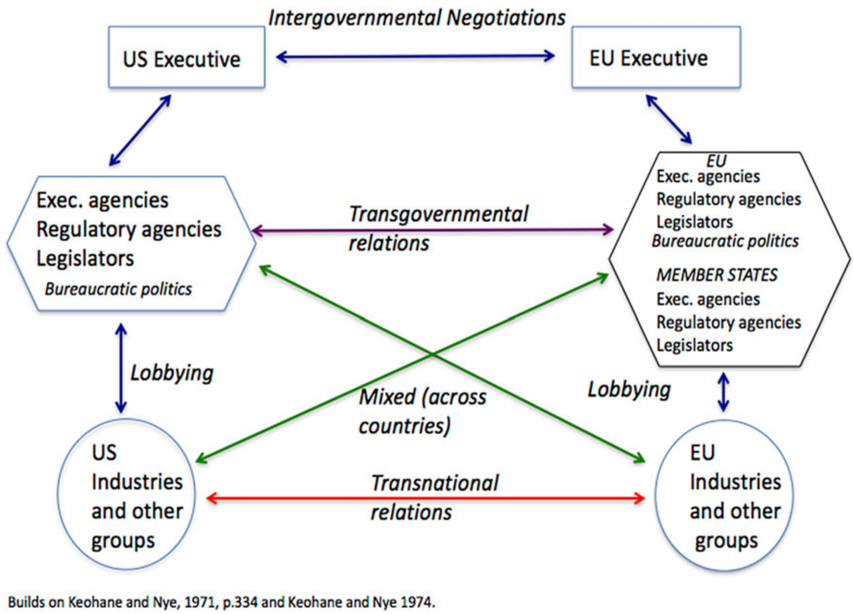

Fig. 1 - Colour online, B/W in print

Figure 1: A framework to examine TTIP negotiations

concerns, but also note that mega-FTAs have been driven by bottom up pressures as well. This primarily U.S.-focused paper is complemented by Claude Barfield's contribution on the political dynamics of lobbying and strategy among U.S. policy-makers. In particular, he focuses on the interest groups behind TTIP, bureaucratic politics, and Congressional-Executive relations.

Parallel, in part, to the Griffith et al. and Barfield's pieces are the contributions focusing on the European Union by Anders Ahnlid and Alexsia Chan and Beverly Crawford. Ahnlid's contribution focuses directly on the link between civil society and E.U. institutions. He emphasizes the high degree of politicization of the negotiations and focuses on the demands of societal groups for greater transparency. Chan and Crawford delve into the political dynamics of state-society relations in key E.U. member states. Addressing the puzzle of why German interest groups have been so opposed to TTIP, despite Germany's heavy trade dependence, Chan and Crawford point to the superior mobilization strategies used by TTIP's opponents in Germany.

Moving away from an overall focus on the negotiations, Aggarwal and Evenett and Jean-Frédéric Morin and Myriam Rochette focus on several key issue areas. Following on their illustrative case study of finance in this introductory chapter, Aggarwal and Evenett's article sheds light on the factors responsible for the stalemates witnessed in the regulatory areas of genetically modified organisms (GMOs) and data privacy. In all three cases, they find a politically salient regulation for which there exists, in principle, a non-mercantilist rationale. In examining the inability of negotiators to come to an agreement, their cases show the key roles of independent regulatory agencies, bureaucratic politics, and transnational coalitions. Morin and Rochette point to an interesting paradox with respect to environmental negotiations. As they note, there is actually significant convergence between top level E.U. and U.S. policymakers. The conflict between the European Union and the United States thus stems not from the top but from the transnational strategies of interest groups, both in the European Union and the United States, putting them clearly out of sync with their own constituents.

The two pieces from Le Roux and Reddie examine the attempted measures and preconditions within the TTIP framework for regulatory harmonization and policy convergence on a primarily legal basis. Le Roux focuses upon the technical rules surrounding the digital economy to point out the multi-layered nature of policymaking across national, regional, and global dimensions that complicate efforts to include harmonization in TTIP. Reddie, in a study of the controversial Investor State Dispute Settlement (ISDS) mechanism, examines the variation in the use of legal norms governing the interaction between private firms and governments. He concludes that the inclusion of ISDS in mega-FTAs involving parties of relatively similar wealth and power is not a foregone conclusion—as some scholars have proposed. Both pieces make clear the legal complications and consequences associated with a European-American agreement, specifically, and in mega-FTAs, generally.

III. TTIP negotiations over financial regulation

To illustrate the dynamics of the framework of negotiations presented in Section II, we focus here on the financial service sector, which has become standard fare in multilateral and regional trade talks. Analytically, the section is organized around the themes of U.S. domestic politics, then internal E.U. politics, and finally turns to a more transnational look.

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

The following mandate was given by the European Council to its TTIP negotiators on 17 June 2013: "With regard to financial services, negotiations should also aim at common frameworks for prudential cooperation."[17] As this case study makes clear, U.S. and E.U. negotiators differed on whether disciplines on financial sector regulation and inter-agency cooperation should be included in TTIP.[18] Moreover, failure to resolve this matter stalled negotiations on the more traditional market access matters in financial services.

Given the strong interest in financial liberalization by the United States and key E.U. member states, in particular the United Kingdom, these matters have become enmeshed in both domestic bureaucratic politics and corporate lobbying on both sides of the Atlantic. On financial sector rules, established regulators have played leading roles in national reform initiatives as well as in relevant international and global fora, including those associated with the G-20 and the Financial Stability Board. Opinions differ on the relative merits of different instruments for international consultation and cooperation. Interestingly, in this case, trade negotiators have found themselves defending the utility of trade agreements as a tool for cooperation to skeptical counterparts in government and hostile NGOs. Much of the opposition to including rules on financial regulation in TTIP, aside from bureaucratic turf battles, stems from U.S. passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 in the wake of the 2008 financial crisis, which is the most comprehensive reform effort by the United States in this industry since the 1930s. Treasury officials are concerned that TTIP could weaken the regulatory regime established by Dodd-Frank. In December 2013, the White House affirmed that it deferred to the Treasury's stance on this particular subject.[19]

Financial regulation and U.S. domestic politics

Bureaucratic politics. The U.S. Treasury in the Obama Administration did not mince words in its opposition to the inclusion of financial regulations in TTIP negotiations. As Treasury Secretary Jack Lew put it:

> I have said on many occasions that I do not believe that trade agreements are an appropriate place for us to dilute the impact of the steps that we have taken to safeguard the U.S. economy,

17 Council of the European Union (2013).

18 For a prescient analysis of the matters at stake see Johnson and Schott (2013).

19 Inside U.S. Trade (2013a).

> and I think that we should make a call to the world community in the appropriate fora, like the G-20 and the FSB to try and drive that race to the top.[20]

As for the ongoing trade talks, Secretary Lew felt they should focus on "opening up access to financial markets for even more U.S. competition and more U.S. investment."[21] The Treasury's Under-secretary for International Affairs, Lael Brainard, was even blunter in the following remarks in a speech on 15 June 2013, which highlight the importance of temporal sequencing:

> In the financial reform agenda, we are already doing work in real time today, and what we don't want to see is a trade agreement getting in the way of implementation, particularly serving as an excuse to delay implementation of financial reforms that have already been committed on very ambitious deadlines that are immediately before us. Why wait? We've already got these commitments, let's get it done now.[22]

The Treasury's position on this issue directly contrasts with the views of industry groups in the United States. Other parts of the U.S. executive branch have also differed with Treasury, albeit carefully. In June 2013, U.S. Ambassador to the European Union, William Kennard, participated in a hearing held by conservative members of the European Parliament. Ambassador Kennard outlined both the position of U.S. regulators and his personal stance, after acknowledging that U.S. regulators see financial services regulation as a sensitive subject. He expressed his own disagreement with the regulators' stance, encouraging the stakeholders to work on persuading the regulators that international coordination is the best solution to tackling regulatory divergences in the financial services sector.[23]

The priority given to the implementation of the Dodd-Frank Act has led to at least one independent agency being pressured to withdraw from an agreement with its E.U. counterparts. In July 2013, shortly after TTIP negotiations commenced, the Commodity Futures Trading Committee (CFTC), in separate talks, reached an agreement with the European Commission that was intended to mitigate differences in the regulation and monitoring of global derivatives trading. Yet, before the CFTC could engage in further discussions to elaborate the details of the agreement, it came under heavy domestic pressure to conform to measures contained in the Dodd-Frank legislation. Eventually, CFTC began enforcement of its own stringent rules, discarding the opportunity to design a common framework with the Commission. Michel Barnier, then the E.U. Commissioner for the

20 Lew (2013).
21 Ibid.
22 Inside U.S. Trade (2013b).
23 Inside U.S. Trade (2013c).

Internal Market and Services, viewed the CFTC's abandonment of this agreement as a negative sign for the TTIP talks.[24]

On this matter, as for many, Congress is divided. In February 2015, Orrin Hatch (R-Utah), Senate Finance Committee Chairman, stated that the United States must not exclude any sectors from the negotiations, including financial services. He expressed support for "regulatory coherence of financial regulations."[25] Meanwhile, several Democratic lawmakers, including the ranking member of the House Financial Services Committee, Maxine Waters (D-Calif), expressed concern that TTIP could undermine financial regulation, noting:

> If financial service market access provisions of past pacts were included in TTIP, it could expose to challenge a variety of nondiscriminatory financial regulations, including, potentially, those that many countries have adopted in the wake of the 2007–2008 financial crisis.[26]

U.S. interest group lobbying. The U.S. financial services industry has been quick to demonstrate its support for the inclusion of financial services regulation from the beginning of TTIP negotiations. A leading industry player in the lobbying landscape is SIFMA—the Securities Industry and Financial Markets Association. SIFMA is a trade group representing a wide collection of U.S. banking institutions, asset management entities, and securities firms and was a prominent advocate of bringing financial regulations into the ambit of the TTIP talks. In June 2013, Judd A. Gregg, then CEO of SIFMA and previously a U.S. Senator, authored a column in *The Huffington Post*, describing TTIP as an opportunity for regulators to establish a framework that will allow them to discuss regulatory differences. Additionally, Gregg denied that the financial industry seeks to derail the implementation of Dodd-Frank measures, pointing out the fact that the new policy regime would be in force by the time TTIP negotiations are likely to be concluded.[27]

A year later in July 2014, SIFMA joined forces with a broad alliance of U.S. financial services industry leaders, including the CEOs of eighteen of the largest financial services institutions in the country, to issue a statement reiterating its desire to see the inclusion of financial services regulation in TTIP. The statement decried the lack of coordination between different regulatory regimes and argued that a streamlined set of regulations will not only benefit customers and the regulators themselves, but will also enhance market resilience.[28]

24 Crisp (2014).
25 Inside U.S. Trade (2015).
26 Lawson (2014).
27 Gregg (2013).
28 Institute of International Finance (2014).

The insurance industry has also been a prominent backer of including financial services regulation in TTIP. In January 2014, the American Insurance Association (AIA), an organization representing more than 300 insurers, published a statement arguing that divergence of rules and regulations between the Untied States and Europe could become a risk to the highly regulated insurance industry. Steve Simchak, AIA's director of international affairs, explained that regulatory coherence is essential for the industry, as the U.S. and E.U. markets are closely integrated.[29] Simchak also argued that TTIP offers the European Union and the United States the opportunity to formulate the global standard for insurance industry regulations, as the financial services chapter would be able to be used as a template in talks with countries such as Brazil and India in which demand for insurance is growing.[30] The statement calls for the inclusion of financial services regulation in TTIP with the objective of using the language as a framework that could be used to set clear benchmarks and to spur ongoing dialogue on regulation of the industry.[31] The AIA's stance broadly corresponds with that of Insurance Europe, an organization representing Europe's national insurance associations.[32]

Financial regulation and E.U. internal politics

Bureaucratic politics. Regulation of the financial sector in the European Union is divided between the Member States and the European Commission (where a Commissioner and Directorate-General are responsible) and, in many cases, divided within Member States between independent regulators, central banks, and finance ministries. Moreover, when financial regulations and the like can be included in trade talks, the European Commissioner for Trade and his or her staff are involved as well. Given the clout of certain Member States' financial sectors, this is a recipe for a crowded bureaucratic space.

In 2013, during the run up to and after the launch of the TTIP negotiations, it was the European Commissioner for the Internal Market and Services, Michel Barnier, who took the lead in making the case for including the regulation of financial services in transatlantic trade talks. In the European Commission that followed, both the Trade and Internal Market Commissioners have made public statements about the role of financial sector regulation in TTIP. In a speech in Washington, D.C. on 13 June 2014, having argued that U.S. and E.U. financial

29 Bertelsmann Foundation (2014).
30 Ibid.
31 American Insurance Association (2014).
32 Ibid.

sector reforms were at comparable stages of implementation (a claim that some contested), Barnier made the following case for TTIP:

> We need to do more to make these regulatory systems work together, that I call the interoperability of our set of rules, identify differences and eliminate them where possible or at least mitigate any detrimental consequences they may have. It would be nothing short of a disaster if our agreements on broad principles are undermined by detailed rules and their implementation being just too different. This is why we want and we have proposed to include regulatory cooperation on financial services inside the TTIP, not as I often read to delay reform, but because it is regulatory issues that are at the heart of our relationship in financial services. Our relationship is about much more than market access.[33]

Commissioner Barnier went on to critique the approach advocated by U.S. Treasury officials:

> U.S. negotiators in the TTIP argue that we already have an informal dialogue, the Financial Markets Regulatory Dialogue, and that it is enough. I don't agree … The dialogue has not avoided situations, which in my view could have been avoided where we only managed to find last minute fixes in situations of urgency leading to important market insecurity.[34]

In making the case for including financial regulatory matters in the TTIP negotiation, the U.K. Treasury argued in a submission to a committee of inquiry of the House of Lords that "Following the financial crisis we have had significantly upgraded financial regulation on both sides of the Atlantic without upgrading the mechanisms for regulatory cooperation." The goal of the negotiation, it was argued, should be to reduce "the unintended consequences of inconsistent regulation" rather than focusing on regulatory harmonization. Failure to do so would lead to "regulatory arbitrage, financial instability, lower competition and higher compliance costs being passed on to households and firms."[35] Interestingly, a senior representative of the U.K. Financial Conduct Authority, who gave evidence to the same inquiry, had to be pressed before conceding any connection between the work of his agency and TTIP, preferring instead to dwell on existing agency-to-agency cooperation.[36] The contrast between the views of two public bodies dealing with similar subject matter in the same Member State of the European Union highlights the contested nature of the bureaucratic politics in this regulatory domain.

In the face of U.S. opposition, and perhaps without the full backing of financial regulators at home, the negotiating position of the European Commission on financial services has evolved over time. Initially, in November 2013, the Commission put forward a two-part proposal for regulatory cooperation in

33 Peterson Institute for International Economics (2014), 4.

34 Ibid., 5.

35 HM Treasury (2014).

36 Lawton (2013).

financial services. The first part would entail an agreement to general principles on matters such as cooperating to promote financial stability, eschewing departures from multilaterally agreed principles, and undertaking outcome-based assessments of the equivalence of each party's rules; and also pledges to avoid rules with extraterritorial impact. The second part, often referred to as more "granular," would establish a forum to discuss regulatory matters, common implementation timetables, procedures for periodic reviews, and consultations for regulations in each major financial service or sector. Furthermore, the Commission indicated that it would be open to negotiations on "specific regulatory differences."[37]

On 27 January 2014, the European Commission published a "non-paper" indicating its negotiating position on financial services regulation.[38] The Commission called for the inclusion of the financial services sector in the TTIP regulatory cooperation procedure, with the process to be based on a number of principles such as "joint work to ensure timely and consistent implementation of internationally-agreed standards for regulation and supervision, mutual consultations in advance of any new financial measures, joint examination of the existing rules, and a commitment to assessing whether the other jurisdiction's rules are equivalent in outcomes."[39]

The Commission stressed that its goal was not to negotiate with TTIP "the substance of international standards," and how previously legislated matters would be implemented, as "discussions on these subjects may continue in parallel with, but outside of, the TTIP negotiations."[40] As a result, European officials stopped insisting that financial regulation be "anchored" in TTIP and instead called for them to be dealt with "in parallel" with it. Indeed, by February 2014, Karel De Gucht, then European Trade Commissioner, was making public statements of the following nature: "Whether it's within TTIP itself or in parallel and that the result is then merged into TTIP, I don't mind about it. It's just the end result."[41]

Industry lobbying. In 2014, according to Eurostat, the financial sector of the European Union generated 686.9 billion euros of value added. That total supported payments to staff in the financial sector totaling 261.2 billion euros. In 2015, it was estimated that 6 million persons worked in the financial sector of the European Union, making the sector a significant employer that, in addition, tended to pay above average levels of compensation. In the United Kingdom, the contribution

37 Inside U.S. Trade (2013d).
38 European Commission (2014).
39 Ibid.
40 Ibid.
41 Inside U.S. Trade (2014a).

of the financial sector is proportionally larger: generating 122 billion euros in value added with 1.1 million employees. The value added created, the employment levels generated, and the taxes paid on profits and salaries are factors that contribute to the lobbying strength of the banking, insurance, and related sectors in the European Union. The importance of this sector to the European economy—or perhaps an indication of the lobbying strength of this sector—can be found in the fact that, according to Eurostat, this sector received bailouts totaling 1.5 trillion euros during the global economic crisis.

With respect to TTIP, European-wide associations representing the financial sector have lobbied openly and actively in favor of including financial regulation on the negotiating agenda. For example, Markus Breyer, director-general of BusinessEurope, has argued that avoiding the fragmentation of the financial sector across the Atlantic will be an important determinant of the future competitiveness of European and American banks.[42] National industry lobbies have also been active. In response to the U.K. House of Lords inquiry into TTIP, a representative of insurers Lloyd's of London made clear his support for including regulatory matters in TTIP and his concerns about the apparently vague dialogues that currently take place between regulators on both side of the Atlantic:

> We have been following the E.U./U.S. insurance regulatory debate very closely through the E.U.-U.S. FMRD for a number of years. Our view is that if reinsurance or insurance were not covered within TTIP, that would be very unfortunate. A degree of progress could continue to be made via the E.U.-U.S. insurance dialogue, but our experience is that there has not been particularly impressive progress to date. We have had the insurance dialogue for a number of years. It struck us as being very opaque. We were always told after meetings by the Commission that very good progress had been made. It was not obvious to us what the concrete steps that were emerging from this were.[43]

For their part, representatives of European banking associations have repeatedly denied that they seek the revision or delayed implementation of the Dodd-Frank Act through TTIP negotiations.[44]

Transnational linkages

Evidence of cooperation across the Atlantic between civil society and business groups, respectively, can also be found in the financial industry. Relatively early on, in a joint letter to the President of the United States, European Commission, and European Council, nearly 100 non-government organizations from both

42 Inside U.S. Trade (2013e).

43 Evidence of Alistair Evans (2013).

44 See, for example, HM Treasury, evidence to the U.K. House of Lords inquiry into TTIP (2014).

sides of the Atlantic expressed their concern that TTIP negotiations would be used to lower regulatory measures of public interest. This letter specifically included a section on the threats to financial stability.[45] Furthermore, a letter to TTIP negotiators from fifty-two civil society groups in support of the U.S. government's rejection of the E.U.'s demand argued that "it is highly inappropriate to include terms implicating financial regulation in an industry-dominated, non-transparent 'trade' negotiation," and that "financial regulations do not belong in a framework that targets regulations as potential 'barriers to trade.'"[46] Other opponents included consumer organizations, such as the Transatlantic Consumer Dialogue (TACD), which characterized TTIP as "deregulating the financial services or harmonise rules towards the lowest common denominator."[47]

European financial lobby groups have also joined forces with American counterparts. The U.S. and European Financial Services Trade Association issued a statement signed by over a dozen business groups in support of including financial services regulatory coordination in the TTIP. They argued "a financial services regulatory framework between the United States and the European Union would facilitate and guide efforts to promote consistent and coordinated high-quality regulatory standards in global markets, providing significant benefits to clients."[48] AmCham E.U., which represents the interests of the U.S. and a small number of European companies, also similarly argued that "given that an estimated 80 percent of the economic benefits of a transatlantic trade agreement would derive from eliminating non-tariff barriers, maximizing the potential of TTIP will require a comprehensive and ambitious approach to regulatory cooperation and convergence in all sectors including financial services."[49] For their part, on 13 June 2014, SIMFA and the Association for Financial Markets in Europe (AFME) issued a joint statement calling for the inclusion of regulatory coordination in the TTIP negotiation arguing that:

> A financial services regulatory framework between the US and EU would enhance coordination, reduce conflict and confusion, and improve the efficiency of regulations across borders.[50]

45 Letter dated 11 November 2013, no title, available at http://www.citizen.org/documents/public-citizen-letter-to-obama-alerting-to-tafta-concerns.pdf.

46 Open Letter on TTIP and Financial Regulations to U.S. and E.U. Negotiators, 1 October 2014.

47 European Parliamentary Research Service (2015).

48 Institute on International Finance (2014).

49 Inside U.S. Trade (2014b).

50 Inside U.S. Trade (2014c).

Negotiation deadlock

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

> I think we've made some progress with the Europeans…to shift the discussion of prudential financial regulation to the existing international bodies that are set up appropriately to deal with it. … I've heard a renewed interest in using the Financial Market Regulatory Dialogue as a place to try and drive those discussions, which we think is the right way to do it, and we are happy to engage in that way.[51]

We could find no official statement from an official European Union representative to substantiate this claim. However, if it is true, then this represents a further weakening of the E.U. position on financial regulations. At first, the European Union wanted a framework on such matters as part of TTIP, then it wanted the matter to be "anchored" in TTIP, and now it seems the European Union may have to accept that the matter is dealt with "in parallel" to TTIP.[52] In a 2017 joint U.S.-E.U. report on "TTIP Progress to Date" there is no mention of progress made on aligning regulations in the financial services sector.[53]

This case study demonstrates that transnational coalitions between corporate interests need not prevail in agenda setting on trade negotiations in the face of entrenched opposition from independent regulators in a party with significant clout in the negotiation. The failure to gain acceptance that financial regulations would be part of TTIP raises questions as to how far behind-the-border regional trade agreements can actually go in the face of opposition from national regulatory institutions. Timing was also important: Advocates of including this matter in TTIP came forward after salient regulatory reforms were enacted, conferring new hard-won powers on independent regulators. Those regulators were loath to see their new freedom for maneuver constrained in a subsequent trade negotiation. It is telling that independent European financial regulators did not rush to the defense of financial sector commercial interests, when the latter advocated the inclusion of financial regulations in TTIP.

51 Inside U.S. Trade (2016).
52 Ibid.
53 Directorate-General for Trade (2017).

IV. Conclusion

Much of the scholarship on trade agreements focuses on the factors responsible for the successful conclusion of negotiations and the societal effects of the implementation of those accords. At the heart of such scholarship on the former is developing a convincing explanation for the basis of deals between the negotiating partners. However, there are some significant international commercial negotiations that have not been successfully concluded. In recent years, the leading example is the Doha round of multilateral trade talks.[54] Examples of older vintage are the various unsuccessful attempts to start formal trade negotiations between the United States and the European Union. Understanding why such negotiations fail has taken on greater import given the launch in 2013 of negotiations towards a TTIP. To paraphrase a leading history of the global financial crisis, will this time be different? On the basis of what is known about the economic, political, and bureaucratic interests at stake, this article has identified the factors that, to date, have frustrated the progress in negotiating financial regulatory matters of considerable commercial and societal importance.

Without claiming to have developed a general theory of the scope of modern regional trade agreements, the logic developed in this introductory chapter, and illustrated in the finance case (and our case studies on GMOs and data privacy), may be applicable to other areas of the TTIP negotiation. For example, the United States had made it clear that the inclusion of some type of ISDS measure is a necessary condition for Congressional approval of TTIP. The credibility attached to that claim may well account for the European Commission's decision to propose a new form of investor dispute mechanism, rather than dropping the topic from the negotiating agenda.[55] Much turns here on the credibility of the trading partner's claims about the consequences of a negotiation unraveling, or even ending, should an attempt be made to either veto the inclusion of a negotiating item or subsequently to take an item off the negotiating table.

With the large number of regional trade agreements negotiated over the past twenty years, there is considerable variation across agreements, negotiating parties, and regulatory policies that could be exploited in future studies of whether an issue area was included in negotiations and whether new rules were agreed in the final accord. The findings of such research might shed more light on the realities of twenty-first-century trade politics as well as have implications for the extent to which binding trade accords induce regulatory reform.

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54 Evenett (2014).

55 European Commission (2015).

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