



The Transatlantic Trade & Investment Partnership: An Update

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Introduction

By November 2014 there had been seven rounds of negotiations between the EU and the USA over the proposed Transatlantic Trade and Investment Partnership (TTIP). These negotiations have been conducted against a backdrop of increased public and media scrutiny over the past year. Trade flows between the EU and the USA are significant; the USA accounts for 16.6 per cent and 11.7 per cent of the EU's exports and imports, respectively.¹ Estimates of the benefits from an EU-US free trade and investment agreement suggest annual gains of £100 billion to the EU economy as a whole and £10 billion to the UK economy in particular.² Recognising the opportunities TTIP presents for boosting the EU economy, the European Council, at its December 2014 meeting, identified TTIP as one of its priorities and said that negotiations with the USA should be concluded by the end of 2015.³

The negotiations are mainly about non-tariff barriers to trade as the average industrial tariff is only around three per cent (although some individual tariffs, such as those on cheese for example, are far higher). TTIP aims to reconcile regulatory differences and remove non-tariff barriers between the EU and US economies in the interest of fostering trade in areas such as: public procurement; services; investment; and intellectual property rights.

The talks have a considerable distance to go before a final agreement is possible (there will be a further four or five rounds of negotiation in 2015) and some controversial issues have emerged in the negotiations. The main concerns are: claims of a lack of transparency in the negotiations; Investor State Dispute Settlement (ISDS) clauses; the alleged impact on public services in Europe; and regulatory standards, particularly in respect of food and personal data. This briefing note looks at the process of the negotiations, the issues that have been raised and at the ratification procedure.

The Talks Process

Trade negotiations with third countries are conducted by the EU on behalf of its Member States; the final agreement then requires unanimity in the Council of Ministers because trade agreements usually involve matters of national as well as EU responsibility and formal approval by the European Parliament. The European Commission conducts the day-to-day negotiations according to a mandate drafted by Member States in the Trade Policy Committee and agreed by the Council of Ministers. The Chief Negotiator for TTIP is Mr

¹ European Commission, *European Union, trade in goods with the US*, August 2014

² From a study by CEPR cited in HM Government, 'Transatlantic Trade & Investment Partnership (TTIP): benefits and concerns', 15 December 2014

³ European Council, *European Council Conclusions – 18 December 2014*, 18 December 2014, p.2

Ignacio Garcia Bercero of DG Trade who was the Chief Negotiator for the Free Trade Agreement (FTA) with South Korea. A lead negotiator from relevant Directorates-General (DGs) heads each policy area under negotiation; overall co-ordination is the responsibility of Mr Garcia Bercero.⁴

As with all international negotiations, in order to preserve the parties' negotiating space, not all matters discussed during negotiation rounds are made public. This has led to accusations of a lack of transparency, given the impact that TTIP will have if it is agreed. The EU has increased the transparency of the process following this criticism. The EU made the negotiating mandate for TTIP publicly available, following a decision of the Council in October 2014 (although it has been available since June 2013 due to a leak), a move which the Commission and European Ombudsman supported but the Member States had previously objected to.⁵ The Commission subsequently released a great deal of other information, including a large number of factsheets about specific aspects of the negotiations.⁶ Trade Commissioner Malmström has stated that in the future the EU will:

be even more transparent, so we can show clearly what the negotiations are about and de-mystify them. We'll use this as a basis to engage further with stakeholders and the public.⁷

The UK influences the negotiating process in a number of ways. The European Commission, which leads the trade negotiations, interacts closely with the UK and other Member States through the Trade Policy Committee, which consists of senior officials from each Member State. Additionally, the UK has bilateral contacts with the USA and its diplomats in Washington work with politicians and officials on the details of TTIP. The UK receives further updates on TTIP developments through the Foreign Affairs Council of the European Union, as well as via the UK MEPs on the European Parliament's Committee on International Trade.

The Negotiations so Far

The main positions of the EU are outlined in the negotiating mandate:

- Tariffs — remove duties on industrial and agricultural goods.
- Rules of Origin — reconcile EU and US approaches.
- Trade Defence Measures — ensure regular dialogue with the US on anti-dumping and anti-subsidy measures.
- Services — open up services at both federal and sub-federal level and ensure that European professional qualifications can be recognised in the US.
- Investment — secure investment liberalisation and establish protection provisions (including ISDS).
- Public Procurement — open up access to procurement markets at both federal and sub-federal levels.

⁴ European Commission, *Mr Ignacio Garcia Bercero*, 17 July 2013

⁵ 'TTIP negotiating mandate finally declassified', James Crisp, *EurActiv*, 9 October 2014

⁶ See European Commission, 'EU negotiating texts in TTIP', 17 January 2015

⁷ European Commission, *Opening the windows: Commission commits to enhanced transparency*, IP/14/2131, 25 November 2014

- Regulatory Issues and Non-Tariff Barriers — extend regulatory co-operation as widely as possible to cover trade in services, including financial services, and trade in goods.
- Intellectual Property Rights — reconcile EU and US approaches (such as protection for geographical indications e.g. Parma ham, Scotch whisky).
- Sustainable Development — include commitments by both parties on the labour and environmental aspects of trade provisions.⁸

Issues outstanding

A number of issues have arisen during the TTIP negotiations. The most notable at this stage are: investor-state dispute settlement (ISDS) clauses; food standards and agriculture; public procurement; and financial services.

ISDS

ISDS provisions in TTIP have proved to be very controversial in the UK and some other Member States (especially Germany, where the concept was invented). The purpose of an ISDS clause is to allow a business to take a country to an arbitration panel when it believes that country's actions have amounted to an expropriation of their business. These clauses have been included in many trade agreements by the EU and are regarded by businesses as important because they protect investors against arbitrary action by foreign governments. In the TTIP context, the concern is primarily over whether ISDS clauses can be invoked to force public services, including the NHS, to be opened up to private sector competition and whether such competition would be irreversible without the payment of substantial compensation to companies involved.

Mr Garcia Bercero wrote to the British All-Party Parliamentary Group on TTIP in July 2014 to confirm that every Member State will – as now – retain the right to decide whether or not to open up its publically owned services to wider competition.⁹ There has been speculation that this process will be irreversible but this is not the case. The fact that a million signatures have been gathered for a petition against TTIP shows the extent to which opposition is being organised by very effective citizen's initiative groups. Although the UK Government has published an information leaflet on separating myths from facts on TTIP, far more must be done to make the positive case for TTIP. A public consultation on whether ISDS clauses should be included has been conducted by the European Commission. Its first results were published on 13 January 2015 and a policy decision will be made in the first half of 2015 after discussion with Member States and MEPs.¹⁰

Agriculture

Significant challenges still remain in a number of fields where the EU and the USA have different regulatory systems - agriculture is one example. One significant difference is that the EU strictly regulates genetically-modified crops, whereas the USA is a proponent of

⁸ House of Lords European Union Committee, *14th Report of Session 2013-14: Transatlantic Trade and Investment Partnership*, HL 179, 13 May 2014, pp. 11-12

⁹ See Cecilia Malmström, *Letter to Lord Livingston regarding TTIP*, European Commission, 26 January 2015

¹⁰ European Commission, *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement*, SWD (2015) 3 final, 13 January 2015

genetically-modified crops. The recent acceptance of the European Council's position by the Parliament that genetically-modified organisms are a matter of national competence could be a positive development in this area. The agri-business sector is one of the largest in the EU, and it has voiced concerns that TTIP would lead to a 'race to the bottom' in terms of regulatory standards, although the then Trade Commissioner Karel De Gucht denied that this would be the case. Certain European goods exported to the USA, such as blue-veined cheeses currently face tariffs of more than 25 per cent, with chocolate facing duties of over 20 per cent.¹¹ The EU is eager to remove, or at least reduce, such tariffs (and non-tariff barriers) to bolster EU food exports.

Public procurement

The EU typically has an open and more liberal approach to public procurement than the USA, which could affect the negotiations.¹² The USA has had a "buy America" policy in various areas of public procurement since at least 1933 (including state laws which are not subject to federal control); recent legislation has extended its scope.¹³ Canada did successfully negotiate an exemption for its businesses from these buy America provisions and the EU is aiming to do the same.¹⁴

Data protection

This is another area of controversy as the EU and the US have very different approaches to the privacy of personal data. The Edward Snowden affair has heightened concerns in the EU that personal data given to US companies will not be protected to the same standard. Data protection issues have been excluded by both parties from the negotiations at this stage but given the importance of personal data and the growth of e-commerce this issue will have to be addressed at some point in the future.¹⁵ The political importance of data protection issues in Europe could influence the current negotiations inside the EU and lead to the EU adopting protectionist measures, which could lead to complications for TTIP.

Financial services

There are high levels of regulatory divergence between the EU and the USA in financial services. The EU would like to see this regulatory divergence reduced or scrapped within TTIP, whereas the USA has so far been reluctant to do so and has suggested addressing the divergences in the "existing and appropriate global forums, such as the G20".¹⁶

Developments in the USA

The USA is eager to see a far-reaching TTIP agreement and strongly believes in the economic benefits that it will bring. The US Ambassador to the EU, Anthony Gardner, asserted that there are "critical geostrategic reasons to get this deal done".¹⁷ In the seventh round of negotiations

¹¹ See Catherine Morvan, Lyna Pärt & Paul Kremmel (eds.), *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, European Parliament, 21 August 2014

¹² See European Parliament, *Detailed appraisal of the impact assessment on rules concerning third countries' reciprocal access to EU public procurement*, 13 June 2013

¹³ 'American Recovery and Reinvestment Act of 2009' (PL 111-5, Feb 17, 2009) United States Statutes at Large, 123 (2009), pp. 115-521

¹⁴ See Government of Canada, 'U.S. Government Procurement', 24 January 2015

¹⁵ 'TTIP: Data is the elephant in the room', Jeremy Fleming, *EurActiv*, 24 September 2013

¹⁶ Office of the United States Trade Representative, 'Readout of Meeting between U.S. Trade Representative Michael Froman and EU Internal Market and Services Commissioner Michel Barnier', 16 July 2013

¹⁷ 'US Ambassador: Beyond growth, TTIP must happen for geostrategic reasons', Daniela Vincenti, *EurActiv*, 17 July 2014

between the US and EU chief negotiators, the US stated that it was wholly committed to completing the TTIP agreement and would continue to improve their consultation with civil society and SMEs.¹⁸ TTIP has garnered a higher level of public support in the USA than the EU; 53 per cent of Americans believe that TTIP will have a positive effect.¹⁹

President Obama sought the renewal of the Trade Promotion Authority (TPA) in his State of the Union address in January 2014. The TPA allows for the fast tracking of trade agreements by allowing the President to present trade agreements to Congress for a 'yes/no' vote, which effectively prevents amendments and filibusters. Whilst TTIP has more public support in the USA than it has in the EU, it is still a politically sensitive trade agreement that could be derailed. Despite the Democrats' loss of control of the Senate in the November 2014 mid-term elections, fast tracking could still be achieved, as the Republicans are broadly pro-TTIP in comparison to the Democrats. Fast tracking would also allow for swift approval of the Trans-Pacific Partnership (an FTA consisting of 12 countries). In the US the Trans-Pacific Partnership is the higher political priority and its ratification by Congress is likely to come ahead of that of TTIP.

Ratification

There may be difficulties ahead in the ratification process within the EU. As some provisions within TTIP are likely to affect Member States' national laws, they may need the approval of their national parliaments. The European Parliament will play a formal role in the process only after the Member States and the Council have reached an agreement. This stage could be important because of the concerns in the Parliament, particularly about ISDS clauses.

Negotiations on the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada were concluded in August 2014. CETA is often seen as a precedent for TTIP. It was therefore significant that some Member States suggested that they might not ratify this treaty. At one point the German Vice-Chancellor stated that the Bundestag would vote against CETA's ratification due to ISDS clauses (he has since backed down) and Romania and Bulgaria threatened to stall the ratification process until visa restrictions on their citizens are lifted by Canada. Similar problems could face TTIP. It is therefore of considerable importance that Member States and the European Commission continue to make the case for TTIP and that they step up their efforts as the negotiations reach a critical stage.

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¹⁸ Daniela Vincenti, *supra* n. 17

¹⁹ 'Americans See Trade Deal With EU as 'Good Thing', Pew Poll Says', William Maudlin, *Wall Street Journal*, 9 April 2014



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