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WHAT THE TTIP LEAKS MEAN FOR THE ON-GOING NEGOTIATIONS AND FUTURE AGREEMENT?

TIME TO OVERCOME TTIP'S MANY INFORMATIONAL ASYMMETRIES

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What the TTIP Leaks Mean for the On-going Negotiations and Future Agreement?

Time to Overcome TTIP's many Informational Asymmetries

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Abstract

One of the major merits of the TTIP leaks has been to highlight the underlying information asymmetry characterising the on-going TTIP negotiations. By systematically releasing its position papers before each negotiation, the EU actual disclosure policy contributes to a permanent yet overlooked information imbalance between the EU and its trading partner(s). The ensuing asymmetry does not only alter the overall negotiating environment, but also how the media, academics, and, in turn, the public actually perceive it. As a result, only the EU positions have been studied, criticized and closely debated, with the US negotiating positions remaining largely a mystery. After briefly presenting the how's of the TTIP leaks, this piece examines the what's and why's behind this unprecedented revelation of negotiating texts.

Keywords: TTIP, US, EU, Leaks, Information asymmetry

I. Introduction

On 1 May 2016, Greenpeace Netherlands released 248 pages of TTIP negotiating texts stemming from previous negotiating rounds[1]. Although it is not the first (and will not be the last) leak since the inception of the negotiation in 2013[2], this is the first to reveal the US negotiating position regarding 13 out of the 24 TTIP chapters.

As such, the TTIP leaks provide an unprecedented opportunity to not only analyse the contrasting positions of the EU and US on several issues in the ongoing negotiations, but also to test the veracity of the competing narratives devised by opponents and proponents of the agreement. To what extent do their respective storylines find support in the actual texts?

Supporters of TTIP have proposed fact-checking as an antidote against the misinformation around TTIP. Yet, having been predominantly advocated and provided for by the EU Commission rather

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[1] Contrary to the initial claims, not all leaked texts date from March 2016, and some of them, like the regulatory cooperation chapter, appear as old as mid-2015.

[2] Green Party leaks confidential TTIP document, Euractiv, March 11, 2014, available at http://www.euractiv.com/section/trade-society/news/green-party-leaks-confidential-ttip-paper/

than by the media, institutional fact-checking failed to counter the massive misinformation characterizing the public and political discourse surrounding the negotiations. Unfortunately, when it comes to public perception, the line between pedagogy and propaganda is fuzzy.

One of the merits of the TTIP leaks is to highlight and - partly overcome - the underlying information asymmetry characterising the negotiations. By systematically releasing its position papers (and, sometimes, its textual proposals) before each negotiation, the EU actual disclosure policy contributes to a permanent yet largely overlooked information asymmetry between the EU and its trading partner(s). As it may be inferred from the TTIP *Tactical State of Play* document leaked by Greenpeace, the existing information imbalance alters not only the overall negotiating environment - by shaping the way trade negotiators interact and draft their texts -, but also how the media, academics, and, in turn, the public perceive it. While the EU disclosure policy might be expected to provide it a comparative advantage in terms of democratic legitimacy over the US[3], paradoxically, the more the EU reveals its negotiation to the public, the less the public appears pleased about the EU Commission's democratic accountability when acting as an international negotiator for the whole EU. In the aftermath of the TTIP leaks, calls by EU leaders to re-examine the mandate granted to the EU Commission to negotiate the agreement are bourgeoning. Likewise the requests by national parliaments to submit TTIP approval to a vote (regardless of its mixed nature) are also multiplying. But there is more.

The patent transatlantic asymmetry surrounding the negotiations generates many other information imbalances within the EU itself: that between the negotiators and the elected representatives (partly addressed by the establishment of the so called reading rooms), that between corporate and civil society interest groups (partly addressed by the TTIP advisory group), and eventually between the 'TTIP circus' and the general public. However, there is also a significant academic imbalance surrounding the TTIP negotiations. If the negotiators themselves have hijacked (and quickly exhausted) the rhetoric of fact-checking, academics have not yet had their chance to contribute to the discussion.

Limited access to the negotiating texts has initially produced some 'chilling effect' on academic writing on both sides of the Atlantic. Then, due to the sudden change in the EU policy disclosure,

[3] Politico Europe, Playbook, 3 May 2016: "The success of a leak is not only a function of the quality and quantity of information revealed, but is also about its ability to prompt future change." By this standard the impact of yesterday's leak is "embarrassingly modest," says Alemanno. It revealed the U.S.'s insistence on secrecy but fell short of confirming the worst concerns raised by the anti-TTIP camp, Alemanno says. "Contrary to what has been claimed by Greenpeace — and blindly echoed by mainstream media — there's no proof that the EU is ready to give in to U.S. demands. As a result, the leak rather strengthens the EU negotiating position."

the availability of EU-only position papers has fueled a growing literature focusing exclusively on the EU position in the negotiations as opposed to the (unknown) stance of the US. As a result, only the EU positions have been studied, criticized and closely debated, with the US negotiating positions remaining largely a mystery.

How can we expect the on-going negotiations to bear fruit when the conditions under which those negotiations have taken place have been so endogenously and exogenously imbalanced?

At a time in which the many transatlantic information asymmetries emerge as one of the major obstacles to the on-going negotiations, this symposium of the EJRR provides a cutting edge analysis of the documents unveiled by Greenpeace in the framework of the TTIP leaks. It contains 10 research-based opinion pieces by leading academics and practitioners who have been closely following the negotiations in their respective areas of expertise.

After briefly presenting the how's of the TTIP leaks, this short piece examines the what's and why's behind this unprecedented revelation of negotiating texts.

II. The TTIP Leaks: An Appraisal

The documents released by Greenpeace Netherlands consist of 13 consolidated TTIP chapters, plus a tactical note stemming from previous negotiating rounds[4]. These documents, which amount to about half of the draft text as of April 2016, appear to capture the state of the negotiations prior to the 13th round of TTIP negotiations between the EU and the US that took place in New York City on 25-29 April 2016 (just a few days before the publication of the leaked documents). Contrary to how they have been depicted by the media, consolidated documents differ from codified documents insofar as they limit themselves to show EU and US positions *side by side*, without reflecting a compromised text.

Greenpeace did not disclose the origins of the documents. After receiving the documents, Greenpeace Netherlands, together with a German investigative research partnership (comprised of *Rechercheverbund NDR*[5], *WDR*, and *Süddeutsche Zeitung*) analysed and compared them to existing documents. Moreover, to render it more difficult to trace the source of the leak, the original text has been retyped, and obvious spelling and grammar

[4] All the documents are available here: https://www.ttip-leaks.org/.

[5] The *Rechercheverbund*, which consists of different German media, has covered, amongst other big stories, the Snowden leaks and the recent Volkswagen emissions scandal.

errors (possibly put there deliberately as markers to identify the origin in case of a leak) were removed[6].

Given the restrictive confidential policy pursued by the US, these leaked documents allowed the public to see for the first time the position of the US in 13 sectoral chapters.

III. Why the TTIP Leaks

The declared rationale pursued by Greenpeace is 'to provide much needed transparency and trigger an informed debate on the treaty'[7]. When measured against these objectives, the leaks seem to have met only the former aim. While the TTIP leaks – by revealing concealed information - indisputably favour transparency, it appears more doubtful that they have prompted a more informed debate. The subsequent polarisation among EU political leaders around TTIP would rather suggest the opposite.

The narrative crafted by Greenpeace's press release, and which the mainstream media has blindly echoed, does not survive basic fact-checking.

The overall impression in the aftermath of the leaks is that Greenpeace devoted more time to preparing and announcing the release of the documents than to studying their contents. In particular, among the published documents there is no 'smoking gun' to substantiate the worst concerns raised by the anti-TTIP contingent.

Not only is there no proof that the EU is ready to give in to US demands when it comes to relaxing the level of consumer protection, food safety, or the environment, but the documents seem rather to highlight the EU Commission's commitment to its treaty obligations (which primes over international treaty negotiations) to mainstream environmental and health concerns in all its policies and keeping its policy process open and inclusive. Moreover, the regulatory cooperation chapter – as it has been put forward by the EU Commission in Spring 2016 – clearly conditions its operation on the attainment of an equal (or higher) level of protection.

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[6] This explains why Greenpeace Netherlands does not offer access to the original documents. By containing 'markers' in the form of deliberate typos or formatting, they might enable the identification of the documents' origins.

[7] See Press Release by Greenpeace Netherlands, available at http://www.greenpeace.org/international/en/press/releases/2016/Leaked-TTIP-documents-confirm-major-risks-for-climate-environment-and-consumer-safety/.

In these circumstances, it would appear naïve to buy into the pedagogical aim pursued by Greenpeace in disclosing such fanfare. Rather, the aim was to influence public opinion prematurely regarding the negotiation by spinning the language employed in the documents and further strengthening anti-TTIP bias within the EU.

A quick glance at recent events suggests that the strategy delivered the expected yet undeclared outcome: to mount public pressure on some EU political leaders, such as Francois Hollande and Sigmar Gabriel, so as to force them to distance themselves publicly from the agreement. That forced the EU Commission to call for a vote within the European Council to check whether all EU Member States would confirm the original negotiating mandate in TTIP[8].

IV. Contextualizing the TTIP Leaks: The Information Asymmetries

Parties to trade agreements traditionally invoke confidentiality so as to preserve tactical decisions, trust formation, and protect sensitive commercial interests at stake. Yet, the negotiations of a 'new generation' of trade agreements, such as the Anti-counterfeiting Trade Agreement (ACTA),[9] the Comprehensive Economic Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP), by the European Union have prompted civil society increasingly to question their 'behind-the-door' nature.

Given the wide policy scope that these trade agreements cover and their rather intrusive approach to domestic regulatory autonomy, the interests at stake are not only broader than in previous trade agreements but also of constitutional significance, affecting private companies, civil society organisations, individual citizens as well as third-party States. The democratic accountability of their negotiations as well as the outcomes are increasingly questioned today. In particular, as these agreements increasingly target regulations and policies enacted by countries that exercise their sovereign power in an effort to promote regulatory cooperation, there has been mounting demand that their negotiations be conducted with greater transparency than conventional trade negotiations. The rationale pursued by the claim for greater transparency is to guarantee equal access and

[8] See http://www.politico.eu/pro/juncker-to-ask-eu-leaders-to-reconfirm-ttip-mandate-at-june-council/.

[9] ACTA was rejected by the European Parliament in July 2012, and did not enter into force. European Parliament, 'European Parliament Rejects ACTA, Press Release,' July 4, 2012, http://www.europarl.europa.eu/news/en/news-room/20120703IPR48247/European-Parliament-rejects-ACTA.

representation of the many interests affected by the proposed agreements. This should be true not only at the time of their negotiation but also when they will be implemented and enforced[10].

As far as the negotiations are concerned, the TTIP negotiating process remained in large parts confidential until the EU Commission and Council of the EU were pushed to react by an unlikely alliance consisting of 250 NGOs acting jointly[11], the EU Ombudsman,[12] and eventually also by the European Parliament.[13]

Their joint request to the EU Commission included making available to the public the EU negotiating mandate, the EU position papers and related documents tabled for discussions, the draft and final versions of individual chapters, as well as the whole agreement at all steps of its drafting process. The European Ombudsman insisted that a proactive publication of documents by the EU Commission was important to improve the legitimacy of the negotiations in the eyes of the general public.[14] Acknowledging the need for some level of confidentiality in trade negotiations, the Ombudsman underlined that confidentiality in negotiations may be justified only when disclosure would damage the trust between negotiators, inhibit free and effective discussions, and/or reveal strategic elements of the negotiations.[15] Taking into account these recommendations, the Council of the European Union disclosed the negotiating mandate[16] and the Commission unveiled a new

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[10] Alberto Alemanno, "The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences", 18(3) *JIEL* 2015, pp. 625–640..

[11] See http://www.foeeurope.org/sites/default/files/foee_ttip-civil-society-transparency-call190514.pdf.

[12] The EU Ombudsman opened a case on the transparency and public participation in relation to the TTIP negotiations on 29 July 2014, and reached a decision on 31 October 2014. For all documents related to the EU Ombudsman's arguments in favour of transparency, see http://www.ombudsman.europa.eu/en/cases/caseopened.faces/en/54631/html.bookmark.
See, in particular, European Ombudsman, 'Letter to the Council of the EU Requesting an Opinion in the European Ombudsman's Own-Initiative Inquiry OI/11/2014/MMN Concerning Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership (TTIP) Negotiations,' July 29, 2014, http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54634/html.bookmark; European Ombudsman, 'Letter to the European Commission Requesting an Opinion in the European Ombudsman's Own-Initiative Inquiry OI/10/2014/MMN Concerning Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership (TTIP) Negotiations,' July 29, 2014, http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54633/html.bookmark.

[13] Report containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), (2014/2228(INI)). http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0175&language=EN.

[14] European Ombudsman, "Letter to the Council of the EU Requesting an Opinion in the European Ombudsman's Own-Initiative Inquiry OI/11/2014/MMN Concerning Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership (TTIP) Negotiations," July 29, 2014, http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54634/html.bookmark.

[15] The EU Ombudsman makes reference to the argumentation of the European Court of Justice in Judgment of the General Court (Second Chamber) of 19 March 2013. Sophie in 't Veld v European Commission. Case T-301/10, ECLI:EU:T:2013:135. See letter by EU Ombudsman to EU Commission in this regard, at http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54634/html.bookmark.

[16] Council of the European Union, Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and United States of America, http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf.

strategy to enhance its transparency in TTIP negotiations in November 2014[17] - which subsequently extended to the negotiations of all trade agreements - with regards to the general public and the Parliament. As a result, the EU Commission now discloses regularly its position papers – generally in advance of the negotiating rounds –, keeps information classified until it has been shared with the other party, systematically reports on negotiating rounds, provides detailed explanation on the different thematic sections, and allows all Members of the European Parliament to consult 'EU Restricted' and 'Limited' negotiating documents.[18] The EU Commission has made public a list of all documents communicated to both the Council and the Parliament since 2013, with links to these documents when available.[19]

When measured against the traditionally confidential approach governing trade negotiations, the EU's sudden change in disclosure policy appears quite revolutionary.

This appears all the more true when compared with its counterpart in the TTIP negotiations, the US administration, and in particular the United States Trade Representative (USTR), which continues to maintain a very confidential approach.[20] In so doing, the US government fails to recognize the specificity of the new generation trade agreements, which – by intruding into the exercise of regulatory autonomy – seem to call for greater transparency and openness than that required by other, conventional trade negotiations.[21] When these different approaches coexist in the same trade negotiation, as is the case in TTIP, this might lead to a significant imbalance between the parties and the ensuing public debate. Moreover, as highlighted by the TTIP leaks, an unequal transparency policy during the negotiations may tarnish the trust in the process and lead to questioning their overall predictability. This appears a paradoxical outcome insofar as the argument for non-disclosure put forward by the US is to build trust between parties.

It is submitted that the information asymmetry characterizing the TTIP negotiations represents an insurmountable obstacle insofar as it signals a different understanding of what can and cannot be

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[17] Communication to the Commission concerning transparency in TTIP negotiations, http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf.

[18] *Ibid*.

[19] European Commission, "The Transatlantic Trade and Investment Partnership (TTIP), List of Documents," February 26, 2016, http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153263.pdf.

[20] The secrecy of the US approach to trade negotiations has been widely criticised, both in the context of the TTIP and the TPP agreements. The US has indeed argued in favour of confidentiality of trade negotiations because of the sensitive interests at stake. Therefore, it did not publish the negotiated texts or its official position papers, but rather fact sheets on the addressed issues and the corresponding US position. United States Trade Representative, 'T-TIP Negotiating Document Procedures', July 5, 2013, https://ustr.gov/sites/default/files/US%20signed%20conf%20agmt%20letter_0.pdf.

[21] In the case of TPP, the text of the agreement was only disclosed a month after its conclusion. Regarding the negotiating documents, the New Zealand Chapter of Transparency International informed us that the parties to the TPP would be required to maintain information on the negotiations confidential for four years. This is confirmed in a letter released by New Zealand as depositary of the TPP Agreement to other parties for signature: http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP%20letter.pdf.

shared during the negotiations. The EU Commission has convincingly shown to the US (and its other trading partners) that there exists a conspicuous space in the negotiation of a trade agreement that could be disclosed without automatically risking the untouchable 'space to think and trade' inherent to any trade negotiation. In other words, the EU has shown that not only can trade partners offer a heightened level of openness without compromising the negotiation process, but also that this is necessary within the framework of the new generation trade agreements. Yet, the EU has failed – at least thus far – to persuade the US to embrace such an innovative approach to transparency in the negotiations. Unless this information asymmetry will be addressed by a change in the US disclosure policy there is a risk that it may further prevent mutual trust.

There are further important consequences stemming from the systemic imbalance in the disclosure policy across the Atlantic. This is because an information asymmetry emerges not only at the level of the information disclosed (one party discloses more than the other) but also at the level of the stakeholders consulted (business representatives have a more prominent place in the negotiations). On the absence of ready-made available material, corporate interests tend to gain better access to the information than civil society organisations.

This dual information asymmetry (between trade partners and between their respective government and their constituencies) calls for the need to reconsider the meaning, role, and level of transparency required in their negotiation and adoption[22].

V. Conclusions

Due to its pioneering bilateral and multilateral efforts to improve transparency in trade, the EU emerges – as it has been demonstrated by this analysis – as one of the most well positioned actors to change the transparency paradigm in trade negotiations. Yet, for this to occur in the framework of TTIP, a move from the US appears needed. Given the patent asymmetry in transparency practices between the EU and its trade partners, it seems as though any additional steps to improve the overall transparency of trade negotiations will depend on some concessions from those partners. As suggested by its bold commitment to the Open Government Partnership,[23] the US officially positions itself in favour of similar transparency ambitions as the EU in many regards.[24] As an

[22] On the need for a new understanding of confidential trade negotiations, see V. Abazi,. How Confidential Negotiations of the TTIP Affect Public Trust, European Journal of Risk Regulation, Volume 7 (2016), Issue 2, pp. 247 – 251.

[23] See http://www.opengovpartnership.org/country/united-states.

[24] The Obama administration has announced it would strengthen efforts to improve transparency, particularly in trade negotiations, and engage with the public and stakeholders. See United States Trade Representative, 'Transparency and the Obama Trade Agenda', January 2015, https://ustr.gov/about-us/policy-offices/press-office/fact-

agreement between two like-minded countries and powerful trader partners, TTIP – regardless of its final fate – is expected to become the golden standard for a new generation of trade agreements. For this to occur, it will be crucial that TTIP also sets a new 'transparency benchmark' aimed at unsettling, and possibly overcoming, existing practice. Should the Transatlantic leadership be capable to identify the outer limits of transparency in trade negotiations, this solution might be plurilateralized and perhaps even be multilateralized to the benefit of a more transparent multilateral trading system. Unless the EU and the US, two like-minded countries and powerful traders, will be able to lay down a joint transparency policy the fate of the TTIP negotiations is already written.

sheets/2015/january/fact-sheet-transparency-and-obama. Arguably, such ambitious transparency pledges may set the expectations of the general public too high, giving rise to more criticism when those promises are not implemented.