

THE EMERGING CONFLICT BETWEEN DEMOCRATIC  
LEGITIMACY AND THE EU'S COMMON COMMERCIAL POLICY.  
RISKS FOR THE EU AS A CIVILIAN POWER  
AND FOR THE MULTILATERAL ORDER

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ABSTRACT

The European Common Commercial Policy is both a *raison d'être* of the EC/EU since the Treaty of Rome and the way to become in 60 years a global civilian power. However, the highly problematic development of the TTIP and CETA trade arrangements may represent a turning point. Not only do domestic pressures and decentralized democratic demands for legitimacy challenge the capacity of the EU institutions to maintain exclusive competence in trade negotiations, but the role of Europe as champion of the global multilateral order established under the hegemony of the USA in 1944-47 is in trouble. Simultaneously, a different but convergent destabilizing process is occurring in US trade policy after the election of a protectionist and anti-multilateralist president. The paper invites the reader to take serious account of the risks of a dramatic change as far as global trade and the world order are concerned.

**Keywords:** EU External Relations, Common Commercial Policy, Multilateralism, Interregionalism.

INTRODUCTION

The Common Commercial Policy (CCP) has been at the essence of the European construction for 60 years since the Treaty of Rome, wherein the 6 Member States provided the EEC with exclusive competence in trade policy. To understand this, one must consider first of all the link between internal trade and external trade: the Common Commercial Policy is a di-

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rect consequence of the Common Market and the Customs Union, both established in 1958 and implemented since 1968. Customs Union means much more than a free trade area (arts. 28 and 32, Treaty of European Union): a common external tariff which automatically leads to a Common Commercial Policy transforming the regional organization into an international actor. Trade is the very core of the European Commission/European Union (EC/EU) as a civilian power.<sup>1</sup> In 1958, internal trade was 35% of the overall total, by 1965 it was 49%, and by 1992, 59% (Heidensohn 1995). In the last decade, more than 60% of the trade of goods and 52% of the trade of services of the EU Member States was internal trade. After the end of the Cold War, the EU became the largest trading bloc and the first trade power, with 15% of the world exports of goods and the 25% of services. It is through commercial relations that the EC/EU makes itself known as an important partner for third parties. For many countries, whether or not they can establish good access relations with the EU market means wealth or misery. This is also why the Common Commercial Policy was for many decades a kind of substitute for foreign policy, and it is still the core of the external relations of a civilian power like the EU which cannot become a classic political and military power.<sup>2</sup>

In legal terms, the European Common Commercial Policy is managed through a special and highly sophisticated decision-making system. Since the Treaty of Rome, 'exclusive competence' has meant that a unanimous voting procedure within the Council is not needed to take a decision in most cases, while the 'Community method' is applied (Treaty of the Functioning of the European Union (TFEU), art. 207 Lisbon Treaty, notably TFEU, ex art 113 TEC):

- monopoly of initiative in the hands of a supranational institution: the Commission, which is in charge of the negotiations (assisted by a special intergovernmental committee, art. 207 TFEU);
- the Council decides by qualified majority voting (QMV) (art. 207.3 TFEU), while unanimous voting is required in regard to culture, intellectual property rights (IPR), foreign direct investment (FDI), issues related to social services, education and health (see art. 207.4 TFEU);
- the European Parliament increasingly matters in the form of a co-decision procedure;

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<sup>1</sup> WALLACE, WALLACE and POLLACK (2005), notably the chapter "Trade Policy": 377-399; HILL and SMITH (2005) notably chapter 11, "Managing Interdependence: Europe and the World Economy": 225-245, as well as chapter 12 (MEUNIER and NIKOLAIDIS, 2005: 247-269); TELÒ (2015), notably chapters 2 "The Three Epochs of Multilateralism" and 11, "The Pillars of the International Trading System": 203-213.

<sup>2</sup> See TELÒ 2005.

– the Court of Justice matters in the case of wrong application of EU law.

Is the CCP compatible with the multilateral global system? According to the Treaty, the EU aims at “fair and equitable trade” (art. 3 TFEU) and the “harmonious development of global trade” (art. 206 TFEU). However, this distinctive institutional feature of the European Community (and since 1992, of the EU) is a derogation within the multilateral system established under the hegemony of the United States since the Bretton Woods conference of 1944 and the soft institutionalization of the GATT in 1947: it clearly violates the Most Favourite Nation clause (MFN) and favours both intra-regional trade and an international regional bloc. However, the compromise provided by the GATT (and WTO) article 44 allows regional markets to be established provided that they do not hinder but foster global liberalization. This compromise has made it possible for the EU to act as a champion of multilateralism for 60 years.

On considering the history of the EU as a trade policy actor, the EU Common Commercial Policy has proved very successful in asserting this structural power: the EU signed hundreds of commercial arrangements over sixty years and became a global power through trade by harnessing globalization and by spreading, through trade agreements, some elements of the European model of society in countries near and far. On the other hand, the European CCP entails also an incremental logic of a functionalist kind: it has gradually included no tariff barriers to trade, technical issues, subsidies, services, public procurement, and investments (art. 207 TFEU). Submitting all these issues to the community method is matter of criticism because, according to Non-Governmental Organizations, the centralization in Brussels and the efficiency of the method of governance raises problems in terms of transparency, legitimacy, and direct accountability. The Lisbon Treaty provided the EP with co-decision power (art. 207.2 TFEU), but this major reform is considered insufficient by many domestic actors. The EU is also criticised for not providing market access to developing countries, notably because of the protectionist side of the European agricultural policy. The latter feature, associated with the even more protectionist approach of the USA and Japan, contributed to the deadlock of the Doha Round started in 2000 (also the rigidity of Southern countries like India is regarded as responsible for the failure, poorly balanced by the small achievements of Bali 2013 and Nairobi 2014): the consequence of this deadlock was, after commissioner Mandelson’s decision of 2006, the priority of interregional and bilateral trade negotiations (EU-USA, EU-Canada, EU-Japan, EU-Vietnam, EU-MERCOSUR, EU-Mexico, EU ASEAN).

## 1. TTIP AND CETA 2016. THE REASONS FOR AN UNPRECEDENTED POLITICISATION OF TRADE ARRANGEMENTS

Why did the European debate on the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) reach an unprecedented level of politicisation largely explaining the negative outcome of the negotiation process?<sup>3</sup> What is really new? Along with a profound revision of the realist and neorealist traditions, the international research community has been aware since the seminal works of the 1990s (Milner 1997, Putnam 1993) of the increasing role of domestic factors and internal political bargaining in shaping international trade negotiations and their outcomes. Contrary to the conventional wisdom, the internal complexity is growing to a much larger extent because of sensitive trade negotiations which are influenced by intensive domestic bargaining among an increasing number of actors, making the decision process slow and oscillating (Allison 1971, Mills 1956). If we establish a ranking from fragmented to concentrated decision-making at élites level, the TTIP negotiation may be defined, from the EU side, as intermediate between lower political issues and strategic political issues with security implications: a kind of ‘polyarchy’ type of negotiation among a relatively small number of private and public actors (Dahl 1972, Lowy 1964).

Indeed, there is evidence that the upgrading of the politicisation of the internal controversy in Europe was the outcome of the transformation of TTIP and CETA into ‘mixed treaties’, which means that not only the Commission as usual since the Rome Treaty of 1957, but all European institutions are legally competent (including the European Parliament (according to the Lisbon Treaty of 2009), but that political legitimacy also needs the member states’ unanimous vote, and in certain cases, like Belgium, also by subnational parliamentary bodies, with the consequence of enhancing the political impact of the mobilization of a larger array of local and transnational actors, political parties, trade unions, social movements, lobbies, NGOs. The explosion of people’s emotional participation is rare as concerns international treaties, notably in the case of trade

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<sup>3</sup> In spite of the “TTIP Negotiations 15e cycle Report” (October 2016) and its official optimism, the Treaty has been in deadlock since the political declarations of French/German central authorities as well as of the newly-elected US President at the end of 2016. The EU’s “TTIP advisory group Report” published in Brussels on November 2016 concludes with a Chair declaration that: “the forthcoming change in US Administration puts the TTIP negotiations on an uncertain footing and it may be necessary to develop new policy approaches to the EU-US economic relationship”.

arrangements, if we mention the comparable precedent of the people's rejection of the EU Constitutional Treaty in France and Holland by the referenda of 2005. This new context extends beyond the previous debate on the distinctive legitimacy mechanisms of EU policies (Telò 1995 and 2014a, Scharpf 1999, Moravcsik 2002), in the context of the transformation of a bilateral/interregional negotiation into a more complex inter-regional/multilateral one, between the USA and an increasing number of EU political entities.

Of course, such an unprecedented politicisation of the European public debate on TTIP and CETA in 2015/2016, in the context of aggressive populist waves within many troubled national democratic polities, was also characterized by exaggerations, wrong perceptions, rhetorical constructs, political instrumentalism, and even "post-truth phenomena" (Keyes 2004). There is no doubt that the Internet and social networks are making spontaneous bottom-up local and transnational mobilization increasingly important; however, the political manipulation of emotions, fears and perceptions is also more efficient and cynical than in the past (Tarrow 2011, Tarrow and Della Porta 2005, Della Porta *et al.* 2009). On the other hand, external factors matter as well: the incremental diffusion in Europe of critical attitudes and massive militant demonstrations against TTIP and the simultaneous CETA negotiations should be also explained through the crucial juncture occurring at the level of the globalization malaise and world uncertainties. The TTIP story is part of a global transition: a political restructuring of trade relations is taking place in the context of a declining trade growth rate (from 8% in 2007 to 2% in 2015), very poor results of the WTO Doha agenda, protectionist decisions by States, as well as the emergence of new populist and nationalist movements exacerbating domestic troubles and international insecurity. Last but not least, the fact that one of the negotiating partners of TTIP was the USA explains the increasingly open link between trade policy and other political issues including geopolitical challenges, notably the place of transatlantic ties within the changing post-hegemonic international order and the relations of the West with the Rest, primarily China (Aggarwal 2013).

## 2. THE INTERNAL CAUSES AND CONSEQUENCES OF POLITICISATION

Even if it is increasingly evident that trade is no longer the main driver of economic growth, it was after the end of the Cold War that the idea of a TTIP represented a logical consequence of the WTO-Doha Development Round (DDR) deadlock for the two giants seeking a way out of the

global financial crisis (as declared in early statements).<sup>4</sup> Never before had an international trade treaty been so broadly discussed and so controversial within the national and European public spheres as the TTIP. Hundreds of meetings and demonstrations, contradictory statements by civil society and business associations, local assemblies, regional bodies' deliberations, massive media coverage took place. What are the internal reasons for such unusual participation?

Only apparently is it an anti-free-trade movement. The main internal explanation for this new mobilization and politicization is that the TTIP and the CETA are much more than mere free trade treaties. They are second-generation arrangements: the four points mandate makes it very clear that it is rather a matter of negotiation between the two most important, complex and multifaceted market regulators within the globalized economy: the USA and the EU.<sup>5</sup> The negotiations agenda is the most ambitious and comprehensive ever. The regulatory issues and the non-tariff barriers increasingly emerged as the explicit priorities. In the case of success, TTIP would have been likely to affect important aspects of citizens' everyday lives and influence the democratic process on both sides of the Atlantic. In any case, this is the largely negative perception by a large part of Europeans, and that is what matters most. On a more positive note, the inclusion in the negotiation agenda of the complex – both culturally and socially – notion of 'precaution', was distinctive of a new era of trade, recalling the concept of 'diffuse reciprocity' (Ruggie 1993 and Keohane 1986) as deepening the 'specific reciprocity' through the inclusion of the dimensions of time, trust and social exchange.

In this respect, the TTIP represented a major change if compared with hundreds of apparently consensual trade arrangement of the first generation. Consider the previous 'New Transatlantic Agenda' (NTA 1995), the 'Transatlantic Business Dialogue' (1994, Hocking and McGuire 2004) and other attempts by the trade Commissioner L. Brittan at transatlantic liber-

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<sup>4</sup> *Joint Statement of the EU-U.S. Summit, 28 November, 2011* "We must intensify our efforts to realize the untapped potential of transatlantic economic cooperation to generate new opportunities for jobs and growth... To that end, we have directed the TEC to establish a joint High Level Working Group on Jobs and Growth... We ask the Working Group to identify and assess options for strengthening the U.S.-EU economic relationship, especially those that have the highest potential to support jobs and growth". And, in 2012: *A New Era for Transatlantic Trade Leadership. A Report from the Transatlantic Task Force on Trade and Investment*, February 2012, claiming a "revival of bilateral trade and regulation partnership between the United States and the European Union which can create jobs and growth" on the one hand and, on the other, "can play a necessary and unique leadership role in promoting economic welfare both within the transatlantic marketplace and worldwide."

<sup>5</sup> The negotiation mandate comprised four chapters: market access, regulatory issues, trade-related rules, trade multilateralism.



alization. The latter were conditioned by the transition from the post-Cold War context, the ‘unipolar momentum’, and much more limited in scope and importance. On comparing the policies of the EU’s Trade Commissioners over the last 20 years, Pascal Lamy deliberately decided not to follow Brittan’s transatlantic free trade priority, while the hard liberalizer, K. De Gucht, optimistically opened the TTIP in 2013, but dramatically underestimated the stakes, failed to respect the established deadline (2014), and contributed to the current outcome.

The Commission suddenly became aware in 2015/16 that, since the TTIP was more important than any previous transatlantic trade and economic arrangement, it was quite logical that, within the most democratic regions of the planet, the global governance dilemma would apply to its fullest extent: the more supranational regulation is enhanced, the stronger the bottom-up call for democratic legitimacy (Keohane 2004).

However, international treaties are not the easiest topics for a very large public debate, as Tocqueville warned already two centuries ago. It is absolutely evident that part of the internally differentiated (from extreme right to extreme left) opposition to the TTIP was based on a mix of understandable concerns with confusing and misleading information. The experience of the previous failure of the EU Constitutional treaty in 2005 should have warned the pro-TTIP elites about the increasing weight of wrong perceptions, misunderstandings, the impact of veto-players and populist manipulation of fears (fear of the other, fear of economic openness) by growing social strata identified as ‘the losers of globalization’. If even Pope Francis warned in Strasbourg EP (2015) about “Europe becoming the continent of fear”, this means that an increasingly inward-looking Europe, represented in various Member States by Marine Le Pen, B. Grillo, M. Salvini, G. Wilders, N. Höfer and other populist movements, is simultaneously rejecting immigration flows, globalization and a transatlantic market regulation. The official discourse is far from able to answer these fears in a satisfactory way, and the populist wave has become not only stronger and internally more pluralist but also able to interplay with democratic bodies and eventually win the majority of the population in some Member States.

Contrary to the very optimistic discourse of 2013, the more the contents of TTIP negotiations were at the centre of public controversies and of an intense Internet and media coverage, the more the acceptance rate declined within the EU member-states during 2014 and 2015, albeit in a very uneven manner (according to Gallup): much more in Germany, France and Belgium than in Italy and the UK. The most impressive consensus breakdown took place not in French-speaking Europe, traditionally influenced by well-rooted anti-American and anti-market feelings, but in Germany (H. Mayer, in Morin *et al.* 2015). The specific causes warrant attention (see below).

This marked decline of citizens' consensus had major consequences both within national (and regional) democratic parliaments and within the European Parliament: see the symbolic postponement of the vote on TTIP in September 2015 decided by president M. Schulz to prevent internal divisions of the Social Democratic group in the European Parliament from becoming public.

Why did the politicization of the public debate on the TTIP negotiations become a fatal handicap rather than a resource for enhancing people's consensus? It did so because no serious attempt was made to explain, in a persuasive communicative manner, the Treaty's many important political implications, while it could have been the only way to regain a majoritarian consensus – as the Swedish debate well shows. Political parties in the continent were absolutely unable to cope with fears and oppositions. They were notably incapable of communicating that a democratic approval of the Treaty after such a public controversy emphasising precaution and high standards protection would have allowed Europe to make a historic step forwards as people became aware of the EU's driving role within a globalized economy. Secondly, against the revival of simplistic anti-American feelings, the TTIP supporters totally failed to communicate an obvious fact: if the Europeans really want to defend the so-called 'European social model', European standards in environmental, social and public policies, they have very little choice but to share some of its distinctive features with external partners: first of all, with like-minded countries, such as the US, notably during the era of the Obama administration, and then with others like China, Latin America, India, Africa, working towards a new multi-lateral rule-based global governance characterized by high-level standards and regulations.

### 3. PAST AND PRESENT. A STILL UNBALANCED EU-US TRADE NEGOTIATION?

The TTIP controversy shows that, for a part of the European national public opinions the USA is still an imperial power, whatever the discourse and practice of the most multilateral Administration for many decades and the statistical evidence on the real economic power relations between the EU and the USA. Both extreme left and extreme right were able in this respect to influence mainstream national perceptions in several countries.

The TTIP was rejected as a tool of US political arrogance and the economic power of the US-based multinational companies. Even the CETA was rejected by the Wallonia opponents as a 'Trojan horse' for imposing US interests in Europe. Furthermore, the "Namur Declaration" asserts that "the EU is currently unable of negotiating a balanced arrangement with the



USA, given the asymmetry between both partners, notably as the completion of their domestic market and the unsolved problems of US extraterritorial legislation".<sup>6</sup> This shows that even the strong opposition against the CETA sprang largely from deep-rooted anti-American feelings of extreme right and extreme left able to persuade large part of the population.<sup>7</sup>

The research community is fully aware that the EU-US trade negotiation, notably during the Obama era, is no longer structurally uneven and asymmetric as it used to be some decades ago. The main findings are now briefly summarized (Morin *et al.* 2014).

Let us start by remembering the consolidated features of the European commercial policy until 2016. Even if the EU is a complex non-State polity, it is not necessarily disadvantaged by trade bargaining and not doomed to be the loser of a competitive zero-sum game. According to the Treaty (art. 207 TFEU), the Commission negotiates on behalf of 28 EU Member States, on the basis of a Council decision (June 2013). Obviously, the Commission must report on a regular basis to a special Council committee (i.e. to the Member States), as well as to the European Parliament (EP) committee under the co-decision procedure. However, also the US decision-making process is complex, as shown even during the TTIP negotiations, due to the sharing of competences between the federal and the State levels (see the public procurement issue). Both the EU and the USA clearly have serious internal problems as regards their trade policy consistency and coherence.<sup>8</sup>

This set of Treaty provisions is defined by many scholars as one of the constitutive features of the EU (Weiler 1999). Furthermore, the Lisbon Treaty has further expanded the roles of the Commission and European Parliament in trade policy negotiations:

– The EP has co-decision power (art. 207.2 and 3) with the Council. This has huge implications because the EP is more conditioned by the oscillations of EU democratic parties and national public opinions (see the EP

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<sup>6</sup> According to "La Déclaration de Namur", promoted by P. Maignette, Wallonia president (December 5<sup>th</sup> 2016), the 'alternative way of doing trade negotiations' should be based on three principles: 1. Respect of democratic procedures; 2. Respect of national socio-economic, health and environmental laws; 3. Respect of public interest in the conflict setting mechanisms. Thomas Piketty, Vivien Schmidt, Philippe Aghion, Philippe Van Parijs, and other intellectuals support this Declaration.

<sup>7</sup> See MARKOVITS 2007; LACORNE and JUDT 2007; KATZENSTEIN and KEOHANE 2005; GIENOW-HECHT 2006.

<sup>8</sup> For the legal framework see paragraph one, introduction. For example, the second round of negotiations (7-11 October 2013 in Brussels) was cancelled because of the consequences of the US government 'shutdown'. The first round of negotiations (Washington, D.C. 8-12 July 2013) covered 20 various areas and was accompanied by a meeting with 350 stakeholders.

Resolution of 4 July 2013 and the intensive role played by its Trade Committee chaired by MP Berg during 2014/2016).

The scope of trade negotiations has been enlarged by including not only goods and services but also direct foreign investments (art. 206 TFEU) and IPR (with the exception of culture, audio-visual field, public services, like health and education: in these fields unanimity is required (according to art. 207.4).

In conclusion, until 2016, the EU-US trade negotiations were not at all like a simplistic deal between a wolf and a lamb, and this for several reasons. Four arguments well show that compared with the post-WW2 decade, a more balanced transatlantic relationship was gradually emerging:

A) If we take the three-level classification of foreign policies mentioned above, we can observe in 2013-2015, two comparably polyarchic negotiation processes on both sides of the Atlantic: the EU Commission and its DGs play the role of leading actors comparable with the US administration, while the Council of Ministers and the European/national Parliaments are comparable with the classic role of the US Congress (Schattschneider 1935). The fragmented and critical pressures applied by domestic constituencies and lobbies (both private and public) are complex factors in both the EU and the USA.

B) As regards trade, after the shortcomings of the WTO-DDR (with the exception of the narrow arrangements of Bali 2013 and Nairobi 2015) regional and interregional partnerships multiplied. Starting in 2005/6, both economic giants decided to look for alternatives to the WTO-DDR deadlock. The USA is not the single global and 'polygamist' trading power; the EU is a very proactive global trade policy actor as well.<sup>9</sup> For both of them,

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<sup>9</sup> The current apparent 'spaghetti bowl' is becoming highly geopolitical and interdependent at the same time. First of all, the TPP whatever its destiny, has an impact on the ongoing EU-Japan negotiations. Europeans are insisting on receiving preferential access to the Japanese market similar to that offered to the US. Furthermore, the legacy of the TTIP negotiations influences the EU-Japan bargaining towards upgrading its regulatory side. Business Europe and Keidanren – the respective largest business associations in Europe and Japan – called for an institutional mechanism that resembles the planned TTIP Regulatory Cooperation Body (RCB). The joint EU-Japan Summit statement of April 2015 noted for the first time that "regulatory cooperation is also to be dealt with via the FTA negotiations".

As said, TTIP has intensively interplayed with CETA. Finally, with Singapore and other partners like Vietnam, the EU's negotiations have reached their advanced stages, while with MERCOSUR a roadmap already exists. Similar deals are likely with other regions, such as ECOWAS, SADEC and the Eastern African Community. The EU DG Trade paper 'Trade for all' Oct.2015) prioritizes not only TTIP and EU-Japan arrangements but also? The EU-China bilateral investment treaty (BIT). It expresses openness to negotiations within ASEAN and the relevant Asia-Pacific region (like Free Trade Agreements with Australia, New Zealand,

the process of ‘downgrading’ after the Doha Round paralysis meant looking for temporary side routes through regionalism, inter-regionalism and bilateralism. This shift towards competition between, on the one hand, two ‘hub and spokes’ models, and on the other, a possible degradation towards contingent, ‘minilateral’<sup>10</sup> and competitive arrangements, looks similar for both trade powers, even if some features still distinguish the EU’s idea of trade negotiations. The key difference from the EU’s point of view is the shared emphasis on the belief that: a) an alternative to an inefficient global multilateralism may be set through regional and interregional arrangements; b) however, this indirect way should be conducive not to trade wars or spaghetti bowls, but to a new multi-layered multilateralism. This belief is directly linked to the EU’s own nature as a regional and multilateral entity. It may balance or at least mitigate negative perceptions of TTIP and other interregional arrangements by the BRICS.<sup>11</sup>

Much evidence shows that the US-EU negotiations were not at all of a hierarchical kind. The USA could not unilaterally assert its standards and rules, particularly those concerning the NTBs and ‘regulatory issues’. No US assertiveness was ‘irresistible’ since the EU’s standards are largely recognized as more sophisticated because they are a product of complex *internal* multilateral negotiations. When the US record of regulation is more efficient, as in the VW case, the US regulation prevails. Forecasting an inevitable end of the EU’s regulatory high standards would be to underestimate the record of two years of negotiations, proving that each player has good cards to play.

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the Philippines and Indonesia) and plans a deepening of the EU’s relationships with African partners. Finally the already existing Free Trade Agreements with Mexico and Chile and the Customs Union with Turkey should be updated. The prospect of a revival of the WTO-DDR is repeatedly mentioned.

<sup>10</sup> Contingent mini-lateralism can be defined as: “getting together the smallest possible number of countries needed to have the largest possible impact on solving a particular problem” (Naim 2012).

<sup>11</sup> The BRICS (BRICS is the acronym for the association of 5 major emerging economies: Brazil, Russia, India, China and South Africa) are expressing their worries, and China’s leadership (Xi Jinping and Li Keqiang) is restyling its Asia policy with a series of decisions: a) upgrading the ‘ASEAN plus 1’; b) upgrading ‘ASEAN plus 3’ and the ‘Regional Comprehensive Economic Partnership’ (RCEP), all of them regional groupings that exclude the US and the EU; c) starting the new interregional project OBOR, which is a multidimensional investment project aimed at deepening the relations with Europe both by sea across the Indian Ocean and by land through Russia. China is also reviving the problematic energy alliance with Russia (May 2014), consolidating the Shanghai cooperation organization and its partnership with Africa. Lastly, the Trade in Services Agreement (TISA) negotiations on services liberalization among 23 parties including the EU is outside the WTO framework. The EU is about to promote an ‘EU-China bilateral Investment Treaty’ (*market access, legal security, nondiscrimination...*); On the other hand, negotiations remain problematic with Brazil/MERCOSUR and India while in the case of Russia they are stopped by economic sanctions.

C) The EU's market power is important, as well as its attractiveness as the largest domestic market in the world (Damro 2012): it is based on the solid array of rules, institutions and values which often underpin the EU's discourse. Only because it is framed by sophisticated and reliable socio-environmental rules (not national, but supranational) can the European single market provide the expected benefits.

D) Regarding the political partnership, it is true that the Trans Pacific Treaty negotiations and signature in October 2015 evidence that the US Obama administration was able to pursue a global strategy characterized by issue-linkage (trade liberalization and security concerns, mainly related to the aim of containing China and demands made by Japan and South East Asia) in favour of a certain vision of its national interests. However, the TTIP negotiations show that issue linkages between trade and political issues were not necessarily in favour of the USA. Of course, the USA still provides the EU with military security within NATO and, potentially, in the case of tensions – notably those provoked by Putin's Russia in Eastern Europe – with energy security. Both these political asymmetries matter, but they do not dramatically change the pre-existing systemic context, making inter-regionalism and multilateralism possible even without the pre-condition of hegemonic stability (Keohane 1984, 2004, Kupchan 2013, Zacharia 2012, Acharya 2014). Even Donald Trump's "America first" cannot change this long-term tendency and this systemic reality. It would be a paradox to revive in 2016 the theories of the US 'empire' or 'hegemony' within the current multipolar and uncertain global context.

To conclude on this point, even if they are still politically uneven to some extent, negotiations in trade between the two most important regulatory agencies, EU and USA, were not so imbalanced that they necessarily gave birth to a kind of 'leonine pact', as asserted by the large opposition movement. TTIP was notably much less asymmetric than other US-led negotiations such as the Bretton-Woods arrangements of 1944, the Free Trade Area of the Americas (FTAA) and the Asia-Pacific Economic Cooperation (APEC) started in the 1990s, or the recent Trans-Pacific Partnership (TPP), which was negotiated and signed in a relatively shorter period. On scrutinizing the negotiation process, its rules and procedures, a complex mix of obvious bilateral tensions and multilateral standards emerges, while the 'general principle of conduct' prevents any unilateral arrogance. The extremist anti-American public opinion mobilization and rhetoric were partly based on largely subjective perceptions, which could be defined as 'post-truth'. It is a matter of fact that the global transatlantic relationship – as far as indicators such as trade –, market-power, performance of the decision-making mechanism, and political relations are concerned – evolved during the Obama administration towards a more balanced partnership.

#### 4. THE TURNING POINT OF JULY 2016 AND THE SHORTCOMINGS OF STRATEGIC INTERNAL COORDINATION OF THE EU AS A CIVILIAN POWER

Since the Treaty of Rome, the EU's main tool in its role as a global and interregional civilian power has been the Common Commercial Policy. However, in a complex multipolar world coordination between commercial policy and other external policies is crucial.

The stagnation of the TTIP trade negotiations in 2015 and 2016 had dramatic effects on European politics shaped by the transnational initiative of anti-TTIP and anti-CETA movements and the inertia of the supporting authorities and parties. The EU's consistency as a trade policy actor gradually declined, showing increasing internal fragmentation and paralysis. By contrast, in the US, the President and the government, on the basis of the fast-track procedure, were committed to supporting a successful negotiation of the Minister of Trade.

The turning point in the decline of the efficiency of the EU decision-making system compared with both federal States (US and Canada) is a double institutional process: on the one hand, the radical change within the EU's decision-making-process that occurred in July 2016; on the other, the missing strategic coordination of external policies.

A) In face of the US delegation's rigidity in negotiating the three main pending issues (the conflict setting mechanism and the nature of the ISDS, the GI, and the public procurement) and public opinion's critical mobilization (dangerous one year before crucial elections in Germany and France), some of the Council of Minister's most authoritative members (France and also Germany) asked for a dramatic change in the Council's voting procedure on TTIP and CETA: unanimity was required for 'mixed treaties'. Much to the surprise of public opinion, this extremely important change was suddenly conceded by the President of the Commission, J.-C. Juncker on July 5th 2016 as far as the CETA was concerned.<sup>12</sup> The Commission

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<sup>12</sup> European Commission Press release, 5<sup>th</sup> July 2016: "The deal is set to benefit people and businesses – big and small – across Europe as of the first day of its implementation. To allow for a swift signature and provisional application, so that the expected benefits are reaped without unnecessary delay, the Commission has decided to propose CETA as 'mixed' agreement. This is without prejudice to its legal view, as expressed in a case currently being examined by the European Court of Justice concerning the trade deal reached between the EU and Singapore".

The decision of the ECoJ on the EU-Singapore arrangement (21.12.2016), notably of the Advocate General, Mrs. Sharpston on the one hand, confirmed the need of a mixed treaty, even if, on the other, she surprisingly underlined the nature as a "political choice" of this decision. Furthermore, in the conclusions, she classified the protection of foreign direct investments as an exclusive competence which no member state is allowed to neglect. After rejecting it, Wal-

accepted the thesis that the TTIP and CETA are ‘mixed treaties’ requiring a unanimous vote by the members of the Council of Ministers, and by doing so the Commission relinquished its ‘exclusive competence’ on commercial policy. This decision dramatically weakened the bargaining power of the EU’s central institutions, and transformed several initially marginal issue-linkages addressed by a radicalized public opinion into a mainstream refusal. Contrary to the relatively stable opinions of experts (90% in favour), the opposition became majoritarian, at least in some countries. Such opposition, based on multiple linkages between trade negotiations and other domestic and international issues, exposed the EU’s fragilities as an efficient international trade actor: the NSA spy issue in Germany and the anti-Americanism feelings elsewhere had extremely serious consequences, such as the collapse of popular support for the TTIP and CETA. While the anti-TTIP and anti-CETA movement, strongly benefitting from social networks, increasingly became a true political opposition to what was perceived as a – direct or indirect – attempt by the USA to strengthen asymmetric transatlantic dominance at the expense of people’s quality of life and protecting standards, the EU’s authorities and the supporting political parties seemed paralyzed, divided, and lacking in leadership.

B) What became increasingly evident was the EU decision-making-system’s failure to ensure strategic horizontal coherence and vertical consistency in trade negotiations with the main global power. The objective of enhancing international coherence was explicitly addressed as a priority by crucial new Lisbon Treaty provisions: the EU’s legal personality (TEU art. 47) and the new role of the ‘double-hat’ High Representative for foreign policy (Commission vice-president and Chair of the Foreign Affairs Council). Furthermore, art. 207.1 is clear in situating the commercial policy within the principles and objectives of the EU’s foreign policy. But the first post-Lisbon High Representative for Foreign Affairs, Catherine Ashton, totally failed in coordinating her action with the Trade Commissioner K. De Gucht (2009-2014), with the consequence that an extremely important trade negotiation with the USA proceeded without any foreign policy coordination, which should have been the logical consequence of its political implications. After 2014, the High Representative (HR) of Common Foreign and Security Policy (CFSP) F. Mogherini and Trade Commissioner C. Malmström significantly improved discourse coordination (see Malmström’s paper ‘*Trade for all*’ of October 2015<sup>13</sup> and Mogherini’s

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lonia eventually gave the green light for the CETA’s signature by Belgium; ratification by the Wallonia parliament is still pending.

<sup>13</sup> Replacing the De Gucht strategic paper of 2011 (“Trade, Growth and World Affairs”), as well as the Mandelson “Global Europe” paper of 2006, the new trade strategic paper (“Trade



Global strategy paper of June 2016, replacing the famous – and obsolete – ‘Solana paper’ of 2003), but without any efficient upgrading of political coordination between foreign policy and trade policy. The opposite happened in practice, when the Commission President gave up the main principle of the Common Commercial Policy (CCP): exclusive competence.

The attempt to include, by means of the new ‘coordinative method’ and the creation of ‘cluster external relations’ within the Commission (involving DG Trade and several other Commission DGs, from Research to Enlargement, from Culture to Development Aid), disappointed hopes for a strategic coherence both within the Commission and between the Commission and the Council regarding crucial issues. Of course, talking of ‘strategy’ would raise too high expectations of a state-styled consistency and coherence at the level of institutions, priorities, means, and modes of policy-making. What is certain is that the ‘coordinative method’ for managing the complex EU decision-making process encountered huge obstacles and bureaucratic resistance. Coordinating the wide array of the EU’s external relations was and still is the main challenge for the HR for foreign policy. It is considered by many observers an impossible mission, even if Mrs Mogherini declares in public that “it is the most exciting side of her job as HR”.<sup>14</sup>

In conclusion, the TTIP-CETA negotiations have been the drivers of a twofold dramatic change as regards the EU’s commercial policy and the coherence of external policy in general. It is curious that the institutional asymmetry between the EU and the USA is mentioned as a problem by some of the national and sub-national actors that are precisely increasing this asymmetry by acting as multipliers of the number of veto players within the EU’s decision-making system.

## 5. THE COLLAPSE OF THE TTIP’S DOMESTIC LEGITIMACY: THE CRUCIAL CASE OF GERMANY AND USA

Why did the consensus for TTIP collapse in Germany, inducing the government and the federal court to play a negative role within the EU

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for all”) directly addresses the question of issue-linkage in its chapter 4.2 (pp. 22-26) with the title “A trade agenda to promote sustainable development, human rights and good governance”. This chapter is in line with the Lisbon Treaty as well as with the High Representative for Foreign Policy’s emphasis on the EU’s ‘comprehensive approach’ to external relations in the perspective of an open, transparent and disclosed policy making process in all its phases. See the emphasis of chapter 3 on *Transparency*, and the relevance of the reference to *European values* (chapter 4).

<sup>14</sup> Conclusions by HR F. Mogherini to the EUISS Annual conference “EU Strategy Matters”, Brussels 8-9 October 2015.

decision-making system? Why did the internal consensus collapse in the USA?

As regards Europe, Germany matters in the transatlantic trade negotiations more than any other European player and more than at any time before. Between, on the one hand, the French economic/trade protectionist approach to TTIP, combined with a revived political understanding with the Obama administration (see Libya, Mali, Syria), and on the other hand, the UK's approach characterized by a desire for economic and political symbiosis with the USA (defined as a special relationship in the UK), Germany seeks to combine its traditional support for transatlantic economic and trade integration with enhanced political autonomy in the areas of both external (Libya, Syria, Ukraine...) and internal security (private data protection).

When we underline that TTIP provoked political consequences and issue linkages, we risk misunderstanding: it would have no military implications for transatlantic relations. Both the EU (see the Malmström and Mogherini papers) and important Member States like Germany would have rejected the TTIP as a kind of 'economic NATO', or as a 'civilization project' against the BRICS, and notably China, Germany's preference was for a concrete market regulation agreement, open and potentially inclusive, a step towards a stronger, rule-based, economic and political multilateral order.

Two political events, the spy story provoked by the National Security Agency (NSA), and the 'democratic issue' related to TTIP and notably to the Investor-state dispute settlement (ISDS), provide clear examples of TTIP, raising issue linkages addressed in particular by German public opinion. These serious transatlantic rifts had dramatic consequences on the negotiations, not only making the German stance tougher but to a large extent explaining the TTIP failure.

A) As regards the NSA-spy issue, it furnishes evidence of a historic change in transatlantic relations: in recent decades, European States have been more ready than during the Cold War to raise issue-linkages of a political nature against any hegemonic legacy or arrogant move. In particular, private data protection is such a sensitive political issue that bipartisan pressures not only by the German *Bundestag* but also by the European Parliament (chaired by a German Social Democrat, M. Schulz) asked for suspension of the TTIP negotiations in 2014 and 2015, until the USA provided serious guarantees and firm commitments to stopping such asymmetric and humiliating spying practices. Furthermore, the European Court of Justice rejected in September 2015 the 'Safe Harbour' transatlantic agreement as an insufficient guarantee of private data protection. This issue not

only negatively interplayed with TTIP negotiations but was, and still is, the expression of cultural differences between the two transatlantic partners. The German and European approaches, whatever we think about them, do show unprecedented and clear signs of an enhanced European political desire for autonomy. They should neither be confused with old-fashioned anti-Americanism nor underestimated, because they are particularly strong precisely in the country which has traditionally been both a NATO junior partner and initially more in favour of the TTIP, i.e. Germany, led by the conservative Chancellor Angela Merkel.

B) The second transatlantic rift regards the ISDS issue (the investor-state dispute settlement mechanism). Germany's early rejection of the CETA with Canada was a warning signal (H. Mayer in Morin *et al.* 2015). As regards the TTIP, German authorities opposed the American understanding of the investor-state dispute settlement mechanism (ISDS) and were not isolated on this matter: convergences with Italy, Belgium and the Scandinavian countries emerged, and this approach gradually became the EU's mainstream orientation.

A dispute settlement mechanism would have been accepted by Germany only on certain conditions: public character of the new court; transparent procedures, professional and permanent judges; possible right to appeal against a decision; relevance of jurisprudence. Only in October 2015 did the new Malmström paper on trade strategy welcome these concerns of German public opinion. The proposal of ISDS as a "fully fledged permanent International Investment Court" or a "WTO appeal Court" (p. 22) seemed likely to fulfil the expectations of large part of the critical public opinion.

However, although this new EU strategy was a means to achieve larger internal consensus, it was not the best way to reach an agreement with the US; whereas Canada gradually accepted the EU's proposals in occasion of the final negotiation round of October-November upgrading the conflict-setting-mechanism into a public permanent court, the TTIP negotiation stagnated. This explains the SPD's 2016 decision to accept a new compromise with its governmental coalition partner CDU led by A. Merkel, thus favouring the CETA at the expense of the TTIP.<sup>15</sup> Also the authoritative

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<sup>15</sup> The SPD leader and Vice-Chancellor S. Gabriel supported by the authoritative monthly journal *Neue Gesellschaft*, (n. 10, 2014, "Klare Sicht auf TTIP"), started criticizing the TTIP and in Spring 2016 proposed a new compromise to Angela Merkel, redefining the German government's policy as 'no to TTIP and yes to CETA'. Contrary to the positive statement of the Swedish, Italian and other social democratic parties, this gradually became the new orientation of the majority of the Party of European Socialists (PES). Greens, extreme left and the Wallonia socialists, as well as the extreme right, opposed both CETA and TTIP.

German Federal Court (*Bundesverfassungsgericht*) indirectly supported this shift to a critical approach.<sup>16</sup>

As regards the USA, the 2016 presidential campaign was a crucial turning point: the three main presidential candidates (Sanders, Clinton and Trump), even if to different extents, rejected both the Obama initiatives of Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP). The president Trump, withdrew from the TPP, while TTIP negotiations were postponed *sine die*.

Overall, Donald Trump's victory has put an end not only to all the interregional projects and trade negotiations set or started by the Obama administration, but also to the lightest regional organization, NAFTA, established on bipartisan initiative by G. Bush senior and B. Clinton in 1993-1994. "America first" obviously means trade protectionism against WTO, transactional and arrogant bilateralism, as a way to dismantle the grand multilateral design set by the American hegemonic power in 1944-47 (from the Bretton Woods Conference, through the UN Charter, to the foundation of GATT).

Many observers note that populists ask for nationalism and protectionism as a shield against globalization: however it is increasingly clear that it is not untrammelled trade liberalization which has been stopped by Trump (MNC continue to develop according to the 'law of the jungle', more than before) but the most sophisticated arrangements of trade regulation ever, the so called second generation trade arrangement, including FTA NTB and regulatory issues. In other words, the US administration is not stopping business globalization, but the best ways of regulation of globalization.

## 6. CONCLUSIONS REGARDING THE EU AND THE MULTILATERAL ORDER

Whatever we think about the very vague concept of 'populism', the democratic legitimacy challenge in the West may not only stop any second-generation trade arrangement but bring the post-WW2 multilateral global order into question.

As regards Europe, the main political issue at stake for the second-generation trade arrangements involving the EU is internal legitimacy. The

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<sup>16</sup> See the German federal court decision of October 12<sup>th</sup> 2016, which rejected the demand by 190 000 citizens to stop CETA negotiations as affecting the German democracy; however, this decision did also underline the threat of a German veto-power within the EU Council in he case of violation of article 20.4 of the *Grundgesetz*. The main condition set by the German supreme court for CETA approval was that the national parliaments must have their say in the ratification process especially when national competences are concerned. The SPD President Gabriel was happy with the decision, while the opposition leaders declared 70% satisfaction. No decision was taken by the German court regarding TTIP because the negotiation was suspended.

disappointing story of the TTIP (and TPP) is no exception even if anti-Americanism played a leading role. Since 2015/2016 it has become clear that, contrary to the past output legitimacy, based on true benefits (Scharpf 1999) and contingent legitimacy (Keohane 2004), every second-generation arrangement depends on broad social and democratic consensus provided not only by all the EU institutions but also by and within the EU member states. This includes a) the national authorities conditioned by the domestic electoral cycles; b) the national federal institutional arrangements, in some cases empowering local parliaments.

Furthermore, in the 21<sup>st</sup> century, contrary to the 20<sup>th</sup> century, the demand for the enhanced legitimacy of internal/external policy-making can no longer simply be addressed by arguing about the democratic nature of the contracting States and by consequence of the Council of Ministers (Moravcsik 2002). What is needed is a supplementary input-legitimacy, combining the supranational and sub-national levels of parliamentary democracy plus a situation of 'non-hostility' of civil society NGOs. This is extremely difficult to achieve and can only be provided by coherent decisions of the European institutions, including a multilevel parliamentary system: the European Parliament, plus national parliaments, plus regional parliaments where national constitutions require it. Every parliamentary decision is strongly influenced by emotional mobilization, in some cases through people's well informed concerns or, in other cases, notably in times of populist waves, by 'post-truth' types of radical opposition.

Our analysis clearly indicates that the TTIP deadlock happened because of multiple democratic deficits since its very beginning and which became dramatic in 2016: the controversy about the publicity and transparency of the initial negotiating mandate; repeated and justified demands for transparency during the early negotiation process; the increasing public distrust of lobbying by private multinational companies; and, last but not least, the revival of protectionist reflexes, anti-Americanism, and various domestic pressures against free trade and market regulation.

We may conclude that in Europe (and maybe on both sides of the Atlantic), the second-generation arrangements, including not only the FTA but also enhanced trade regulation through mutual recognition as well as new shared rules regarding social, environmental, health and public service standards, are inevitably raising not only multiple concerns, demands for participation, accountability and democratic control by public opinion, trade unions and multilevel parliaments, but also irrational fears and populist demands for protectionism.

The national and EU democratic institutions were incapable of positively channelling and framing such an unprecedented explosion of emotions, concerns and demands for civic participation.

There are many signs of fragmentation and political disarray. What is new is that the centrality of the democratic deficit and the enhanced role of what we call a 'European multilevel parliamentary system' and its interplay with both civil society and the European Commission has been conducive to a workable compromise only in the case of the CETA signature, and at the price of repeated dramatic crises. The intense dialogue between the Commission and the EP Trade Committee was constructive for both TTIP and CETA but dramatically insufficient, since the two treaties were officially defined by the Commission President J.-C. Juncker on July 2016 (under the pressure of the Council of Ministers' more authoritative members) as 'mixed treaties' demanding the unanimous vote of every Member State, which means, for Belgium, the unanimous decision of every regional sub-national parliament (Flemish, Wallonia and Brussels regions).

In this new context, the broad public consultation promoted, after a long delay, by the European Commission was not at all successful in reconstructing a necessarily unanimous consensus, improving details of the negotiations, channelling both fears and precaution demands.<sup>17</sup> Opening such a public debate was the right choice for publicity and input democracy, but not enough for a successful democratic deliberation based on unanimous consensus.

The theory of democracy is divided in evaluating whether the veto-right exercised by single states or even by local assemblies (e.g. Wallonia, representing 3 million people out of 500 million EU inhabitants), is an expression of true democracy (as asserted by the "Namur Declaration" of 2016) or a form of dictatorship by a minority encapsulated within state boundaries (as Hans Kelsen and other classic references assert). Furthermore, breaking the past compromise between democracy and multilateralism, and weakening multilateral and interregional regulatory frameworks may have negative consequences on constitutional democracy: less protection of individual rights, worsening quality and efficiency of democratic deliberation, decreasing capacities to achieve important public purposes at national and international levels (Keohane, Moravcsic and Macedo 2009). Moreover, how can powerful entities – states and corporations – be held accountable in world trade (instead of their acting as they please) when the WTO is in deadlock and even the second-best options, interregional and bilateral arrangements, are rejected?

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<sup>17</sup> Regarding the topics at the centre of public debate: public health, labour standards, democracy and technical/practical concerns, public procurement, transport, issues (covered by the 'Reach' Directive) and/or linked to the EU's environmental standards, car emissions, agriculture, phytosanitary services, explicitly value-driven issues such as GMOs, food safety, nature and scope of the ISDS and, in general, all the issues where public perceptions and culture matter.



What is certain is that the European commercial policy, a fundamental tool of the EU's external influence, is seriously wounded. It used to be a policy without politics during the period of trade commissioner De Gucht; currently a mix of democratic demands and populist politics is killing it. The new priority for legitimacy by Commissioner Cecilia Malmström, in enhanced coordination with the HR for foreign policy, was too late and eventually inefficient. Such an option for dialogue and political leadership was largely absent in the Commission's action during the first phase of TTIP negotiations (2013-2014). The new policy adopted in 2015 aimed at 'consensus building'; notably at engaging actively with civil society, with the EP and national governments' responsibility, seeking both enhanced efficiency and consensus. But it came too late, since the anti-TTIP multiple oppositions within some national public opinion was strong.

However, something more general and crucial is going wrong with both multilateral and interregional trade negotiations involving the USA and the EU, something which will influence next decade. A narrow interest-based US trade policy could mean either that protectionism will exacerbate trade conflicts or that trade deals will be about making money in a transactionalist way not enhancing global or interregional liberal trade regimes. Regarding the EU, what we can say is that not only the TTIP but every second-generation arrangement will be unable to regain the previous majoritarian consensus without a profound reflection on the magnitude of the historical change occurring and its major institutional consequences. Since even important economists (e.g. Krugman, Stiglitz) have at last identified 'simplistic neo-liberal market fundamentalism' as responsible for the rise of protests by social classes whose material security has declined in the West, new trade-offs should be explored between trade liberalization/regulation, on the one hand, and democratic representation, accountability and legitimacy on the other.

Secondly, weakening the EU common commercial policy explicitly addresses the very core of the EU's external relations. This legitimacy challenge may stop any second-generation trade arrangement and foster a return to a simple FTA with extremely negative consequences for the EU's global role as a civilian power. Beyond Europe and the USA, of course, economic globalization itself is not collapsing, but it is slowing down from its hyper-globalization phase while attempts at re-regulation are failing. Forward to the past? Back to the 30s? Or are we witnessing the end of the post-WWII American economic order combining multilateralism and democracy, and the start of an unknown era based on a conflictual combination of complex interdependence with new forms of nationalism and protectionism? Global governance and Western domestic democracy are both interlinked and at stake as never before since WW2.

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