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**Research Report**

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# THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: An Accident Report

*J. Robert Vastine, J Bradford Jensen, Hosuk Lee-Makiyama*

## THE TRANSATLANTIC VISION

IT WAS LAUNCHED with the best of intentions and highest of ambitions. The Transatlantic Trade and Investment Partnership (TTIP) was embraced by President Obama and every European head of government as the world's two largest economies fulfilling their destiny. Prime Minister Cameron called it 'the most important trade agreement of all time'. USTR Michael Froman pledged to finalize the agreement quickly: on 'one tank of gas'.

At the outset, leaders of the transatlantic business community published a vision statement as an advisory to the High Level Working Group on Jobs and

Growth.<sup>1</sup> This statement was extraordinary in its high-flown expressions of ambition for the new FTA: It must seize new ground, be rooted in the distinctive nature of the partnership. It must be grounded on the rules of the WTO, but use 'synergistic strategies' to boost innovation and to enhance the digital economy, while addressing more obvious issues, like agriculture and GMOs. The new FTA would address virtually every aspect of the commercial relationship.

But, with prescience, the authors of the vision

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1 Forging a Transatlantic Partnership for the 21st Century, Business Roundtable, Transatlantic Business Dialogue and the European Roundtable of Industrialists, April 18, 2012

## EXECUTIVE SUMMARY

The Transatlantic Trade and Investment Partnership (TTIP) was launched with highest of ambitions. Yet after more than 500 days of negotiations, the results are plainly discouraging. The EU and the US misunderstood each other's intention on market access, and deteriorated into retaliatory behaviour. Each side has also its set of politically sensitive issues, but TTIP negotiations stimulate sensitive issues when European governments are at their weakest. The revelations of US electronic surveillance and wiretapping coincided with the first round of

TTIP talks; Europe's decision to open up public consultations on ISDS gave the opposition space to congeal public opinion, and the anti-trade forces appear better organized and possibly even better funded than business groups.

It is in the interest of the US and EU to fashion a new, open and fair global trading system for the 21st century. But time is running out. Getting TTIP back on course will require, three elements. First, the EU and the US need a common understanding of ambitions. Are the parties negotiating a regular FTA, or

a new form of an economic partnership going beyond any existing precedent? The second element concerns political leadership and mobilizing support – in the end, this question comes down to: Who is willing to pay for TTIP? The last element concerns the overarching objective of TTIP, which must be approached as strategic in its purpose. TTIP could be the third pillar of a new global economic governance together with TPP and EU-Asia agreements. TTIP should be the most comprehensive and sturdiest of these three pillars – not the weakest.

statement laid down a warning: ‘There will be a natural inclination to do what we all know best - focus quickly on the granular elements of either a standard bilateral free trade agreement or targeted sectoral trade, investment and regulatory negotiation’. It warned that remaining barriers are so embedded that they ‘run a high risk of deadlocking the negotiations’.

Indeed, the optimism soon waned as the parties became engaged in the usual effort to achieve tactical advantage. Longstanding irritants that had derailed previous attempts to creating a transatlantic market space resurfaced. New controversies like investor-state dispute settlement (ISDS) emerged, but so did imaginary ones, like how TTIP might force the British healthcare system to privatize.

The post world War II commercial relationship between Europe and the US has a long history of achievement and of false starts. After successive rounds of GATT negotiations, officials realized that true growth would come through elimination of non-tariff barriers and a new focus on services and regulation. Joint efforts to jumpstart work on this new agenda like the New Transatlantic Agenda and Transatlantic Business Dialogue (1995), and the Transatlantic Economic Council (2007), did not produce meaningful results, leading to frustration and a deep scepticism on both sides that another European-US effort – like TTIP – could possibly succeed. Yet, as this new Partnership negotiation opened in July 2013, negotiators went about their business as they would in organizing an ordinary negotiation with a lesser power. In other words, the stage was set for an accident at the outset.

At the time of the writing, after more than 500 days of negotiations, the results are plainly discouraging and worse, political support for TTIP in Europe has badly eroded. How did we arrive at this state of play?

## MARKET ACCESS

TTIP WAS DESTINED to get stuck in a ditch almost from the start. Like all standard FTAs the negotiations began with an exchange of offers. The EU made a strong tariff offer covering 95% of its tariff lines. The US answered with an offer covering 67% of its tariff lines. Commission officials reacted with shock, openly taking the US move as a blatant affront. To the US, this offer was a stand-

ard opening move in goods negotiations, simply a usual practice in an FTA negotiation. US officials pointed out that starting ‘low’ would give it leverage to obtain higher quality in the EU offer. In a ‘partnership’ that trumpeted the goal of zero tariffs, the US approach seemed chary, though it makes sense in the context of a traditional FTA parley. Moreover, the European side had refused to agree to a benchmark – a pre-agreement between the negotiators to give an offer a certain threshold, presumably over fears of being bound by a benchmark that would force it to open up EU agriculture tariffs in the first round.

EU vexation at this contretemps on goods was shortly reflected in its stance on services. The EU announced that it would not table offers on financial services as ‘retaliation’ for US refusal to bring financial services regulation into the discussion. To this day, the EU has not tabled a text for services negotiations, though the EU has agreed to a solid services element in its other FTAs. Overall on services, the US and EU market access offers were based on those the parties tabled in their previous bilateral FTAs and the Doha Round. It is a tired, familiar list: the US must remove barriers to coastal maritime trade, civilian aviation markets; the EU must remove cultural barriers. Despite these limited openings, services accounts for almost 40% of transatlantic trade, an extraordinarily high volume that reflects the naked fact that in the service sectors the actual trade barriers are few, and services trade is robust – in the vast majority of the sectors where trade is open.

## SENSITIVE ISSUES

WE DO NOT suggest that the most able and seasoned negotiators of this generation might have been poorly prepared. However, neither the EU nor the US were conditioned to negotiating with a party of equal size. Both entities had been negotiating with Asia-Pacific and Central American counterparts based on blueprints modelled after their own regulations. These model FTAs are valuable for opening up trade barriers in markets like Korea, but in the end do not address problems in transatlantic trade.

As in all FTA negotiations, each side has its set of politically sensitive issues. In an attempt to appease a sceptical public, Europe, more than the US, has tied itself to the mast. Along the road, some European leaders have

publicly asserted that under no circumstances will they allow TTIP negotiations affect the EU's GMO or privacy regulations.

And since the outset of this venture, the political climate in Europe has changed. Though member states are acutely aware of the importance of trade to their economies, Germany and many other member states are governed by fragile coalitions that shy away from unnecessary political risks, on top of the divisive Euro-crisis. TTIP negotiations stimulate sensitive issues – such as audio-visuals, healthcare, agriculture, internet and energy – when European governments are at their weakest.

Other much deeper political issues have led to the skid into the ditch – the revelations of US electronic surveillance and wiretapping coincided with the first round of TTIP talks (when some EU Parliamentarians even calling for postponing the talks). This had a pivotal, negative effect on politicians' willingness to commit their political capital in the TTIP negotiations. It also poisoned the effort to make progress on securing open flows of data by exciting further a European concern with privacy. The contentious and painstakingly slow overhaul of the EU General Data Privacy Regulation (GDPR) had already put a hold on the talks on cross-border data flows in TTIP. It is simply unimaginable that an FTA between the world's most data-dependent services economies would not secure the right to free flows of data, as both the EU and the US have done in prior FTAs. But some European leaders advocated a decisively unilateral approach following the revelations.

And, some requests test the limits of political reality. For example, the proposal that the Congress change the way it legislates in order to give the EU the right to have a voice in this complex and delicate process – or suggestions that the working procedures of the Commission could be changed in order to accommodate US influence in the uniquely complex legislative process in Europe.

Europe's decision to open up public consultations on ISDS gave the opposition space to congeal public opinion against it. Of the 150,000 responses, 97% were 'canned' responses organized by non-governmental organizations (NGOs). The revolt by civil society caught EU officialdom completely by surprise, resulting in a pause in the investment negotiations. In hindsight, it perhaps should not have been a surprise. The anti-trade forces have lain dormant but never disappeared since they began disrupt-

ing important international conferences, like the WTO Seattle Ministerial Meeting in 1999. A large bloc of special interests, and potentially also third countries, feel threatened by the prospects of a closer economic and political co-operation between the EU and the US. Anti-trade forces appear better organized and possibly even better funded than business groups, demonstrating their potency in both the European and national Parliaments.

Finally, there is the troubling issue of transparency. Even representatives of the member states stationed in Brussels suspect the Commission negotiators of making secret deals to their disadvantage. On both sides the idea that trade negotiations are unnecessarily private, or secret, has prevailed, even among some of our most august intellectual leaders. In some ideal world the idea that all texts should be publicly available sounds good but is unworkable.

For trade negotiations to work, each side must have the assurance it can negotiate the best possible outcome without pressure from vested interests. Legislators in Europe, have demanded public disclosure of negotiation texts during on-going negotiations, although it is the outcome that must be justified exhaustively to the public and legislative bodies. As a result, the separation of powers between the executive and the legislative is blurred. Transparency can entrench the European position deeper and tie the hands of the negotiators. On the other hand, each government can improve the openness of its approach to legislators and officials who have a stake in the outcomes.

## THE BENEFITS OF TTIP REMAIN

WHILE THE HURDLES of reaching a transatlantic deal were higher than originally thought, its potential gains have remained constant. The TTIP is an important opportunity for the EU and the US to set the 'rules of the game' for issues beyond tariffs that are collectively important to both economies. The EU and the US are very similar in a number of ways. Both strongly protect the rule of law, intellectual property, relatively open foreign direct investment regimes, and possess comparative advantage in service activities. These similarities are even more pronounced in comparison to the large, fast-growing emerging market countries (e.g. China, India, Brazil, Indonesia). The EU and the US have shepherded the liberalization of

the global trading system in the post-war period to the collective benefit of all countries.

It is in the interest of the US and EU to fashion a new, open and fair global trading system for the 21st century. But time is running out. While the US and EU have historically accounted for more than half of world GDP, the time is fast approaching (if not already past) when the US and EU will no longer dominate the world economy or be able to dictate the terms of the global trading system. Yet, together, the EU and the US are still important enough to influence the rules. Thus, it is imperative that the US and EU come together to fashion a framework that they can agree upon for their own trade, but that sets a template for the global trading system. In this light TTIP should be viewed as a chance to set the rules of the game for the next 50 years.

This objective significantly raises the stakes. While increasing trade and investment between the US and EU will undoubtedly increase growth on both sides of the Atlantic, the real economic growth gains will be found in increased trade in services between the advanced economies in the US/EU with the BRICs. However, in the first 500 days of negotiations, this objective seems to have been lost.

## CONCLUSION – GETTING TTIP BACK ON COURSE

THE VISION OF the TTIP is still valid though it may initially have been expressed in overblown rhetoric. It is not time to downsize the negotiations. Rather it is appropriate to make a ‘fresh start’ as Commissioner Malmström and Ambassador Froman have suggested. What are the elements of this new start?

The first element concerns a common understanding of ambitions. Are the parties negotiating a regular FTA, or a new form of an economic partnership going beyond any existing precedent? The level of ambition must be clearly understood by both parties. Then a negotiation approach must be chosen that fits the purpose. If the level of ambition goes beyond a regular FTA, the negotiators must look to negative lists, full coverage and equivalence at onset rather than ‘best offers’, positive lists and finding a middle ground between EU and US template FTAs. Both sides must agree on a common level of ambition, and each side should consider a bold new offer according to that ambition – as a confidence building exercise.

The second element concerns political leadership and

mobilizing support. Trade negotiations require political engagement on the highest level. Mere declarations do not work – one only needs to recall the repeated, futile, ultimately hollow calls by political leaders to conclude the Doha negotiations. The political leadership needs to share the urgency embraced by the trade negotiators, and ultimately take ownership of the negotiations. In the end, the question comes down to: Who is willing to pay for TTIP? Ultimately, either party must want something from the other, and show willingness to offer one of its ‘holy cows’ in return.

The last element concerns the overarching objective of TTIP, which must be approached as strategic in its purpose. But the strategic imperative of TTIP is not in hard geopolitics and economic statecraft as in the Asia-Pacific. As we said above, the TTIP can be the third pillar of a new global economic governance. Together with TPP and EU-Asia agreements, they can work against the current trajectory towards unilateralism and hard mercantilism. Having the world’s two dominant economies as signatories, TTIP should be the most comprehensive and sturdiest of these three pillars – not the weakest.

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