

October 31st, 2014
TTIP Consultation

Access submission to European Ombudsman's public consultation on transparency in the Transatlantic Trade and Investment Partnership (TTIP) negotiations

Access welcomes the European Ombudsman initiative to put forward a public consultation on transparency in the Transatlantic Trade and Investment Partnership (TTIP) negotiations.

Access (AccessNow.org) is an international organisation dedicated to defending and extending the digital rights of users at risk around the world. To achieve this mission, Access works through its Policy, Technology, and Advocacy teams to provide thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and universality. Access also operates a 24/7 digital security helpline that provides real-time direct technical assistance to users around the world. With an action-focused global community of nearly half a million users from more than 185 countries, Access is non-partisan and not affiliated with any country, corporation, or religion.

Access has been actively following the negotiations of the TTIP currently being discussed by the United States and the European Union. This massive trade agreement could affect a multitude of sectors and industries, from chemicals to agriculture to the digital sphere, including the telecoms industry, e-commerce and therefore, digital rights. Ever since the launch of the negotiations in June 2013, both the EU and the US have been conducting talks behind closed doors of what could be the world's largest trade agreement.

While the substance of the TTIP talks leaves much to be debated, following the consultation guidelines, our answers will focus on the issue of transparency in the negotiating process.

1. Concrete measures to improve transparency

The first question of the consultation seeks recommendations of concrete measures the European Commission could implement to improve transparency in the TTIP negotiations.

Access has identified measures in six areas that need to be addressed urgently: 1) access to documents, 2) advisory groups, 3) stakeholder dialogues, 4) involvement of European Parliament & National Parliaments, 5) reading rooms, and 6) identifying “revolving door” cases and conflict of interest. These are described in detail below.

1.1. Access to documents

Ever since the beginning of the TTIP negotiations, the lack of transparency in the negotiations has been a major obstacle for citizen, civil society, and European Parliament participation in the process.¹ The work of civil society representatives is complicated by the lack of access to official sources, leaving groups with no other option but to work on the basis of a few leaked documents. Access therefore recommends the online publication of the following documents:

- Position papers tabled by the EU;
- Sectoral offers put forward by the EU to the US;
- Negotiating texts at draft stage and after every round of negotiations;
- Written communications between the European Commission and other European institutional bodies; and
- Agenda and minutes of meetings between negotiators and EU officials;
- Agendas and minutes of meetings between European Commission staff and third parties on TTIP.

The publication of all these documents would benefit openness and accountability in the negotiating process as well as enabling public engagement in the talks. Since the beginning of the negotiations, the European institutions contributed to the opacity in the talks by keeping secret documents related to TTIP. So far, attempts at more transparency made by the European Commission regarding access to documents are either weak or deceiving. On October 9, the EU eventually decided to publish the EU negotiating mandate.² Although this document was considered “classified” until then, it had in fact been freely available online since June 2013 through a leak obtained by the EU research and campaign group Corporate Europe Observatory.³

¹ For more information see *Keeping us in the dark*, Le Monde Diplomatique, June 2016. Available online at: <http://mondediplo.com/2014/06/13ttip>

² See Decision of the Council of the EU to declassify the mandate and link to the document: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf

³ See *Leaked mandate for EU-US trade deal opens floodgate to lawsuits by corporations*, Corporate Europe Observatory, June 2013. <http://corporateeurope.org/pressreleases/2013/leaked-eu-us-trade-deal-opens-floodgate-lawsuits-corporations>

This limited access to documents was agreed upon between the EU and US even before the start of the negotiations via an exchange of letters between the European Union's chief negotiator and his United States colleague.⁴ In this exchange, the EU negotiators explained that, while according to the European Regulation on public access to documents negotiation texts should be made available to the wider public, all negotiating texts around TTIP would be kept secret for up to 30 years.⁵ To do so, the European Commission invoked a provision of the aforementioned Regulation allowing the non-disclosure of documents to the public for the “protection of the public interest as regards international relations.” The Court of Justice of the European Union warned that the EU “institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest” which often obliged the court to review the legality of the institutions’ decision refusing access to documents on the basis of possible “manifest error of assessment” or “misuse of powers.”⁶

Furthermore, the Court of Justice of the European Union’s case law on access to documents asserts that the EU institutions have to undertake a careful assessment of each document according to the principle of proportionality to justify the application of an exception to public disclosure.⁷ Therefore, it is difficult to imagine how the EU Commission’s decision to prevent access to *any* negotiating documents for 30 years would pass the proportionality test and thereby comport with EU law.

Finally, the EU Commission justifies the level of secrecy in the talks by arguing that negotiating a treaty is “like playing poker: you don’t want to show the other player your cards.”⁸ This is justified by the European Commission as they believe limited access to documents is needed to protect a possible EU strategic advantage in the negotiations or at least to not undermine the EU’s position in the talks. However, at the time the TTIP negotiations were launched, the Snowden disclosures revealed that the US National Security Agency has been spying on several European Union offices and diplomats,

⁴ See “*Arrangements on TTIP negotiating documents*” - Letter sent by the European Commission to US chief negotiator, Daniel Mullaney on July 2013.

http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151621.pdf

⁵ EU Regulation 1049/2001 on public access to documents - Full text available online at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:EN:PDF>

⁶ See Paragraph 40 of Judgement of the European Court of Justice in case T-264/04 - WWF European Policy Programme v Council. Full judgement available at:

<http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130d5c66486926aab4d9393aba2792c19d1cc.e34KaxiLc3eQc40LaxqMbN4Ob3uPe0?text=&docid=61308&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=172752>

⁷ For more information see *Case Law Summary - EU access to documents Regulation*, Statewatch, 2010.

Available online at <http://www.statewatch.org/analyses/no-116-eu-case-law-summary-access-regulation.pdf>

⁸ See *Keeping us in the dark*, Le Monde Diplomatique, June 2016. Available online at:

<http://mondediplo.com/2014/06/13ttip>

gaining access to internal emails and documents.⁹ Official documents recently published in Glenn Greenwald book's *No Place to Hide* demonstrate how the NSA has been spying for the benefits of its so-called "customers," including US Trade Representative and the US Department of Commerce.¹⁰ The Obama Administration has since apologised for spying to their allies across the ocean, but the EU institutions still haven't received assurances that these unlawful intrusions have stopped. Simply put, while transatlantic trust remains undermined, citizens are the only ones being kept in the dark during these negotiations. It is unclear how the incoming Commissioner for Trade, Cecilia Malmström, will be able to restore this broken trust. Not only has her response to mass surveillance disclosures been limited, but a document recently acquired by Access through a Freedom of Information Act request also sheds light on Commissioner Malmström cabinet's interactions with the US administration to undermine a crucial and complex EU legislative reform.¹¹ Commissioner Malmström first refuted the validity of the compromising document when faced with questions regarding its content by MEPs during her confirmation hearing.¹² However, during a later exchange of emails with Access, the Commissioner recognised that the document was genuine, but refused to provide further comments on her involvement with the US government in lobbying activities against the EU Data Protection Reform.¹³ In the absence of clarifications, serious doubts remain regarding Commissioner Malmström's suitability to represent and uphold EU citizens' interests during the TTIP negotiations.

1.2. Advisory groups

To arguably ensure "close dialogue and exchange with all stakeholders" in the TTIP talks, the Commission has established a special advisory group of experts.¹⁴ Even though we consider this a step in the right direction, several shortcomings put into question the legitimacy of this process.

⁹ For more information, *Attacks from America: NSA Spied on European Union Offices*, Der Spiegel, June 2013. Available online at

<http://www.spiegel.de/international/europe/nsa-spied-on-european-union-offices-a-908590.html>

¹⁰ See NSA Documents from *No Place to Hide*, Glenn Greenwald, 2014. Available online at:

<http://leaksource.info/2014/07/31/glenn-greenwalds-no-place-to-hide-nsa-documents-excerpts/>

¹¹ For more information, see *Big brother's little helper inside the European Commission*, Access Brussels Office, 2014. Available online at:

<https://www.accessnow.org/blog/2014/09/27/big-brothers-little-helper-inside-the-european-commission>

¹² See *Despite compromising hearing, Cecilia Malmström gets green light to become EU Trade Commissioner*, Access Brussels Office, 2014. Available online at:

[https://www.accessnow.org/blog/2014/10/02/despite-compromising-hearing-cecilia-malmstroem-gets-green-li](https://www.accessnow.org/blog/2014/10/02/despite-compromising-hearing-cecilia-malmstroem-gets-green-light-to-become-)
[ght-to-become-](https://www.accessnow.org/blog/2014/10/02/despite-compromising-hearing-cecilia-malmstroem-gets-green-li)

¹³ See *Malmström acknowledges validity of compromising document*, Access Brussels Office, 2014. Available online at:

<https://www.accessnow.org/blog/2014/10/08/malmstroem-acknowledges-validity-of-compromising-document>

¹⁴ See Expert group to advise European Commission on EU-US trade talks, European Commission, January 2014. Available at http://europa.eu/rapid/press-release_IP-14-79_en.htm

First, the selection process was extremely opaque leaving the public without information on how members of the advisory group were selected and by whom. Similar concerns with other advisory groups led the EU Ombudsman to conduct a public consultation concerning the composition of European Commission expert groups in the summer of 2014.¹⁵

Furthermore, it is unclear what is the role of this advisory body. Members of the TTIP group of experts have expressed doubts regarding the value and purposes of their work as no one from the European Commission ever reached out to them for advice.¹⁶ It is also unclear to the members whether the EU institutions take into account the recommendations produced by this advisory group. These concerns have led the European Parliament to freeze the budget dedicated to these Commission expert groups until efforts on transparency are made.¹⁷

In light of these elements, Access recommends the implementation of the following measures to ensure meaningful stakeholder participation:

- Transparent process of selection of “experts” sitting in the advisory group including a consultation period and a balance between corporate and civil society representatives;
- Clear description and publication of the list of responsibilities, duties and missions of the expert group;
- Regular updates from the Commission to the advisory group on the state of play of the negotiations ;
- Online publication of documents produced by the advisory group;
- Online publication of agenda and minutes of advisory group meetings;
- Feedback from the European Commission on the input provided by the advisory group;
- Mechanisms allowing the advisory group to receive inputs from third parties through public consultation.

1.3. Stakeholder dialogues

After each round of negotiations, the European Commission organises “stakeholder dialogues” where representatives from civil society, NGOs, governments, local

¹⁵ European Ombudsman launches public consultation concerning the composition of European Commission expert groups, May 2014.

<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54300/html.bookmark>

¹⁶ See Tweet from EMI Summit on TTIP held on October 9, 2014 with Monique Goyens, Head of the consumer organisation BEUC and member of the TTIP special advisory group fo expert:

https://twitter.com/Joanna_Nahorska/status/517604242534969344

¹⁷ For more information see *MEPs withhold millions from EU commission over transparency*, EUObserver, October 2014. Online article available here: <http://euobserver.com/justice/126194>

authorities, trade unions, business associations, and companies gather to hear EU officials report on the state of the negotiations.¹⁸

Ostensibly intended to improve stakeholder participation, the structure of those meetings, in which various questions are raised in a rapid-fire manner, hasn't allowed for more than a superficial look into the complex issues at stake. In short, these meetings do not enable the promised "dialogue" to take place. While the 2014 edition of the Oxford English Dictionary defines dialogue as the following: "A discussion between two or more people or groups, especially one directed towards exploration of a particular subject or resolution of a problem," the meetings organised by the EU Commission focus on one way conversation.¹⁹ In the first few rounds of these sessions taking place in Brussels in November 2013, March 2014, and July 2014, stakeholders were permitted to briefly present their point of view on a specific issue to a room full of others stakeholders where few or no EU officials were present to receive these inputs. On the final day of these meetings, the aforementioned "Q&As" session took place where EU officials presented a general state of play of the negotiations without requesting any feedback or input from the attendees.²⁰ With stakeholders from all sectors gathered in the same room, questions remain extremely general, preventing any meaningful dialogue or debate on specific issues.

When participants complained about the description of these meetings, arguing that the promised "dialogue" was not taking place, the Commission "solved" the problem by re-naming the following meetings "briefings."²¹ Rather than changing the name of these sessions, Access recommends implementing the following measures to develop an active two-way dialogue between stakeholders:

- Establish regular sector-specific roundtables with a diverse group of stakeholders to provide direct input to negotiators and EU officials;
- Roundtable participants should have access to negotiating texts and the opportunity to provide specific input;
- Participation of stakeholders in shaping EU strategy and positioning in the negotiations; and
- Extensive and regular reporting from the negotiators on the state of play of negotiations to stakeholders, broken down by topic.

¹⁸ Example of invitation to one of the "civil society dialogue" on TTIP organised by the EU Commission on July 2013: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=945>

¹⁹ See Oxford dictionary - "dialogue": <http://www.oxforddictionaries.com/definition/english/dialogue>

²⁰ For more information see the European Commission's reports on the Stakeholders meetings from November 2013 & March 2014 as well as the list of stakeholders' presentations given on July 2014:

http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151920.pdf

http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152294.pdf

http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152668.pdf

²¹ See a report from one of the European Commission "briefing" on TTIP here:

http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152668.pdf

1.4. Involvement of European Parliament and National Parliaments

While public participation in the negotiations process has been obscured by a number of shortcomings elaborated throughout this consultation, the European Parliament also found itself relatively excluded from the talks. Only very few members of the European Parliament Committee on International Trade have had the possibility to access a limited number of negotiating documents under very strict rules.²² As several committees are expected to produce an opinion on TTIP by 2015, access to documents for the whole Parliament is crucial. Effectively, in addition to excluding European citizens, the only elected body of the European Union has been shut out of the negotiations at the expense of EU citizens' interests.

Faced with concerns from citizens all around Europe, Members of the European Parliament from all political groups are calling for greater transparency in the negotiating process.²³ As the European Parliament will be the institution deciding whether to adopt the TTIP once the negotiations are concluded, members should be fully involved in the talks and regularly consulted by the Commission. Article 218 of the Treaty on the Functioning of the European Union (TFEU) indicates that while the European Commission shall conduct the negotiations of an international trade agreement with the authorisation and directives from the Council, the European Parliament "shall be immediately and *fully* informed at *all stages* of the procedure."²⁴ Therefore, the current method used by the Commission to inform the European Parliament fails to comport with the requirements of the TFEU.

Eventually, at national levels, local law-makers see themselves as mere spectators of the TTIP negotiations even as several parts of the trade deal might touch on their competencies.

Therefore, to improve openness in the negotiations, Access recommends the European Commission:

- Inform and report back to the European and National Parliaments after every round of negotiations;
- Share negotiating texts and draft offers with the Parliaments;

²² For more information see Lack of transparency in TTIP - a case for the ECJ?, The Greens/EFA, July 2014. Available online at: <http://ttip2014.eu/blog-detail/blog/TTIP%20ECJ%20Transparency.html>

²³ See *Street Demonstrations In 21 European Countries Held To Protest Against TAFTA/TTIP; Another ACTA Revolt Brewing?*, TechDirt, October 2014. Available online at <https://www.techdirt.com/articles/20141014/09343628828/street-demonstrations-21-european-countries-held-to-protest-against-taftattip-another-acta-revolt-brewing.shtml>

²⁴ Full text of the Treaty on the Functioning of the European Union available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

- Establish a consultation period for Parliaments to provide input on negotiating texts;
- Establish a mechanism similar to the existing EU “trialogue” to agree on texts based on consensus with the European Parliament and National Parliaments; and
- Webcast meetings on TTIP between EU institutions and between the EU and National Parliaments.

1.5. Reading rooms

Selected Members of the European Parliament and members of the TTIP Special Advisory Group of Experts are allowed to consult consolidated texts and other negotiating documents put forward by the European Commission in “reading rooms” where very strict rules apply. To enter this room, members are requested to leave their phones, watches, computers, pens and papers out to ensure that no classified information will be taken out of this room. In sum, in order to provide input to the European Commission on the substance of the negotiations, MEPs and members of the advisory group better have an excellent memory. These rooms therefore establish further obstacles to stakeholder participation in the talks. Outraged by this process, MEPs from several political groups recently organised a protest in front of one of these “reading rooms,” calling for meaningful access to documents for all MEPs.²⁵

To ensure meaningful participation in the TTIP negotiations, Access recommends:

- Elimination of reading rooms and full access to negotiating documents for all MEPs; and
- Access to documents to the public as detailed under point 1.1 of this consultation.

1.6. Identify “revolving door” cases and conflict of interest

Beyond reforming *how* the TTIP negotiating process is currently taking place, the question of *who* is involved in this negotiation should be addressed. While transparency would enable greater public scrutiny and parliamentarians’ participation, representatives whose involvement in the talks would lead to a conflict of interest should be excluded.

The EU Ombudsman regularly inquires and monitors the issue of “revolving doors” in the European Union to avoid conflict of interest.²⁶ However, every year, more and more new cases of former EU officials leaving their position as regulators for jobs in industries

²⁵ Information on the protest: *Access Denied: MEPs stage TTIP reading room demonstration*, GUE/NGL, October 2014. Available at <http://www.guengl.eu/news/article/access-denied-meps-stage-ttip-reading-room-demonstration>

²⁶ *“Revolving doors”: Ombudsman will step up supervision of senior EU officials*, September 2014. <http://www.ombudsman.europa.eu/press/release.faces/en/56332/html.bookmark>

where their knowledge can be used for lobbying. The TTIP negotiations do not escape this worrying trend as several revolving door cases have been identified. For instance, in June 2013, an EU senior official from DG Agriculture left the EU Commission to join a US consultancy and open his own consultancy where he offers to provide “a valuable perspective that will assist [consultancy] clients and partners in understanding the market and in addressing market access, subsidy, SPS, food safety, farm and trade policy, technology, and other issues”.²⁷ While still at the Commission, this senior official addressed a seminar organised by the Washington International Trade Association in the context of TTIP. During a discussion, he told the audience that the US should not have "any illusions" that it will be able to get the EU to drop the precautionary principle through TTIP talks, an issue currently at the core of the negotiations on GMOs.

In this context, Access recommends the EU Ombudsman to:

- Continue monitoring and launch further in-depth inquiries into the issue of revolving doors;
- Urge the Commission to remedy current revolving cases by taking all necessary measures preventing the participation of former EU officials in the talks when affiliated with industries.

2. Best practices on transparency

The second question of the consultation seeks examples of best practices on transparency that the European Commission could adopt when negotiating the TTIP.

Access has selected five examples of best practices in transparency that could be used as a model during the TTIP negotiations:

2.1. EU legislative process

Transparency in the EU law-making process is ensured at every stage by the publication of draft proposals, opinions, reports, amendments, and legal opinions of all EU institutions. In addition, most of the negotiations and votes taking place in the European Parliament are webcasted, ensuring openness in the process.

While this process could be further improved, the European Commission could apply its own best practices as a basis for transparency during the TTIP talks regarding access to documents and to actively include other EU institutions and stakeholders into the negotiation process.

²⁷ For more information see *Commission's new revolving door case: a real litmus test?*, Corporate Europe, June 2014.

<http://corporateeurope.org/revolving-doors/2014/06/commissions-new-revolving-door-case-real-litmus-test>

2.2. The United Nations Framework for Convention on Climate Change (UNFCCC)

The United Nations Framework Convention on Climate Change (UNFCCC) is both a negotiated international environmental treaty and a United Nations Secretariat charged with supporting the operation of the Convention.²⁸

The treaty was negotiated and adopted at the United Nations Conference on Environment and Development (UNCED) in Brazil in 1992. Since then, the treaty has been modified and extended at several occasions, always according to a transparent and rather inclusive negotiating process. All negotiating texts and submissions from the parties are circulated before the start of the negotiations. Observers, including external stakeholders are allowed attend the sessions, and can provide submissions on request by the parties. Information regarding the process, the negotiated documents, involved parties, and stakeholders are all displayed on the very detailed website of the Secretariat.

2.3. The Aarhus Convention

The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as the Aarhus Convention, is an international agreement on access to information.²⁹

The Convention, entered into force in 2001, has been ratified by 46 states to date and the European Union. The Aarhus Convention focuses on interaction between citizens and public authorities, granting citizens' rights regarding access to information, public participation, and access to justice in governmental decision-making processes on matters concerning the local, national, and transboundary environments.

Regarding transparency, each meeting of the Convention governing body and its subsidiary bodies are as a rule public. Accredited observers enjoy the same rights as signing parties and therefore can participate in meetings and in drafting groups to develop texts during the negotiations. While the EU implements these criteria through its participation on the Aarhus Convention and promoted the rights to access to information in the Water Framework Directive 2000/60/EC, such standards can and should be extended to trade negotiations.

²⁸ See the United Nations Framework Convention on Climate Change webpage at <http://newsroom.unfccc.int/>

²⁹ For more information see the European Commission page on the Aarhus Convention at <http://ec.europa.eu/environment/aarhus/>

2.4. The Marrakesh Treaty

The Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities sets a norm for signing countries to develop copyright exceptions to facilitate the creation of accessible versions of books and other copyrighted works.³⁰

This Treaty, signed in 2013, was negotiated under “unprecedented conditions” of openness and transparency.³¹ A complete access to document was provided with online publication of agendas of the meetings, lists of participants, draft clauses, decisions on admission of observers, and progressive reports on the negotiations, as well as the progressively updated draft text. To foster participation and accountability, not only were negotiating sessions webstreamed and available to the general public, but civil society was also able to effectively contribute to the outcome of the treaty by providing comments throughout the process.

These open negotiations resulted in the conclusion of an agreement broadly welcomed by both the negotiators and civil society representatives. We greatly encourage the Commission to adopt these best practices in the TTIP negotiations.

2.5. The United Nations Conference on Trade and Development (UNCTAD)

The United Nations Conference on Trade and Development (UNCTAD) is the permanent intergovernmental body of the United Nations General Assembly dealing with trade, investment, and development issues.

Although UNCTAD did not in itself implemented best practices in transparency, this organ has developed a long series of recommendations to improve openness in trade negotiations and the investor to state dispute settlement mechanism (ISDS). Specifically, UNCTAD put forward recommendations for transparency measures to be adopted within International Investment Agreements (IIAs) such as the organisation of consultations, the publications of public and private inputs into agreements, and list a series of transparency obligations related to access to documents.³²

While measures proposed by UNCTAD includes shortcoming enabling negotiating parties to evade proposal for openness, the UN body continues to update its proposal on transparency, especially regarding the ISDS mechanism and is very critical to Free Trade

³⁰ See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled <http://www.wipo.int/treaties/en/ip/marrakesh/>

³¹ For more information see WIPO Treaty for the Blind Shows that Transparency Can Work (and is Necessary), 2013. Available online at: <http://infojustice.org/archives/30027>

³² See Report on Transparency, UNCTAD, 2011. Available online at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=425>

Agreements and IIAs trumping transparency. Specifically, the European Commission should adopt the recommendations put forward by UNCTAD for parties to include further transparency obligations or a Chapter on Transparency in the text when negotiating an international agreement. Such chapter sets rules on access to documents between signing parties and to the public and defines the process for the launch of public consultations consultations between signing parties .

3. Impact of transparency on outcome of negotiations

The third question invites respondents to provide views on how transparency “might affect the outcome of the negotiations.”

Access has identified that transparency in trade negotiations have a positive impact in two main areas: trust, legitimacy, and democracy as well as trade itself.

3.1. Trust, legitimacy, and democracy

Transparency and trade negotiations have often been at odds, constantly leaving citizens and civil society in the dark. This was the case for instance of the negotiations on the Anti-Counterfeiting Trade Agreement (ACTA), the Trans-Pacific Partnership (TPP), and the TTIP, all of which have been or are being negotiated away from public scrutiny.³³ Setting aside controversial issues on the substance of the text, the recurring lack of openness in the negotiations of those agreements has lead to a series of demonstrations and public outrage in the past years.

Opaque trade negotiations severely hinder trust and legitimacy of the process. According to a study from Brigham Young University, trust is closely connected with transparency and the two are positively related.³⁴ As a driving factor in the fostering of trust, transparency in the negotiations would also bring greater legitimacy to the European Institutions. This positive relationship between transparency from one side and trust, legitimacy, and democracy on the other side is recognised in EU law. The EU Regulation 1049/2001 on public access to document reads:

“Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more

³³ For more information on the lack of transparency in ACTA see *Shining Light On ACTA's Lack Of Transparency*, TechDirt, February 2012. <https://www.techdirt.com/articles/20120217/04283717793/shining-light-actas-lack-transparency.shtml> / On the lack of transparency in TPP see *Trans-Pacific Partnership Agreement*, Electronic Frontier Foundation. <https://www.eff.org/issues/tpp>

³⁴ See *Linking Trust and Transparency*, Brad Rawlins, 2007. <http://www.instituteforpr.org/linking-trust-and-transparency/>

accountable to the citizen in democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights.”³⁵

Ever since the beginning of the talks on TTIP, trust and legitimacy have been major obstacles in the negotiations. The European Commission did learn from the failed ACTA and attempt to bring a semblance of openness in the process through so-called “stakeholder dialogues” and “advisory groups” mentioned earlier. However, citizens and civil society remain in the dark, and substantial changes are needed for meaningful transparency in the negotiations. As the Commission continues to ignore the calls for transparency of citizens rallying all across Europe, trust and legitimacy of the TTIP negotiations will only be further undermined. In sum, without transparency and democratic participation in the substance of the talks, TTIP will have a hard time getting legitimacy in the eyes of citizens.

3.2. Benefits to trade

Transparency not only offers significant benefits to society, but can also have a positive impact on trade. A recent study from the Organisation for Economic Co-operation and Development (OECD) found that trade agreements introducing mechanisms for enhancing transparency were experiencing increases in bilateral trade.³⁶ By improving transparency in trade deals, parties get a better understanding of the markets, thus improving their investments. The study continues, “market openness without transparency can hinder the realisation of potential benefits from negotiated agreements.” Therefore, while the European Commission argues that secrecy is needed to protect “Europe’s commercial interest,” there is a positive empirical relation between transparency and trade benefits, both during the negotiations and in the trade exchanges once the agreement is concluded.³⁷

Conclusion

Transparency must be a *sine qua non* prerequisite of trade negotiations as it brings wide-ranging benefits by enabling democratic participation and needed scrutiny in the process. Access takes the opportunity of this consultation to reiterate the call made by more than 250 organisations for immediate transparency in the talks.³⁸

³⁵ EU Regulation 1049/2001 on public access to documents - Full text available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:145:0043:0048:EN:PDF>

³⁶ For more information see *Quantitative Evidence on Transparency in Regional Trade Agreements*, OECD Trade Policy Papers, 2013. Available online at:

http://www.oecd-ilibrary.org/trade/quantitative-evidence-on-transparency-in-regional-trade-agreements_5k450g9v2mg5-en

³⁷ See *Keeping us in the dark*, Le Monde Diplomatique, June 2016. Available online at: <http://mondediplo.com/2014/06/13ttip>

³⁸ *Civil society call for full transparency about the EU-US trade negotiations*, May 2014.

Transparency needs to be ensured during the talks, but this does not mean that any action by EU institutions would be justified so long as they are “transparent.” Openness must not be the single criteria for successful trade negotiations, but rather is a critical step that enables discussion on the substance of negotiations, resulting in a democratic, transparent process that is beneficial to citizens. We cannot but deplore the blatant lack of transparency in the TTIP negotiations which has taken away any possibility of meaningful stakeholder engagement on the content of the proposed texts. If concluded, the Transatlantic Trade and Investment Partnership will greatly impact EU and US citizens lives, and citizens should therefore be able to actively contribute to these negotiations at every stage. Thank you for your opportunity to provide comment on this important matter.

Access defends and extends the digital rights of users at risk around the world. By combining innovative policy, user engagement, and direct technical support, we fight for open and secure communications for all.

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http://www.foeeurope.org/sites/default/files/foee_ttip-civil-society-transparency-call190514.pdf