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## TTIP, the Revenant

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For those of you familiar with Michael Punke's book 'The Revenant' (or screen portrayal of the same), the central character, played by Leonardo di Caprio, is mauled terribly by a grizzly bear, betrayed by his appointed protector and left for dead deep in woodland in frozen conditions. Against all the odds, he not only survives, but makes it back to the camp, where upon he tracks down and kills his betrayer – at which point the similarities with TTIP should end.

TTIP was all but written off following the election of Donald Trump, having already endured severe mauling at the hands of anti-globalisation movements. But there are now signs that TTIP has crawled its way out of the woodland where it was left for dead, with quietly constructive noises seeping out of Washington and Berlin. The institutions in Brussels are playing down all talk of a renaissance at this stage, and the Advisory Group of which I am a nominal member has no plan to meet again. So far so sensible.

### What's the beef?

There were 15 rounds of negotiations, many inter-sessionals, and three and a half years of serious effort from officials. The huge waterfront of EU and US economic ties was covered in detail, but the results of all that activity were very mixed. Whilst agreement was reached on the elimination of 97% of all tariffs, the remaining 300 tariffs lines are the most sensitive. Under the regulatory co-operation pillar, there was not one single consolidated text. Whilst the Commission is keen to point out that there are a good many consolidated chapters, many still have significant sets of 'brackets', with only a handful (literally, five) being, more or less, fully consolidated.

The reason for this seemingly underwhelming state of affairs is due, in no small part, to the sheer scale and technical complexity of many of the issues under discussion at a regulator to regulator level, ranging from automobile safety, chemicals, medical devices, engineering, pesticides, SPS (e.g. the fabled chlorinated chickens), or cosmetics (yes, you read that correctly). But there were also many areas where fundamental differences of position bedevilled progress round after round, including some where the US did not ever get around to submitting a single position paper. A couple of examples where polarisation persisted throughout:

- Sunscreen UV filters – regarded as a chemical in one jurisdiction but a cosmetic in another, which became a seemingly unbridgeable issue;
- geographic indicators – the US regard the EU's system as incompatible with their approach to trademarks. To be fair, the EU had already sold a free pass to the US in 1986, by allowing US produced wines to use certain 'generic' designations. Consequently, the US saw no reason to revisit that concession;
- tomato paste – a very sensitive issue, it seems;
- public procurement (Buy America) – too obvious to detail;
- ...and let's not talk about beef and hormones.

### L'esprit de l'escalier?

When people look back at the time spent, they will, I hope, recognise that there were some fairly basic handling errors. The first was the fact that the EU mandate was not disclosed until after Cecilia Malmström became Commissioner, eighteen months into the negotiation. Her predecessor, Karel De Gucht, had asked for it to be disclosed, but was blocked by certain individual countries in Council. This schoolboy error allowed several myths to become accepted as facts, not the least of which was the forcible privatisation of the UK's National Health Service. By the time the nineteen-page document was disclosed, it was almost impossible to undo the damage, even though the Mandate makes clear that national healthcare is outside the scope of negotiation, and not subject to investor-state dispute settlement (ISDS). No objective reading of that Mandate could lead anyone to conclude that they had just come across some great state secrets – it ought never have been withheld.

The second great issue was the ISDS proposal itself. In part, the failure to disclose the Mandate created the groundswell of

speculation that this was a deal being done in secret, which could lead to businesses suing governments capriciously. ISDS does no such thing, in either version of its proposal. Every trade agreement requires some mechanism for dispute resolution between the parties, and there were already myriad bilateral investment treaties in existence, which had not come to the attention of the anti-globalisation lobby before TTIP came along. But ISDS became the albatross around Cecilia Malmström's neck in Europe, and consumed more than a year of political capital and officialdom, before things began to calm down. As we now know, following the CJEU ruling on the Singapore FTA, ISDS is one of the two areas that require Member State's participation in the concluding.

The third issue, it seems to me, is the near total failure of Member States to remain engaged consistently or politically in TTIP. Very few Heads of Government, or their Ministers, invested serious time in championing TTIP, or seeking to support (or challenge) the Commission in its dealings with the US. To give one example, for the Finance Minister of one country (that hosts a large financial services sector) to not even know that financial services was in the Mandate – let alone not to champion TTIP during their Presidency – seems to me to be a fairly extraordinary state of affairs. Happily, Member States now recognise this, and have made it clear that the same mistake will not be made in the negotiations with the UK.

The Advisory Group is one innovation that the Commission should be praised for. It required no small dedicated resource to service it, and the Chief Negotiator and his team were unfailingly generous with their time and responsiveness, within certain constraints. The Group represented the broadest possible cross-section of interested parties, and – despite some very different perspectives – was a remarkably harmonious forum, where serious detail and issues were discussed. Whether the Commission truly found it useful is unclear to me, but I did and I have the impression that my colleagues did too. There were frustrations, of course, including the fact that we only had access to the EU texts, and not the consolidated texts, despite the fact that we could only view them in the Reading Room in the Charlemagne Building. But it cannot be said that the discussions lacked candour, or that we were ever the source of a leak.

### **Financial services**

It will seem remarkable to some, in light of the rhetoric following the UK Referendum result, that France was - alongside the UK - the most steadfast and engaged supporter of the inclusion of financial services regulatory co-operation within TTIP, and remained so until the suspension of negotiations. The US did, in fact, discuss this within the parameters of TTIP in each Round up to the Fifth. Thereafter, it insisted on a parallel process. The Financial Markets Regulatory Dialogue was that process, and had been in existence since before the financial crisis. It had no mandate and was entirely a goodwill exercise, subject to the caprices of personalities and relationships. It clearly failed to prevent the crisis, and was no more fit for purpose during the crisis. These are the main reasons why I and others invested time and effort in seeking to have it included in TTIP. In the end, the Commission and the US made some tweaks to the process, replaced the individuals leading each side, and renamed it, calling it the Financial Markets Regulatory Forum. We are assured that it is much more effective. But it is no replacement for what could be full-scale regulatory co-operation across the EU and US authorities under TTIP.

### **Brexit**

Inevitably, the departure of the UK from the EU will impact the potential value of TTIP. It represents a skirmish in the process, rather than a mauling. Each side will need to reassess whether and how it will alter their offensive and defensive negotiating priorities, in the event that TTIP restarts. In the meantime, those same parties will need to work out their new trading arrangement with the UK, and how this will sit alongside any TTIP. Nobody should be under any illusion that the UK will be able to strike a deal with the US that will be significantly quicker or better than where TTIP was heading. There are too many similarities in the issues that the UK will face to those encountered in TTIP for it to be notably easier, if the deal is to be of a scale to make a difference. In its favour, however, the trading relationship between the UK and US is more balanced, so President Trump will genuinely feel well disposed to a deal with the UK.

### **The Revenant?**

President Trump and EU leaders' recent agreement to a 'joint action plan on trade' does not presage any imminent breakthrough - but I am going to declare my (perhaps naive) belief that TTIP will return, albeit not before December this year, by when we may have a new German Government, or a new version of the current Government. The reason I believe this? There is no sensible alternative to TTIP, or something very similar, albeit rebranded, if genuine progress is to be made in reducing costs, opening markets and generally increasing trade between the EU and the US. The new US President is a deal-maker, and – unlike TPP – he has not ruled out TTIP. He now accepts that he cannot cut a trade deal with Germany – or the UK, whilst it is a member of the EU - he has to deal with the EU as one entity. But, for a deal to happen, I suspect that some issues will have to be quietly dropped, if not excluded as part of a revised Mandate. An obvious one will be the removal of the EU's demands to drop the 'Buy America' provisions - if it was a problem for the Obama Administration, it is doubly so under President Trump. What the EU then decide to take off the table in exchange will be much debated, but reducing tariffs on US agricultural goods might be an obvious one. On the other hand, new areas might be included - I have heard positive noises on financial services from US Congressional visitors to the UK in recent months.

But let's not get ahead of ourselves: Leonardo has crawled out of the woods, but there are still quite a few obstacles before he reaches camp.