

New Research in

Global Political Economy



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Critical Perspectives on TTIP

Expropriation, Financial Deregulation
and Domination of the World

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Table of Contents

List of Abbreviations	iii
Introduction (Anil Shah, Norma Tiedemann, Kosmas Kotas)	1
Class Struggle From Above. Contextualizing Investor Protection in TTIP as 'Primitive Accumulation' (Anil Shah)	4
1. Introduction	4
2. Mapping Research on TTIP	5
3. Theoretical Framework: Re-conceptualizing Primitive Accumulation	7
3.1. <i>Some remarks on the continuous character of primitive accumulation</i>	7
3.2 <i>Re-conceptualizing primitive accumulation</i>	8
3.3 <i>Primitive accumulation in the age of neoliberalism</i>	9
4. Understanding Investor Protection in TTIP	10
4.1 <i>Describing investor protection in TTIP</i>	10
4.2 <i>Outlining major implications</i>	12
4.3 <i>A corporate perspective on ISDS</i>	13
5. Investor Protection in TTIP as 'Primitive Accumulation'	14
6. Concluding Remarks	15
7. References	17
If the crisis is a perfect storm, neoliberal capitalism seems to be built from bricks. A discourse-theoretical analysis of the struggles over financial services within the Transatlantic Trade and Investment Partnership (TTIP) (Norma Tiedemann)	24
1. Introduction	24
2. Theoretical framework	25
2.1 <i>Central concepts</i>	26
2.2 <i>Empirical base</i>	27
3. Financial Services in TTIP	28
4. Identifying hegemonic strategies	30
4.1 <i>Antagonistic chains of equivalence</i>	30
4.2 <i>Making alternatives unthinkable</i>	32
4.3 <i>De-politicization</i>	33
4.4 <i>Boundary drawing and legitimate difference</i>	34
5. The context of European financial market reforms	35
6. Conclusion	37
7. References	39
Exclusion as a strategy of world domination. Why are non-OECD countries excluded from mega-regional trade agreements? (Kosmas Kotas)	46
1. Introduction	46
2. Theoretical framework	47
3. Rewriting the rules through mega-regionals	51
4. Constitutive rules as geostrategic tools	53
5. Conclusion	56
6. References	57

List of Abbreviations

BIT	Bilateral Investment Agreement
CEO	Corporate Europe Observatory
CETA	Comprehensive Economic and Trade Agreement (Canada & the EU)
EC	European Commission
EU	European Union
FET	Fair and Equitable Treatment
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
HLWG	High Level Working Group (on Jobs and Growth)
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IMF	International Monetary Fund
IPRs	Intellectual Property Rights
ISDS	Investor-State Dispute Settlement
MAI	Multilateral Agreement on Investment
NAFTA	North-American Free Trade Association
NTB	Non-Tariff Barriers
OECD	Organization of Economic Cooperation and Development
S2B	Seattle to Brussels (Network)
TB	Tariff Barriers
TNI	Transnational Institute
TPP	Transpacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USTR	United States Trade Representative
WEF	World Economic Forum
WTO	World Trade Organization

Introduction (Anil Shah, Norma Tiedemann, Kosmas Kotas)

Once again 'free trade' is at the heart of political and public debate in the global North. Within the World Trade Organization (WTO), negotiations have come to a hold for the past decade due to conflicting positions between northern and southern states. As a response, the major industrialized countries are pushing for new mega-regional trade and investment agreements outside of the WTO, which go beyond the mere reduction of tariff barriers and aim at establishing global standards. Agreements such as the Transatlantic Trade and Investment Partnership (TTIP) or the Transpacific Partnership (TPP) represent a prime example of the global North's forum-shifting. Despite the secrecy around the negotiations, civil society has contributed significantly to repoliticizing trade policy and exposing the narrow corporate interests behind the new liberalization agenda. At the same time, trade has become a hot topic among researchers due to the broad agenda including sensitive areas such as investor protection, intellectual property rights, and regulatory capacity of parliaments. Nevertheless, the prevailing academic discourse mostly focuses on economic effects and understands trade policy as a merely economic, apolitical issue. Free trade is primarily discussed based on limited concepts such as comparative advantage, efficiency gains or competitiveness. Important contextual aspects such as social and power relations, historically specific developments or path dependencies are neglected within the rather narrow theoretical approaches which dominate the debate.

The aim of this collection is thus to contribute to a critical Political Economy of global trade. The articles differ from the majority of academic literature, which mostly represents a problem-solving approach to trade and investment policy by taking the existing social order, functioning and fundamental developments for granted. In contrast, the primary aim of this working paper is to develop a 'perspective on perspectives' (Cox 1981), challenging both the prevailing socio-economic and political power structures, and their theoretical interpretation in mainstream social sciences.

Through well-elaborated theoretical frameworks, the articles help to contextualize the ongoing shifts and developments in global trade and investment negotiations, particularly focusing on the negotiations between the European Union and the United States.

Although they employ three different theoretical frameworks and methods of analysis, the articles share a concern with analyzing hegemonic power structures and related social struggles. In doing so, they highlight the three dimensions of expropriation, financial

deregulation and domination in the world order, which have thus far only experienced marginal attention in academic analyses of ongoing trade and investment negotiations.

The first contribution by Anil Shah investigates how investor protection, as one key component of current trade and investment agreements, can be understood in relation to the dynamics of the contemporary global political economy. It draws on a historical materialist perspective that emphasizes expropriation and social struggles over the socio-economic conditions of society. In reconceptualizing Marx's notion of primitive accumulation, Shah highlights how the global reproduction of capital is conditioned by the political, judicial, and socio-cultural creation and safeguarding of opportunities to invest profitably. In this context investor protection in TTIP serves to set a global standard that shifts the public-private divide in favor of the latter, while legalizing numerous processes as investments, regardless of their detrimental social, political, and environmental effects. Ultimately, it is argued, such comprehensive investor protection in TTIP is best understood as a class project which aims at regulating capital's contradictions. The success of this class project is, however, contingent upon the social struggles and contestations surrounding it.

In the second chapter, Norma Tiedemann explores a highly controversial issue within the negotiations of TTIP, namely the inclusion of financial services under a regulatory cooperation approach. Although in the aftermath of the Global Financial Crisis a seeming consensus among G20 countries emerged over the need to re-regulate financial markets, the EU is pushing for policies which are likely to lead to further liberalizations of the sector, thereby strengthening the hegemony of financialized capitalism. Through the lens of a discourse-theoretical perspective, she analyzes which hegemonic articulations and discursive strategies can be identified within the struggle over changes and stabilizations in the global financial architecture. The EU's efforts, in close conformity with transatlantic financial lobby groups, to include regulatory cooperation on financial services within TTIP, she argues, must be understood as one part of the broader EU financial reform agenda, which aims for an overall further integration of capital markets. This shows that the discourse on the crisis and the economic recession as caused mainly by misguided or a lack of financial regulations instead of more systemic aspects such as (global) inequality, is hegemonic and continuously shapes EU trade policies.

The last part by Kosmas Kotas looks for the motives that might explain the current shift of trade negotiations to plurilateralism. Kotas claims that a new trade regime is under construction. Non- OECD countries have been excluded from TTIP and TPP negotiations despite studies that predict possible negative impacts for excluded countries. Constructivist

and neo-Gramscian concepts inform the author's argument. He draws upon Ruggie's conception of trade regimes and uses his interpretation of constitutive rules to argue that TTIP and TPP go beyond trade liberalization and seek to change the "rules of the game". The change in the trade regime is attributed to the change in domestic social relations and the ability of the transnational capital class to merge state interests with its own. Furthermore, it is argued that exclusion from the negotiations is a geo-strategic move to impose rules of trade and investment on emerging economies that pose a future threat to hegemonic classes.

As the three papers illustrate vividly, negotiations over free trade agreements and thus global trade and investment rules are not in the slightest purely technical issues, but fundamentally political struggles over the organization of global economic processes, i.e. how surplus value is created, how it is distributed and who is included/excluded. Analyses of trade policies, and especially of the currently debated TTIP, informed by theories of International Political Economy offer a critical perspective on global relations of power and on the reproduction of hegemonic structures and discourses. The Transatlantic Trade and Investment Partnership (TTIP) could be demonstrably more than just some regulations on transatlantic product exchange - it aims to guarantee future capital accumulation, secure the EU and US position within the world market and stabilize the hegemony of neoliberal, financialized capitalism. Because this venture has not evolved without ongoing strong resistance by civil society, sparking discussions on the dangers and limits of TTIP, it remains to be seen in what direction the global trade regime will develop.

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Class Struggle From Above. Contextualizing Investor Protection in TTIP as 'Primitive Accumulation' (Anil Shah)

1. Introduction

In July 2013, the official talks for the largest trade and investment agreement in history commenced. The Transatlantic Trade and Investment Partnership (TTIP) would link the European Union (EU) and the United States of America, comprising nearly half of the world's GDP and 30 percent of world trade (HLWG 2013). While tariffs and quotas are generally already quite low between the negotiating parties, the proceedings mostly focus on extensive chapters on 'regulatory cooperation'¹ and 'investor protection'² (cf. Beck 2014). In doing so, the negotiations reflect a general trend of the past two decades to include private arbitration in international free trade and investment agreements. Lehmkuhl (2011), for example, estimates that currently about 90 percent of all cross-border contracts contain an arbitration clause. Although actively implemented by state actors, this agenda is clearly driven by corporate interests (Speckmann 2014). Likewise, critical scholars have argued that neoliberalism's supremacy is maintained to a great extent through such a “vehicle of legal reform” (Schneiderman 2014a: 165).

From a historical materialist point of view, it is crucial to understand how the nature of 'investor protection' in TTIP can be understood in the context of the contemporary global political economy. The paper attempts to shed light on this question by re-conceptualizing Marx's concept of 'primitive accumulation'. It aims to add yet another perspective on the importance of investor protection by relating it to the reproduction of global capital. Thus, the second chapter will first map existing literature and analysis on TTIP, as well as identifying a research gap from which the research question emerges. Subsequently, I will outline my theoretical framework in chapter three by re-conceptualizing primitive accumulation with insights from regulation theory. Chapter four will then analyze investor protection in TTIP by looking at position papers, leaked documents, and experiences from similar agreements. In addition, the interests and benefits for (transnational) corporations will be highlighted. Based on this evidence, chapter five will reflect upon investor protection in TTIP as primitive accumulation, before drawing some concluding remarks.

¹ Regulatory cooperation mainly aims to align political regulations, standards, licensing procedures, etc. in various economic areas. It not only addresses current procedures, but also future political processes in each of the contracting parties, which is to be supervised by a 'regulatory council'.

² In contrast to the term '*investment* protection', the use of the term '*investor* protection' highlights both the protection of investments, as well as investor's agency in implementing, extending, and enforcing these rights, through e.g. investor-state dispute settlement (ISDS).

2. Mapping Research on TTIP

The academic literature on TTIP is as diverse as the topics the agreement touches upon. Broadly speaking, two fundamental questions are covered by numerous studies and articles that all try to analyze and make sense of the currently negotiated US-EU trade agreement.

One is the question of why TTIP is being negotiated at all. A first major strand of literature in this regard attempts to shed light on the geopolitical motivations driving the agenda of a transatlantic FTA. In this context, the increasing relevance of the BRICS economies in the global trade flow and especially the shift of *the global center of economic gravity* particularly to Asia, is a powerful notion (cf. de Gucht 2013). Likewise, Plummer (2014) states that despite the leading role of the US and the EU in the international governance of trade and finance for the past decades, there is increasing pressure from the 'Asian Giants' - China and India. Against this background, TTIP is often described as a measure of 'the West' to set global standards of trade and investment for the twenty-first century (Höffken 2014). Accordingly, the contents negotiated in TTIP, such as the reduction of non-tariff-barriers (NTB) and investor protection, do not serve only regional purposes. Rather, they would fuel the stalled negotiations for multilateral agreements in the context of the World Trade Organization (WTO) (Venhaus 2013), or by-pass the inclusive negotiations within the WTO by simply establishing a new 'status quo' for international trade and investment rules (Wahl 2014). In addition, others have emphasized that closer economic ties through a successful TTIP could also have implications for stronger political and security ties vis-à-vis 'the East', and to reconstitute their "leadership role in promoting their values on the global stage" (Hormats 2014: 19-20). Moreover, critical scholars have emphasized that a TTIP is certainly not only desired by nation-states and their geopolitical interests. Quite the contrary, these scholars have highlighted that the agreement was essentially a project of transatlantic capital as the driving forces which would also benefit most from such agreement (Fritz 2014; Speckmann 2014; Wallach 2013). This perspective is supported by the fact that business groups like employer associations or neoliberal think tanks were extensively consulted prior to the official negotiations, while civil society groups were not recognized in any of these talks (CEO 2013).³

The second broad strand of literature analyzes the potential effects that such an agreement would have on the economy, political institutions, and society and the environment more generally. Perhaps most prominent are econometric studies and analyses

³ From a released list by the European Commission of 'meetings with stakeholders' more than 90 percent (at least 119 out of 130) were with large corporations and their lobby groups (CEO 2013).

that measure and forecast the economic effects, particularly on economic growth and employment. These studies were mostly initiated and financed either by public authorities such as the European Commission (ECORYS 2009; CEPR 2013) or the Germany Federal Ministry of Economic Affairs and Energy (Felbermayr et al. 2013a), or think tanks like the Bertelsman Stiftung (Felbermayr et al. 2013b). Hence, these analyses primarily aim at shaping the public discourse on TTIP, political justifications, and creating a 'popular common sense' on the necessity of a successful conclusion. Projected numbers in terms of GDP growth or jobs that could be newly created in the aftermath of the agreement are at the center of this debate. A number of studies have, however, made critical assessments, in particular of methodology which exaggerates (economic) gains and neglects social and environmental costs (cf. Beck/Scherrer 2014; Raza et al. 2014). Moreover, a number of critical impact assessments mostly initiated, financed and supported by civil society actors, highlight the negative impacts such an agreement could have on environmental regulation in general (Gerstetter/Meyer-Ohlendorf 2013; S2B 2013), labor and trade unions (Scherrer 2014), consumer protection (Knoll et al. 2013), policy space and democratic procedures (Eberhardt 2014a), or effects on third countries, particularly in the global South (Mildner/Schmucker 2013; Mthembu 2013; Kovziridze 2013). Against this background, one of the most controversially discussed contents of TTIP is a chapter on investor protection and the inclusion of investor-state dispute settlement (ISDS) mechanisms in the agreement (Eberhardt 2014b; Krajewski 2014; S2B/CEO/TNI 2013). In this context, Eberhardt/Fuchs (2014) have interpreted the increasing role of investor protection and ISDS as “instruments to enforce transnational capital interests against regulation, redistribution and counter-hegemonic forces” (own translation).

However, such a claim has hardly been theorized from a historical materialist perspective so far. The most elaborate critical research program in this regard is the literature on 'new constitutionalism', linking a global corporate rights regime with the disciplinary mechanisms of neoliberalism and the concept of 'market civilization' (cf. Eberhardt 2014b; Gill 2003; Gill/Cutler 2014). Primarily focusing on the political and judicial dimensions, this approach fails to grasp the *political economy* of these processes. Likewise, Parker (2008) has criticized that literature on 'new constitutionalism' overemphasizes the importance and stability of law, while effective contestations and resistance are understated. Against this background, the present paper aims to contribute to a historical materialist interpretation of TTIP, while shedding light on the question of how 'investor protection' in TTIP can be understood in the context of the current global political economy. It is suggested that a re-

conceptualization of Marx's 'primitive accumulation' can broaden our understanding of the social struggles around TTIP, while essentially linking it to the broader dynamics of contemporary capitalism.

3. Theoretical Framework: Re-conceptualizing Primitive Accumulation

3.1. Some remarks on the continuous character of primitive accumulation

In the famous chapter 24 of *Capital*, Marx analyses the transition from feudalism to capitalism in Britain since the 15th century (cf. Marx 1867/1971: 741ff). In doing so, he criticizes the notion of classical political economists, especially Adam Smith, according to which capitalism developed through a “diligent, intelligent, and, above all, frugal elite” that “accumulated wealth” (ibid.). Marx’s essential argument is that the precondition for capitalism was a century long process of 'enclosures' of common land, and their conversion into modern private property. Key to these 'enclosures' was the creation of the 'free labourer'⁴, which was (forcefully) transformed into a wage laborer through state legislation and brutal enforcement.⁵ Thus, at the core of this process was the separation of the majority of the producers from the means of production. Many Marxist scholars have interpreted primitive accumulation as a historically concluded process that only set the pre-conditions for expanded reproduction (cf. Zarembka 2002). However, this article suggests a different reading of Marx’s primitive accumulation and challenges the orthodox view in various ways:

Theoretically, the notion of 'primitive accumulation' as a historically concluded process reveals a rather linear concept of history in general, and capitalist development in particular. It presumes that capital accumulation was a self-sustaining process after its initial inception (cf. Perelman 2000; Federici 2004). Thereby, it tends to a deterministic and economic interpretation of capitalist development, while at the same time rendering alternative (non-capitalist) practices in society marginal, and precluding their theoretical understanding (cf. De Angelis 2007). After all, such perspective perceives capital logic as a 'totalised system' without embedding it in broader social forces that counter-act the capital logic (De Angelis 2007: 135).

⁴ According to Marx, the ‘free labourers’ are free in a double sense: On the one hand they are not part of the means of production themselves (like, for example, slaves or bondsmen). On the other hand, they do not possess any means of production (e.g. land), “as in the case of peasant proprietors; they are, therefore, free from, unencumbered by, any means of production of their own” (Marx 1867/1971: 743).

⁵ For a more detailed account of the 'blood laws' and criminalization of vagabonds, and non-wage-laborers, see Marx (1867/1971: 750ff). For a broader historical perspective from a feminist perspective, see Federici (2004).

3.2 Re-conceptualizing primitive accumulation

These criticisms might become more apparent when taking a Regulationist perspective on capital and capitalist development⁶. From this perspective, capital as a social relation is 'constitutively incomplete' (Jessop 2001), since it always depends on fictitious commodities⁷. Thus, capital is dependent on permanent 'regulation', not simply understood as political regulation. Rather, it refers to the way in which a social relation is "reproduced despite and through its conflictual character and contradictory character" (Lipietz 1988: 11). Regulation of capital is therefore a complex form of processing societal contradictions, which can only be understood in the context of the social balance of power (Brand/Wissen 2013: 137). Correspondingly, there's no 'centre of control' of capitalism, which steers development or dictates strategies. The reproduction of capital rather takes place through permanent disputes and struggles between contending actors, which can lead "to more permanent social compromises, that manifest themselves in specific systems of institutions" (Brand/Görg 2008: 573), temporarily stabilizing the reproduction. From this it follows that capitalist relations can never be completely totalized, and that "other social relations or practices are the very condition of existence [...] of capitalist relations" (Lipietz 1988: 19). In other words, capitalist and non-capitalist social relations always exist simultaneously, while the latter are a pre-condition for the existence of the former. The dynamic relation of the two can theoretically be understood through the concept of 'primitive accumulation'.

Following Luxemburg (1913/2003), a number of scholars have recently emphasized the 'dual character' of capital accumulation, which comprises both 'primitive accumulation' and 'expanded reproduction' (cf. Harvey 2003). In this context 'primitive accumulation' is both a logical condition of and requirement for the existence of capital (accumulation) more generally (cf. Bonefeld 2001; Federici 2004: 63; von Werlhof 2000). Expanded reproduction may reproduce rather smoothly temporarily, but its success is not pre-determined, but contingent upon other social relations. Accordingly, capital accumulation is not simply understood as an 'economic engine' that reproduces itself automatically. Rather, capital is a precarious social relation that is embedded in society's everyday reproduction (cf. De Angelis 2007). 'Primitive accumulation' as a theoretical concept thus describes the continuous regulation of capitalist and non-capitalist relations, particularly the ways in which new

⁶ Regulation theory as it is used here, has developed from a critique of orthodox Marxism, but still draws on Marx's writings to develop a critical understanding of the (global) political economy (cf. Lipietz 1988).

⁷ The notion of 'fictitious commodities' is developed by Polanyi (1944/2001) and essentially refers to the fact that money, labor, and land (broadly understood) are all commodified in capitalist relations, but can never be 'produced' under capitalist relations exclusively.

opportunities for capital's reproduction are opened, legalized, and socially naturalized.⁸ Such a re-conceptualized version of 'primitive accumulation' is thus best understood as the socially contested struggle over the *conditions* for capital's reproduction (cf. McCarthy 2004). In other words, 'primitive accumulation' is *class struggle from above*. From this perspective, social struggles over various economic practices, their political constitution, and socio-cultural embeddedness is at the heart of capitalist development (cf. Federici 2004).

Moreover, the concept of primitive accumulation offers a non-economistic reading of capitalist development by highlighting the necessity of state institutions like law (enforcement) to be ultimately backed by violence and cultural-ideological processes (cf. Harvey 2003; Perelman 2000). Without the continuous (legal) creation of opportunities for capital to reproduce in various spatio-temporal contexts, expanded reproduction cannot take place successfully.

3.3 Primitive accumulation in the age of neoliberalism

In the age of neoliberalism, the forms of 'primitive accumulation' have become exceedingly creative, because capital has been confronted with a persistent crisis of overaccumulation since the 1970s (cf. Harvey 2003). That is to say that surplus capital is evolving while opportunities to invest it profitably are diminishing (Harvey 2006: 192). This process is increasingly fuelled by the financialization of ever more spheres of life (cf. Bello 2012; Federici 2012). Generally speaking, the relation of nominal financial assets in the global economy has rapidly increased within the past decades. Accordingly, claims on the future surplus value (represented by financial assets) are increasing faster than actual production of surplus value, implying a 'structural overaccumulation' (Huffs Schmid 2009). As a result, the present period is marked by the lowest business investment in relation to GDP ever (McNally 2012: 42).

Moreover, because “nearly two-thirds of foreign trade is now accounted for by transactions within and between the main transnational corporations” (Harvey 2004: 71), the pressure for big business to secure profitable investments cross-border is tremendously high. In this context the notion of 'primitive accumulation' as *class struggle from above* becomes more coherent. The persisting crisis of overaccumulation may be temporarily or spatially solved through a number of measures that relate to securing cheaper inputs, widening markets, and keeping profitable opportunities open (Harvey 2003: 139). Such a corporate search to

⁸ Key to this regulation and to the process of primitive accumulation is the role of the state. For the purpose of this article, it suffices to understand the state not as a coherently acting institution, but primarily as “the material condensation of social forces” (Brand/Görg 2008; Brand/Wissen 2013).

secure profitable investments is necessarily legalized and backed by state power. It is, however, also embedded in wider social forces which act as limits to the appropriation of new opportunities of profit-maximization. It is these processes that are at the heart of the contemporary phenomenon of 'primitive accumulation'. After analysing 'investor protection' in TTIP in the following chapter, we will return to these questions in chapter 5.

4. Understanding Investor Protection in TTIP

4.1 Describing investor protection in TTIP

Advocates of extensive investor protection in TTIP argue that investment is the “key driver of the transatlantic economy” (Business Alliance for TTIP 2014). Indeed, more than half of the FDI in either 'bloc' comes from the other (Eberhardt 2014a: 32), and EU companies are the biggest investors in the US, accounting for more than 1.6 trillion Euros (EC 2015c). However, since investments are already very high and national jurisdiction generally enforced reliably in both the US and the EU, it is very unlikely that investors from the US (or Canada) would deter from investing in the EU - or vice versa - on the basis of lack of investment protection (cf. Krajewski 2014).⁹

Nevertheless, the EU's mandate to negotiate the transatlantic agreement states that a chapter on investor protection would “[...] increase Europe's attractiveness as a destination for foreign investment” (EU 2013: 8). Moreover, it openly declares that it is not only about regional concerns, but about “setting the path for global standards” (EU 2013), referring particularly to “global investment standards” (Höffken 2014). Thus, the High Level Working Group on Jobs and Growth, which was commissioned to prepare suggestions for negotiations prior to the official talks, “recommends that a comprehensive U.S.-EU trade agreement should include investment liberalization and protection provisions based on the highest levels of liberalization and highest standards of protection that both sides have negotiated to date” (HLWG 2013). In this context, “highest standards” refers to very vague definitions of investments and investors, which are supposed to be protected through “an effective and state-of-the-art investor-to-state dispute settlement mechanism” (EU 2013: 9). Portfolio investments and intellectual property rights, for example, are declared as investments regardless of “whether the investment is made before or after the entry into force of the Agreement” (EU 2013: 9). Moreover, all sub-central authorities, referring to states or

⁹On the contrary, big business argues that OECD countries generally have sound legal systems, but still “adequate investor protection is not guaranteed” (BusinessEurope 2014).

municipalities “should effectively comply with the investment protection chapter of this Agreement” (EU 2013: 10).

After releasing the HLWG's recommendations and the EU mandate to negotiate TTIP, massive resistance from civil society was organized. Accordingly, the European Commission stalled the negotiations on investor protection in TTIP and initiated a public consultation on investor protection between 27 March and 13 July 2014. During the consultation process it was revealed that the EU's position on the investment protection chapter in TTIP will be essentially the same as in the CETA negotiations (cf. Fritz 2014; Sinclair 2014a). In order to understand how investor protection in TTIP might look in the end, it is thus insightful to take a closer look at the consolidated CETA text.

Herein, an investment is defined as:

“Every kind of asset that an investor owns or controls, directly or *indirectly*, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, *the expectation of gain or profit, or the assumption of risk*“ (EC 2014: 149, own emphasis).

The definition explicitly includes not only enterprises, shares, stocks, and other forms of equity participation in an enterprise, but also debt instruments, loans, or “an interest arising from a concession [...] including to search for, cultivate, extract or exploit natural resources” (EC 2014: 150), and “claims to money or claims to performance under contract” (ibid.). Moreover, any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment (ibid.). In addition to this broad definition of investment, the determination of 'indirect expropriation' represents another crucial part of investor protection. Subsequently:

“indirect expropriation occurs where a *measure or series of measures of a Party* has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, *including the right to use, enjoy and dispose* of its investment, without formal transfer of title or outright seizure” (EC 2014: 183, own emphasis).

This also comprises “the extent to which the measure or series of measures interferes with distinct, *reasonable investment-backed expectations*” (EC 2014: 183, own emphasis).

4.2 Outlining major implications

What becomes very clear from the above-mentioned official statements is that investments are understood in a very broad sense, securing all kinds of 'assets' (cf. Krajewski 2014). Thus, short-term portfolio investments would be regarded as 'investment' even if they were purely for speculative reasons.¹⁰

Moreover, the notion of 'indirect expropriation' "has been used to challenge measures of a general and regulatory nature" (Krajewski 2014: 13), although the exact meaning of 'indirect expropriation' remains unclear and contested in international law (Meltzer 2009). Ultimately, the term could refer to any loss in value of property due to political regulation - be it health protection, environmental regulation, or social policy like minimum wage, debt reduction, or water protection - a provision that cannot be found in national constitutions (Eberhardt 2014a: 34; McCarthy 2004). Meltzer (2009) therefore argues that the increasingly complex and comprehensive investment provisions in FTAs raises a number of challenges for states, the meaning of 'indirect expropriation' being one of the most pressing. Only the 'legitimate expectation' of profits can become a reason for arbitration, and thus "a threat to the rights of governments to regulate, and especially to alter and strengthen regulatory approaches in response to changing circumstances, new knowledge, investor behavior, public perceptions of risk and democratic decision-making" (Sinclair 2014a: 9). Under the notion of fair and equitable treatment (FET), which includes the maintenance of a 'stable legal and business environment', corporations have used this as a "weapon against domestic laws and other regulatory measures" (Krajewski 2014: 12). Since any new regulation or government measure can be argued to affect cross-border trade in services or foreign investment, and thus impact private assets, such agreements undermine long-established protections for social welfare and economic justice, environmental values and individual rights (Greider 2001; Sinclair 2014a). At the same time, there is a complete absence of investor obligation in the treaty (or respective position papers), as well as a lack of relation between investment protection and protection of human or environmental rights (cf. Krajewski 2014). Subsequently, it seems that investor protection in TTIP would serve more as a powerful 'weapon' used to influence politics than a protection shield against government assaults (Eberhardt 2014a: 35). Such a trade and investment agreement would thus represent a quasi-constitution that protects and privileges the interests of corporate capital and transnational

¹⁰*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2 is a case in point. Therein, Deutsche Bank sued Sri Lanka for over 60 million US dollar on the basis of an oil futures investment it had previously concluded with the state oil company. Although Deutsche Bank had purely speculative interests and did not engage in physical investments, the claim was awarded in October 2012 (cf. Eberhardt 2014b).

investors exclusively (Schneiderman 2014b; Sinclair 2014b). This is what Gill (2003) has described as oligopoly and protection of the strong, and socialization of their risks. Ultimately, investor protection in TTIP is all about restoring the primacy of property against society's broader claims, and about limiting counter-hegemonic forces and democratic decision-making (Greider 2001; Eberhard 2014a).

4.3 A corporate perspective on ISDS

Before contextualizing these findings into the broader dynamics of contemporary capitalism, a closer look at the corporate interests may be illuminating. From a corporate point of view, the expansion of ISDS has numerous advantages. Firstly, they are particularly attractive “because they often allow investors to initiate litigation before an international tribunal without first exhausting remedies available in the host-state” (Cross 2013: 76). Secondly, private arbitration through ISDS mechanisms depoliticizes investment matters in various ways. They provide absolute obligations, for example, with regard to expropriation or the requirement to provide fair and equitable treatment, and they establish a legal way to circumvent the national system of legal remedies (Krajewski 2014). Moreover, through the establishment of international institutions such as the ICSID, foreign policy and foreign investment are separated, because investors can circumvent diplomatic protection to assert their claim (Meltzer 2009: 218). Thirdly, these tribunals are constituted as ad-hoc compositions, giving corporations a high degree of procedural flexibility regarding the choice of location and nomination of arbitrators (Lehmkuhl 2011: 141). Fourthly, private arbitration guarantees higher confidentiality and secrecy than litigation, since neither the proceedings nor the outcome of the cases are released as public information (Krajewski 2014; Lehmkuhl 2011: 141). Fourthly, ISDS mechanisms provide yet another important advantage for corporations. Because they have become widely accepted in the international community, arbitral awards are more likely to be accepted and enforced domestically than are decisions of foreign courts, “even if the same foreign procedural and substantive provisions are the basis of both decisions” (Lehmkuhl 2011: 141).

Finally, the growth of ISDS in IIAs and FTAs has been paralleled by a growth of the arbitration industry as such. Law firms specialized in international trade law therefore have strong economic interests in the further growth of the private arbitration industry, while these specialized lawyers belong to an exclusive circle of 'experts' that earn excessive wages (cf. Eberhardt/Olivet 2014). Against this background, it becomes very clear why (transnational) corporations have become major advocates of the necessity to include an investment chapter

in TTIP (cf. Business Europe 2014; Business Alliance for TTIP 2014). Apart from these specific (procedural) advantages, and reasons for corporations to push for investor protection in TTIP, the following chapter will attempt a more comprehensive contextualization.

5. Investor Protection in TTIP as 'Primitive Accumulation'

In chapter 3 it was argued that primitive accumulation in the age of neoliberalism is best understood as the social struggle over the conditions for capital's reproduction in the environment of a persisting crisis of overaccumulation. With regard to investor protection in TTIP, the notion of 'primitive accumulation' can help in understanding two distinct though interrelated and equally important processes.

On the one hand, investor protection legalizes numerous processes as 'investments', regardless of their detrimental social, political, and environmental effects. The explicit inclusion of, for example, intellectual property rights is a case in point. Such 'protection' implies the appropriation of crops, seeds, or other biological resources for the purpose of capitalist production. Hence, investor protection helps in opening up new conditions for capital's reproduction, which is why the protection of intellectual property rights as investments can be understood as “the latest step in the centuries-long process of the enclosure of nature-based means of production” (McCarthy 2004: 336). Also, the inclusion of merely speculative investments of finance capital (as “money claims”) can be interpreted as a way to secure the legal and political conditions for the further transnationalization of production and finance. It can therefore be concluded that what is at stake here are not actual investments as commonly understood, but the appropriation of existing opportunities for profit-maximization (von Werlhof 2003: 158). In the context of the persisting crisis of overaccumulation, the international legalization of investor protection and private arbitration is a class project aiming at regulating capital's contradictions.

On the other hand, such legalization criminalizes all forms of resistance against these 'investments'. As such, countering social forces aimed at establishing and securing commons in health care, water and other resources, or public services are portrayed as 'expropriators'. Thus, the legalization of investor protection also redefines the public and private authority structures in essential ways (cf. Cutler 1995). It ultimately deprives the public of a means to set limits on capitalist expansion through legislation, while enforcing an international private judicial system beyond democratic control. Just like in many previous cases of primitive accumulation, “the end result is to move assets and resources from the public or common

realm into private hands not via the exchange of commodities, but through legal manoeuvrings and the mobilization of class power” (McCarthy 2004: 337).

Overall, the inclusion of investor protection is not a mere regional project, but an attempt to set global investment standards. In other words, the successful inclusion of investor protection in TTIP would mean a major step towards a global “corporate bill of rights” (S2B/CEO/TNI 2013). However, as mentioned earlier this process is contingent upon various social relations, in particular on the balance of social forces in society. This is why this latest wave of 'enclosures' should be defined as “a strategic terrain among social forces with conflicting value practices” (De Angelis 2007: 140). That is to say that although 'investor protection' in TTIP is certainly a class project and a strategy to secure opportunities to employ surplus capital, it is not necessarily a successful one.

The self-organized *European Citizen Initiative against TTIP and CETA* may be a case in point. It has mobilized more than 3.2 million supporters throughout the EU and achieved considerable disruption of the negotiation timetable. The new EU Commissioner for Trade, Cecilia Malmström, spoke at a recent press conference on the results of the public consultation process on investment protection in January 2015. She said that “the consultation clearly shows that there is a huge scepticism against the ISDS instrument” and that more discussion about investment protection and ISDS in TTIP were needed with “EU governments, with the European Parliament and civil society before launching any policy recommendations in this area” (EC 2015a). These events show the socially contested nature of the conditions for capital's reproduction which are not merely mediated economically, but also politically, legally, and socio-culturally.

'Investor protection' in TTIP may thus seem rather different from what Marx initially described as 'primitive accumulation'. However, with a closer look, only the forms and targets of this primitive accumulation differ, “but the fundamental logic of establishing and maintaining the conditions of capitalist production, via privatization backed up by the law and force of the state, is the same” (McCarthy 2004: 337). Ultimately, this class struggle from above is a means to secure profitability in times of insecure profitable investment opportunities, if necessary through the state as profit-guarantor of last resort.

6. Concluding Remarks

This work aimed to contribute an original perspective on how 'investor protection' in TTIP can be understood through a re-conceptualization of 'primitive accumulation'. It was argued

that investor protection in TTIP is best understood as a *class struggle from above* to secure conditions for capital's reproduction in the context of a persistent global crisis of overaccumulation. Moreover, it was stated that such strategies are best theorized through the concept of 'primitive accumulation', focusing on the social struggle over the conditions for capital's reproduction. It describes the continuous regulation of capitalist and non-capitalist relations, and the ways in which new opportunities for capital's reproduction are opened, legalized, and socially naturalized.

The extensive definitions of 'investment' and 'indirect expropriation' in the negotiations and in the consolidated CETA text (which serves as a blueprint for the EC's position in the negotiations), can thus be interpreted as the appropriation of new opportunities for profit-maximization. As such, the increasing importance of private arbitration is part of a new 'wave of enclosures' that not only focuses on the privatization of arable land, but of various other conditions of production such as intellectual property rights. Ultimately, any kind of government regulation whether on health care, consumer or environmental protection, is thus a limit to profitable investment opportunities that 'expropriates' (transnational) corporations from their 'legitimate (profit) interests'. Simultaneously, civil society resistance to maintain or further establish commons is criminalized through such legalization. This is why these enclosures are best understood as a 'strategic terrain', within which conflicting social groups struggle for diverging social practices.

In contrast to the research program of 'new constitutionalism', the presented theoretical framework can thus make sense of these processes, while at the same time linking them to the broader configurations of contemporary capitalism. In the end, the broad civil society resistance against 'investor protection' in TTIP vividly demonstrates that the *class struggle from above* may also fail.

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If the crisis is a perfect storm, neoliberal capitalism seems to be built from bricks. A discourse-theoretical analysis of the struggles over financial services within the Transatlantic Trade and Investment Partnership (TTIP) (Norma Tiedemann)

1. Introduction

With the recent economic crisis, the everyday proceedings on financial markets have emerged once again as a highly political issue. What often seems remote and technical actually affects wide segments of society. The ensuing debates over necessary re-regulations of the financial sector are thus not issues of technical expertise, but must be understood as political struggles.

In the immediate aftermath of the first crisis shock moments when it was primarily perceived as a “financial-stress driven recession episode” (European Commission 2009: 1) caused by insufficient oversight over excessive speculation, an international consensus emerged that financial market regulations need to be improved. One consequence was the establishment of the G20 which in 2009 laid down general principles for the reform of financial markets (G20 2009). In the EU and the US, these guidelines initiated a process of drafting new legislation in order to comply with the agreed standards. According to the EU Commission, 40 new measures were proposed and partly adopted (European Commission 2014b) whereas in the USA, the Dodd-Frank Wall Street Reform and Consumer Protection Act represent the major reform package in response to the crisis (The White House, n.d.). Regulators and the political community of industrialized countries seemed resolved to overhaul the regulatory framework of the financial sector “to help prevent a recurrence of the events of the past two years” (Ben Bernanke 2009), events that have been termed “a perfect storm” (European Commission 2009: 14). The new responsible Commissioner even claimed that the EU has “created an entirely new set of rules governing the financial sector” (Hill 2014).

This, however, might be contradicted by newer developments looming at the EU's policy making horizon: The Transatlantic Trade and Investment Partnership (TTIP) is becoming a channel through which the European Commission, supported by the transatlantic finance sector, is attempting to establish mechanisms for harmonizing, facilitating and increasing trade in financial services and pushing for further integration of global financial markets. Because one of the main goals is the opening of markets (Malmström 2015), regulations are first of all portrayed as barriers to this agenda.

Taking into account that both the EU and the USA continue to face low growth, high unemployment and other negative effects of the crisis (The Guardian 2015, Wahl 2015: 2) and that the process of implementing globally agreed standards is not completed yet, this seemingly contradictory turn within financial policy requires an explanation.

The overall question this paper addresses will thus be: Why is there a push for the inclusion of financial services in TTIP other than the voiced consensus over the causal role of unregulated finance in the recent crisis and how is it articulated? Hence, I will not deal with the technicalities of legislative projects in the area of financial services - others have done so (e.g. Brummer 2013, Deutsch 2014, Morrison and Foerster 2015). Instead, being grounded in discourse-theoretical hegemony theory, the focus will be on the hegemonic articulations which can be identified in the attempt to establish a consensus regarding the benefits of including financial services into TTIP. It is argued that this debate takes place in the context of a struggle over a potentially new economic and financial order, in the course of which the previously hegemonic project of finance-led, neoliberal capitalism could be re-established with only minor concessions at the EU level.

The first chapter introduces major concepts of the theoretical framework and the empirical basis of the analysis. The second gives a brief overview of what exactly is being debated concerning financial services and TTIP. The third chapter presents the results of the text-based analysis by addressing the strategies which can be identified in the struggle over including financial services. Subsequently, the portrayed debate will be contextualized within the broader hegemony project of neoliberal, finance-led capitalism at the EU level. The concluding chapter will summarize the findings, thereby answering the research question and formulating further open questions.

2. Theoretical framework

Discourse-theoretical hegemony theory as developed by Laclau and Mouffe (1985) and elaborated by several others (e.g. Bedall 2014, Nonhoff 2006, Wullweber 2010, Wullweber 2014) is based on the ontological assumption of the social world's radical contingency, the consequence of which is to acknowledge the primacy of political struggles over the structuration of society. Structures which have achieved a relative stability are referred to as hegemonic discourses (cf. Wullweber 2014: 3). Thus, it is not about certain groups or classes being hegemonic, but systems of signification and meaning.

2.1 Central concepts

Discourses in this context can be understood as attempts “to dominate the field of discursivity” (Laclau and Mouffe 1985: 112) via social practices referred to as articulations. Articulations are acts of generating meaning through discursive relationing which follow two kinds of logic: the logic of difference, which constitutes elements as distinct elements by differentiating them from each other, e.g. by drawing boundaries; and the logic of equivalence, which connects elements to groups, referred to as chains of equivalence (Bedall 2014: 41). The constituting elements thereby become equivalent in relation to everything that is excluded from the chain of equivalence and/or they become equivalent in relation to a social universality, which is represented by the articulated chain of equivalence as a whole (ibid.: 46). *Participation*, *equality* and *efficiency* could, for example, be articulated into a chain which represents *democracy* as the purported universal good a society should strive towards. The concept of the social universality is central, because the continuous reference to a purportedly universal social good plays a crucial role in the processes whereby hegemony is established. These processes emerge as struggles between different hegemony projects, understood as ensembles of interrelated demands and interpretations, which aim to stabilize a system of meanings (Bedall 2014: 42). They divide the respective spatio-temporal field of discursivity by articulating antagonistic chains of equivalence - on the one hand chains which articulate a social universality and contain those demands which, once fulfilled, result in societal harmony. Through these articulations, a project is linked to an imagined universality in a manner which convinces a wide range of subjects that only its implementation will result in general well-being (Wullweber 2010: 140). In order to explain how subjects are compelled to identify themselves with certain interpretations, Howarth (2010: 322 ff.) adds the concept of fantasy. Fantasy conceals “the radical contingency of social relations, [...] by naturalizing the various relations of domination” (ibid.). The fantasmatic narrative of the social universality with its promise of harmony represents the *beatific* dimension of fantasy. On the other hand there are chains articulating all barriers to the establishment of the social universality. By representing everything that inhibits harmony, it represents the *horrific* dimension of fantasy, which “foretells of disaster if the obstacle proves insurmountable” (ibid.). Hegemony is achieved when a high degree of discursive dissemination is reached, i.e. when a hegemony project's demands and interpretations are re-articulated over an extended period of time by a variety of actors (Nonhoff 2006: 15).

It is important to note that the described discursive contestation does not take place in an unstructured environment, where each act of articulation is arbitrary. The structuring of

a discursive field is an outcome of previous struggles, where different discourses competed for hegemony by articulating their particular demands as universalities. If hegemonic discourse organizations could be established, the associated systems of signification become sedimented, i.e. relatively routinized by being inscribed into norms and institutions. The field of discursivity is hence characterized by layers of differently sedimented discourses, privileging some strategies and actors over others (Wullweber 2010: 115).

According to Nonhoff, strategies should be understood as ways to arrange discursive elements in a spatio-temporal dimension resulting in specific discursive constellations (2006: 210). He contends that it only makes sense to identify retrospectively those strategies eventually resulting in the specific constellation of hegemony, i.e. hegemonic strategies. The empirical analysis of political struggles is about discerning those strategies which can be analytically linked to certain hegemony projects. These bundles of strategies appear as repeated patterns of similar articulations (Wullweber 2010: 144) in the modes of difference and equivalence through which relations to a social universality are strengthened, and negative associations with the hegemony project weakened and alternatives excluded (ibid.). *How* these general concepts play out in the specific empirical case is a question for which the answer cannot be established a priori, but constitutes the main interest concerning the processes through which hegemony emerges.

2.2 Empirical base

For concrete analyses, it is important to define the rather abstract ideas of post-structural discourse analysis, which was the aim of the previous section, by introducing concepts such as chains of equivalence, articulations, social universality, hegemonic strategies and the dimensions of fantasy. A further specification will be accomplished implicitly through the application of these concepts in the analysis.

The overall goal is then to identify the hegemonic strategies in the struggle over financial market reforms, specifically over financial services within TTIP. A focus of this paper is on the strategic articulations of relevant social forces through which universal benefits are ascribed to a regulatory cooperation framework on financial services within TTIP, and thus to integrated financial markets. The analysis is based on 25 documents of (financial) industry associations, banks or companies, including consultation-contributions, brochures, press releases, position statements, studies and conference papers. From the European Commission, 12 documents were reviewed comprising speeches, press releases, studies, public and leaked documents and website information. Additionally, publications

from civil society groups, articles in newspapers, online magazines or of think tanks have been consulted, the latter specifically for further quotes of Commission representatives or industry groups which might better represent the public dimension of the strategies.

3. Financial Services in TTIP

Including financial services into global rule-making is not a new issue. The General Agreement on Trade in Services (GATS) already contained a sector-specific annex (GATS 1995: 308-311) and some WTO members even signed a more comprehensive “Understanding on commitments in financial services” (WTO.org 2015). However, due to the lack of an automatism pushing forward liberalization, the process proceeded rather incrementally and unsatisfactorily for the major industrialized countries with strong financial services sectors (Lipke and Stichele 2003: 23). Given the time-consuming bargaining, bilateral agreements in the past provided opportunities to remove trade barriers for the highly competitive EU and US financial services firms (ibid.: 32). The sector has a substantial size: at the end of 2012, European foreign direct investment in the US amounted to \$1,647.6 billion – 36.7% in manufacturing and 21.7% in banking and other financial services. US investment in the EU reached \$2,239.6 billion, of which 18.2% was in financial establishments (Cooper 2014: 7). However, from a liberal market perspective it is perceived as a sector where any kind of regulation “can act as a barrier to free trade” (Hill 2015). Thus, transatlantic cooperation on this issue might now be extended to the ambitious bi-regional TTIP.

With the negotiations continuously being carried out behind closed doors, there are few sources of information on the potential future content of the agreement. Thus, the following description cannot be understood as the definitive state of affairs, since it is based on a few leaked documents and NGO analyses. This caveat applies even more considering the different positions of the negotiation partners. Treating trade in financial services under a regulatory cooperation framework is particularly advocated by the EU, whereas US negotiators, given the already established regulatory dialogues, would be content with only a market access chapter (EurActiv 2014). The former Commissioner for Internal Market and Services, Barnier, nevertheless stressed that “[t]here’s no question of having such an agreement on access without having a regulatory level playing field. This would make no sense at all” (Fronza 2013). The current Commissioner for Financial Services is equally busy with publicly promoting the inclusion of a regulatory cooperation approach (Hill 2014, Hill 2015).

According to a leaked document (European Commission 2014a), the EU wants to commit the signing parties to “engage in a process towards convergence of their respective regulatory and supervisory frameworks for financial services” (ibid.: 2). This is to be achieved by establishing a “Joint EU/US Financial Regulatory Forum” (ibid.: 4) consisting of regularly meetings and permanent working groups. The goal is to prevent the parties from “introducing rules affecting market operators and the jurisdiction of the other” (ibid.: 2) – this is interpreted by many critical observers as a further move to liberalize financial services (e.g. Corporate Europe Observatory 2014). Trade facilitation, as proposed in the leaked document, can also be achieved through reliance on the other party's rules after conducting an “equivalence/substituted compliance test” (European Commission 2014a: 3). European banks, for instance, would thereby be allowed to offer their services in the US following EU regulations, not US regulations, assuming that the two parties accept their effects as equivalent.

The purpose of the joint regulatory forum, on the other hand, can be understood as pushing towards greater harmonization of rules. Before any new regulation is drafted, the other side must be consulted (ibid.: 2) in order to create future “inter-operable” rules (ibid.: 3).

Another critical issue is the formulation used with regard to so-called “prudential carve-outs”, i.e. measures which may be adopted for “ensuring the integrity and stability of a Party's financial system” (European Commission 2013b: 38). These shall not be “more burdensome than necessary” (ibid.). The difficulty with such formulations arises because it can never be established where a future crisis will originate and it is impossible to examine the necessity for regulations intending to prevent crises before signs of turbulence are detectable (WEED e.V. 2013).

Several NGOs issued critical analyses of the dangers of including financial services within TTIP with regard to existing regulations and future attempts to curb the power of finance (Corporate Europe Observatory 2014, SOMO 2014, WEED e.V. 2013). It is stated that it would “not only pose a risk to the ability of states [...] to regulate, [...] but also more generally, a risk of further dangerous liberalization and growth of finance” (Finance Watch n.d.). Instead of enabling stronger democratic control of the finance industry, the “proposal is about the interests of financial corporations, not the interests of [...] society at large” (Corporate Europe Observatory 2014).

What becomes thereby apparent is the attempt to establish the inclusion of financial services under a regulatory cooperation approach as a benefit with universal extent. The subsequent section will analyze how this particular interpretation is articulated.

4. Identifying hegemonic strategies¹¹

Hegemony in this context characterizes specific spatio-temporal discourse organizations which have stabilized – albeit always only relatively - the field of discursivity by stabilizing the meaning of the social, and by offering sets of interpretations and interrelated ideas, thereby giving a certain structure to how social reality is perceived and established. Hegemonic discourse formations depend for their realization and stabilization on their continuous re-articulation by a variety of social forces via hegemonic practices which are understood as “an exemplary form of political activity that involves the articulation of different identities and subjectivities into a common project” (Howarth and Stavrakakis 2000: 15). The contingent nature of the social, its antagonisms and dislocations are thereby concealed. In the case at hand, the major forces engaging in the practice of hegemonic articulations are various representatives of the financial services industry on both sides of the Atlantic and the European Commission¹². The identification of the hegemonic strategies connected to this project, that is the strategic articulations of the major forces, will be the focus of this chapter.

4.1 Antagonistic chains of equivalence

It has been stated that hegemony projects divide the field of discursivity by articulating antagonistic chains of equivalence - this discursive pattern is particularly conspicuous throughout the analyzed documents.

It is argued that regulatory cooperation on financial services in TTIP will lead to “increased economic efficiency”¹³, will “enhance the efficiency of the transatlantic financial markets”¹⁴ and will “contribute towards preventing future crisis”¹⁵. Because lack of appropriate regulation and supervision have been identified as major causes of the crisis, establishing a framework for cooperation is claimed to fill the gap and bring about “high-quality” regulation through greater consistency of reforms.¹⁶

¹¹ For better readability I will use footnotes in this section to list the sources of quotations identified as specific representations of broader discursive strategies.

¹² Moreover, members of the Republican party have also expressed their support for setting up a regulatory cooperation framework on financial services within TTIP (House of Lords, European Union Committee 2014: 38), but in general this paper excludes the debate within US political institutions.

¹³ O'Farrell 2014: 2

¹⁴ Coalition of Service Industries 2013: 10; EU-US financial services industries 2015: 1

¹⁵ European Commission 2014a: 1

¹⁶ Association of German Banks 2012: 4; Calviño 2013: 10; Coalition of Service Industries 2013: 10; Eurofi 2014: 1; European Banking Federation 2013: 2; European Commission 2014a: 1; Financial Services Forum 2014; Securities Industry and Financial Markets Association 2013: 2; SIFMA and AFME 2014: 1; US and European Financial Services Trade Associations 2014: 1; US Chamber of Commerce 2013: 9

Regulatory cooperation on financial services is even proclaimed by the Commission to be “the only way forward to protect financial stability, while allowing the financial sector to allocate capital efficiently throughout the world”.¹⁷ Integration and stability are articulated as equivalent¹⁸ and are linked to the promise of economic growth: “We must maintain the benefits of an integrated financial system – and integrating it further still. [...] By acting together we can protect better financial stability, and achieve sustainable growth through integrated markets”.¹⁹ Also in his most recent speeches, Commissioner Hill argues that only “a larger and more efficient marketplace” for financial services will help to “create jobs and boost growth”²⁰. The rationale behind these articulations is the assumed lack of available financing for the “real economy”, which is contended to be caused by the wrong kinds of regulations and to be the root of sluggish growth rates in Europe (de Larosière 2014: 1). Thus, transatlantic regulatory cooperation on financial services “would improve the ability of the integrated financial system to provide financing to the real economy”²¹. Eventually, “[t]hese outcomes ultimately benefit the [...] EU and US society at large”²².

On the other hand, a lack of cooperation is predicted to result in higher costs²³ and increased financial instability²⁴ due to inevitable differences in financial market reforms on both sides of the Atlantic, which cannot be prevented without regulatory cooperation on financial services within TTIP. Describing it as a “tower of Babel of rules”²⁵, regulatory divergence is articulated continuously as a threat in itself²⁶, leading to “regulatory arbitrage”²⁷ and “fragmentation”²⁸. These potential developments are interpreted as barriers to the overall desired goal of economic recovery because “divergent and conflicting regulation [...] is damaging for financial markets’ contribution to global growth and job creation”²⁹.

¹⁷ Calviño 2013: 8

¹⁸ European Commission 2014a: 5

¹⁹ Calviño 2013: 11

²⁰ Hill 2015

²¹ European Commission 2014a: 5

²² EU-US financial services industries 2015: 1

²³ O’Farrell 2014: 2

²⁴ European Commission 2014a: 5

²⁵ Calviño 2013: 7

²⁶ Deutsch 2014; European Commission 2014a: 5; European Services Forum and Coalition of Service Industries 2012: 2; EU-US financial services industries 2015: 1; The Atlantic Council 2013; Transatlantic Industry Contribution 2012: 1; U.S. Chamber of Commerce and Business Europe 2012: 4

²⁷ Calviño 2014, Deutsch 2014: 19; Eurofi 2014: 1, European Banking Federation 2015: 2; European Commission 2014a: 2; Hill 2015

²⁸ Association of German Banks 2012: 4; Calviño 2014; Deutsch 2014: 4; Eurofi 2014: 1; European Banking Federation 2013: 4; European Commission 2014a: 3

²⁹ European Banking Federation 2015: 2

Stretching these assumed dangers even further, a potential decision to exclude financial services is equated with a retreat to protectionism³⁰, “regulatory unilateralism”³¹, “risk of chaos”³² and the “balkanization” of financial markets³³. These consequences are formulated in an analogy to the hegemonic narrative of the events in the Great Depression's aftermath, claiming that the introduction of protectionist measures led to a breakdown of the international trading system, massively worsening the crisis, increasing political tensions and contributing to the outbreak of the Second World War³⁴. By drawing these connections, *fragmented markets* are articulated as equivalent to the danger of failing international cooperation as such, thereby evoking a threat scenario far beyond some conflicting regulations that might make compliance slightly more complex for service providers.

The antagonism is thus clear – on the one hand we are confronted with a world where a universal lack is overcome by including a regulatory cooperation framework on financial services within TTIP. The social universality is negatively embodied in the lack of growth and economic recovery. Financial integration, presumably reached via regulatory cooperation, is articulated in a chain of equivalence with stability, consistency, growth and job creation. These strategic articulations represent the beatific dimension of the project's fantasy.

On the other hand, fragmentation, inconsistency, regulatory arbitrage, financial instability and protectionism, with its assumed threat of general cooperation breakdown, are articulated as equivalent barriers to the emergence of societal harmony embodied in cooperation, convergence and compatibility of rules. The threat scenario represents the horrific dimension of this project as it “foretells of disaster” when the barriers are not overcome (Howarth 2010: 322).

Though structuring the discursive field through this repeated articulation of antagonistic chains is the most prominent approach found within the documents, other discursive strategies are also identifiable.

4.2 Making alternatives unthinkable

Another practice structuring the discourse around financial services within TTIP is constituted through articulations which portray this policy as the only option, making

³⁰ Association of German Banks 2012: 4; European Banking Federation 2015: 2; European Commission 2009: 15

³¹ European Banking Federation 2015: 2

³² Jones and O'Donnell 2015

³³ Bennetts 2014, Deutsch 2014: 9; European Banking Federation 2015: 2; European Commission 2009: 20

³⁴ Bennetts 2014; Calviño 2013: 3; European Commission 2009: 14 ff.

alternatives unthinkable. This becomes visible in formulations such as that “the importance of the EU and U.S. financial markets [...] *dictates* greater regulatory convergence”³⁵, that it “*goes without saying* that the EU and the US should both lead the way in designing a new regulatory framework”³⁶ or that “the US and the EU will *naturally* have to do most [...] in this collaborative relationship”. Inevitability is evoked by stressing that regulatory cooperation “*must* be an integral part of TTIP [...] to deliver its full potential”³⁷. No room for other reflections on the causes and appropriate responses to the crisis is left when stressing that the lesson to be learnt was that “we need deeper cooperation between regulators and supervisors [...] especially between the largest financial centers”³⁸.

Equally, the discursive figure of globalization, as an unchangeable context in which one cannot but play by its rules, is put into service for this strategy of miniaturizing the space for political maneuvering. Including financial services within TTIP would simply be “in recognition of the integrated nature of the transatlantic financial markets”³⁹ where “the U.S. and EU economies and capital markets are inextricably linked”⁴⁰ - a situation which, as a sedimented discourse formation and thereby an almost naturalized phenomenon, is not questioned. Instead, “coordinated financial reform” is even metaphorically framed as a life-saving medicine whose injection is “crucial for the future health and vitality of the global economy”⁴¹, thus turning it into some sort of moral obligation.

4.3 De-politicization

By making the issue appear as a technical problem to be solved by recourse to purely rational decision, a strategic de-politicization is being pursued. This is expressed in the need for “appropriate”⁴² rule making, which would “capture the international reality of modern-day finance”⁴³. The impression is created that the issue is one of neutral, a-political regulation based on transparency and accountability⁴⁴ (without ever considering *to whom* it should be transparent and accountable), “clear, consistent, and predictable rules”⁴⁵, “timelines for achieving objectives”⁴⁶, development of a “methodology for consultation”⁴⁷ and the

³⁵ European Banking Federation 2013: 1, emphasis added

³⁶ Deutsch 2014: 22, emphasis added

³⁷ Coalition of Service Industries 2013: 10; US and European Financial Services Trade Associations 2014: 1

³⁸ Calviño 2013: 2

³⁹ Coalition of Services Industries 2013: 10; US and European Financial Trade Services Association 2014: 1

⁴⁰ Securities Industry and Financial Markets Association 2013: 2

⁴¹ The Atlantic Council 2013: 4

⁴² Deutsch 2014: 22; European Commission 2009: 58; U.S. Chamber of Commerce 2013: 9;

⁴³ Calviño 2014

⁴⁴ European Commission 2014a: 3, O'Farrell 2014: 3

⁴⁵ U.S. Chamber of Commerce 2013: 9

⁴⁶ TheCityUK quoted in House of Lords, European Union Committee 2014: 37

⁴⁷ U.S. Chamber of Commerce and BusinessEurope 2012: 4

introduction of “impact assessments”⁴⁸. A “smart and robust transatlantic regulatory cooperation”⁴⁹ is claimed to be the right answer to the identified problem of regulatory divergence, making it clear that the favored approach is one of efficient management, insulating the process from political or public contestation. The need for such a “rule-based”⁵⁰, a-political process is illustrated by a frequently repeated story about “irregular summits” where deals were “brokered at 11.59”⁵¹ thus bringing about “situations in which we are forced to scramble for last-minute fixes”⁵² - obviously, so the argument goes, leading to sub-optimal outcomes. Thus, because it is claimed that “financial regulation is too important to be discussed ad hoc in informal settings at the very last minute”⁵³, a regulatory cooperation framework within TTIP appears as the undebatable next step.

4.4 Boundary drawing and legitimate difference

However, the drive to include financial services under a regulatory cooperation framework has met with opposition, especially from US civil society⁵⁴ and the current US government. Worries are circulating that regulatory cooperation might jeopardize the post-crisis regulation efforts. These fears are addressed in the discourse by drawing a clear boundary between the project's aim (regulatory cooperation) and the element of “deregulation” which is thereby excluded from the discourse altogether. The European Banking Federation, for instance, has declared that a “[r]egulatory cooperation framework does not equal deregulation”⁵⁵ and Commissioner Hill has stated that “we do not want to risk the financial stability we have worked so hard to restore by undermining Dodd-Frank”⁵⁶. By calling the worries “myths and misunderstandings”⁵⁷, they are articulated as what Nonhoff calls a *super-difference*⁵⁸ attempting to defend the discourse's borders.

Another strategy is taking up criticism as legitimate difference, thereby incorporating potential antagonisms into the project and neutralizing their disruptive power. One major argument against the regulatory framework approach is that a variety of bodies already exist

⁴⁸ Coalition of Services Industries 2013: 10; National Foreign Trade Council 2013: 4, US and European Financial Services Trade Associations 2014: 3

⁴⁹ The Atlantic Council 2013: 5

⁵⁰ European Commission 2014a: 3

⁵¹ Normington 2014

⁵² Hill 2015

⁵³ European Commission 2014a: 2

⁵⁴ E.g. AFL-CIO 2013; Citizens' Trade Campaign 2013; Consumer Federation of America 2013; Transatlantic Consumer Dialogue 2013

⁵⁵ European Banking Federation 2015: 2

⁵⁶ Hill 2015

⁵⁷ Ibid.

⁵⁸ Nonhoff 2006: 212

(G20, the Basel Committee for Banking Supervision, the International Organization of Securities Commissions, the Financial Markets Regulatory Dialogue) which are entrusted with drafting new regulatory standards and that there is hence no need for a further institutionalized setting⁵⁹. These comments are accepted as valid interventions – the importance of these bodies is stressed as well as the need to retain them⁶⁰. However, they are portrayed as lacking the power to take binding decisions, as well as to guide the implementation process of the reform agenda and thereby achieve what seems to be so urgently needed: regulatory consistency or convergence⁶¹.

Having identified some of the articulatory strategies which form part of the attempt to establish the universal benefits of including regulatory cooperation on financial services, the next section contextualizes this specific debate within a broader struggle over the re-establishment of the previously hegemonic discourse formation in the crisis-aftermath.

5. The context of European financial market reforms

One has to acknowledge that the recent initiative to conclude a transatlantic free trade agreement has not emerged in a vacuum, but is part of more wide-spanning debates over the future of US-EU economic leadership, the future shape of international trade and investment and, last but not least, over the capitalist core's response to the recent global crisis. This event partly re-politicized the last decade of consensus over the organization of the world economy. (Neoliberal) capitalism's contradictions and the prospects of a potentially new economic and financial order were debated vividly again (e.g. Nesvetailova and Palan 2010; Kotz 2009; Schwennicke 2009). However, despite these analyses, which emphasized a fundamental dysfunctionality of which financialization and the growth of finance capital are just a symptom, the hegemonic interpretation of the crisis focused rather on excessive financial speculation and missing regulation (Brand 2009: 2).

Including financial services under a regulatory cooperation framework within TTIP should thus be considered as a partial instantiation of the broader attempted re-establishment of the discourse formation of neoliberal, finance-led capitalism. It must be embedded in the context of a wider initiative to reform European financial markets. The European

⁵⁹ Miriam Sapiro, Deputy US Trade Representative, quoted in House of Lords, European Union Committee 2014: 38

⁶⁰ Calviño 2013: 9; Deutsch 2014: 16; European Banking Federation 2013: 4; Securities Industry and Financial Markets Association 2013: 3; The Atlantic Council 2013: 4; US and European Financial Services Trade Associations 2014: 2

⁶¹ Calviño 2013: 6; De Gucht 2014; Deutsch 2014: 18; Eurofi 2014:1; European Banking Federation 2015:2; European Commission 2014a: 1; Securities Industry and Financial Markets Association 2013: 3; The Atlantic Council 2013: 4

Commission's agenda includes plans to develop private European Long-Term Investment Funds (European Commission 2013a), new impetus for the long-held scheme of a Capital Markets Union (European Commission 2015a), and proposals for “simple, transparent and standardized securitization” (European Commission 2015b) amongst others. All these initiatives aim to reduce the often propounded over-reliance of the European economy on banks, initiate the revival of securitization and “[i]ncreasing the global competitiveness and attractiveness of European capital markets” (European Commission 2015a: 9). These goals astonishingly resemble the European Commission's financial policy objectives before the crisis, when it was assured “that the more integrated financial markets are, the more efficient the allocation of economic resources and long-run economic performance will be” and that advanced financial markets are “essential for the EU’s global competitiveness” (European Commission 2005).

Despite warnings that a Capital Markets Union, the promotion of securitization and a turn away from “boring banking” towards private market-based mechanisms could increase exposure to systemic risk (Finance Watch 2014; The Financial 2015), the European Commission seems trapped by faith in the universal benefits of deep and integrated finance. Competitiveness is still the buzzword, market-driven solutions are preferred over public frameworks, infrastructure shall be further privatized via public-private partnership agreements, and highly problematic processes in the field of financial assets, such as securitization, are supported again (Finance Watch 2014). The Commission is increasingly reluctant to implement globally agreed standards (Brunsden 2015) and some post-crisis regulations are supposed to be reviewed to check whether they “act as [...] unnecessary barriers to the capital markets” (European Commission 2015a: 10).

Thus, these projects and the inclusion of financial services within TTIP do not represent a rupture with the pre-crisis, neoliberal, finance-led model of the European political economy, but rather a continuity where the “free flow of capital” is understood as “one of the fundamental principles on which the EU was built” (European Commission 2015a: 3). The belief in the “benefits of greater [capital] market size and depth” (ibid.: 9), especially as the solution to the recession that keeps haunting Europe, seems to be as strong as before.

This view is even upheld despite the fact that there are studies by the International Monetary Fund (Arcand et al. 2012) and the Bank for International Settlement (Cecchetti and Kharroubi 2012) substantiating the argument that there is a threshold beyond which a financial sector's growth is detrimental to overall economic development – termed by others as the “finance curse” (Shaxson and Christensen 2013).

This is due to the hegemonic interpretation of the crisis as having been caused by too little regulation and supervision (cf. European Commission 2009) and the belief that the reason for the prolonged low growth levels is a scarcity of financial capital available for investment in “the real economy” (Barnier 2014; European Commission 2015a; de Larosière 2014: 1). Alternative analyses, suggesting that low growth is a feature of many early-industrialized economies since the 1970s and that globalization, increasing financialization, growing inequality and lack of demand play a significant part in this development (Finance Watch 2014: 11), are nowhere to be found in the documents of the EU.

6. Conclusion

Referring back to the initial observation which gave rise to the question of this paper – the seemingly contradictory turn in the EU's financial policy of further liberalizing financial services trade via TTIP – it became clear that this is indeed only an apparent contradiction. Analyzing the strategies of articulation connected to this policy project and contextualizing them within the broader financial reform agenda at the European level has shown that the push to include financial services under a regulatory cooperation framework has to be understood as a specific instantiation of the broader hegemony project of neoliberal, finance-led capitalism which could be re-established with only slight concessions on a regulatory level.

A bundle of hegemonic strategies could be identified, constructed on the sedimented discourse of the beneficial nature of sizeable financial markets, which illustrates how the relevant social forces promote the implementation of this specific project. These strategies comprise the articulation of antagonistic chains of equivalence with a particularly strong horrific dimension including the attempt to make alternatives unthinkable, a de-politicization to limit political space, as well as boundary drawing and the inclusion of legitimate differences to respond to potentially disruptive antagonisms.

Beyond these findings, many issues remain unaddressed or oversimplified. Due to space limitations I treated the European Commission and the financial industry representatives as one collective subject. For further research, it would need to be established why the European Commission has become such a strong advocate of exactly those policies preferred by the business community, how these groups are influencing each other's self-understanding and interests, and whether they can be understood as a discourse coalition. Moreover, it would be interesting to inquire when and how the seeming consensus on the universally beneficial nature of *integrated, harmonized, sizeable* and *efficient* financial

markets emerged given that after the Great Depression fragmentation and “boring banking” prevailed and coincided with “an era of spectacular economic progress” (Krugman 2009). Although it remains to be seen whether financial services will be part of the regulatory cooperation chapter of TTIP, it seems that this consensus was not radically challenged in the wake of the crisis. One could thus conclude that if the recent crisis is a perfect storm, the discourse formation of neoliberal, finance-led capitalism seems to be built from bricks with cracks that are not as visible as one might have thought in the first years of the crisis⁶².

⁶²However, of course, one could also conclude that a crisis cannot be perceived as “a storm” which is able to automatically initiate changes as a disruptive external power, but that any kind of cracks in the hegemonic discourse formation need to be brought about by counter-hegemonic struggles, thus depending on agency and appropriate strategies.

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Exclusion as a strategy of world domination. Why are non-OECD countries excluded from mega-regional trade agreements? (Kosmas Kotas)

1. Introduction

The simultaneous ongoing talks to reach comprehensive transatlantic and transpacific trade agreements constitute a critical moment in the timeline of trade which is worth investigating. Because the Doha Round in the WTO has not brought any progress in liberalization, major OECD countries prompted by the USA have shifted negotiations to exclusive discussion tables outside of the WTO with the aim of pursuing new regional free trade agreements, such as TTIP and TPP.

The EC, based on the estimations of the four most prominent studies (Berden et al. 2009, Felbermayr et al. 2013, Fontagné et al. 2013, Francois et al. 2013), claims that the potential economic stimulus derived from TTIP will be approximately €120 billion for the EU economy, €90 billion for the US economy and €100 billion for the rest of the world. Furthermore, the EC claims that this will be achieved by generating jobs and growth across the EU by opening the US to large and small EU firms and setting new rules to make it easier and fairer to export, import and invest overseas. This agreement will help the EU kick-start its economy, adapt to emerging economies outside Europe and maintain its influence over world trade rules while projecting its values globally (EC 2015). Likewise, the USTR has been promoting TPP as an opportunity to reach a comprehensive agreement that will facilitate trade and investment in the Asia–Pacific region, thus creating more jobs and economic growth in the USA (USTR, n.d). Despite the ambitious claims, negotiations behind closed doors have been accompanied by multiple contestations from labor unions, civil society and political parties over the social costs and the demise of democracy that these agreements will bring (Hansen-Kuhn 2013) (Stop TTIP 2015).

The existing body of literature on TTIP and TPP is composed mostly of quantitative or qualitative studies trying to assess the potential effects and implications of mega-regionals for the countries involved in the negotiations. However, the potential effects of TTIP and TPP stretch far beyond their designed borders and will affect the economies and lives of people in excluded countries. Building upon this observation and the scarcity of arguments informed by a theoretical understanding of the political economy of the issue, I will attempt to answer the often sidelined question of why non-OECD countries are excluded from these mega-regionals. My ambition is to explore theoretical frameworks that can inform a consistent answer to the question posed. However, since TTIP and TPP are recent developments, it can be asserted that there is still a lack of academic literature developing a

narrative with respect to a particular theoretical perspective. Thus while discussing some aspects of constructivist and neo-Gramscian thought, I will attempt to create a conceptual framework which will inform my two main arguments. In a nutshell, I will suggest that TTIP and TPP are an attempt to create a new trade regime through the change of constitutive rules and that the latter change is driven by geostrategic interests of hegemonic actors.

2. Theoretical framework

Constructivism contests materialism by hypothesizing the structures of human association as primarily cultural rather than material phenomena (Behravesch 2011). Constructivists argue that understanding how non-material structures condition actor identities is important because the latter inform interests and, in turn, actions (Reus-Smit 2005: 197). Constructivism in international relations as evolved during the 1990s can be categorized into three different forms: systemic, unit-level, and holistic (Reus-Smit 2005: 194). For the purposes of this paper, only the first and the third will be further explained.

Systemic constructivism, which is represented by the influential writings of Alexander Wendt, concentrates particularly on “interactions between unitary state actors” and what happens between them at the expense of what happens domestically. These processes of interaction are the foci of the construction or transformation of their identity, interests and intentionality (Wendt 1999: 43). According to Wendt, the interaction between states creates a certain structure of identities and interests. Thus it is agency that gives causal powers to the structure (Wendt 1999: 146). Moreover, the structures which organize actions are constituted by collective acceptance. It is through the participation in the latter that actors acquire identities, roles and expectations about themselves and other actors (Wendt 1999: 217). Hence, Wendt defines institutions as “...a relatively stable set or structure of identities and interest [...] which are often codified in formal rules or norms” (Wendt 1992: 399).

While systemic and unit-level constructivists contend over the dichotomy between the international and the domestic domain, holistic constructivism attempts to integrate the domestically established corporate identities of states and their internationally determined social identities into “a unified analytical perspective that treats the domestic and the international as two faces of a single social and political order” (Reus-Smit 2005: 201). John Ruggie’s study of the postwar regimes for money and trade falls into this category. According to him, international regimes are social institutions around which actor expectations converge. Regimes take shape in the form of converging expectations they have an

intersubjective quality like a language. Therefore, when studying international regimes, we cannot limit ourselves to their ‘concrete elements’, but we must understand the trade regime as an ‘intersubjective framework of meaning’ (Ruggie 1982: 380).

Moreover, Ruggie argues that to understand changes in international trade regimes it is necessary to look at how power and legitimate social purpose become fused to project political authority into the international system (Ruggie 1982: 382). He illustrates this argument by drawing a distinction between the open trade order that existed pre-WW1, and the one that followed post-WW2. While a hegemonic power existed in both periods, the two trading orders differed along the axis of social purpose. The former, he argues, was characterized by a shared commitment to *laissez-faire* liberalism. The latter grew out of a commitment to Keynesian domestic policies to foster the welfare of the country (Lang 2006: 86). Ruggie seeks to demonstrate how the international economic order has historically varied according to changes in collective ideas about the ‘legitimate social purposes’ for which power can be exercised. Shared ideas at the international level, Ruggie suggests, are in part a function of changes in ideas at the domestic level. Concerning international trade, changes in ideas about the purposes “in pursuit of which state power was expected to be employed in the domestic economy” are particularly important (*ibid.*).

Furthermore, Lang impeccably summarizes a later argument from Ruggie on rules regulating trade regimes. According to Ruggie, the latter consists not only of *regulative* rules, but also of *constitutive* rules. Where regulative rules prohibit, require and constrain already existing social activity or behavior, constitutive rules create the very possibility of a social activity. Constitutive rules define the rules of trade including who trades, what the objectives are, what roles are to be assumed, and what particular kinds of activity count in the context of trade. Constitutive rules are logically prior to regulative rules, because they define the domain in which regulative rules take effect (Lang 2006: 104). Therefore it can be asserted that the trade regime does not just regulate trade policy, but sets the conditions of possibility of international exchange of goods and services by setting the “rules of the game” by which actors understand what it is that they are doing.

In order to explore the role of agency and power relations in international structures more in depth, the concept of hegemony from a Neo-Gramscian perspective can be useful. Gill defines hegemony as the foundation and establishment of a system of relatively universal appeal (Gill 2003: 3), a world order which contains mechanisms that permit the institutionalization of conflict and weighting of subordinate interests in a transnational

political statement (ibid.). Gramsci contends that hegemony in international relations is based on both coercion and consent, but primarily rests upon the latter (Cox 1983: 164). Although Gramsci's account primarily focuses on the domestic level of societies, his theoretical formulations can be useful to understand matters in the international domain. The ability of a hegemonic country to internalize the interests of all other countries in a hegemonic order is the foremost virtue of its status as a hegemon. Moreover, Gill emphasizes that the understanding of the "big picture" depends upon how one theorizes dominant structures and social forces: the ideas, institutions and capacities for production and destruction that constitute the world order (Gill 2003: 1). Additionally, Bieler and Morton conceptualize structure and agency as a guardian knot, and argue that historical structures are considered to consist of intersubjective ideas, which are not 'givens' but 'mades' (Bieler and Morton 2001: 25).

The co-optation of varying interests that molds them to be aligned with the interests of the hegemon is a characteristic that distinguishes the hegemon from other states constituting the world order. Cox highlights that universalization of hegemonic norms also depends on the cultural dominance of the hegemon (Cox 1983: 168). Similarly, the hegemonic order has the ability to absorb counter-hegemonic challenges to its dominance (Cox 1983: 173). These challenges can either be subverted or internalized by the hegemonic order to align them with the larger framework of universalized norms. Therefore, individual countries or groups of countries within the reach of the hegemonic order can at best pose a temporary threat to the hegemonic order, before being subdued either by passive or coercive measures.

Cox mentions the role of international institutions in reifying the consensus around which a hegemonic order is built as mechanisms for its spatial expansion. International institutions function as the process through which the institutions of hegemony and their ideology are developed (Cox 1986: 172). He delineates the features of international institutions as: (1) the embodiment of the rules which facilitate the expansion of hegemonic world orders; (2) [international institutions] the product of the hegemonic world order; (3) the ideological legitimation of the norms of the world order; (4) co-optation of elites from peripheral countries and (5) absorption of counter hegemonic ideas (Cox 1983: 172).

Furthermore, Gramsci contends that for a class to become hegemonic, it must exercise cultural and moral leadership to appear as a true representative of the interests of all classes. The exercise of leadership is integral to the production of a consensus around which the

hegemonic order can be centered. This congruence of social forces is called the historic bloc (Cox 1986: 167). In Gramsci's view, the historical bloc consists of a structure and a superstructure reciprocally influencing each other. The structure is constituted by material circumstances, which include social relations and productive capacities, and the superstructure consists of the ideational sphere and the incumbent order of political organization (Cox 1983: 167). Moreover, the transposition of national historic bloc formation to the international relations sphere brings about the formation of a "transnational historical bloc". The latter envisions historical blocs of states whose international interests converge to maintain or improve both the domestic and international hegemonic status quo (Cohn 2011).

From a regional perspective, the transnational historical bloc is formed by the national historical blocs of a certain regional organization. Bearing in mind that the latter is the combination of the dominant modes of production and political and civil societies, it can be asserted that the choice of integration serves the purposes and interests of hegemonic groups within national borders. Another possible transnational historical bloc results from the convergence between transnational relations of production interests, which in a more integrated and globalized world transcend state borders and are merged into regional organization commitments (legal and political norms). In both cases, the concept of transnational historical bloc relies on a collective interest shared by the dominant classes (Ludwig 2011: 6). Similarly, Scherrer argues that the ability of a government to exert hegemony in world markets rests on the hegemony of a group of "corporate internationalists" within the state. Thus there is a "double hegemony", a state and a class-based hegemony (Scherrer 2001: 573). These two can be considered as the components of the transnational historical bloc. Basic changes in international power relations or world order, which can be observed as changes in the military-strategic and geo-political balance, can be traced to fundamental changes in social relations (Cox 1986: 169).

This brief summary of some main concepts of the two theories demonstrates their emphasis on the role of agency in shaping structures. Their point of convergence is the strong assertion that the international sphere is constructed and influenced by ideas and language through which dominant interests in the domestic level are expressed internationally. International institutions or regimes are the space in which internationally shared hegemonic ideas and beliefs become norms and obtain their legitimacy. The actors who do not share the same framework of ideas are obliged, sooner or later, to adopt the norms through what can be labeled as a *coercive consensus*. Thus the application of these concepts in the analysis of

trade regimes can provide a more consistent account compared to the economic studies on potential effects of mega-regionals. In fact, by looking at ideas, interest-formation and agency it is possible to observe the motivations and modus operandi of international trade regimes.

3. Rewriting the rules through mega-regionals

Since the beginning of the High Level Working Group on Jobs and Growth, both US and EU representatives have made it clear that TTIP aims to set global standards for future free trade agreements (EC 2015). Likewise, TPP is described as an opportunity not just to facilitate exports in the Asia Pacific region, but also as a way to *set high-standard rules for trade, and address vital 21st-century issues within the global economy* (USTR, n.d., own emphasis). At this stage, with the exception of Israel, Turkey, and Korea, which is still stalling its position on the possibility of joining TPP, all the OECD countries and five more nations have joined the mega-regional negotiations⁶³.

However, because the intentions of these negotiations transcend the national borders of the countries involved, it is unclear why a large number of countries, which according to the Developing Assistance Committee of the OECD are considered recipients of official development assistance, are excluded (OECD 2014). Fontagné et al. (2013) and Francois et al. (2013) predict trade diversion effects for countries outside of the agreements that nonetheless can be disregarded because the spillover effects cover the losses. On the other hand, Felbermayr et al. (2013) predict only losses from trade diversion for developing economies. As Raza et al. put it, because the studies that support TTIP acknowledge possible negative effects for the rest of the world, an agreement on the existing terms would contradict the EU's commitment to Policy Coherence for Development, the aim of which is to eradicate poverty in economically struggling countries (Raza et al. 2014: 89).

Following Ruggie's categorization of rules in international trade regimes as regulative and constitutive, it can be argued that despite the fact that TTIP and TPP explicitly aim to change regulative rules in trade relations, the real implicit and obvious target are constitutive rules. In this context issues such as chlorine hens, GM food, fracking, customs tariffs and agricultural subsidies fall into the regulative rules category (Beck 2014: 11). On the other hand, the inclusion of an ISDS mechanism, the elimination of NTBs, and the predisposed selection of participatory countries and sectors of economy can be considered as constitutive rules. Moreover, in order to change the latter, the interests of actors involved in

⁶³ Brunei Darussalam, Malaysia, Vietnam, Singapore, Peru

the negotiations must converge. Thus this convergence of interests constitutes the intersubjective framework of meaning (Ruggie 1982: 380).

In the case of the currently negotiated mega-regionals, the formation of this framework is observable in the content of official statements of the negotiating states and the statements of company representatives with transnational interests that push for the agreements. The language used in the documents released by the HLWG between the US and EU clearly set the outline of the agenda while defining what is considered important for the future of international trade. Because custom tariffs are already low, NTBs or behind-the-border regulations are considered as the new unnecessary barrier to trade (HLWG 2013). If the latter is achieved, it would mean that countries wanting to sign trade agreements in the future with countries already in the mega-regionals would have to subscribe to these rules (Levy 2013: 28). However, many of the economies the OECD considers as developing countries survive on income received from behind-the-border measures (Beck 2014: 36).

Furthermore, there is also a focus on the liberalization of services. This serves as an upgrading strategy from manufacturing to activities that have easier mobility and higher profit. However, because trade in services can have higher value added (Johnson and Noguera 2011), it requires higher regulatory negotiations and thus longer negotiations. Hence it is more convenient to exclude countries which would stall the agreements, similarly regarding the so called “Singapore issues”. In fact, both TTIP and TPP explicitly claim the importance of opening public procurements to foreign competition and removing subsidies and state support to domestic firms (EC 2013, USTR 2011). Once again this would harm weaker countries with export-oriented industries competitive solely due to subsidies and protectionist policies. This can be interpreted as “a joint political and economic sway” to remove barriers in third country markets for firms, through pressure in future agreements, and to discourage the regulations that these countries have adopted for development policy reasons (Beck 2014: 15).

Emphasis has also been placed on the issue of investor protection. In the published negotiation texts, ISDS is treated as an impartial mechanism which will aid in the quick and efficient resolution of disputes between investors and states, without harming the public interest or sovereignty of the latter in any way (EC 2014b). Likewise, business lobby groups have supported and celebrated the inclusion of a modernized ISDS mechanism because it will foster investments abroad without limiting domestic policy (Business Europe 2014). However, the vague definitions of investment and indirect expropriation in the already agreed

CETA have led to the belief that in contrast to the arguments for ISDS inclusion, it might have serious consequences for future domestic policies (EC 2014a: 183). Thus the most vulnerable in the international arbitration courts will be governments with weaker economies against giant transnational companies.

It can be ascertained that the convergence of interests of domestic elites and the governments of several countries has created a framework of common interests and shared beliefs. The attempt to define the barriers to international trade, identify which sectors need to be liberalized and dictate how this can be achieved obviously indicates the role of a universal lawmaker to which the actors involved are attributing themselves. The endeavor to change constitutive rules is sustained by the modification of collective ideas about the legitimate social purposes for which power can be exercised. Domestically, mega-regionals are justified as important counter-measures to the consequences of the financial crisis of 2008, such as stagnating economic growth and high unemployment rates. Thus changes in ideas of crisis solution at the domestic level serve to legitimate the desired path to trade liberalization at the international level. This legitimacy is used to push forward specific interests by setting global standards which will sooner or later be adopted by the excluded countries. In addition, the shift to a new trade regime can be understood as a shift in domestic social relations. In domestic social struggles, the prevailing ideology will set the hierarchy of interests and dictate the international agenda of the state (Gill 1993: 58). Thus it can be argued that the interests of transnational capital are the driving force of the changes in constitutive rules that governments are pursuing through TTIP and TPP.

4. Constitutive rules as geostrategic tools

The argument derived from the previous chapter is that a change in the constitutive rules of the current trade regime means that a new trade regime is being constructed. After the era of laissez-faire liberalism, the post-War international trade regime was characterized by embedded liberalism followed by a wave of neoliberal globalization (Abdelal and Ruggie 2009: 153). Furthermore, more recently there have been claims of a shift towards competitive liberalization. This is based on the argument that the rapid increase of global interdependence has forced all countries to liberalize trade and investment regimes in order to compete aggressively for unrestrained international investment (Bergsten 1996). Nevertheless, the currently negotiated mega-regional trade agreements cannot be reduced to just a global race for more profits through liberalization. Alongside the reduction of custom tariffs and

elimination of NTBs, these agreements are also building new barriers such as possible higher standards in certain areas and stricter rules on intellectual property rights, which would indirectly affect the excluded countries (Beck 2014: 15).

TTIP and TPP supporters usually advance three reasons why these agreements are desirable: first, because the competitive advantage of industrialized nations is being eroded by emerging economies such as China and India; second, because multilateral trade negotiations have come to a standstill; and third, because the rise of the BRICS, China in particular, will result in a declining ability of the transatlantic powers to shape the rules of cross-border commerce (Dieter 2014: 7). Thus it is of paramount importance for major OECD countries to set global rules of trade and impose them on countries that pose a threat. Particularly as the only country involved in both the agreements, it can be argued that the US is seeking to create a managed trade regime (Stiglitz 2013) which will serve its interests and secure its competitiveness through advantages from IPRs.

It can be argued that the new projected trade regime has more geostrategic purposes rather than trade liberalization. Many preferential trade treaties do not contribute to a further liberalization of trade, but are meant instead to function as protection from threatening competition. The approach taken by the US government is a strategic shift of focus from free trade to fair trade. In other words, the aim is to exclude allegedly unfair competitors, which from an American perspective is mainly China. Thus TTIP and TPP are defensive attempts to create a trade regime without China (Dieter 2014: 8).

Hinting at geopolitical motivations for mega-regionals, Baldwin argues that the exclusion of emerging economies such as Brazil, China and India will affect those countries in future investments abroad. This is because they have not yet expanded enough in terms of offshore production to be concerned with host-nation trade policy reforms. However, when they want to invest in countries that have adopted the standards of the mega-regionals as domestic laws and regulations, they will have to play by rules that they did not contribute to making (Baldwin in WEF 2014: 26).

In the attempt to visualize the ways in which the trade regime is being transformed, Figure 1 can be helpful. The core represents the domestic domain where firms lobby to set their interests as priorities for the government. In order to legitimize their request, the government promises jobs and economic growth to the working classes to oppose the resistance coming from civil society. Consequently, after capital interests become hegemonic

in the intersubjective framework of meaning, they are projected in the second strata. The latter is represented by forums in which governmental experts from different states meet, as in the case of the HLWG, and discuss the terms of agreements in accordance with the interests of their domestic capitalist class. Judging from the presence of the US in both TTIP and TPP and the explicit support from business groups, it can be inferred that the US is the hegemonic force in the current negotiations.

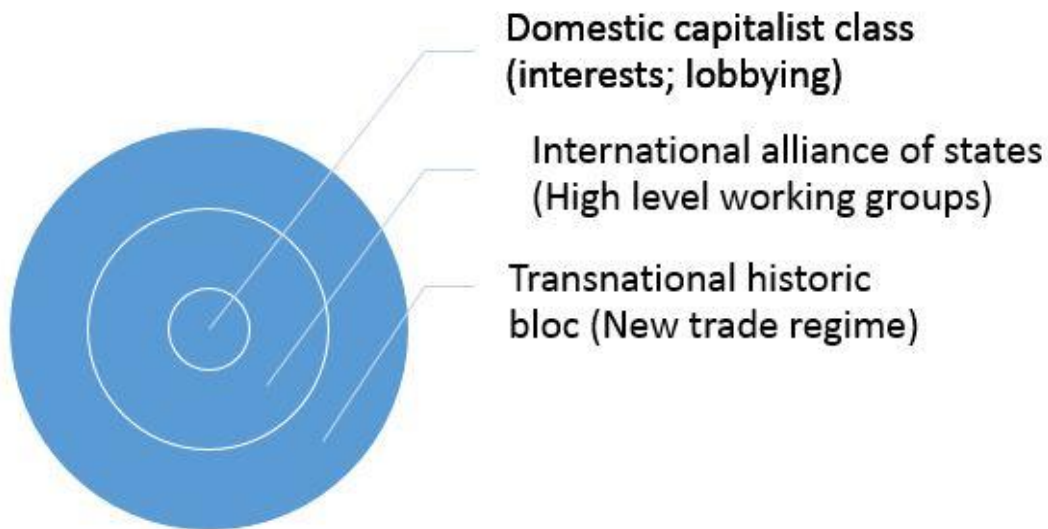


Figure 1: Trade Regime Transformation (own interpretation and visualization)

However as discussed in the chapter on theories, despite the fact that at this level the hegemon will internalize differing ideas, its agenda will prevail in the end. It can be further argued that the double hegemony stemming from the fusion of state and class hegemonic interests aims at a norm-transforming change of the current trade regime to construct a new trade regime based on constitutive rules that reflect its interests.

Furthermore, the transnational historic bloc intends to obstruct any counter-hegemonic challenge through the constitutive rules instituted in the new regime and the consequential coercive consensus imposed on the excluded. Although the emerging economies of BRICS have not yet announced any future concrete counter response to the mega-regionals, the recent tariff reduction deal between China and Korea can be considered as such. In addition, China has also started negotiations with Australia, which is part of TPP (Lippert 2014). This move concerns Japan as a TPP advocate and main beneficiary of China's exclusion, since they might be a strategy of stalling TPP and at a later point a pillar for China's bid to join TPP talks. However, the US has welcomed China to join as long as they

agree with US terms (Meltzer 2014). Otherwise, the inclusion of China would compromise the initial goals set by participatory countries and would create unpredictable outcomes that might also result in the termination of TPP negotiations.

5. Conclusion

The purpose of this paper is to contribute to the literature on the currently negotiated mega-regional agreements on two levels. First, it attempts to establish a linkage between holistic constructivism and Neo-Gramscian theory to create a theoretical framework that can be instrumental in understanding trade regimes. Second, through the application of theoretical concepts, it seeks to identify potential explanations for the exclusion of non-OECD countries from TTIP and TPP negotiations.

Mega-regionals can be interpreted as an attempt to construct a new trade regime. This can be observed in the language and issues included in the negotiations. The implicit aim is to change constitutive rules and their imposition on the countries that are excluded. The exclusion of developing and emerging economies not only enables the participatory countries to avoid obstacles on issues that have stalled multilateral rounds in the WTO, but also builds the foundation of a coercive consensus in the future of trade negotiations. This will be achieved by prompting TTIP and TPP standards as a benchmark and minimum requirement for future agreements. Thus the excluded countries will have to adopt the rules set by an exclusive group of countries.

Furthermore, it is claimed that the change in constitutive rules is not pursued for merely economic profits from trade liberalization, but mainly for geostrategic motives. Constitutive rules are being employed as a diplomatic weapon for regional influence. The rise of emerging economies, especially China, is identified as a threat for the advanced countries and as such it needs to be hindered. Hence, by setting norms according to the interests of the participatory countries, there is a move to put pressure to China to play by their rules, especially from the US and Japan.

This interpretation highlights the lack of commitment of advanced countries such as the US, the EU and Japan towards their own development programs. The shift from multilateralism to plurilateralism does not represent just a shift in trade politics. It implicitly asserts a shift in social relations and exhibits the dominance of capital and power interests vis-à-vis the struggling classes. In this light, the OECD block is revealing itself as nothing more than a power cartel with exclusive interests.

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