

Mandate Disclosure in EU Trade Negotiations: The Case of TiSA

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MICHAL OVÁDEK, MAY 24 2016

In March 2013, the European Commission obtained a Council mandate ('negotiating directives') to commence the negotiation of the Trade in Services Agreement (TiSA). TiSA is in the process of being negotiated by 23 members of the WTO (principally the 'Really Good Friends' sub-group) and has so far seen thirteen rounds of talks take place. Its aim is the elimination of discriminatory measures and a more robust liberalisation of trade in services than the one provided for by the General Agreement on Trade in Services (GATS).[1] While it is currently short of a full (multilateral) WTO agreement, the plurilateral TiSA is being drafted in line with WTO principles and it promises to be open for signature to other WTO members.[2]

Together with the other major EU trade agreements under negotiation such as the Transatlantic Trade and Investment Partnership (TTIP), TiSA has generated significant controversy and public protest, particularly following the release of a leaked draft of the Financial Services Annex by WikiLeaks.[3] Opponents of the deal have highlighted the secrecy of the negotiations: an argument that reinforces in the eyes of the public the allegations framing the substance of the agreement as bending to corporate interests and a danger to democracy.[4] In response to the public pressure, the Council, on request of the Commissioner for Trade, has approved in March 2015 the disclosure of the otherwise secret directives given to the Commission.[5]

This paper will situate the decision to publish the mandate in the framework of Robert Putnam's two-level game approach to international negotiations.[6] It will discuss the impact on the size of the EU's win-set in the ongoing TiSA negotiations in light of the EU's institutional arrangement and outline some potential implications of the decision.

TiSA in a Three-level Game

Robert D. Putnam's seminal article on how the international is linked with the domestic in diplomacy provides a useful guide to understanding EU trade negotiations. The EU negotiator, usually the Commission, conducts negotiations with other parties at what Putnam terms Level I, i.e. the international level. When it comes to Level II, however, it is necessary to extend the standard 'unitary-state' framework by inserting another level of analysis due to the multi-level nature of the EU.[7] The resulting conceptualisation is, therefore, one of a three-level game where Level II represents the EU and Level III the national plane.

At Level I, the EU is represented by a negotiating team directed by the Head of the Trade in Services Unit of the Directorate-General for Trade. Drawing on insights about the better understood TTIP negotiations, it would be a mistake to see the Commission or Directorate-General for Trade as an isolated monolithic negotiator.[8] First, there is consensus-seeking consultation between the lead Directorate-General (Trade) and other Commission services on an issue-specific basis.[9] Second, the Commission consults the Member States during the negotiation process – in their capacity as actors at Level II (EU) – both directly and through the Council's Trade Policy Committee. While there is no obligation on either side to accept the demands and proposals of the other,[10] the underlying institutional constraints have an impact on the relationship between the Commission and the Member States. Not only does the Council authorise the Commission to formally open talks and adopt negotiating directives that guide the Commission's conduct, it is also responsible for the conclusion and ratification of any international agreement. As

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regards TiSA, it is clear from the wording of Article 207(4) TFEU that the Council will have to agree unanimously to the agreement, which reduces the potential size of the win-set and increases the danger of involuntary defection, something the Commission must be mindful of when considering to what extent it should take on board Member States' preferences.

Following the Lisbon Treaty, the second key actor at Level II is the European Parliament (EP). The involvement of the European Parliament throughout the negotiations is normally much feeblar than of the Member States, particularly as far as the possibility to input into the substance of the agreement is concerned. Nonetheless, the Treaties oblige the Commission to "report regularly [...] to the EP on the progress of negotiations" (Article 207(3) TFEU), which gives the European Parliament privileged access to developments that are by and large not made public. As such, the European Parliament is in a unique position to politicise TiSA, taking into account that it can score electoral points by channelling public dissatisfaction regarding the agreement (as it has done with TTIP).[11] The important point here is that the European Parliament's powers are not merely rhetorical: its consent is required for the ratification of the agreement, which further limits the EU's win-set and represents another risk of involuntary defection. Expressed in the cautionary words of the European Parliament Committee on International Trade, "TiSA will be balanced, or it will simply not be." [12]

The last institutional hurdle relates to the national level (Level III). Were TiSA to be concluded as a so-called 'mixed agreement', the Member States would also need to ratify the agreement in their domestic systems, which would on more than one occasion require the consent of the national parliaments. While whether an agreement is concluded as 'mixed' is only determined by its final form, the Commission itself has conceded in the case of TTIP that recent practice of the Council shows the preference of the Member States to use the mixed agreement classification rather generously.[13] This reluctance to cede ratification powers over international agreements gives the Member States another opportunity to veto TiSA, even if provisional application of an international agreement (Article 218(5) TFEU) would allow the temporary circumvention of Level III ratification.

Saving the Win-set

The complexity of the EU's institutional design makes for a difficult job for the Commission as the EU TiSA negotiator. On the one hand, the Commission is conducting actual trade negotiations at Level I with its counterparts regarding the substance of TiSA; on the other hand, it is consulting actors and keeping track of developments at Level II and III in order to ensure that TiSA is within 'domestic' (EU *and* national) win-sets. It is in this context that the Commission's request for the disclosure of the negotiating mandate and the Council's approval must be understood.

Two concepts from Putnam's original 1988 article help to facilitate the explanation of the TiSA mandate disclosure. The first is *reverberation*, which is a process whereby international influences have an impact on domestic politics and thus indirectly also on the international negotiations.[14] In the case of TiSA, the international salience of the agreement triggered by the Wikileaks' revelations has had a negative influence on public opinion which has, in turn, been picked up by stakeholders at Level II and III (the European Parliament and Member States), toughening their stance on TiSA. In the language of two-level games, the domestic win-set of the EU has shrunk; combined with the existence of multiple veto points, involuntary defection has become a real possibility.

Due to the public nature of the opposition to TiSA, the diminished domestic win-set and the looming danger of non-ratification could not escape the attention of the Level I negotiators. Where institutional constraints could normally play into the EU's hands by allowing it to drive a harder bargain, the increased *uncertainty* resulting from domestic reverberation of public disconcertedness regarding TiSA has thrown the Commission's credibility to pass the agreement at home in doubt. Uncertainty of other parties with respect to the overlap of any proposed deal with the EU's win-set has thus surpassed the point where the negotiating 'straitjacket' is viewed as a bargaining device.[15] Rather, the EU's win-set has become so narrow that it endangers the whole agreement; instead of unilateral actions aimed at increasing the opponent's win-set for the sake of bargaining advantage, there are joint rescue statements intent on reassuring the public of TiSA's harmlessness.[16]

The mandate disclosure should be seen in the same light: as a means to alleviate public concerns about TiSA. The

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disclosure provides a boost to positive associations with the agreement, namely 'transparency', while dispelling the label of 'secrecy' in a bid to widen the EU's domestic win-set. Although the Commissioner for Trade suggested in her request that "the publication of the mandate would not undermine our negotiating position",^[17] such a stance would be more believable had the mandate been published voluntarily before the start of the negotiations. After all, the EU is not always this accommodating, as showcased by the refusal to publish the mandate in EU-India FTA negotiations, on the grounds that "any disclosure of the document [...] would seriously undermine the EU's negotiating strategy".^[18] Moreover, the other Commission's avowed justification for disclosure – that it is consistent with WTO's transparency objectives – is similarly dubious, given that the mandate has also been published in the TTIP negotiations which were not declared to be open for other WTO members but not in, for example, the EU-India bilateral talks. What connects TiSA and TTIP is a high level of public awareness – something that is absent from EU-India or other EU negotiations. Mandate disclosures thus seem to be about extending too narrow win-sets.

Conclusion

The publication of the negotiating mandate will not by itself ensure the success of TiSA. It is merely a stepping stone towards expanding the EU's win-set to a feasible size. In the event that TiSA is agreed at Level I, however, there will still be a substantial danger of involuntary defection. Considering the fact that the Council has approved the disclosure of the mandate – and, furthermore, given the level of politicisation of the issue – the main risk of involuntary defection resides with the European Parliament at Level II and with national parliaments at Level III.

It is difficult to predict whether mandate disclosure will be the new 'normal'. The increased drive towards transparency in TiSA and TTIP has been brought about by public pressure on the negotiations. While it appears that the Commission is learning its lesson,^[19] it is unclear whether mandate disclosure will be employed as an emergency measure or become a standard part of EU trade negotiations. If the latter, it may affect the content of future mandates, prompting the Council to be, for example, less concrete about the Commission's red lines. A precedent for trade transparency could be forming, but at what cost?

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[2] European Commission, Directorate-General Trade, "In focus: Trade in Services Agreement (TiSA)", 29 October 2015.

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[4] Russian media count among the critics, see e.g. "Secret trade agreement covering 68 percent of world services published by WikiLeaks", *Russia Today*, 19 June 2014.

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[6] R. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organization*, vol. 42, no. 3, 1988, pp. 427-460.

[7] *Ibid.*, p. 449.

[8] T. Novotná, "EU institutions, Member States and TTIP negotiations: the balance of power and EU foreign policy", in J. Morin et al. (eds.), *The Politics of Transatlantic Negotiations: TTIP in a Globalized World*, Dorchester, Ashgate, 2015, p. 62.

[9] *Ibid.*, p. 63.

[10] *Ibid.*

[11] *Ibid.*, p. 62.

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[13] European Commission, "Decision regarding the follow-up to National Parliaments' Opinions", C(2014)7557/F1, Brussels, 16 October 2014.

[14] Putnam, "Diplomacy and Domestic Politics", *op. cit.*, p. 454.

[15] Putnam, "Diplomacy and Domestic Politics", *op. cit.*, p. 453.

[16] See e.g. Office of the United States Trade Representative, "EU-US Joint Statement on Public Services", 20 March 2015.

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