Some Final Questions and Conclusions

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Published in:
Tiptoeing to TTIP

Citation for published version (APA):

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TIPTOEING TO TTIP: WHAT KIND OF AGREEMENT FOR WHAT KIND OF PARTNERSHIP?

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ISSN 1878-9587 (print)
ISSN 1878-9595 (online)
1. INTRODUCTION

The present collection of papers issued from the Asser Institute’s Roundtable on the Transatlantic Trade and Investment Partnership (TTIP) on 16 September 2015 concentrates on two controversial subjects which are part of the draft texts that have been circulating: the Investor-State Dispute Settlement (ISDS) mechanism and the idea of making the TTIP into a ‘living agreement’ equipped with organs that can discuss, advise about, and perhaps even decide on, certain matters. Just as large segments of the ‘informed classes’ and the population at large in Europe were most ‘shocked’ by the old 1958 EEC provisions or the Constitution for Europe in 2005, in the case of TTIP people were unnerved by investment protection and ISDS provisions that had been present in much less refined form in Bilateral Investment Treaties (BITs) of which many Western-European States had concluded between fifty and a hundred or more each since 1958. Similarly, the political class and the broader public were worried about ‘living agreement provisions’, whilst the EC/EU since 1958 has been concluding dozens of Association Agreements outfitted with Association Councils that have taken binding decisions on such subjects as the free movement of Turkish workers in the EU. The controversial TTIP Regulatory Cooperation Board (RCB), however, has no such decision-making power.¹ We will leave open the question whether the seemingly deep worry about these points is due to the oft-mentioned failure of the political class in Europe to tell the European citizens the truth about the EU or a sign that many European citizens are bad learners.

It is interesting to note that the two contributions that principally concern ISDS are on a much more optimistic note about the ISDS provisions than the two other contributions that take a closer look at the organs and committees that are created by a future TTIP are about the powers and legitimacy of these organs and their decisions and recommendations. Venzke, on the basis of an analysis that refers to a study by Armin von Bogdandy and himself about the legitimacy of international courts,² and Pantaleo, on the basis of more practice-oriented research, both take the view that the reforms to the ‘old-school’ ISDS of the Member State BITs proposed in the European Commission’s May 2015 draft of the relevant chapter of TTIP are a great step forward. It is indeed an ‘audacious attempt to eliminate the halo of mistrust that […] surrounds investment arbitration’, as Pantaleo puts it. It bears pointing out, however, that this

¹ The latest EU proposals on transparency in regulatory cooperation published on 21 March 2016 do no longer mention the RCB and develop another method for arriving at a common agenda for regulatory reform. See <ec.europa.eu/trade/tpip-texts>.

mistrust was often inspired by opponents of ISDS, who refused to see or to properly value the numerous attempts by the sector itself to reform its practices. Intergovernmental initiatives, such as the UNCITRAL transparency rules in Investor-State arbitration (2014), and private initiatives such as the Burgh house (2005) and the Hague principles (2010) on ethical standards, respectively for judges and arbitrators of, and for counsel appearing before, international courts and tribunals, including investment tribunals, and finally the ASIL-ICCA joint Task Force Report on Issue Conflicts in Investor-State Arbitration (2016) were all royally ignored. Similarly, the many new so-called model BITs that were developed by major BITs users such as the US, UK, France, the Netherlands and others during the years 2004–2008 were not taken into account by the critics either. It is on all these efforts and improvements that the Commission initiative builds and takes the additional and revolutionary step of judicialising the whole process, including the establishment of an Appeals Court. It would seem, therefore, that, apart from their own solid arguments, Venzke and Pantaleo have these underlying reform movements as a solid basis for their optimism, at least if the opponents are willing belatedly to look at the facts. On the other hand, Douma in his contribution on the environmental aspects of TTIP, sounds a skeptical note about the need for ISDS between developed countries with (at first sight) well-functioning legal and court systems. Whether this skepticism holds up in the light of the ISDS of NAFTA continuous functioning, the CETA’s improved system of investment dispute settlement and the need to explain to China that the EU wants ISDS with it because presumably it is underdeveloped and has a mal-functioning court system, is another matter.

Mendes and Jancic remain much more skeptical and critical of the Commission’s efforts in the field of regulatory cooperation and its attempts to bring about a regular review of both sides’ regulatory efforts in the RCB, so as to arrive at better mutual recognition of the results of the regulatory processes on both sides of the Atlantic. Jancic rediscovers the democratic dilemma that was always inherent in fitting out Association Councils with decision-making power. Within the Union it was believed to have been made bearable by two processes: (1) the advance political legitimation inherent in the conclusion of the Association Agreement that created these Councils by the EU legislator (presently Council and Parliament) and (most of the times) also by the national

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legislative power of the Member States, and (2) the procedure of Article 218(9) TFEU, defining the common position to be taken by the Union delegation in the Association Council, when a binding decision was about to be adopted. The crucial question is why this time-tested doubly secured method of legitimisation of decisions of organs created by EU agreements with third States would now all of a sudden be inadequate, while the RCB’s acts remain mere recommendations.

Mendes looks more at the influence on the EU regulatory process itself and especially how responsive it is to civil society groups, but from time to time also returns to the democratic legitimisation of the influence of the recommendations of the RCB. She usefully draws the attention to the question posed by the European Parliament whether acceptance of the recommendations of that Board does not constitute a distortion of the institutional structures of the Union. Here one is left to wonder what the Parliament can have meant by such a suggestion. Presumably it would be the Commission that would take the RCB’s recommendation into account when making a regulatory proposal. The Commission would have to explain why it did so and would have to take the responsibility for having done so either in relation to the Union legislator, i.e., Council and Parliament, or, if it concerned an implementing act, in relation to the relevant Committee under Article 291 TFEU. These are both constitutionally ordained procedures that have been laid down in the Treaties and it is difficult to see what could be wrong with that. Mendes rightly draws the attention to other, subtler aspects of participation in such committees as the RCB, but the EU wants influence in that way on the US constitutional and parliamentary procedures, and it will have to accept the one in order to get the other. If the EU should remain immaculate in these negotiations, it should not even go to the negotiating table.

On the environmental aspects of TTIP, Douma has an important point, when he demonstrates that the sustainability impact assessment for the agreement has not been put on the rails in time to have a serious impact on the negotiations any longer.

After this brief critical introduction to the contributions, which remain very interesting and pose questions that really demand an answer – to which the few lines above are a first attempt – I propose to discuss below two aspects of the context of the negotiations for TTIP that have been neglected, probably by necessity, in the five contributions to this book. Subsequently, I will bring up some questions of principle that confront those who would improve the democratic legitimisation of agreements like TTIP by giving more influence respectively to the European Parliament and/or to the national parliaments. These are questions that have only increased in cogency and urgency by the way in which the

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8 Art. 218(9) TFEU reads in part as follows: ‘The Council, on proposal from the Commission […] shall adopt a decision […] establishing the position to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects […]’.

9 This must have irritated an organization like Greenpeace and may have contributed to its reading much more bad news in the leaked negotiating texts that it recently published than was possibly warranted by them.
recent Netherlands referendum purports to undo the Association Agreement with Ukraine.

2. TWO CONTEXTUAL QUESTIONS THAT DESERVE TO BE RECALLED

2.1. Why do the EU and the US want to negotiate TTIP?

During the roundtable, where the drafts for these contributions were discussed, it was striking that the underlying reasons why this agreement is being negotiated were not mentioned at all. The four contributions are representative of the roundtable in this respect. The answer is relatively simple, but should always be kept in mind. In 2013, when the initiative for the negotiations was taken, both parties needed to show that the bond between them was still important and strong. The US pivot to Asia needed a certain counterweight and a comprehensive free-trade agreement with the EU had the merit for the US to incite the Asian partners, and in particular Japan that was dragging its feet, to work seriously with the US in the TPP negotiations. For the EU it was interesting to try to emulate and go further than TPP and to show that, in spite of the Euro-crisis, the EU was and remains a true superpower in the field of trade – that field being the only one where it is truly of equal weight to the US. TPP and TTIP could set a model for trade agreements in a world where global trade agreements, in the sense of all-encompassing as far as subjects and participants are concerned, in the WTO could no longer be achieved. The EU and the US remain dominant in international trade, even in respect of China, and wanted to use this possibly last opportunity to set the model rules for international trade outside the WTO. This is an ambition that President Obama has expressed more than once with respect to TPP, but it applies equally to TTIP. Hence there is the continued ambition on both sides to try and reach new frontiers in regulatory cooperation. On the European side the need for re-forging the bond with the US only increased after 2014, when the confrontation with Russia over the Ukraine began. In a way both parties are condemned to succeed, although it remains to be seen whether they can maintain the level of their ambitions.

2.2. What is the US perspective?

It is perhaps inevitable that the US perspective is almost entirely lacking in this volume and hence it is useful to recall certain fundamentals of that position. In the US the TTIP must arguably remain a trade agreement; in that way TTIP can be concluded as a so-called congressional-executive agreement, that is to say that it is not a treaty within the meaning of the US Constitution and will not require the advice and consent of the US Senate, for which a two-thirds majority is required. This in turn means that one cannot be so ambitious that the scope of the agreement arguably goes beyond trade, as a two-thirds
majority in the Senate is very difficult, if not impossible, to obtain in the present political climate, characterized by extreme partisanship. Normally trade agreements pass both houses of Congress without too much difficulty, if the President has been authorized by both Houses beforehand to conclude such an agreement, described in some detail and subject to certain conditions in a so-called trade negotiation authority. This is also called fast-track authority, as the Congress promises not to modify the agreement in exchange for the mandate that it grants the President and, through him, the US Trade Representative (USTR), for what is normally a series of negotiations. The fast-track authority for TTIP, which included also TPP and a number of other agreements, was granted in June 2015.

The EU may have its fundamental problems with respect to certain aspects of ISDS, but the US certainly has its limitations on the matter as well. There is a considerable group of so-called ‘sovereigntists’ in Congress, who have a great aversion to international dispute settlement in general. They will probably go along with WTO-like dispute settlement as is provided for in the trade portion of the agreement, but a complete judicialised approach to ISDS, including a Court of Appeals, as urged by the EU, may go much too far for these Congressmen and Senators. This same group is likely to be opposed to the idea of a ‘living agreement’. There is a respectable conservative academic current in the field of US foreign relations law that has had long-standing problems with giving decision-making authority to ‘treaty bodies’. In a US legal perspective this may constitute unlawful delegation of legislative powers to entities outside the US constitutional system. The ‘sovereigntists’ in Congress have latched on to this view of what constitutes impermissible delegation in US foreign relations law and are also likely to oppose this aspect of the agreement’s draft as presented by the Commission. They may even try to argue that it is not covered by the broad terms of the fast-track authority and convince USTR not to negotiate at all on this point.

With respect to regulatory cooperation, the EU side has to realize that there exists a large number of so-called independent regulatory agencies in the US, which are extremely powerful and will see no reason to limit their authority, unless there is considerable congressional and executive pressure brought to bear on them. Agencies such as the SEC, the FDA, the FAA, the NHTSA, the FTC and the EPA and others of that kind may bring formidable obstacles to bear on the progress of negotiations and on the final result. In addition, the federated states of the US, and their relative freedom within the US constitutional system in such matters as preferential policies on procurement and local content, subsidization of in-state enterprises and ‘buy local’ or ‘buy American’ requirements, form in and of them themselves an enormous trade barrier for European exporters. The EU tries to get a handle on these phenomena precisely

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11 Security and Exchange Commission, Food and Drug Administration, Federal Aviation Authority, and National Highway Transportation Safety Administration, Federal Trade Commission and the Environmental Protection Agency respectively.
through detailed provisions in TTIP, but whether that is palatable to the US states and whether EU concessions on other issues may be deemed sufficient ‘payment’ for giving up part of their cherished State autonomy, remains very much an open question.\textsuperscript{12}

More generally, the election campaign in the US has brought to the fore an almost universal anti-trade sentiment. It is generally felt that trade agreements have failed to deliver an equitable sharing of the advantages and disadvantages of increased trade as between lower, middle and upper class segments of the population, in spite of the labor provisions contained in these agreements and the so-called trade adjustment assistance accompanying them.\textsuperscript{13}

3. HOW TO IMPROVE THE DEMOCRATIC LEGITIMACY OF TTIP?

3.1. By increasing the rights of the European Parliament

When one interprets the resistance of large segments of the public against TTIP as being caused by a sentiment of being ‘left out’ of the decision-making or to the fact that ‘Brussels’ is seen as physically or metaphorically ‘too far away’, the quick remedy is to increase parliamentary influence. Obviously the European Parliament may very well suffer of the same ‘too far away syndrome’ as the other EU institutions, but it is arguable that getting the Parliament closer involved with the controversial aspects of TTIP will in any case do no harm. Already long before the entry into force of the Lisbon Treaty, which gave the EP the right to approve trade agreements, Commissioner Mandelson decided to inform the EP of trade negotiations going on with third States and developed a mechanism to show negotiation documents to the EP’s INTA Committee on condition of keeping them secret. For the TTIP negotiations Commissioner Malmström has gone even further and has put proposed negotiating texts from the Commission before all of the Parliament and in the public domain. What more can be done?

As was mentioned above, insofar as both parties still want to create an institution based on the Treaty that can at least make recommendations to both sides, the existing procedure of Article 218(9) TFEU is in principle not adapted to that situation, as it only aims to define the position of the EU delegation in a treaty body in cases where that body will make a binding decision. Moreover, that position will be fixed by the Council alone on a proposal of the Commission. It is not excluded, however, that the Parliament asks its co-legislator, the

\textsuperscript{12} The US has considerable problems in practice with enforcing international legal rules in its States and municipalities. Oddly enough the EU has greater practical powers – used sparingly – to make unwilling Member States toe the line on the international obligations, as Art. 216(2), stating that international agreements of the EU bind the Member States, makes it possible to have recourse to the infringement procedure.

\textsuperscript{13} The new Commission Programme ‘Trade for All’ of 2015 states that the European Globalisation Adjustment Fund (EGF) has never been fully drawn down in any year since its creation a few years ago. In the US the long–standing (1962) Trade Adjustment Assistance (TAA) programme was terminated in 2015, because there were serious doubts about its effectiveness.
Council, to include a procedure on the model of Article 218(9), but that is better adapted to the TTIP. This could be a procedure that applies also to the preparation of recommendations in a possible TTIP treaty body and the position that is going to be taken there by the EU representation on that body. It ought also to include the EP as an institution that must agree to the Commission proposal next to the Council. Such a special procedure could be part of the decision approving TTIP and could be part of the conditions on which the EP will agree to TTIP.

3.2. By giving national parliaments more to say about TTIP

It may seem logical to carry over the reflex to give more powers to the EP also to the national parliaments and to involve them more in information, discussion and perhaps even decision-making. Suggestions to that effect are advanced fairly regularly. It would pose serious questions of principle about the proper functioning of the EU, if it were to be decided to give national parliaments actual decision-making powers with respect to what are basically trade agreements, such as TTIP and CETA. These agreements do not contain political clauses, as many association agreements do, and which for that reason are often considered mixed agreements, which have to be ratified by the EU and all its Member States. Trade agreements fall under the exclusive powers of the Union, as laid down in Article 3(1)(e) TFEU. The powers that national parliaments have to issue so-called yellow or orange cards to Commission proposals that are allegedly contrary to the subsidiarity principle and have entered into the normal legislative procedure involving the Council and the Parliament are not applicable to the exclusive powers of the Union,\(^\text{14}\) for the simple reason that they are exclusive.

A credible reason why agreements such as CETA and TTIP might be considered mixed rather than exclusive, is because the notion of foreign direct investment, newly included in Article 207 TFEU on the common commercial policy, would not include portfolio investment, whereas the agreements were to include portfolio investment among the matters that fall under foreign direct investment. Another reason might be that the agreement covers cultural matters, as did the agreement with Korea, and is also the case with CETA. However, even in such cases one can take the position that such limited exceptions to the EU’s exclusive competence are of an ancillary nature and could thus be subsumed under the overall exclusive trade policy power. This issue is going to be decided by the Court of Justice in an Opinion requested by the Commission in respect of the Free Trade Agreement with Singapore.\(^\text{15}\)

Even if TTIP would have to be considered mixed on the basis of the Court’s future Opinion 2/15, one can still pose the question, if it is legitimate to give national Parliaments an important role in the negotiation and conclusion of an

\(^\text{14}\) See Protocols 1 and 2 of the Lisbon Treaty and in particular Art. 7 of Protocol 2, which triggers a decision-making procedure with special majorities in the Council.

agreement that for 98 to 99% would fall under exclusive Union competence. National Parliaments thus would be seriously encroaching on the powers of the European co-legislators, Council and Parliament, and of the negotiator, the Commission, guaranteed by the Treaty of Lisbon.

3.3. The Impact of the Dutch Referendum on the Association Agreement with Ukraine

It is here that the full force is felt of the precedent that is being created by the Dutch so-called corrective referendum about the Dutch Parliament’s act of approval of the mixed Association Agreement between the Union and its Member States of the one part and the Ukraine of the other part. This agreement is mixed largely out of tradition, because Association Agreements have always been mixed, except the now defunct Association Agreements with Cyprus and Malta. This was mainly done to emphasize their political importance and thus has a political rather than a legal justification. In the case of the agreement with Ukraine it was also legally justified on the basis of the political clauses at the beginning of the Treaty, which the Member States in the Council decided to base on their national foreign policy competence rather than on the CFSP, which would have been perfectly possible, and would have rendered mixity unnecessary. This would have cut off the eventuality of last minute national objections as caused by the Dutch referendum.

If no solution is found that permits the Union, the Netherlands and Ukraine all to escape without losing too much face, the Union can find itself in a position where the Netherlands feel constrained to say out loud that they are not able to ratify the agreement with Ukraine. The consequence would be that the agreement is dead or would have to be redrafted in the form of a trade agreement that would only be concluded by the Union alone, with next to it a political CFSP agreement or – more likely – a declaration on political cooperation. This would exclude the possibility for the Netherlands alone to stop the agreement from being ratified by the Union and the non-binding political declaration from being adopted.

The movement that mobilized the necessary support for pushing through the corrective referendum has already declared that it looks towards TTIP as its...

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16 It has to be recalled that Art. 218 TFEU, after Lisbon, foresees the possibility to negotiate and to conclude international agreements that contain both CFSP elements and aspects of TFEU foreign relations and would thus make mixity caused by political provisions unnecessary. Thus far this option has not been used by the Member States in the Council as they preferred old-fashioned mixity in order to reassert their presence on the international scene. This is just one of the examples, where Member States have not been willing over the last years to make full use of the improvements of the external capacity for action of the EU, so much vaunted by them, when bringing about the Lisbon Treaty. See also ‘From the Board. Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty’, 43 Legal Issues of Economic Integration 1/2016, 1–14.

17 It should be pointed out that many mixed agreements exist for years and are applied provisionally or not for a long time without the ratification of one or more Member States, since these are still seen as late ratifications that will arrive at some time. This would not be the case of the Netherlands ratification in this case.
next victim, not because it cares about TTIP, or cared about the Ukraine Association before it, but because it wants to derail the European Union. There is little doubt that the Union should look for ways to draft such agreements in a way that makes them referendum-proof, which can best be achieved by accepting that fundamentally they are trade agreements falling under the Union’s exclusive competence. That would be nothing less than revolutionary.¹⁸

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¹⁸ It is also unlikely to happen, as so far none of the Member States’ governments has been willing to stand up for their own creation after Lisbon and explain to their electorates that the improvements in EU foreign relations law are fully needed and must be embraced in order to construct Europe’s place in the future international order. Leading from the front is a dying art in European politics.