

The Controversy about the Conclusion of the Transatlantic Trade and Investment Partnership (TTIP) in a Legal Context

Assoc. Prof. Christoph Schewe

DAAD-Langzeitdozent für Rechtswissenschaft

Faculty of Law, University of Latvia

Visiting Associate Professor at the Department of International and European Law

E-mail: *schewe@lu.lv*

The negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the European Union (EU) and the United States have triggered considerable controversies in the EU member states about its potential impact. Civil society and the media intensely discussed substantive and procedural elements, while different groups initiated protests and even started European citizens' initiative against this trade agreement. This article aims at giving an insight into this controversy, while also illustrating the impact of a trade agreement concluded by the EU on the member states and their citizens. The focus is directed at the negotiation process and the questions regarding the EU's competences with regard to concluding the TTIP under the Common Commercial Policy.

Keywords: TTIP, megaregionals, EU competences, common commercial policy, trade agreements, free trade agreements.

Contents

I. Introduction	177
II. History, Content and Controversy of the TTIP	177
1. A Brief Sketch of the Way to the TTIP Negotiations	178
2. The Content of the TTIP	179
3. The Controversy about the TTIP	179
III. The Legal Framework of the EU Regarding the Conclusion of the TTIP	182
1. Competences and Procedure under the Common Commercial Policy	182
2. The Scope of the Common Commercial Policy	183
3. Procedure	184
4. The Relevance for the Conclusion of the TTIP	185
IV. Conclusion	186
Sources	187
Bibliography	187
Normative acts	187
Case law	187
Additional internet resources	188

I. Introduction

A book of Jan Klabbers on International Institutional Law starts quoting from Mary Shelley's *Frankenstein*, where Dr. Frankenstein's creation speaks: "You are my creator, but I am your master; obey!" Indeed, this quote illustrates the risk inherent to international organizations as creations of member states, which may one day turn from political instruments to actors giving the states binding orders. Besides international organizations, the quote perfectly fits the current debate on the TTIP. Moreover, it is noticeable that Mary Shelley's novel on modifying and creating artificial life implying incalculable risks, shows a parallel to some of the TTIP controversies, such as genetically modified organisms (GMOs, also called "Frankenfoods"). While the US are aware of the implications of international organisations,¹ the second concern appears to be rather a European one, as people in the EU seem to be much more concerned about the dangers of GMOs, hormones or fracking.

Some have praised the TTIP for setting a global "gold standard" in trade and investment agreements.² Even if this term is not used, for the European Union the TTIP has become a priority and the Commission urges member states, Council and European Parliament (EP) to conclude the deal quickly. In contrast to this position, the opposition seems to be constantly growing and, particularly in Germany, the debate has become emotional, as the impressive participation of citizens in all member states with over 2.305.332 signatures illustrates.³ The activism on both sides raises the question – why did the relevant actors start these initiatives while the TTIP is still being negotiated and before a draft-text is available? The answer is linked to the fact that international agreements concluded by the EU bind the EU institutions, i.e., that they rank higher than secondary law (Art. 216 (2)) TFEU. While exclusive trade agreements are concluded by the EU, i.e., Commission, Council and – depending on the matter – EP are involved; national parliaments only need to ratify the so-called mixed agreements. With respect to the importance of trade agreements, it becomes visible that the procedure of their conclusion is essential as it determines who has a saying. Hence, this article aims at providing an overview of this agreement's essence and the controversial aspects, explaining them in the context of the legal framework of EU law, particularly with regard to the conclusion of trade agreements.

II. History, Content and Controversy of the TTIP

The public has become much more aware of the consequences of international trade and trade agreements since the creation of WTO in 1995 and which, since then, has become a symbol of globalization. Organized international trade facilitated global economic transactions and made commitments of members

¹ This reservation manifests, for instance, in the reluctance to become a member of international organisations that have binding dispute settlement, as for instance the ICJ but also manifests in the reasons that made the US Congress turn down the ITO, see: *Van Grassek, C.* The History and the Future of the WTO, Geneva: WTO, 2013. Available at https://www.wto.org/english/res_e/publications_e/historyandfuturewto_e.htm [last viewed 10.09.2015], p. 44.

² See, for instance, *Robinson, P. M., Dybvad, K., Bäckström, U.* Financial Times 10 March 2014, The 'T' in TTIP will create a global gold standard. Available at <http://www.ft.com/cms/s/0/be2a91c8-a5ff-11e3-b9ed-00144feab7de.html#axzz3eixUgOgV> [last viewed 10.09.2015].

³ <https://stop-ttip.org> [last viewed 10.09.2015] provides an interactive map, which shows that Latvian citizens appear to be less excited compared to Western-Europeans.

binding. However, since its creation, the WTO has not been significantly reformed. Given the dramatic changes in the global economic environment – particularly the revolution of the telecommunication sector and the development of a cyberspace – the WTO-framework does not always meet today's requirements – at least not those of the EU and the US. The reason for this may partially be found in its success: The impressive membership of 161 members of the WTO indicates the difficulties that the organization is facing to undergo considerable amendments that would require consensus.⁴ It thus appears logical, that members like the US or the EU, which are aspiring to reforms, evade to regional or bilateral trade agreements. This has already been practised for several decades, whereas the massiveness under the TTIP, among the world's two leading trading blocks, is without precedence.

1. A Brief Sketch of the Way to the TTIP Negotiations

After the fall of the Berlin wall, relations between the US and the EU have intensified and several measures on the transatlantic relations have been adopted. While these partially aimed at promoting market economy and rejecting protectionism, between 1995 and 1997, 29 OECD member states started secretly negotiating the multilateral agreement on investments (MAI)⁵ which, partially because of the elements of investor-state dispute settlement (ISDS), faced the opposition of the French government and subsequently failed. While the Bush era and the Iraq war initially slowed transatlantic initiatives, the climate became better after 2005. Eventually, since 2006, both have continuously worked for creating a transatlantic partnership.⁶ After a series of events, on 14 June 2013, EU Member States gave the European Commission the consent to start trade and investment talks with the United States. This initiative builds on the report of a High-Level Working Group on Jobs and Growth,⁷ published in February 2013. A month later, in March 2013, the European Commission proposed negotiating guidelines⁸ to the member states and released an impact assessment⁹ on the future of the EU-US trade relations and an in-depth independent study¹⁰ on the potential effects of the EU-US TTIP.¹¹ After a series of negotiation rounds, in July 2015, the two trade blocks hold the 10th TTIP round.

⁴ Treier, V., Wernicke, S. Die Transatlantische Handels- und Investitionspartnerschaft (TTIP) – Trojanisches Pferd oder steiniger Weg zum Olymp? EuZW 2015, p. 334 provides an overview of the background of the TTIP and its content.

⁵ See the OECD-website on the MAI. Available at <http://www.oecd.org/daf/mai/> and <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> [last viewed 10.09.2015].

⁶ For instance: *European Parliament*, European Parliament resolution on improving EU-US relations in the framework of a Transatlantic Partnership Agreement (2005/2056(INI)).

⁷ *United States-European Union High Level Working Group on Jobs and Growth (HLWG)*, Final Report of the HLWG, February 11, 2013. Available at http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf [last viewed 10.09.2015].

⁸ *European Commission*, European Commission Fires Starting Gun for EU-US Trade Talks, Press release, Brussels, 12 March 2013. Available at http://europa.eu/rapid/press-release_IP-13-224en.htm [last viewed 10.09.2015].

⁹ *European Commission*, Commission staff working document, Impact Assessment Report on the future of EU-US trade relations SWD(2013) 68 final, Strasbourg, 12.03.2013. Available at <http://trade.ec.europa.eu/doclib/html/150759.htm> [last viewed 10.09.2015].

¹⁰ *European Commission*, Independent study outlines benefits of EU-US trade agreement Memo (and full text), Brussels, 12 March 2013. Available at http://europa.eu/rapid/press-release_MEMO-13-211_en.htm [last viewed 10.09.2015].

¹¹ Website of the *European Commission*, DG trade. Available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> [last viewed 10.09.2015].

2. The Content of the TTIP

The TTIP may be regrouped in three parts: The first part of the TTIP particularly aims at improving market access that comprises the traditional aim of abolishing tariffs – which today, with roughly 3–4% are already very low.¹² Furthermore, this part deals with improving market access by establishing rules on services, public procurement and rules of origin. The second part intends to improve regulatory coherence and cooperation by dismantling unnecessary regulatory barriers such as bureaucratic duplication of effort. Areas like sanitary and phytosanitary measures (SPS) and technical barriers to trade (TBT) are the main aspects of this second part, which, furthermore, addresses specific issues such as chemicals, pharmaceuticals etc.¹³ These rules also aim at removing the so-called “behind the border barriers to trade”. These are all the rules that, apart from tariff barriers, hinder foreign goods and services from entering a market and may come in very different forms. The typical examples mentioned for the current deficits are the different standards and double regulations in the EU and in the US that do not necessarily lead to increased safety but considerably hinder trade relations in spheres like the car industries that have different requirements for turn signals or wing mirrors.

While these two parts may be considered as traditional trade issues and are generally also dealt with under the WTO, a third part goes beyond, aiming at improved cooperation when it comes to setting international standards.

In order to explain the benefits and the necessity of concluding the TTIP, the Commission points at the challenges the EU is facing and advertises the TTIP for its presumable curing effects and welfare gains. Here it refers to an ‘independent study’,¹⁴ according to which, from 2027 on, there would be benefits on both sides of the Atlantic.¹⁵ Their amount, however, would differ according to the depth of economic liberalisation, and may amount to € 306 to € 545 per four person household per year in the EU.¹⁶ The Commission argues that these effects of the TTIP might help generating jobs and growth across the EU, as well as cutting prices while offering more choice for consumers. Furthermore, it states that TTIP could also help the EU to influence world trade rules and ‘project the EU’s values globally’.

In the light of these advertised benefits one may ask, where critics see the initiative’s shortcomings.

3. The Controversy about the TTIP

One of the primary concerns questions the presumable positive effect. Differing studies come to the result that there would not be any positive outcomes of the TTIP at all,¹⁷ furthermore, critics refer to the promises before concluding other trade

¹² Although the European Commission states that the average customs duty rate is approximately 1.2%. Available at http://ec.europa.eu/taxation_customs/customs/policy_issues/facts_and_figures/customs_mean_revenue_en.htm [last viewed 10.09.2015].

¹³ The European Commission publishes facts about this part 3 at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#rules> [last viewed 10.09.2015].

¹⁴ *Centre for Economic Policy Research*, “Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment”, London. Available at <http://trade.ec.europa.eu/doclib/html/150737.htm> (full study), <http://trade.ec.europa.eu/doclib/html/150738.htm> (annex) [last viewed 10.09.2015].

¹⁵ *Ibid.*, p. 33.

¹⁶ *Centre for Economic Policy Research*, “Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment”, London. Available at <http://trade.ec.europa.eu/doclib/html/150737.htm> (full study), <http://trade.ec.europa.eu/doclib/html/150738.htm> (annex) [last viewed 10.09.2015], p. 45.

¹⁷ *Myant, M., O'Brien, R.* (2015). The TTIP’s impact: bringing in the missing issue. ETUI working paper 2015.1. Available at <https://www.etui.org/Publications2/Working-Papers/The-TTIP-s-impact-bringing-in-the-missing-issue> [last viewed 10.09.2015].

agreements, such as the NAFTA, where almost none of promised benefits have been realised.¹⁸ The TTIPs scope of application includes areas regulated in different ways in the EU and in the US.¹⁹ The approach aiming at providing security in the US is frequently characterised as a self-regulating system, meaning that the economic actors are mainly constrained by potential legal consequences and thus adhere to certain standards. While this characterisation amounts to a posterior control, the EU adheres to the precautionary principle. A simplified, yet fitting illustration describes the diverging approach towards food security. Most of the EU member states – and citizens – seem to be reluctant towards GMO or hormone treated beef, while US citizens appear to be less concerned about potential risks. Consequently, the controversy about the TTIP initially focused on food security and the *chlorinated chicken* (i.e., result of sanitizing poultry in lightly chlorinated water) had become a symbol of the risks of the TTIP. The *chlorinated chicken*, however, does not only stand for the fears in the field of food security but goes further, pointing at a general lowering of the presumably higher EU standards. Moreover, the concerns are directed against risks regarding trade in energy products, hinting at potential dangers of fracking but also at lowering labour standards in the EU. Furthermore, critics interpret the ambition to liberalise trade and bring rules protecting foreign investment as an obligation to unconditionally open up the markets to foreign competitors, including the privatization of essential facilities. According to them, this obligation might endanger achievements in the educational or cultural sectors, and lower the quality of health-service, respectively, render them much more expensive.²⁰

While one may assume that these fears can be appeased with clauses protecting public policy, public health, etc., TTIP-sceptics argue that this would not be sufficient because the element of ISDS might rule in favour of free trade and against state interests.²¹

Today, given that the content and scope of the agreement still is unclear, it is impossible to determine, whether the scepticism is justified.²² However, to a high

¹⁸ Seccareccia (ed.). Introduction. *International Journal of Political Economy*, 2004, Vol. 43/2, p. 3; Blecker, R. A., The Mexican and U.S. Economies after 20 years of NAFTA. *Ibid.*, p. 5.

¹⁹ Illustrative: Van den Bossche, P. The Law and Politics of the WTO, 2nd ed., Cambridge: Cambridge University Press, 2008, p. 863.

²⁰ Concerns may, for instance, be found on the website of the citizens' initiative stop-ttip. Available at <https://stop-ttip.org/what-is-the-problem-ttip-ceta/> [last viewed 10.09.2015].

²¹ Bode, T. TTIP, die Freihandelslüge, München: DVA, 2015, p. 71.

²² Yet, an already high number of articles analyse the current proposals and the potential consequences of the TTIP. See, for instance: Hummer, W. Was haben TTIP, CETA und TISA gemeinsam? "Investor-State Dispute Settlement" (ISDS) als umstrittenes Element der Freihandelsabkommen, *Integration* 1/2105, Nomos, Baden-Baden, p. 3; Nowak, C., Masuhr, M. S. "EU only": Die ausschließlichen impliziten Außenkompetenzen der Europäischen Union – Anmerkung zum Urteil des EuGH vom 4.9.2014 in der Rs. EUGH Aktenzeichen C-114/12 (Europäische Kommission/Rat der Europäischen Union, EuR 2, Nomos, Baden-Baden, pp. 189–206; Mayer, F., Ermes, M. Rechtsfragen zu den EU-Freihandelsabkommen CETA und TTIP ZRP 2014, p. 237; Sackmann, J. Im Schatten von CETA und TTIP: Zur Verfahrenstransparenz in Intra-EU-Investitionsschiedsverfahren SchiedsVZ 2015, p. 15; Schewe, C. Das Recht von FTAs als Indikator für Vorherrschaft und Gestaltung des internationalen Handels? In: Joerges, Pinkel, Uetzmann, Josef Falke zum 65. Geburtstag, ZERP Diskussionspapier 1/2014, pp. 153–168; Treier, V., Wernicke, S. Die Transatlantische Handels- und Investitionspartnerschaft (TTIP) – Trojanisches Pferd oder steiniger Weg zum Olymp? *EuZW* 2015, p. 334; Hoffmeister, F. Wider die German Angst – Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP); AVR, Band 53, Heft 1, 2015, pp. 35–67; Hindelang, S. Repellent Forces: The CJEU and Investor-State Dispute Settlement; AVR, Band 53, Heft 1, 2015, pp. 68–89 (22).

degree this distrust goes back to the European Commission's management of information and marketing, which has been heavily criticised:²³ Negotiations were held behind closed doors and efforts of NGOs to obtain information were turned down. Continuously, the media started reporting about the TTIP in usually negative reports, civil society organized projects against the TTIP, and citizens started demonstrating. As a response to these developments, the European Commission started a counter-campaign against the massive criticism, aiming at informing the public about the TTIP and its benefits. Despite major improvements, frequently this information rather resembles an advertisement than serious and reliable information about the ongoing negotiations and the TTIP's content.²⁴ Furthermore, the handling of the process by the Commission, including turning down the application of a European citizens' initiative,²⁵ might pour water on the mill of TTIP-critics: On 15 July 2014, 150 organisations handed in the European citizens' initiative (ECI).²⁶ Submitting it to the Commission, they sought for competent legal advice by Prof Kempen from Cologne University regarding the correct initiation of the procedure.²⁷ It may appear as if the Commission was determined to negotiate the agreement as quickly as possible without admitting external influence. This impression, however, creates additional scepticism, which, with a view to the Anti-Counterfeiting Trade Agreement (ACTA)²⁸ – which failed partially because of the massive public criticism – was predictable and should have been avoided.²⁹

This controversy raises the question – how are the international trade agreements concluded and, in the light of the potential consequences, particularly, will the parliaments of the member states be involved in their ratification? Consequently, the following subsection introduces the relevant procedure of Art. 207 TFEU, illustrating the legal framework and distribution of competences.

²³ *Hummer, W.* Was haben TTIP, CETA und TISA gemeinsam? Investor-T-State Dispute Settlement (ISDS) als umstrittenes Element der Freihandelsabkommen, integration 1/2105, Nomos, p. 3. For reading an opposing view on this matter, see: *Hoffmeister, F.*, Wider die German Angst – Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP); AVR, Band 53, Heft 1, pp. 35–67.

²⁴ See, for instance, the European Commission's publication, The top 10 myths about TTIP, slide 3. Available at trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153266.pdf or the Commission's video-clip on youtube. Available at https://www.youtube.com/watch?v=_znkaxwtnc [last viewed 10.09.2015].

²⁵ More extensively, *Hummer, W.* Was haben TTIP, CETA und TISA gemeinsam? "Investor-T-State Dispute Settlement" (ISDS) als umstrittenes Element der Freihandelsabkommen, integration 1/2105, Nomos, (11), p. 3.

²⁶ Meanwhile, the ECI comprises more than 480 civil-society organisations from all member states and managed to collect over 2,3 million signatures, reaching the required minimum in 18 member states, see: <https://stop-ttip.org/supporting-organisations/> [last viewed 10.09.2015].

²⁷ Legal opinion regarding the admissibility of a European Citizens' Initiative against TTIP and CETA (Comprehensive Economic and Trade Agreement) by *Kempen, B.* University of Cologne. Available at <https://stop-ttip.org/legal-opinion/> [last viewed 10.09.2015].

²⁸ See: *European Parliament*, European Parliament rejects ACTA, press release, External/international trade – 04-07-2012. Available at <http://www.europarl.europa.eu/news/en/news-room/content/20120703IPR48247/html/European-Parliament-rejects-ACTA> [last viewed 10.09.2015].

²⁹ *Hummer, W.* Was haben TTIP, CETA und TISA gemeinsam? Investor-T-State Dispute Settlement' (ISDS) als umstrittenes Element der Freihandelsabkommen, integration 1/2105, Nomos, p. 3, shares this view.

III. The Legal Framework of the EU Regarding the Conclusion of the TTIP

Since entering into force of the Lisbon Treaty, the EU has legal personality (Art. 47 TEU) and may enter into international agreements (Art. 216 TFEU). Art. 3 (1) lit. e. TFEU stipulates that the EU holds the exclusive competence for the common commercial policy. Within the EU's external action, there are only two norms (Art. 206 and 207 TFEU) that exclusively regulate the Common commercial policy. While Art. 206 TFEU lays down the common commercial policy's aims, Art. 207 TFEU regulates its main principles and lists the areas covered by this policy. Furthermore, Art. 207 TFEU governs procedures (the conclusion of international agreements may amount to similar consequences as decision-making of the institutions) and regulates the respective institutional competences, which may differ according to the respective political area.

1. Competences and Procedure under the Common Commercial Policy

Art. 206 TFEU is considered to be more than a mere declaration and legally binds the member states³⁰ even though, regarding its vague formulation, does not enjoy direct effect. Furthermore, it is not absolute but may be subject to limits (see below).

However, the Treaties do not define the term "common commercial policy", which bears the potential for conflicts regarding the competence over specific trade-relevant matters. For determining its scope and, consequently, EU-competences, the wording of Art. 207 TFEU suggests a wide interpretation, as it states that "The common commercial policy shall be based on uniform principles, particularly with regard to .." The word "particularly" insinuates that the provision should be open to further aspects, which are not listed. On the other hand, expanding the EU competences could collide with the principle of conferral (Art. 5 (1) TEU and 7 TFEU).

Initially following the option of an extensive understanding, also inspired by the word "particularly" that indicates an exemplary enumeration of trade measures, the ECJ followed a dynamic interpretation.³¹ Mainly, however, it reasoned that, to provide EU with certain flexibility in order to keep up with the evolution of international trade and to avoid diverging interpretations that could lead to different standards in the EU:

*".. it seems that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down .. an interpretation .. which would .. restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms .. A "commercial policy" understood in that sense would be destined to become nugatory in the course of time."*³²

³⁰ ECJ, Case 112/80, 1095, *Dürbeck*; Case 245/81 *EDEKA*, 2745.

³¹ ECJ, Opinion 1/78 *International Agreement on Natural Rubber*, Art. 45.

³² ECJ, Opinion 1/78 *International Agreement on Natural Rubber*, Art. 44.

Later, however, the ECJ limited this jurisprudence, admitting that it could conflict with the principle of conferral (today: Art. 5 (1) TEU and 7 TFEU).³³ It hence clarified that trade agreements that went beyond the explicit competence would require to be concluded as mixed agreements. This static interpretation meant that not only the EU, but also the member states had to conclude more comprehensive trade agreements, such as, for instance, the accession to the WTO. From the EU perspective, this incompleteness of competences made it desirable that the common commercial policy would be adjusted to the areas covered by the WTO, namely, in the fields of services, commercial aspect of intellectual property rights and FDIs. Eventually, these Treaty amendments were made with the Lisbon Treaty, which will be further addressed in a greater detail in 3.2.

Art. 207 (2) TFEU also covers the practically relevant conclusion of trade agreements between the EU and third countries, or with international organisations. Jointly with Art. 216 TFEU it aims at codifying the pre-Lisbon ECJ case law, in which it elaborated the implicit powers with regard to the EC's external powers. Similar to the findings in Opinion 1/94,³⁴ Art. 3 (2) TFEU states that the Union shall also have exclusive competence for the conclusion of an international agreement, when its conclusion is provided for in a legislative act of the Union. The second alternative of this norm seems to lay down what the ECJ already stated in Opinion 1/76³⁵ if it “.. is necessary to enable the Union to exercise its internal competence ..” while the third, “.. in so far as its conclusion may affect common rules or alter their scope.” matches the findings of the AETR judgement.³⁶ Art. 207 (2) TFEU clarifies that the Common commercial policy also covers the implementation of trade agreements. Conversely, Art. 207 (5) TFEU stipulates that the negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.³⁷

2. The Scope of the Common Commercial Policy

Art. 206, 207 TFEU are partially identical to the previous Art. 131 and 133 TEC. However, several provisions under the TEC have been deleted with Lisbon,³⁸ while services and commercial aspects of intellectual property have been integrated into the common commercial policy from their former position in Art. 133 (5) TEC. An additional field has been added with the competence for foreign direct investments (FDI). Furthermore, procedures and competences have partially been amended, notably those of the EP. These amendments became necessary, firstly, as the former Art. 133 TEC only incompletely matched the practical necessities of the EC in the WTO and, secondly, responding to the criticism of a democratic deficit regarding the impact of the Common commercial policy on domestic matters.

³³ This results from the findings in diverse opinions and decisions: ECJ, Opinion 1/94 WTO (1994) ECR I-54416, Art. 99 (mixed competences/services); ECJ, Opinion 2/92 OECD (1995); ECJ C-281/01, Energy Star).

³⁴ ECJ, Opinion 1/94 WTO (1994) ECR I-54416, Art. 94.

³⁵ ECJ, Opinion 1/76 *Laying-up Fund for Inland Waterway Vessels* (1977) ECR 741,756, Art. 5.

³⁶ ECJ, Case 33/70 *Commission/Council (AETR)*, 1971 ECR 263, 275, Art. 22.

³⁷ More extensively on these competences in the recent jurisprudence of the CJEU. Nowak, C., Masuhr, M. S. “EU only”: Die ausschließlichen impliziten Außenkompetenzen der Europäischen Union – Anmerkung zum Urteil des EuGH vom 4.9.2014 in der Rs. EUGH Aktenzeichen C-114/12 (Europäische Kommission/Rat der Europäischen Union, EuR 2, Nomos, Baden-Baden, pp. 189–206.

³⁸ These were the Art. 132 (export subsidies) and 134 TEC.

Regarding the EU founding Treaties it has been controversial in respect to how far services were covered by Art. 133 TEC.³⁹ Given the limitations pronounced by the ECJ in Opinion '94,⁴⁰ the later Treaty amendments⁴¹ made the competences match the coverage to the WTO. Furthermore, the current version of Art. 207 TFEU abandons the shared competence approach regarding trade in cultural and audiovisual services, educational services, as well as social and human health services. Today, these areas only require unanimity in the Council for the conclusion of trade agreements in particular cases, namely, where these agreements risk prejudicing the Union's cultural and linguistic diversity.

Art. 207 TFEU furthermore comprises the *Commercial aspects of intellectual property*. Given that the provision was introduced to make the common commercial policy match the WTO requirements, the term may be described by recurring to the TRIPS agreement. Hence, it comprises copyrights, brands, designs, models or patents. Furthermore, the Lisbon Treaty incorporated the competence on foreign direct investments (FDI). There still is some controversy about the reach of this competence, given that the term suggests that, by explicitly limiting the competence to FDI, short-term portfolio investments are not covered.⁴² This reading requires that, apart from the EU, member states need to be included in the negotiations of bilateral investment treaties (BITs) as they partially hold relevant competences. Furthermore, there is a debate whether the EU holds the competence to negotiate investment protection.⁴³

3. Procedure

Art 207 (3) TFEU regulates the procedure for concluding agreements with one or more third countries or international organisations. According to the rules established, at a starting point the Commission recommends the Council to take up negotiations. The Council in the following takes the decision regarding the authorisation of the opening of negotiations, names the negotiator and may give negotiating directives (mandate).⁴⁴ Furthermore, according to Art. 3 the Council appoints a special committee (207 Committee), comprising representatives of the member states and which the Commission shall consult. On this basis, the Commission conducts negotiations with the aim to finalise an authenticated wording of the agreement. In addition, the Commission shall regularly report to the special committee and to the European Parliament on the progress of negotiations. Given that the Council and the Commission shall be responsible for ensuring the compatibility of the negotiated agreements with internal Union policies and rules (Art. 4), the Council has to take a decision authorising the negotiator to the sign and conclude the agreement.

³⁹ ECJ, Opinion 1/94 WTO (1994) ECR I-54416, Art. 44.

⁴⁰ ECJ, Opinion 1/94 WTO (1994) ECR I-54416, Art. 73–77.

⁴¹ Already the Amsterdam Treaty had introduced a section 5 to Art. 133 TEC, which, however, did not become relevant in practice, the competence was introduced with the amendment of this norm in the Nice Treaty, *Osteneck, K.* In: *Schwarze, J.* EU-Kommentar 2. Aufl. 2008, Art. 8–9.

⁴² *Krajewski, M.* The Reform of the Common commercial policy in Biondi/Eeckhout/Ripley, *EU Law after Lisbon*, 292–312 (297), Oxford: OUP 2012; *Hoffmeister, F.* *Wider die German Angst – Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP)*; AVR, Band 53, Heft 1, 2015, pp. 35–67 has an opposing view.

⁴³ *Krajewski, M.* The Reform of the Common commercial policy. In: *Biondi, Eeckhout, Ripley.* *EU Law after Lisbon*, Oxford: OUP, 2012, pp. 292–312 (302).

⁴⁴ The mandate (11103/13 DCL 1, 17 June 2013) is published on the website of the Council. Available at <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> [last viewed 10.09.2015].

Regarding the decision-making in the Council, Art 207 (4.1) TFEU stipulates that, “*For the negotiation and conclusion of the agreements .. (with third countries and international organizations ..) .., the Council shall act by a qualified majority.*” Diverging from this concept – that trade agreements are generally concluded with qualified majority – Art. 4.2 and 4.3 require unanimity. With regard to the sensitivity of certain sectors for member states, Art. 4.2 stipulates: “*For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.*” The last aspect of the provision establishes a parallelism to internal rules and thus ensures that internal competences are not circumvented *via* the common commercial policy.

With respect to the specific sensitivity of these aspects for some member states, art 207 (4.3) TFEU establishes further unanimity requirements for Council decisions. This concerns the agreements in the field of trade in cultural and audiovisual services (lit. a), if these agreements risk prejudicing the Union’s cultural and linguistic diversity. Moreover, unanimity is required in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of member states to deliver them (lit. b).

The reference of Art 207 (3) TFEU that Article 218 shall apply, where agreements with one or more third countries or international organisations need to be negotiated and concluded, signifies that the EP’s consent is required in the cases stated therein.

4. The Relevance for the Conclusion of the TTIP

While the negotiation of the TTIP as a trade agreement falls under Art. 207 TFEU, and thus the proceedings follow the explanations above, there notwithstanding is a controversy, whether it may be concluded only by the EU, as stated by the Commission⁴⁵ or if it requires the participation of the member states.⁴⁶ The German Ministry of Economy and Energy, as well as the mandate indicate that member states assume – the conclusion of the TTIP would follow this latter option as a mixed agreement. It is, however, not entirely clear and depends on the outcome of negotiations, and which elements are comprised. A legal opinion on the CETA – frequently seen as a blueprint for the TTIP – analysing the controversial aspects in regard to the competences, comes to the conclusion that it needs to be concluded as a mixed agreement.⁴⁷ This conclusion refers particularly to the provisions on investment protection, transport, mutual recognition of diploma, labour protection and the mutual recognition for pharmaceutical products.⁴⁸

⁴⁵ See the website of the Commission, “EU Governments and MEPs decide.” Available at <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/process/> [last viewed 10.09.2015].

⁴⁶ For instance, Mayer, F. Legal expertise for the Federal Ministry of Economics and Energy, “Is the planned free trade agreement of the EU with Canada a mixed agreement?” Available at <http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> [last viewed 10.09.2015]; see also the wording of the Council TTIP mandate (above at 40) at Art. 22.

⁴⁷ See also the Commission indicating the CETA as recent trade agreement on the TTIP-webpage. Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> [last viewed 10.09.2015].

⁴⁸ See legal expertise by Mayer, F. “Is the planned free trade agreement of the EU with Canada a mixed agreement?” above at 42, p. 24.

The Commission favours the option to conclude the agreement as an EU-agreement, given that involving the parliaments of 28 member states would have considerable inconveniences. Firstly, in the light of the current controversy, it is not guaranteed that all of them would give their consent and that it would thus fail. Secondly, the process would considerably delay the finalization of the agreement. In contrast to this negative assessment, concluding the TTIP might also bring positive aspects such as democratic legitimation. With a view on the uncertainties of the competences in the areas comprised, this would politically be important for the EU. In addition, the process may otherwise also be delayed, if this question is brought to the CJEU.⁴⁹

IV. Conclusion

Some praise the TTIP as the gold standard of trade agreements, a vision that stands in stark contrast to the Frankenstein-image retained by others. As has been stated above, it is currently impossible to take a definite stand on its substance, as the final text and content are not yet available. Notwithstanding, there are a few aspects, which may already be reviewed.

The negotiating process has shown elementary deficiencies regarding the information of the public. With regard to the considerable consequences, which far-reaching trade and investment agreements may have for the EU, its member states and citizens, one may state that it is a positive development that the negotiations have gained attention and ceased to be solely the object of secret discussions. In order to debate sensitive issues, democracies require information and a certain involvement of the parliaments and citizens. Furthermore, with regard to the EU's democratic deficit, as well as lack of credibility and acceptance, which reflects in the low numbers of voters for the EP-elections, enhanced transparency may be seen as an opportunity to improve democratic participation. One may also assume that the agreement will not suffer in quality by having a public debate. Proponents definitely bring good reasons for concluding the TTIP, and on this basis the parties may negotiate an agreement with an acceptable outcome.

The controversy focuses on a range of issues, which have revealed a considerable public concern. The public opinion clearly shows – the TTIP needs to ensure that EU-standards are not circumvented or lowered, and would also apply to US products and services. Furthermore, the proponents so far have not succeeded in providing a convincing explanation, why ISDS needs to be a crucial element of the agreement. Consequently, new forms of dispute settlement have been suggested and will be debated in the near future. However, the longer the controversy endures, the greater public pressure lies on the European Commission to promote the TTIP. While most recently the EP has backed the agreement (with reservations on ISDS),⁵⁰ it seems that the media and civil society sees the TTIP rather as a Frankenstein than a golden standard.

Given the character of the TTIP as a trade agreement, the negotiations are led by the European Commission. Other institutions and member states only hold rights as far this is stipulated in Art. 207 TFEU. With a view to the uncertain final

⁴⁹ Similarly, *Treier, V., Wernicke, S.* Die Transatlantische Handels- und Investitionspartnerschaft (TTIP) – Trojanisches Pferd oder steiniger Weg zum Olymp? *EuZW*, 2015, pp. 334, 336.

⁵⁰ European Parliament, EP's recommendations on TTIP adopted in plenary, 8 July 2015, P8_TA-PROV(2015)0252. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN> [last viewed 10.09.2015].

outcome of the agreements' text, it is yet to be seen, whether the TTIP will be concluded as an EU agreement or as a mixed agreement, which might give member states' parliaments a voice in this procedure. While it might technically be feasible to conclude the TTIP as an EU-agreement, much speaks in favour of taking this latter option to ensure legal certainty and legitimacy.

Sources

Bibliography

1. Biondi, A., Eeckhout, P., Ripley, S. EU Law after Lisbon, Oxford: OUP, 2012.
2. Bode, T. TTIP, die Freihandelslüge, München: DVA, 2015.
3. Blecker, R. A. The Mexican and U.S. Economies after 20 years of NAFTA. *International Journal of Political Economy*, 2014, Vol. 43/2, p. 5.
4. Hindelang, S. Repellent Forces: The CJEU and Investor-State Dispute Settlement; AVR, 2015, Band 53, Heft 1, pp. 68–89 (22).
5. Hoffmeister, F. Wider die German Angst – Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP); AVR, 2015, Band 53, Heft 1, pp. 35–67.
6. Hummer, W. Was haben TTIP, CETA und TISA gemeinsam? Investor-T-State Dispute Settlement (ISDS) als umstrittenes Element der Freihandelsabkommen, integration 1/2105, Nomos, Baden-Baden, p. 3.
7. Nowak, C., Masuhr, M. S. "EU only": Die ausschließlichen impliziten Außenkompetenzen der Europäischen Union – Anmerkung zum Urteil des EuGH vom 4.9.2014 in der Rs. EUGH Aktenzeichen C-114/12 (Europäische Kommission/Rat der Europäischen Union, EuR 2, Nomos, Baden-Baden, 2004, pp. 189–206.
8. Mayer, F., Ermes, M. Rechtsfragen zu den EU-Freihandelsabkommen CETA und TTIP ZRP, 2014, p. 237.
9. Sackmann, J. Im Schatten von CETA und TTIP: Zur Verfahrenstransparenz in Intra-EU-Investitionsschiedsverfahren Schieds VZ, 2015, p. 15.
10. Schewe, C. *Das Recht von FTAs als Indikator für Vorherrschaft und Gestaltung des internationalen Handels?* In: Joerges/Pinkel/Uetzmann, *Josef Falke zum 65. Geburtstag*, ZERP Diskussionspapier 1/2014, pp. 153–168.
11. Schwarze, J. EU-Kommentar 2. Aufl., Baden-Baden: Nomos, 2008.
12. Seccareccia (ed.). Introduction. *International Journal of Political Economy*, 2014, Vol 43/2, p. 3.
13. Treier, V., Wernicke, S. Die Transatlantische Handels- und Investitionspartnerschaft (TTIP) – Trojanisches Pferd oder steiniger Weg zum Olymp? EuZW, 2015, p. 334.
14. Van den Bossche, P. *The Law and Politics of the WTO*. 2nd ed. Cambridge: Cambridge University Press, 2008.
15. Van Grassek, C. *The History and the Future of the WTO*, Geneva: WTO, 2013. Available at https://www.wto.org/english/res_e/publications_e/historyandfuturewto_e.htm [last viewed 10.09.2015].

Normative acts

Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon, signed on 13 December 2007, *Official Journal C 326*, 26/10/2012, pp. 0001–0390.

Case law

1. ECJ, Case 112/80, *Dürbeck*, 5 May 1981. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].
2. ECJ, Case 245/81 *EDEKA*, 15 July 1982. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].
2. ECJ, Opinion 1/78 *International Agreement on Natural Rubber*, 4 October 1979. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].
3. ECJ, Opinion 2/92 *OECD*, 24 March 1995. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].
4. ECJ, C-281/01, *Energy Star*, 12 December 2002. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].

5. ECJ, Opinion 1/76 *Laying-up Fund for Inland Waterway Vessels* (1977), 26 April 1977. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].
6. ECJ, Case 33/70 *Commission/Council (AETR)*, 31 March 1971. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].
7. ECJ, Opinion 1/94 WTO, 15 November 1994. Available at <http://curia.europa.eu/> [last viewed 10.09.2015].

Additional internet resources

1. Centre for Economic Policy Research, “Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment”, London. Available at <http://trade.ec.europa.eu/doclib/html/150737.htm> (full study), <http://trade.ec.europa.eu/doclib/html/150738.htm> (annex) [last viewed 10.09.2015].
2. Council of the European Union, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, document 11103/13 DCL 1, 17 June 2013. Available at <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> [last viewed 10.09.2015].
3. European Commission, “EU Governments and MEPs decide”. Available at <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/process/> [last viewed 10.09.2015].
4. European Commission indicating the CETA as recent trade agreement on the TTIP-webpage. Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> [last viewed 10.09.2015].
5. European Commission, European Commission Fires Starting Gun for EU-US Trade Talks, Press release, Brussels, 12 March 2013. Available at http://europa.eu/rapid/press-release_IP-13-224en.htm [last viewed 10.09.2015].
6. European Commission, Commission staff working document, Impact Assessment Report on the future of EU-US trade relations SWD(2013) 68 final, Strasbourg, 12.3.2013. Available at <http://trade.ec.europa.eu/doclib/html/150759.htm> [last viewed 10.09.2015].
7. European Commission, Independent study on the benefits of EU-US trade agreement Memo (and full text), Brussels, 12 March 2013. Available at http://europa.eu/rapid/press-release_MEMO-13-211_en.htm [last viewed 10.09.2015].
8. European Commission, DG trade. Available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> [last viewed 10.09.2015].
9. European Commission, on customs duties. Available at http://ec.europa.eu/taxation_customs/customs/policy_issues/facts_and_figures/customs_mean_revenue_en.htm [last viewed 10.09.2015].
10. European Commission on TTIP rules. Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#rules> [last viewed 10.09.2015].
11. European Commission, The top 10 myths about TTIP. Available at http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153266.pdf [last viewed 10.09.2015].
12. European Parliament, European Parliament rejects ACTA, press release, External/international trade – 04-07-2012. Available at <http://www.europarl.europa.eu/news/en/news-room/content/20120703IPR48247/html/European-Parliament-rejects-ACTA> [last viewed 10.09.2015].
13. European Parliament resolution on improving EU-US relations in the framework of a Transatlantic Partnership Agreement (2005/2056(INI)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0238+0+DOC+XML+V0//EN> [last viewed 10.09.2015].
14. European Parliament, EP’s recommendations on TTIP adopted in plenary, 8 July 2015, P8_TA-PROV(2015)0252. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN> [last viewed 10.09.2015].
15. *Kempen, B.* Legal opinion regarding the admissibility of a European Citizens’ Initiative against TTIP and CETA (Comprehensive Economic and Trade Agreement). Available at <https://stop-ttip.org/legal-opinion/> [last viewed 10.09.2015].
16. *Mayer, F.* Legal expertise for the Federal Ministry of Economics and Energy, “Is the planned free trade agreement of the EU with Canada a mixed agreement?” Available at <http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> [last viewed 10.09.2015].
17. *Myant, M., O’Brien, R.* The TTIP’s impact: bringing in the missing issue. ETUI working paper 2015.1. Available at <https://www.etui.org/Publications2/Working-Papers/The-TTIP-s-impact-bringing-in-the-missing-issue> [last viewed 10.09.2015].
18. OECD-website on the MAI. Available at <http://www.oecd.org/daf/mai/> and <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> [last viewed 10.09.2015].

19. *Robinson, P. M., Dybvad, K., Bäckström, U.* (2014). Financial Times 10 March 2014, The 'T' in TTIP will create a global gold standard. Available at <http://www.ft.com/cms/s/0/be2a91c8-a5ff-11e3-b9ed-00144feab7de.html#axzz3eixUgOgV> [last viewed 10.09.2015].
20. Stop TTIP.org. Available at <https://stop-ttip.org> [last viewed 10.09.2015].
21. United States – European Union High Level Working Group on Jobs and Growth (HLWG), Final Report of the HLWG, February 11, 2013. Available at http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf [last viewed 10.09.2015].