

Critiquing the Transatlantic Trade and Investment Partnership (TTIP): Systemic Consequences for Global Governance and the Rule of Law

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Considering the implications of the Transatlantic Trade and Investment Partnership (TTIP) for the architecture of global (economic) governance, including the international rule of law, the article addresses some of the most pertinent systemic consequences TTIP is likely to produce, based on the shape the agreement is currently taking. The article's main arguments are that despite representing innovation and added value in some areas, TTIP may produce negative consequences in at least three respects. Firstly, it will cater to an imbalance in terms of access to justice in the area of investment protection; secondly, by providing a way out for the World Trade Organization's (WTO) two most active litigants, it can contribute to the de-judicialization of international trade law; and thirdly, it creates potential for a fierce backlash from the rest of the world as regards the global promotion of an overtly transatlantic regulatory and normative agenda.

1 INTRODUCTION

Who, like us, firmly believes that globalisation needs to be framed by a clear set of rules on everything from product safety to human rights? Which of those other top five world economies will share our high standards of regulation, democracy, and the rule of law?

The United States.

And that's why we need the Transatlantic Trade and Investment Partnership. To strengthen our transatlantic partnership for long term!¹

These are the words of European Union (EU) Trade Commissioner Cecilia Malmström in a speech from February 2015, showing the EU's hopes for the

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¹ Cecilia Malmström, European Commissioner for Trade, *TTIP: Subsidiarity and Other Shared Transatlantic Principles*, Speech 5 (Brussels 12 Feb. 2015).

Transatlantic Trade and Investment Partnership (TTIP) to be not merely a transatlantic trade agreement, but an instrument to strengthen global governance and the international rule of law.

TTIP has already caused vivid discussion among scholars as well as the general public on specific substantive matters such as social and environmental standards and democratic legitimacy.² Taking into account a wider perspective when two of the world's major trade powers advance their own sophisticated preferential trade regime, this article discusses a number of implications of TTIP for the architecture of global (economic) governance, including the international rule of law at large.

For the purposes of this article, governance is understood as involving 'formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest'.³ Global governance, then, can best be understood as 'the set of actors that wield authority across national borders, including states that exercise authority over other states (hierarchy), international organizations that possess authority over their member states (supranationalism), and non-governmental organizations and corporations that exert authority over communities located in two or more states (private authority)'.⁴ This authority is not to be exercised in the narrow pursuit of national or any other particular interests, but for 'the management of global problems and the pursuit of global objectives through concerted efforts of states and other international actors'.⁵

As regards the international rule of law, the article employs the term not only in the 'thin sense', i.e. 'a modest version of adhering to the rules',⁶ but rather in the 'thick' sense, which includes also considerations of substantive justice on a global scale.⁷ Closely connected to this is the role of international courts. They are understood here not as mere arbitrators, but as entities wielding 'public authority'.⁸ As

² See Stefan Martinić & Mihael Maljak, *Certain Controversial Issues of EU-US Trade Negotiations Leading to the Signing of the Transatlantic Trade and Investment Partnership (TTIP)*, 10 *Croatian Y.B. Eur. L. & Policy* 341 (2014); Anne Meuwese, *Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective*, 78 *L. & Contemp. Probs.* 153 (2015); and Luca Pantaleo, Wybe Douma & Tamara Takács, *Introduction*, in *Tiptoeing TTIP: What Kind of Agreement for What Kind of Partnership?*, Centre for the Law of EU External Relations Paper 2016/1, 11–13 (Luca Pantaleo, Wybe Douma & Tamara Takács eds., 2016) and the various contributions contained in the edited working paper.

³ Commission on Global Governance, *Our Global Neighborhood 2* (Oxford University Press 1995).

⁴ David Lake, *Rightful Rules: Authority, Order, and the Foundations of Global Governance*, 54 *Intl. Stud. Q.* 587, 590 (2014).

⁵ Martin Ortega, *Building the Future: The EU's Contribution to Global Governance*, EUISS Chaillot Paper No. 100, 46 (Apr. 2007).

⁶ George Fletcher, *Basic Concepts of Legal Thought* 11 (Oxford University Press 1996).

⁷ Brian Tamanaha, *A Concise Guide to the Rule of Law*, in *Relocating the Rule of Law* 3–15, 4 (Gianluigi Palombella & Neil Walker eds., Hart Publishing 2009).

⁸ See Armin von Bogdandy & Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014).

such, they are ‘multifunctional actors because they do much more than settling disputes in concrete cases’,⁹ i.e. they ‘contribute to the stabilization and development of the law, they make law through their decisions, and they review as well as legitimize the authority exercised by other actors on different levels of government’.¹⁰

With this conceptual backdrop in mind, the article focuses on the systemic consequences that TTIP, in its currently proposed form, is likely to produce. The article argues that despite representing progress, innovation, and added value in some areas, firstly, TTIP may cater to an imbalance in terms of access to justice in the area of investment protection; secondly, it risks undermining international economic governance structures, potentially contributing to the de-judicialization of international trade law; and thirdly, it could prompt a backlash from third countries which see themselves confronted with an ambitious ‘transatlantic duo’, exporting not only goods, services, and capital on a large scale, but also developing regulatory standards coupled with an overtly normative agenda, mostly under the guise of the new chapter on ‘sustainable development’. Following some preliminary considerations and a brief counterfactual exercise, the article addresses each of these points before summing them up in a conclusion.

Before turning to the substantive part of the article, it is important to make two preliminary disclaimers. Firstly, it needs to be stressed that – perhaps ‘hardened’ by the experience of the long and rocky roads the EU at times needs to wander in order to conclude wide-ranging international agreements – talking about TTIP is discussing more of a distant proposition than an imminent possibility.¹¹ Even the most avid TTIP-supporter cannot ignore the likelihood that even if the United States Congress can bring itself to ratify TTIP, the Court of Justice of the EU (CJEU) might still strike it down as incompatible with the EU Treaties. Bluntly put, if TTIP is not killed on Capitol Hill, it may still be shot down in Luxembourg. Moreover, should TTIP be concluded as a mixed agreement, it would require ratification by all EU Member States, which hands each of them a national veto to stop the agreement from entering into force. Secondly, being under negotiations in politically tumultuous times, TTIP represents a moving target for analysis (post-Brexit vote, so does the EU, also as a

⁹ Ingo Venzke, *On the Functions, Authority and Legitimacy of Investor-State Arbitration: The Case of the Transatlantic Trade and Investment Partnership (TTIP)*, in *Tiptoeing TTIP: What Kind of Agreement for What Kind of Partnership?*, Centre for the Law of EU External Relations Paper 2016/1, 59–75, 60 (Luca Pantaleo, Wybe Douma & Tamara Takács eds., 2016).

¹⁰ *Ibid.*

¹¹ Examples in this vein include the European Economic Area (EEA) agreement, the European Patent Court, and the still ongoing accession process to the European Convention on Human Rights (ECHR). See for a critical overview Bruno de Witte, *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union*, in *The European Court of Justice and External Relations Law: Constitutional Challenges* 33–46 (Marise Cremona and Anne Thies eds., Hart Publishing 2014).

contracting partner in international trade agreements). Hence, it is important to acknowledge that the appraisal offered here is based on the textual proposals made available by the European Commission, stemming from 2015. On the one hand, this should reflect the latest state of play in the negotiations and adaptations to public concerns. On the other, these are not final texts and may yet see significant change, not least as the US counterpart will weigh in on these proposals.

2 A BRIEF COUNTERFACTUAL EXERCISE

In order to take a step back from the countless technical details of trade negotiations and with a view to putting things in perspective, it may be worthwhile to embark on a brief exercise in counterfactual history. Imagine that TTIP would have been concluded after the Second World War, once the Western European economies were in sufficiently good shape to open their markets, as an agreement arguably between the United States, Western European countries, and perhaps even the fledgling European Communities. This would have amounted to a quantum leap in transatlantic cooperation. It would have completed what International Relations scholars call the ‘transatlantic bargain’,¹² with both military and economic cooperation on a transatlantic scale. Moreover, given that in the multilateral context (sans the Communist bloc) there was only the non-judicial, entirely member-driven General Agreement on Tariffs and Trade (GATT), a post-war TTIP with inter-party dispute settlement and an investment court would also have represented a significant qualitative advancement in international economic governance, albeit among a limited number of participants.

If we fast-forward to the early 1990s and the advent of the World Trade Organization (WTO), what would it have meant to have concluded TTIP at the same time? At first glance, the content would have fit the narrative of the ‘New World Order’, but its limited participation would not. It may well have taken the wind out of the sails of the Uruguay Round, and its watershed package deal on making the international trading regime more rules-based, above all through the establishment of quasi-judicial dispute settlement topped off by an Appellate Body. TTIP would have been a kind of Blair House Agreement that mattered to the United States and Europe only, leaving the rest of the world as spectators. At the dawn of the post-Cold War era, it would have felt anachronistic to establish this sort of ‘Trade NATO’.

Returning to the present – or rather a somewhat distant future paved with numerous US Senate debates, judgments of the CJEU, and public discourse

¹² See Stanley Sloan, *NATO, the European Union, and the Atlantic Community: The Transatlantic Bargain Challenged* 1 (2d ed., Rowman & Littlefield 2005).

lamenting the loss of sovereignty and autonomy – what would it mean to see TTIP ratified and enter into force for global economic governance at large? Certainly, TTIP has great potential to advance free trade, regulatory cooperation and transparency among its parties. Moreover, it would draw most of ‘the West’ more closely together. However, it would also represent a step back for global economic governance in at least three regards, on which the following sections elaborate, i.e. contributing to an imbalance in access to justice for foreign investors, undermining the WTO and its compulsory dispute settlement system, and, regarding United States and EU foreign policy at large, risking to be perceived as imposing Western norms on the rest of the world rather than bolstering universal norms and institutions of global governance. The following three sections focus on these concerns based on the textual proposals currently available.

3 TTIP AND INVESTMENT PROTECTION

Of the three features of TTIP on which this article focusses, the envisaged investment court system (ICS) represents the one that is most innovative and beneficial to the rule of law in international economic governance. However, this will both cause tensions with the special characteristics of EU law and grant wider access to justice in a selective way, i.e. to foreign investors only.

Investor-state dispute settlement, much less the new ICS, does not have an equivalent at the WTO. There, the Agreement on Trade-Related Investment Measures (TRIMs) exists, but with only states as possible parties to disputes. Instead, in contemporary international economic governance investor-state dispute settlement is mostly carried out on the basis of Bilateral Investment Treaties (BITs). A Multilateral Agreement on Investment (MAI) negotiated in the 1990s was never ratified.¹³ The EU, which after the Lisbon Treaty pursues an investment policy as part of the Common Commercial Policy, is in the process of gradually replacing the numerous BITs concluded by its Member States.¹⁴ The prospect of investor-state dispute settlement under TTIP has been met with fierce criticism in the public discourse, based on concerns about democracy and the upholding of socio-economic and environmental standards.¹⁵ This has led to

¹³ See Riyaz Batlu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 *Fordham Int'l L.J.* 275 (2000–2001).

¹⁴ N. Jansen Calamita, *The Making of Europe's International Investment Policy: Uncertain First Steps*, 39 *L.I.E.I.* 301 (2012).

¹⁵ See for this line of argumentation, e.g. an op-ed written by ten European health, transparency and environmental NGOs entitled *TTIP Puts the EU's Environmental and Social Policies on the Line*, EurActiv, 13 Jan. 2014, <http://www.euractiv.com/section/trade-society/opinion/ttip-puts-the-eu-s-environmental-and-social-policies-on-the-line/> (accessed 23 Apr. 2016); and further Mark Weaver, *The*

some modifications, which are reflected in the EU's textual proposal made public on 12 November 2015.¹⁶

Unlike inter-party dispute settlement (see next section), a two-tier system is envisaged with a 'Tribunal of First Instance' and an 'Appeal Tribunal' – the latter not being provided under traditional BITs. Furthermore, efforts are made to safeguard the autonomy of parties' legal orders, arguably in an attempt to assuage both public opinion as well as sovereignty concerns of domestic political and judicial institutions.

The revised proposal on the ICS is both innovative and, to some extent, responsive to legal, political, and public concerns.¹⁷ If the ICS survives the likely *a priori* review at CJEU, it will represent progress in terms of 'judicialization' and access to justice, especially since it moves beyond the WTO model under which only states (and the EU) can be parties to dispute settlement proceedings.

However, it remains doubtful that TTIP, if it included the investment chapter as currently proposed by the European Commission, would stand up to scrutiny at the CJEU, not least in view of Opinion 2/13. There, the Court found that the EU could not become a party to the European Convention on Human Rights (ECHR) because the accession agreement, which provided for both a co-respondent mechanism and the possibility for prior referral to the CJEU, did not sufficiently safeguard the autonomy of the EU legal order.¹⁸ Under the ICS proposal, similar issues arise, i. e. as to whether the EU and its Member States will be parties to disputes,¹⁹ which involves procedures for the determination of the proper respondent,²⁰ and as to whether treatment was 'afforded exclusively' by a Member State or not.²¹

The textual proposal of November 2015 does not provide explicitly for any involvement of the CJEU. It does, however, stress that 'the domestic law of the Parties shall not be part of the applicable law' of the investment tribunals,²² which would include EU law. Instead, it states that the tribunals shall treat domestic law 'as a

Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications, 29 Emory Int'l L.Rev. 225, 253–254 (2014–2015).

¹⁶ European Commission, *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce*, tabled for discussion with the United States and made public on 12 Nov. 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (accessed 22 Apr. 2016).

¹⁷ See on the merits of the ICS also Luca Pantaleo, *Lights and Shadows of the TTIP Investment Court System*, in *Tiptoeing TTIP: What Kind of Agreement for What Kind of Partnership?*, Centre for the Law of EU External Relations Paper 2016/1, 77–92, 78–85 (Luca Pantaleo, Wybe Douma & Tamara Takács eds., 2016).

¹⁸ Opinion 2/13, EU:C:2014:2454; see further Tobias Lock, *The Future of the European Union's Accession to the European Convention on Human Rights After Opinion 2/13: Is It Still Possible and Is It Still Desirable?*, 11 EuConst 239 (2015).

¹⁹ European Commission, *supra* n. 16, s. 3, Art. 1(2).

²⁰ *Ibid.*, s. 3, Art. 5.

²¹ *Ibid.*, s. 3, Art. 4(4).

²² *Ibid.*, s. 3, Art. 13(3).

matter of fact’,²³ that in doing so they ‘shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party’,²⁴ and that the meaning they may give to such law ‘shall not be binding upon the courts or the authorities of either Party’.²⁵ Future changes to the proposal could include a default procedure for determining the respondent and further safeguards. Whether this all will assuage the CJEU in its assessment of compatibility with the EU Treaties remains questionable.

Even if considered compatible with EU law and eventually operational, a point of criticism, or at least a question as to its necessity, will remain regarding the ICS. In terms of the rule of law, the ICS proposal provides additional access to justice, but only in a selective way. With the ICS, ‘a specific type of remedy is created for the additional protection offered to foreign investors’²⁶ between developed economies. This remedy is afforded in a particular forum to a particular category of claimants, most likely large corporations. As regards claims before national or EU courts relying on TTIP, brought by either foreign investors or domestic corporations and individuals, these will likely be thwarted by denying direct effect of TTIP explicitly in the agreement, as is the case in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada as well as other recent free trade agreements (FTAs).²⁷

In sum, TTIP at the moment would contribute to global economic governance by providing new sophisticated institutions at the mega-regional level, which are not available at the multilateral level, and by widening access to justice. However, it remains an open question whether the CJEU will accept this innovation as compatible with EU law. Equally questionable remains whether it is necessary to increase access to justice to this particular class of actors in a special venue detached from the national and EU legal orders.

4 TTIP AND INTER-PARTY DISPUTE SETTLEMENT

The clamour, not least in the media and in public discourse, surrounding investment protection under TTIP should not overshadow inter-party dispute settlement as envisaged by TTIP and its relationship with the multilateral sphere. Inter-party dispute settlement raises two prospects, neither of which is very attractive for global

²³ *Ibid.*

²⁴ *Ibid.*, s. 3, Art. 13(3).

²⁵ *Ibid.*, s. 3, Art. 13(4).

²⁶ Marise Cremona, *Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, 52 *CML Rev.* 351, 359 (2015).

²⁷ See the text in the version following the legal review conducted by the *Canadian Government and the European Commission, Canada-EU Comprehensive Economic and Trade Agreement*, Art. 30.6, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (accessed 25 Apr. 2016); and Cremona, *supra* n. 26, at 359–360.

economic governance. One option, the more pessimistic one, is that TTIP could strike at the quasi-judicial compulsory dispute settlement mechanism of the WTO. The latter is one of the most successful instances of dispute settlement in the international legal order, aptly described as being ‘at the heart of the WTO system’.²⁸ The other – arguably more realistic – option is that the EU and United States will leave unapplied TTIP dispute settlement provisions and continue to avail themselves of the WTO, which would raise questions as to the added value of TTIP in terms of a contribution to rules-based trade governance.

The United States and the EU are the two most active users of WTO dispute settlement. To date, the United States has acted as a complainant in 109 cases at the WTO, while being a respondent in 126. The EU has been a complainant in 96 cases and respondent in 82. Both have faced each other in 52 cases.²⁹ By concluding TTIP, both trading powers could possibly be taking themselves out of WTO dispute settlement as far as their bilateral trade relations are concerned. While this would certainly lessen the pressure on the docket in Geneva, it might slow down the development of international economic law and constitute an important step towards the de-judicialization of international trade dispute settlement as more deep and comprehensive FTAs and mega-regionals are on the horizon.

According to the EU’s textual proposal, TTIP is to have a compulsory dispute settlement mechanism between its parties, i.e. the responding party’s consent is not necessary in order for jurisdiction to be established. In terms of enforcement, a supervised system of suspension of concessions is foreseen to induce compliance.³⁰ It is not entirely clear from the text which entities will be the possible parties to these disputes. The proposal refers to ‘Government to Government’ and at this time it is not clear whether TTIP will or will not be a ‘mixed agreement’, i.e. whether it will include both the Union and the Member States as parties.³¹ According to the EU’s textual proposal, more precisely its Annex I on Rules of Procedure, ‘[u]nless the Parties agree otherwise, the hearing shall be held in Brussels if the complaining Party is the US and in [Washington, D.C.] if the complaining Party is the EU.’³² This

²⁸ Former WTO Director-General Ruggiero cited in Meinhard Hilf & Tim René Salomon, *Running in Circles: Regionalism in World Trade and How It Will Lead Back to Multilateralism*, in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* 257–268, 264 (Ulrich Fastenrath et al. eds., Oxford University Press 2011).

²⁹ These numbers are taken from the ‘Find disputes cases’ interface on the WTO website: https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm results (accessed 22 Apr. 2016).

³⁰ European Commission, *Textual Proposal: Dispute Settlement*, tabled for discussion with the United States in the negotiating round of 10–14 Mar. 2014 and made public on 7 Jan. 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf (accessed 22 Apr. 2016).

³¹ The pending Opinion 2/15, requested by the European Commission under Art. 218(11) TFEU, should help to clarify this matter. See also Pieter Jan Kuijper, *Some Final Questions and Conclusions*, in *Tiptoeing TTIP: What Kind of Agreement for What Kind of Partnership?*, Centre for the Law of EU External Relations Paper 2016/1, 93–101, 99 (Luca Pantaleo, Wybe Douma & Tamara Takács eds., 2016).

³² European Commission, *supra* n. 30, Annex I: Rules of Procedure, pt. 23.

would suggest that each dispute would be United States versus the EU, or vice versa. This would also be consistent with practice under the WTO, where the EU has always taken up cases launched against individual Member States, including in areas which at the time fell outside of the EU's exclusive competence.³³

Based on the EU's proposal, to which extent is this a step forward for global economic governance and the rule of law? Is it a mega-regional innovation designed to take trade dispute settlement to the next level and enforce the more advanced rules under TTIP? That remains highly doubtful. Firstly, unlike WTO dispute settlement, there is no appellate mechanism under the current proposal for inter-party dispute settlement under TTIP, in contrast to the new ICS. It is basically a one-shot arbitration. Considering that 'appellate review adds an accelerating dynamic to judicial lawmaking and is likely to increase not only legal certainty, but also judicial authority',³⁴ the lack of an appellate instance may be detrimental to the future consistency and coherent development of what could become known as 'TTIP law'.

Moreover, inter-party dispute settlement under TTIP creates a venue choice between WTO or TTIP dispute settlement for the EU and the United States.³⁵ This is *a priori* not a negative development, as finding judicial instances with jurisdiction in international law – not least in cases involving the United States – is no mean feat. The recent obstruction by the United States of the reappointment of an Appellate Body member despite fierce criticism from other WTO members only reminds us not to take the achievement of WTO dispute settlement for granted.³⁶ Nevertheless, it raises questions about the relationship with the law and jurisprudence of the WTO.

According to the EU's textual proposal, the article on 'Rules of Interpretation' states that the 'panel shall also take into account relevant interpretations in reports of panels and the Appellate Body adopted by the WTO Dispute Settlement Body'.³⁷ This differs from the analogous provisions in the Trans-Pacific Partnership (TPP), a trade agreement between the United States and eleven other countries of the Pacific Rim. According to the relevant provision on TPP dispute settlement, '[w]ith respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the

³³ See e.g. Notification of Mutually Agreed Solution, *Ireland—Measures Affecting the Grant of Copyright*, WT/DS82/3 and *European Communities—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WT/DS115/3, 13 Sept. 2002; for more examples see Andrés Delgado Casteleiro & Joris Larik, *The 'Odd Couple': The Responsibility of the EU at the WTO*, in *The International Responsibility of the European Union* 233–255 (Malcolm Evans & Panos Koutrakos eds., Hart Publishing 2013).

³⁴ Venzke, *supra* n. 9, at 61.

³⁵ See European Commission, *supra* n. 30, Art. 23 containing the relevant 'fork in the road' clause.

³⁶ *WTO Members Debate Appointment/Reappointment of Appellate Body Members*, WTO News Item, 23 May 2016, https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm (accessed 19 June 2016).

³⁷ European Commission, *supra* n. 30, Art. 20.

panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body.³⁸

In the case of TPP, where provisions have been taken over directly from the WTO Agreements, the interpretation through WTO case law of these provisions shall be considered. In the case of TTIP, the duty to draw on WTO case law is more ambiguous. It will be up to the respective TTIP panels to decide what is ‘relevant’, with no appellate instance to aid in the creation of guidelines as how to ensure ‘WTO-consistent’ interpretation where appropriate, or when to develop – to use the EU law term – ‘autonomous’ interpretations of TTIP provisions. In any event, in both the TTIP and TPP as they currently stand, there is no obligation to actually follow WTO case law; they are merely to be taken into account and considered, respectively.

While raising this spectre of ‘fragmentation’ of international trade law may admittedly remain of rather limited practical import, looking at practice under bilateral FTAs, however, may paint a different kind of gloomy picture as regards the rule of law in international economic governance. Where compulsory dispute settlement exists under such agreements, it is rarely used.³⁹ Why would TTIP be different? In case it will operate like most other FTAs, from a practical point of view the inter-party dispute settlement provisions prove to be virtually nugatory. Hence, there is a good chance that the opportunity will very rarely arise for panels to be able to engage in exercises of interpreting TTIP provisions. A dense and coherent body of ‘TTIP law’ may never arise. Moreover, as long as the parties do not make use of dispute settlement, not even a ‘muted dialogue’⁴⁰ can be had between the existing WTO and the prospective TTIP legal spheres in order to clarify their relationship.

Disputes, instead, will be resolved through diplomatic backroom deals, with no open judicial process and without a resulting decision based on legal reasoning.⁴¹

³⁸ TPP was signed on 4 Feb. 2016. The legally verified text of the agreement was released on 26 Jan. 2016. Trans-Pacific Partnership, Art. 28.12 (emphasis added), https://www.mfat.govt.nz/assets/_secured/files/Trans-Pacific-Partnership/Text/28.-Dispute-Settlement-Chapter.pdf (accessed 25 Apr. 2016).

³⁹ Claude Chase, Alan Yanovich, Jo-Ann Crawford & Pamela Ugaz, *Mapping Dispute Settlement Mechanisms in Regional Trade Agreements: Innovative or Variations on a Theme?*, WTO Economic Research and Statistics Division, Staff Working Paper, 46–49 (World Trade Organization 2013), http://www.wto.org/english/res_e/reser_e/ersd201307_e.pdf (accessed 22 Apr. 2016); and further William Davey, *Dispute Settlement in the WTO and RTAs: A Comment*, in *Regional Trade Agreements and the WTO Legal System* 343–357 (Lorand Bartels & Frederico Ortino eds., Oxford University Press 2006).

⁴⁰ Marco Bronckers, *From ‘Direct Effect’ to ‘Muted Dialogue’: Recent Developments in the European Courts’ Case Law on the WTO and Beyond*, 11 J. Int’l Econ. L. 885 (2008).

⁴¹ The North American Free Trade Agreement (NAFTA) would be an example of an FTA with a dispute settlement mechanism, which is being used for cases that cannot be amicably resolved. However, practice here is largely limited to anti-dumping cases (as well as investor-state disputes). See Marc Froese, *Regional Trade Agreements and the Paradox of Dispute Settlement*, 11 Manchester J. Int’l Econ. L. 367, 380 (2014).

Optimistically speaking, perhaps such disputes can all be solved amicably – though the history of the United States and EU in the WTO would suggest differently. Even then, no contributions are made to the development of either ‘TTIP law’ or of international trade law at large through building and refining an *acquis* of judicial decisions as an exercise of public authority. Of course, the EU and United States could continue to bring cases under WTO dispute settlement, but these would concern existing WTO law, and not TTIP or other FTAs. While TTIP would not be undermining WTO dispute settlement in this scenario, it would not add value either in terms of rules-based global economic governance.

In sum, not only could the WTO be deprived of future case law prompted by the United States and EU, it likely would not even lead to new case law under the umbrella of TTIP. Both transatlantic and multilateral economic governance, consequently, is likely to be much more member-driven and much less rules-based.

5 TTIP AND ‘SUSTAINABLE DEVELOPMENT’

As the third and final point of concern this article turns to is the normative agenda that TTIP is to embrace, as it appears in the EU’s textual proposal on ‘Trade and Sustainable Development’ of 6 November 2015.⁴² This agenda goes far beyond both traditional or even new trade issues,⁴³ and is concerned rather with global governance and the promotion of international norms in general. The proposal stresses ‘the benefit of considering trade and investment-related labour and environmental issues as part of a global approach to trade and sustainable development.’⁴⁴ Substantive areas include labour rights, environmental aspects, health, and corporate social responsibility. There are areas which are not only likely to stir up political controversies in the United States, in particular in Congress, but also to create a backlash from the ‘non-TTIP’ world.

In addition to the domestic scrutiny which TTIP is prone to face, the sustainable development chapter of TTIP can at first glance be seen as a contribution to the realization of the EU’s foreign policy objectives as enshrined in its constitutional documents.⁴⁵ In the post-Lisbon EU Treaties, the specific objectives of the Common Commercial Policy, stipulated in Article 206 TFEU, have to be read ‘in

⁴² European Commission, *Textual Proposal: Trade and Sustainable Development*, tabled for discussion with the United States in the negotiating round of 19–23 Oct. 2015 and made public on 6 Nov. 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf (accessed 22 Apr. 2016).

⁴³ Compare with the less extensive Ch. 22 on *Trade and Sustainable Development* of the *Canada-EU Comprehensive Economic and Trade Agreement*, *supra* n. 27.

⁴⁴ European Commission *supra* n. 42, Art. 1(3).

⁴⁵ See further Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016).

the context of the principles and objectives of the Union's external action'⁴⁶ at large. Hence, the call for 'free and fair trade' in Article 3(5) TEU needs to be considered together with calls for 'sustainable development of the Earth', the promotion of human rights, democracy and the 'strict observance and the development of international law' and other tenets enshrined in that same article. TTIP, then, can be understood as a vehicle to contribute to these substantive normative goals.

Moreover, there is a strong systemic, multilateral dimension to the EU's constitutional foreign policy mandate. In this regard, TTIP's positive contribution is more doubtful – unless one is completely captivated by the 'stepping stone' narrative on FTAs. Of particular relevance from this point of view are the following objectives contained in Article 21 TEU which aim at improving global governance and its institutions, i.e. building 'partnerships with third countries, and international, regional or global organizations which share' the EU's principles, the promotion of 'multilateral solutions to common problems'⁴⁷ and 'an international system based on stronger multilateral cooperation and good global governance'.⁴⁸ The multilateral dimension is also echoed in high-level policy documents and public speeches. The EU's Global Europe strategy of 2006 stresses that the Union's priority is the pursuit of 'an ambitious, balanced and just multilateral agreement to liberalise international trade further'.⁴⁹ The strategy goes on to note that the best way to achieve this is through the WTO as 'a rules-based system, and a cornerstone of the multilateral system'.⁵⁰ In this same spirit, a decade later, the Global Strategy for the EU's Foreign and Security Policy of June 2016 stresses that TTIP is a sign of transatlantic 'willingness to pursue an ambitious rules-based trade agenda'⁵¹ and notes that the 'EU will ensure that all its trade agreements are pursued in a manner that supports returning the World Trade Organisation (WTO) to the centre of global negotiations'.⁵²

In the textual proposal for TTIP's chapter on sustainable development, there is a clear emphasis on normative, rules-based approaches, in particular the ratification and implementation of international treaties by the parties.⁵³ This is likely an

⁴⁶ Art. 207(1) TFEU.

⁴⁷ Art. 21(1), second subpara. TEU.

⁴⁸ Art. 21(2)(h) TEU.

⁴⁹ European Commission, *Global Europe – Competing in the World: A Contribution to the EU's Growth and Jobs Strategy* (Brussels 4 Oct. 2006), COM(2006) 567 final, 2.

⁵⁰ *Ibid.*

⁵¹ *Shared Vision, Common Action: A Stronger Europe, A Global Strategy for the European Union's Foreign and Security Policy*, 37 (June 2016).

⁵² *Ibid.*, at 41.

⁵³ See European Commission, *supra* n. 42, Art. 4(2)(b) on ratification and Art. 4(4) on implementation of fundamental Conventions of the International Labour Organization (ILO) and their Protocols; Art. 10 (3) on multilateral environmental agreements; and Art. 14(2)(b) on trade and sustainable management of fisheries and aquaculture products.

expression of the EU's stronger emphasis on – and trust in – international law, setting TTIP apart from TPP. The latter, though it addresses similar norms, does not contain the manifold references to international treaties and conventions in any explicit terms.

The proposal specifically mentions, among others, a number of treaties which the United States thus far has not ratified, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Rights of People with Disabilities (CRPD) as well as a number of environmental agreements. The proposal furthermore calls for the 'worldwide promotion' by United States and EU of numerous treaties and the norms they contain in the area of labour aspects of trade and sustainable development, 'in particular through promoting adherence to relevant international instruments, including with regard to ratification where appropriate, as well as participation in relevant international processes and initiatives'.⁵⁴

However, the 'worldwide promotion' of this wider normative agenda may not only become a red flag for the American side, in particular Congress, but also create a backlash from other parts of the world. As research on the EU as a global actor has shown, and in contrast to the EU's self-image, there is little 'evidence of the EU being widely seen as a "normative power" exporting universal values of democracy and human rights',⁵⁵ not least as regards the emerging BRICS countries (Brazil, Russia, India, China and South Africa) and the 'Global South' in general.⁵⁶ Against this backdrop, such contestation may be further encouraged rather than abate if the 'transatlantic duo' of United States and EU were to use TTIP as the launch pad for jointly pursuing this normative agenda as part of a package of standards and regulations the rest of the world is to follow, and the universality of which is postulated rather than grown at the multilateral level.

6 CONCLUSION: TTIP AS A BRAVE NEW ANACHRONISM

Just because one may accept the overall rationale for deep trade agreements and the degree of innovation that TTIP might provide in a number of areas does not mean

⁵⁴ *Ibid.*, Art. 5(3)(h) on freedom of association and the right to collective bargaining; *see also* Art. 6(3)(c) on elimination of forced or compulsory labour; Art. 7(3)(e) on the effective abolition of child labour; and Art. 8(3)(f) on equality and non-discrimination in respect of employment and occupation; *see also* Art. 9 (g) on 'cooperation with and in third countries' regarding ILO core labour standards; and Art. 11(2)(c) on cooperation regarding the protection of biodiversity and other environmental aspects 'at the bilateral, regional and global levels'.

⁵⁵ Sonia Lucarelli, *The European Union in the Eyes of Others: Towards Filling a Gap in the Literature*, 12 E.F.A. Rev. 249, 269 (2007).

⁵⁶ *See* Lisbeth Aggestam, *Global Norms and European Power*, in *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* 457–471, 465–466 (Knud Erik Jørgensen & Katie Verlin Laatikainen eds., Routledge 2013).

one cannot be concerned about the shape TTIP will take and the implications this will have for global governance and the international rule of law. In other words, the road to TTIP may well be paved with good intentions, but we should stay alert to where it might lead. Based on the contours of TTIP as they become visible through the textual proposals 2015, the following conclusions can be summarized.

If TTIP had been concluded any time before 1994, it would have been a giant leap in transatlantic relations and an ambitious, potentially inspiring model for the rest of the world. More than two decades later, a new environment has emerged in which TTIP can still bring some added value, not least considering lacking progress in multilateral trade governance, of which the gridlocked Doha Round has become the epitome. However, in the aspects outlined here, TTIP may actually result in a step backward from the remarkable progress which has been achieved under the auspices of the WTO to date. In these respects, TTIP appears rather as a ‘brave new anachronism’.

Firstly, the revamped ICS is, compared to the WTO, an increase in access to justice in the area of international trade governance. The introduction of an appellate instance, moreover, can contribute to legal certainty and coherence. However, it is an unbalanced innovation in the sense that it is limited to foreign investors.

Secondly, and more troublesome, is TTIP’s inter-party dispute settlement system, which could serve as a way out for the WTO’s two most active litigants, draining momentum from the development, refinement, and legitimacy of international trade jurisprudence. Whether such a loss would be offset by a new *acquis* of ‘TTIP case law’ is highly doubtful given the practice – or rather lack thereof – under existing FTAs. Instead, dispute settlement under TTIP would likely follow a more member-driven than rules-based approach.

Thirdly, the ambitious normative agenda contained in the proposed part on ‘Trade and Sustainable Development’ puts an emphasis on international treaties and pursuing the global implementation of norms beyond traditional trade issues. While this conforms at least to the EU’s self-image as power promoting universal norms, this perception is not shared in the rest of the world – perhaps not even in the United States to begin with. In the ‘non-TTIP world’, in the future, there will be a danger that TTIP is seen as catering to anachronistic notions of Western regulatory and value promotion under the guise of ‘sustainable development’.

TTIP will face some tough struggles – in Washington, in Luxembourg, and probably in the EU Member State capitals – before it can enter into force. But that is only half the story. In order to contribute to advancing global economic governance and the rule of law, it will have to stand up, moreover, to scrutiny beyond the political and judicial institutions on both sides of the North Atlantic.