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# European Union Trade Policy and the Prospects for a Transatlantic Trade and Investment Partnership

PANAGIOTIS DELIMATSIS

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Amid the most severe refugee crisis the European continent has seen in decades and the increasing fears that European integration is in peril, the expansion of European Union (EU) trade policy continues. Jean-Claude Juncker, the president of the European Commission, and his administration have prioritized the conclusion of comprehensive economic agreements with strategic partners, including the United States, Japan, and China. These negotiations are currently conducted by the European Union, showcasing the dramatic change of global trade politics in the last ten years.

A clear shift away from the World Trade Organization (WTO) as the predominant trade negotiating forum is taking place. The fact that the recent WTO Ministerial Conference in Nairobi expressly recognized not only the

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**Panagiotis Delimatsis** is a Professor of European and International Trade Law and Director at the Tilburg Law and Economics Center (TILEC), Tilburg University, the Netherlands. He is currently serving as a Visiting Scholar at the Program on International Financial Systems at Harvard Law School. His research focuses on regulatory issues in the service sector, in particular the effects of unduly burdensome domestic regulations on factor mobility from a comparative perspective, as well as the institutional and substantive aspects of standardization, financial regulation, and energy in global economic governance. Delimatsis has also published work in the *European Journal of International Law*, the *Journal of International Economic Law*, the *Common Market Law Review*, the *European Law Review*, the *Journal of World Trade*, and the *World Trade Review*.<sup>1</sup>

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centrality but also the primacy of the WTO system does not seem to affect these dynamics.<sup>2</sup> Particularly, this shift has manifested itself in the increasing emphasis the EU is placing on concluding bilateral trade agreements with strategic partners—which, while occurring within the framework of WTO obligations, occurs outside of the WTO as a negotiating forum.

Against this backdrop, this note assesses the current state of affairs and future prospects for a balanced transatlantic trade deal. Absent any significant progress within the WTO and multilateral negotiations, larger economies are seeking to redefine the agenda of trade rules for the medium run out of the acknowledgement that new production methods and business models also require creative legal engineering. This note outlines the current trajectory of EU trade policy under the Juncker administration, analyzes the importance and challenges of concluding the Transatlantic Trade and Investment Partnership (T-TIP) between the EU and the United States, and concludes with a review of the current state of global trade regulation.

### THE DIRECTION OF EU TRADE POLICY

Focusing on the future of EU trade policy, the European Commission has made clear the shape of the EU agenda in coming years:<sup>3</sup> it will seek to become more effective and more transparent, as well as attempt to export EU values to the rest of the world. These three elements—effectiveness,

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transparency, and values—constitute the three pillars of the revitalized EU trade policy. Effectiveness means that EU trade policy will become more results-oriented, focusing on the facilitation of value chains, the inclusion of digital trade in prospective negotiations, and the easing of rules governing movement of high-skilled professionals. Transparency, the second pillar, has been a recurring theme in trade negotiations, and EU institutions have been the recipients of numerous calls for increased access to documents previously regarded as confidential. In a significant policy turn toward more openness vis-à-vis civil society and the public in general (which, admittedly, was also the result of a more hands-on approach to the issue of access to confidential documents by the Court of Justice of the European Union, the EU's highest court), the EU started publishing key negotiating texts shortly after they were discussed at the table with the EU's partners. This is in stark contrast to the policy

the United States administration has adopted, turning a deaf ear to the demands for more transparency in the negotiations for the Trans-Pacific Partnership (TPP) or in the current T-TIP negotiations.

The third pillar of the EU's new approach to trade matters rests on the idea that EU values can be "exported" through trade negotiations. In EU foreign policy, this has previously included the exporting of concepts relating to public services (so-called "services of general interest") to the EU's partners in Eastern Europe, but also the exporting of concepts relating to competition law. In its new policy, the EU aspires to enrich this agenda with new concepts such as enhanced corporate social responsibility to ensure a high level of protection for European consumers, increased legitimacy for investment arbitration systems used by the EU in its international agreements, and a more targeted system of autonomous preferences given to developing and least developed countries.

#### T-TIP'S IMPORTANCE FOR THE EU

Whereas the EU claims to remain focused on the conclusion of the Doha Round, it seems that the Doha negotiating mandate has been abandoned.<sup>4</sup> The multilateral round of negotiations that was launched with high hopes in 2001 in the Qatari capital largely failed to meet the expectations of developing and developed countries.

After fifteen years of negotiations and procrastination, the WTO Ministerial Declaration in Nairobi confirmed the indifference of many key members regarding the conclusion of the Doha Development Round. It is worth noting that despite the sluggish progress in the WTO negotiations, trade liberalization—notably through the decrease of tariffs on goods—continued apace, showing that trade liberalization occurs, but increasingly outside the WTO.

The EU trade agenda, announced in October 2015, had already signalled the arrival of a new era for the WTO by suggesting that, rather than focusing on comprehensive (and thus time-consuming) negotiations on an ever-increasing array of issues, issue-based negotiations and early harvesting may be the most sustainable future for the WTO.

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This approach is being tested with the negotiations for a Trade in Services Agreement (TiSA), currently negotiated by twenty-five WTO members (counting the EU as one member). TiSA has been promoted by

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the biggest services exporters globally, including the EU, the United States, Japan, Canada, and the Republic of Korea. Brazil, Russia, India, China, and South Africa (the BRICS) have largely distanced themselves from this initiative, but any signal by China suggesting its participation would quickly alter these dynamics. With the current slowdown of trade in goods and the rather mediocre prospects in the short run,<sup>5</sup>

China will soon need to further diversify its economy. The potential of the service sector remains untapped for the most part.

With a combined transatlantic trade volume of around €400 billion in 2014, representing over half of all global trade in services, services are a key component of a future transatlantic deal between the EU and the United States. In both goods and services trade with the United States, the EU as a bloc currently enjoys a small but steady surplus, notably in goods. However, this does not mean that the EU will not benefit from such a deal with the United States; to the contrary, T-TIP forms part of the EU's considerable shift in external trade policy to focus on the conclusion of trade agreements that can have a significant impact on EU trade. Thus, under the instructions of the European Council,<sup>6</sup> the European Commission's interest shifted towards the launch of negotiations with its strategic partners, who are at the same time important global trade partners. Within this framework, concluding comprehensive and balanced trade agreements with the United States, China, Russia, Japan, India, and Brazil became a top priority for EU trade policy.<sup>7</sup>

There are varying degrees of progress in these negotiations. For instance, negotiations with India have witnessed sluggish progress with no real prospect for the conclusion of a trade and investment agreement any time soon. The same appears to be the case with MERCOSUR, a trade bloc of South American economies, of which Brazil is a member. It is unclear whether the EU still favors the initial idea of concluding the EU-MERCOSUR association agreement before any separate agreement with Brazil. On the other hand, the United States and Japan appear to be

the top political priority for the new Juncker administration, as an agreement seems to be more feasible in the short run.<sup>8</sup>

In his State of the Union speech, the president of the European Commission reiterated his willingness to conclude a reasonable and balanced agreement with the United States in the coming years.<sup>9</sup> The EU leadership had hoped to conclude the transatlantic negotiations as early as 2015, but negotiations are still ongoing, notably because they were put on hold until the TPP was concluded in October 2015. However, the most recent statements by the lead negotiators of the two partners suggest that a conclusion of the negotiations during the Obama administration is desirable and feasible.<sup>10</sup> At the same time, the EU recognizes that the recently concluded TPP also needs to enter into force. Obama has faced criticism for this agreement from various sides, including reluctant statements by members of the United States Congress and every presidential candidate of both parties. Thus, it may be more challenging than in 2015 for the Obama administration to conclude an additional trade deal of even greater magnitude. Calls that this should be left to the incoming United States president increase. The fact that the EU has increasingly insisted on adding its new concept of investor-state arbitration into the final deal its new concept of investor-state arbitration after convincing Canada to add it in the final EU-Canada Comprehensive Economic and Trade Agreement (CETA) render slim the prospects of a final deal by the end of 2016.

Even so, this does not seem to change the planning on the EU side. In any case, ratification and enforcement also entail a complicated process within the twenty-eight individual EU member states. Taking into account the most recent views of the Commission, it seems that the EU has opted for immediately prioritizing three agreements: T-TIP, the agreement with Japan, and the investment agreement with China. In all cases, the EU confirmed the importance of concluding WTO-consistent bilateral agreements, although it is no longer conceivable to achieve substantial progress on both the bilateral and the multilateral front simultaneously. Perhaps the only exception where such simultaneous negotiations take place is the area of services, in which the EU expressly confirmed its commitment to the bilateral route (through T-TIP, CETA with Canada, or the EU-Korea Agreement) and the multilateral/plurilateral route (through TiSA within the WTO framework).

Upgrading the cooperation with the United States on all fronts is the clear message from European leaders. For many observers, the Transatlantic Economic Council (TEC) that preceded the T-TIP negotiations did not achieve as much as was expected, but for others, it did set the foundations

for a more comprehensive collaboration and understanding, in particular on regulatory matters.

T-TIP has drawn public attention since the very beginning of the announcement that transatlantic negotiations would start. Legally speaking, T-TIP represents an interesting legal construct under the the lens of EU external relations law. It is not the first free trade agreement that the EU has negotiated, nor is it the first free trade agreement that the EU will conclude since the entry into force of the Treaty of Lisbon. The Comprehensive Economic Trade Agreement (CETA) with Canada will also be concluded under the relevant new Common Commercial Policy (CCP) provisions of the Treaty on the Functioning of the European Union (TFEU). The EU Free Trade Agreement with South Korea, the EU's first with an Asian economy, was also concluded recently.<sup>11</sup> This agreement was concluded as a "mixed agreement," which, in EU jargon, designates that both the EU and its member states together shall conclude the agreement. In practice, such a mixed agreement requires ratification by all member states before it can produce any legal effects. In the case of the Korea free trade agreement, though, the Council had decided to provisionally apply the free trade agreement as of July 2011. This is the first agreement of what the Commission calls the new generation of EU free trade agreements. However, both free trade agreements were concluded based on respective mandates that were addressed to the European Commission *prior* to the entry into force of the Lisbon Treaty, with much confusion surrounding the normative character of the changes brought about by the then forthcoming introduction of the new Lisbon treaty rules.

The T-TIP mandate was approved by the Council of the EU in 2013.<sup>12</sup> Thus, all related decisions and acts were adopted after the entry into force of the Lisbon Treaty. Another, less mediatized agreement that has similar characteristics is the free trade agreement with Singapore, negotiations for which were finalized in October 2014, absent political will to conclude a broader agreement with all ASEAN countries. The free trade agreement with Singapore, however, is not as prominent as T-TIP in terms of trade flows because Singapore is the EU's seventeenth largest trading partner. Still, the free trade agreement with Singapore is of high constitutional significance for the evolution of EU external relations law, as the European Commission decided to go a step further and claim exclusive competence for the conclusion of this agreement based on the then-new Lisbon framework. The new Article 207 TFEU appears to suggest that CCP, including investment, is an exclusive EU competence with varying decision-making procedures (that is, qualified majority combined with

unanimity when liberalization of the audio-visual sector or public services is at stake). The Commission’s request for an Opinion by the Court of Justice of the European Union (CJEU) based on Article 218:11 TFEU is pending and awaited with great interest, as it may constitute a yardstick for all subsequent EU free trade agreements, including the T-TIP.

Hence, just in terms of sheer trade size, T-TIP is at the epicenter of the public debate regarding trade and regulatory matters on both sides of the Atlantic. The United States is the EU’s top trading partner, representing over 15 percent of extra-EU trade flows. For the United States, the EU is the second most important trading partner after Canada. In the United States, a recurring discussion about the benefits of

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NAFTA, and lately TPP, instigates suspicion against mega-regional agreements of this type. In the EU, on the other hand, the debate about T-TIP is even more heated due to the trauma that the *EC Hormones* saga caused, but also due to the EU-specific concept of public services, that some see being put in jeopardy if a trade agreement with the United States is to occur, even though there is agreement between the EU and the United States to exclude public services from the agreement. In addition, statistics show that, even in times of crisis, the EU has had a steadily positive trade balance with the United States the last decade, making the case for further integration a “tough sell” to EU citizens anxious about their standards of living and the future of their welfare state so much hit by the recent Great Recession that followed the global financial crisis.<sup>13</sup>

Harnessing public opposition against T-TIP is not a given in the EU, as recent events show. Civil society groups and other non-governmental organizations (NGOs) started collecting signatures of EU citizens who were willing to support the interruption of any trade negotiations with the US. A central argument is that the agreement would possibly jeopardize the status quo with respect to the supply of public services in Europe. Just as over 3 million signatures in favor of stopping the T-TIP negotiations were collected, the central organizers of the movement attempted to unsuccessfully register this initiative as a European Citizen initiative pursuant to Article 11 TEU and the corresponding regulation. Accordingly, the persons in charge decided to launch a lawsuit before the CJEU.

To reassure citizens and NGOs that were mobilized, the EU and the United States recently pledged to take into account the important preferences

and values that underlie the provision of public services.<sup>14</sup> Water, education, health, and social services are mentioned as mere examples of sectors in which important sensitivities on both sides of the Atlantic exist. This statement confirms a consistently reluctant stance that the EU has taken in its free trade agreements with respect to public services (a so-called “public utilities exception”) in line with the negotiating guidelines by the Council.<sup>15</sup> Other sensitive areas for the EU in terms of liberalization include the opening of audio-visual services to the United States service suppliers. Due to traditional sensitivities associated with this sector that have been expressed already at the moment that the most-favored nation (MFN) exemptions to the WTO General Agreement on Trade in Services were discussed in the early 1990s, the Council of the European Union recommended the overall exclusion of the sector from the transatlantic discussions.<sup>16</sup>

Once the negotiations started drawing public attention, European Parliament involvement also increased, signalling the type of deal and ensuing commitments that it would be unable to approve. Recall that in the case of T-TIP, no agreement can be binding for the EU unless the European Parliament gives its consent. Recently, the European Parliament invited the Commission as the lead negotiator to exclude from the scope of T-TIP public services to ensure that “national and, if applicable, local authorities retain the full right to introduce, adopt, maintain, or repeal any measures with regards to the commissioning, organisation, funding, and provision of public services as provided in the Treaties as well as in the EU’s negotiating mandate; this exclusion should apply *irrespective of how the services are provided and funded*” (emphasis added).<sup>17</sup> Notably in the case of public healthcare services, the Parliament suggested the exclusion of the sector from the negotiations due to the differing approaches between the EU and the United States. Whereas the EU is very keen to add in the final text a horizontal chapter on regulatory cooperation, its proposed text excludes services of general interest (i.e. public services) from the scope of that chapter.

In addition, the Parliament agreed with the Council regarding the exclusion of the audio-visual sector. The Parliament even pushed this carve-out further by asking the Commission to actively pursue the introduction of a provision that would allow the EU and its member states to continue subsidizing and providing financial support to cultural industries and cultural, educational, audio-visual, and press services. However, the Parliament was no less ambitious in its final recommendations. According to the Parliament, an ambitious and balanced deal with the United States would entail the removal of United States restrictions on foreign ownership



of transport services and airlines, better access to United States telecommunications markets (without disregarding the EU high level of data protection and conditions for data flows), .....  
 and liberalization of the United States public procurement market at all levels of government. In the area of financial services, the Parliament underlines the importance of cooperation within international fora such as the Financial Stability Board (FSB), but urges the European Commission to negotiate meaningful commitments on market access. In addition, both the Council and the Parliament agree with the Commission that such commitments would only be useful if accompanied by strong rules on regulatory cooperation in financial services, including exchange of financial information. Finally, the Parliament calls for the convergence of regulations relating to professionals that still hamper mutual recognition of equivalent standards. Therefore, facilitating mobility should be an important objective of the EU to the benefit of both partners.

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## A CRITICAL JUNCTURE FOR GLOBAL TRADE NEGOTIATIONS

The regulation of global trade has never been more in flux than it is now. The emergence of mega-regional agreements such as TPP and T-TIP and the long-lasting difficulties in finalizing the Doha Development Agenda agreed upon in 2001 reveal a more fragmented future as far as trade regulation is concerned. One cannot help but observe the dynamics developed in the last fifteen years that followed the high hopes created by the adoption of the Doha Mandate. Fragmentation and variable geometry is the order of the day and the prospects for a more inclusive approach have faded. The ecology of global trade is characterized, on one side, by a group of countries, mostly developed and advanced developing ones, which have come together to set more specific rules that aim at the facilitation of supply chains, trade in intermediate goods, digital trade, state trading, or the movement of high-skilled personnel and, on the other side, by a larger

group of developing and least developed countries (LDCs), whose reluctance to join the trend transforms them into takers of trade liberalization pledged in a rather patchy way within the WTO.

Indeed, whereas the most recent WTO Ministerial Declaration in Nairobi confirmed the indifference of many key developed-country members regarding the conclusion of the Doha Development Round, members still felt compelled, after several years of procrastination, to finally go after the low-hanging fruits to the benefit of the developing world: members agreed to alleviate diachronic injustices in the trade of cotton and to address, decisively, the issue of export subsidies in the agricultural sector. With respect to market access in the cotton sector, members (developed countries and developing countries that are able to do so, including China) pledged to offer duty-free, quota-free access to imports of cotton from LDCs.<sup>18</sup> Most crucially, members satisfied a recurring request by the cotton-producing countries by prohibiting cotton export subsidies. This prohibition has immediate effect for developed-country members and shall be applicable to developing countries no later than January 1, 2017. This pledge is part of a broader obligation made by developed countries to finally abolish export subsidies in agriculture (except for a very limited number of agricultural products) immediately. For developing countries and LDCs, this obligation is set for a later date.<sup>19</sup> If one adds to these obligations the LDC waiver in the area of services, allowing deviation from the MFN obligation to grant to LDCs preferential access to domestic services markets, and the agreement on trade facilitation, the deliverables of the Doha negotiations are not negligible. Nevertheless, they are still not as ambitious as they were at the moment the multilateral trade negotiations started.

For the EU, such deliverables at the multilateral level are quintessential for the stance in international trade matters (and international relations, more generally) that the EU28 bloc advocates a more inclusive and responsible approach to trade matters, focusing on sustainable development and benefits for all. After some considerable delays in the conclusion of Economic Partnership Agreements (EPAs) with Asian, Caribbean, and Pacific trade partners to replace the WTO-inconsistent Cotonou Agreement, the EU has managed to conclude trade deals with African regional and multilateral communities, including

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West Africa, the Eastern African Community (EAC), and the South African Development Community (SADC). Additional EPAs with the remaining African countries and the Pacific partners are in advanced stage. However, T-TIP is the most ambitious and strategic trade agreement ever undertaken by the EU. If successful, these negotiations will certainly shape multilateral trade rules in the not so distant future. If seen through this angle, then both the EU and the United States have an interest in a comprehensive bilateral trade and investment agreement. *f*

## ENDNOTES

- 1 Discussions with Bernard Hoekman, Petros Mavroidis, Hal Scott, Joel Trachtman and Mark Wu have allowed me to sharpen the ideas developed here. Any errors are the author's alone. Contact: p.delimatsis@uvt.nl.
  - 2 WTO Nairobi Ministerial Declaration, December 19, 2015, WT/MIN(15)/DEC, para.19.
  - 3 European Commission Communication, "Trade for all: Towards a more responsible trade and investment policy," COM(2015) 497 final, October 14, 2015.
  - 4 Shawn Donnan, "Trade talks lead to 'death of Doha and birth of new WTO'," *Financial Times*, December 20, 2015.
  - 5 Shawn Donnan, "Global trade: structural shifts," *Financial Times*, March 2, 2016.
  - 6 European Council Conclusions of 16 September 2010, EUCO 21/1/10, October 12, 2010, para. 4.
  - 7 European Commission Communication, "Trade for all: Towards a more responsible trade and investment policy," COM(2015) 497 final, October 14, 2015.
  - 8 The conclusion of the transatlantic deal is one of the 10 top priorities that Jean-Claude Juncker set for his term as European Commission's president.
  - 9 *Jean-Claude Juncker*, "State of the Union 2015," September 9, 2015, available at: [http://ec.europa.eu/priorities/soteu/docs/state\\_of\\_the\\_union\\_2015\\_en.pdf](http://ec.europa.eu/priorities/soteu/docs/state_of_the_union_2015_en.pdf) (visited November 22, 2015). See also President Juncker's political guidelines addressed to the next Commission, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change," July 15, 2014.
  - 10 Leo Cendrowicz, "T-TIP talks 'could be completed before the end of 2016'," *The Independent*, February 26, 2016.
  - 11 Council of the European Union, "EU-South Korea free trade agreement concluded – Press release," October 1, 2015, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/10/01-korea-free-trade/> (visited November 22, 2015).
  - 12 Council of the European Union, "Press Release - 3245<sup>th</sup> Council meeting," 10862/13, June 14, 2013.
- The document was declassified in October 2014: see "Council Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America," ST 11103/13, June 17, 2013.
- 13 See, for instance, Eurostat, "US EU international trade and investment statistics," Statistics in focus 2/2015, September 11, 2015.
  - 14 "Joint Statement on Public Services by Ambassador Froman (USTR) and EU Commissioner Malström (DG Trade)," March 20, 2015.

- 15 See Panagiotis Delimatsis, *Services of General Interest and the External Dimension of the EU Energy Policy*, in *SERVICES OF GENERAL INTEREST BEYOND THE SINGLE MARKET – EXTERNAL AND INTERNATIONAL LAW DIMENSIONS*, 345ff (Markus Krajewski, ed, 2015).
- 16 With respect to both audiovisual services and public services, see the European Parliament “Resolution on the opening of negotiations on a plurilateral agreement on services (TiSA),” 2013/2583(RSP), July 4, 2013.
- 17 EU Parliament Resolution, “Recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (T-TIP),” 2014/2228(INI), July 8, 2015, para. 2(a)vii.
- 18 WTO, “Ministerial Decision of 19 December 2015 on Cotton,” WT/MIN(15)/46 and WT/L/981, December 21, 2015.
- 19 WTO, “Ministerial Decision on Export Competition,” WT/MIN(15)/45 and WT/L/980, December 21, 2015.