

Chapter 14

No Agreement is an Island: Negotiating TTIP in a Dense Regime Complex¹

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Introduction: Changing the Metaphor

Bilateral trade and investment negotiations, including the Transatlantic Trade and Investment Partnership (TTIP), are often analysed with metaphors borrowed from mechanics, like 'building blocks', 'stumbling stones', 'parallel tracks', 'hub and spoke', 'gravity models', 'ratchet effect', 'domino theory', 'bicycle theory' etc. These mechanical metaphors are not just nice figures of speech. As heuristic devices, they powerfully – and perhaps insidiously – structure our thinking. They imply that trade and investment agreements are created independently from one another and that their internal composition remains stable until they fall apart under exogenous pressure. These assumptions are useful if one is aiming to isolate variables, attribute causality and predict impacts. But are these mechanical metaphors at all accurate in the first place?

The ongoing TTIP negotiations can hardly be conceived of in isolation. They are taking place parallel to other major ongoing negotiations and in an environment of already dense, complicated and overlapping existing agreements. In this context, it may be more suitable to borrow an alternative metaphor to conceptualize trade and investment agreements from ecology (Haas 1982).

An ecosystem is a network of several interacting living organisms, evolving in conjunction with their environment in different niches, at different scales and at different paces. Trade and investment agreements can be seen as such 'living organisms' – some negotiators themselves refer to TTIP as a 'living agreement' (De Gucht 2013b). They are 'living' because they are the direct result of earlier generations of agreements, and they evolve constantly over their life span as they interact with other institutions. Far from being autonomous and rigid, they are full of ambiguities and open to constant (re)production. They evolve formally through ministerial decisions and interpretations (Brower 2005), amendments and renegotiations (Pauwelyn and Alschner 2014), increasing delegation of

¹ Many thanks to Jean-François Brakeland, Robert Keohane, Simon Lacey and Neysun Mahboubi for comments on an earlier version of this chapter.

authority to regulatory bodies (Büthe 2008), and dispute resolutions (Alter and Meunier 2006), but also informally through changing practices and discourses (Wolfe 2005). These 'living' agreements, with partly overlapping mandate and membership, constitute an intertwined ecology, otherwise known as the 'trade and investment regime complex' (Davis 2009, Orsini, Morin and Young 2013).

However, the ecosystemic metaphor also has its limits: institutions do not adapt to their environment through natural selection – as they rarely die – but through learning (Haas and Haas 1995). Yet, as genetic diversity favours biological adaptation, institutional diversity enables trial and error and learning from experimentations. Under pressure from institutional competition, thriving institutions are those that learn from and adapt to their changing environment (Abbott, Green and Keohane 2013).

To what extent does the imbrication of TTIP in the existing trade and investment complex shape the negotiations? In turn, does TTIP have the potential to shape the rest of the complex moving forward? Our central argument is that TTIP negotiators face both learning constraints and learning opportunities as a result of the trade and investment complex, which will not only influence the current negotiation process but also the potential outcome of negotiations. The first section of this chapter portrays the ever growing trade and investment complex in which TTIP is being negotiated. The second section analyses the constraints and opportunities faced by TTIP negotiators. The third section explores some of the negotiators' strategic calculations as they internalize the impact of the dense regime complex. The conclusion suggests implications of TTIP on the rest of the trade and investment complex.

The Ever-Growing Trade and Investment Complex

Even though there is no prior transatlantic free trade or investment agreement to act as template, the TTIP negotiations are not starting from a blank slate. Instead, they are taking place in a dense and ever growing complex of trade and investment institutions, as well as in parallel to trade and investment negotiations involving the US or the EU as negotiating parties.

The trade and investment complex is expanding in three dimensions. It is first expanding institutionally. Until the early 2000s, the elemental components of the complex were primarily intergovernmental organizations, regional customs unions and bilateral agreements. Recently, other institutional forms have mushroomed, including plurilateral sectoral agreements (e.g. the Anti-Counterfeiting Trade Agreement), trade summits (e.g. the India-Brazil-South Africa Summits), venues for regulatory agencies (e.g. the International Competition Network), collaborations among intergovernmental organizations (e.g. the Standards and Trade Development Facility), private organizations (e.g. the International Accounting Standards Board) and 'mega-regionals' (e.g. the Trans-Pacific

Partnership). These alternative institutions are on the rise and contribute towards making the trade and investment complex even more multiscalar and multiform.

Secondly, the trade and investment complex is expanding thematically. Rather than simply building on the WTO legacy with 'WTO-plus' commitments, it covers an increasing number of 'WTO-extra' issues such as anti-corruption, data protection, money laundering, statistic harmonization and tax evasion (Horn et al. 2010, Baldwin 2014b). These issues were not initially on the WTO agenda, but are now addressed by various trade initiatives and broadening the thematic frontiers of the trade and investment complex.

The third expanding dimension of the trade and investment complex is geographical. Until recently, only a handful of countries were aggressively promoting trade and investment agreements. Today, the number of countries negotiating simultaneously on several fronts is such that former hubs are progressively losing their strategic position. Figure 14.1, for example, illustrates that several countries that have signed free trade agreements with the US have also signed similar agreements with one another. Likewise, Figure 14.2 shows that several countries that are negotiating comprehensive trade agreements with the EU, including the US, are also negotiating together in parallel. Both figures reveal the high density and intricacy of the trade and investment regime complex.

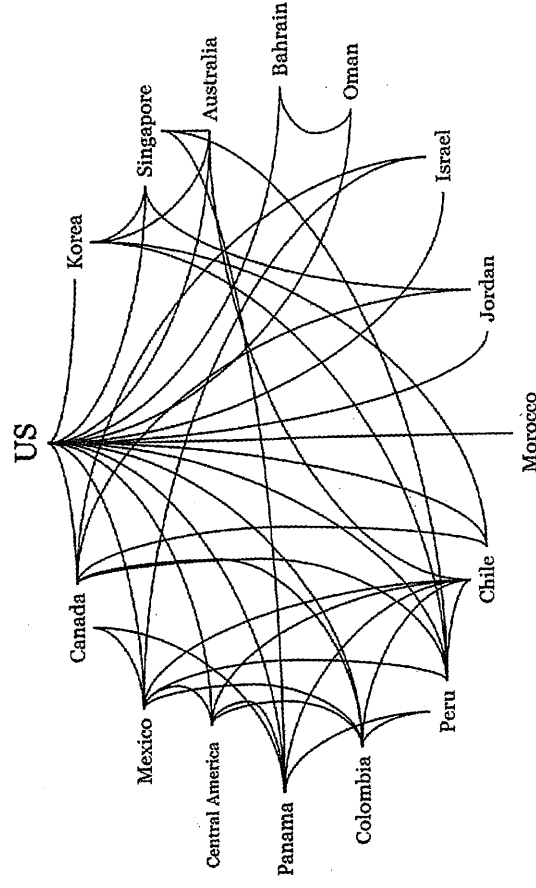


Figure 14.1 Trade agreements in force with the US and among US partners

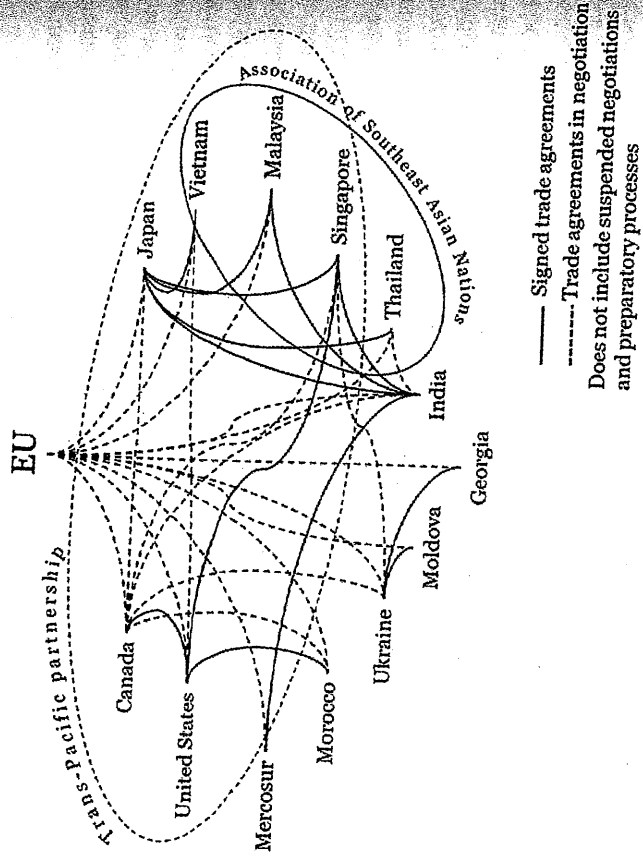


Figure 14.2 Parallel trade negotiations with the EU and among EU partners

Institutions in this trade and investment ecosystem are not clinically isolated but rather in constant interaction. They are informally – if not formally – connected to each other. Innovations emerging in one setting are often replicated elsewhere. For example, Chile, having negotiated bilaterally with the US the liberalization of public procurement, has subsequently included similar provisions in bilateral agreements with third countries (Woolcock 2013). The rapid multiplication of trade initiatives is a vehicle for norm diffusion. As a result, the characteristics of recent agreements are strong predictors – apparently even better than power asymmetry and countries’ economic properties – of the characteristics of agreements to follow (Chen and Joshi 2010, Kinne 2013).

There are also ‘systemic reverberations’ between the different scales of the complex. Several bilateral and regional agreements strengthen multilateral institutions. Countless free trade agreements, for example, require the ratification of the multilateral agreements of the World Intellectual Property Organization and refer to the International Centre for Settlement of Investment Disputes. In this context, changes at the multilateral level are rapidly reverberated at the bilateral level. When in 2005 WTO members adopted an amendment to facilitate the export of generic drugs, it was soon reproduced at the bilateral level: for example in the 2008 agreement between Colombia and the European Free Trade Association. Importantly, the flow of influence between the different layers of governance is not only top-down, but multidirectional. Bilateral agreements orient multilateral

negotiations as much as the other way around. For instance, novel approaches for the liberalization of services were first experimented with bilaterally before being promoted regionally and plurilaterally, notably in the context of the Trade in Services Agreement (Mattoo and Sauvé 2011).

While new norms orient subsequent institutions, they can also transform older institutions. These iterative interactions are particularly perceptible in the interpretation, implementation and adjudication of trade and investment agreements. Despite fear of incompatible rulings and strategic forum shopping between dispute settlement mechanisms, blatant inconsistencies have not been observed. The various dispute settlement mechanisms do not operate in isolation from each other. They are part of the same social and normative soup (Alter and Meunier 2006, Gomez-Mera and Molinari 2014, Wolfe 2005).

Some agreements even explicitly promote coherence within the existing complex. The EU–Korea free trade agreement provides that a ‘party shall not seek redress of an obligation which is identical under this Agreement and under the WTO Agreement in the two forums’ (Art. 14.19) and that an arbitration panel set up under this bilateral agreement ‘shall adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body’ (Art. 14.16). This same agreement also obliges its parties to revise its provisions at the end of the Doha Round to integrate the outcomes of these WTO negotiations, notably on intellectual property, services, trade facilitation and trade remedy.

The trade and investment complex is thus a system that can be analysed as a whole (Pauwelyn and Alschner 2014). Its density and intricacy make it greater than the sum of its parts. In the 1980s, some analysts used to question whether the GATT was truly multilateral since negotiation practices for tariff reduction were essentially bilateral and commitments were based on reciprocity. Today, the bilateral, regional, plurilateral and transnational initiatives are so profoundly embedded in a global ecology, negotiated and implemented in the shadow of each other, that one could wonder whether they constitute a new form of multilateralism (Muzaka and Bishop 2014): a polycentric multilateralism that is not centralized in one organization, but held together by a plurality of connected institutions.

A complex comprising a plurality of institutions provides significant opportunities (Abbott, Green and Keohane 2013). It enables trial and error and could favour incremental adaptation to a changing economic environment (Pauwelyn 2014). It also comes with drawbacks, such as redundancies and duplication, some confusion and the need for constant management of institutional interactions. But these could be a fair price to pay to have a governance structure that is flexible, adaptive, creative and less vulnerable to crisis, provided that participants in the trade and investment complex have the capacity to learn from small-scale institutional experimentations. These learning constraints and opportunities are further discussed in the next section.

Constraints and Opportunities Provided by the Trade and Investment Complex

While learning is essential for innovation and adaptation, the growth of the trade regime complex raises challenges for European and American negotiators. How does the architecture of existing agreements and concurrent negotiations shape the TTIP negotiations? This section examines both the learning constraints and learning opportunities faced by TTIP negotiators.

The existence of prior agreements, both between the negotiating parties as well as between them and third countries, significantly informs the substantive provisions that can be included in the new agreement under negotiation. Bilaterally, while the EU and the US are not united by a prior agreement, they are joint parties to many pre-existing transatlantic dialogues, such as the Transatlantic Economic Council and the US-EU High Level Regulatory Cooperation Forum. Nevertheless, American TTIP negotiators may well find themselves bound by the existence of prior agreements with some of the EU Member States. For instance, when it comes to investment, the US signed BITs with nine individual Member States before they joined the European Union (Bulgaria, 1992; Croatia, 1996; Czech Republic, 1991; Estonia, 1994; Latvia, 1995; Lithuania, 1998; Poland, 1990; Romania, 1992; Slovak Republic, 1991). These prior agreements create certain minima and basic levels of provisions that the TTIP agreement will need to meet. However, they are older generation BITs; in the meantime the US has significantly revised its own BIT model, and the EU aims to replace the nine BITs with new provisions. So while they do not provide a template directly applicable in the current negotiations, they do establish a reference point for what the new agreement needs to achieve.

The existence of prior agreements between the negotiating partners and third countries also serves as useful information to learn and gauge what might be feasible in the current negotiations. For instance, American negotiators at US-TR have been actively studying the practices of EU Member States regarding investment treaties (AmCham EU 2013), and the European Commission seems to have drawn lessons from NAFTA case law on investment protection, particularly with regard to the contentious notions of 'indirect expropriation' and 'fair and equitable treatment' (European Commission 2013d) (see Figure 14.3). American negotiators are also dissecting the many FTAs in which the EU has been involved in the past decade, while the EU negotiators are closely studying American FTAs. Their respective templates vary significantly, as US FTAs tend to provide more 'WTO-plus commitments', building on issues already addressed at the WTO, while EU FTAs favour 'WTO-extra commitments', dealing with issues that are not currently on the WTO agenda (Horn et al. 2010, Baldwin 2014b). The assumption is that the negotiating partner will be willing to do at least as much in the current negotiations. Following this logic, TTIP will likely provide for an economic integration that is equally deep (WTO-plus) and broad (WTO-extra).

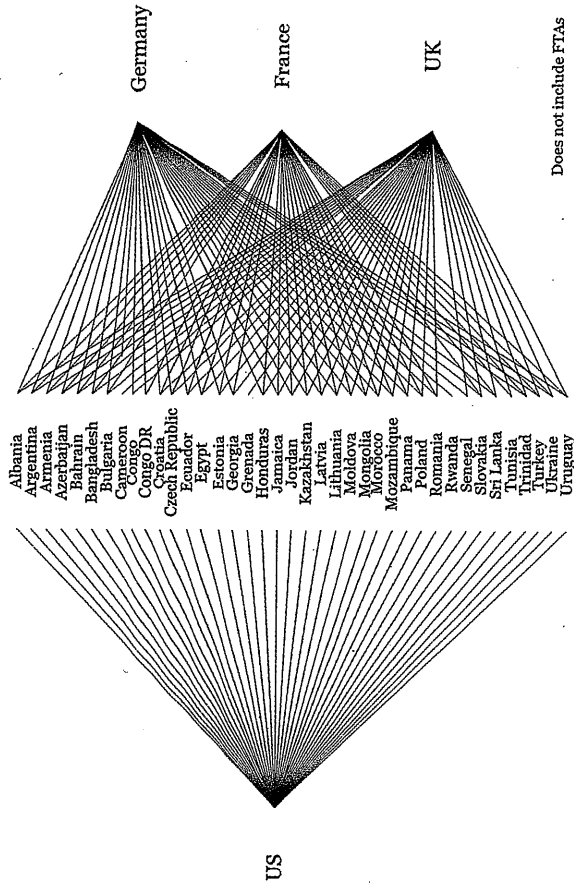


Figure 14.3 US BITs partners and their BITs with Germany, France and the UK

While building on previous practice may speed up the negotiating process, at least in the beginning, it may, however, create a sense of inertia and hamper creativity and out-of-the-box thinking. Previous agreements may be seen as templates to be replicated instead of experimentations to be improved upon. With its 14 FTAs, the US has developed a particular approach and architecture to its trade and investment agreements. As the basic framework has been relatively constant since NAFTA, in part because of Congressional pressures, this may turn into an intransigent way of approaching new agreements which are not allowed to deviate from that framework. As for investment, American negotiators insist on the fact that their template has been the subject of intensive discussion with stakeholders, and they are therefore not particularly amenable to revising that template (Froman 2014).

The constraint of past agreements as templates is less true in the case of the EU because the subsequent shifts in competence have made the agreements more varied and less 'cookie-cutter' over the years. Initially the EU had competence only over trade in goods; Member States negotiated other aspects of trade agreements, including trade in services. After the institutional reforms included in the Treaty of Nice (2000), the EU negotiated most aspects of international agreements relating to trade in services as well, such as the EU-Chile Association Agreement and the EU-Korea Free Trade Agreement. The Treaty of Lisbon (2009) transferred the competence for international investment policy to the supranational level as well, so the EU has been negotiating investment-related provisions on behalf of its

Member States since then, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

These template constraints may play out in a particular way in the transatlantic case. The EU and the US have been used to negotiating comprehensive agreements with developing countries, and more recently with advanced industrialized economies, but not with each other. Presumably, past practices have created negotiating habits and framed negotiators' mindsets in a way that might not be appropriate for a transatlantic agreement. For example, it is likely that TTIP will include investment and IP provisions initially designed for countries that offer different levels of FDI and IP protection and, in some cases, have lax legal systems and weak enforcement mechanisms. However, duplicating these norms in TTIP might be sub-optimal, if not quite inappropriate. An upward harmonization of IP law could reassure foreign investors in developing countries, but hardly in the transatlantic relation. Likewise, an investor-state dispute settlement mechanism could be justified in agreements signed with developing countries, but serves no clear purpose when an agreement is signed among countries with domestic legal systems developed and impartial enough to comfort foreign investors. Conversely, it could be argued that several trade-related issues that could have been relevant for the transatlantic context (such as tax evasion and economic sanctions targeting third countries) were not put on the agenda because they did not figure out in templates developed from previous negotiations.

In addition to past agreements, the existence of simultaneous negotiations in which the US or the EU may currently be involved also creates learning constraints and opportunities for TTIP. Negotiating several agreements at once may put a severe constraint on the resources available to carry out effectively another set of international negotiations. Parallel negotiations may create in principle manpower issues and personnel shortage, leading to a slowdown or stop-and-go process of negotiations, though in practice this has happened neither in the US nor in the EU case (in the EU, DG Trade personnel have been redeployed to TTIP from the anti-dumping unit). The limited size of the negotiating personnel pool to draw from can, however, also be an opportunity. On the American side, the office of the USTR is rather small, with about 200 employees. As a result, the USTR is well positioned to learn from past agreements and parallel negotiations. This small size fosters a highly collaborative environment where information flows back and forth between negotiators and technical experts involved in all simultaneous negotiations through both institutionalized and *ad hoc* informal meetings. On the EU side, the situation is similar. Sectoral experts monitor several negotiations simultaneously. The EU chief negotiator actually negotiated the recent EU-South Korea Free Trade Agreement and has been involved in the FTA negotiations with India, which facilitates the flow of ideas from one agreement to the other.

We therefore see that the imbrication of TTIP in the trade and investment regime complex creates both learning constraints as well as opportunities for the negotiators. On the one hand, norm diffusion and isomorphism from past and simultaneous negotiations reduce opportunities for experimentation and out-

of-the-box thinking. A complex calls for specialized technical expertise (Alter and Meunier 2009), and negotiators naturally turn to the other elements of the complex for guidance. On the other hand, the expansion of issues and scale creates ambiguity, which can be turned into creativity. The existence of prior and concurrent agreements can also accelerate the negotiating process and lift up the substance of the negotiation.

Strategic Implications of the Dense Regime Complex

Students of international relations often discuss negotiations as part of a 'two-level game', involving both inter-state and domestic politics (Putnam 1988). The TTIP negotiations suggest that the two-level game vision may be outdated. To borrow from a baking metaphor, instead of a layered cake with the domestic and international layers neatly stacked on top of each other, trade and investment negotiations today resemble more a marble cake, whose dense layers have been swirled around. In other words, the dense regime complex in which the TTIP is negotiated creates a *multidimensional and multi-level game*, in which each level is more intertwined than the traditional two-level game view presumes.

Consider first the intergovernmental level of this game. Negotiating several agreements simultaneously implies careful legal and political coordination of what is happening in all these negotiations. Negotiators working on one agreement have to be very vigilant about what their peers are doing in other negotiations. Such an instance of simultaneous negotiations creates a certain framework and may give rise to issues of interpretation that are expected to carry over across negotiations. Therefore, agreements negotiated simultaneously have to be consistent.

Negotiators need to assess not just the costs and benefits of particular agreements and strategies to improve prospects for a favourable outcome; they need to devise strategies that take into account other negotiations, either those occurring simultaneously with different partners, those regarding the implementation of existing agreements, or those on possible future negotiations. The existence of a dense regime complex therefore enormously complicates the strategic calculations of negotiators.

Furthermore, the negotiators, who are well aware that they operate within a complex and dense institutional environment, may try to craft the current agreement with an eye to future negotiations. They may include provisions in TTIP which would set a precedent for forthcoming negotiations. Although this is not based on evidence, one might argue that the insistence on including an investor-to-state dispute settlement (ISDS) mechanism in TTIP may be to create a precedent, for instance for negotiations with China (Sapir 2014). Other examples of this forward-looking approach may include the inclusion of provisions on energy and raw materials as well as on state-owned enterprises.

The need both to be consistent and to anticipate effects on future and past agreements can help move the negotiation forward and faster. If negotiations get

stuck because of a sticky problem, the answer to the pressing policy question may be found in the other negotiation context. For instance, the 'negative list approach' that the EU is using in the CETA negotiations for service liberalization might greatly facilitate the incorporation of a negative list approach in TTIP. The EU had never used a negative list before CETA, and it took the Commission considerable time to list all the exclusions, but the work is already cut out for TTIP. Another CETA innovation that can easily be transplanted into TTIP is the implication of sub-federal units such as provinces and cities in public procurement, since both Canada and the US are federal systems. As for the European public consultation regarding the ISDS in TTIP, it refers directly to the CETA text (European Commission 2014a).

Alternatively, strategically anticipating the effect of the current negotiations on future agreements may also have the opposite effect and slow down the negotiating process. The provisions that negotiators may want to include in agreements currently negotiated in order to ensure that they are part of the template for later use are, by nature, controversial. So instead of delaying the fight until later, negotiators with this strategic, forward-looking outlook are provoking the public debate at an earlier time, which may slow down or even stall the negotiations.

This need to anticipate effects on future negotiations also has the potential to result in the highest, not the lowest, common denominator. Every new agreement lifts the standards higher. Especially if the EU and the US tend to favour higher standards, their calculations about future negotiations with other states provide incentives for them to raise standards in TTIP, in order to set a favourable benchmark for such future negotiations. Contrary to what many critics of TTIP suggest, therefore, the embeddedness of TTIP in the trade and investment complex leads instead to an expectation that there will not be any race to the bottom.

For instance, TTIP tries to make opportunities for small and medium-size enterprises (SMEs) the focus of the agreement. According to a joint transatlantic document, 'US and EU negotiators are working to ensure that SMEs are in a position to take full advantage of the opportunities that an agreement would provide. As part of this effort, negotiators are discussing the inclusion of a chapter dedicated to SME issues' (EU Publications Office 2014). One of the implicit intentions of American policymakers may be to have these provisions specially designed for SMEs travel over to TPP (Hamilton 2014a). In that way, TTIP may impact the substance of agreements subsequently negotiated with third countries.

Now turn to the domestic side of this multidimensional two-level game. Negotiators have to be aware of the arguments to be used to 'sell' the agreement at home. If they are crafting the agreement with an eye to simultaneous or future negotiations, it may be difficult to explain the provisions – especially if their strategies towards other states depend on a certain amount of guile. Furthermore, if the case is made that a new agreement is worth ratifying because it includes several provisions and innovations that will be useful in other negotiations, then it will be a hard sell politically if the next agreement to come along for ratification does not include the same provisions.

While we can expect the negotiators themselves to capitalize on the learning opportunities from past and simultaneous negotiations, the emergence of new actors on the scene – actors that often operate transnationally and blur the international-domestic divide – may make the process even more complex. Several 'novice' actors recently empowered by new competences or attracted by new issue-areas might integrate the trade and investment complex differently than seasoned actors in their analysis of the situation. On the one hand, they may rely even more than others on existing templates, since they first have to learn the tools of their trade and can be co-opted by those who teach them how things are done, leading to more conformism. On the other hand, they may engage in turf wars and try to assert their newfound power, resulting in negotiations that are both procedurally and substantially different from past negotiations.

Such new actors may include, on the American side, states and cities on issues of public procurement, as well as health and safety regulatory authorities such as the Consumer Product Safety Commission and the National Highway Traffic Safety Administration. On the European side, new actors include the European External Action Service (EEAS), which is now sharing the overall geopolitical strategy underlying TTIP with the Commission's DG Trade. Also new on the scene is the European Parliament, whose role on trade matters was greatly enhanced by the 2009 Lisbon Treaty, mostly at the expense of the relative autonomy of the Commission (Woolcock 2012). Moreover, many non-governmental actors have been empowered in these negotiations, both because of public consultation and because of social media, and many of the TTIP issues are particularly sensitive in some domestic contexts (GMOs, geographical indications and audio-visual in France, data protection in Germany etc.) and are getting a lot of media attention, including front-page coverage. How these new actors or newly empowered actors take their cues from or against the precedent of existing agreements will have a major impact on the substantive TTIP negotiations.

From a strategic perspective, TTIP illustrates how negotiators' calculations are immensely complicated by the combination of new actors entering the scene and the embeddedness of negotiations in a dense existing regime complex. Negotiators' strategies not only impact the strategies of negotiating partners and are constrained by domestic politics, as in the two-level games framework; they also influence the strategies of other states and of transnational actors, which both complicates negotiations and makes the domestic politics of ratification more difficult.

Conclusion

The negotiation of TTIP is an implicit recognition that, given the complexity of the unresolved issues in the trade and investment sphere, the WTO is not the appropriate forum to tackle such issues with any chance of success – at least in the foreseeable future. The EU and the US being 'like' economies, it may be easier to tackle non-trade barriers and thorny regulatory issues which would stand no

chance if negotiated at the multilateral level. But this raises the question of whether any agreement today can be an 'island'. Can there still be a purely transatlantic agreement, both in its origin and in its impact?

As this chapter has shown, TTIP is shaped by the trade and investment complex. It cannot refer purely and exclusively to transatlantic economic relations. What the US and the EU have concluded in prior agreements with third countries, in addition to those with each other, and what they are currently negotiating simultaneously are important determinants of the substance of TTIP, and their strategies in TTIP are profoundly impacted by the other actual and anticipated negotiations that they are considering.

Given the economic weight of the two parties, their frequent trade disputes, their numerous trade agreements with third countries and their significant normative influence in world politics, TTIP will have a strong systemic impact on the entire trade complex, including on past and on future agreements. However, these impacts are hardly predictable. Years of research on building blocks vs stumbling blocks does not support clear-cut and universalistic claims. One needs to acknowledge that results of empirical research are mixed, uncertain and often case-specific (Kono 2007, Mansfield and Solingen 2010).

Amplifying this uncertainty is the fact that TTIP will focus on non-tariff barriers and regulations. This form of liberalization is significantly more difficult to model than tariff reductions, especially due to measurement problems and lack of available data. We can only speculate on the impact on third countries, as no other agreement of this systemic magnitude has ever been concluded. It is difficult to tell, for instance, whether third countries will face greater anti-dumping scrutiny if the EU and the US agree to reduce anti-dumping actions between themselves (Prusa and Teh 2010). Worsening further uncertainty, the impact on third countries will likely vary depending on a long list of factors, including whether these countries are already FTA partners of the US and the EU, whether they are currently negotiating an FTA with them, whether they benefit from most-favoured nation or preferential status, or whether a customs union agreement is already in place.

Regardless of the uncertainty about particular provisions and whether a comprehensive deal will be struck, TTIP will itself have an impact on the shape of the trade and investment complex, especially when it comes to non-tariff barriers and regulations. The potential for the transatlantic deal to have a meaningful impact beyond the transatlantic borders is not an afterthought; rather, it is internalized by the negotiators as they consider strategically what to include in the present deal. As the USTR Mike Froman states,

we see TTIP as providing an opportunity for the US and the EU to not only deepen the transatlantic space that reflects our shared interests and values, but to work together to strengthen those values beyond our borders. TTIP is an opportunity to articulate and promote globally our shared values on the rule of

law, transparency, public participation, and accountability. ... It's about shaping a global system – one with our shared values at the core. (Froman 2014)

In more academic terms, the implication of Froman's remark is that the whole regime complex is path-dependent: the *status quo* influences what can be negotiated, and what is negotiated helps to create a new *status quo*. Since the past foretells the future, smart negotiators who are concerned about the future seek to shape what will soon become the past.