Rachel Wellhausen
Associate Professor, Department of Government
University of Texas at Austin
rwellhausen@utexas.edu

Bipartisan Spoilers Targeting EU Investment Policy: Continuity from Trump to Biden

Prepared for "Trans-Atlantic Disruption: Challenges and Opportunities"
Shapiro Geopolitics Workshop
Perry World House
The University of Pennsylvania
25-26 January 2021

Investment policy is one of the many areas in which the Trump administration disrupted transatlantic efforts rooted in multilateralism and legalization.[1] In its first year, the Trump administration ceased Transatlantic Trade and Investment Partnership (TTIP) negotiations; in 2019, the European Council declared their original negotiating directives "obsolete and no longer relevant."[2] Other disruptions include the US effectively ignoring EU efforts to replace current ad hoc arbitration of investor-state disputes with a standing court; stymying progress at the World Trade Organization on trade-related investment issues, among other things; and rejecting EU member states' efforts to negotiate over international tax coordination, euphemistically requesting a "pause" in negotiations of the OECD Inclusive Framework on Base Erosion and Profit Shifting (BEPS).[3] There is little-to-no evidence that these disruptions originated with the EU. For example, the EU approved the Comprehensive Economic Trade Agreement (CETA) with Canada in 2017, which speaks to these investment issues and more via a multilateral, legalized approach.[4]

After the 2020 US election, consistent with its preference for multilateralism, the EU raised the prospect of renewed coordination between the incoming Biden administration and the EU in meeting the "strategic challenge" of China.[5] Then, weeks before Biden took office, the

---

[1] Johns, Leslie, Krzysztof J. Pelc, and Rachel L. Wellhausen. "How a Retreat from Global Economic Governance May Empower Business Interests." Journal of Politics 81(2): 731-738. 2019.
[2] Council of the European Union decision 6052/19. Brussels, 9 April 2019. (https://www.consilium.europa.eu/media/39180/st06052-en19.pdf)
[3] Erb, Kelly Phillips. "US Pauses OECD Talks After Expressing Concern over Digital Tax." Forbes. 18 June 2020.
[4] The regional parliament of Wallonia, which nearly derailed CETA, agreed to support it contingent on the European Court of Justice ruling on the legality of its investor-state dispute settlement provisions, itself a multilateral and legalized solution. Although, CETA remains in force only provisionally, an example of the intra-EU hold-up problems generated by underlying legal requirements for member state unanimity (as of January 2020).
[5] Fleming, Sam, Jim Brunsden, and Michael Peel. "EU proposes fresh alliance with US in face of China challenge." Financial Times. 29 November 2020.

EU and China concluded negotiations on a years-in-the-making Comprehensive Agreement on Investment (CAI). As articulated by the EU's trade commissioner, the CAI "represented a 'levelling up' with the US," securing for EU actors the kind of access American actors got as a result of the Trump administration's Phase 1 deal – which, of course, was concluded without EU involvement.[6] Much substantive criticism of the CAI focuses on its obviation of China's troubling human rights record – a record that, to be sure, it already had at the time of the Trump Phase 1 deal.[7] Nonetheless, human rights issues do not dominate the headlines of US news media reporting on the CAI.

Instead, the go-to US media framing is exemplified by an article in the New York Times Europe news section, titled, "Will the Sudden EU-China Deal Damage Relations with Biden?" The article introduces the CAI as a possible "diplomatic and political error," which pursues an EU policy of "strategic autonomy…that annoys many American policymakers," and "looks like it was done on the sly, in an underhand manner." The article concludes that, "for trans-Atlantic relations, this will stay as a bitter taste for Biden."[8]

Supporters of the CAI in the EU would surely be vexed by this kind of news reporting. In answering the headline question in the affirmative, the article accuses the EU of doing something untoward. The logic implied is perplexing: the EU should have set its economic goals aside (despite both acute and secular economic turmoil); paused final negotiations on its long-pursued economic agreement (despite the US having already concluded a parallel agreement, without EU involvement); and waited for the approval of the Biden administration (despite Biden not yet being in office). Moreover, the narrative expecting EU deference implies that the EU would be more successful in achieving its goals under the leadership of the Biden administration (already a herculean expectation given the massive Trump-era damage to the effectiveness of US leadership on the world stage). It bodes poorly if the expectation of EU deference is so ingrained in the US psyche that it has bled over from op-eds to news reporting.[9]

---

[6] Quoted in: Brunsden, Jim, et al. "EU and China agree new investment treaty." Financial Times. 30 December 2020.

[7] The US signed the Phase 1 deal while also emphasizing that existing US law prevents the import of products made by forced labor; it went on to implemented a number of targeted bans. Unquestionably, the EU's legal position on the forced labor issue is weaker, as the EU itself does not have equivalent law. The CAI asks China to make "continued and sustained efforts" to ratify conventions on labor rights, without clear enforcement measures. ("Cynicism explains a flawed new EU-China commercial pact." The Economist. 9 January 2021.)

[8] Erlanger, Steven. "Will the Sudden EU-China Deal Damage Relations with Biden?" New York Times. 6 January 2021.

[9] With only this US media narrative in hand, one cannot parse the logic offered by the Chair of the European Parliament's delegation for relations with China: "The whole idea that [the] EU must hurry to strike a China deal to impress the US is misguided…It helps EU sovereignty more if we demonstrate that we know when to stand tall to China. And align with partners." (Quoted in: Sevastopulo, Demetri, et al. "Biden team voices concern over EU-China investment deal." Financial Times. 22 December 2020.)

Most importantly, the assumption is incorrect that the EU and the US have the same investment policy goals. To repeat, the EU has been committed to multilateralism and legalization in investment policy, with which the CAI is consistent. The CAI is a legalized solution, and it has the added benefit of being in the service of multilateralism – as an EU diplomat put it, "[The CAI] will put the EU and US at the same level to then discuss jointly how to handle China."[10] In stark contrast, the US has accrued years of evidence of deep, bipartisan rejection of multilateralism and legalization when it comes to trans-Atlantic investment policy – as made clear by the relentless US opposition to Nord Stream 2.

Nord Stream 2 is the $11 billion pipeline project initiated in 2015 to expand gas delivery from Russia to Germany, for onward delivery to European markets. Gazprom owns the pipeline, and half of its cost is being financed by European firms.[11] The EU and its member states have used their legitimate governing authority to intervene in the political economic issues to which Nord Stream 2 has given rise. Oil and gas pipelines linking Russia, Germany, and the EU more broadly have geostrategic implications of interest to the US as well, and the US has been emphatic in its opposition. In March 2019, when asked to comment on US opposition, the German Ambassador to the US emphasized a pivotal EU gas directive widening the applicability of EU law to Russian-owned assets, for which "the US had long pushed." In the Ambassador's estimation, this legal measure had successfully reconciled the US with the project: "as a former critic of Nord Stream 2, I can tell you now that those key areas of concern have been addressed."[12]

But addressing Nord Stream 2 via multilateralism and legalization had never matched US policy that was and remains "to oppose the Nord Stream 2 pipeline."[13] In 2017, 2018, 2019, and 2020, reliably bipartisan legislation has imposed increasingly deep and wide, unilateral sanctions aiming to stop the project by making it commercially unviable.[14] In mid-2020, a representative of Germany's Federal Foreign Office made clear that "Threatening a close friend and ally with sanctions, and using that kind of language, will not work…European energy policy will be decided in Brussels, and not in Washington, DC."[15] The specific impetus for this comment was a letter from three Republican senators threatening "crushing" sanctions against operators in the terminal German port town, not just executives and

---

[10] Quoted in: Sevastopulo, Demetri, et al. "Biden team voices concern over EU-China investment deal." Financial Times. 22 December 2020.

[11] "Russia's Nord Stream 2 Pipeline: Running in Place." Congressional Research Service. Updated 28 September 2020. Gazprom has a 51% stake in Nord Stream 1, and European firms own the remainder (Ibid).

[12] The Ambassador's first reaction to the question asking her to reflect on US opposition was to laugh and say, "I could do that sleeping…I've been asked that so often." Remarks by Ambassador Emily Haber at the University of Texas at Austin, in response to the author. 30 March 2019.

[13] "Russia's Nord Stream 2 Pipeline: Running in Place." Congressional Research Service. Updated 28 September 2020.

[14] By September 2020, even international associations of shipping insurers confirmed that they would not take on Nord Stream 2 clients, because of threats of US sanctions. (Gardner, Timothy. "Russia to Germany gas pipeline targeted in U.S. defense bill." Reuters. 4 December 2020.)

[15] Quoted in: Payne, Adam. "Germany is furious…" Business Insider. 11 August 2020.

shareholders but also employees.[16] Setting aside this particular letter's inflammatory targets and language, the letter's intent to stop the project is reliably bipartisan. On the Democratic side, the incoming Biden administration repeated that "the Europeans must stop the construction of Nord Stream 2," to give the US "the opportunity to confidentially and calmly speak" with European governments.[17] There is scant evidence to suggest such interaction would aim at anything other than EU deference, as anything else would not be consistent with the narrative around US opposition, summarized by a Democratic Representative co-sponsor of 2020 sanctions legislation: "[Nord Stream 2] is another tool used by Putin to attempt Russian domination of a free and prosperous Europe."[18]

In short, I see little reason to expect the Biden administration to ease conflicts in trans-Atlantic investment policy through a commitment to shared principles of engagement built on multilateralism and legalization. Neither US media reporting around the CAI, nor well-established democratic positions on Nord Stream 2, are bellwethers of change. Why is a matter of debate – Private US interests? Issue linkage to other foreign policy goals with regard to China and Russia? The invisibility of investment policy to the US public? An accepted narrative of a return to US dominance in international relations as the cure for Trump-era disruptions? Regardless, without credible expectations that the US will defer to its principles of engagement, there is little reason to believe the EU would prioritize trans-Atlantic concessions in its investment policy choices.

---

[16] Letter dated 5 August 2020, addressed to the Managing Director and Legal Director of Mukran Port, signed by Senators Ted Cruz, Tom Cotton, and Ron Johnson.
[17] Quoted in: Payne, Adam. "Germany is furious…" Business Insider. 11 August 2020.
[18] Congressman Denny Heck (D-WA), quoted in: Gillespie, Maura. "Bipartisan bill expands sanctions on Nord Stream 2 pipeline." Press release from the office of Congressman Adam Kinzinger (R-IL). 25 June 2020.