ON THE BENEFITS OF THE TTIP NEGOTIATIONS FOR THE EU LEGAL ORDER: A LEGAL PERSPECTIVE

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This article argues that Transatlantic Trade and Investment Partnership (TTIP) negotiations have a positive legal story worth recounting as to the effects of the negotiations upon the EU legal order. The paper explores the negotiation of EU international agreements as a specific field of law and considers how the TTIP negotiations overall contribute to the politicisation of the EU through shifts in legal practice on the part of all major institutional actors to EU international relations in changes to approach, procedure and actions. It uses the metric of responsiveness to measure or chart the former, considering the responses as actually practiced by institutional actors in law to normative concerns arising. It considers these practices across a range of actors, specifically the European Commission, the European Parliament, the Ombudsman, the Committee of the Regions and the TTIP Advisory Group.

Introduction

This article argues that Transatlantic Trade and Investment Partnership (TTIP) negotiations have a positive legal story worth recounting as to the effects of the negotiations upon the EU legal order in the field of external relations. One of the outcomes of the TTIP negotiations, irrespective of their eventual success, appears to be their politicisation of the EU. Politicisation is a term normally used by political scientists and for the purposes of this paper it is defined as the process by which decision-making is brought into the political space. This paper argues that politicisation has not taken place in a legal vacuum or without legal consequences and that the legal dimension of this politicisation is worth analysing. The outside pressures that the TTIP negotiations bring to bear on the EU institutions involved in the negotiation process induce a degree of responsiveness in these institutions that has observable effects on the operation of the EU legal order in the field of foreign relations, understood here as the ability to respond quickly and appropriately. The relationship of the external relations context upon the internal context is a recent phenomenon of EU law in the post-Lisbon context, outwards-in.[1] The TTIP negotiations appear to provide rich evidence of responsiveness of EU institutional actors to concerns about shortcomings in the democratic process in EU foreign relations law and hence about the legitimacy of decision-making in the TTIP negotiations. This responsiveness often goes far beyond what the CJEU appears to demand in its recent case law on international relations and access to documents.[2] It also eclipses historical precedents in EU-US relations from the 1990s.[3] It is thus a broadly positive story from a legal and specifically EU law perspective in so far as it contributes positively to our understanding of the place of international relations in the supranational EU legal order.

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[1] See Christina Eckes, *How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures*, 12 (4) I.CON 904, (2014).

[2] See Merijn Chamon, *The Institutional Balance, an Ill-Fated Principle of EU Law*?, European Public Law, forthcoming.

[3] E.g. M. Pollack & G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Rowman & Littlefield 2001); M. Pollack, *The New Transatlantic Agenda at Ten: Reflections in an experiment in International Governance*, 43 JCMS 899, (2005).

Section 1 explores briefly the negotiation of EU international agreements as a specific field of law. Section 2 considers generally how the TTIP negotiations overall contribute to the politicisation of the EU through shifts in legal practice on the part of all major institutional actors to EU international relations in changes to approach, procedure and actions. Section 3 uses the notion of responsiveness to measure politicisation, considering the responses as actually practiced by institutional actors in law to normative concerns arising. It considers these practices specifically as an indication of politicisation across a range of actors, specifically the European Commission, the European Parliament, the Ombudsman, the Committee of the Regions and the TTIP Advisory Group.

The negotiation of international agreements as a field of law

It is striking that the process of the negotiation of international agreements is not viewed per se as a substantive area of administrative, global administrative law, public or even transnational law.[4] The negotiation of multiple global 'mega regional deals' such as the TTIP necessitates a broader view of what is at stake and why. The 'nitty gritty' of *on-going* international negotiations remains a veritable legal blind spot arguably because it is somehow a highly political step, even if hyper-legalised. Accordingly, the new mega-regional negotiation era does not necessarily fit so well within existing analytical perspectives.

As Eeckhout states, as a matter of EU law, the subject matter of the procedures surrounding the negotiation, conclusion and termination of an international agreement is 'a terse and self-referential legal subject'.[5] The EU's negotiation of international agreements is not an area where traditionally legitimacy, normative or participation concerns have enjoyed a specific place.[6] The new role of the EP, including its new information rights, is an important normative concern of the post-Lisbon era.[7] Yet post-Lisbon debates are still some stretch away from grander debates on *inter alia*, participation, civil society and the global 'others' affected by such

[4] See Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' *GlobalTrust Working Paper Series* 08/2015.
[5] See Piet Eeckhout *EU External Relations Law* (2nd ed., OUP 2011), 193; cf Robert Schütze *European Constitutional Law* (2nd ed., Cambridge University Press 2015), 284-286, 285.
[6] Eeckhout, *ibid*; Deirdre Curtin, *Official Secrets and the Negotiation of International Agreements: is the EU Executive Unbound*?, 50 CMLRev, 423, (2013);
[7] E.g. Elaine Fahey, 'EU Foreign Relations Law: Litigating to Incite Openness in EU Negotiations' *European Journal of Risk Regulation* 553, 4/2014.

agreements.[8] Negotiation is arguably also still viewed in highly formalist term even within the recent international relations case law of the CJEU.

The TTIP negotiations as an architectural infrastructure of itself must be said to be legally and constitutionally quite 'exceptionalist' in so far as the wording of Article 218 TFEU does not necessarily envisage any sort of institutionalised infrastructure or structured apparatus along the lines of the TTIP negotiations. Similarly, the emerging post-Lisbon case law on institutional balance in international relations law does not provide any indication as to the contours of the evolution of the TTIP. This raises the question- how organic can and should specific actors be in response to the TTIP negotiations and how should we understand change?[9]

As a result, there is much merit in focussing upon our understanding of negotiations and the limitations of contemporary understandings of negotiation through law. The account thus turns next to the specific narrative which this account develops as to the TTIP negotiations as politicisation, prior to considering the responsiveness of the various actors involved in the negotiations in the form of new legal practices and shifts through and by law.

Shifts in EU international relations law- practice as politicisation

On Politicisation and the EU

The TTIP negotiations appear to have generated substantial fears at national and EU levels, as to the transfer of authority to a new living entity as a form of global governance.[10] The current level of delegation of authority to entities beyond the State continues to rise exponentially and is charted to a considerable range of empirical and theoretical work.[11] Politicisation beyond the Nation State is regarded as a forceful and effective antidote to normative concerns about the rise of the delegation of authority beyond the Nation State.[12] Politicisation is defined here as the process by which decision-making is brought into the political space. It involves making

[8] Benevenisiti, *supra*, n.4.

[9] See Marija Bartl & Elaine Fahey, 'A Post National marketplace? Negotiating the Transatlantic Trade and Investment Partnership in Elaine Fahey and Deirdre Curtin (eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge University Press 2014), Ch. 9.

[10] E.g. Ferdi De Ville & Gabriel Siles-Brugge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership.* (Polity, 2015); Marise Cremona, *Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP),* 52 CMLRev 351, (2015).

[11] E.g. Gary Marks & Liesbet Hooghe*, Delegation and Pooling in International Organizations*, 10 Review of International Organizations 305-328 (2015). In a broader context, see for example Saskia Sassen, *Globalisation or Denationalisation*, 10 *Review of International Political Economy* 1, (2003).

[12] Michael Zürn, *Opening up Europe: next steps in politicisation research,* 39(1) West European Politics, 16-82 (2016); Michael Zürn, *The politicization of world politics and its effects: Eight propositions* 6(1) European Political Science Review 47, (2014).

collectively binding decisions a matter or subject of public discussion.[13] Politicisation involves 'day light' being brought upon political decisions.[14] It has been argued that the day to day politics of the EU in recent times, be it from the euro crisis to the migration crisis, has begun steadily to politicise the EU.[15] While the management of these crises may well have other valid analytical frames and critiques, this paper draws upon broader politicisation trends within the EU as evidence of wider similar change. It is thus a context of positive change. Politicisation may have the downside of constraining the negotiator through the information balance between the parties. However, this is far from certain or proven as a hypothesis within the TTIP negotiations so far.[16]

The next section charts the general changes in approach, procedures and action on the part of EU institutional actors that TTIP has incited. These actions thus involve international relations being brought into the public domain, through transparency, debate or through engagement, prerequisites of politicisation, which are sketched here next.

On politicisation and the TTIP

There have been many remarkable specific acts of politicisation as regards decision-making that are argued to be identifiable within the TTIP negotiation processes largely conducted through shifts in legal practice. As regards the *European Parliament* (EP), the TTIP negotiations are argued here to have 'formally' politicised the EP using law as a medium. The TTIP has forced internal policy shifts and has created political cleavages within the EP as to the legal framework of the TTIP, discussed further below. Certain MEPs have even openly breached the law by illegally leaking the negotiating documents in violation of confidentiality regulations, thereby acting in defiance of the Member States and EU institutions, so as to procure transparency.[17]

As regards the Council, over one year after the adoption of the TTIP negotiation directives, the *Council* finally declassified the already leaked documents and thus changed its legal position originally adopted.[18] This followed extensive critique at national parliamentary and EP level of the official secrecy surrounding the directives. It was a very tardy but nonetheless marked a sea

[13] Zürn, *ibid,* 2014, 50.
[14] This paper does not consider or develop the full consequences of this thesis albeit that it is often understood to involve the hollowing out of national democracy.
[15] Zürn, 2014, *supra,* n.12.
[16] E.g. see Eugénia da Conceição-Heldt , *Exploring the TTIP Transparency Paradox*, forthcoming.
[17] Christoph Herrmann, '*Transleakancy*' in C Herrmann, B Simma & R Streinz (eds.), Trade Policy between Law, Diplomacy and Scholarship – Liber amicorum in memoriam Horst G. Krenzler European Yearbook of International Economic Law 39, (2015). See his detailed exposition of this at circa p. 39.
[18] http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf Brussels, 9 October 2014 11103/13 DCL 1 Declassified on 9 October 2014: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf (accessed 24 Feb. 2016).

change in the transparency of the documents of EU international relations law, whereby the mere listing of EU interests no longer deemed worthy of secrecy.[19] These acts of publication marked a step change well beyond recent case law of the CJEU on the international relations exceptions to transparency.[20]

As regards the *European Council*, its direct incitement in its Conclusions for political dialogue to begin in the Member States on the TTIP, especially vis-à-vis civil society, is notable.[21] Although non-binding, its Conclusions carry increasing legal significance for the EU's legislative process, particularly during the crisis.[22] The TTIP is remarkable to the extent that it is hard to say when the Member States have previously been incited to 'activise' their domestic political constituencies in such a fashion in respect of EU foreign affairs.[23] Politicisation through the TTIP here appears to challenge the 'behind-the-doors' logic of EU international relations decision-making.[24]

As regards *other bodies outside of the EU institutions*, the TTIP negotiations have also 'politicised' entities or agencies in foreign affairs, previously only mere sub-units of the larger political process without an express mandate in international relations (e.g. Committee of the Regions, Ombudsman and organised civil society). As will be developed here further below, these bodies have notably insisted upon more input, participation and openness in the TTIP negotiations. Civil society in particular appears increasingly politicised through law. For example, the gathering of 3,284,289 million signatories for a European Citizens Initiative (ECI) on the TTIP, from a range of Member States, is argued here to have marked an important step in the mobilisation of ordinary citizens against the TTIP itself as an act of politicisation through activist networks and NGOs, expressing transnational protest.[25] Although the ECI was ultimately rejected for ostensibly procedural reasons,[26] a new ECI, supported by the President of the European, STOP TTIP AND CETA with 3,404,467 signatories at the time of writing, is now pending. It provides further evidence of ongoing politicisation through law.

[19] Curtin, *supra*, n.6.
[20] E.g. Case C-350/12 P *Council of the European Union v Sophiein 't Veld,* ECLI:EU:C:2014:2039; Vigjilenca Abazi & Martijn Hillebrandt, *The Legal Limits to Confidential Negotiations: Recent Case Law Developments in Council Transparency: Access Info Europe and in 't Veld* (2015) 52 CMLRev 825.
[21] European Council Conclusions EUCO 11/15 (19-20 March 2015).
[22] See Uwe Puetter, *The European Council and the Council. New intergovernmentalism and institutional change* (Oxford University Press 2014); Chris Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press 2012); Deirdre Curtin, *Challenging Executive Dominance in European Democracy,* 77(1) MLR, 1 (2014).
[23] TTIP has also been placed on the agenda of national elections, for example, in Germany.
[24] H De Waele 'Strained Actorness – The 'New' European Council in Theory and Practice' in Elaine Fahey (ed.), *The Actors of Postnational Rule-Making: Contemporary Challenges of EU and Public International Law* (Routledge 2015).
[25] https://stop-ttip.org/the-eci-result-in-numbers/ (accessed 24 Feb. 2016); Commission Delegated Regulation EU 1070/2015.
[26] See https://stop-ttip.org/sign/(accessed 24 Feb. 2016).

These actions, practices and procedures have thus brought TTIP within the public domain, in a manner in which international relations was not previously. This thesis of politicisation still requires further development for its measurement through law, which this account next turns.

On responsiveness as a measure of politicisation

Overview

A major feature of politicisation is the ability to chart change or progress and explicitly identify shifts or changes in practice. Accordingly, one key indicator of international politicisation of much significance to the present account is the *responsiveness* of international institutions to societal demands.[27] Responsiveness is the ability to respond quickly or appropriately.[28] Responsiveness involves strategically applying instruments in a manner which is flexible and sensitive to behaviour, attitude and culture, environments, regimes, regulatory priorities challenges and objectives and is a core principle of regulation.[29] While regulation theory is about choices faced in practice, international negotiations share a commonality in so far as actors choose directions and face new pressures- and change accordingly. Responsiveness contributes to politicisation in so far as institutional change is sought as part of politicisation demands.[30] The actors may not be 'symmetrically' aligned because responsiveness may feed directly or indirectly into politicisation. Nonetheless, the staggering array of changes to the TTIP negotiation process are themselves reactions from actors through innovation, establishing new procedures; forums and practices have been established that never existed before, often beyond the requirements of CJEU case law on EU international relations law.[31] Such responsiveness acts as the empirics of politicisation because they provide evidence of change precisely because they are measurable changes.

The paper next delves more deeply into the specifics and explores the practices evolved by various actors within the TTIP negotiations: namely: (1) the European Commission, (2) the European Parliament, (3) the European Ombudsman, (4) the Committee of the Regions and (5) the Advisory Group. It briefly outlines the salient features of each of the actors' roles in international relations and then steps taken by the actors in response to the negotiations.

[27] Zürn, *supra*, n.12 58.
[28] I.e. reacting in a desired or positive way or quick to react or respond.
[29] See Julia Black and Robert Baldwin, *Really Responsive Risk-Based Regulation,* 32 Law and Policy 181 (2010).
[30] Zürn, *supra*, n.12, 60.
[31] See Alec Stone Sweet, Wayne Sandholtz & Neil Fligstein (eds.), *The Institutionalization of Europe* (Oxford University Press 2001).

On responsiveness practices and the European Commission

Pursuant to Article 218 TFEU, the Council can but need not necessarily authorise the European Commission (Commission) to be the Union negotiator for an agreement.[32] Nevertheless, as Eeckhout suggests, the negotiation of international agreements in the past has been a significant Commission prerogative.[33] The Commission is also said to vacillate between autonomy and delegation of powers in its negotiations, externally with third countries and internally with the Council.[34] The Commission is arguably the most normatively salient actor in the TTIP negotiations from an EU perspective because it has principally been responsible for evolving a vast infrastructure of practices.

Ostensibly, the recent case law of the CJEU has not necessarily strengthened the Commission's hand in international relations negotiations, i.e. specifically during the negotiation process. For example, the recent decision of the CJEU in *Commission v. Council* (Greenhouse Gas Emissions) appears to require both autonomy for the Commission qua negotiator but also considerable accountability as between the Commission and the Council's special committee in negotiations.[35] It thus outlines a modest and balanced vision of Commission autonomy in negotiations. There, the Commission sought annulment of a Council Decision authorising the opening of an EU emissions trading scheme with Australia for its alleged infringement of the principle of sincere cooperation and institutional balance in Article 13 TEU. It argued principally that the Commission as negotiator could not be bound by the negotiating Directives which established detailed negotiating positions for reason of the silence of the treaties. The CJEU agreed that the Council lacked powers to bind the Commission whilst simultaneously also emphasising its accountability to the Council. While this goes well beyond previous case law (albeit based on previous provisions in the early 1990s and at a later stage of conclusion of a treaty), for example, in *France v. Commission*[36] (where France successfully challenged the authority of the Commission to autonomously claim power to bind itself to an international agreement with the United States), it is not so far-reaching because it gives little indication of the change that the Commission has spear-headed in the TTIP negotiations.

[32] See Eeckhout and Schütze, *supra,* n.5.
[33] Eeckhout, supra, 197*,* n.5.
[34] Schütze, *supra*, n. 5.
[35] Case C-425/13, *Commission v. Council*, ECLI:EU:C:2015:483.
[36] Case C-327/91 *France v. Commission,* ECLI:EU:C:1994:305.

In this regard, the amount and quantity of transparency and participation that the Commission as lead negotiator has sought to apply to the TTIP by the 13th round of negotiations is very far-reaching in contrast to such case law and recent EP transparency case law. The TTIP negotiations contrast sharply with the Commission's reactions in the negotiation of Anti-Counterfeiting Trade Agreement (ACTA), where it had to quickly respond and combat myths with documents and fact sheets, which ultimately failed to convince the EP.[37] A landmark operational agreement was thus entered into in December 2015 whereby the Commission provided the EP all consolidated texts and other sensitive TTIP documents.[38] The TTIP negotiations after 13 rounds of negotiations and multiple rounds of information disclosures appear far more institutionalised and sophisticated in their attitude to transparency. They thus stand significantly apart from its ACTA 'knee-jerk' responsiveness, considerably more limited temporally and thus once-off, with limited inter-institutional impact. This is because it has generated a wholly different dialogue, textual format and a more meaningful form of information provision. They thus mark a major shift in the Commission's transparency practices.[39]

The TTIP negotiations also appear to have generated a specific accountability dynamic around the Commission to *inter alia* the Ombudsman, the EP, citizens, States, the Council and even the newly established Advisory Group (discussed below) has driven its programme of responsiveness.[40] Its ability to propose large-scale global reforms e.g. the Investment Court System (ICS), as a means to address broad-reaching concerns on Investor-State Dispute Settlement (ISDS), forms also an important example of far-reaching responsiveness practices on its part as a means to garner more public support through legal change and holding itself to account as lead negotiator.[41] The TTIP negotiations have thus incited considerably responsiveness practices on the part of the Commission.

[37] See Christina Eckes, Elaine Fahey & Machiko Kanetake, *International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)*, XX(2) *Currents,* 20 (2012); Cremona, *supra*, n. 10.
[38] Pursuant to annex II, point 2.3, Framework Agreement on relations between the EP and European Commission (20 November 2010 OJ L 304/ 57); Letter from Cecilia Malmström 'Access to TTIP-related documents- comprehensive agreement on operational agreements between the INTO Committee and DG Trade' D 321485 10 December 2015.
[39] See Abazi and Hilldebrant, *supra*, n.20; Curtin, *supra*, n. 6.
[40] See Politico, 'Softer secrecy deal for TTIP group' (6 January 2015): http://www.politico.eu/article/softer-secrecy-deal-for-ttip-group/ (accessed 24 Feb. 2016).
[41] European Commission Concept paper '*Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*', 5 May 2015.

On responsiveness practices and the EP

Moving on to another significant actor, the EP, the history of the powers of the EP in international relations is one of modest and gradual empowerment.[42] Post-Lisbon, the EP has powers of consent to approve international agreements in a variety of circumstances, pursuant to Article 218(6)(a) TFEU.[43] They are nevertheless limited to modest information and veto rights ameliorated through an agreement. The European Parliament is still excluded from the critical stage of the opening of negotiations on international relations agreements in Article 218(3) TFEU.[44] The legal role of the EP as to the TTIP principally relates to its information rights and its eventual consent to the final result. However, its non-binding resolutions increasingly carry legal significance, especially with the US through resolutions,[45] indicating its politicisation 'outwards in'.[46]

The empowerment of the EP as a legal actor in international relations to some extent has been strengthened in recent CJEU case law. In *in 't Veld*, the CJEU has recently eroded important international relations exceptions to the transparency regulation in response to litigation taken by an individual MEP, Sophie in 't Veld.[47] The principle of inter-institutional balance has also been applied to it with much force in *Parliament v. Council* ('EU-Mauritius'), on its late information provided to the EP about of an agreement between the EU and Mauritius already published in the OJ as a breach of the EP's democratic rights under Article 218 TFEU, resulting in its annulment.[48] However, it might be contrasted with *European Parliament v. Council* ('Europol'), where the EP recently failed in its effort to allege procedural impropriety in the Council decision listing third countries that Europol could engage in agreements with, by arguing that it was a political choice that it needed to influence.[49] Thus, a standard line of reasoning has not yet emerged.

In July 2015, the EP passed a significant resolution on the TTIP.[50] Although non-binding under the treaties, it was obtained after a series of important and remark-worthy delays. On the first

[42] See Daniel Thym, 'Parliamentary Involvement in European International Relations' in M Cremona and B De Witte (eds.), *EU Foreign Relations Law: Constitutional Foundations* (Hart Publishing 2008) pp. 201-231; 210.
[43] Article 218(6)(a)(v) TFEU.
[44] See Eeckhout, *supra*, n. 5, 199.
[45] See D Jančić, 'The Role of the European Parliament and the US Congress in Shaping Transatlantic Relations: TTIP, NSA Surveillance and CIA Renditions', *Journal of Common Market Studies* (forthcoming).
[46] See Eckes, *supra*, n. 1.
[47] *In 't veld*, *supra*, n.20.
[48] C-658/11, *Parliament v. Council*, ECLI:EU:C:2014:2025.
[49] C-363/1z4, *European Parliament v. Council,* ECLI:EU:C:2015:579
[50] 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) (2014/2228(INI)).

of these, the decision to postpone discussion of a resolution passed by 183 votes to 181 with 37 abstentions. The President of the EP was condemned in media reports for using 'an underhanded' administrative procedure to postpone the vote by the EP on the TTIP as a 'ruse' to cover up sharp divisions within two large political groups on the rightful place of ISDS.[51] The EP resolution finally passed on 8 July 2015 displays considerable political prevarication.[52] For example, its resolution was perceived to be particularly ambiguous in terms of its political place: supporting the TTIP but rejecting ISDS albeit not unequivocally, by 436 to 241.[53] Shortly thereafter, it was reported in September to have overwhelmingly supported Investment Court System (ICS) reforms and continues to do so.[54]

The EP shows many further shifts in practice through responsiveness. In response to the Council's failure to publish the negotiation mandate, with MEPs initially individually leaking documents. More broadly, however, during the 12 rounds of negotiation, the EP has consistently acted as a transparency champion, lauding Commission, European Council and Ombudsman efforts at transparency, going well beyond the strict contours of recent CJEU case law, for example, in *in 't Veld*. However, its responsiveness to broader normative concerns, for example, as to democratic, legitimacy or other significant concerns in the development of TTIP, is arguably not so homogenous. Instead, in the TTIP negotiations the EP has displayed high levels of politicisation and stronger interest cleavages or divides. The TTIP negotiations give strong evidence of outwards-in pressures. Arguably, its responsiveness has been more muted while its politicisation appears intensified. Nevertheless, the EP here appears to act as a subject or agent of politicisation in the broader sense through its organisation of political protest beyond that envisaged in current case law.

3.4: On responsiveness and the European Ombudsman

The European Ombudsman (Ombudsman) is the next important reference point for shifts in inter-institutional practice. Recent studies demonstrate convincing how 'reprimands' from the Ombudsman to other institutions generally modify EU practice positively and increase EU accountability.[55] The TTIP negotiations are argued here to mark an important recent example of

[51] *EUObserver* 'MEPs snipe at one another, as US trade vote postponed' (9 June 2015).
[52] *EUObserver* 'MEPs back US free trade after socialist U-turn' (28 May 2015).
[53] *Euractiv*, 'European Parliament backs TTIP, rejects ISDS' (9 July 2015); *EUObserver* 'MEPs snipe at one another, as US trade vote postponed' (9 June 2015).
[54] See the recent account on political positions in *EUObserver* 'TTIP investor Court illegal say German judges' (4 February 2016).
[55] See Petia Kostadinova*, Improving the Transparency and Accountability of EU Institutions: The Impact of the Office of the European Ombudsman,* 53 JCMS 1077, (2015).

this. Despite significant legislative exclusions existing in Council Regulation 1049/2001 (EC) on access to documents so as to limit her conduct in foreign affairs, she launched an important own-initiative inquiry into the Commissions conduct of the TTIP negotiations.[56] Thus, the Ombudsman raised a broad range of concerns in July 2014, a year into the negotiations, as to the failures to discover key documents, delays, granting privileged access to certain types of stakeholders but also raised 'softer' accountability questions as to the learning process of the TTIP, mirroring concerns raised by the EP and civil society.[57] Her inquiry ostensibly concluded in January 2015 raised 10 suggestions including, *inter alia,* to be proactive in providing information, negotiation texts and making meetings transparent with negotiators. It resulted in a detailed follow up and response, which amounts to an important tale of positive practice in developing openness in negotiations.[58] It has proven to be a positive learning process in so far as the Ombudsman herself eventually becomes a champion of the Commissions' unprecedented' and 'real' efforts to promote public participation.[59]

Her actions demonstrate some breadth of the interpretation of her role – pushing the boundaries of her function which might not have previously been understood to capture foreign relations, excluded as it is from EU transparency law. One might note that the Ombudsman has recently also sought to apply transparency to the governance arrangements surrounding the transfer of data under the EU-US (Swift) Terrorist Financial Tracking Programme (TFTP) - with considerably *less* success than as to TTIP.[60] Ironically, this failure appears to have arisen from the formal legal limits of her role, i.e. her inability to obtain permission for access from the US.

Her actions in TTIP demonstrate a specific responsiveness to the public concerns arising as to TTIP, achieving legal results in line with recent studies of the Office.[61] The information generated by the Ombudsman in her TTIP inquiry amounts to important legal empowerment for other actors, e.g. the EP,[62] which can feed more broadly into politicisation activities of the EP.

[56] Regulation (EC) No 1049/2001 of the European parliament and of the Council of 30 May 2001 regarding public access to European Parliament; Transparency of the Transatlantic Trade and Investment Partnership, Decision of 6 January 2015: http://www.ombudsman.europa.eu/en/cases/summary.faces/en/58670/html.bookmark (accessed 24 Feb. 2016); Follow up of European Commission and the reply of the Ombudsman: http://www.ombudsman.europa.eu/cases/correspondence.faces/en/59898/html.bookmark (accessed 24 Feb. 2016); Decision of 2 September 2014 http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54678/html.bookmark (accessed 24 Feb. 2016).
[57] Access to documents of the institutions and decision of the European Ombudsman of 6 January 2015 closing her own initiative inquiry O1/10/2014/RA concerning the European Commission on dealing with requests for information and access to documents (Transparency).
[58] *Supra,* n.56.
[59] See 'Comments to Commission on own-initiative inquiry' REF 01/10/2014 RI.
[60] See http://www.ombudsman.europa.eu/en/cases/summary.faces/en/57623/html.bookmark (accessed 24 Feb. 2016).
[61] Kostadinova, *supra*, n. 55.
[62] See Paul Craig *EU Administrative Law* (2nd ed., Oxford University Press 2012), 357.

The work of the Ombudsman is thus important in characterising responsiveness of other institutional actors in the negotiations.

On responsiveness and the Committee of the Regions

Moving on next to other non-institutional actors, namely the Committee of the Regions (CotR), it appears to have acted as a form of subject or agent of politicisation within the TTIP negotiation, albeit of a lesser sort. The CotR is an advisory body of the EU pursuant to Article 300 TFEU, comprised of regional and local elected representatives and provides opinions where consulted by the institutions. The CotR entity has delivered some interesting interventions in the TTIP negotiations, albeit it can at most make non-binding recommendations.[63] The CotR is not necessarily or usually associated with EU foreign affairs because there is no formal infrastructure for EU external action with respect to sub-national actors. It is often an entity perceived with some scepticism as to its political salience in 'real world' politics.[64] The political influence of the Committee has only recently become the object of formal study and its legal influence similarly remains embryonic.[65] Some have sought to enhance the mandate and role of the CotR specifically in EU-US relations by way of a multi-level legitimation of EU structures, seeing the global as local.[66]

In its draft opinion on the TTIP of 11-13 February 2015, the CotR criticised the delay in the publication of the TTIP negotiating mandate several months after it was leaked online.[67] The CotR has also sought to emphasise the significance of multi-level democracy and the place of the regions within the national parliaments that would eventually get to vote upon TTIP going forward. The CotR is rarely associated with international relations, lacking an express mandate in this field, and its intervention marks an important incitement towards politicisation sparked by the TTIP. It is worth recalling that the outputs of international institutions are less likely to be rubberstamped at national level where international politicisation is increased. The voice of multi-layered democracy in this context appears thus of significance.

[63] Zürn, *supra*, n. 12.
[64] See Nikos Skoutaris 'Comparing the subnational constitutional space of the European sub-state entities in the area of foreign affairs' 4(2) *Perspectives on Federalism*, E239-E268, (2012).
[65] See Christian Hönnige & Diana Panke, *The Committee of the Regions and the European Economic and Social Committee: How Influential are Consultative Committees in the European Union?*, 51 *Journal of Common Market Studies* 452, (2013); Josephine Van Zeben in 'A 'Bottom-Up' Perspective on EU-US Relations: The Role of Sub-Central Authorities' in Fahey and Curtin, *supra*, n.9.
[66] Van Zeben, *ibid.*
[67] See http://cor.europa.eu/en/news/Pages/ttip-potential.aspx (last accessed 24 Feb. 2016).

On responsiveness and the Advisory Group

The final actor of note considered here as to the TTIP negotiations is the Advisory Group as the body established after 3 rounds of negotiations to formally represent civil society, albeit as a non-institutional actor of EU law. Thus, a TTIP Advisory Group was established in January 2014, after 3 rounds of negotiations. It was specifically designed to combat critique as to the privileged place of the corporate world within the TTIP negotiations and also to provide 'high quality advice' within the talks and thus deepen the Commissions' commitment to dialogue with all stakeholders.[68] The Advisory Group is additional to stakeholder meetings and civil society dialogues which at the time of its composition had already engaged in consultation with over 500 entities. The Advisory Group is comprised of 14 members, drawn from consumers' interests, labour law, environment, health, business, manufacturing, agriculture and services sectors. Arguably, their selection was not necessarily wholly transparent.[69] The Commission was reported to have watered down the non-disclosure agreement required of the group's members, after concerns that the Commission had reacted excessively in response to leaking linked to the group. However, it subsequently was compelled to remove clauses which would have precluded the Group from speaking to the media, demonstrating clear shifts in Commission practice in its favour.[70] Moreover, the Ombudsman in her TTIP decision in 2015 advocated greater access to the consolidated texts for the Advisory Group, thereby acting as an advocate of its interests.

The Group at the time of writing was about to hold its 22nd meeting (5 April 2016) and appears to have functioned along the lines of hearing presentations from the Commission and engaging in a question and answer session with the EU negotiator. One specific issue is the extent to which such a group functions beyond merely advisory status and can function as a form of tangible check on the legal and normative limits of the TTIP. For example, the Advisory Group appears to have argued that ISDS should be severed from TTIP or at least referred to the CJEU as well as the formal relationship of the TTIP with the TPP or the scope of proposals (i.e. on the ICS) in its most recent responses at the time of writing. Overtime, contrasting the earliest with the latest meetings by late 2015, a considerable evolution takes place in terms of the reporting, the transparency and the level of engagement between the body and the Commission. The Group's increasingly critical questions or requests e.g. to sever parts of the negotiations or to

[68] See European Commission, 'Expert group to advise European Commission on EU-US trade talks' (27 January 2014). http://europa.eu/rapid/press-release_IP-14-79_en.htm (accessed 24 Feb. 2016).

[69] See Bartl and Fahey, *supra*, n.9; see for its detailed composition: http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152102.pdf (accessed 24 Feb. 2016).

[70] See the disclosure agreement: http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2015/06/20150601-Non-Disclosure-Agreement-TTIP.pdf (accessed 24 Feb. 2016).

refer parts to the CJEU present an interesting modus vivendi that warrant further scrutiny. Nevertheless, how meaningful and effective the group will be or has been can only be gauged at a later stage.

Conclusions

Although the legal dimensions of international negotiations is not uniformly well understood across disciplines, the TTIP negotiations provide evidence that it is rich terrain for legal and many other perspectives alike. The TTIP negotiations have altered and been re-constituted considerably through each round of negotiations and appear to provide evidence of positive changes each time. These positive changes represent the effects of international relations upon EU law. It has accordingly been argued that the negotiations provide important evidence of politicisation taking effect within the EU legal order through shifts in legal practices in the TTIP negotiations, bringing transparency, legitimacy and democracy to the fore. It is not yet evident what the downsides of this politicisation are from a legal perspective, e.g. whether the EU's negotiating position has been legally constrained because of its commitments to transparency.

The salience of the negotiations has been argued here to manifest specifically in 'responsiveness' through or by empowerment of actors within the negotiations. Responsiveness has been argued here to be a useful measure for politicisation, showing reactions and change, particularly when viewed from a legal perspective. Accordingly, the positive benefits of change and innovation on the part of so many institutional actors through law appears worthy of further consideration and reflection from a legal perspective.