

# Old alliances, new struggles

## The Transatlantic Trade and Investment Partnership

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The Transatlantic Trade and Investment Partnership (TTIP) is a bilateral agreement between the European Union and the United States of America aimed at the liberalization and regulation of trade in goods and services. If adopted, it will supplant the EU, the North American Free Trade Agreement (NAFTA) and the deal between China and the Association of South East Asian Nations (ASEAN) as the largest free-trade zone in the world. By reducing tariff and Non-Tariff Barriers (NTBs), developing Investor-to-State-Dispute-Settlement (ISDS) mechanisms, and harmonizing cross-border regulatory convergence, the agreement claims to ensure economic growth, create jobs and, according to a US Chamber of Commerce brochure, 'promote regulatory cooperation to ensure high levels of health, safety, and environmental protection while cutting unnecessary costs'.<sup>1</sup> The European Commission (EC) argues that the 'extra economic growth will benefit everyone; boosting trade is a good way of boosting our economies by creating increased demand and supply without having to increase public spending or borrowing'.<sup>2</sup>

As such, the TTIP is a specific instrument of international relations that illustrates tactical shifts in state-capital relations and the relationship between international law and capitalism. It signals an accelerated concretization of North Atlantic-Pacific legal hegemony, marking a shift away from the World Trade Organization (WTO) and other more supranational legal institutions. And it exemplifies the urge to revive old strategic alliances in a climate of renewed tensions between emerging and developed capitalist states.

The first round of talks took place in July 2013 in parallel with negotiations on regional trade agreements between Canada and the EU (CETA), and between the USA, Australia, Japan and other Pacific states (the Trans-Pacific Partnership or TPP). These 'mega-regional' agreements are the new kids on the block. Although their basic format is a cumulative version of Bilateral Investment Treaties (BITs), in circulation since 1959,<sup>3</sup> the important shift that analysts are debating is the move away from the WTO and its more global forum of economic cooperation. In the face of the lengths of the WTO's Doha rounds, Atlantic and Pacific partners are instead cementing their favoured relationships through regional free-trade zones. Although governmental brochures are keen to stress how these measures will not negatively impact non-parties to the agreements (the main concern being China, but also the other BRIC members – Russia, India and Brazil – as well as African partners), various critics have taken a less naive approach to the geopolitics at play.

In fact, after a year and a half of secretive negotiations, an address to the geopolitical dimension of the agreements is becoming unavoidable. An important report and collection of recent commentaries published by a German-based think-tank, 'How to Save TTIP?', makes three policy recommendations: '(1) The Transparency Deficit:

“Hard” Evidence Needs to Support “Soft” Assurances; (2) Investor–State Dispute Settlement: Reform or Removal; and (3) A Change in Emphasis: Geopolitics and Economics.<sup>4</sup>

EU and US negotiators are faced with a few facts that make their statements sound rather flat. First, the economic benefits of the agreement appear as either overly ambitious or negligible in the long run. The main source for the economic growth forecast figures – widely regurgitated – is a March 2013 report by the European Centre for Policy Research (ECPR). Commissioned by the EC, this report, based on a ‘state-of-the-art’ computable general equilibrium (CGE) model, predicts a 0.48 per cent rise in European GDP by 2027 under an ‘ambitious’ scenario, or 0.27 per cent rise under a ‘less ambitious’ scenario.<sup>5</sup> The latter figure has been mostly ignored, while the first figure has been rounded up to 0.5 per cent and considered as an average. These are the ‘soft assurances’ needing ‘hard evidence’. Moreover, as a report commissioned by the European Parliament notes, ‘the CGE approach has drawbacks, such as the (unrealistically) flexible labour market, the peculiarities of how investments are included, the lack of innovation and productivity-growth effects in enterprises of different sizes.’ Crucially, the model fails to account for factors relating to the environment (apart from CO<sub>2</sub> emissions) and to the social impacts of labour. Specifically, the ECPR model deals mainly with the reallocation of labour, and does not account for the effects of job creation and unemployment.

Second, trade liberalization is already a key policy of all the states involved, increasing suspicion over the secrecy of the negotiations. If the packaging of the agreements, their scale, and the turn to regional zones are somewhat novel, what they contain in terms of trade policy is no revolution. Third, negotiators are facing growing debate about, if not discontent with, the more contentious regulatory aspects of the agreement: the ISDS and the opening of market access in the domains of energy, health, food, and their impacts on the environment. The ISDS is the investor-protection clause of the agreement, and consists in standardized legal provisions for states and corporations actionable in arbitration tribunals rather than domestic or international courts. It amounts to an increase of corporate legal sovereignty to ensure a level playing field between investors, and between investors and states. Crucially, it ensures the enforcement of EU–US standards across the world, thus constituting a powerful bargaining tool with China, for whom arbitration is a key concern. Germany has been leading the talks on this issue, but is under pressure from other member states and the SPD to reform or abandon the clause. In sum, the case for TTIP is less and less straightforward and critics are emerging from a variety of perspectives.

### **Strategic**

Two broad camps can today be distinguished. First, there is a liberal group of analysts, lobbyists, and public and private parties believing in the potential benefits of the agreement and eager to see its positive outcomes outdo its externalities and mishandling by negotiators. For example, Bernadette Ségol, general secretary of the European Trade Union Confederation, ‘is willing to support TTIP if it does not contain ISDS, if it enforces labour standards and excludes public services’.<sup>6</sup> Second, there is a coalition of critical commentators, NGOs, trade unionists and MEPs denouncing the encroachment of private interests over the terms of the deal and thus campaigning for its abandonment. Both camps agree that TTIP hides much more than negotiators are willing to reveal, and that EU and US citizens remain dangerously unaware of what it signifies for the broader geopolitical and economic future.

Are TTIP and similar agreements just ‘business as usual’ for capitalist states? In terms of basic survival in the face of recessions, stagnation and unemployment – yes; but in terms of the shaping of the state–capital (or state–business) nexus – political and economic elites working together to maintain the conditions of their social

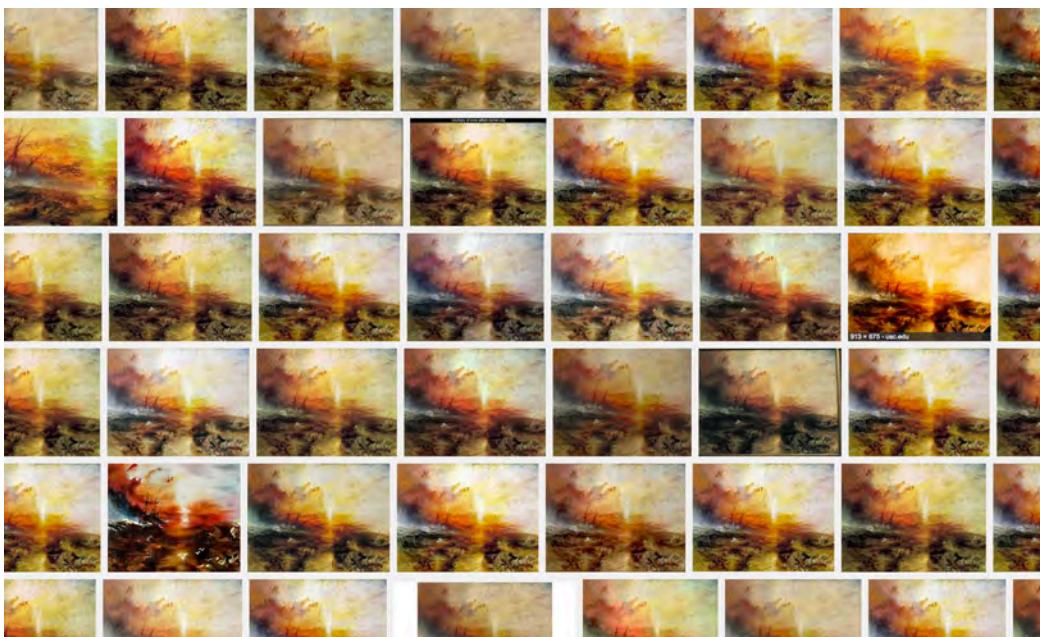
reproduction – no. It requires these elites to enact changes to our political and legal systems in order to maintain the best conditions possible for the accumulation of capital and for their authority over those conditions.

For example, TTIP is supported by a large coalition of business partners with clear interests in the ISDS and in the opening of tariffs. In terms of sectors where regulation is still a concern for investors, such as energy and raw materials (since in most other sectors trade has already been largely liberalized), TTIP sends a comforting message to private partners. Consider the following, taken from the Council of the European Union ‘Directives for the negotiation on the TTIP’, a document drafted in June 2013 but declassified only in October 2014:

The Agreement will include provisions addressing trade and investment related aspects of energy and raw materials. Negotiations should aim at ensuring an open, transparent and predictable business environment in energy matters and at ensuring an unrestricted and sustainable access to raw materials.<sup>7</sup>

‘Open, transparent and predictable’ is an interesting phrase, when negotiations have been kept secret. Transparency and predictability are strictly meant for the small group of parties able to take part in or influence those discussions. The terms of the major deals and partnerships set to emerge from the TTIP will not have been subject to public scrutiny. Moreover, how can access to raw materials be kept unrestricted *and* sustainable? The language of these Directives is unmistakably in favour of corporate interests and illustrates the state–capital relation that TTIP is contributing to shaping.

Moving beyond the World Trade Organization is an asserted goal of the TTIP negotiations. How significant is this shift? In the first instance, it is important to recall why the EC is the institutional body negotiating the agreement, and not the European Parliament or a delegation of European governments. The authority of the EC to negotiate on transatlantic trade deals was asserted by the 2009 Lisbon treaty. Considering the many contentious aspects of this treaty and the important referendums in France and the Netherlands, in which a majority voted against its ratification, the jurisdictional basis of the negotiations is shaky. David Cameron’s diplomatic sabre-rattling at Jean-Claude Juncker’s presidency of the EC might be thought to raise doubts over the role of the institution leading the closed-door negotiations over TTIP. Yet Cameron’s support for the agreement is unflinching.



## Judicial globalization

Moving away from the WTO is evidently not a major shift in neoliberal strategy, but rather one of tactics. Since the 1990s, there has been a notable move towards judicial globalization – that is, an increase in dialogue between domestic courts, the increased citing of domestic decisions and legislation in those courts, and an increase in quasi-judicial settlement mechanisms, such as arbitration tribunals and ISDS (which the WTO, as a quasi-judicial body, helped to put in place). Judicial globalization implies a move away from supranational and regional legal institutions such as the International Court of Justice and the European Court of Human Rights. TTIP and its contentious ISDS are a step further in this direction, and for many are merely following the natural course of events, since ‘ISDS clauses are included in more than 1,400 bilateral investment and trade treaties.’<sup>8</sup>

However, standardizing this form of arbitration according to EU, US and Canadian norms means cementing regional alliances against others and ensuring legal hegemony. The TTIP-TPP-CETA link revives the 1990s triad of North America, the EU and Japan-Australia. This triad has evidently gained new momentum from the rise of China, India and the conflicts with Russia in the Eurasian region. One of Obama’s crucial foreign policy aims is the ‘Pacific pivot’, a move away from the Middle East and towards the Pacific region.<sup>9</sup> TPP (whose origins go back to 2005) is a major part of this move, and it responds to Chinese efforts at securing free-trade zones with ASEAN. Competition between China and the USA over the region remains crucial. Thus, moving away from the WTO is a way of responding more aggressively to changing geopolitical patterns, and to threats from China and Russia.

The dispute between leading NATO members and Russia over the latter’s involvement in Ukraine is an important sign of this move towards regional alliances. While TTIP ensures economic ties between the EU and the USA, NATO provides the military backup. Both parties have resorted to invoking international law as a rhetorical instrument for practices more directly determined by the combined interests of state and capital. As the joint statement from Cameron and Obama at the last NATO summit showed, the EU and US military industries have much to gain from these alliances: ‘Britain and America are two of only four NATO members to meet the target of spending 2% of our GDP on defence and other states must urgently step up their efforts to meet this too.’<sup>10</sup>

However, this tactic of regional alliances might be risky in the short term. As the global campaigns against the Stop Online Piracy Act and the Protect Intellectual Property Act (SOPA-PIPA) and the Anti-Counterfeiting Trade Agreement (ACTA) in 2011 demonstrate, resistance to multilateral treaties can generate a fruitful terrain of struggle for retaining some form of public scrutiny over sweeping attempts to ‘liberalize’ all social relations – even if short-lived.<sup>11</sup> In the first instance, certain tactics of underground resistance become adopted by the mainstream; second, more traditional tactics of resistance – demonstrations and petitions – become more effective.

Critics of TTIP have referred to it as ‘the last enclosure’.<sup>12</sup> In the words of E.P. Thompson:

‘Enclosure’ did not just, or even necessarily, mean closing in or fencing off a piece of land. The real essence of enclosure was the extinction of customary rights – the traditional rights that permitted people to make use in various ways of land held in common or even ‘privately’ – for example, the right to gather wood or to collect the remnants of harvests. Enclosure also meant that the community was excluded from the regulation of production.<sup>13</sup>

In the case of SOPA-PIPA and ACTA, the entertainment industry needed to secure its hold on the distribution of its products, and it did so in a way that excluded the global community from the regulation of these products. Yet even powerful



corporations, such as those representing Hollywood, found it difficult to exclude the Internet's 'underground' community, especially as it found support on the ground from more traditional protest groups and liberal European lobbies. For TTIP, pinning down the sphere of production is more tricky: what communities are being excluded from is, in a sense, the regulation of regulation. To consolidate TTIP as a process of capital accumulation, the parties need to make their case. The changes in the state-capital nexus are not yet a done deal. The outcome of the struggles – between Cameron and Obama's push to close negotiations after the next round in February 2015, those in favour of the free-trade zone but only under better conditions, and those against this form of regional alliance – is difficult to predict.

Since the European day of action in October 2014, the campaign against TTIP seems to be gradually touching more local community groups and raising greater awareness as to its potential impact on health, food, public goods and a loss of democracy. Indeed, previous struggles against SOPA-PIPA and ACTA are a sign of why similar agreements are a growing terrain for resistance and the voicing of democratic ideals. However, as these treaties were both domestic and WTO-led failures for the state-capital nexus, they also show that defeating such treaties remains only a short-lived victory. In response, the EU and the USA have changed tactics and moved towards 'mega-regionals'. TTIP thus constitutes an important new tactic of legal hegemony for states whose major economic assets lie more in trade than production. In a world order that remains unsure of itself, relying on old strategic alliances currently seems the safest bet for the shared interests of states and capital.

## Notes

1. US Chamber of Commerce, International Affairs, 'Top 10 Overlooked Facts about Transatlantic Trade'.
2. European Commission website, 'Trade: Policy: About TTIP', updated 15 March 2014, <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip>.
3. Ntina Tzouvala, 'TTIP: Back to the Future?', 14 November 2014, *Critical Legal Thinking*, <http://criticallegal-thinking.com/2014/11/14/ttip-back-future>.
4. Jörg Wolf, Jillian Beytin, Christopher Huppertz and Matthew Skinner, *How to Save TTIP?*, 17 December 2014, Atlantische Initiative e.V., [www.atlantic-community.org/-/how-to-save-ttip/](http://www.atlantic-community.org/-/how-to-save-ttip/)
5. European Commission, 'Transatlantic Trade and Investment Partnership: The Economic Analysis Explained', September 2013.
6. Bernadette Ségol, 'TTIP Will Not Be Approved Unless ISDS is Dropped', *Financial Times*, Letters, 27 October 2014, [www.ft.com/cms/s/0/1c06a35c-5b92-11e4-a674-00144feab7de.html#axzz3Mjo1TBVy](http://www.ft.com/cms/s/0/1c06a35c-5b92-11e4-a674-00144feab7de.html#axzz3Mjo1TBVy).
7. Council of the European Union, 'Directives for the Negotiation on the TTIP between the EU and the USA', 17 June 2013, declassification on 9 October 2014, para. 37, p. 16.
8. *Financial Times*, 'Jean-Claude Juncker Plays with Future of EU-US Trade Deal', 23 October 2014, [www.ft.com/cms/s/0/3571c8b2-5aco-11e4-b449-00144feab7de.html?siteedition=intl#axzz3Mjo1TBVy](http://www.ft.com/cms/s/0/3571c8b2-5aco-11e4-b449-00144feab7de.html?siteedition=intl#axzz3Mjo1TBVy).
9. John Feffer, 'The Pacific Pivot', *Le Monde Diplomatique*, 28 January 2014, <http://mondediplo.com/openpage/the-pacific-pivot>.
10. David Cameron and Barack Obama, 'Strengthening the NATO Alliance', *The Times*, 4 September 2014; speech delivered at NATO summit in Newport, Wales, [www.gov.uk/government/speeches/strengthening-the-nato-alliance-article-by-david-cameron-and-barack-obama](http://www.gov.uk/government/speeches/strengthening-the-nato-alliance-article-by-david-cameron-and-barack-obama).
11. SOPA-PIPA and ACTA attempted to regulate Intellectual Property Rights and the use of the Internet. ACTA was agreed at the WTO as part of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) since the 1990s. However, it failed to be ratified by a sufficient number of parliaments after the pressure of campaigns in Europe and in the USA – from MEPs to Anonymous hackers.
12. Kim Bizzari, *A Brave New Transatlantic Partnership*, Seattle to Brussels Network, Brussels, 2013.
13. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, Pantheon, New York, 1975, p. 21.