

The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions

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The Transatlantic Trade and Investment Partnership (TTIP) negotiations have become the centre of debate in EU trade policy, where the European Commission and civil society organizations are key actors. This article argues that a key reason why TTIP has become so controversial has to do with the nature of the arguments used by each side. The main arguments in favour of TTIP emphasize the economic and geostrategic benefits. The main criticisms of TTIP focus on its alleged negative impact on product safety and public policies. Identifying the foundational assumption(s) behind these arguments, we show that this debate is special because opponents and supporters' premises emerge from assumptions based on different perspectives: while opponents assume that the EU will succumb to neoliberal American preferences, supporters focus on the US-EU combined market power vis-à-vis third countries. Since these assumptions do not necessarily contradict each other, the debate is less whether benefits outweigh costs and more whether such costs are probable, leaving the supporters with a defensive position. This is an important distinction in explaining why opponents dominate the public debate. Our findings also indicate, however, that opponents' thesis has been successful because the US is the partner; such public mobilization is less probable on other trade agreements.

1 INTRODUCTION

The Transatlantic Trade and Investment Partnership (TTIP) has become the most controversial bilateral trade agreement ever attempted by the EU. In the TTIP debate supporters primarily include firms and the European Commission. The Commission early on instructed its staff and Member States on the need for 'strong political communication' in order to 'define the terms of debate' on TTIP,¹ not

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¹ European Commission, *Issues paper Communicating on TTIP – Areas for cooperation between the Commission services and Member States*. Brussels: European Commission (7 Nov. 2013), <http://corporate.europe.org/trade/2013/11/leaked-european-commission-pr-strategy-communicating-ttip> (accessed 8 July 2015).

unlike the way the American Administration and the office of the US Trade Representative (USTR) attempted to set the terms of debate on Trans-Pacific Partnership (TPP), but has failed spectacularly in this endeavour; private organizations favouring an agreement have fared no better. The opposition is led by civil society organizations (CSOs), who have mobilized resource and galvanized public opinion to an unprecedented extent, adding to the traditional opposition mounted by trade activists such as labour unions.

In trying to understand opponents' inroads and supporters' failure to control the debate, the spotlight has so far been placed on the unprecedented engagement by non-traditional actors (civil society groups), which may in part be due to the equally unprecedentedly extensive focus on non-tariff barriers (NTB) in the negotiations.² Modern, twenty-first century trade agreements focus predominantly on regulations and rules, thus touching on domestic cultural norms and preferences in ways market access provisions, which are still present but less prominent, normally do not.³ Moreover, complex and interdependent value-chains mean many firms are both importers and exporters, eliminating the traditional distinction between companies advocating for protecting domestic markets from import competition while fighting for foreign market access (agriculture being the clearest exception).⁴ As a result, preferences of economic actors have assumed new constellations. Consumers used to support trade liberalization because it was expected to increase options and lower prices, while firms preferred protection from foreign competition. Now consumers increasingly fear that liberalization means weaker standards, turning previous supporters of trade agreements into sceptics, while cross-national and transatlantic private sector interests instead favour eliminating barriers to trade and investments.

This article explores whether the nature of the arguments used by each side also helps explain opponents' control of the terms of the debate. Each side is supported by two key arguments. Opponents, particularly in Europe, argue that the agreement will lower safety standards and increase the power of

² Ferdi De Ville & Gabriel Siles-Brügges, *TTIP: The Truth About the Transatlantic Trade and Investment Partnership* (London: Polity 2015); Pascal Lamy, *The New Global Trade Agenda*, Peterson Institute for International Economics (Washington DC, Unedited Event Transcript 2015); Matthias Bauer, *Groups Dominate German Online Media and Set the Tone for TTIP Opinion*, ECIPE blog 2015, <http://www.ecipe.org/blog/anti-ttip-german-online-media/> (accessed 8 July 2015).

³ Tariffs measures are designed to limit foreign competition, whereas non-tariff barriers may be adopted based on protecting the consumer but end up discriminating against foreign firms. 'Standards and norms concern such issues as precaution, risk management and, ultimately, what a community sees as being good or bad, an aspect commonly referred to by the term 'collective preferences'. Elvire Fabry, Giorgio Garbasso & Romain Pardo, *The TTIP Negotiations: a Pirandello Play*, Notre Europe-Jacques Delors Institute and the European Policy Centre in Brussels (23 Jan. 2014), http://www.epc.eu/documents/uploads/pub_4095_ttip_-_pirandello_play.pdf (accessed 3 Feb. 2015).

⁴ Alasdair Young, *The Distinctive Politics of the Transatlantic Trade and Investment Partnership Negotiations*, EUSA EU Political Economy Bulletin 9–13 (summer 2015).

multinationals.⁵ Their premises are that mutual recognition (MR) of standards will lead to a race to the bottom and that multinational corporations will be allowed to sue governments, causing ‘regulatory chill’. If these premises are accurate then TTIP is bad for citizens and negotiations should either cease or establish more *red lines* (areas left out of the agreement).⁶ Supporters instead emphasize the agreement’s economic and geostrategic benefits,⁷ relying primarily on two other premises: that lower tariffs and removal of non-tariff measures bring economic gains, and that standards agreed between the two largest markets will become globally dominant.

We carve into the arguments used by opponents and supporters by identifying the foundational assumption(s) and the conditions under which each of their premises could be considered both possible and probable.⁸ Our analysis is based on both primary (official documents and interview) and secondary (literature review) sources. We find that opponents argue that TTIP will be costly because the EU will succumb to American demands; they assume the EU has less bargaining power than the US. Supporters’ arguments, on the other hand, depend on the partners’ combined relative power vis-à-vis emerging economies. In short, opponents and supporters’ premises are not mutually exclusive or contradictory: TTIP could produce less product safety and endanger public policies while simultaneously generating economic benefits and serving geo-strategic aims. In such a situation the benefits are not expected to reduce costs, making it essential to establish whether such costs are probable. As a result, opponents have gained the upper hand in the debate because they have no need to show that benefits will not occur, only that costs are high, while supporters have to explain and defend benefits, while also proving opponents wrong, leaving them with a defensive position. This is an important distinction in explaining why opponents dominate the public debate, and have turned an increasingly large section of public opinion against TTIP. Our findings also indicate, however, that opponents’ reactionary

⁵ De Ville & Siles-Brügges, *supra* n. 2.

⁶ A distinction can be made between reformists (e.g. BEUC), who would accept TTIP if certain extensive changes were made (e.g. omitting SPS and ISDS), and rejectionists (e.g. Corporate Observatory Europe), who oppose any TTIP agreement beyond tariff reductions. Yet in regards to the general debate and underlying assumptions there are at best nuanced differences, and both camps oppose ISDS (discussed below) in all its forms.

⁷ Judy Dempsey, *Come on Europe, Go for TTIP! Carnegie Europe* (12 Oct. 2015), <http://carnegieeurope.eu/strategic europe/?fa=61584> (accessed 17 Oct. 2015);

The Geopolitics of TTIP; Repositioning the Transatlantic Relationship for a Changing World (Daniel Hamilton ed., Washington DC: Center for Transatlantic Relations, John Hopkins University 2014).

⁸ We understand an assumption as ‘a statement accepted or supposed as true without proof or demonstration; an unstated premise or belief’ and a premise as ‘a proposition upon which an argument is based or from which a conclusion is drawn’. See Critical Thinking Community on-line glossary, <http://www.criticalthinking.org/>. See also William Hughes & Jonathan Lavery, *Critical Thinking: An Introduction to the Basic Skills* (5th ed., Multiple: Broadview Press 2004).

thesis, and their choices of issues and language, is partly due to the US being the negotiating partner. Thus we would expect less public mobilization on other trade agreements.

Though negotiations are still under way at the time of writing (fall 2016), assessing the arguments of both sides has scholarly value for several reasons. First, the main arguments favouring and opposing TTIP have remained fairly constant, allowing for an assessment of their foundational assumptions. Second, textual proposals from the EU Commission in TTIP negotiations are public. Access to text is helpful in analysing arguments about the outcome, but the publication of proposals is also the result of the changing EU trade policy stemming from the opposition to TTIP we assess. Third, this article is a useful contribution to the emerging literature on trade that tries to explain the growing importance and influence of non-traditional actors and the public. Fourth, our article can be used to ponder the uniqueness of TTIP.

2 OPPONENTS' PREMISES AND ASSUMPTIONS

To convince the public that TTIP would harm product safety and public health, controversial issues related to food (sanitary and phytosanitary processes (SPS), hormone treated beef, and Genetically Modified Organisms (GMOs)), and Investor-to-State Dispute Settlement systems (ISDS) were deliberately and strategically chosen by opponents in order to maximize the perceived threat to consumer interests and safety posed by TTIP.⁹ These are based on presumptions of lower American product safety standards as well as aggressive American companies and ISDS corporate bias. TTIP is presented as a trade-off between neo-liberalism (or 'wild-west capitalism') and 'popular sovereignty'.¹⁰ This section shows that

⁹ E.g. European Consumer Organization (BEUC), *The Micula Case: When ISDS Messes with EU Law* (27 Oct. 2014), <http://www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/> (accessed 3 Dec. 2015); BEUC, *Consumers at the Heart of the Transatlantic Trade and Investment Partnership*, Position Paper (21 May) http://www.beuc.eu/publications/beuc-x-2014-031_mgo_ttip_updated.pdf (accessed 7 Feb. 2016); Public Citizen, *Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges*, Washington DC (July 2015), <http://www.citizen.org/documents/ustr-isds-response.pdf> (accessed 7 Oct. 2015); Public Citizen, *Table of Foreign Investor-State Cases and Claims Under NAFTA and Other US 'Trade' Deals*, Washington DC (June 2015), <http://www.citizen.org/documents/investor-state-chart.pdf> (accessed 12 Oct. 2015); European Public Health Alliance, *EPHA Position on Investment Protection in TTIP and Trade Agreements* (Nov. 2015), http://www.ephah.org/IMG/pdf/EPHA_Position_Paper_on_Investment_Protection_in_TTIP-3.pdf (accessed 2 Jan. 2016). Leif Johan Eliasson, *The Transatlantic Trade and Investment Partnership: Interest Groups, Public Opinion, and Policy* in *Different Glances at EU Trade Policy* (Barcelona: Barcelona Center for International Affairs 2016) discuss how the German group *Campact!* systematized and professionalized testing of key phrases to aid CSOs opposing TTIP.

¹⁰ E.g. AFL/CIO, TTIP Stakeholder presentation, Chevy Chase, Maryland, 32014; Friends of the Earth Europe, *How TTIP Undermines Food Safety and Animal Welfare* (4 Feb. 2015), <http://www.foeurope.org/how-TTIP-undermines-food-safety-animal-welfare-040215> (accessed 5 Mar. 2016).

while opponents' premises are possible, their probability depend not only on whether American standards are lower and American companies aggressive, but on the EU giving in to US demands, unable to negotiate as an equal.

2.1 LOWER PRODUCT SAFETY

Opponents present regulatory convergence as preventing future improvements to public safety by cementing current standards, while regulatory compatibility and common standards are construed as euphemisms for lowering environmental consumer and food standards.¹¹ This premise is based on two assumptions: that the US (generally, and specifically on food) has lower regulatory standards than the EU, and that MR will prevail in the agreement. We show that the validity of these assumptions depends on whether the EU has less bargaining power than the US.

If American standards are lower we should expect higher rates of food borne illnesses; instead they are higher in the EU, as are the number of annual food recalls.¹² Several scientific studies, including European, have also found American SPS procedures safe.¹³ Furthermore, the largest US poultry producers have all voluntarily ceased using antibiotics as growth hormones, something one major European CSO nonetheless dismisses as 'reversible'.¹⁴ The 'precautionary principle', touted by CSOs as 'European', is also used just as frequently, albeit in different areas, by the US. Wiener et al. (2011) compare 100 randomly sampled areas, concluding there is little difference in the number of policy areas guided by the precautionary principle in the EU and US.¹⁵ According to the authors American regulatory safety standards are higher in some sectors or segments thereof,

¹¹ Institute for Agriculture and Trade Policy, *Promises and Perils of the TTIP: Negotiating a Transatlantic Agricultural Market* (23 Oct. 2013), <http://www.iatp.org/documents/promises-and-perils-of-the-ttip-negotiating-a-transatlantic-agricultural-market#sthash.lJNfQtMX.dpuf> (accessed 1 Nov. 2014); Institute for Agriculture and Trade Policy, *Analysis of the European Commission proposal for the Sanitary and Phytosanitary Measures (SPS) Chapter of the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (4 Feb. 2015), <http://www.iatp.org/documents/analysis-of-the-european-commission-proposal-for-the-sanitary-and-phytosanitary-measures-s> (accessed 8 June 2016); BEUC, *supra* n. 9.

¹² The Acheson Group, *Foodborne Illness: How Do the U.S. and EU Compare?* (2014), <http://ache-songroup.com/2014/03/foodborne-illness-us-eu-compare/> using EFSA and USFDA data (accessed 3 Dec. 2015).

¹³ European Food Safety Agency, *Opinion of the Scientific Panel on Food Additives, Flavourings, Processing Aids and Materials in Contact with Food (AFC) on a Request from the Commission Related to Treatment of Poultry Carcasses with Chlorine dioxide, Acidified Sodium Chlorite, Trisodium Phosphate and Peroxyacids*, 297 EFSA J. 1–27 (2005); Spiegel Online, *Verbraucherschutz: Behörde hält Chlorhühnchen für unbedenklich* (10 June 2014), <http://www.spiegel.de/forum/gesundheit/verbraucherschutz-behoerde-haelt-chlor-huehnchen-fuer-unbedenklich-thread-128635-1.html> (accessed 11 June 2014).

¹⁴ Interview, Brussels, 17 Mar. 2016.

¹⁵ Jonathan Wiener et al., *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe* (Washington DC: RFF Press 2011).

including fishery, pharmaceuticals, or residuals on food stuff (which incidentally acts to block European artisanal food imports, such as unpasteurized cheese, which are considered dangerous).

There are also cases which raise questions about EU standards. While the EU has banned anti-microbial washes with chlorine for poultry since 1997, it allows a higher chlorine concentration to be used as a 'processing aid' in washing produce. Yet there is still less residue on the consumed product 'than found in a glass of [British] water', a contradiction rarely mentioned by opponents,¹⁶ and these are results very similar to that found in numerous studies of the chlorine poultry wash. The 2013 'horse meat scandal' exposed weaknesses in the EU's traceability requirements for food, and the 2015 Volkswagen diesel emissions scandal (where the company deliberately manipulated emissions to pass inspections, and which was discovered by American inspectors) cast doubt on European safety standards by exposing weaknesses in the self-certification regulations for automobiles. Thus, while difficult to empirically determine what constitutes 'higher' standards, opponents' assumptions regarding technical regulations appear doubtful at best.

Even if American and European standards differ across certain sectors, opponents' arguments that American standards are lower in key sectors and thus TTIP will jeopardize Europeans' health and safety can only materialize – the argument that TTIP lowers safety standards can only be sustained – if a second assumption holds true: that the EU is going to accept all American standards as valid and equal, thus permitting access the European market. To put it differently, opponents extrapolate that MR will dominate TTIP and force acceptance of products from the US into the EU even if standards in the former are deemed lower or significantly different. However, the EU can refuse to accept certain US standards as equivalent to those in the EU, through its 'power of exclusion'.¹⁷ As shown below, opponents' assumption requires the EU to abandon previous practices in trade negotiations and within its own single market, something theoretically possible, but only probable in one scenario: if the US was able to impose its preferences and alter EU policies through TTIP negotiations.

In most areas, MR entails only recognizing the conformity assessment process undertaken by US exporters to the EU (and *vice versa*) and such 'MRAs are based on the legal and political premise that domestic regulation, its objectives and

¹⁶ Maria Gil et al., *Fresh-Cut Product Sanitation and Wash Water Disinfection: Problems and Solutions*, 134 *Intl. J. Food Microbiology* 37–45 (2009); Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment, *COT Statement on a Survey Investigating Disinfection By-Products in Prepared Salads* 6 (2007), <http://www.food.gov.uk/multimedia/pdfs/cotstatementwashands200614-pdf> (accessed 7 June 2016).

¹⁷ Alasdair Young, *The European Union as a Global Regulator? Context and Comparison*, 22(9) *J. Eur. Public Policy* 1233–1252, 1241 (2015).

institutions remain unaffected'.¹⁸ Moreover, regulations adopted by elected legislators cannot be negotiated away; regulators sit alongside negotiators to help clarify where and how MR within existing regulations or processes may be possible.¹⁹ MR would thus only be possible in limited areas, where first there was extensive regulatory compatibility (as on marine equipment, aircraft inspections, or organic food), and even in those cases it would not be automatic. The EU defended its self-certification policies after the 1998 MR agreement with the US on Low Voltage electronics, refusing to accept American requirements for third-party safety verifications, resulting in the agreement's failure; this despite the prospective gains for European exporters. The EU has also consistently defended its SPS rules in the WTO, despite widespread criticism of its dubious scientific basis from the US and other members.

To our knowledge the degree of MR feared by opponents only exists between two countries: Australia and New Zealand (even there a negative list limits its scope), and Georgia is the only country in the world applying a unilateral and automatic recognition of all products complying with prevailing norms in OECD Member States. The EU has already negotiated several comprehensive agreements with third countries with lower standards (at least in certain issues) without raising fears of a weakening of EU standards because nobody expects the automatic acceptance of those countries' products. Even within the European Single Market, where MR applies to products lacking full EU harmonization legislation, a product legally sold in one member cannot always be sold in another. Exceptions for health and safety ensure that some Member States rules regarding a product or service are deemed non-equivalent by other Member States.²⁰

In sum, Europeans and Americans enjoy generally equal standards, with scant evidence that TTIP will weaken EU standards or that automatic MR, of

¹⁸ Jacques Pelkmans & Correia de Brito, *Transatlantic MRAs: Lessons for TTIP?*, CEPS Special Report no. 101, 13 (Mar. 2015), <https://www.ceps.eu/publications/transatlantic-mras-lessons-ttip> (accessed 4 June 2016). CAPs = Conformity Assessment Procedures. Some mutual recognition, if agreed in negotiations, may require legislative changes in the authorizing language for regulators, but this would still be decided through the domestic legislative process, not in negotiations.

¹⁹ Matthias Goetz, *Do EU Trade Negotiations Harmonise Regulatory Standards? Domestic Business Politics and Regulatory Convergence*, UACES 46th Annual Conference, London (5–7 Sept. 2016). The author argues that 'Regulators will defend the maintenance of a regulatory measure or process as changes would negatively affect its preferences' (p. 19).

²⁰ 'The personal interviews with the business associations revealed that there are examples of Member States putting up barriers when requirements in one Member State are not equivalent to those of the destination Member State. These Member States require *equivalence of requirements*, which is very different from recognition of requirements, and this is a problem'. European Commission, *Evaluation of the Application of the Mutual Recognition Principle in the Field of Goods*, ENTR/172/PP/2012/FC – Lot 4, 83. Cf. European Commission, *A Single Market Strategy for Europe – Analysis and Evidence*, Commission Staff Working Document SWD(2015)202final. In other words, while the Single European Market is in theory based on Mutual Recognition, in practice it works on the basis of regulatory equivalence.

e.g. American SPS techniques for poultry, will materialize. While TTIP *could* potentially lower product safety, the premise that the TTIP *will* lower product safety lacks credibility unless we accept that the EU is going to accept US products and practices even in cases where US regulations are not deemed equivalent to European ones. This could only occur if the US was able to impose its preferences upon the EU through negotiations, meaning the EU lacked any bargaining power.

2.2 LESS PUBLIC POLICY AUTONOMY

Some of the greatest fears expressed about TTIP concern private firms' influences over governments' rights to regulate in the public interest, reflected in opposition to ISDS schemes. Originating in the late 1950s Bilateral Investment Treaties (BITs), ISDS is meant to guarantee investors access to de-politicized legal redress for compensation (not legislative changes) when a host country's government violates the terms of the investment treaty. In other words, to ensure the enforcement of international law,²¹ not equal treatment with a domestic company (since the host country's judiciary might not be trustworthy). The argument against an ISDS scheme in TTIP is based on two assumptions: that investment arbitration systems favour large corporation and that US companies make active use of ISDS, and will thus do so in TTIP in order to stifle public policy. While cases can be found where US large corporations used arbitration systems to their benefit, and contemporary BITs are admittedly rife with vague language on governments' rights to regulate in the interest of public and plant health and safety, the timing of protests and the fact that they favour *status quo* over reforms indicate that the validity of this argument is again dependent upon the US and the EU not being equal partners.

Studies on investment arbitration system indicate that claims are expensive to pursue, over 90% of BITs have never experienced a case, and the state still prevails in the vast majority of cases, both in the EU and globally.²² The rise in global filings since 2014 corresponds to increased investment levels, and the percentage of cases filed by an

²¹ As recognized and practiced by the United Nations Commission on International Trade Law (UNCITRAL), the Permanent Court of Arbitration in The Hague, the International and Stockholm Chambers of Commerce, and the World Bank's International Center for the Settlement of Investment Disputes (ICSID).

²² Center for Strategic and International Studies, *Investor-State Dispute Settlement: A Reality Check*, Working Paper, A Report by the Scholl Chair in International Business at CSIS (2014); UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, New York and Geneva, United Nations Conference on Trade and Development (2014); Susan Franck, *Investor State Dispute Settlement: A Reality Check*, Presentation at the Center for Strategic and International Studies (31 Oct. 2014); Susan Franck, *Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*, Washington and Lee Public Legal Studies Research Paper Series 2014–2013.

actor correlates with their investment stock (as would be expected). The average award in the roughly 30% of cases investors win (loosely defined) equals pennies on the dollar. Moreover, EU investors use ISDS roughly four times more than their American counterparts and then most often against European governments.²³ There have only been six ISDS cases between an American investor and an EU government, all with post-2004 EU Member States, and no investor prevailed.

Nonetheless, investment arbitration systems may allow foreign corporations to sue governments over democratically adopted public policy and some of those cases have been pursued by North American companies. Frequently cited cases used to ‘educate’ the public on the problem with ISDS include Philip Morris’ establishment of a subsidiary (a shell company in Hong Kong) to sue Australia over tobacco regulation (the arbitrator rejected the claim in 2015, deflating its significance), and the case where the Commission deemed illegal a tax-incentive offered by the Bulgarian government to a Swedish investor, yet an arbitration panel nonetheless awarded the company compensation.²⁴ The German government’s 2011 decision to abandon nuclear energy likewise prompted the Swedish company Vattenfall to sue under the EU Energy Treaty.²⁵ Though it is noteworthy that in the aforementioned cases, and many others, governments adopted policies even though they expected lawsuits, contrary to expectations of ‘regulatory chill’,²⁶ the present EU Trade Commissioner Cecilia Malmström herself has admitted that investment arbitration systems can and should be improved.²⁷

The fact that investment arbitration systems can provoke controversy is therefore not a surprise. What is suspicious, however, is both complainants timing and their preference for the *status quo*. Europeans invented and applied ISDS in over 1,500 agreements (the vast majority remain in place), and yet it was never targeted prior to the launch of TTIP. ISDS in the EU agreements with Singapore and Canada were not subject to opposition prior to the launch of TTIP. A Google trend report on ISDS in Germany (where Google has 94% of the search market) shows no traceable searches on ISDS until after TTIP was launched.²⁸ When asked

²³ Franck, *supra* n.20 (presentation); Elvire Fabry & Giorgio Garbasso, ‘ISDS’ in the TTIP. *The Devil Is in the Detail*, Delors Institute Policy Paper 122 (2015).

²⁴ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 – See more at: <http://www.italaw.com/cases/851> (accessed 18 Jan. 2016); Commission Decision (EU) 2015/1470 of 30 Mar. 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v. Romania of 11 Dec. 2013 (notified under document C (2015) 2112), OJ L 232, 4 Sept. 2015, 43–70.

²⁵ *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), case ongoing.

²⁶ De Ville & Siles-Brügges, *supra* n. 2.

²⁷ See for example her speech to the International Trade Committee of the European Parliament on 18 Mar. 2015.

²⁸ L. Johan Eliasson, *Fear or Facts: The Case for ISDS in Modern Trade Agreements*, Global Pol. Mag. (6 June 2015), <http://global-politics.co.uk/wp/2015/06/07/fear-v-facts-the-case-for-isds-in-modern-trade-agreements/> (accessed 7 July 2016).

in the summer of 2015 about any emails regarding the EU-Japan negotiations or EU-Canada Comprehensive Economic and Trade Agreement (CETA) two well-known members of the European Parliament's international trade committee responded that they had received 'a handful' on each negotiation; a leading opposition organization likewise conveyed 'they were not our focus'.²⁹ The timing of the complaints therefore indicates that the real problem is not the inclusion of ISDS but the partner, the US.

Opponents' preference for the *status quo* also points in that direction. As explained below, ISDS proposed reforms go in line with opponents' demands and excluding ISDS from TTIP means continuing *both* with all the vagaries and weaknesses they themselves criticize in the arbitration system and allowing for different treatment of companies depending on the EU member state. Hence the rejection of inclusion of any investment arbitration system in the TTIP indicates that the problem is not the ISDS *per se*, leaving the choice of partner as the most probable explanatory variable.

Including an ISDS option based on a compromise version of the US 2012 Model BIT and the 2015 European Commission proposal would appear to satisfy opponents' stated objections. The EU gained legal authority over investments with the 2009 Lisbon Treaty, and TTIP would initially replace exiting Member States' BITs signed after 2 December 2012, and incrementally all BITs.³⁰ A reformed ISDS would strengthen governments' rights to regulate in the public interest by including explicit public policy safeguards, narrowed definition of terminology, allowance for external submissions, transparency in filings, prohibition on dual track pursuits, empowerment of arbitrators to dismiss unwarranted cases, bans on tobacco company claims, and 'loser pays legal expenses' provisions; the EU also wants included a set of permanent judges and an appeals process (and now refers to a reformed ISDS an 'Investment Court System' (ICS)).³¹ Even short of a

²⁹ Interview, Brussels, June 2015.

³⁰ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 Dec. 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. Official Journal L 351/40, 12 Dec. 2012; For a discussion see Luca Schico, *Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy*, College of Europe, Research Papers in Law (Feb. 2012), <https://www.coleurope.eu/news/research-paper-law-2/2012-member-state-bits-after-treaty-lisbon-solid-foundation-or-first> (accessed 3 Jan. 2014). US BITs with nine EU states signed prior to 2 Dec. 2012 would remain valid unless either side chose to retract an agreement, which would expire after the number of years stipulated in the agreement.

³¹ European Commission, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations* (16 Sept. 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364> (accessed 5 May 2016). Yet in assessing the EU's proposed ICS CSOs expressed opposition and both law scholars and the German magistrates' association said the permanent court would violate EU law as it may usurp power from the EUCJ, while the existing system was not deemed illegal (reminiscent of when the EUCJ said the EU could not join the ECHR for the same reason). Laurens Ankersmit, *Is ISDS in EU Trade Agreements Legal Under EU Law?*, Investment Treaty News, International Institute for Sustainable Development (29 Feb. 2016), <https://www.iisd.org/itn/2016/02/29/is-isds-in-eu-trade-agreements-legal-under-eu-law-laurens-ankersmit/>; Deutscher Richterbund, *Stellungnahme zur*

permanent court, a TTIP agreement with all reform aspects of ISDS would include most of what opponents publicly say they desire, and set a precedent for future EU/US trade agreements (with e.g. Brazil and India), and for the international community.³² Including a reformed ISDS in all bilaterals or megaregionals also prevents making its case-based inclusion dependent on contingent political developments (who decides what constitutes a stable democracy with a fair and functioning justice system?), which is both one of the criticisms of the current system and a policy proposal by opponents (cf. European Consumer Organization (BEUC), European Trade Union Confederation (ETUC). ‘Old’ (pre-2004) EU members also do not wish to give up their own intra-EU BITs with judicially weaker members without a replacement; certain European court systems are rife with delays and corruption (e.g. Italy, Bulgaria, Romania; Italy is erecting specific courts for investors),³³ while several European business representatives express doubts about many American states’ courts.³⁴

To sum up, the fact that ISDS was never the object of public mobilization in previous trade agreements and opponents’ preferences for the *status quo* indicate that the real problem is the choice of partner.³⁵ If ISDS provides unfair advantages to corporations and creates ‘regulatory chill’, we would logically expect to have seen public outcry against existing BITs, as well as leaks from government sympathetic officials acknowledging apprehension of adopting certain regulations. However, this has not been the case. Opposition was lacking before TTIP and while opponents claim that the problem is the system design, they prefer the *status quo* to a system that would improve previous BITs along the lines they demand. This suggests that what makes ISDS so contentious is that the EU is negotiating with the US. Opponents doubt the EU’s ability to stand up to US demands,³⁶ and expect the EU to accept a system designed to favour the rights of large companies in general and North-American ones in particular. Thus only if accepting the assumption that the EU has less bargaining power than the US is opposition arguments probable.

Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015 (2016), http://www.drb.de/cms/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stm_Nr_04_Europaeisches_Investitionsgericht.pdf (accessed 1 Mar. 2016)

³² Reinhard Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, 49 (2) J. World Trade 99–210 (2015).

³³ James Politi, *Renzi Shakes up Italy’s Legal System in Effort to Cut Delay and Boost Overseas Investment*, Fin. Times 4 (13 July 2015).

³⁴ Swedish Institute for International Affairs, *The Transatlantic Trade and Investment Partnership (TTIP) – Challenges and Opportunities Ahead*, Seminar (13 Oct. 2014).

³⁵ There were limited NGO campaigns against the 1995–1998 OECD attempt at a Multilateral Agreement on Investments.

³⁶ On asymmetric bargaining power, see Eugenia da Conceição-Heldt, *When Speaking with a Single Voice Isn’t Enough: Bargaining Power (A)symmetry and EU External Effectiveness in Global Trade Governance*, 21(7) J. Eur. Public Policy 980–995 (2014).

3 SUPPORTERS' PREMISES AND ASSUMPTIONS

TTIP supporters' premises are that TTIP is economically beneficial and will set globally dominant standards, meaning transatlantic rules and regulations will continue dominating the international trade system. Thus concluding an agreement will improve both parties' economies and serve to solidify the global regulatory power of the transatlantic partners. In this section we show that both premises are not only possible but also probable if the US and the EU combined have enough market power vis-à-vis third countries. In other words, our analysis of the foundational assumptions behind the supporters' premises indicates that their validity does not depend on whether or not the US has more bargaining power than the EU.

3.1 ECONOMIC BENEFITS

Supporters expect economic benefits from TTIP. Though tariffs are generally low on each side they remain high in select areas (e.g. autos, food, leather), even cost prohibitive in certain cases, especially for small and medium enterprises with small profit margins. The sheer size of transatlantic trade means that removing even low tariffs equate to substantial sums, thus boosting the prospects of the estimated 37% of transatlantic companies using European/American imports in assembling and/or exporting final goods, while simultaneously increasing companies' resources to invest, resulting in jobs and know-how (e.g. Siemens' operations in North Carolina or Volkswagen in Chattanooga, Tennessee). Add in lower compliance costs through the removal of redundant regulations (certain NTBs) as well as further liberalization of trade in services and firms' competitiveness, sales, and bottom lines improve while consumers enjoy better prices and supply. Even most opponents, while questioning the size and distribution of prospective macro-economic gains (Gross Domestic Product [GDP] growth), accept that some aggregate macro-economic benefits will ensue.³⁷

³⁷ Ferdi De Ville & Gabriel Siles-Brügges, *The Transatlantic Trade and Investment Partnership and the Role of Computable General Equilibrium Modelling: An Exercise in Managing Fictional Expectations*, 20(5) *New Pol. Economy* 653–678 (2015); BEUC, 2014 *supra* n. 8. Siles-Brügge and de Ville criticize EU officials and supportive policy makers for creating 'fictional expectations' by touting an overly rosy best case scenario for jobs and economic growth from TTIP based on economic Computable General Equilibrium (CGE) models, where output is highly dependent on the assumptions used for the computations. Yet Caroline Freund & Susan Oliver, *Gains from Harmonizing US and EU Auto Regulations Under the Transatlantic Trade and Investment Partnership*, Peterson Institute for International Economics, PB15-10 (June 2015), <http://piie.com/publications/pb/pb15-10.pdf> (accessed 7 July 2015) find that regulatory convergence is not trade diverting, and it is precisely because of the difficulties of predicting expanded demand and income that the same authors find that most studies underestimate macro-economic and sectoral gains, arguments also made by David Cleaton, *Global Value Chains and TTIP*, Paper presented at the European Union Studies Association's Biannual

The expected economic benefits are based on two assumptions. The first is that regional trade agreements (RTA) bring net welfare gains to all parties, especially if they are already each other's main trading partners.³⁸ Viner (1950) first attested that customs unions may have negative welfare implications as a result of trade diversion, while today's economics models, accounting for static and dynamic effects, indicate that RTAs may bring net welfare gains to all parties, though the net effects of RTAs depend on their structure.³⁹

The second assumption of the economic benefits argument is that NTB removal generates more trade creation than diversion. Any RTA that focuses primarily on reducing NTB is expected to benefit third countries,⁴⁰ since 'By their very nature, some deep integration provisions are *de facto* extended to non-members because they are embedded in broader regulatory frameworks that apply to all trading partners'.⁴¹ Provisions regarding competition policy or state owned firms, for example, would immediately benefit all foreign producers. Other deep integration provisions such as common standards are expected to have net trade creation effects with third countries after an adaptation period.⁴² New common requirements on automobiles may result in short-term diversion effects as third country producers find exporting to the EU or the US more expensive due to changes in technical standards, but over time adaptation to the new common requirements would open the integrated zone's market to those exporters,

meeting, Boston (3–5 Mar. 2015); Richard Baldwin & Robert-Nicoud, *Trade-in-Goods and Trade-in-Tasks: An Integrating Framework*, 92(1) J. Intl. Econ. 51–62 (2014).

³⁸ Studies on the economic impact of RTAs developed on the bases of Viner's theory show that the lower the partner costs relative to the outside world the greater the trade creation effects vis-à-vis trade diversion Thomas Pugel, *International Economics* (15th ed., New York: McGraw-Hill 2012); Dominique Van der Mensbrugge, *The Doha Development Agenda and Preference Erosion: Modeling the Impacts*, Conference on Preference Erosion: Impacts and Potential Policy Responses, Geneva (13–14 June 2005), http://siteresources.worldbank.org/INTRANETTRADE/Resources/Mensbrugge_preferences_global.pdf (accessed 23 July 2010); David Roland-Holst et al, *NAFTA Liberalization and the Role of Nontariff Barriers*, 5(2) N. Am. J. Econ. & Fin. 137–168 (1994).

³⁹ World Trade Organization, *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (Geneva: WTO 2011); Richard Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, Rev. Econ. Stud. 11–32 (1996).

⁴⁰ Tariffs preferences create 'hard discrimination' while non-tariffs preferences may have soft or even non-discriminatory effects. See World Economic Forum, *Mega-Regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System*, Global Agenda Council on Trade and Foreign Direct Investment (July 2014), http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf (accessed 7 Aug. 2015)

⁴¹ WTO, *supra* n. 39, at 168.

⁴² WEF, *supra* n. 40; Joseph Francois et al, *Reducing Transatlantic Barriers to Trade and Investment – An Economic Assessment. Final Report for the European Commission*, Contract TRADE10/A2/A16, Center for Economic Policy Research, London (2013); Richard Baldwin, *21st Century Regionalism: Filling the Gap Between 21st Century Trade and 20th Century Trade Rules*, Staff Working Paper ERSO-2011-08, Economic Research and Statistics Division of the World Trade Organization (2011); 'Regulatory conversion has no economic downside, and no trade diversion'. Freund & Oliver, *supra* n. 37.

allowing them to sell the same cars to both the EU and the US.⁴³ This has been the experience of the EU with its Single European Market (SEM), arguably the first mega-regional.⁴⁴ As Woolcock (2012) put it, ‘The SEM significantly enhanced transparency and introduced a rules-based system of regulation within the EU that made the EU market more open to competition from suppliers within the EU, but also from those outside’.⁴⁵ The end result of ‘reverse trade diversion’ from such a RTA is that imports from excluded countries also rise, even if less than among partners.

As a result of these assumptions, positive net welfare effect, with little trade distortion, is the most probable scenario resulting from TTIP for two reasons. Firstly, as the US and the EU are primary trading partners, and already each other’s most efficient provider, an RTA between them would be less trade-distorting than with other countries.⁴⁶ Secondly, TTIP goes well beyond tariff cuts and existing regulatory cooperation at the multilateral level (WTO-plus provisions) and the current WTO mandate (WTO-extra provisions), providing a deep integration agreement with provisions that apply to third countries. While economic benefits from TTIP are thus highly probable, such benefits will be greater if, as supporters assume, the combined market power of the US and the EU is sufficiently strong that TTIP will be the export vehicle for agreed transatlantic standards. In such scenario, reverse trade diversion is maximized. This is a major reason why supporters argue the geopolitical advantages of TTIP.

In sum, theories of trade and studies on RTAs show prospective economic gains.⁴⁷ The large transatlantic relationship and the TTIP focus on NTB, makes it not only possible but probable that TTIP will generate economic benefits. However, the size of the latter depends on the extent to which the combined market power of the US and the EU influence countries’ adaptation of TTIP

⁴³ Moreover, if TTIP is enacted, American and Canadian auto parts are deemed the same when calculating rules-of-origin requirements (like Canadian beef count as part of America’s beef export quota to Europe). With new EU FTAs with TPP countries mimicking TTIP requirements manufacturers (premised on ratification of TPP and CETA) could soon produce the same vehicles for all four markets.

⁴⁴ We follow the WEF (2014: 13) *supra* n. 37, definition of mega-regionals: ‘deep integration partnerships in the form of RTAs between countries or regions with a major share of world trade and FDI [foreign direct investment] and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains (i.e., the United States, the EU, Japan, China)’.

⁴⁵ Stephen Woolcock, *European Union Economic Diplomacy* 67 (Farnham: Ashgate 2012).

⁴⁶ Cf. Alessandro Antimiani & Luca Salvatici, *Regionalism Versus Multilateralism: The Case of the European Union Trade Policy*, 49(2) *J. World Trade* 253–276 (2015).

⁴⁷ Opponents of the EU-South Korea Agreement predicted worsening conditions for EU exporters and yet the results of the first four years of the EU-South Korea FTA show greater than predicted by supporters) economic benefits for the EU. European Commission, *South Korea Monitoring Report* (19 Feb. 2016), http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154699.pdf (accessed 13 Mar. 2016).

standards. The supporters premise is based on the underlying assumption that the US–EU tandem will have the necessary market power to ensure extensive adoption by third countries of TTIP rules and regulations.

3.2 GEOPOLITICAL BENEFITS

The geopolitical logic of supporters' argument is that 'only by sticking together can the EU and the US counter their slide into economic and geopolitical irrelevance'.⁴⁸ Neither the EU nor the US have independently been able to prevent Chinese dumping and other trade violations, improve investment opportunities, nor stem its growing regional influence, and 'The window of opportunity may be closing on the ability of Western countries to maintain high labor, consumer, health safety, and environmental standards, and to advance the norms of the liberal rules-based order unless the United States and the European Union act more effectively together'.⁴⁹ In other words, TTIP's geopolitical benefits are based on two assumptions: that the US and the EU are losing their previous influence due to structural changes in the international system, and that TTIP can help restore the same by establishing global standards while the two still dominate international trade.

Observers agree that a break in the structure of multilateral trade governance occurred in the WTO Ministerial hold in Cancun in 2003, confirming dissatisfaction among certain members that emerged in 2001.⁵⁰ Despite concessions to developing countries, consensus building in both the General Agreement on Tariffs and Trade (GATT) and the WTO has largely been determined by the US, in later decades in collaboration with the EU, along with Japan and Canada – the so-called Quad. In Cancun, India and Brazil, leading a new coalition called G20 that also included China (which became a WTO member in 2001), rejected the agreement on agriculture proposed by the US and the EU, thus challenging the classic Western leadership on trade governance.⁵¹ From 2004 onwards, new consensus groups in various formations emerged: the so-called New Quad (EU, US, India and Brazil), the G5 (with Australia), G6 (with Japan) or G7 (with China). Analysts talk of a period of 'interregnum', or 'structural power shifts', as

⁴⁸ De Ville & Siles-Brügge, *supra* n. 2, at 40.

⁴⁹ Hamilton, *supra* n. 5, at ix.

⁵⁰ Patricia Garcia-Duran, Montserrat Millet & Jan Orbie, *EU Trade Policy Reaction to the BIC: From Accommodation to Entrenchment*, in *The EU in a 'No One's World': Policy Responses to an Unsettled Multilateral System* (Esther Barbé et al. eds, Basingstoke: Palgrave 2016); Bernhard Zangl et al., *Imperfect Adaptation: How the WTO and the IMF Adjust to Shifting Power Distributions among their Members*, Paper presented at the 2016 Barcelona Workshop on Global Governance (4–5 Feb.). Forthcoming in *Review of International Organizations*.

⁵¹ Patricia Garcia-Duran, Benjamin Kienzle & Montserrat Millet, *Revisiting European influence: the case of agricultural trade negotiations*, 48(5) *J. World Trade* 1057–1076 (2014).

the Old Quad hegemonic position dissipated, but without a new power formation able to provide effective leadership on concluding the Doha Round of multilateral trade negotiations.⁵² It is in this new challenging environment – with new individual and coalition challengers – that TTIP negotiations are held, substantiating the assumption that the EU and the US are losing relative influence in the international trade governance system.

The second assumption of the geopolitical premise is that the TTIP can be instrumental in changing this situation by enabling the EU and the US to continue setting global standards, thus realizing through bilateral means what they have been unable to achieve through the multilateral system.⁵³ For that assumption to be possible TTIP should be able to externalize its regulatory measures or at least have the ‘power resources’ to do so.⁵⁴ Following Chad Damro’s (2012) seminal contribution in this respect, an identity with market power has (at least) three mutually reinforcing characteristics: material existence, institutional features, and interest contestation.⁵⁵ TTIP would fit the first based on the sheer size of the transatlantic market and the nature of the agreement. Any agreement on either technical standards or rules (investment, public procurement, competition policy, environment or labour) by two or more countries spurs third country exporters’ adaptation to the integrated zone (here TTIP). Not only will emerging countries’ exporters (read: especially China’s) have to comply to access the transatlantic market place, TTIP member firms exporting to emerging markets constitute a second level of external pressure on public authorities to adopt those standards.⁵⁶ Moreover, the US and the EU are regional hubs in Global Value Chains parlance,⁵⁷ meaning the threat of exclusion is maximized, enhancing the market power of the US-EU tandem.

⁵² World Economic Forum, *The High and Low Politics of Trade: Can the World Trade Organization’s Centrality Be Restored in a New Multi-Tiered Global Trading System?* Global Agenda (2015); *The EU in a ‘No One’s World’: Policy Responses to an Unsettled Multilateral System* (Esther Barbé, Oriol Costa & Robert Kissack eds, Basingstoke: Palgrave 2016).

⁵³ Two scholars argue that ‘regulatory capacity is a relational concept’ so that the strategies employed by the EU (or the US) to shape global rules vary depending on the context. Abraham Newman & Eric Posner, *Putting the EU in Its Place: Policy Strategies and the Global Regulatory Context*, 22(9) J. Eur. Public Policy 1316–1335 (2015). Following their analysis (p. 1325) the TTIP would allow for regulatory export and first mover regulatory strategies in front of third countries and for mutual recognition agreements and coalition building between the EU and the US.

⁵⁴ Newman & Posner *supra* n. 53, at 1321; cf. Young, *supra* n. 17.

⁵⁵ See Chad Damro, *Market Power Europe*, 19(5) J. Eur. Public Policy 682–699 (2012); See also Michael Strange, *Power in Global Trade Governance: Is the EU a Unitary Actor, a Tool for Dominance, or a Site of Contestation? GATS and the TTIP Negotiations*, 38 (12) Intl. J. Public Administration 38, no. 12 (2015):884–894.

⁵⁶ Guoyou Song & Wen Jin Yuan, *China’s Free Trade Agreement Strategies*. Center for Strategic and International Studies, 35(4) Wash. Q.107–119 (2012); Christopher Layne, *After the Fall, International Politics, U.S. Grand Strategy, and the End of the Pax Americana* (New Haven: Yale University Press 2014).

⁵⁷ Richard Baldwin & Javier Lopez-Gonzalez, *Supply-Chain Trade: A Portrait of Global Patterns and Several Testable Hypotheses*, 38(11) World Economy 1682–1721 (2015).

Regarding its institutional features, the TTIP is expected to generate common rules, regulations and technical standards as a result both of sectoral agreements based on present EU-US negotiations and of procedures that facilitate regulatory cooperation beyond its formal conclusion (i.e. ‘living agreement’). To set global standards, however, the transatlantic partners cannot limit their agreement to the easiest mode of regulatory cooperation (i.e. bilateral recognition of standards, to the exclusion of others), as this carries economic risks (of trade diversion and fragmenting existing and potential global supply chains) as well as regulatory ones (it would limit third countries incentives to adapt to TTIP regulations). To have market power, any TTIP agreement must allow for rule externalization (i.e. harmonization or *erga omnes* MR of requirements). In short, to be able to set global rules, the partners must grant TTIP the expected levels of regulatory capacity.

Interest contestation is already observable.⁵⁸ The mere act of negotiating TTIP is triggering competing and complementary initiatives around the globe as emerging markets respond to a potential mega-regional with the EU and the US at its core.⁵⁹ Chinese officials are worried about being sidelined by new RTAs, and have sought to join the Trade in Services Agreement negotiations, expressed interest in a deep and comprehensive Free Trade Agreement (FTA) with the EU, and agreed to separate negotiations on BITs with the EU and US. The Regional Comprehensive Economic Partnership (RCEP) and the China-Japan-South Korea FTA talks are two reawakened regional Chinese initiatives.⁶⁰ China is also seeking a possible Asia-Pacific FTA and a network of FTA with the countries located along the Old Silk Road. Brazil has revived talks of a bilateral trade agreement with the EU (independent of Mercado Comun del Sur (MERCOSUR)), and India has become more supportive of the RCEP. Brazil and Turkey have also indicated they view TTIP as setting the standards for others, while Russia indirectly admits as much by opposing the agreement.⁶¹

In sum, the premise that TTIP will bring geopolitical benefits is based on assumptions whose validity hinges on EU and US joint bargaining power vis-à-vis third countries rather than on whether they are equal partners. If the EU and the US are able to both set common rules and have third countries accept them, TTIP would ensure not only the economic gains discussed in the previous section but

⁵⁸ Cf. Strange, *supra* n. 55.

⁵⁹ WEF (2014 and 2015), *supra* ns 41, 42, 52.

⁶⁰ The RCEP includes the ten ASEAN countries and six of its RTA partners: China, India, Japan, South Korea, Australia and New Zealand.

⁶¹ E.g. *Daily Sabah, Turkish EU Minister: Updated Customs Union Agreement Will Double Trade Volume* (5 Feb. 2016), <http://www.dailysabah.com/money/2016/02/05/turkish-eu-minister-updated-cus-toms-union-agreement-will-double-trade-volume> (accessed 7 Feb. 2016). Market Power Europe, and having a market power identity, however, ‘does not mean that it will always get other actors to adhere to or behave in a way that generally satisfies its market-power related policies and regulatory measures’. Chad Damro, *Market Power Europe: Exploring a Dynamic Conceptual Framework*, 22(9) J. Eur. Public Policy 1345 (2015).

also further geopolitical interests. Supporters' claims are both linked to the market power capacity of TTIP rather than on EU bargaining power vis-à-vis the US.

4 WHY IT MATTERS

This article has shown that the underlying assumptions of supporters' and opponents' premises – while different – are not contradictory. As summarized in Table 1, by identifying the foundational assumption(s) and the conditions under which each of their premises could be considered both possible and probable, we have found that opponents assume the EU has less bargaining power than the US while supporters assume that the important variable is the partners' combined relative power vis-à-vis third countries. That means that opponents and supporters' premises are not mutually exclusive or necessarily contradictory. The EU could have less bargaining power than the US and at the same time gain market power vis-à-vis third countries through further economic integration with the US. This has interesting implications for future research examining the European Commission's (in)ability to steer the debate over TTIP. Since fears of the negotiating partner feature prominently in assumptions of opponents our results indicate that it is not only the inclusion of NTBs that have helped make CSOs successful in generating opposition; the nature of the arguments used by each side are part of the explanation of why TTIP has generated so much controversy in the EU.

The differences in the focal point of the underlying assumptions reveal that opponents' reactionary strategy has not been based on challenging the benefits held by supporters. In fact, opponents have developed an argument based on the costs of losing (the benefits of) the *status quo*. It is what Hirschman (1991) calls a 'jeopardy thesis', that is, a thesis that 'argues that the cost of the proposed change or reform is too high as it endangers some previous, precious accomplishment'.⁶² European TTIP opponents believe that the *status quo* represents (more) appropriate rules and standards for goods and services, while (better) ensuring generous public policies preserved from the negatives caprices of corporations. *Status quo* is therefore, as Hirschman (1991) predicts, seen as the result of 'older hard-won conquests or accomplishments',⁶³ and TTIP would place it in jeopardy. The message is: 'We lose and we gain, but what we lose is more precious than what we gain'.⁶⁴

The recognition that underlying assumptions are not mutually exclusive further indicates that supporters' alleged benefits cannot cancel out opponents' alleged costs, or *vice versa*. TTIP could favour economic and geopolitical benefits while also

⁶² Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* 7 (Cambridge, MA: The Belknap Press of Harvard University Press 1991).

⁶³ *Ibid.*, at 84.

⁶⁴ *Ibid.*, at 123.

leading to lower safety standards and less sovereignty in constructing public policies. If TTIP was to produce less product safety and endanger public policies, geopolitical benefits could be easier to achieve (as third countries would adapt more easily to lower standards) and economic benefits would still emerge. Although the distribution of such benefits would be different and probably less favourable to EU companies, consumer prices would decline and trade diversion would be even less probable. It is therefore a situation where increased costs (lowering safety standards and establishing a corporate biased investment arbitration system) would not preclude benefits, and increased benefits (economic gains and third countries adoption of TTIP rules and regulations) could materialize notwithstanding costs. To use a counterfactual, if opponents had focused on addressing the limits of economic and geopolitical benefits (along the lines of for example Hirschman's 'perversity' and 'futility' theses or Becker's 'fictional expectation theory'),⁶⁵ the debate would have been different; it would have focused on whether benefits will materialize.

Table 1 *The Underlying Assumptions*

<i>Argument</i>	<i>Stop TTIP</i>		<i>Support TTIP</i>	
Premises	TTIP regulatory convergence will lead to a race to the bottom in standards	TTIP ISDS will prevent European governments from adopting public policies	TTIP will generate economic gains	TTIP will ensure US-EU regulatory dominance
Assumptions	US has lower standards	US companies make active use of ISDS	RTAs may bring net welfare gains to all parties	Structural power shifts in multilateral trade governance
	MR will prevail	ISDS favours corporations	NTB removal generates more trade creation than diversion	TTIP will establish global standards

⁶⁵ The arguments of the perverse effects and of the futility thesis both show 'how actions undertaken to achieve a certain purpose fail miserably to do so. Either no change at all occurs [futility thesis] or the action yields an outcome that is the opposite of the one that was intended [perversity thesis]' *Ibid.*, at 81. Jens Beckett theorizes that 'decision-making of intentionally rational actors is anchored in fictions'. Actors imagine a future and then gear their actions toward that. In *Imagined Futures: Fictional Expectations in the Economy*, Theoretical Sociology, 42 (219) 2013, DOI 10.1007/s11186-013-9191-2.

<i>Argument</i>	<i>Stop TTIP</i>		<i>Support TTIP</i>	
				because it has market power
<i>Underlying assumption</i>	<i>EU has less bargaining power than US</i>	<i>EU has less bargaining power than US</i>	<i>EU-US together have global market power</i>	<i>EU-US together have global market power</i>

Source: Own Elaboration.

Due to the lack of interdependence between the alleged costs and benefits of the TTIP, the focus of the debate has not been on whether benefits compensate for the costs but on whether such costs are probable. This has given the opponents the upper hand in the public debate because it has centred the discussion on their arguments. Supporters must show that risks are at most negligible, while opponents need to address probable benefits, let alone prove they will not materialize, is marginal. In other words, while opponents do not need to substantiate the probability of their arguments, supporters are faced with disproving opponents' arguments. Following from that, the EU Commission has been unable to set the terms of the debate because opponents have not focused their efforts on challenging its arguments bringing the debate round to their field.

In agreement with other research,⁶⁶ our analysis recognizes that the inclusion of NTBs is important in explaining public society mobilization because it has allowed opponents to build up a 'jeopardy' thesis appealing to deep-seated European cultural and social attachment to safety regulations and public policies. Our findings, however, also indicate that the 'jeopardy' thesis has only been successful because US is the partner. In other words, the success of the anti-TTIP campaign in using the 'jeopardy theory' may not necessarily transfer to other deep and comprehensive trade agreements, even if they include NTB provisions.⁶⁷

⁶⁶ E.g. De Ville & Gabriel Siles-Brügges *supra* n. 5; Niels Geyhle, *Politisering van TTIP: een lont in het knuïtvat*, Internationale Spectator (4 July 2016).

⁶⁷ We cannot say definitely that TTIP is the exception since we are not making a distinction between the US being the cause for mobilization by CSOs (with a need to convince the public), the US being the reason for public acceptance of opponents' arguments (which presumes a deep pre-existing scepticism towards the US), or a policy-specific combination of the two. Existing surveys showing Europeans sceptical of American neo-liberal capitalism indicates a receptivity to statements pairing negative consequences and American policy.