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**THE TTIP NEGOTIATION PROCESS: A TURNING
POINT IN THE UNDERSTANDING OF THE
EUROPEAN PARLIAMENT'S ROLE IN THE
PROCEDURE FOR CONCLUDING EU EXTERNAL
AGREEMENTS?**

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ABSTRACT

The 2009 Lisbon Treaty undoubtedly democratized the procedure for concluding EU External Agreements. Not only did it improve the European Parliament's right to information (art. 218§10 TFEU), but it expanded the hypotheses in which this democratic institution has to give its consent at the end of the procedure, particularly in the case of trade agreements (art. 218§6.a) TFEU). Even if the latter power does not allow the EP to amend the provisions of the agreement under negotiation, this institution regularly intends to use this veto power as a threat to see its recommendations on the content of the agreement taken into account. This classic issue is however of unprecedented magnitude concerning the Transatlantic Trade and Investment Partnership (TTIP) under negotiation with the USA, given the ambition of this proposed agreement and the highly sensitive issues which are at stake. In this context, the concerns amply expressed by public opinion somehow resonated inside the European Parliament, generating strong dissent among MEPs. Thus, the first half of 2015 was characterized by quite a tumultuous internal parliamentary procedure which led to the adoption, on July 8, of the resolution that contains recommendations to the Commission on the negotiations for the TTIP, and that drafts the red lines not to be crossed to obtain the EP's consent at the end of the procedure.

This episode seems to shed new light on the European Parliament and could even draw a turning point in the understanding of the role of this democratic institution in the process for negotiating trade agreements. Firstly, it reveals that the European Commission now takes the risk of a parliamentary veto very seriously, and therefore intends to better involve the EP in the procedure thanks to improved information and greater awareness of its comments. Secondly, it highlights the difficulty in carrying out the internal parliamentary process in order to develop a clear position on the content of such a strategic and sensitive agreement. More particularly, the TTIP negotiations showed the delicate balance to be found between, on the one hand, the debate in plenary as witness of the primary function of a democratic parliament, and on the other hand, the parliamentary work outside the plenary, indicating the search for effectiveness

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INTRODUCTION

On June 9, 2015, the President of the European Parliament (“EP”), Martin Schulz, decided¹ to postpone the vote on the Transatlantic Trade and Investment Partnership (“TTIP”) resolution (scheduled for June 10), *“to give more time to the International Trade Committee² to further reflect on the outstanding issues and to reduce as much as possible the large number of amendments tabled”*.³ The day after, following a vivid discussion in plenary, the MEPs also decided, by a very small majority,⁴ to postpone the debate on the TTIP⁵ *“to move it closer to the vote”*.⁶ This last minute change gave rise to opposite reactions among MEPs, especially within the lead INTA Committee. Whereas its chair Bernd Lange⁷ welcomed such a postponement, which he considered useful to reach a stable majority for the TTIP resolution and to come forward with a strong, clear and unequivocal position,⁸ its vice-chair Yannick Jadot⁹ exclaimed *“What is this European Parliament in which the President decides to manipulate the rules because he is afraid of not having a majority for the TTIP (...)? What is this European Parliament which is afraid of the vote, which is afraid of the debate and which is afraid of European citizens?”*.¹⁰ Almost a month later, on June 29, the INTA Committee finally paved the way for a plenary vote by retabling the June plenary amendments,¹¹ which allowed the EP to definitely vote and adopt the resolution on July 8.¹²

¹ On the basis of Article 175 of the Rules of Procedures of the European Parliament (“RPEP”) [September 2015] which states that *“When more than 50 amendments and requests for a split or separate vote have been tabled to a report for consideration in Parliament, the President may, after consulting its Chair, ask the committee responsible to meet to consider those amendments or requests. Any amendment or request for a split or separate vote not receiving favourable votes at this stage from at least one-tenth of the members of the committee shall not be put to the vote in Parliament”*.

² Hereinafter “INTA Committee”.

³ 116 amendments were tabled. See, “Martin Schulz on the postponement of the vote on the TTIP resolution”, European Parliament Press Release – Internal Policies and EU Institutions, Strasbourg, 10 June 2015.

⁴ 183 in favour, 181 against, 37 abstentions.

⁵ According to Article 152§2 RPEP which states that *“2) Once adopted, the agenda may not be amended, except in pursuance of Rules 154 or 187 to 191 or on a proposal from the President. If a procedural motion to amend the agenda is rejected, it may not be tabled again during the same part-session”*.

⁶ In the words of Martin Schulz.

⁷ Rapporteur for the resolution on TTIP (S&D).

⁸ See “TTIP: Rapporteur Lange welcomes postponement of vote”, European Parliament, Plenary Session Press Release – External/international Trade, 9 June 2015.

⁹ Shadow Rapporteur for the resolution on TTIP (Greens/European Free Alliance).

¹⁰ European Parliament, Debates, 10 June 2015, pt. 7 “Amendment of the agenda”.

¹¹ “TTIP: MEPs pave way for plenary vote by retabling June amendments”, European Parliament – INTA Press Release, 29 June 2015.

¹² European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), P8_TA-PROV(2015)0252.

In the background, this is the role endorsed by the European Parliament in the framework of the procedure for concluding EU external agreements which is at stake: As *the* democratic assembly of the European Union, should the EP always give priority to democratic deliberation even if this reveals internal dissent likely to weaken its position, or should it look for a consensus at all costs, in order to draft strong positions agreed by a great majority of MEPs and to try to influence the best the negotiation process?

Indeed, the European Parliament can claim to weigh in on the negotiations of such a free trade agreement since the Lisbon Treaty significantly strengthened its position. First of all, new article 218§10 of the Treaty on the functioning of the European Union (“TFEU”) improved its right to information, stating that the EP shall be “*immediately and fully informed at all stages of the procedure*”. But above all, since the Common Trade Policy is now governed by the ordinary legislative procedure,¹³ the EP will have to give its consent when the negotiations are finished, before the conclusion of the TTIP.¹⁴ Even if this power does not allow the European Parliament to amend the provisions of the agreement under negotiation, it is not surprising that this institution, as usual, intends to use this veto power as a threat to see its recommendations on the content of the agreement taken into account.

Concerning the TTIP, this issue is, however, of unprecedented magnitude given the partner involved and the proposed agreement. In fact, in 2013, the USA represented the most common destination for goods exported from the EU (16.6%), the third supplier of goods imported into the EU (11.6%),¹⁵ as well as the main EU partner for trade of services¹⁶ and Foreign Direct Investments.¹⁷ Besides, the TTIP seems crucial if the EU wants to remain a strategic partner of the USA as the latter is strengthening its relations with several Asian and Pacific countries through the Trans-Pacific Partnership (“TPP”).

Consequently, the EU began negotiating the Transatlantic Partnership in July 2013,¹⁸ and wishes to conclude an ambitious, comprehensive and balanced agreement, consistent with WTO rules and obligations, which “*shall provide for the reciprocal liberalisation of trade in goods and services*

¹³ According to Article 207§2 TFEU.

¹⁴ According to Article 218§6a)v) TFEU. Before the Lisbon Treaty, the European Parliament was excluded from the procedure for concluding trade agreements. Indeed, ex-article 300§3 TEC stated that “*The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3) [Common trade policy]*”.

¹⁵ After China (16,6%) and Russia (12,3%). See, “International trade in goods”, Eurostat Statistics Explained, August 2014, http://ec.europa.eu/eurostat/statistics-explained/index.php/Main_Page/fr.

¹⁶ Representing 10,5% of EU services exports and 11,7% of EU services imports. See “International trade in services”, Eurostat Statistics Explained, July 2014.

¹⁷ See “Foreign Direct Investment statistics”, Eurostat Statistics Explained, June 2014.

¹⁸ In total there have been eleven rounds of negotiations (July 2013, November 2013, December 2013, March 2014, May 2014, July 2014, September-October 2014, February 2015, April 2015, July 2015, October 2015).

as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments”.¹⁹ More specifically, the TTIP rests on three components, namely market access (a), regulatory issues and Non-Tariff Barriers (NTBs) (b), and rules (c). Once fully implemented, this agreement is supposed, even if the statistics are controversial,²⁰ to bring significant economic gains for the EU (€119 billion a year) and the USA (€95 billion a year), as well as to have a positive impact on worldwide trade and income.²¹

Despite these alleged beneficial effects, the highly sensitive issues which are at stake - such as data protection, social, environmental and sanitary standards, or investment protection - led public opinion to grip this project and express its hostility, particularly through the European Citizens’ initiative “Stop TTIP”,²² and the public consultation on ISDS²³ organised in 2014 by the European Commission.²⁴

These concerns somehow resonated inside the European Parliament throughout its internal procedure for the adoption of the resolution containing recommendations to the Commission on the negotiations for the TTIP. Not only did the diversity of issues at stake command the opinion of 13 parliamentary committees²⁵ but their sensitivity generated strong dissent among MEPs. Hence, the content of the resolution, which shall draft the red lines not to be crossed to obtain the EP’s consent at the end of the procedure, was eagerly awaited.

In this regard, the current “wave of panic” concerning the TTIP, inside and outside the European Parliament, seems to draw a turning point in the understanding of the role of this democratic institution in the process of negotiating trade agreements. Firstly, it reveals that the fear of a parliamentary veto at the end of the procedure as well as the search for a more democratic process led to a reinforced involvement of the EP during the negotiations (1). Secondly, it highlights the

¹⁹ Council of the EU, Directives for the negotiation on the TTIP, 11103/13 DCL 1, Brussels, 9 October 2014, pt. 3.

²⁰ See J. François, M. Manchin, H. Norberg, O. Pindyk, P. Tomberger, “Reducing Transatlantic Barriers to Trade and Investment – An Economic Assessment”, Final Project Report, Centre for Economic Policy Research, London, March 2013 ; G.J. Felbermayr, B. Heid, S. Lehwald, “Transatlantic Trade and Investment Partnership (TTIP): Who benefits from a free trade deal? Part 1: Macroeconomic Effects”, Global Economic Dynamics, BertelsmannStiftung, 2013 ; L. Fontagné, J. Gourdon, S. Jean, “Transatlantic Trade: Wither partnership, which economic consequences?”, CEPII, Policy Brief, September 2013; W. Raza, J. Grumiller, L. Taylor, B. Tröster, R. von Arnim, “Assess_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership”, Österreichische Forschungsstiftung für Internationale Entwicklung, Policy Note, October 2014.

²¹ J. François, M. Manchin, H. Norberg, O. Pindyk, P. Tomberger, “Reducing Transatlantic Barriers to Trade and Investment – An Economic Assessment”, cited *supra* note 20.

²² The Commission refused to register this European Citizens’ Initiative (See its letter C(2014)6501, 10 September 2014). Several European citizens then brought an action before the General Court of the European Union (Case T-754/14) claiming for the annulment of the Commission Decision C(2014)6501.

²³ “Investor-State dispute settlement”.

²⁴ See Commission Staff Working Document, Report – “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic and Investment Partnership Agreement (TTIP)”, SWD(2015)3 final, Brussels, 13 January 2015.

²⁵ Transmitted to the lead INTA Committee.

difficulty in carrying out the internal parliamentary process in order to develop a clear position on the content of such a strategic and sensitive agreement. More particularly, the TTIP negotiations showed the delicate balance to be found between, on the one hand, the debate in plenary, as witness of the primary function of a democratic parliament, and on the other hand, the parliamentary work outside the plenary (especially in the lead Committee as well as in and between political groups), indicating the search for effectiveness (2).

1. THE INTENSIFIED SEARCH FOR THE EP'S REINFORCED INVOLVEMENT THROUGHOUT THE NEGOTIATIONS

1.1. A successful exploitation of the power of consent

Under Article 218§6a) TFEU, the power of consent in the hands of the European Parliament only allows the latter to give, at the end of the procedure, the green light to conclude the agreement or, on the contrary, to block such a conclusion and to sabotage the entire process. In no case do the treaties allow the EP to amend the provisions of the proposed agreement or to participate ahead of the stage of conclusion. However, the practice demonstrates that this democratic institution means to use its veto power as a “procedural weapon” in order to go beyond Article 218 TFEU, and to actively influence the content of the negotiations. Indeed, the European Parliament has taken the habit of making recommendations during the negotiations so that the Commission can take them into consideration before the initialling of the agreement.²⁶ Of course, the Commission is not bound by such recommendations. The 2010 Framework Agreement on the relations between the EP and the Commission only states that the latter “*shall take due account of Parliament’s comments throughout the negotiations (...) [and] explain whether and how Parliament’s comments were incorporated in the texts under negotiation and if not why*”.²⁷

Yet, the EP usually means to put additional pressure on the Commission when its consent is in the end required. As a matter of fact, it does not hesitate to suggest in non-legislative resolutions that it will not approve the conclusion of an agreement if its claims are not followed.²⁸ This is exactly what the EP did in its resolution of 23 May 2013 on “EU trade and investment negotiations with

²⁶ In compliance with Article 108 RPEP.

²⁷ Framework Agreement on relations between the European Parliament and the European Commission, *OJEU* L 304, 20 November 2010, p.47, Annex III, pts.3 and 4.

²⁸ On this issue, see for instance C. Delcourt, “La banalisation de la procédure d’approbation des accords externes”, *Revue trimestrielle de droit européen*, 2011, p. 659 ; I. Bosse-Platière, « Le Parlement européen et la procédure de conclusion des accords internationaux », in *Le Parlement européen après l’entrée en vigueur du traité de Lisbonne*, J. AUVRET-FINCK (dir.), Larcier, 2013, 273p., pp. 79-107, pp. 100-103.

the USA”. Having highlighted the elements it considered essential to include in the future negotiating mandate – such as the exclusion of cultural and audiovisual services, a high protection of personal data, or the full respect of fundamental rights standards –, the EP reminded everyone, as a warning, “*that Parliament will be asked to give its consent to the future TTIP agreement (...) and that its positions should therefore be duly taken into account at all stages*”.²⁹ In the same spirit, the report containing the EP’s recommendations on the TTIP negotiations, adopted on May 28, 2015, by the INTA Committee, tries to “intimidate” the Commission by casting the shadow of the unfortunate ACTA episode.³⁰

Therefore, even though the EP’s manoeuvre is not new, and even though the real impact of the EP on the TTIP’s content can only be measured when the procedure is finished, the European Commission seems particularly sensitive to the EP’s claims.

In this respect, the Commission may have learnt from the post-Lisbon parliamentary practice. Even if a “*banalisation*”³¹ of parliamentary consent can be observed, the European Parliament strengthened the credibility of its threats. Indeed, the three successive SWIFT,³² Fisheries Protocol,³³ and ACTA³⁴ episodes brightly demonstrated that the EP does not hesitate to use its veto power when it is weakly and lately involved in the procedure,³⁵ and when its “essential”

²⁹ European Parliament resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, P7_TA(2013)0227, pt. 25. For another example, see European Parliament resolution of 12 March 2014 on the situation and future prospects of the European fishing sector in the context of the Free Trade Agreement between the EU and Thailand, P7_TA(2014)0210.

³⁰ Report containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 1 June 2015, A8-0175/2015, Explanatory Statement. In 2012, the EP declined to consent to conclusion of the ACTA (European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, P7_TA(2012)0287).

³¹ Expression borrowed from C. Delcourt, “La banalisation de la procédure d’approbation des accords externes”, cited *supra*, note 28. In English, “normalization”.

³² European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, P7_TA(2010)0029.

³³ European Parliament legislative resolution of 14 December 2011 on the draft Council decision on the conclusion of a Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, P7_TA(2011)0569.

³⁴ European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, P7_TA(2012)0287.

³⁵ See for instance European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058 ; also see “Explanatory Statement” in Recommendation on the draft Council decision on the conclusion of a Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, 29 November 2011, A7-0394/2011.

claims are not adequately taken into account, particularly when sensitive issues³⁶ which mobilize civil society are at stake.³⁷ Moreover, the SWIFT and Fisheries Protocol cases showed that once the EP vetoed the agreement/Protocol, it was necessary to better involve him during the renegotiation and to grant him some concessions in order to secure its approval.³⁸ Hence, the battle was to some extent won by the European Parliament, but at the cost of the failure of the whole first procedure, which jeopardized the credibility of the European Union itself.

Regarding the TTIP process, it seems that the Commission is no longer ready to take such a risk and wishes to obtain the EP's approval at the first attempt. More particularly, the great concerns expressed inside the EP about the ISDS mechanism³⁹ surely encouraged Commissioner for trade Cecilia Malmström to organise a special meeting with the INTA Committee in March 2015,⁴⁰ and to present a concept paper in May 2015 in order to improve the ISDS mechanism.⁴¹ Above all, on September 16, the European Commission published a draft text concerning provisions on investment protection and resolution of investment disputes and investment court system, to be included in the TTIP. The latter underlines that the Commission "*will discuss the proposal with the European Parliament before presenting a formal text proposal to the United States*".⁴² Thus, it looks like the Commission will not make firm commitments to the USA concerning the sensitive issues until it is sure to have the approval of the European Parliament. That is why the comments transmitted by the EP to the Commission are crucial. In order to address such recommendations, the EP insists on an essential prerequisite which has also been much more taken into consideration

³⁶ More specifically privacy/personal data in the SWIFT case, civil liberties in the ACTA case. The fisheries protocol with Morocco raised environmental/ecological concerns as well as issues with regard to Western Sahara.

³⁷ See particularly the petition against ACTA signed by almost 2.5 million people in 2012, which called on MEPs "*to stand for a free and open Internet and reject the ratification of the Anti-Counterfeiting Trade Agreement (ACTA)*" ("Parliament receives petition against ACTA", European Parliament, Press release – Petitions/External/international trade, 28 February 2012).

³⁸ On the SWIFT case, see M. Cremona, "Justice and Home Affairs in a Globalised World: Ambitious and Reality in the tale of the EU-SWIFT Agreement", Institute for European Integration Research, *Working Paper Series*, Working Paper n° 04/2011, March 2011; A. Ripoll Servent & A. MacKenzie, "The European Parliament as a 'Norm Taker'?" EU-US Relations after the SWIFT Agreement", *EFAR*, Vol. 17, April 2012, Special Issue, pp.71-86. On the Fisheries Protocol, see the Explanatory Statement of the Recommendation on the draft Council decision on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (A7-0417/2013) which states that "*After the European Parliament declined to grant its consent to a one-year extension of the fisheries protocol with Morocco, which expired on 27 February 2012, the Commission opened negotiations on the conclusion of a new protocol which has now been submitted for consent. Both parties bore Parliament's concerns very much in mind during the negotiations and agreed that the new text should seek to respond to the criticisms and guidelines contained in the report of the Committee on Fisheries and the resolution adopted at the same time, which called for guarantees that it would be mutually beneficial and evidence that it would be based on economic, social and environmental sustainability*".

³⁹ See below.

⁴⁰ INTA Committee, Minutes – 18 March 2015, INTA_PV(2015)0318_1.

⁴¹ Concept paper, "Investment in TTIP and beyond – the path for reform", May 2015, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

⁴² http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

during the TTIP negotiations: its full information throughout the negotiations, prior to the approval stage.

1.2. A new starting point in the improvement of the EP's information?

In this regard, the EP can undoubtedly rely on several legal texts. Indeed, since the application of the Lisbon Treaty, its right to information during the procedure for concluding external agreements has been improved. Article 218§10 TFEU, which states that “*the European Parliament shall be immediately and fully informed at all stages of the procedure*”,⁴³ has been extensively interpreted by the Framework Agreement on relations between the European Parliament and the European Commission (2010).⁴⁴ According to the latter, the Commission shall inform the EP about its intention to propose the start of negotiations, present its draft negotiating directives, and keep it “*regularly and promptly informed about the conduct of negotiations until the agreement is initialled*”. Moreover, since the TTIP will require the consent of the EP, the Commission shall “*provide [it] during the negotiation process all relevant information that it also provides to the Council*”, including “*draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement, (...) the text of the agreement to be initialled [and] any relevant documents received from third parties*”⁴⁵.⁴⁶

Specifically, regarding TTIP negotiations, the European Commission works closely with the lead INTA Committee, as well as with a specially set-up Monitoring Group and a group of high-ranking MEPs around the Parliament's president. According to the European Commission, from the first round of negotiations in July 2013 to March 2015, more than 65 important TTIP documents had been sent to the EP, and the representatives of the Commission had appeared at the 15 meetings of the EP and many more informal meetings.⁴⁷ Besides, MEPs have been able to

⁴³ See also Article 207§3 TFEU (concerning trade agreements): “*The Commission shall report regularly (...) to the European Parliament on the progress of negotiations*”.

⁴⁴ Framework Agreement on relations between the European Parliament and the European Commission, cited *supra*, note 27, Annex III.

⁴⁵ Subject to the originator's consent.

⁴⁶ The Commission shall also inform the Parliament when an agreement is initialled, and when it intends to propose its provisional application or its suspension. Moreover, when the consent of the EP is required, the Commission shall also keep Parliament fully informed before approving modifications to an agreement which are authorised by the Council, by way of derogation, in accordance with Article 218(7) TFEU.

⁴⁷ See European Commission, “The Transatlantic Trade and Investment Partnership (TTIP) – TTIP explained”, 19 March 2015, 6 p., pt. 3, http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf.

obtain information from the Commission by fully using a classical instrument of parliamentary scrutiny, namely parliamentary questions.⁴⁸

Yet, the European Parliament keeps calling for greater transparency and for broad access to information for all MEPs. In particular, as negotiating directives and some negotiating documents are classified, only a few MEPs, duly authorized, are allowed to consult them in “reading rooms”, in which the information cannot be copied by any means (photocopying or photographing) and no notes of the documents can be taken.⁴⁹

In this respect, the EP seems to benefit from the global movement towards transparency which is currently surrounding TTIP negotiations.⁵⁰ Indeed, after intense criticism from public opinion against the opacity of the process, and in compliance with the European Ombudsman’s request (Emily O’Reilly),⁵¹ the Council accepted in October 2014 to declassify and to release the TTIP negotiating mandate.⁵² Moreover, the European Commission has, for several months, been publishing a series of texts on its website, including EU’s negotiating texts and position papers, as their disclosure would not undermine the protection of any of the public or private interests provided for in Article 4 of Regulation 1049/2001.⁵³ Even if this evolution is highly appreciated and promoted by the EP, the delay before publication can be long and documents which need to stay classified are not impacted. That is why, besides public information, the European Commission committed itself in November 2014 to providing MEPs an improved access to classified information, for instance by “*extending the use of a ‘reading room’ to those MEPs who had no access to ‘Restreint UE’ documents so far*”.⁵⁴

⁴⁸ Available on the website of the European Parliament.

⁴⁹ For information classified at the level EU RESTRICTED, see Decision of the bureau of the European Parliament of 15 April 2013 concerning the rules governing the treatment of confidential information by the European Parliament, *OJEU* C 96, 1 April 2014, p.1 (art. 8 to 11); For information classified at the level EU CONFIDENTIAL, EU SECRET or EU TOP SECRET, see Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, *OJEU* C 95, 1 April 2014, p.1 (art. 4 to 6).

⁵⁰ On this issue, see C. Flaesch-Mougin, “Commerce et démocratie – Quelques réflexions sur l’ère post-Lisbonne”, in *Mélanges en l’honneur du Professeur Henri Oberdorff*, LGDJ, 2015, 303 p., pp. 107-124.

⁵¹ See Letter to the Council of the EU requesting an opinion in the European Ombudsman’s own-initiative inquiry OI/11/2014/MMN concerning transparency and public participation in relation to the TTIP negotiations, 29 July 2014, http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54634/html.bookmark#_ftnref2.

⁵² Council of the EU, “TTIP negotiating mandate made public”, Press Release ST 14095/14 PRESSE 507, Brussels, 9 October 2014. Also see, Council of the EU, Directives for the negotiation on the TTIP, cited *supra*, note 19.

⁵³ Regulation (EC) n° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJEC* L 145, 31 May 2001, p. 43. On the topic of transparency during the negotiation process, see for instance General Court, 19 March 2013, *Sophie in’t Veld v European Commission*, case T-301/10 ; ECJ, 3 July 2014, *Council of the EU v Sophie in’t Veld*, case C-350/12 P ; ECJ, 4 June 2015, *Stichting Corporate Europe Observatory v European Commission*, case C-399/13 P.

⁵⁴ Communication to the Commission concerning transparency in TTIP negotiations, C(2014)9052 final, 25 November 2014, 5 p., pt. 3.

This general movement for transparency, started with the TTIP, could well strengthen in the future and contaminate the negotiation process of upcoming external agreements, as the recent release of the TISA negotiating mandate suggests it.⁵⁵ In this regard, the EP will not abandon its quest since its comprehensive information is essential if it wants to draft relevant recommendations and attempt to influence the content of the negotiations. The EP's credibility is, indeed, conditioned by the drafting of a clear position. The TTIP negotiations reveal that this prerequisite is confronted with the balance to be found between democratic debate and effectiveness.

2. THE DELICATE SEARCH FOR A BALANCE BETWEEN DEMOCRATIC DEBATE AND EFFECTIVENESS WITHIN THE EP

2.1. The priority finally given to debate and vote in plenary

Obviously, the stormy parliamentary process showed that the EP had many difficulties to balance the work in committee and in plenary in order to develop an unequivocal position. It must be said that the goal to reach through the TTIP is highly delicate and generated much dissent among MEPs. Indeed, it involves the “*effective opening of each others markets*”⁵⁶ while preserving EU social, environmental, and sanitary standards, protecting sensitive areas like agriculture, and promoting fundamental values and principles such as human rights and sustainable development. To that extent, these are the principles and goals of the EU's external action, as described in Article 21 TEU, which are at stake.

Thus, after the release of the draft report last February,⁵⁷ 898 amendments had to be debated in April by the INTA Committee. These revealed, according to the rapporteur Bernd Lange, four main areas in which MEPs were divided, namely data protection, services, environmental sustainability, and investor protection rules.⁵⁸ Consequently, much haggling between political groups was necessary and led to the drafting of several compromise amendments. Some of them, concerning in particular the ISDS mechanism,⁵⁹ public procurement⁶⁰ or public services,⁶¹ ended

⁵⁵Council of the EU, Draft Directives for the negotiation of a plurilateral agreement on trade in services, 6891/13 ADD1 DCL 1, 10 March 2015.

⁵⁶ Thanks to “*the elimination of duties, the elimination of unnecessary regulatory obstacles to trade and an improvement in rules*”, according to the negotiating mandate, document 11103/13 DCL 1, cited *supra* note 19, pt.5.

⁵⁷ Draft Report containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 5 February 2015, 2014/2228(INI).

⁵⁸ See, “TTIP: MEPs differ on safeguards for data, services, environment and investment”, INTA Press release, 14 April 2015.

⁵⁹ On this issue, see below.

up being included in the motion for a resolution which was finally adopted by the INTA Committee on May 28.⁶² Still, 116 amendments tabled on this motion were supposed to be discussed in plenary a few days later, on June 10. But the postponement of the vote and of the debate, as well as the referral of these amendments to the INTA Committee, revealed, at this moment, that the MEPs decided to put the democratic deliberation aside and gave priority to the effectiveness of the work in committee. However, this prevalence to efficacy was apparently short-lived since, on June 29, the INTA Committee retabled the amendments, allowing a three hour plenary debate on July 7 and the final vote on the resolution the day after. Nevertheless, both of them showed some ambiguities and invite to put things into perspective.

First of all, despite the great number of amendments retabled, it looked like the debate in plenary concerned more the ISDS mechanism than the agreement as a whole.⁶³ Indeed, with the exception of the members of political groups which are against this Partnership and therefore criticized its *raison d'être* (GUE, EFDD, ENF),⁶⁴ the MEPs mostly concentrated on the very specific issue of ISDS, to the extent that several topics which had however been covered in amendments - such as the approach to adopt concerning the liberalisation of services,⁶⁵ or data protection -,⁶⁶ have surprisingly barely been mentioned.

⁶⁰ A compromise amendment, jointly proposed by the EPP, the S&D, the ALDE and the ECR, asked the Commission to “ensure equal access for EU and US companies”.

⁶¹ A compromise amendment explicitly called for the exclusion of public services from the scope of the treaty, « including water, health, social security systems, education ».

⁶² Report containing the European Parliament’s recommendations to the European Commission on the negotiations for the TTIP, cited *supra*, note 30.

⁶³ The debate is available on the website of the European Parliament.

⁶⁴ Concerning the MEPs which are not against the TTIP, the debate showed that there is a basic consensus on the goal to reach, namely an ambitious partnership which will benefit both partners, increase international competitiveness, open new opportunities for EU companies (in particular SMEs), create jobs and have positive impact on European consumers, without lowering European high standards and fundamental values or jeopardizing the right of governments to regulate in the public interest.

⁶⁵ MEPs were more specifically divided on the approach to adopt, namely the “positive list” (meaning that services to be liberalised are explicitly mentioned) or the “negative list” approach (meaning a liberalisation in all sectors except those specifically quoted). Although the February 2015 draft report encouraged the use of the first method, the motion for a resolution adopted in May by the INTA Committee, recommended increasing market access for services according to a “hybrid list approach”, using for market access “positive lists”, and for national treatment the “negative list approach”. Even if two amendments [Amendments 13(Y. Jadot and others on behalf of the Verts/ALE Group, T. Beghin and others on behalf of the EFDD Group, H. Scholz and others on behalf of the GUE/NGL Group) and 33 (T. Beghin and others on behalf of the EFDD Group)] as well as four committees’ opinion [Committee on Economic and Monetary Affairs (pt. 1.o), Committee on Employment and Social Affairs (pt.1.xix), Committee on the Environment, Public Health, and Food Safety (pt. 9), Committee on Petitions (pt. 16)] required a turning back, the final resolution endorsed this “hybrid list approach” [European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the TTIP, cited *supra*, note 12, pt. 1.b)v)].

⁶⁶ Concerning the second aspect, compared to the negotiating directives, the motion for a resolution added the highly sensitive question of data protection, asking to “ensure that the EU’s *acquis* on data privacy is not compromised through the liberalisation of data flows” and to “negotiate provisions which touch upon the flow of personal data only if the full application of data protection rules on both sides of the Atlantic is guaranteed” (pt. 1.b)xii). Yet, several MEPs were severely reluctant about this last idea and requested the removal of the reference to any

This ambiguity has furthermore been echoed in the vote on the amendments. Contrary to what the postponement of the vote could suggest, the main challenge was not the great number of amendments tabled⁶⁷ (in the end, very few were adopted⁶⁸) but the compromise to be found on the drafting of one particular key amendment whose adoption affected the adoption of the whole resolution: the amendment on the ISDS mechanism. This issue best illustrated the ambiguous nature of the plenary debate which took place in Strasbourg. In fact, since this topic brought into opposition the two main political groups inside the pro-TTIP coalition (EPP and S&D), informal negotiations have been necessary until the last moment before plenary in order to ensure that the final resolution would be adopted.

2.2 The ISDS mechanism, witness of substantive informal negotiations until the last moment

This mechanism would allow foreign investors to bring a case directly against a host country before an arbitral tribunal and to obtain compensation if it is proved that a piece of legislation adopted by the host state breaches rules on investment protection set out in the TTIP⁶⁹ and causes investors significant damage. Beside criticisms concerning the alleged lack of transparency of arbitral proceedings and the alleged lack of impartiality of arbitrators, this mechanism is above all challenged because of the so-called “chilling effect”. ISDS would in fact dissuade states from adopting environmental, social or sanitary legislation from fear that they will have to pay compensation if these measures prejudice foreign investments.⁷⁰ Consequently, the February draft report stated that an ISDS mechanism “*is not necessary in TTIP given the EU’s and the US’ developed legal system; a state-to-state dispute settlement system and the use of national courts are the most appropriate tools to address investment disputes*”.⁷¹ In light of the vivid debates within the EP, primarily opposing the EPP Group (in favour of an improved ISDS mechanism) and the S&D Group (against any ISDS mechanism), the Commissioner for trade,

negotiation on personal data flows [Amendment 42 (T. Beghin and others on behalf of the EFDD Group), and 50 (M. Le Pen and others)]. If this hostile reaction has not been followed up, the final resolution still stresses that the consent of the EP “*could be endangered as long as the US blanket mass surveillance activities are not completely abandoned and an adequate solution is found for the data privacy rights of EU citizens*”(pt. 1.b)xiii).

⁶⁷ In the end, 118 amendments were tabled. Two compromise amendments were tabled at the last moment (Amdt 117, B. Lange ; Amdt 118 Y. Jadot on behalf of the Greens, both concerning the ISDS mechanism).

⁶⁸ European Parliament, Plenary Session, Minutes, 8 July 2015, Results of votes, pt. 1. See particularly Amdt. 117 (B. Lange) on the ISDS mechanism.

⁶⁹ Like prohibition of discrimination or prohibition of expropriation of foreign investments without compensation

⁷⁰ See for instance the case opposing Vattenfall and the German government (concerning nuclear issues) or the case opposing Philip Morris and the Australian government (concerning Health issues).

⁷¹ Draft Report containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), cited *supra*, note 57, pt.1.d)xiv).

Cecilia Malmström, presented last May new proposals for improving the ISDS mechanism in order to ease tensions among MEPs. These suggestions are even more critical as the Commission specified that “*what will be proposed in the TTIP context will set the standard for the further development of investment protection provisions and investment arbitration in EU investment negotiations*”. For instance, its concept paper suggests providing for a clearer provision to ensure that ISDS does not undermine the right of governments to regulate in the public interest. It also suggests creating an appellate mechanism and clarifying the drafting of the standards of protection such as “fair and equitable treatment” or “indirect expropriation”.⁷² Yet, in May/June, great confusion reigned within the democratic institution. Indeed, the motion for a resolution (adopted in May by the INTA Committee) was supposed to be based on a compromise between political groups, mentioning the following four-point recommendation: (1) to use the concept paper presented by Cecilia Malmström “*as a basis for negotiations on a new and effective system of investment protection*”, (2) to trust national courts “*to provide effective legal protection based on the principle of democratic legitimacy, efficiently and in a cost-effective manner*”, (3) to “*propose a permanent solution for resolving disputes between investors and states*” which would fulfil several requirements,⁷³ and (4) to state that in the medium term, a public International Investment Court “*could be*” the most appropriate solution.⁷⁴ Despite this, several amendments tabled in June on this motion,⁷⁵ including one introduced by Bernd Lange and David Martin (on behalf of the S&D Group),⁷⁶ as well as four parliamentary committees,⁷⁷ requested that the final resolution expressly insists on the exclusion of an ISDS mechanism. While this saga seemed far from over within the EP, a turnaround occurred on July 1st. The S&D Group adopted a new compromise amendment promoted by Martin Schultz, which replaced the one introduced in June. Without specifically calling for the exclusion of the ISDS mechanism, this new amendment seems to play on words while leaving room for the Commission to propose an alternative. Indeed, it states the need to “*replace the ISDS-system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in*

⁷² See Concept paper, Investment in TTIP and beyond – the path for reform, cited *supra* note 41.

⁷³ Concerning democratic scrutiny, transparency, independent professional judges, public hearings, an appellate mechanism and the respect of the jurisdictions of courts of the EU and of Member States.

⁷⁴ Report containing the European Parliament’s recommendations to the European Commission on the negotiations for the TTIP, cited *supra* note 30, pt.1.d)xv).

⁷⁵ See Amendment 27 (J. Kirton-Darling and others), 40 (T. Beghin and others on behalf of the EFDD Group), 106 (H. Schloz and others on behalf of the GUE/NGL Group).

⁷⁶ See Amendment 115.

⁷⁷ Constitutional Affairs Committee (AFCO), Petitions Committee (PETI), Legal Affairs Committee (JURI), Environment, Public Health and Food Safety (ENVI).

public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives". Before the vote in plenary, the EPP, the ALDE and the ECR Groups were consulted on this text and their positive reactions suggested that this amendment would be approved by all major political groups.⁷⁸ Indeed, this is what happened on July 8.⁷⁹ If this last sudden development enabled the EP to adopt its recommendations, it regrettably proved that the primacy given to the plenary at the end of June was somehow a facade...Without preventing MEPs from discussing the ISDS issue in plenary, it looks like the die had already been cast.

3. CONCLUDING REMARKS

Evidently, the TTIP negotiations do not go unnoticed and seem to shed new light on the role of the European Parliament by raising three issues at the same time which will need to be deeply followed and thought through in the future.

Firstly, it appears that the European Commission now takes the risk of a parliamentary veto very seriously and therefore intends to better involve the EP in the procedure thanks to improved information and greater awareness of its comments. If this trend is confirmed, the democratic nature of the procedure for concluding EU external agreements would be strengthened, matching in this regard Article 10§1 TEU according to which "*the functioning of the Union shall be founded on representative democracy*".

Secondly, the conduct of the internal parliamentary process brightly puts into question its democratic nature, particularly when it comes to the plenary debate. Since the vote on the resolution (and specifically on the ISDS amendment) had been secured before the debate thanks to informal negotiations between members of the pro-TTIP coalition, what could be the impact of the interventions of MEPs who are strictly against the ISDS mechanism or against the agreement in general? In other words, does not the pro-TTIP coalition consensus generate anti-democratic effects on the other political groups?

Lastly, if the European Parliament demonstrated that it is sensitive to the concerns of civil society regarding the ISDS mechanism, the ambiguous wording of the parliamentary resolution imperfectly echoes the results of the public consultation organised on this topic by the European

⁷⁸ See J. Sopinska, "TTIP : Chaos, then vote", *Europolitics*, 2 July 2015.

⁷⁹ European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the TTIP, cited *supra*, note 12, pt. 1.d)xv).

Commission.⁸⁰ As noticed during the plenary debate,⁸¹ the innovative question of the articulation between representative democracy and participatory democracy is now raised.

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⁸⁰ According to the Commission, "The vast majority of replies, around 145,000 (or 97%), were submitted through various on-line platforms of interest groups, containing pre-defined, negative answers" (European Commission, Press Release, 13 January 2015, IP/15/3201).

⁸¹ Y. JADOT, European Parliament, Debates, 7 July 2015, pt. 4.

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