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# The Politics of Transatlantic Trade Negotiations

## TTIP in a Globalized World

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## Chapter 5

# EU Institutions, Member States and TTIP Negotiations: The Balance of Power and EU Foreign Policy

Tereza Novotná

### Introduction

Although the Transatlantic Trade and Investment Partnership (TTIP) between the United States (US) and the European Union (EU) is primarily an economic agreement focused on trade and regulatory issues (as discussed by other chapters in this book), if TTIP is concluded, it is likely to have broader political and, in particular, foreign policy implications for the EU, its institutions and Member States. By focusing on empirical data, this chapter therefore sheds light on how the conclusion of TTIP can affect the balance of power within the EU, particularly through different ways in which the EU conducts its negotiations of international agreements, including TTIP.

Firstly, TTIP is not an agreement between two nation states. Even though EU Member States and particularly Europe's 'Big Three' (i.e. the UK, France and Germany) have a key say in setting the strategic direction of the EU's position on TTIP and, from time to time, may have become vocal if any issues which are sensitive to them are included (or left out) in any deal, this chapter argues that, taking a sporting metaphor, all EU Member States are essentially substitutes on the bench waiting while the negotiations are conducted between the American and EU authorities. In the first section, the chapter therefore asks this question: what impact do TTIP negotiations have on the role of EU institutions and their weight in international settings *vis-à-vis* EU Member States?

Secondly, the 2010 Lisbon Treaty created a new post of the High Representative/Vice-President of the European Commission (HRVP) and a new diplomatic body, the European External Action Service (EEAS) with its 'EU embassies', or EU Delegations, bringing together the EU's foreign and security policy with the external competencies of the Union into a single 'comprehensive approach' (European Commission and High Representative of the European Union for Foreign Affairs and Security Policy 2013, Council of the European Union 2014). Yet at the TTIP negotiating table, it is not the HRVP and EEAS who are representing the EU, but the European Commission (and its directorate for trade, or DG TRADE, in particular). Drawing on the negotiation literature and literature on the EU and its

foreign policy (Howorth 2011, Bátorá 2013, Telò and Ponjaert 2013) as well as a number of semi-structured interviews and background discussions conducted with EU and US officials, including senior members of the negotiating teams, the second part of the chapter therefore inquires: what implications do TTIP negotiations have on EU foreign policy *vis-à-vis* the US? How can EEAS shape and be shaped by TTIP negotiations?

The chapter argues that unless HRVP and EEAS particularly through its EU Delegation in Washington, DC gets more involved in TTIP negotiations, the negotiation process may in fact sideline the EEAS and hinder rather than encourage the comprehensive approach in EU's foreign policy. Despite the fact that TTIP negotiations may lead to increased clout for EU institutions at the expense of EU Member States at the international level, it may be the European Commission rather than the EEAS which has greater input in setting the direction of TTIP and transatlantic relations in general, particularly since it is the Commission rather than EEAS which is in charge of the nitty-gritty aspects of TTIP negotiations.

Although the low emphasis on effectiveness of the comprehensive approach and on the 'Vice-Presidential' half of HRVP's role has been one of the most criticized aspects of Catherine Ashton's 2010–14 tenure (Lehne 2013, Marangoni and Raube 2014), the chapter nonetheless suggests that the shift in the balance of power from HRVP to the Commission through TTIP is, however, not a foregone conclusion. It can be substantially changed with Juncker's incoming Commission where, thanks to its restructuring into 'project teams' of groups of Commissioners who are led by the Commission Vice-Presidents, it is indeed the incoming High Representative who in her role as the Commission's Vice-President controls the foreign policy cluster which includes the Commissioner for Trade and DG TRADE (European Commission 2014b). Yet it may all in the end depend on the personal chemistry and working arrangement between incoming HRVP Mogherini and Commissioner Malmström with her trade portfolio as well as on Commission President Jean-Claude Juncker and the extent to which he will run his 'Team Juncker' (King 2014) with a tight fist and get involved in one of the most significant Commission agendas of the next few years – TTIP.

### **Who is in Charge of TTIP Negotiations? The European Commission vs EU Member States**

Before we can embark on unravelling the first question of this chapter, i.e. how TTIP negotiations and their (successful) conclusion may shift the balance of power between EU institutions, and the European Commission with its DG TRADE in particular, *vis-à-vis* EU Member States, it is necessary to explore how TTIP negotiations were launched, how they are prepared and how they are conducted at the European (as well as the American) side.

In contrast to other EU-led negotiations, such as on EU enlargement, which has been widely examined by an 'enlargement' and 'conditionality' literature as

well as documented by participants in these talks (see e.g. Novotná 2012, Novotná 2015, Ludlow 2004, Telička and Barták 2003, Vassiliou 2007, Haughton 2007, Schimmelfennig 2001, Schneider 2008, Vachudova 2005), TTIP negotiations do not take place within an intergovernmental conference with EU Member States sitting on one side of the table with the negotiating partner (such as a candidate state) on the other and the European Commission playing a role of a technocratic expert and mediator, but not of a direct participant. In TTIP, all EU-28 Member States are represented by a single authority i.e. the European Commission which is primarily represented by the negotiating team coming from DG TRADE.

The prominent role of the Commission is given mainly by the fact that trade policy is an exclusive power of the EU (e.g. Young 2002). This EU's trade and investment policy is set down in Article 207 of the Treaty on the Functioning of the European Union (TFEU) and includes trade and investment relations with non-EU countries that are managed through the Commission. As DG's TRADE website puts it: '... so only the EU, and not individual member states, can legislate on trade matters and conclude international trade agreements'.<sup>1</sup> Of course, and perhaps even more importantly, in TTIP negotiations in contrast to EU enlargement, the power (a)symmetry between the negotiating sides is strikingly different: the US is not an applicant, or 'entering entity', and the EU is not an 'accepting entity' (Novotná 2015), but the EU and the US are more or less on the same footing as two equal partners. In other words, neither of the two wants to join the other's club, but both want to get a mutually beneficial deal.

So where did EU Member States disappear from the equation? Was it not France which initially threatened to stop the launch of the TTIP discussions due to its concerns over the 'cultural digital agenda' (i.e. the rules on TV, movie and other cultural production)? Later on, was it not one of the German coalition partners (the Social Democratic Party – SPD) which wanted to temporarily suspend the EU-Canada Free Trade Agreement (CETA), a treaty that has been widely considered a template for TTIP, if the investor-state dispute settlement (ISDS) issues are not dropped from CETA and, consequently, from TTIP (see Mayer's chapter in this book on the German TTIP debate)?

As one of the interviewees<sup>2</sup> pointed out to the author of this chapter, at the strategic level, the impetus to initiate TTIP negotiations with the US came from EU Member States. In fact, according to the official, some Member States even pushed the Commission into the launch of the talks despite the fact that there was seemingly no clear consensus within the Commission that the negotiations should commence as quickly as they did. The Council has adopted several conclusions in which it called for the work of the Commission to be expedited and for the negotiations to be launched. At the top political level, influence of EU Member

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1 DG TRADE, <http://ec.europa.eu/trade/policy/policy-making/> [accessed: 28 September 2014].

2 An interview with a senior official, DG TRADE, Brussels.

States was therefore very high and the major strategic orientation was fully co-decided between the Commission and the Council.

Nevertheless, following the EU-US summit in November 2011, preparatory work was at the European side done by the Commission with DG TRADE in charge. The summit established a High-Level Working Group on Jobs and Growth (HLWG) which was led by US Trade Representative (at that time Ron Kirk) and EU Trade Commissioner Karel De Gucht. The HLWG published its interim report in 2012 (High Level Working Group on Jobs and Growth 2012) and the final report in February 2013 (High Level Working Group on Jobs and Growth 2013). During this exercise, any influence of EU Member States was limited. As one of the Commission officials put it: 'WE informed THEM'.<sup>3</sup> Yet the final report must have been endorsed by all three Presidents – of the European Commission, of the Council of the European Union and, of course, President of the United States.

Between March and June 2013, the Commission launched procedures to obtain a negotiating mandate. The Commission proposed a draft mandate and submitted it to EU Member States for their approval. Since the negotiating mandate was a highly political and sensitive issue, EU Member States amended it quite significantly by, for instance, removing the audiovisual services from the mandate. Because a number of Member States still do not wish to make the original mandate public, we can only speculate which countries pushed for what amendments. It seems, however, clear that it was not just France that took a critical stance on the audiovisuals, but a number of other states were happily hiding behind it.<sup>4</sup> In the end, the Council (2013) approved the mandate and thus gave a green light to the launch of TTIP talks on 14 June 2013.

Given the fact that the European Parliament (EP) must in the end assent to any negotiated deal, it is rather surprising that EP entered the game rather late albeit with all the more greater force. Even though the EP has been very vocal on issues related to private data protection provoked by the NSA spying scandal (see Mayer's and Telò's chapters further in this book) and, as a response, some MEPs called for suspension of TTIP talks (EurActiv 2014), this may have only been the result of the pre-election campaigning and realization that jumping on the bandwagon of a general dissatisfaction with TTIP among the European publics may bring electoral points. The EP has in fact so far adopted only one resolution (European Parliament 2013) clearly related to TTIP on 23 May 2013 i.e. two months after the Commission drafted its negotiating mandate and a month before the Council's decision on the launch of the talks.

Once TTIP negotiations were launched, DG TRADE, which is in most of the cases the Commission's lead Directorate-General (DG) on the TTIP agenda, strictly follows the inter-service consultation process.<sup>5</sup> Before taking any official position on a TTIP item, particularly if in writing, DG TRADE clears it with

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3 An interview with a senior official, DG TRADE, Brussels.

4 An interview with a senior official, DG TRADE, Brussels.

5 It is also possible to split the issues between the lead and co-lead DGs.

other services (DGs) concerned. For instance, if DG TRADE makes a proposal on public procurement, it consults it with DG Internal Market (DG MARKT) and DG Enterprise (DG ENTR), while proposals on sanitary and phytosanitary (SPS) issues are jointly prepared with DG Health and Consumers (DG SANCO). Although the negotiators do not in the end have to accept amendments by other DGs to the draft position proposed by DG TRADE, the aim is to reach consensus among all the Commission services involved. As one of the members of the TTIP negotiating team explained: 'If I think that what they are proposing is rubbish, I can say no ... We argue but we work it out ... that is the governing way how we work'.<sup>6</sup>

In contrast to the comprehensive consensus-seeking intra-service method within the Commission, the working method with EU Member States is different, partly because the Treaties provide for such different working arrangements. All TTIP draft positions and other papers are submitted to Member States for their comments. Moreover, all trade decisions are accompanied by the Council's Trade Policy Committee which meets weekly at the technical and once a month at a senior political level. Member States also have an opportunity to provide their views in writing on TTIP or ask for a meeting with anyone on the negotiating team. As a rule of thumb, the negotiators always accept such requests for meetings.

Yet when it comes to official approval, Member States are not required to agree to any of the TTIP materials that are submitted to them. Or, vice versa, the Commission negotiators are not obliged to accept any of the suggestions made by EU Member States. Although DG TRADE officials claim they would take on board issues that Member States ask for to the extent that the negotiators think that the requested change is possible or a good idea, a number of times, however, they do not bow to the pressure of Member States and do not accept their proposals. Clearly, though, officials then need to explain to the Member State 'demandeur' why an issue was off the TTIP table. The negotiators after all know that, at the end of the day, any TTIP deal which will be agreed on will need support by Member States. Similarly, after each TTIP negotiations round, the Commission officials report to Member States through information sessions and answer numerous questions of Member State representatives in order to make sure that they are fully on board and understand both what the Commission is proposing and what the US position is. In the words of one of the TTIP negotiating team members, 'it is a subtle exercise'.

A special case of Member State-negotiating team collaboration relates to the role of the Presidencies of the EU throughout the process of TTIP negotiations. When negotiations are conducted within an intergovernmental conference, as in the case of accession negotiations, the Presidencies can become main drivers of the entire process by clearly setting the negotiation agenda, finding consensus among fellow Member States and pushing both sides to accept a compromise (Ludlow 2004). Moreover, they tend to compete and show off what was achieved under their helm. In trade negotiations, including TTIP negotiations, however, the

6 An interview with a senior official, DG TRADE, Brussels.

Presidencies play rather a marginal role. It is not up to them to propose next steps and draft texts, but up to the Commission. Since Member States do not sit at the TTIP negotiating table, the Presidencies do not run the show. They are more or less only involved to the extent that they chair meetings of the Council and the Trade Policy Committee.

Moreover, the intensity of the relationship with the Commission's TTIP negotiating team varies depending on the issue at stake and a specific moment during the negotiation process. When the Presidency is lucky enough to be in the chair when it comes to decision time, the TTIP negotiators may work with it very closely. On the other hand, during the more routine periods, the relationship is looser and is basically limited to reporting by the DG TRADE negotiators on the TTIP negotiations' state of play. As with other issues related to the clout of Presidencies, they come and go every six months and, depending on their own priorities and quality of the resources, they may be more (as the Irish in the first half of 2013 who worked hard on getting the negotiating mandate) or less (as the Greeks in the first half of 2014) active on TTIP-related issues.

To better compare the TTIP negotiation process on both sides of the Atlantic but without going much into the detail, it suffices to say that the US negotiating position goes through a triple consultation process.<sup>7</sup> As with the inter-service consultations within the Commission, the American draft position papers firstly go through an internal 'inter-agency' process. Once a draft is complete, it is sent to the US Congress where it is looked over by the House and Senate staffers and experts. In the third step, the US TTIP position paper is submitted through a secured website to the Advisory Committee for Trade Policy and Negotiations (ACTPN) whose advisors have about five to ten working days to provide their feedback.

Only after this sophisticated and, to some extent, even more complex than in Europe process of consultations with the additional third layer of trade advisors is complete, the US negotiating position on TTIP is presented to the European counterparts. Interestingly though, and in contrast to other negotiating partners that the EU is involved with in trade talks, the US side does not allow the sharing of its position papers with EU Member States. Since any final TTIP agreement will be an EU (rather than EU Member States)-US deal and it is the Commission who represents the Union at the TTIP talks, from the American perspective it is logical that only EU officials should have access to the key documents. As a Commission official indicated, Member States are unsurprisingly unhappy about this situation but none of them has so far told the Commission TTIP negotiators to stop the talks and otherwise 'what else you can do about it'.<sup>8</sup>

All in all, this section of the chapter demonstrated that TTIP negotiations are on the European side clearly led by supranational institutions, the European Commission with its DG TRADE in particular. Although EU Member States get involved in the strategic political aspects of TTIP by, for instance, pushing for the

<sup>7</sup> An interview with a senior official, USTR Office, Brussels.

<sup>8</sup> An interview with a member of the negotiating team, DG TRADE, Brussels.



start of TTIP talks, throughout the negotiation process they are bystanders rather than key players. Their side role is well understood and reflected by the wish of the American partners who ban them from seeing the US negotiation positions. As a result of a potentially successful conclusion of TTIP talks, the balance of powers between EU institutions and EU Member States can shift towards the EU side. A TTIP agreement will after all be an EU deal with the US rather than a treaty among EU Member States with a third party.

Yet the question remains: will this potential swing towards the clout of EU institutions be replicated in transatlantic relations in general or will it be limited to the transatlantic trade and investment relationship? In other words, how can TTIP impact on the EU's foreign policy *vis-à-vis* the US? The second section of this chapter will examine these questions.

### **Who is in Charge of Transatlantic Relations throughout TTIP Negotiations? The European Commission vs European Diplomatic Service**

The partnership with the US and transatlantic relations have traditionally been at the forefront of the EU's foreign policy. Not only is the US one of the EU's key Strategic Partners, but the EU (and previously the Commission) Delegation to Washington, DC has been the first representative office of the European Communities since the 1950s in a third country outside the EU (Maurer and Raik 2014).<sup>9</sup> The EU Delegation to Washington is also one of the most active EU offices around the world whose work is generally welcomed and supported by the US administration and enjoys good access to senior US officials (Novotná 2014). Moreover, since the creation of the EEAS, a special division covering North America has been created within a managing directorate for the Americas.

Despite having a good pool of resources when it comes to TTIP, however, neither EEAS with its head, HRVP, nor EU Delegation get much involved. Yet once concluded, a TTIP treaty will have not only economic but also political and geostrategic implications (Hamilton 2014a, Hamilton 2014b) which should not be overlooked by the EU's foreign policy machinery. To some extent, the ambiguous stance of EEAS, HRVP and the Delegation on what to do about TTIP reflects the hybrid structures and lacking consistency in the EU's foreign policy-making as well as EEAS's ambivalent cooperation with other EU institutions, the Commission in particular.

Although the head and deputy head of EU Delegation to Washington follow TTIP closely and the press and political sections offer a useful analysis of the American situation, their role is more or less limited to providing input in terms of intelligence gathering. The trade section within the EU Delegation in Washington, on the contrary, is a part of the DG TRADE's negotiation team and

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<sup>9</sup> The first EC Delegation was opened in London, but the United Kingdom has since then joined the EC/EU.

reports directly to the Commission's deputy TTIP negotiator.<sup>10</sup> The coordination on TTIP within the Delegation thus does not go through a single person, i.e. the head of EU Delegation, but through two Brussels channels that are separate from one another – EEAS and its North America division on the one hand and the North America Trade Relations unit in DG TRADE on the other.

The practical aspects of inadequate coordination on TTIP among EU institutions are also illustrated by practical issues, such as the logistics for trips of the negotiating teams to both sides of the Atlantic. Since the logistical aspects, such as flights and accommodation for TTIP negotiators, are supposed to be taken care of by the host negotiating country, it is DG TRADE's negotiation unit which handles these issues when the European negotiators visit the US rather than the locally-based EU Delegation. The communication and coordination between EEAS and the Commission is thus left to personal contacts: the heads of both North America sections in EEAS and DG TRADE meet for a weekly coffee to discuss the latest developments in TTIP negotiations and transatlantic relations. It is the sad truth that the North America unit is the only unit in DG TRADE which meets its geographical counterpart from EEAS on such a regular and frequent basis.<sup>11</sup>

### **Conclusion: TTIP and the Balance of Power in Brussels**

Even though TTIP and TTIP negotiations are primarily about getting the best trade deal between the EU and the US, there are broader political ramifications related to TTIP which are worth exploring. This chapter focused on two factors tapping into TTIP negotiations. Firstly, at the European side, who is in charge of the negotiation process: do we see EU Member States leading the direction of the talks or can we observe EU institutions and the European Commission in particular having the main say? Secondly, the chapter examined the input and participation of the EU foreign policy-making bodies in TTIP negotiations.

Despite the fact that EU Member States spurred the launch of TTIP negotiations, it is primarily the Commission with its DG TRADE which is in control of the TTIP process. Thanks to the fact that EU Member States are not required to approve any negotiation positions and do not directly participate in TTIP talks, their influence on the final outcome has rapidly decreased, particularly in comparison to other types of negotiations which are led at the EU level, such as EU enlargement. Therefore, the chapter argues that thanks to the negotiation process but mainly if TTIP agreement takes place and a common transatlantic market is created, the balance of power between EU Member States and EU institutions may be significantly shifted towards the supranational side, at least in relationship to the US.

Nevertheless, a word of caution needs to be spoken here: all EU Member States are adamant to keep their bilateral relations with the US, which is evidenced by

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<sup>10</sup> An interview with a member of the negotiating team, DG TRADE, Brussels.

<sup>11</sup> An interview with a senior official, EEAS, Brussels.

the fact that all EU-28 keep their national embassies fully staffed in Washington. Moreover, some Member States allegedly complain about the Commission's negotiators directly to the American side (USTR). This, however, undermines the EU's negotiating position instead of strengthening it. As a result, the US officials can play a good cop-bad cop double act: a good cop *vis-à-vis* EU Member States and a bad cop *vis-à-vis* the Commission negotiators, thereby exploiting the desire of Member States to maintain their bilateral relations and be appreciated by them.

The foreign policy aspects of TTIP have not yet been fully explored by academic literature. This chapter therefore analysed to what extent and how the EU's diplomatic service (EEAS) with its EU Delegation based in Washington participates in and is shaped by TTIP negotiations. The chapter highlights that despite having promising means of influence that could ensure better impact and coordination both on the ground in Washington and in the Brussels HQ, EEAS with its current (at the time of writing of this chapter) head, HRVP Catherine Ashton, does not seize upon its possibilities and, in a way in contrast, distances itself from TTIP. Although it is understandable that EEAS does not want to get in the way of the Commission's prerogatives and increase already tangible tensions between these two Brussels-based EU bodies, it is a shame because TTIP provides a unique chance for HRVP to make full use of her Commission's Vice-Presidential hat and lead the way in terms of strategic thinking about TTIP and transatlantic partnership. In fact, TTIP offers an exceptional opportunity for the 'comprehensive approach' combining management of foreign policy with the EU's external policies (trade in particular) to be implemented in one of the most significant partner countries for the EU. On the other hand, a reluctant approach is hazardous for EU's diplomacy because once the TTIP train is set in motion and the Commission is one of the two principal drivers, it will be hard to become at least a substitute driver.

Not all is lost for EEAS and HRVP, however. Much will depend on agencies and actors rather than structures which are coming into place. Firstly, David O'Sullivan, former Director-General in DG TRADE and Catherine Ashton's chief operating officer overseeing the set-up of EEAS, has been selected to be a new head of EU Delegation in Washington. Perhaps his past experience and credentials will be the best asset for the EU Delegation to establish itself on the TTIP negotiation stage. Indeed, he has himself confirmed that TTIP will be his top priority in his new post.<sup>12</sup> Moreover, once the Commission President-elect Jean-Claude Juncker gets his team confirmed and the restructuring of the Commission services into 'clusters' or 'project teams' receives the go ahead from the EP, it will be incoming HRVP Mogherini who will oversee the foreign policy cluster and who will be responsible for the new Commissioner for Trade. Last but not least, given the significance of the transatlantic partnership, the new Commission President may decide to make TTIP a *Chefsache* and get personally involved. In any case, TTIP will impact not just on trade and politics, but also on how the foreign policy business is done in Europe.

12 An interview with a top official, EEAS, Brussels.

