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GERMANY'S PIVOTAL ROLE ON THE WAY TO TTIP

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On the cover: Detail of the Reichstag in Berlin at dusk. © Thomas Saupe/istockphoto.com

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1 POLICY CHALLENGES AND POLICY RECOMMENDATIONS

Policy Challenge

Germany has long been one of the world's leading trading nations. However, as in several other countries, the debate about the Transatlantic Trade and Investment Partnership (TTIP) in Germany has taken an increasingly adversarial tone over the past year. Although some debate was anticipated in Germany regarding food safety and environmental issues, the country was not expected to be a major hurdle on the way to a transatlantic trade deal. Going beyond the NGO community, the debate now involves a wide array of societal actors and several distinct issues. Besides overarching concerns regarding the transparency of negotiations, other issues include fears over the lowering of European and German standards, as well as questions related to potential investor-state dispute settlement (ISDS) provisions. Given Germany's position as Europe's largest economy and one of the world's leading traders, the debate in Germany has the potential to affect the scope and scale down the depth of a final agreement. Without careful handling, the German TTIP discussion could harm both the EU's image in Germany as well as the already strained transatlantic relationship, instead of delivering a much-needed boost to both.

Policy Recommendations

The public debate on TTIP and the persistence of fears (and, in part, prejudices) has reached such a state that policymakers and officials on both sides of Atlantic need to seriously consider the risk of a failure or serious scaling down the agreement. For the transatlantic deal to be able to reach its full potential, it will be essential for crucial stakeholders and significant parts of the population in key countries like Germany to be convinced of the transatlantic partners' determination and ability to reach the highest possible standards during the negotiation and in a final agreement.

In this regard, one of the most voiced concerns — the lack of transparency — should be addressed actively through (among other things) a new communication strategy at the national and EU levels, including the publication of as many relevant documents as possible. Furthermore, policymakers could counter the misperception of TTIP as a “U.S. agreement” by underscoring specific European and German interests in the transatlantic trade talks. Finally, policymakers should reaffirm, both through means of public diplomacy and even stronger stakeholder involvement, that European and German standards will not be lowered, by considering the release of intermediate negotiation results in order to alleviate fears and to clarify the direction of deliberations.

2 THE GERMAN TTIP DEBATE

While Germany is not the only large member state in the European Union to experience public controversy over TTIP, given the country's economic and political weight in Europe, the development of the German debate could have the potential to affect the scope and chances of a successful agreement.

The start of negotiations for the Transatlantic Trade and Investment Partnership (TTIP) in July 2013 was initially greeted with cautious optimism by most observers and stakeholders in Germany, a country whose society is traditionally open to free trade agreements. TTIP, it was said on both sides of the Atlantic, would deliver economic growth and jobs, revive or even repurpose the transatlantic partnership, and, finally, have the potential to set global standards for trade and investment for years to come.

Although certain questions, revolving largely around food safety and environmental issues, were anticipated to present some difficulties in the German debate, most observers did not expect the country to pose a significant hurdle to the negotiations. In fact, there was even talk that Berlin could play a key role in moving along more “problematic” countries, like France, on the way to a successful agreement.

A year on, while official government support remains steadfast, the public debate on the transatlantic trade talks has taken an increasingly critical and adversarial tone. In spring 2014, an online campaign against TTIP gathered more than 700,000 signatures within months.¹ And politicians campaigning for the European elections in May 2014 were frequently confronted by vocal protests against TTIP, leading the newsmagazine *DER SPIEGEL* to wonder whether resistance to the transatlantic trade deal could prompt the emergence of a new extra-parliamentary opposition.²

In part, the augmented criticism reflects the fact that the stated goals of TTIP “aim to go beyond the classic approach of removing tariffs and opening markets on investment, services and

public procurement.”³ Instead, TTIP is widely seen as a “blueprint for a ‘new generation’ of trade agreement,” which aims to narrow the “regulatory gap.”⁴ It thereby touches directly on regulations conventionally deemed to represent domestic policy preferences. Given this, it is perhaps not surprising that the German TTIP debate now involves a wide array of actors and topics. Among these, several distinct issues have dominated the public discourse. Besides overarching concerns regarding the transparency of negotiations, these include fears over the lowering of European and German standards, as well as questions related to potential investor-state dispute settlement (ISDS) provisions.

While Germany is not the only large member state in the European Union to experience public controversy over TTIP, given the country's economic and political weight in Europe, the development of the German debate could have the potential to affect the scope and chances of a successful agreement. The concerns over German approval of the almost-completed Comprehensive Economic and Trade Agreement (CETA) with Canada,⁵ hinging on questions related to the inclusion of investor protection clauses, can be seen as an indication that Germany, at least on the European side, may increasingly become the pivotal country for the transatlantic trade agreement.

¹ <http://www.ttip-unfairhandelbar.de/start/petition/>

² Abé, Nicola, “Im Säurebad,” *DER SPIEGEL*, May 26, 2014, p. 20

³ European Commission, “European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership,” February 13, 2013, http://europa.eu/rapid/press-release_MEMO-13-95_en.htm

⁴ Fabry, Elvire, “TTIP at the forefront of international trade?,” EurActiv, March 11, 2014, <http://www.euractiv.com/trade/ttip-forefront-international-trade-analysis-534062>

⁵ Vasagar, Jeevan and Christian Oliver, “Germany seeks to limit investor protection to save trade deal,” *Financial Times*, August 4, 2014, <http://www.ft.com/intl/cms/s/0/bcb8ab98-1bdb-11e4-adc7-00144feabdc0.html>

3 AN INCREASINGLY ADVERSE PUBLIC OPINION

When TTIP was launched in 2013, 56 percent of German respondents in a German Marshall Fund (GMF) poll stated that proposals to increase trade and investment between the United States and the EU would help the economy grow, while 36 percent answered it would heighten economic vulnerability.⁶ Similarly, an April 2014 survey by the Pew Research Center and the Bertelsmann Foundation found that Germans by a wide margin (55 percent to 25 percent) believed that TTIP would be good for the country.⁷ However, only two months later, in a DeutschlandTREND opinion poll, an equally clear majority of respondents (55 percent) stated that a transatlantic trade deal would be disadvantageous to Germany (only 31 percent saw more advantages).⁸ Then again, an October 2014 survey found 48 percent of Germans expressing a positive view of TTIP (32 percent had a negative view).⁹

These varying results point to the difficulty in determining public opinion trends with regard to TTIP and trade in general, as even the overall positive numbers in April 2014 were accompanied (in the same survey) by more negative responses toward specific aspects of a potential agreement. On these particulars, public opinion trends appear more adversarial regarding TTIP.

In the Pew/Bertelsmann poll, German respondents disapproved by significant margins of all individual

aspects of TTIP asked about in the survey. They opposed eliminating all duties on goods imported from the United States, making U.S. and European standards for products and services as similar as possible, and they disapproved of efforts to remove restrictions on investment between the United States and the EU.¹⁰ Similarly, the vast majority of Germans showed fundamentally higher trust levels in European standards on issues such as food safety, data privacy, auto safety, and environmental safety than in U.S. ones¹¹ (see Figure 1). Given this deep distrust in U.S. standards, consumer protection ranks high as a topic in the German public debate around TTIP. In a survey for the Federation of German Consumer Organizations (vzbv), 92 percent of respondents stated that the safeguarding of European consumer protection standards in TTIP was important to them (including 59 percent who said it was “very important”).¹²

Germans also appear skeptical of transatlantic investment activities. While a slim plurality (49 percent) approves of U.S. “greenfield”¹³ investments in Germany, 73 percent of respondents in the Pew April 2014 poll thought that U.S. takeovers of German companies would hurt the economy.¹⁴ This negative view may reflect the widespread portrayal since the mid-2000s of U.S. financial investors (mostly private equity firms and hedge funds) in many German political debates as “locusts” (“Heuschrecken”) and corporate raiders.

The vast majority of Germans showed fundamentally higher trust levels in European standards on issues such as food safety, data privacy, auto safety, and environmental safety than in U.S. ones.

⁶ German Marshall Fund of the United States, “Transatlantic Trends. Topline Data 2013,” September 6, 2013, p. 54, <http://trends.gmfus.org/files/2013/09/TT-TOPLINE-DATA.pdf>

⁷ Pew Research Center, “Support in Principle for U.S.-EU Trade Pact,” April 20, 2014, p. 7

⁸ infratest dimap, “ARD-DeutschlandTREND,” June 2014, p. 5, <http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2014/juni/>

⁹ Demling, Alexander, “Freihandelsabkommen von EU und USA: Jeder zweite Deutsche findet TTIP gut, Siegel Online, October 31, 2014, <http://www.spiegel.de/wirtschaft/soziales/ttip-haelfte-der-deutschen-findet-freihandelsabkommen-mit-usa-gut-a-1000224.html>

¹⁰ Pew Research Center, p. 23, Question 7a-c

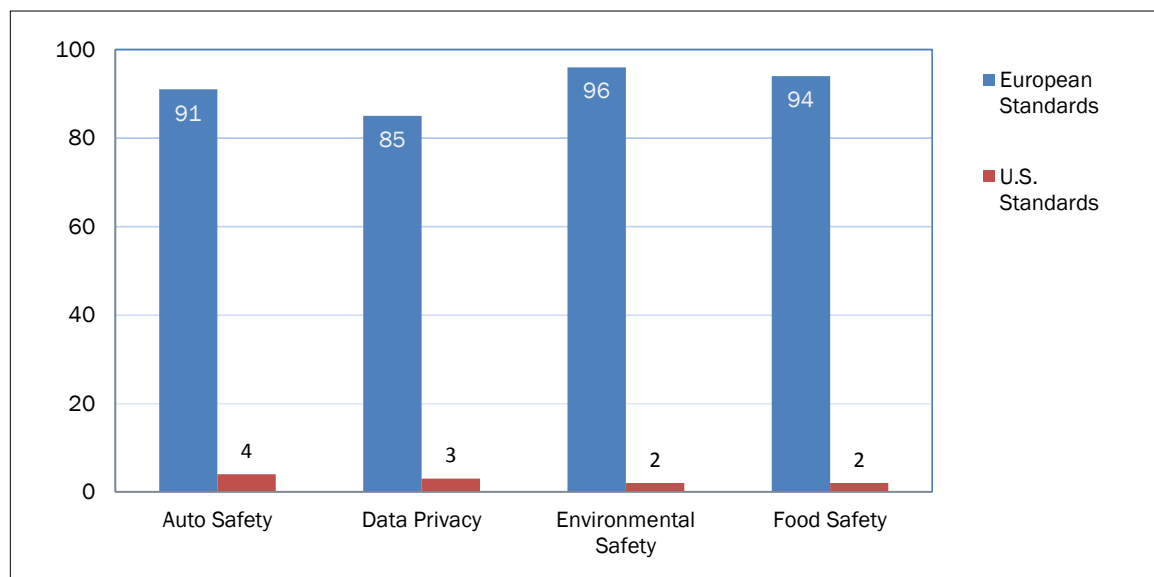
¹¹ Pew Research Center, p. 22, Question 4a-d

¹² Verbraucherzentrale Bundesverband e.V., “Große Mehrheit für europäische Verbraucherschutzstandards bei TTIP,” May 19, 2014, <http://www.vzbv.de/13276.htm>

¹³ “Greenfield” investments are new (ex nihilo) investments, as opposed to other forms of investments such as mergers and acquisitions in which ownership of existing investments is transferred.

¹⁴ Pew Research Center, p. 23

Figure 1: German Trust in European, U.S. Standards



Source: Pew Research Center 2014

Adding to the concerns about perceived lower U.S. standards is a growing skepticism of the United States in general, following the revelations of National Security Agency (NSA) activities in Germany in the summer of 2013 and the discovery of an alleged U.S. double agent in the German intelligence services in July 2014.

In fact, German attitudes toward the United States had already undergone notable fluctuations before 2013. After the upheaval of the Iraq war, when public sentiment toward the United States plummeted in Germany, the election of Barack Obama in 2008 reversed these trends. For instance, the percentage of those stating U.S. leadership in world affairs is desirable increased from 39 percent to 65 percent between 2008 and 2009.¹⁵ Moreover, 87 percent of Germans had a positive opinion of Obama, the highest measure ever for a U.S. president, not even achieved by President John

¹⁵ German Marshall Fund of the United States, p. 4

F. Kennedy immediately after his visit to Berlin in 1963.¹⁶ Around the same time, 78 percent of Germans valued the United States as a trustworthy partner.¹⁷

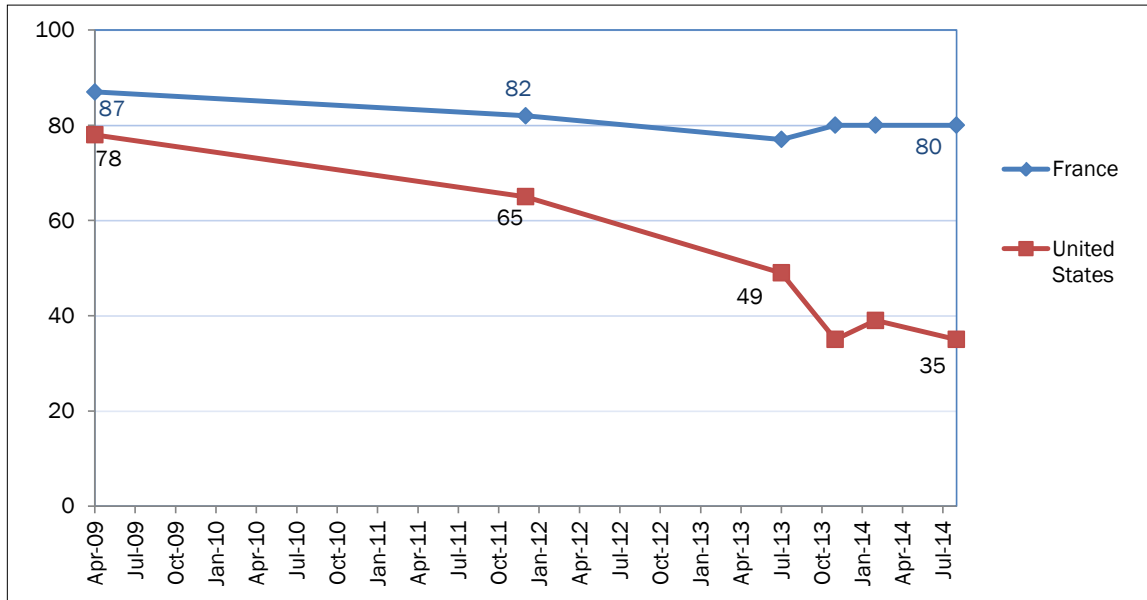
During the first years of the Obama administration, sentiment toward the United States dropped, but remained at overall high levels. In December 2011, 65 percent of Germans still saw the United States as a reliable partner.¹⁸ Yet the revelation of NSA activities in Germany in June 2013, just as TTIP negotiators were preparing to launch the first round of trade talks, dramatically changed the

¹⁶ Thomas Petersen, "Schleichende Zunahme des Antiamerikanismus," *Frankfurter Allgemeine Zeitung*, January 23, 2013

¹⁷ infratest dimap, "ARD-DeutschlandTREND," April 2009, p. 7, <http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2009/april/>

¹⁸ Infratest dimap, "ARD-DeutschlandTREND," December 2011, p. 9, <http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2011/dezember/>

Figure 2: German Percent Trust in the United States, France



Source: Infratest dimap 2009-14

picture. The number of respondents who saw the United States as a trustworthy partner dropped by 16 points to 49 percent in July 2013, and — as news about the tapping of the German chancellor’s mobile phone emerged — fell by another 14 points through November (see Figure 2). At this point, even the approval ratings of the president were affected, dropping by 32 percentage points between 2012 and 2013, and resulting — for the first time — in a majority of Germans disapproving of Obama’s work (52 percent).¹⁹ Over the coming months, these figures recovered slightly, with polls showing 39 percent of Germans in February 2014 viewing the United States as a reliable partner.²⁰

Since then, however, new revelations of U.S. intelligence operations in Germany have further eroded the U.S. image. In a July 2014 opinion poll, 69 percent of Germans stated that their trust in the U.S. partner had declined, and 57 percent of respondents wanted Germany to become more independent of the United States.²¹

¹⁹ Ibid

²⁰ Infratest dimap, “ARD-DeutschlandTREND,” February 2014, p. 15, <http://www.infratest-dimap.de/umfragen-analysen/bundesweit/ard-deutschlandtrend/2014/februar/>

²¹ *Der Spiegel*, “Umfrage: Deutsche wollen größere Unabhängigkeit von USA,” July 6, 2014, <http://www.spiegel.de/politik/deutschland/umfrage-deutsche-wollen-groessere-unabhaengigkeit-von-den-usa-a-979432.html>

4 RATIFYING TTIP IN GERMANY

While isolated calls arguing for the suspension of trade talks could be heard in Berlin following the new disclosures in July 2014, the government was careful to underscore its continued support for TTIP and to highlight the potential benefits of the agreement.

Although the initial NSA revelations did not have any immediate impact on negotiations, some TTIP supporters remained less outspoken than otherwise may have been the case in the early stages. At the same time, the fallout from the spying affair also quelled efforts in Germany to promote TTIP as a strategically important foreign policy tool, or even an “economic NATO,” as has sometimes been the case in the U.S. discourse.

While isolated calls arguing for the suspension of trade talks could be heard in Berlin following the new disclosures in July 2014, the government was careful to underscore its continued support for TTIP and to highlight the potential benefits of the agreement. Still, some policymakers pointed to a lasting impact on public sentiment, further complicating the already difficult domestic debate,²² with one minister warning that the revelations threatened to erode the bare minimum of societal support needed for a successful agreement.²³

This support is all the more important as the German government, in line with other EU countries, views TTIP as a so-called “mixed agreement” that touches upon member states’ competencies. As such, any final agreement would have to be approved individually by each country in addition to being ratified at the EU level (requiring approval by the Council and the European Parliament).

For Germany, this would mean that both the Bundestag and (likely) the Bundesrat (the second

federal legislative chamber representing the interests of the Federal States) would have to sign off on a final agreement. While the grand coalition government of Christian Democrats and Social Democrats holds a vast majority in the Bundestag, the situation is more complicated in the Bundesrat. Here the government cannot rely on a guaranteed majority, as delegates in the Bundesrat represent the 16 German state governments (“Länderregierungen”) and thus include a sufficient number of votes for the Green and Left party, who are represented in several coalition governments at the state level.²⁴ These parties are overall more opposed to TTIP, potentially increasing the difficulties for state governments to come to an affirmative vote.

There is no decision yet on whether TTIP will, in the end, be ratified as a “mixed agreement.” However, the Bundesrat, by adopting resolutions underscoring the chamber’s constitutionally mandated competencies in a number of potentially impacted policy areas, has already inserted itself as an actor within the TTIP debate. Equally and despite the clearer picture in the first chamber, the Bundestag has, unlike with previous EU trade agreements, taken on an increasingly active role in the TTIP discussion, holding plenary debates, committee discussions, and hearings on related topics.

²² Hoidn-Borchers, Andreas, “Die Amerikaner begehen eine unendliche Dummheit,” *Stern*, July 16, 2014, <http://www.stern.de/politik/deutschland/roettgen-im-stern-zur-spionageaffaere-die-amerikaner-begehen-eine-unendliche-dummheit-2124229.html>

²³ Geisen, Thomas, Jörg Wagner, Wolfgang Wagner, and Astrid Wirtz, “Maas fordert Ende der Spionage,” *Frankfurter Rundschau*, July 11, 2014, <http://www.fr-online.de/datenschutz/spionageaffaere-maas-fordert-ende-der-spionage.1472644.27788796.html>

²⁴ The results of recent and upcoming state elections could still alter the current balance in the Bundesrat in favor of the governing grand coalition.

5 WIDESPREAD CALLS FOR MORE TRANSPARENCY

One of the most widespread criticisms of TTIP in Germany is a perceived lack of transparency since negotiations are being conducted “behind closed doors.” In a statement in April 2013, before trade talks had started, the German Trade Union Confederation (DGB) identified “the secrecy surrounding the negotiating mandate of the EU Commission” as a “core problem, common to all EU trade agreements.”²⁵

Adding to general concerns over secret negotiations is the notion that other stakeholders, especially business lobbyists, are presumed to receive preferential access to the negotiation documents, a complaint not only voiced by NGOs, but also shared, for example, by labor organizations, like the United Services Trade Union²⁶ (ver.di), which represents more than 2 million members and other societal actors.²⁷ While some organizations have demanded full public access to negotiation documents, others have solely called for clarity regarding the exact range of sectors covered by negotiations (often to demand the exclusion of their respective field).

Moreover, members of the German Bundestag from all political parties have criticized the European Commission’s information-sharing practices with member states and national parliaments as insufficient.²⁸ The German federal government

reportedly has also not always been pleased with the flow of information from Brussels.²⁹ These concerns might also reflect and play to anti-EU sentiments in parts of the general public who would, in any case, rather see such agreements negotiated at the national level.³⁰

The Commission has tried to alleviate these concerns by setting up advisory groups, publishing negotiation position papers, conducting stakeholder meetings during negotiation rounds, and launching a public consultation process over investor protection provisions — all of which goes beyond the standard practice of previous trade negotiations. Meanwhile, the German Federal Ministry for Economic Affairs and Energy (BMWi) has installed a TTIP-advisory board, including representatives from business associations, unions, the cultural sector, church leaders, and NGOs. While these efforts have been acknowledged by some as a positive reaction to widespread concerns, so far they have not been able to satisfy the harshest critics, who see such endeavors as fig leaves.

As opposed to traditional, tariff-cutting trade agreements, public apprehensions regarding TTIP are less focused on the potential threat of increased international competition, but rather on the impact on national or European standards and policy processes. In this way, the concerns regarding the transparency of TTIP negotiations reinforce (and are in turn affected by) broader, pre-existing fears over a loss of democratic influence both in the relationship between member states (Germany) and Brussels, and between the interests of the public and corporations.

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²⁵ Deutscher Gewerkschaftsbund, “Statement of the German Trade Union Confederation (DGB). Concerning the planned negotiations for a Transatlantic Trade and Investment Partnership between the EU and the U.S. (TTIP),” April 29, 2013, p. 3

²⁶ ver.di Bundesverwaltung, “Angriff auf Löhne, Soziales und Umwelt. Was steckt hinter dem transatlantischen Freihandelsabkommen TTIP?,” December 2013, p. 5

²⁷ Calls for broader information sharing and greater transparency can be heard from a diverse array of organizations and societal actors ranging from, for example, the Academy of Arts (Akademie der Künste) to the German Medical Association (Bundesärztekammer) and the German Civil Service Federation (Deutscher Beamtenbund).

²⁸ Deutscher Bundestag, “TTIP: Abgeordnete für mehr Transparenz,” February 19, 2014, http://www.bundestag.de/presse/hib/2014_02/01/262002

²⁹ Sievers, Markus, “Heimliche Gespräche; Intern beklagt die Bundesregierung die Geheimniskrämerei Brüssels bei Freihandelsverhandlungen,” *Berliner Zeitung*, May 22, 2014, p. 11

³⁰ According to the Pew/Bertelsmann poll, 65 percent of respondents think that the German government should negotiate trade agreements for the country rather than the EU, Pew Research Center, p. 24, Q10

Given this breadth and depth of negotiations, TTIP may have required an altogether different approach to the question of information sharing and transparency from the beginning. Efforts such as the push to declassify the confidential negotiating mandate, driven by the Italian EU presidency and backed by then-EU Trade Commissioner Karel de Gucht, can be seen as recognition of this necessity. More efforts in this direction, including the publication of as many relevant documents as possible, will be necessary over the coming months to assuage at least parts of the concerns over transparency in Germany.

6 U.S. vs. EUROPEAN STANDARDS

One long-anticipated sticking point for TTIP in Germany has always been the question of differing regulatory standards. After all, conflicting risk assessments regarding chlorine-washed chicken, hormone-fed beef, and genetically modified foods (GMOs) have long been a point of contention between the transatlantic partners. Recognizing the symbolic and emotional impact, especially of food safety standards, members of the government have addressed the issue directly, with Merkel affirming unequivocally during a European election campaign speech in May 2014 that “there will be no import of chlorinated chicken from America.”³¹ Moreover, assessments by representatives of the Federal Institute for Risk Assessment (BfR) that the chlorine-washing of chicken is not seen as causing any known health risks,³² have not yet significantly altered the debate. According to a survey, 56 percent of Germans (68 percent of women) believe that chlorinated chicken pose a health risk.³³

In fact, underlying many specific concerns over standards are broader worries about the presumed intention and direction of negotiations. The discussion thus goes beyond “classic” food safety issues and includes topics like environmental, labor, and general consumer protection standards. Consumer protection advocates and unions, for example, have jointly called for a change of course, citing fears that the trade talks are

unilaterally aiming at further deregulation.³⁴ These organizations are instead calling for a harmonization of standards at the highest possible level.

Such concerns touch on differing transatlantic approaches to regulatory procedures, most notably the European precautionary principle, which aims at reducing health and environmental risks by allowing for preemptive restrictions, if a process or product is deemed potentially dangerous and if scientific evaluation does not allow the risk to be determined with sufficient certainty. Consumer advocates fear that the potential inclusion of mutual recognition clauses in TTIP could undermine this principle, for example in the areas of food safety and chemicals.³⁵

German trade unions, in addition, have expressed grave concerns over the potential effects of a transatlantic trade deal on worker and union rights. From their point of view, European and German labor standards are fundamentally higher than U.S. ones, so that only a harmonization at the most advanced level can protect European workers from a potential downward spiral. Therefore, union leaders have demanded the implementation of all core labor standards of the International Labor Organization (ILO) by all contractual partners. Currently, the United States has ratified two of the eight core conventions. Along these lines, some unions have made this a prerequisite for their support of a final agreement.³⁶

The discussion thus goes beyond “classic” food safety issues and includes topics like environmental, labor, and general consumer protection standards.

³¹ *Frankfurter Allgemeine Zeitung*, “Merkel: Chlorhühnchen werde ich verhindern” (author’s translation), May 24, 2014, <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/merkel-mit-mir-gibt-es-keine-chlorhuehnchen-aus-amerika-12956071.html>

³² Spiegel Online, “Verbraucherschutz: Behörde hält Chlorhühnchen für unbedenklich,” June 10, 2014, <http://www.spiegel.de/gesundheit/diagnose/chlorhuehnchen-ist-laut-bfr-und-efsa-nicht-gesundheitsschaedlich-a-974342.html>

³³ Stern, “Stern-Umfrage zum Freihandelsabkommen: Deutsche haben keinen Appetit auf Chlorhühnchen,” July 9, 2014, <http://www.stern.de/wirtschaft/news/stern-umfrage-zum-freihandelsabkommen-deutsche-haben-keinen-appetit-auf-chlorhuehnchen-2122552.html>

³⁴ Verbraucherzentrale Bundesverband, “TTIP: DGB und vzbv fordern Kurswechsel bei Verhandlungen,” July 14, 2014, <http://www.vzbv.de/13642.htm>

³⁵ Verbraucherzentrale Bundesverband, “FAQ. Das Transatlantische Handels- und Investitionsabkommen (TTIP),” June 19, 2014, http://www.vzbv.de/cps/rde/xbcr/vzbv/TTIP_FAQ_vzbv_2014.pdf

³⁶ IG Metall, “Abkommen nur mit höchsten Arbeits- und Sozialstandards,” September 18, 2014, <http://www.igmetall.de/ttip-transatlantisches-freihandelsabkommen-zwischen-der-eu-und-13347.htm>

Among the eight EU countries in the survey, Germany showed the strongest aversion to the U.S. business approach.

In part, such statements aim to underscore long-standing and general concern and fears over further deregulation and the erosion of German labor standards. Disputes between German unions and U.S. companies over the introduction of what are perceived as “American-style business practices,”³⁷ most noticeably in the recent quarrel between the United Services Trade Union and Amazon, are receiving wide media coverage. In this vein, a 2012 poll found that 65 percent of Germans dislike “American ways of doing business,” while only 26 percent approved of them. Among the eight EU countries in the survey, Germany showed the strongest aversion to the U.S. business approach.³⁸

The debate should therefore be viewed in the context of the experience of recent years, including the upheavals of the global financial crisis, which many in Germany, at least in part, attribute to financial market deregulation efforts of previous years. For trade unions and the Social Democrats, disputes over deregulation extend to the period of vast reform efforts, especially of the labor market, in the early and mid-2000s. Carried out by an SPD-led government, it was during this time that the traditionally close ties between the Social Democrats and the unions came under immense pressure. Additionally, the Social Democrats remember all too well that reform efforts were in no way rewarded in any of the subsequent elections. Recent years have seen a rapprochement between Social Democrats and the unions, with the SPD campaigning on and initiating union-backed policies such as a national minimum wage. TTIP therefore represents a delicate balancing act for the

SPD, now that it is back in government. If the labor movement were to openly mobilize against a final agreement, it would place the Social Democratic Party in a difficult position, potentially forcing its leaders to decide between official support for an agreement and (again) alienating their base.

It is against this background that a recent and much covered joint statement³⁹ of the Confederation of German Trade Unions and the Ministry for Economic Affairs can best be understood. While the declaration signaled the union confederation’s general support for an agreement, the text itself is carefully crafted to reemphasize a commitment to the highest possible labor, consumer protection, and environmental standards. Although it is a joint declaration, the text also states that the DGB and the ministry do not share the same position on all aspects of TTIP. Nonetheless, the umbrella organization of German trade unions, at least for now, has signaled its willingness to politically support an agreement that, if certain criteria can be met, “could contribute to the promotion of fair and sustainable rules of global trade.”⁴⁰

³⁷ Wingfield, Nick and Melissa Eddy, “In Germany, Union Culture Clashes With Amazon’s Labor Practices,” *The New York Times*, August 4, 2013, <http://www.nytimes.com/2013/08/05/business/workers-of-amazon-divergent.html?pagewanted=all>

³⁸ Pew Research Center, “Global Opinion of Obama Slips, International Policies Faulted,” June 13, 2012, p. 94, <http://www.pewglobal.org/files/2012/06/Pew-Global-Attitudes-U.S.-Image-Report-FINAL-June-13-20123.pdf>

³⁹ Bundesministerium für Wirtschaft und Energie/Deutscher Gewerkschaftsbund, “Transatlantic Trade and Investment Partnership (TTIP): Anforderungen an Freihandelsgespräche zwischen der EU und den USA unter der Berücksichtigung von Nachhaltigkeit, Arbeitnehmerrechten und der Gewährleistung der Daseinsvorsorge,” September 18, 2014, <http://www.bmwi.de/BMWi/Redaktion/PDF/S-T/ttip-dgb-bmwi,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>

⁴⁰ Bundesministerium für Wirtschaft und Energie/Deutscher Gewerkschaftsbund, p. 1 (author’s translation)

7 AN UNEXPECTED OBSTACLE: INVESTOR-STATE DISPUTE SETTLEMENT MECHANISMS

Perhaps most surprising to many observers of the German debate has been the vocal criticism over the potential inclusion of investor protection provisions, specifically the so-called investor-state dispute settlement (ISDS), in TTIP, with one newspaper commentator going so far as to labeling such clauses a “satanical stipulation.”⁴¹ This instrument of international commercial law grants foreign investors the right to bring claims against a host government before a third-party arbitral tribunal, if the investor believes the host to be in breach of the rules of the agreement.

Before the start of TTIP negotiations, the topic had never played a major role in any public debate — even though Germany is already partner to more than 130 investment protection agreements. TTIP created broad public awareness of such provisions so that ISDS criticism has now spilled over onto other agreements, including the almost-completed trade deal with Canada.

The criticism centers on the perceived threat to democratic rule and to European standards. Critical NGO-groups see ISDS as undermining fundamental principles of the rule of law and granting special rights to corporations. In particular, they view the use of third-party arbitral courts as circumventing well-established democratic and judicial institutions. German environmental NGOs in particular are voicing concerns about the potential impact of ISDS provisions on regulations and policies around such hot-button issues as fracking and the country’s nuclear power phase-out, citing the current international claims brought by Swedish energy company Vattenfall against the Federal Republic as a case in point for the latter.

⁴¹ Jens Jessen, “Eine Wahnsinnstat,” *Die ZEIT*, June 5, 2014, p. 47 (author’s translation)

Other societal actors, from unions to consumer protection advocates and cultural associations, are equally opposed to the inclusion of ISDS clauses, worrying for instance that long-established support mechanisms, like fixed retail pricing for books or public film subsidies, could become targets of claims before arbitral tribunals.

Equally, the German Association for Small and Medium-sized Businesses (BVMW) strictly opposes the inclusion of ISDS clauses in TTIP, asserting that high procedural costs would essentially preclude smaller companies from employing the ISDS mechanism.⁴² Other business associations like the Federation of German Industries (BDI) meanwhile support a robust investor-state dispute mechanism in TTIP, which they see as compatible with the ability of governments to regulate and as an opportunity to reform the current international investment system and to set higher standards for future agreements.⁴³

In the German Bundestag, opposition to ISDS provisions comes from the Green and Left parties, but the governing Social Democrats have also called for the exclusion of further investor protection clauses. Early in 2014, the Social Democratic German environment minister, Barbara Hendricks, went so far as to call ISDS a “loophole,” through which the accomplishments of the labor, women’s, and environmental movements

⁴² Bundesverband mittelständische Wirtschaft, “Stellungnahme im Rahmen des Konsultationsverfahrens der EU-Kommission zum Investitionsschutz im geplanten Transatlantischen Freihandelsabkommen TTIP,” http://www.bvmw.de/fileadmin/download/Downloads_allg._Dokumente/politik/Positionspapier_TTIP.pdf

⁴³ Mildner, Stormy-Annika, “Submission. Consultation of the European Commission on Investment Protection and ISDS in TTIP,” July 4, 2014, http://www.bdi.eu/download_content/Globalisierung/MaerkteUndHandel/BDI_ISDS_Consultation_final.pdf

TTIP created broad public awareness of such provisions so that ISDS criticism has now spilled over onto other agreements, including the almost-completed trade deal with Canada.

ISDS has become a symbol of broader unwelcome trends: a loss of democratic control, growing corporate influence, and a lack of transparency.

would be destroyed by “the stroke of a pen.”⁴⁴ And in March, the SPD party chairman, vice chancellor, and economics minister, Sigmar Gabriel, in a letter to then-EU Trade Commissioner de Gucht, reemphasized the federal government’s position that the United States and Germany already offer adequate legal protections to investors, so that ISDS provisions would not be required in a transatlantic agreement⁴⁵. Since then, the government has been somewhat more guarded in its public statements concerning ISDS. But in July 2014, the German Bundesrat, (which presumably will have to sign off on a final agreement), passed a resolution stating that it sees ISDS-provisions in TTIP as expendable,⁴⁶ indicating the potential importance of the topic for the ratification process.

The EU Commission’s decision to temporarily suspend ISDS negotiations and to initiate a public consultation process in March 2014 was welcomed by most stakeholders in Germany and can equally be viewed as an example of the potential impact of German concerns on the broader negotiations. The vast number of submissions to the consultation process from Germany, reaching more than 32,000 and making up nearly 22 percent of all submissions,⁴⁷ serves as further indication of the significance of this issue in the German discussion,

even if, as has been stated by the Commission, many of the entries may have been coordinated.

ISDS has hence become a symbol of broader unwelcome trends: a loss of democratic control, growing corporate influence, and a lack of transparency. By now, opposition to ISDS is deeply entrenched in the public debate, to the point that it is difficult to imagine how a final agreement including ISDS provisions could receive support from its current critics. Going forward, the government will thus have the option to try to convince others in Brussels and Washington of its position regarding the expendability of ISDS provisions. Or, in case the exclusion of ISDS clauses will prove impossible, it will need to mitigate the domestic outfall, by seeking to sufficiently amend and dilute such provisions in TTIP. Neither option, of course, satisfies the original hope of TTIP proponents to set new and potentially global standards for investment provisions, including dispute settlement mechanisms, but such action may be necessary to push through a final agreement.

⁴⁴ Medick, Veit and Annett Meiritz, “Große Koalition: Widerstand gegen Freihandelsabkommen wächst,” Spiegel Online, February 3, 2014, <http://www.spiegel.de/politik/deutschland/grosse-koalition-minister-warnen-vor-freihandelsabkommen-a-950444.html>

⁴⁵ Gabriel, Sigmar, “Letter to EU Commissioner Karel de Gucht,” March 26, 2014, <http://www.bmwi.de/BMWi/Redaktion/PDF/B/brief-sigmar-gabriel-de-gucht-zum-investitionsschutz-beim-ttip,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>

⁴⁶ Bundesrat, “Beschluss des Bundesrates (Drucksache 295/14),” July 11, 2014, p.3, [http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14\(B\).pdf?__blob=publicationFile&v=1](http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14(B).pdf?__blob=publicationFile&v=1)

⁴⁷ European Commission, “Preliminary Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP),” July 2014, http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf

8 MOVING FORWARD

Germany has long been one of the world's leading trading nations, with a particularly strong focus on export-oriented industries. In 2013, the United States was the second-largest destination of German exports (just behind France and three positions ahead of China) and ranked fourth in imports. Overall, turnover (export plus imports) between the United States and Germany reached a volume of nearly €137 billion.⁴⁸ Moreover, both countries are among each other's most important foreign investment destinations. A transatlantic agreement that expands this economic relationship further and has the potential to stimulate growth should thus generally be in the country's interest. At the same time, the vigorous debate in Germany points to serious concerns among the general public and key stakeholders. Furthermore, recent snags in German-U.S. relations have impaired the overall atmosphere for transatlantic endeavors in Germany.

Although it is currently not a frequent argument for TTIP in Germany, a transatlantic agreement could offer a significant strategic opportunity beyond its potential economic impact on both sides of the Atlantic. In an era of a rapidly changing international order, TTIP could, if set up properly, help to promote higher global standards on a range of issues. However, for the transatlantic deal to be able to reach this strategic potential, it will be essential that crucial stakeholders and significant parts of the population in key countries like Germany be convinced of the transatlantic partners' determination and ability to reach the highest possible standards.

In light of this, there are several ways in which policymakers could move the current debate in Germany forward.

First, it will be essential to sincerely engage with and subsequently address some of the main concerns of the German TTIP debate. Steps have been taken both at the European and German levels to address transparency issues, as well as the question of investor protection clauses. Such efforts, including pushing for the publication of as many relevant documents as possible, should be proactively intensified, so that they are not perceived as merely reactive.

Secondly, German political leaders in favor of a transatlantic trade deal will have to make a renewed and expanded effort at public engagement, including at the highest level. Similar endeavors by the European Commission, while important, are unlikely to have an equally weighty impact, given the already existing skepticism toward Brussels in some corners.

In addition, it will be important to actively address misperceptions. Currently, TTIP is widely seen as a U.S. project that is being imposed on reluctant Europeans. In this vein, the widely respected intellectual weekly *DIE ZEIT* (with a circulation around 500,000) recently asked in a headline of a special section on TTIP: "Will the Americans dominate us soon?"⁴⁹ And a July public opinion poll showed that a substantial majority of Germans (58 percent) believed that Americans would benefit more from TTIP than Europeans (only 14 percent saw more advantages for Europe).⁵⁰

To counter this impression, policymakers should highlight and emphasize specific European and German offensive interests in TTIP negotiations

A transatlantic agreement that expands this economic relationship further and has the potential to stimulate growth should thus generally be in the country's interest.

⁴⁸ Federal Statistical Office, "Foreign Trade. Ranking of Germany's trading partners in foreign trade, 2013," August 20, 2014, https://www.destatis.de/EN/FactsFigures/NationalEconomyEnvironment/ForeignTrade/TradingPartners/Tables/OrderRankGermanyTradingPartners.pdf?__blob=publicationFile

⁴⁹ *Die ZEIT*, "Beherrschen uns bald die Amerikaner?," June 26, 2014 (author's translation)

⁵⁰ *Stern*, July 9, 2014

in a manner that goes beyond the repetition of generally positive effects of an agreement on jobs and growth.

Finally, policymakers and negotiators face a stark challenge: while they try to address concerns by assuring the public that European or German standards will not be lowered, critics are unlikely to be swayed until results are revealed as part of a final agreement. Instead, a vast number of stakeholder groups have preemptively positioned themselves to fend off potential infringements on their respective area of interest, largely as a result of the uncertainty over TTIP's exact range.

In this situation, and although it would impair the flexibility of negotiators, it may be expedient to go beyond the conventional approach to trade talks

and to consider releasing intermediate negotiation results to assuage fears and clarify the direction of deliberations.

Depending on the state of negotiations, this approach may also allow German policymakers to point to specific successes and deliver a much needed "win," similar to the one French officials were able to present to their public by achieving the exclusion of audiovisual products before negotiations had even begun.

Given Germany's weight in Europe, the debate over TTIP in this key country has the potential to affect the scope of a final agreement. To achieve TTIP's full potential, it will be essential to successfully address concerns of key stakeholders and to increase public support.

ABBREVIATIONS

BDI	Federation of German Industries
BfR	Federal Institute for Risk Assessment
BMWi	Federal Ministry for Economic Affairs and Energy
BVMW	German Association for Small and Medium-Sized Businesses
CETA	Comprehensive Economic and Trade Agreement
DGB	German Trade Union Confederation
EU	European Union
GMF	The German Marshall Fund of the United States
GMO	Genetically modified organism
ILO	International Labor Organization
ISDS	Investor-State Dispute Settlement
NGO	Non-governmental organization
NSA	National Security Agency
SPD	Social Democratic Party of Germany
TTIP	Transatlantic Trade and Investment Partnership
ver.di	United Services Trade Union
vzbv	Federation of German Consumer Organizations

The background is a solid dark blue color. It features several horizontal white lines. Some of these lines have small white dots placed at various intervals along their length. The dots are scattered across the upper and lower portions of the page, creating a minimalist, grid-like aesthetic.

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