
EU-US negotiations on TTIP

A survey of current issues



IN-DEPTH ANALYSIS

EPRS | European Parliamentary Research Service

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Members' Research Service

July 2016 — PE 586.606

EN

Since the completion of the thirteenth round of negotiations on TTIP in April 2016, the European Commission and the USA have been working to achieve substantial progress before the next round takes place in July 2016. As this latest round of negotiations gets under way, this publication examines progress to date and looks at the various issues that are still outstanding.

PE 586.606

ISBN 978-92-823-9561-5

doi:10.2861/407441

QA-02-16-691-EN-N

Original manuscript, in English, completed in July 2016.

This document is an updated version of an [EPRS publication](#) from June 2015.

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EXECUTIVE SUMMARY

Significant progress was achieved in the last round of negotiations. By the end of April 2016, negotiators managed to work on 17 consolidated texts (that is, documents containing both EU and US proposals for further discussion and work towards a final text); for the remaining chapters, there were textual proposals from either the EU or the US side. The USA would like to see the negotiations concluded before the end of the Obama mandate in 2016; the EU Chief Negotiator, Ignacio García Bercero, has stated the EU's commitment to work towards finalising negotiations in 2016, provided that agreement can be found on the substance.

Several problematic issues remain, in particular: the divergent views on the (negative or positive) approach to adopt with regard to offers on the liberalisation of services and the extent of concessions in this area; the extent of US concessions regarding the public procurement chapter; the suspension of discussions on data flows until the agreement on solving the EU-US data protection issues is confirmed; the fact that the EU's proposal for extending geographical protection beyond the existing EU-US wine agreement remains controversial for the USA; discussions that have recently re-started on the investment chapter and the submission by the EU of its proposal for an investment court to replace the US-favoured arbitration system; and, finally, the EU-US divergences on the sanitary and phyto-sanitary chapter and food safety questions which remain one of the most controversial issues in the negotiations.

TTIP, as any other EU trade agreement, will have to obtain the European Parliament's consent in order to be signed by the Council of the EU, in accordance with Articles 207 and 218 of the Treaty on the Functioning of the European Union (TFEU). In July 2015, the Parliament adopted a resolution making recommendations on the TTIP negotiations to the European Commission. In particular, Parliament issued a condition *sine qua non* to its consent, insisting on the replacement of the arbitration system in investor-state dispute settlement. Parliament's recommendations called for **an ambitious and comprehensive** trade and investment agreement aimed at achieving ambitious market access in trade, services, investment and procurement, as well as a reduction of non-tariff barriers and enhanced regulatory compatibility across the Atlantic. At the same time, it called for a **balanced approach**, including a list of sensitive products subject to transitional periods, quotas or even exclusion, and for a **rule-based** framework, including compliance with data protection, environmental, labour and consumer laws and geographical indications. It also stressed that regulatory cooperation must respect established regulatory systems and the state's right to regulate public services. Parliament also called for enhanced **transparency** in the negotiations. As shown in this in-depth analysis (IDA), several of these recommendations have been incorporated in the Commission's negotiating positions.

At the conclusion of the 13th round of negotiations on the Transatlantic Trade and Investment Partnership (TTIP), held in New York in April 2016, discussions between the European Union and the United States had succeeded in covering all of the agreement's chapters. The 14th round of negotiations will take place in Brussels from 11–15 July 2016.

On the eve of the next round of the negotiations, this IDA summarises the main EU positions and, depending on the information available, the US positions with respect to the different issues tabled for discussion.

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List of main acronyms used

- **AGOA:** African Growth and Opportunity Act
- **AUSFTA:** Australia-US Free Trade Agreement
- **BIT:** Bilateral investment treaties
- **CETA:** Comprehensive Economic and Trade Agreement
- **CSR:** Corporate social responsibility
- **FCN:** Treaty of Friendship, Commerce and Navigation
- **FDI:** Foreign direct investment
- **FET:** Fair and equitable treatment
- **FTA:** Free trade agreement
- **GATS:** General Agreement on Trade in Services
- **GATT:** General Agreement on Tariffs and Trade
- **GI:** Geographical indication
- **GMO:** Genetically modified organism
- **GPA:** Government Procurement Agreement
- **ICSID:** International Centre for Settlement of Investment Disputes
- **ISDS:** Investor-state dispute settlement
- **MFN:** Most favoured nation
- **NAFTA:** North American Free Trade Agreement
- **NTB:** Non-tariff barriers
- **NTM:** Non-tariff measures
- **PCA:** Permanent Court of Arbitration
- **SME:** Small and medium-sized enterprises
- **SPS:** Sanitary and phyto-sanitary
- **TBT:** Technical barriers to trade
- **TiSA:** Trade in services agreement
- **TPA:** Trade promotion authority
- **TPPA:** Trans-Pacific Partnership Agreement
- **TTIP:** Transatlantic Trade and Investment Partnership
- **WTO:** World Trade Organization

1. TTIP negotiations: current situation

1.1. State of play of the TTIP negotiations

TTIP negotiations cover a wide range of issues¹ aimed at agreeing on ambitious provisions going beyond World Trade Organization (WTO) rules in a number of fields: market access in goods and services, regulatory provisions (SPS and TBT), intellectual property rights, and public procurement. TTIP also aims for ambitious new rules on sustainable development, competition, state-owned enterprises, SMEs, investment and regulatory cooperation. The EU has also proposed an unprecedented specific chapter on energy and a new proposal to replace the former arbitration system for solving disputes arising between states and foreign investors by referring them to an investment court. During their 13th round, (see Table 1) TTIP negotiations achieved significant progress, especially on regulatory cooperation. By the end of April 2016, there were 17 consolidated documents on the negotiation table; for the remaining chapters there were textual proposals from either the EU or the US side.² The USA would like to see the negotiations concluded before the end of the Obama mandate in 2016; the EU Chief Negotiator, Ignacio García Bercero, has stated the commitment of the EU to work toward finalising negotiations in 2016, but only if the substance of the negotiation is right.

Table 1: Previous rounds of negotiations³

Negotiation Round	Date and Venue
First Round	8–11 July 2013, Washington DC
Second Round	11–15 November 2013, Brussels
Third Round	16–20 December 2013, Washington DC
Fourth Round	10–14 March 2014, Brussels
Fifth Round	19–23 May 2014, Arlington (VA)
Sixth Round	14–18 July 2014, Brussels
Seventh Round	29 September to 3 October 2014, Chevy Chase (MD)
Eight Round	2–6 February 2015, Brussels
Ninth Round	20–24 April 2015, New York
Tenth Round	13–17 July 2015, Brussels
Eleventh Round	19–23 October 2015, Miami
Twelfth Round	22–26 February 2016, Brussels
Thirteenth Round	25–29 April 2016, New York

Data source: European Commission, 2016.

¹ European Commission, [Inside TTIP](#): An overview and chapter-by-chapter guide in plain English, 2015.

² European Commission, The Transatlantic Trade and Investment Partnership (TTIP) – [State of Play](#), 27 April 2016, hereafter quoted as: European Commission, TTIP State of Play [fn2].

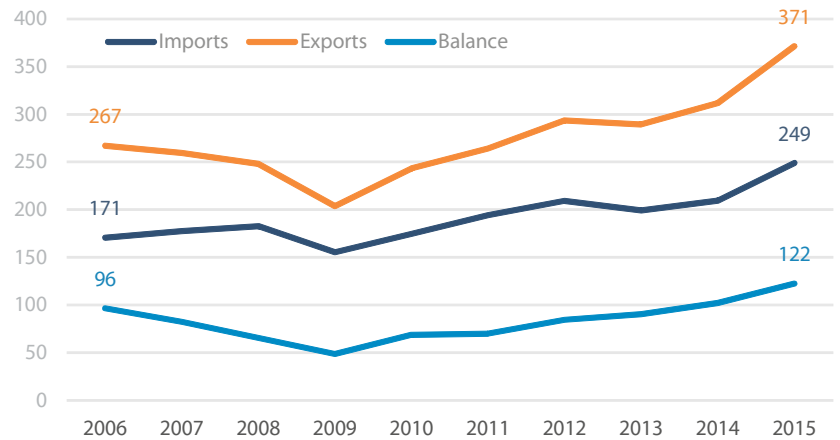
³ For all documents on past negotiation rounds, please refer to the European Commission [DG Trade website](#).

1.2. Economic and geopolitical rationale

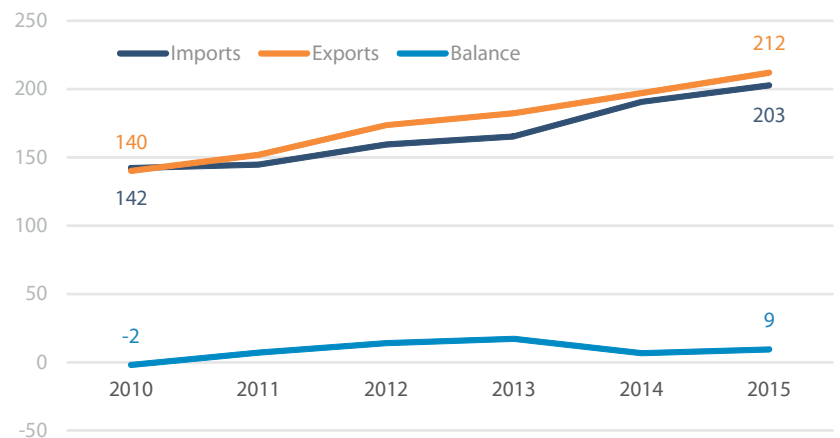
The USA remains the EU's top trading partner and export market. Exports of goods to and imports from the USA by EU-28 firms amounted respectively to €371 and €249 billion in 2015.⁴ Some 88% of firms exporting to the USA were reported to be small and medium-sized enterprises (SMEs) in 2012.⁵ The Commission has reported that over 10 million European jobs already depend on exports to the USA.⁶ For the USA, TTIP would only be its third-biggest market for trade in goods covered by a free trade agreement, but would still represent its largest market for services and investments.⁷ In 2014, the EU and USA represented 46% of world GDP.⁸ Both the EU and the USA have substantially liberalised their trade in goods multilaterally (in 2014, the simple average applied tariffs were 5.31% for the EU and 3.51% for the USA).⁹ However, some tariff peaks remain (in particular, in agricultural goods),¹⁰ and substantial gains would be achieved by reducing duplication in regulatory procedures and

Figure 1: EU-US trade in goods, in services, and EU direct investment stocks with the USA

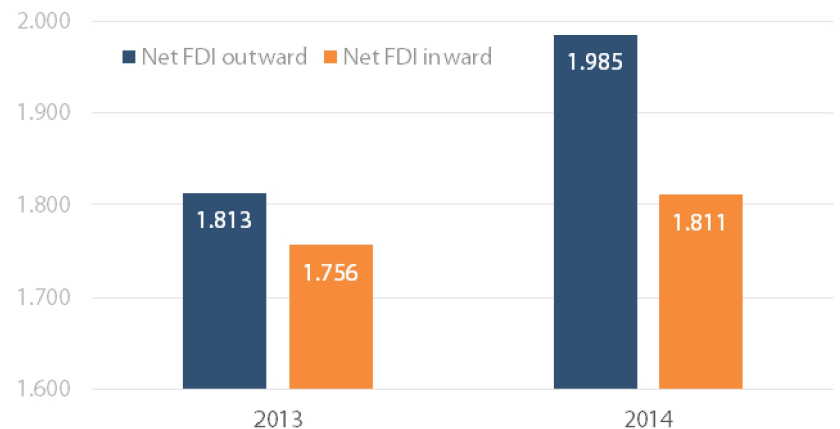
I: EU-US trade in goods



II: EU-US trade in services



III: EU FDI stocks with the US



Data source: Eurostat.

⁴ [DG Trade](#) data.

⁵ European Commission report on [Small and medium-sized Enterprises](#) and the Transatlantic Trade and Investment Partnership, 2015, hereafter Commission report on SME [fn 5].

⁶ [DG Trade website](#) (last accessed 14/06/2016).

⁷ Shayerah Ilias Akhtar, Vivian C. Jones, Proposed Transatlantic Trade and Investment Partnership (TTIP): In Brief, June 2014.

⁸ [World Bank](#) data.

⁹ [WTO](#) data.

¹⁰ *idem*.

requirements.¹¹ Often, producers have to adapt inputs in order to sell their products on the other market, and different procedures require different tests to prove that a product respects domestic regulatory requirements – thus acting as non-tariff barriers (NTBs) and increasing the costs of exporting. Gains are also expected from the further opening of services, procurement¹² and investment markets. Apart from economic reasons, TTIP has been championed for commercial reasons – as a means for building a new model for trade rules – and for geopolitical reasons.¹³ The USA has concluded a major and ambitious agreement with its Pacific partners (the Transpacific Partnership Agreement¹⁴); in view of the rise in Asian trade, TTIP would reaffirm transatlantic relations. A transatlantic consensus on major trade issues could be a key driver for future debates in the WTO and it could provide joint answers to how trade should relate to issues such as sustainable development and high-standard regulations.

For further EU-US trade data refer to: O. Maise, G. Sabbati and L. Bartolini, [US: Economic indicators and trade with the EU](#), European Parliamentary Research Service and GlobalStat (July 2016).

1.2.1. Potential Impact of TTIP – an overview of the main studies

Several studies have shown varying results for the potential economic effect of TTIP (see Table 2 below).¹⁵ More recently, following a request by Parliament, the Commission produced a second impact assessment which also focused on sustainable development issues (Ecorys II, 2016).¹⁶ Studies which find a GDP increase of either more than 1% or less than 0% (those highlighted in purple and blue in the table) have in common the fact that they depart from the model used in the first impact assessment, the Centre for European Policy Research (CEPR) (2013) study. The Capaldo study, which yields negative results, takes a short-run perspective using a Keynesian model, therefore introducing output rigidities, fixed wages and unemployment and not allowing for reallocation of resources.¹⁷ All other studies take trade models as their basis. Those following the CEPR (2013) approach (highlighted in orange in the table) use traditional computable general equilibrium models,¹⁸ whereas those in purple use new quantitative trade theory

¹¹ European Commission – DG Trade, [Transatlantic Trade and Investment Partnership - The Economic Analysis Explained](#), September 2013.

¹² S. Woolcock and J. Heilman Grier, [Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations](#), CEPS, February 2015.

¹³ Daniel Hamilton and Steven Blockmans, The Geostrategic Implications of TTIP, Paper No. 5 in the CEPS-CTR project 'TTIP in the Balance' and CEPS Special Report No 105, April 2015.

¹⁴ For the implications of TPP for the EU, refer to: Krisztina Binder, [The Trans-Pacific Partnership \(TPP\): Potential regional and global impacts](#), European Parliamentary Research Service, May 2016.

¹⁵ NB: the table presents the results from the ambitious scenario, that is, the scenario assuming the largest liberalisation outcome from the negotiations.; see also: Jacques Pelkmans, Arjan Lejour, Lorna Schrefler, Federica Mustilli and Jacopo Timini (CEPS), [EU-US Transatlantic Trade and Investment Partnership: Detailed Appraisal of the Commission's Impact Assessment](#), European Parliamentary Research Service, 2014.

¹⁶ ECORYS, [Trade SIA](#) on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA – Draft Interim Report, 2016.

¹⁷ Capaldo, J., [TTIP: European Disintegration, Unemployment and Instability](#), GDAE, Working Paper No 14-03, 2014.

¹⁸ CEPR, [Reducing Transatlantic Barriers to Trade and Investment](#): An Economic Assessment, Study for the EU Commission, 2013; ECORYS, [Trade SIA](#) on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA – Draft Interim Report, 2016; WTI, [TTIP and the EU Member States](#), World Trade Institute, University of Bern, Bern, 2016.

models.¹⁹ The latter create scenarios with existing data from other FTAs or integration systems, instead of using scenarios built on expert-driven assumptions (that is, the expert makes assumptions as to how negotiations will reduce the level of tariffs or non-tariff measures). In using existing trade data, new quantitative trade theory models try to link the scenario to a situation that is observable in reality. All trade models take a long-run perspective thus allowing for reallocation of resources. With the exception of the Bertelsmann study, none of the studies *based on trade models*²⁰ integrate any kind of labour-market friction and all assume no unemployment. The Bertelsmann (2013) and the Felbermayr et al. (2015) studies are by the same authors and use a similar model; however, there are some major difference that explain why the former ended up with over-estimated, positive values. As highlighted by Felbermayr himself,²¹ the first difference is the base year, which was 2007 in the Bertelsmann study, and thus accounted for a pre-crisis period, whereas the 2015 study took 2012 as a base year, accounting for the post-crisis economic reality. The second difference concerns the number of countries used as a basis for simulating data: the Bertelsmann study used 126 countries, whereas the 2015 study processed data for 173 geographical units. The most recent Ecorys II (2016) study adjusts and makes use of the CEPR (2013)²² model, considering it as more appropriate and as generating more credible results than those using the new quantitative trade theory approach.

Table 2 Overview of results from studies on TTIP's economic impact on the EU and the USA

Studies	Ecorys (2009)	CEPR (2013)/ WTI (2016)	GED Bertelsmann (2013)	Capaldo (2014)	Aichele et al. (2014)	Egger et al. (2015)	Felbermayr et al. (2015)	Ecorys II (2016)
Estimated (annual) GDP growth due to TTIP (ambitious scenario)	EU GDP +0.7% US GDP +0.3%	EU GDP +0.5% US GDP +0.4%	EU GDP +5% US GDP +13%	EU: -0.5% GDP	EU: 2.1%	EU: 2.3%	EU: 3.9%	EU: 0.5 USA:0.4
Wage effect in EU	0.8%	0.5%	2.3%	n.a	2.1%	n.a	3.9%	0.5%
Income effect in EU Member States (max and min result found in ambitious scenario) ²³	n.a.	+1.6% in Lithuania to -0.3% in Malta	Per capita income changes: +9.7% (UK) to +0.03% (Luxembourg)	GDP changes: - 0.03% (Italy); -0.50 (for other northern EU Member States)	Malta: 9.2%; 1.7%: Italy	Only for selected countries	5.56 (Spain); 2.25 (Belgium)	+1.4 (Ireland) to +0.1 (for several countries)

¹⁹ Ifo-Bertelsmann, [Transatlantic Trade and Investment Partnership](#): Who benefits from a free trade deal?, 2013; Aichele et al, [Going Deep: The Trade and Welfare Effects of TTIP](#), CESifo Working Paper No. 5150, 2014; Gabriel Felbermayr et al., [Macroeconomic potentials of transatlantic free trade](#): A high resolution perspective for Europe and the world, Economic Policy, Vol 30(83), 2015.

²⁰ As explained above, Capaldo considers labour market rigidity as he uses a short term Keynesian model.

²¹ Gabriel Felbermayr, [Economic analysis of TTIP](#), Ifo Working Paper No 215, April 2016.

²² ECORYS, [Trade SIA](#) on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA – Draft Interim Report, 2016.

²³ The 'ambitious scenario' is the most ambitious scenario, which also includes spill-over effects if the model allows for it. For Felbermayr et al., the scenario referred to in the table is the preferred one mentioned by the [authors in their article](#).

Studies	Ecorys (2009)	CEPR (2013)/ WTI (2016)	GED Bertelsmann (2013)	Capaldo (2014)	Aichele et al. (2014)	Egger et al. (2015)	Felbermayr et al. (2015)	Ecorys II (2016)
Effects on third countries (per capita income change): max, min and world result ²⁴	n.a.	0.3% for the world	Canada - 9.5%; -0.2% in Malaysia; 3.3% for the world	n.a.	2.38: Central Asia; 0.48: East Asia; 2.20: world	1.8: Turkey; -0.47: other Asian countries	-3.09 (Canada); 0.40 (Vanuatu)	National income change: 0.00% for low income, Mercosur and India; 0.7% for ASEAN

Data source: [Ecorys](#) (2009); [CEPR](#) (2013); [WTI](#) (2016); [GED/Bertelsmann](#) (2013); [Capaldo](#) (2014); [Aichele et al.](#) (2014); [Egger et al.](#) (2015), [Felbermayr et al.](#) (2015), [Ecorys II](#) (2016).

1.3. Procedures and political background in Europe

The Commission negotiates towards a TTIP agreement on the basis of a mandate issued by the Council,²⁵ which has placed some limits, such as the introduction of the 'cultural exception'²⁶, on the negotiations. The Commission has a duty to keep Parliament informed throughout the negotiations. Once negotiations have finished and the Council has given its authorisation to sign the agreement, the Council is required to ask Parliament for its consent to ratification.²⁷ If TTIP takes the form of a 'mixed agreement' (that is, it covers areas of both EU and Member State competences), then the final text will also have to be ratified by the individual Member States in accordance with their national procedures.²⁸

With a view to securing the Parliament's consent and complying with the reporting requirements, the Commission maintains regular dialogue with Parliament and publishes its position papers and textual proposals. However, the Parliament, conscious of the need to understand the US perspective in order to get a clearer picture of the outstanding issues and to achieve possible compromises, has asked the USA to make similar efforts with regard to transparency. While the USA tries to engage stakeholders on a wide range of negotiating issues, confidentiality of draft proposals remains non-negotiable in the US approach to trade talks.²⁹ Parliament's July 2015 resolution called for further transparency, asking for access to all negotiating documents, including the consolidated text. In view of the possibility of a mixed agreement, the resolution also encouraged Member States to involve national parliaments.³⁰ In December 2015, the

²⁴ NB: the world results may appear more positive than the results for third countries, possibly because they also take into account the gains from TTIP for the EU Member States and for the USA. Thus, the trade diversion effect is compensated by trade creation within the FTA.

²⁵ [Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America](#).

²⁶ For further information on the cultural exception in TTIP, see discussion on audiovisual services below.

²⁷ See [Article 218\(6\) TFEU](#).

²⁸ For a short overview of the treaty negotiation procedure in the EU, refer to this [European Commission document](#): DG Trade (September 2013), Trade Negotiations Step by Step.

²⁹ USTR website, [Transparency and the Obama Trade Agenda](#).

³⁰ [European Parliament resolution of 8 July 2015](#) containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) ([2014/2228\(INI\)](#)), hereafter referred to as EP resolution of 8 July 2015 [fn 30].

Commission and the USA reached an agreement to grant access to consolidated TTIP texts to all MEPs and to the members of national parliaments.³¹

TTIP has attracted a great deal of public attention. A Eurobarometer survey conducted in 2014 and 2015 (see map below) found support for TTIP to vary greatly across EU Member States.³² Germany, Austria, Luxembourg and Slovenia were found to have a level of support lower than 50%. Support for TTIP in 2015 declined in Belgium, Austria, Netherlands and Slovenia by more than 10 percentage points compared to the 2014 Eurobarometer survey results. However, overall support for TTIP in the EU only slightly declined from 58% in 2014 to 56% in 2015. Successive surveys on the topic focused on Germany. In a survey conducted by Pew in 2015,³³ the US rates in favour of TTIP were equal to or slightly above 50% in 2014 and 2015, while in Germany support rates were reported to have decreased from 55 to 41% from 2014 to 2015. The study found that while US sceptics were more preoccupied with jobs, 61% of German sceptics feared instead that TTIP would lower regulatory standards. Another German survey by TNS³⁴ found that support for arbitration in investor-state dispute settlement (ISDS) was 37% but it fell to 19% when considering the possibility that TTIP might reduce the state's regulatory power. Other issues raised by public opinion in the Member States concerned the transparency of the negotiations and their potential impact on public services, the audiovisual sector and sensitive agricultural products.

Parliament's July 2015 recommendations reflected these political sensitivities and differed substantially in tone from its recommendations of May 2013,³⁵ indicating the precise direction in which the institution would like to see future negotiations go. In particular, the Parliament issued a condition *sine qua non* to its consent, calling for the replacement of the arbitration system in investor-state dispute settlement. Parliament's recommendations insisted on **an ambitious and comprehensive** trade and investment agreement aimed at ambitious market access in trade, services, investment and procurement, reduction of non-tariff barriers and enhanced regulatory compatibility across the Atlantic. At the same time, MEPs called for a **balanced approach**, including a list of sensitive products subject to transitional periods, quotas or even exclusion. They also called for a **rule-based** framework, including compliance with data protection, environmental, labour and consumer laws and geographical indications. In addition, they stressed that regulatory cooperation must respect the established regulatory systems and the state's right to regulate public services. Finally, as mentioned above, they called for enhanced **transparency** in the negotiations.

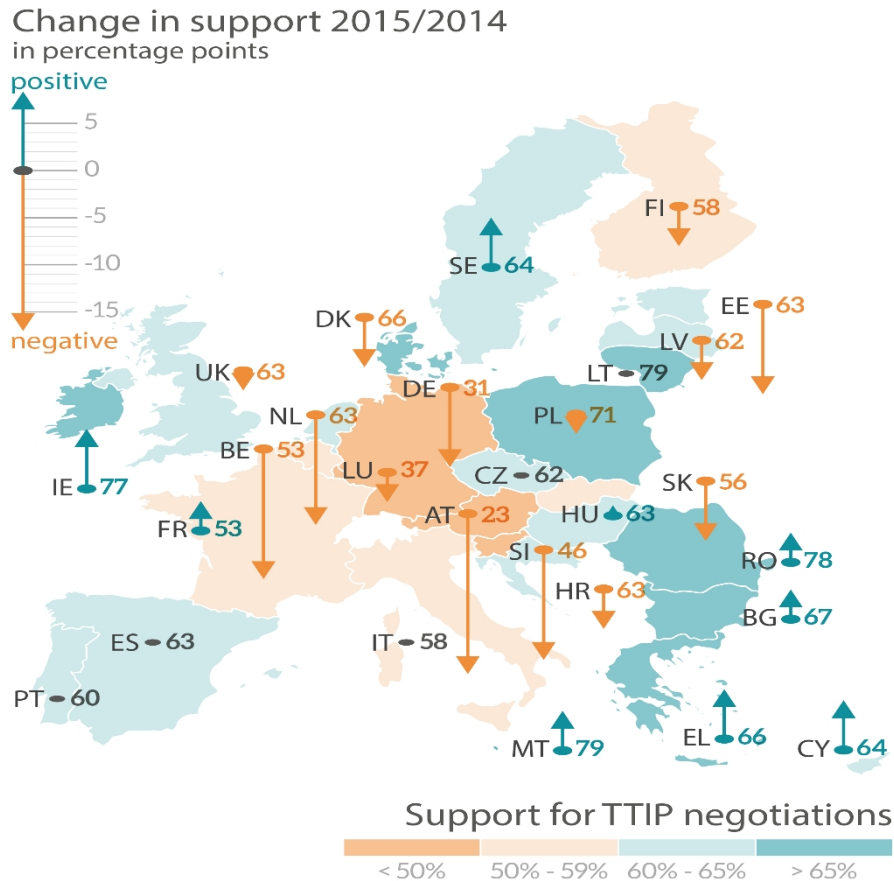
³¹ Laura Puccio, [TTIP: Access to consolidated texts](#), European Parliamentary Research Service, July 2016.

³² Eurobarometer, Public Opinion in the EU, [2014 version](#) and [2015 version](#); Bruce Stokes, [Is Europe on board for a new trade deal with the U.S.?](#) Pew, 2015.

³³ [Germany and the United States](#): Reliable Allies, but Disagreement on Russia, Global Leadership and Trade, Pew Research, 2015.

³⁴ [German survey by TNS](#), 2015.

³⁵ EP resolution of 8 July 2015 [fn 30].

Map 1: Support for TTIP across the EU in 2015 and variations from 2014³⁶

Source: Bertelsmann Stiftung, based on Eurobarometer data, 2014, 2015.

1.4. Political background to the negotiations in the USA

The 2015 Trade Promotion Authority Act (TPA) allows the use of 'fast-track authority' for TTIP.³⁷ Fast-track is an expedited procedure which permits the implementing legislation of a trade agreement to be passed by the US Congress on the basis of a yes/no vote only; in other words, Congress relinquishes its right to ask for amendments. Fast-track can only be granted if the trade agreement complies with the substantial and procedural requirements contained in the TPA. The substantial requirements in the TPA stipulate the main objectives that the agreement must pursue; in a sense the TPA becomes a sort of broad negotiation mandate which provides a general orientation for US negotiators to follow and identifies the objectives the USA wants to achieve during negotiations. However, because the TPA has not been specifically adapted for the TTIP negotiations, it is not as detailed as the Commission's TTIP negotiating mandate. Even though the TPA is unspecific, once in force, it might nevertheless constrain the USA's negotiating position. At the same time, the Office of the US Trade Representative (USTR) could use TPA requirements to put pressure on negotiating partners to accept US negotiating objectives.

³⁶ Christian Bluth, [GED study: Attitudes to global trade and TTIP in Germany and the United States](#), Bertelsmann Stiftung, 2016.

³⁷ [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#); see also I. F. Fergusson and R. S. Beth, [Trade Promotion Authority \(TPA\): Frequently Asked Questions](#), 27 May 2015; Micaela Del Monte and Laura Puccio, [Role of the US Congress in trade agreements: The 'Fast-Track' procedure](#), European Parliamentary Research Service, February 2016, hereafter M. Del Monte and L. Puccio, Role of US Congress in trade agreements [fn 37].

A survey conducted by the Pew Research Centre finds Americans to be mostly in favour of a trade agreement with the EU (53% of Americans would find a trade agreement between the EU and the USA 'good').³⁸ That said, anti-trade discourses have plagued the 2016 election campaigns.³⁹ However, TTIP is not at the centre of the debates, the Trans-Pacific Partnership (TPP) currently remaining the controversial trade agreement in the USA, mainly because of the fear of losing jobs to Asian countries.⁴⁰

2. Outstanding issues in the negotiations: sector analysis

2.1. Market access

2.1.1. An overview of market access for industrial and agricultural goods

On average, applied and bound Most Favoured Nation (MFN) tariffs are low, in particular for non-agricultural goods ('Non-Ag' in Table 3 below). Some gains will certainly be achieved from further liberalisation, both in terms of lower costs for sourcing of inputs and lower costs of final goods export.

Average applied tariffs (for the year 2014) and average bound tariffs⁴¹ are in general higher for the EU than for the USA, both for agricultural and non-agricultural goods (see Tables 3). While Most Favoured Nation (MFN) applied tariffs are generally low, some peaks persist in agricultural goods, as can be seen in the 2014 WTO tariff profiles reporting the frequency distribution of tariff lines (see Table 4). Tariff peaks in agricultural goods are significant in the EU, where 24.3% and 4.2% of tariff lines in 2014 were subject respectively to duties higher than 15% and higher than 50% (see Table 4). For the same year, in the USA, tariff peaks in agricultural goods were less significant, with 5.7% and 1.1% of tariff lines subject respectively to duties higher than 15% and higher than 50% (see Table 4).⁴²

The USA has an important agricultural products trade deficit with the EU. A US Department of Agriculture (USDA) study has found important increases in exports for the USA if EU agricultural market access were to be substantially liberalised.⁴³ The study finds that **if all tariff rate quotas were liberalised (scenario 1)**, US agricultural exports to the EU would increase by US\$5.5 billion from base year (2011) levels, while EU agricultural exports to the USA would increase by US\$0.8 billion. Overall, US agricultural exports would increase by 2% and agricultural imports by 1%. EU agricultural exports would decrease by 0.25%, and agricultural imports would rise by 0.5%. **If selected NTMs were also liberalised (scenario 2)**, the gains for US exports to the EU would increase by an additional US\$4.1 billion over gains under the first scenario. For the EU, the removal of NTMs would generate, under the second USDA

³⁸ [Pew Research Center report](#).

³⁹ https://ballotpedia.org/2016_presidential_candidates_on_international_trade

⁴⁰ The Economist, [Fighting the secret plot to make the world richer - As America inches towards a big trade deal with Asia, Barack Obama faces a showdown with his party](#), 2015.

⁴¹ A tariff bound is the maximum level of tariff on a product to which a WTO Contracting Party has committed within GATT. WTO Contracting Parties can always decide to apply in practice tariffs lower than the tariff bound.

⁴² [WTO 2015 Tariff Profiles](#).

⁴³ Jayson Beckman, Shawn Arita, Lorraine Mitchell, and Mary Burfisher, [Agriculture in the Transatlantic Trade and Investment Partnership: Tariffs, Tariff-Rate Quotas, and Non-Tariff Measures](#), [USDA Economic Research Report Number 198](#), November 2015.

scenario, an additional gain of US\$1.2 billion in exports to the USA. The above scenarios do not seem realistic, however, considering the current state of negotiations on both agricultural tariffs and NTMs. Agricultural market access remains one of the main offensive areas of the negotiation for the USA.

Table 3: Average EU-US tariff levels

Summary	EU					US				
	Total	Ag	Non-Ag	Other Information		Total	Ag	Non-Ag	Other Information	
Simple average final bound	5.00	12.50	3.90	Binding Coverage	100.00	3.50	4.80	3.30	Binding Coverage	100.00
Simple average MFN applied (2014)	5.30	12.20	4.20	Binding Coverage	100.00	3.50	5.10	3.20	Binding Coverage	100.00
Trade weighted average (2013)	3.60	22.30	2.30	Ag: Tariff quotas (in %)	11.30	2.20	4.10	2.10	Ag: Tariff quotas (in %)	4.50
Imports in billion US\$ (2013)	1996.50	128.70	1867.80	Ag: special safeguards (in %)	23.90	2168.20	108.80	2059.30	Ag: special safeguards (in %)	2.90

Data source: [WTO Tariff Profile](#), 2015.

Table 4: Tariff peaks in agricultural goods tariffs for the EU and the USA⁴⁴

Frequency distribution (Agricultural products)	EU Tariff lines - Agricultural Goods								
	Tariff lines and import values (in %)								NAV %
	Duty-free	0<=5	5<=10	10<=15	15<=25	25<=50	50<=100	>100	
Final Bound	32.3	10.2	16.3	12.7	11.7	9.7	3.7	0.6	32
MFN applied (2014)	31.7	10.1	17.5	13.5	11.4	8.7	3.4	0.8	31.2
Imports (2013)	46.1	11.9	13.3	7.3	7.3	3.1	4.9	6	24.6
Frequency distribution (Agricultural products)	US Tariff lines - Agricultural Goods								
	Tariff lines and import values (in %)								NAV %
	Duty-free	0<=5	5<=10	10<=15	15<=25	25<=50	50<=100	>100	
Final Bound	30.2	44.4	12.7	4.9	2.9	1.4	0.2	0.5	41.3
MFN applied (2014)	30.8	46.4	12.2	5	3.1	1.5	0.3	0.8	41.5
Imports (2013)	41	35.1	14.9	2.9	1.9	4.8	0	0.2	34.5

Data source: [WTO Tariff Profile](#), 2015.

While recognising the objective to achieve an ambitious agreement, Parliament's 2015 resolution called for a balanced approach to liberalisation. Accordingly, this resolution not only mentioned the necessity to account for the sensitivity of some products, but also suggested that negotiations should consider the maintenance of some quotas or the creation of a list of excluded goods.⁴⁵

⁴⁴ [WTO 2015 Tariff Profiles](#).

⁴⁵ EP resolution of 8 July 2015 [fn 30].

During the 11th negotiation round in October 2015, the EU submitted its second tariff offer. Both the US and EU proposals would liberalise 97% of tariff lines.⁴⁶ According to the leaked Commission document, 87.5% of tariffs lines were offered for immediate liberalisation. Apparently, the main issue in the previous months had been for the EU to try to rebalance the offers; indeed, while the offers were more or less comparable on a tariff line basis, they were unbalanced from a trade value perspective, with US offers being much lower than EU ones.⁴⁷ According to Chief Negotiator Bercero, the last round brought some progress in further improving the October 2015 offers by *inter alia* reducing transition periods for some products.⁴⁸ Michael McKeon from the Bertelsmann Foundation reports that tariff lines to be eliminated at the entry into force of the agreement were increased by 2.5% points, thus reaching 90% of tariff lines for immediate liberalisation.⁴⁹ In line with Parliament's request, 3% of tariff lines of products considered sensitive have thus far been kept out of the negotiations.⁵⁰ This 3% of tariff lines would, according to the documents leaked by Greenpeace, be mainly in agricultural products for the EU (such as meat and dairy products, sugar and rice). For the USA, these included a mix of non-agricultural (some textiles and motor vehicle lines) and agricultural products (including dairy, bovine meat, wine, sugar, chocolate and tobacco).⁵¹ Beyond the 3% currently excluded tariff lines, the October 2015 offers created a new category (called T-basket) with longer staging liberalisations. For the EU, this basket would also apparently be composed of agricultural products.⁵²

Further contentious agricultural market access issues relate to the European ban on hormone-treated beef, poultry processed with pathogens, and the European genetically modified organism (GMO) approval regime.⁵³ While US domestic lobbies are especially strongly positioned with regard to these issues, they remain controversial in the EU and the Commission does not, therefore, intend to negotiate on them. The documents leaked by Greenpeace in May 2016 show that the USA's position continues to include an article on GMOs. In a press conference, the EU Chief Negotiator stressed that this article reflects only the US position and that the EU does not intend to negotiate on GMOs.⁵⁴ As the EU is not likely to change its position on the subject, it is probable that the USA will want to use this article later in the negotiations as a bargaining chip in exchange for other EU concessions.

⁴⁶ European Commission, [Report of the 11th round of negotiations](#) for the Transatlantic Trade and Investment Partnership, 6 November 2015; European Commission, TTIP State of Play [fn2].

⁴⁷ Greenpeace-leaked document: European Commission, [EU-US revised tariff offers, October 2015](#), 20 November 2015.

⁴⁸ [Statement by Ignacio García Bercero](#), EU Chief Negotiator for TTIP on the conclusion of the 13th TTIP negotiation round, 29 April 2016.

⁴⁹ Michael McKeon, [Latest TTIP Round Yields Progress, Gridlock](#), Brief, Bertelsmann Foundation, May 2016.

⁵⁰ [Statement by Ignacio García Bercero](#), EU Chief Negotiator for TTIP on the conclusion of the 13th TTIP negotiation round, 29 April 2016.

⁵¹ Greenpeace-leaked document: European Commission, [EU-US revised tariff offers, October 2015](#), 20 November 2015.

⁵² Idem.

⁵³ The recent modification of the European GMO regime, allowing Member States to decide whether to allow access of GMO products to their markets, has obviously raised US objections. [USTR press release](#), April 2015.

⁵⁴ EU Chief Negotiator Bercero's speech on the 13th round of negotiations for the Transatlantic Trade and Investment Partnership (TTIP), European Commission technical briefing on-the-record on the 13th TTIP negotiation round debriefing ([video](#) last accessed on 26 May 2015).

Finally, US concerns regarding agricultural product market access also stem from EU geographical indications (GI) measures. The US cheese industry lobbies heavily against GIs, and the US wine industry is fearful of changes to the 2006 US-EU Agreement on Trade in Wine.⁵⁵ The latter agreement will definitely be included in the TTIP, alongside the 1994 bilateral agreement on the mutual recognition of certain spirits. However, the latter agreement only recognised the names of six spirits, while 17 EU wine names were acknowledged only as 'semi-generic' under the 2006 Wine Agreement.⁵⁶ Therefore, the EU aims to extend the protection to other products, including 22 additional spirits names and the 17 wine names currently marked as 'semi-generic' under the 2006 Wine Agreement, as well as to add protection for some 201 other food products.⁵⁷ Some of these 17 EU wine names were given protection under CETA after a transitional period.⁵⁸

Table 5: Geographical Indications protected in selected EU agreements

	Total GIs	Wines and spirits***	Food****
US-EU Agreement on wine (2006)	1409	1409*	0
US-EU Agreement on mutual recognition of spirits (1994)	6	6	0
EU proposal for TTIP (2016 version)	1646	1445	201
CETA	1781	1606**	175
EU-South Korea	165	105	60
EU-Singapore	196	113	83

* This number includes all wines listed in Annex IV of the 2006 US-EU Agreement on Trade in Wine. Nine of these wines' names are also included under Annex II of the 2006 US-EU Agreement on Trade in Wine and are therefore considered semi-generic

**This number only includes the wines 'names contained in Annex III(a) and the spirits listed in Annex IV(a) of the 2004 EU-Canada Agreement on wines and spirit. The latter agreement having been concluded before 2004, the annexes don't include the names of wines and spirits from the new Member States which might have been protected under that agreement after their accession to the EU.

***For the sake of these calculations: sub-regional names were counted whenever the latter could be used independently from a regional wine name; whenever a wine name had several spelling or denominations it was counted only once.

****All the food names listed in the relevant annexes were included (whether or not protection for that name was granted fully or partially)

Data sources: Author from [CETA draft treaty](#); [EU-Canada Agreement on wines and spirit](#) (2004); [EU-Singapore draft treaty](#); [EU South-Korea FTA](#); EU TTIP proposals for a) [foodstuffs](#) and b) [spirits](#), March 2016 version; [US-EU Agreement on wine](#) (2006); [EU-US Agreement on mutual recognition of certain distilled spirits/spirits drinks](#) (1994).

2.1.2. Rules of origin

The rules of origin systems in EU FTAs and US FTAs are very different.⁵⁹ As of the 11th round, work has started on a consolidated text for horizontal rules governing origin.⁶⁰

⁵⁵ For further information, regarding the US wine sector position and GI, refer to: R. Johnson, *The US Wine Industry and Selected Trade Issues with the European Union*, CRS Report, April 2015.

⁵⁶ The 17 EU wine names are contained in Annex II of the 2006 Wine Agreement and include: *Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry and Tokay*. Unlike other wine names in the agreement, these 17 names are not currently given exclusive rights. Therefore a non-EU originating bottle can still use one of these names as long as the name is used on bottles for which the specific label (COLA) was approved before 10 March 2006.

⁵⁷ For documents on the EU position with respect to GIs, refer to the Commission [Position Paper on Geographical Indications](#) (March 2016).

⁵⁸ [CETA draft treaty](#).

⁵⁹ Stefano Inama, *Rules of Origin in International Trade*, Cambridge University Press, 2011; Laura Puccio, [Building bridges between regionalism and multilateralism: enquiries on the ways and means to internationally regulate preferential rules of origin and their impact on systemic problems of FTA](#), EUI Thesis – Cadmus Repository, 2013.

The EU is searching for compromises on how to write general principles shared by both the USA and the EU. Discussions continue also on areas, such as administrative procedures and rules of origin for textiles, where there is more divergence.⁶¹ Another area, which may lead to future discussions as negotiations on product specific rules advance, concerns valuation rules in the automotive sectors. No information has been issued on whether the EU proposal for a future possible 'cumulation of origin' with other trade partners (such as Mexico and Canada) has been dropped. This kind of provision has been included in the draft CETA.⁶²

2.2. Trade in services

2.2.1. *An overview of trade in services*

Trade in services is particularly important for the USA: TTIP would represent its largest market for services.⁶³ Services are also the main sector of EU inward foreign direct investment (FDI) from the USA. For this reason, the USA would like to see more openness from the EU on services. Up to now, the EU has fostered greater openness through individual FTAs than through the GATS system. The USA is therefore negotiating for increased market access through TTIP and the Trade in Services Agreement (TiSA). Services liberalisation has been encouraged in US trade agreements through a negative approach,⁶⁴ considered as the more comprehensive liberalisation technique. Until recently, the EU favoured a positive approach to liberalisation⁶⁵ but used a negative approach in CETA and proposed a hybrid approach in its July 2015 TTIP offer.⁶⁶

The hybrid approach adopted in the EU's July 2015 offer suggests using a positive approach for market access liberalisation, involving granting such liberalisation only to sectors listed in Annex III and subject to the limitations mentioned therein.⁶⁷ A negative approach was proposed for commitments with respect to the National Treatment and Most Favoured Nation (both for investment and for cross-border services) and also for investment commitments relating to performance requirements or principles applying to senior management and board of directors requirements. To implement the negative approach, two annexes provide for exceptions to liberalisation:⁶⁸

- Annex I, lists all the existing measures in the EU or in specific Member States that do not comply with all or some of the above-mentioned principles and that the EU or its Member States want to keep after the entry into force of the agreement. Measures listed in this annex are subject to the 'ratchet' clause, that

⁶⁰ European Commission, TTIP State of Play [fn2].

⁶¹ European Commission, [Report of the 13th round of negotiations](#) – for the Transatlantic Trade and Investment Partnership, 2016, hereafter referred as Commission report of the 13th TTIP negotiation round [fn 61].

⁶² Article 3 of the [CETA](#) Protocol on rules of origin and origin procedures;

⁶³ S. I. Akhtar and V. C. Jones, [Transatlantic Trade and Investment Partnership \(TTIP\) Negotiations](#), CRS Report, June 2014.

⁶⁴ In a negative approach to services liberalisation, a general obligation to liberalise is introduced which is then restricted by a list of specific exceptions.

⁶⁵ In a positive approach, no commitment has been made unless it is explicitly specified in the commitments list.

⁶⁶ [EU offer in services and investments](#), July 2015; see also the [Reading guide](#) produced by the European Commission's DG Trade.

⁶⁷ European Commission, [Reading of the EU service Schedule in TTIP/TISA](#) (accessed May 2016).

⁶⁸ European Commission, [Reading guide – Publication](#) of the EU proposal on services, investment and e-commerce for the Transatlantic Trade and Investment Partnership, July 2015.

is, if these measures were to be lifted, then neither the EU nor the specific Member States could reintroduce them later on.

- Annex II, lists all the existing measures or measures that can be introduced in the future that do not comply with the above-mentioned principles (NT, MFN and performance and senior management investment requirements). These measures are not subject to the ratchet clause and can be introduced and reintroduced at any time in the future.

Liberalisation commitments and reservations respectively under Annex III and Annexes I and II are made at EU level (which binds or introduces a reservation also for Member States) or by one or more Member States (in which case the reservation only refers to the Member States concerned). These liberalisation commitments and reservations can be made with respect to particular modes of services, of which there are four, as in the GATT system: mode 1 corresponds to cross-border trade in services; mode 2 corresponds to consumption abroad; mode 3 is establishment; mode 4 relates to movements of natural persons supplying the service.⁶⁹

Another issue concerning services is the definition of new services,⁷⁰ where the USA wants to discuss what parties understand by this notion. In general, new services are exempted from commitments on National Treatment, MFN and Market Access and also from commitments with regards to domestic regulation (that is, licensing and authorisation requirements).⁷¹ In the FTAs it has concluded thus far, the EU has applied the 1991 United Nations Provisional Central Product Classification (CPC) to define new services, meaning that any goods not included in the 1991 CPC are considered as a new service.⁷² This definition is challenged by the USA. In its resolution of July 2015, the Parliament requested that new services be excluded, without specifying the definition of new services.⁷³

Another important point concerning market access for services are professional qualifications. Parliament's July 2015 resolution called on the Commission to strive hard to obtain mutual recognition of professional qualifications, as these can act as barriers to services provided by professionals and high-skilled labour.⁷⁴ So far, progress has been achieved for architects and auditing professionals. The USA had requested greater involvement of EU Member States to deal with qualifications not harmonised at EU level. The EU's proposal suggested incorporating in the Treaty both an annex with mutual recognition granted during the negotiations and a mechanism allowing for future mutual recognition to be granted under the TTIP framework.⁷⁵ The EU and the USA are currently

⁶⁹ For examples of the different service modes refer to: European Commission, [Reading of the EU service Schedule in TTIP/TISA](#) (accessed May 2016); Laura Puccio, [TTIP and regulation of financial markets – Regulatory autonomy versus fragmentation](#), European Parliamentary Research Service, June 2015, hereafter L. Puccio, TTIP and regulation of financial markets [fn 69].

⁷⁰ The definition of new services can be particularly important in a chapter on service liberalisation, as new services may receive a particular treatment; for example, in the CETA Chapter on cross-border trade in services, parties are allowed to derogate from market access rules or non-discrimination rules (national treatment and MFN) when regulating new services. Refer to the understanding included in the draft [CETA](#) (Annex X on cross-border trade in services).

⁷¹ Understanding included in the draft [CETA](#) on Annex 9-B Understanding on New Services not classified in the United Nations provisional Central Product Classification (CPC), 1991.

⁷² *idem*.

⁷³ EP resolution of 8 July 2015 [fn 30].

⁷⁴ *idem*.

⁷⁵ Textual proposal of the EU for the TTIP [Chapter on services and investments](#), July 2015.

discussing how to design this framework for future Mutual Recognition Agreements (MRAs), so that it is compatible with both parties' regulatory systems.⁷⁶

2.2.2. Public-private sector

One of the main points of contention in the domain of services is the relationship between private and public services. The USA would like non-discrimination to apply and therefore wants equal competition for, and openness to, private sector services. The EU and the USA have, however, issued a joint statement on public services, which clearly reaffirms: that governments have a right to provide public services; that nothing in TTIP will amount to an obligation to privatise; and that countries retain the discretion to define the public-private balance.⁷⁷ In its July 2015 resolution, Parliament welcomed the above statement and further clarified its understanding of what the meaning of the public sector exclusion should be: national and local authorities retain the full right to modify and introduce provisions with respect to the commissioning, organisation, funding and provision of public services. The text also contained a non-exhaustive list of areas to be covered by the exclusion.⁷⁸ The EU's July 2015 offer incorporates public sector exclusion in several reservations to liberalisation commitments (see Table 6 below).⁷⁹ Reservations on NT, MFN, Performance Requirements and Senior Management requirements are contained in Annex II and therefore would not be subject to the ratchet clause.

Table 6: General EU-level reservations for public services in the EU 2015 offer on services and investments:

Annex	Sector	Reservation number/Limitation
Annex II: reservation on NT, MFN, Performance Requirements, Senior Management and Boards of Directors	Education	Reservation 17
Annex II: reservation on NT, MFN, Performance Requirements, Senior Management and Boards of Directors	Water (collection, purification and distribution of water, including provision of drinking water and water management)	Reservation 18
Annex II: reservation on NT, MFN, Performance Requirements, Senior Management and Boards of Directors	Health and social services	Reservation 20
Annex III limitations on market access	All sectors	Limitation on Establishment (3) in the EU: Activities considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators ⁸⁰

Data source: [EU July 2015 offer for services and investments](#).

⁷⁶ European Commission, [Report of the 12th negotiation round for the Transatlantic Trade and Investment Partnership](#), 23 March 2016.

⁷⁷ [EU-US Joint Statement on Public Services](#), March 2015.

⁷⁸ EP resolution of 8 July 2015 [fn 30].

⁷⁹ [EU offer in services and investments](#), July 2015.

⁸⁰ Public utilities exist in sectors such as related scientific and technical consulting services, research and development services in the context of social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific listing is not practical. This limitation does not apply to telecommunications services and to computer and related services.

2.2.3. Financial services

Financial services are equally important for the USA and the EU (see Table 7 below). Financial services are one of the major sectors of US FDI in the EU.⁸¹ Negotiators agreed, during the 12th round, on a structure for the Financial Services Chapter and made progress on the scope, rules and exceptions.⁸² However, the USA still excludes cooperation on financial regulation issues as requested by the EU. Indeed, the EU requested inclusion of cooperation on prudential regulation in TTIP due to the divergence and incompatibility of some EU and US regulations. Prudential regulations often include extraterritoriality provisions, making compliance extremely costly and difficult for firms operating on both sides of the Atlantic.⁸³ The EU's TTIP proposal on financial services⁸⁴ originally included discussions regarding the introduction of provisions aiming at more systematic cooperation and facilitating the negotiation process toward recognition, such as: 1) timely adoption of international standards; 2) mutual consultation before adopting new measures; 3) joint examination of existing rules; and 4) assessing possibilities for equivalence.

The USA finds the Commission's second proposed measure, which suggests mutual consultation before adopting new measures, particularly controversial. Some US observers have seen an *ex-ante* mutual consultation as a potential factor for a delay in the implementation of the Dodd-Frank Act. The USA may be open to discussing an *ex-post* consultation mechanism similar to the existing EU-US Financial Market Regulatory Dialogue.

Table 7: US financial and insurance services trade with the EU and the world (in US\$ million)

	Exports			Imports		
	2013	2014	Percentage in total US financial service exports	2013	2014	Percentage in total US financial service imports
Financial Services						
All countries	84 091	87 290	100.00	18 519	19 503	100.00
European Union	31 806	34 245	39.23	8 812	9 349	47.94
Insurance Services	2013	2014	Percentage in total US insurance service exports	2013	2014	Percentage in total US insurance service imports
All countries	17 058	17 417	100.00	53 420	50 096	100.00
European Union	3 655	3 421	19.64	11 977	11 843	23.64

Data source: [Bureau for Economic Analysis \(BEA\)](#), 2015.

2.2.4. Audiovisual

Two further contentious areas in services are the audiovisual sector and the digital services sector. The USA is aware that the EU will not negotiate on audiovisual services in TTIP, as these fall outside the Commission's negotiating mandate. The USA is,

⁸¹ Laura Puccio, [Investment rules in trade agreements](#) – Evolution and issues in light of the TTIP debate, EPRS, (September 2015), hereafter L. Puccio, Investment rules in trade agreements [fn 81].

⁸² European Commission, [Report of the 12th negotiation round for the Transatlantic Trade and Investment Partnership](#), 23 March 2016.

⁸³ L. Puccio, TTIP and regulation of financial markets [fn 69].

⁸⁴ The EU proposal for [Financial Service Regulation Cooperation](#) in the TTIP.

however, concerned that there are no discussions on the definition of audiovisual services (and therefore on the scope of that exception). In its July 2015 resolution, Parliament specified what it considered as being a part of this broader cultural exception.⁸⁵ The exclusion was introduced in the EU textual proposal on services and investments as an exception to the scope of the chapter on investment, cross-border services and electronic commerce (see Table 8 below). Moreover, the provisions protecting the state's right to regulate include the protection of cultural heritage in the listed policy objective (see Table 8 below).

Table 8: Excerpts from the EU proposal concerning the audiovisual and cultural exception in relation to the chapter on services and investments:

Chapter and article	Sub-paragraph and text
Scope exclusion	
Chapter II on Investments - Section 1 Liberalisation of Investments, Article 2-1 on scope:	<i>(2) The provisions of this Section shall not apply to audio-visual services.</i>
Chapter III on Cross-Border supply of services, Article 3-1 on scope	<i>(2) The provisions of this Section shall not apply to audio-visual services.</i>
Chapter VI on electronic commerce, Article 6-1 on objective and scope	<i>(3) The provisions in this chapter shall not apply to gambling services, broadcasting services, audio-visual services, services of notaries or equivalent professions and legal representation services</i>
Regulatory Freedom and cultural exception	
Chapter I general provisions, Article 1-1 Objectives, coverage and definitions	<i>(1) Consistent with the provisions of this Title, each Party retains the right to adopt, maintain and enforce measures necessary to pursue legitimate policy objectives such as protecting society, the environment and public health, consumer protection, ensuring the integrity and stability of the financial system, promoting public security and safety, and promoting and protecting cultural diversity.</i>
Chapter V on regulatory framework, Article 5-2	<i>(6) Subject to the provisions specified by this Article, in establishing the rules for the selection procedure, each Party may take into account legitimate public policy objectives, including considerations of health, safety, consumer protection, the protection of the environment and the preservation of cultural heritage.</i>

Data source: EU textual proposals for TTIP [chapter on Services and Investments](#), July 2015.

2.2.5. Digital Services and cross-border data flows

Digital services and cross-border data flows are one of the main US negotiating objectives within the TPA.⁸⁶ In particular, the TPA objectives in this area would require US agreements to ensure that governments refrain from implementing measures that impede digital trade and restrict data flows or require local storage or processing of data in order to conduct business. The USA introduced this new objective on preventing local data location conditions also in the draft TPP.⁸⁷ Even though TPP provisions allow for measures inconsistent with the prohibition of data location requirement to fulfil legitimate public policy purposes, as long as the measure is proportional and necessary, the EU is wary that such a provision could be inconsistent

⁸⁵ EP resolution of 8 July 2015 [fn 30].

⁸⁶ See the TPA negotiating objectives [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

⁸⁷ See [TPP Article 14.3](#); see also: Krisztina Binder, [The Trans-Pacific Partnership \(TPP\): Potential regional and global impacts](#), European Parliamentary Research Service, May 2016.

with EU data protection laws. Currently, negotiations on cross-border data flows and digital services within TTIP have been put on hold until the privacy issues on transatlantic data flows are resolved.⁸⁸ In its July 2015 resolution, Parliament went so far as to link its consent to TTIP to the dismantling of US mass surveillance programmes and the introduction of a proper redress mechanism for EU citizens.⁸⁹

Negotiations on how to solve transatlantic data protection issues have advanced on several fronts. First of all, in September 2015, the EU and the USA concluded negotiations on an Umbrella Agreement on data privacy and protection (DPPA), with the intention of sharing some key principles in data protection, such as judicial redress.⁹⁰ In February 2016, the US Congress passed the Judicial Redress Act of 2015,⁹¹ extending the citizens' remedies rights under the Privacy Act to citizens from a 'covered country'; this framework could be used to enhance EU citizens' redress rights to protect their data privacy and is a prerequisite for the EU's adoption of the Umbrella Agreement. The Umbrella Agreement will have to be subject to Parliament's consent before entering into force. Finally, the Privacy Shield agreement was concluded to replace the Safe Harbour agreement after its annulment by the Court of Justice of the European Union (CJEU);⁹² accordingly, a new Commission adequacy decision was written.⁹³ The Article 29 Working Group issued a mixed opinion.⁹⁴ The Parliament adopted a (non-binding) resolution on 26 May 2016 and called on the Commission to further negotiate improvements to the Privacy Shield with the USA and to fully implement the recommendations of the Article 29 Working Group.⁹⁵ On 8 July 2016, The Article 31 Committee approved a modified Commission adequacy decision.⁹⁶

2.3. Public procurement

Public procurement markets represent 13% and 17% of GDP (OECD, 2013) respectively for the USA and the EU.⁹⁷ Liberalisation of public procurement is of particular importance for the EU, which considers to have substantially opened up its public procurement market, whilst it sees the USA's liberalisation of its own procurement market as insufficient.⁹⁸ Progress in these discussions has been slow and the EU Chief

⁸⁸ European Commission, TTIP State of Play [fn2].

⁸⁹ EP resolution of 8 July 2015 [fn 30].

⁹⁰ EU-US [Umbrella Agreement](#) on Data Privacy and Protection.

⁹¹ [Judicial Redress Act](#) of 2015.

⁹² Judgement of 6 October 2015, [M. Schrems vs Data Protection Commissioner](#), C-362/14, EU:C:2015:650; Shara Monteleone and Laura Puccio, [The CJEU's Schrems ruling](#) on the Safe Harbour Decision, European Parliamentary Research Service, October 2015.

⁹³ [Commission implementing decision](#) pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield and its [related annexes](#); see also: Shara Monteleone, [Transatlantic data flows](#), European Parliamentary Research Service, May 2016.

⁹⁴ Article 29 Working Group, [Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision](#), 13 April 2016.

⁹⁵ European Parliament resolution of 26 May 2016 on transatlantic data flows ([2016/2727\(RSP\)](#)).

⁹⁶ Please refer to the [Comitology register](#).

⁹⁷ S. Woolcock, [TTIP: Opportunities and Challenges in the area of Public Procurement](#), Directorate General for Internal Policies – European Parliament, June 2015.

⁹⁸ The liberalisation of the US procurement market has been found to be less comprehensive: S. Woolcock and J. Heilman Grier, [Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations](#), CEPS, February 2015.

Negotiator mentioned in his concluding speech to the 13th negotiation round that further progress on this chapter – as on the chapters on tariffs or services – is required to reach the end of the negotiations.⁹⁹

During the 12th negotiation round, the main issues brought up by the EU were:¹⁰⁰

- The introduction of new restrictions, in particular regarding state projects that utilise federal 'flow-down' funds, or money provided by the US Government to states and local projects. One of these measures is the FAST ACT,¹⁰¹ signed into law in December 2015 by US President Obama. The FAST ACT gives the US Federal Government funding up to US\$305 billion for state and local-government projects to improve the US public transportation systems over the next five years. The act would increase the Buy American requirement to 70% from 60% value content requirement. The Buy American Act is waived for the USA's GPA and FTA partners but only for federal-level procurement. On these grounds, the EU would like to be granted access to US public procurement contracts in the field of rail and transportation.
- Discussions continued on the issue of expanded market access commitments, both at federal and local level. The main problem for the USA remains that the procurement market is divided between a federal procurement market, which can be opened by the federal government, and a state procurement market, which remains a prerogative of the states (according to the constitutional division of competence between federal and state level). About 65% of US public procurement is at the sub-federal level (either state or local government level).¹⁰² The US Constitution remains above US-concluded treaties; therefore the USA can only open federal-level procurement and cannot impose the opening of state and local-level public procurement. The USA had already involved its states in the GPA.¹⁰³ Of the 50 US states, 37 agreed to comply with the GPA.¹⁰⁴
- Finally, the EU wanted to strive for the inclusion of some central government entities that were excluded from the US GPA commitments (covering 89 entities listed in Annex 1 of the US GPA Appendix 1), among which entities subordinated to the central government, such as the Federal Aviation Administration.¹⁰⁵

For its part, the USA would like to see access to utilities procurement covering purchase of water, energy, urban transport and postal services.¹⁰⁶ Currently, bids in these areas would need 50% of EU content unless products originate from countries covered by an

⁹⁹ [Statement by Ignacio García Bercero](#), EU Chief Negotiator for TTIP on Conclusion of the 13th TTIP Negotiation Round, 29 April 2016.

¹⁰⁰ European Commission, [Report of the 12th negotiation round for the Transatlantic Trade and Investment Partnership](#), 23 March 2016.

¹⁰¹ The Fixing America's Surface Transportation Act ([FAST Act](#)).

¹⁰² S. Woolcock, [TTIP: Opportunities and Challenges in the area of Public Procurement](#), Directorate General for Internal Policies – European Parliament, June 2015.

¹⁰³ For more information on the GPA, see the [WTO website](#).

¹⁰⁴ Refer to [Annex 2 of the US Appendix to](#) the GPA.

¹⁰⁵ Richard Craven, [Chapter 5. The Public Procurement Chapter of the TTIP](#): the potential for further market access, 26 September 2014.

¹⁰⁶ S. I. Akhtar, V. C. Jones and R. Johnson, Transatlantic Trade and Investment Partnership (T-TIP) Negotiations, CRS Report, February 2016.

international or bilateral agreement which has granted EU undertakings similar access to the public utilities procurement market.¹⁰⁷

2.4. Energy markets

The EU has proposed the introduction of a distinct chapter on energy and raw materials with the main aim of including specific liberalisation provisions focused on achieving open, competition-friendly and rule-based market access. That way, the EU aspires to gain access to the US crude oil and liquefied natural gas market, among other things with a view to diversifying energy supplies. The USA currently grants its FTA partners an expedited procedure for exports of liquefied natural gas and the question of whether it should grant further preferential access has been debated in Congress.¹⁰⁸ Yet another aim of the EU's proposed chapter on energy and raw materials has been to provide a framework for discussions on energy efficiency, sustainability and green policy.

Discussions on this chapter are still ongoing and there is no clear idea on how it could be framed. The USA has not yet committed to accepting a separate chapter on energy.¹⁰⁹ It remains cautious about such a chapter,¹¹⁰ as it does not want it to become an exception within the commercial chapters, the main question for the US side being to understand why the EU wants a separate chapter to deal with energy, what its scope should be (should it be broader than just gas and oil?), and how it should be written and subsequently incorporated within the rest of the agreement. Some discussion on these issues took place during the 13th negotiating round.¹¹¹ A major US interest concerns natural gas market access (licences granted on a national treatment basis and without delays). Regulators could be involved in the discussions as of the 14th round.¹¹²

In its July 2015 resolution, Parliament supported the Commission's initiative on dedicating a specific chapter to energy. It said that this should include, *inter alia*: rules facilitating energy exports and creating a competitive, transparent and non-discriminatory energy market; rules supporting diversification of energy sources and contributing to security of supply, while at the same time ensuring the right of parties to govern and regulate the exploitation and production of energy, as well as ensuring that legitimate, non-discriminatory democratic decisions regarding energy production and environmental standards are not undermined; rules promoting green goods and services; and finally, rules to ensure that TTIP serves as a forum for the development of sustainability standards for energy production and efficiency.¹¹³

2.5. Small and medium-sized enterprises

Both the USA and the EU attach importance to a chapter on small and medium-sized enterprises (SMEs). Table 9 below, taken from a study by the Commission, provides

¹⁰⁷ Article 58 of [Directive 2004/17/EC](#) of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, (2004) OJ L 134/1.

¹⁰⁸ S. I. Akhtar, V. C. Jones and R. Johnson, Transatlantic Trade and Investment Partnership (T-TIP) Negotiations, CRS Report, February 2016.

¹⁰⁹ Commission report of the 13th TTIP negotiation round [fn 61].

¹¹⁰ Intervention by the US negotiator at the [Ninth negotiating round press conference](#).

¹¹¹ Speech by the EU Chief Negotiator at the [final press conference of the ninth negotiating round on 24 April 2015](#).

¹¹² Commission report of the 13th TTIP negotiation round [fn 61].

¹¹³ EP resolution of 8 July 2015 [fn 30].

data on the importance of SMEs in EU trade with the USA. Although their traded value only represents 28% of the total number of EU companies exporting to the USA, 88% of these companies are SMEs.¹¹⁴ However, in some EU countries, SMEs are important in terms of exporter numbers as well as trade value (this is true for the Netherlands, Italy, Ireland, Spain, Estonia and Latvia).¹¹⁵ SMEs are also important for the USA.¹¹⁶

Table 9: Breakdown of the total number and value of EU companies exporting goods outside the EU and to the USA by size category¹¹⁷

	1-250 workers (SME)	250+ workers (large)	Unknown size	Total EU firms	Share of SMEs (1-249) to total firms
Number (in thousands)					
Exporters outside the EU	619	24	147	790	78%
Exporters to the USA	150	14	6	169	88%
Value (billion euros)					
Exporters outside the EU	538	945	207	1 690	32%
Exporters to the USA	77	187	13	277	28%

Data source: [European Commission](#), 2015.

The proposal, submitted only by the EU, includes incorporating discussions on SMEs that have (already) taken place under the Transatlantic Economic Council (EU-US SME Dialogue) and supplementing them with an exchange of information and data on market access for SMEs.¹¹⁸ In its July 2015 resolution, Parliament suggested introducing further features, such as the proposal for fast-track procedures and a forum to engage SME stakeholders.¹¹⁹ Currently, the parties are discussing a full consolidated text with a predominant focus on how to share information in a user-friendly manner with SMEs. This chapter will be linked to provisions that, although laid out in other TTIP chapters, ensure benefits for SMEs. For example, some SME-specific provisions are discussed in the framework of the Public Procurement Chapter, where parties are discussing the possibility of a help and info-desk dedicated to SMEs.¹²⁰

2.6. Investment Chapter (including ISDS-related issues)

Investments remain an important area of transatlantic relations¹²¹ and therefore market access and protection is critical to EU-US economic relations. Initially, investment agreements were negotiated by Member States, but after the Lisbon Treaty made foreign direct investments an EU competence, agreements related to them also fell within it. Therefore, the EU has introduced investment chapters in its recently

¹¹⁴ Commission report on SME [fn 5]

¹¹⁵ Idem.

¹¹⁶ [USTR website on SMEs](#), last accessed on 30/06/2016.

¹¹⁷ Commission report on SME [fn 5]

¹¹⁸ For the textual proposal submitted by the EU on SMEs, refer to the DG Trade [website](#) outlining the EU's negotiating positions.

¹¹⁹ EP resolution of 8 July 2015 [fn 30].

¹²⁰ Commission report of the 13th TTIP negotiation round [fn 61].

¹²¹ O. Maisse, G. Sabbati and L. Bartolini, [US: Economic indicators and trade with the EU](#), European Parliamentary Research Service and GlobalStat (July 2016).

concluded negotiations with Canada, Singapore and Vietnam and is discussing the introduction of such a chapter in the future EU-Japan FTA.¹²²

The TTIP Investment Chapter attracted much public debate in Europe and became one of the most controversial issues in the negotiations, with some even challenging the necessity for investment protection chapters in agreements between developed countries. Criticism on arbitration and bilateral investment protection provisions is not limited to the EU, but is also present in the USA.¹²³ Currently, 21 EU Member States have investment protection provisions in bilateral agreements with the USA; apart from the nine bilateral investment treaties concluded at the beginning of the 1990s between the USA and some of the EU's central and eastern European Member States, all other bilateral agreements date back to pre-1970s and do not reflect the more recent models of international investment provisions.¹²⁴

The US and EU approaches to reforming investment provisions have been different, making negotiations in this sector more difficult. While the US aims to reform substantive rules¹²⁵ so that discretion of arbitrators in interpreting the investment protection chapter would be limited, it does not feel the necessity to substantially modify the procedural rules of arbitration.¹²⁶ At the same time, the 2015 TPA includes in the US trade objective the revision of the ISDS mechanism and the introduction of an appellate mechanism.¹²⁷ On the other hand, the EU wants to address both the substantive law on the protection of investments and the ISDS procedural rules. After a public consultation at the end of 2013, the EU had to suspend discussions on the chapter in order to find new consensus on an EU approach to the ISDS reform. Parliament's July 2015 resolution rejected the use of arbitration for ISDS and called for the institution of an investment court.¹²⁸ The Commission issued a new proposal for such a court in September 2015 and restarted negotiations with the US on that chapter in February 2016.¹²⁹

Discussions in the area of investment restarted by concentrating first on investment liberalisation and substantive protection rules covering both definitions and reservations.¹³⁰ Progress was made on consolidating texts where the EU and the US have fairly similar approaches, such as for expropriation and compensation for

¹²² European Commission – [Press release CETA](#): EU and Canada agree on new approach on investment in trade agreement, 29 February 2016; [Text](#) of the Comprehensive Economic and Trade Agreement between the EU and Canada; Text agreed as of January 2016 for the [EU-Vietnam Free Trade Agreement](#) (currently undergoing legal revision); [Report of the 16th EU-Japan FTA/EPA negotiating round](#), Tokyo, 11–20 April 2016.

¹²³ For a summary of the critical stances, see: Marta Latek, [Investor-State Dispute Settlement \(ISDS\) – State of play and prospects for reform](#), EPRS, January 2015; Ortolani et al. (2014), [Legal Instruments and Practice of Arbitration in the EU, European Parliament](#) – Policy Department on Citizens' Rights and Constitutional Affairs; L. Puccio, Investment rules in trade agreements [fn 81].

¹²⁴ L. Puccio, Investment rules in trade agreements [fn 81].

¹²⁵ idem

¹²⁶ The USTR position can be found on the USTR [website](#). Further information on ISDS can be found [on the USTR blog](#).

¹²⁷ [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

¹²⁸ EP resolution of 8 July 2015 [fn 30].

¹²⁹ European Commission, TTIP State of Play [fn2].

¹³⁰ Commission report of the 13th TTIP negotiation round [fn 61].

losses.¹³¹ Discussions mainly focused instead on those areas where differences are more important, such as on the issues of national treatment and fair and equitable treatment (FET).¹³² With respect to national treatment, the US has been addressing issues regarding restrictions of foreign ownership in the area of aviation, communication, government contracting, maritime activities, mining and natural resources, where national security reasons allow for discriminatory treatment.¹³³ The USA and the EU applied different approaches to reforming the FET provisions. As a result of certain NAFTA cases, the USA limited the application of the FET provisions to the 'minimum standard of treatment of aliens' in international customary law. In contrast, the EU proposals for the FET provisions did not refer to the quality of the protection as much as to delimiting the scope of application of the provisions by listing all the measures that can constitute an FET violation.¹³⁴ Another contentious area on substantive rules could be the issue of how to write the provisions protecting the regulatory prerogatives of the state. In its proposal, the EU included a new provision dealing specifically with the right of states to regulate. This provision has been criticised by some US firms for being far too broad.¹³⁵

On ISDS, discussions restarted during the last round. The EU's procedural concerns regarding arbitration are not totally shared by the USA. The USA is convinced that safeguards on the interpretation of substantive rules and some procedural reforms will suffice to tackle the ISDS issues, as they limit discretion of arbitrators, guaranteeing the rights of states to regulate as well as avoiding forum-shopping or frivolous suits. Furthermore, the USA favours the ICSID as a forum for arbitration.¹³⁶ As the USA has always won arbitration cases, originally it was opposed to the idea of an appellate body in ISDS procedures.¹³⁷ However, the TPA 2015 includes in its foreign investment objective the introduction of an appellate body.¹³⁸ Still, the question of the scope of appellate review might remain controversial, as the USA might favour a narrower scope and the EU a broader one (such as the provision introduced in CETA).¹³⁹ Notwithstanding the above, the two parties discussed the proposal for an investment tribunal as submitted by the EU in detail.¹⁴⁰ The proposal to create a first instance tribunal and an appellate tribunal was submitted after the Parliament rejected the use

¹³¹ *idem*; L. Puccio, Investment rules in trade agreements [fn 81].

¹³² *idem*; L. Puccio, Investment rules in trade agreements [fn 81].

¹³³ S. I. Akhtar, V. C. Jones and R. Johnson, Transatlantic Trade and Investment Partnership (T-TIP) Negotiations, CRS Report, February 2016.

¹³⁴ L. Puccio, Investment rules in trade agreements [fn 81].

¹³⁵ Such an example is the [response of the American Chamber of Commerce to the European Union](#) (AmChamEU) to the EU proposal on the investment court.

¹³⁶ The USTR's position can be found on its [website](#). More information on ISDS can be found on the [USTR blog](#).

¹³⁷ *idem*.

¹³⁸ The 2015 Trade Promotion Authority bill: [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#); M. Del Monte and L. Puccio, Role of US Congress in trade agreements [fn 37].

¹³⁹ Article 29 of the [EU proposal on investment protection](#) for TTIP negotiations; [Text](#) of the Comprehensive Economic and Trade Agreement between the EU and Canada (see Article 8.28(2) CETA).

¹⁴⁰ Commission report of the 13th TTIP negotiation round [fn 61].

of arbitration in TTIP and asked the Commission to create a new system with independent and professional judges.¹⁴¹

Beyond the proposal for setting up an investment court, the negotiating parties discussed other procedural issues which enjoy greater convergence of negotiating positions and are independent of the choice of dispute settlement fora, such as: multiple claims consolidating procedures, early dismissal of unfounded claims, appointments of experts to report, relation between investor-state dispute settlement mechanisms and state-to-state dispute settlement (SSDS).¹⁴²

2.7. Regulatory issues

Potential gains from TTIP would stem primarily from the reduction of tariffs, elimination of non-tariff barriers (NTBs) to trade in goods and in services, and from opening up public procurement. The study commissioned by the Commission on non-tariff measures (NTMs) under TTIP finds that there are substantial economic benefits to be reaped from reducing the trade costs of transatlantic regulatory divergences. For the EU, removing all actionable NTMs¹⁴³ would translate into an increase in GDP (€122 billion a year) and exports (+2.1%).¹⁴⁴ Sector-wise, EU benefits would come mainly from gains in trade in motor vehicles, chemicals, pharmaceuticals, food and electrical machinery.¹⁴⁵ For the US, benefits from removing actionable NTMs are estimated at €41 billion a year for GDP and 6.1% for exports. US benefits would mainly accrue to the electrical machinery, chemicals, pharmaceuticals, financial services and insurance sectors.¹⁴⁶

The 2015 TPA stipulated regulatory convergences as one of the key objectives in FTA negotiations.¹⁴⁷ Parliament's July 2015 resolution recognised the importance of regulatory cooperation and encouraged the adoption of disciplines aiming at 'regulatory coherence and transparency for the development and implementation of efficient, cost-effective and more compatible regulations'. At the same time, it also recalled that chapters on regulatory cooperation must secure the highest level of protection in line with the precautionary principle and in full respect of regulatory autonomy, the regulatory systems on both sides of the Atlantic, and the Parliament's role. The Commission stated that any EU-US cooperation should respect the following five principles: 1) at least enhancement or maintenance of existing levels of protection; 2) respect for the existing legislative processes and accountability; 3) transparency; 4) regulators will identify areas for cooperation where regulations are similar and where benefits can be ensured for citizens and business; and 5) regulators (not trade negotiators) will lead regulatory cooperation initiatives.¹⁴⁸

¹⁴¹ EP resolution of 8 July 2015 [fn 30].

¹⁴² Commission report of the 13th TTIP negotiation round [fn 61].

¹⁴³ Actionable NTMs are such barriers that can be reduced via negotiation.

¹⁴⁴ European Commission, [Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis – Highlights of the study](#), 18 December 2009.

¹⁴⁵ Idem.

¹⁴⁶ Idem.

¹⁴⁷ The 2015 Trade Promotion Authority bill: [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#); M. Del Monte and L. Puccio, Role of US Congress in trade agreements [fn 37].

¹⁴⁸ See: European Commission, [Regulatory cooperation in TTIP – The benefits](#), 2016.

2.7.1. Sanitary and phyto-sanitary (SPS) and technical barriers to trade (TBT) rules

As with any trade agreement, TTIP will have SPS and TBT provisions. The SPS chapter ensures that states may regulate and also limit trade in goods that can pose a risk to human, plant or animal life, while at the same time ensuring that such regulation is not enacted in order to distort trade. On the other hand, TBT provisions ensure that technical regulations (including product safety requirements, labelling, and conformity assessment procedures) are legitimate and do not distort or unduly limit trade.

The negotiations contain two main areas of disagreement on how to introduce SPS measures. The first issue concerns 'zoning', which means that if there is an outbreak of, for instance, an animal disease in a specific area of a country, the whole country would not be (automatically) subject to import restrictions, but rather restrictions would only apply to the area concerned. The question is how to divide 'safe' from 'contaminated' zones. The USA, following a strictly scientific approach, divides regions depending on their natural conditions and their related propensity to developing a certain regulated organism of sanitary and phyto-sanitary concern. The EU instead would like to clarify that the term 'protected zone' should apply to any geographical area in the EU in which that organism is not established (so far), in spite of (generally) favourable (natural) conditions and its presence in other parts of the Union.¹⁴⁹ The internationally agreed guidelines are likely to be used as guidance¹⁵⁰ for both the issue of regionalisation¹⁵¹ and audits. The second area of contention is the US demand for inclusion in the SPS provision of risk assessment based on science.¹⁵² This is a major US priority, as it was referenced in the TPA.¹⁵³ The EU has a different approach to risk assessment.¹⁵⁴ The main difference lies in how to manage uncertainty from scientific results or insufficient studies on a particular risk.

TTIP will go beyond negative integration in these areas with provisions that can allow for future positive integration. In particular, the proposal for the SPS and TBT chapter would go beyond the negative integration rules and propose some cooperation provisions and positive integration provisions. In the TBT, positive integration provisions included in the EU proposal provide for provisions on standardisation, on conformity assessment procedures and on marking and labelling, whereby parties are encouraged to review their domestic requirements in order to identify areas where divergences could be reduced.

Discussions on SPS have been rather slow. Parties discussed regionalisation, audits and certification extensively during the 12th round of negotiation. Discussions in the 13th round focused on anti-microbial resistance, animal welfare and GMOs, the EU indicating that it did not support the US proposal on the latter.

2.7.2. Regulatory cooperation mechanism

In February 2015, the EU submitted a draft proposal for the institution of a horizontal regulatory cooperation mechanism. Parliament's July 2015 resolution further specified the main requirement to be respected by a regulatory cooperation body within TTIP in

¹⁴⁹ See the [EU text proposal](#).

¹⁵⁰ See Greenpeace-leaked document [on TTIP state of play](#).

¹⁵¹ [WTO decision on SPS regionalisation](#).

¹⁵² A similar provision has been introduced by the USA in the TPP agreement, see [Article 7.9 of TPP](#); see also the Greenpeace-[leaked document](#).

¹⁵³ See, TPA negotiating objectives: [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

¹⁵⁴ D. Vogel, Risk Regulation in Europe and the United States, Yearbook of European Environmental Law vol.3, 2003.

order for the latter not to encroach on domestic legislative power. Indeed, the draft text clarified that any direct implementation of the recommendations enacted by a regulatory cooperation body would be considered a breach of the EU Treaties.

The proposal submitted by the EU¹⁵⁵ included a horizontal chapter for regulatory cooperation and a chapter on good regulatory practices in order to foster further possibilities for transatlantic cooperation. The proposed chapters would include: 1) an early information requirement on planned legislation and regulation; 2) a provision on non-discriminatory consultation of stakeholders; 3) a requirement that the impact assessment include consideration of the impact on international obligation of the party, as well as on international trade and investment; 4) the periodic review of the regulations that are in effect; and 5) a regulatory cooperation framework. The latter would include the establishment of a bilateral cooperation mechanism and a regulatory cooperation body which should promote regulatory compatibility through exchange of information and joint examination of possibilities. The aim would be to achieve mutual recognition or equivalence in part or in full of regulatory acts; harmonisation; or simplification of regulatory acts. The parties would also agree in this framework to cooperate internationally. Regulatory cooperation for financial sector regulations would follow specific provisions and a specific framework would be instituted. Finally, unlike the USA, the EU would like to keep these regulatory cooperation chapters out of the scope of the state-to state dispute settlement as was the case for the cooperation dialogues chapters in the older generation of EU association agreements.

Whilst the USA also wants regulatory cooperation, it remains careful about creating a superstructure that could infringe upon domestic legislative powers. The USA seems currently to be focusing its proposal on provisions concerning regulatory good practices, such as:¹⁵⁶ 1) transparency with possibility for stakeholders to submit feedbacks regardless of their established residence; 2) impact assessment; 3) ex-ante consideration of the trade effect of regulation on the other trade party; 4) the principle that regulation should be based on objective evidence (scientific, economic or technical); 5) the right of individuals and stakeholders to petition for changes and amendments of a regulation; and 6) periodic review of regulations. At the same time, the 2015 TPA objectives include the establishment of a consultative framework that seeks to improve regulatory coherence and promote convergence in regulatory standards (through harmonisation, equivalence or mutual recognition).¹⁵⁷ Moreover, the USA wants to keep financial services out of this chapter and does not want it to apply to the legislature.¹⁵⁸

2.7.3. Sector-specific negotiations

The focus of TTIP negotiations has mainly been the sector-specific chapters on regulatory cooperation.¹⁵⁹ The importance of regulatory cooperation is acknowledged throughout Parliament's July 2015 resolution. In particular, the recognition of equivalence of the greatest number of vehicle safety regulations would be considered

¹⁵⁵ See the EU text proposal for a [regulatory cooperation mechanism](#) and for [good regulatory practices](#).

¹⁵⁶ See leaked consolidated documents on regulatory cooperation.

¹⁵⁷ The 2015 Trade Promotion Authority bill: [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#); M. Del Monte and L. Puccio, Role of US Congress in trade agreements [fn 37].

¹⁵⁸ *idem*.

¹⁵⁹ Further elements on regulatory issues by individual sectors were presented by Ignacio Bercero during the [press conference held on 24 April 2015](#).

one of the main achievements of TTIP negotiations. The sector-specific chapters were planned to cover nine sectors: cars, chemical, pharmaceutical, medical devices, cosmetics, textiles, ICT, engineering and pesticides. Some aspects of regulatory cooperation in animal welfare and veterinary matters will instead be included directly in the SPS chapter (see above).

Cooperation in bilateral agreements can take different forms. In order of integration levels, these are: 1) dialogues, exchange of information and best practices; 2) strengthened cooperation within international regulatory cooperation fora; 3) alignment to international standards, where such exist; 4) discussion on equivalence: equivalence makes it possible to recognise a particular regulatory practice of the other party as an equivalent effect to the domestic regulatory framework. It requires some similarity (at least a common regulatory objective) but not necessarily an identical regulatory framework; equivalence entails that both regulatory systems achieve the same objective(s) and the same level of protection; 5) mutual recognition: as in the case of equivalence, mutual recognition does not entail harmonisation and therefore allows for differences in the regulatory framework, but it recognises that a product is regulated in a similar manner and accepts assessment of conformity issued by specified conformity assessment bodies; 6) harmonisation: this entails one or both parties changing their standard or procedure to implement an identical regulatory framework or procedure.

TTIP will mostly focus on the lower integration level spectrum because of the current divergence in transatlantic regulatory setting. The table below provides an overview of the current discussions within TTIP.

Table 10 Current approaches discussed in the sector-specific chapters¹⁶⁰

Sector	Exchange of Information and best practices	Cooperation and other activities in international cooperation fora	Discussions on equivalence	Discussions or interests on harmonisation	Alignment with international standards	Mutual recognition
Vehicles		x	x	x	x	
Pharmaceutical	x	x		x	x	x
Medical devices	x			x	x	
Cosmetics	x	x			x	
Textiles	x					
ICT	x			x		
Engineering	x	tbc	tbc	tbc	tbc	
Chemical	x					
Pesticides	x	x		x		

Data source: Author from various European Commission reports.

¹⁶⁰ The table refers to ongoing discussions as mentioned in the [EU reports on ongoing negotiations](#). The final text of the agreement may contain other approaches than those mentioned in this table.

Box 1: Sector-specific chapters and overview of discussions

Some of the discussion mentioned below might not be of shared interest for both parties, but at least one of the parties is interesting in starting them.

- **Vehicles:**

Cooperation and other activities in international cooperation fora: UNECE activities and implementation of Global Technical Regulations (GTR).¹⁶¹

Discussions on equivalence: mirrors.

Discussions or interests on harmonisation: adaptive front lighting; automatic emergency braking system; seat-belt interlocks.

Alignment with international standards: safety glazing and UN GTR No 6.¹⁶²

- **Pharmaceuticals:**

Exchange of information and best practices: exchange of information among regulators (including confidential information and trade secrets); parallel scientific advice by EMA and FDA on authorisation of paediatric medicines; exchange of information on common standards for unique identifiers.¹⁶³

Cooperation and other activities in international cooperation fora: activities within the International Council for Harmonisation of Technical Requirements for the Registration of Pharmaceuticals for Human Use (ICH);¹⁶⁴ participation in the information-sharing pilot on generic medicines within the International Generic Drug Regulatory Programme (IGDRP);¹⁶⁵ aiming at the alignment of rules for the naming and labelling of biosimilars.¹⁶⁶

Discussions or interests on harmonisation: harmonisation of guidelines in order to reduce the number of *in vivo* bioequivalence studies; harmonisation of requirements for clinical data for complex generic medicines requiring the performance of pre-clinical tests and trials for their authorisation.¹⁶⁷

Mutual recognition: good manufacturing practice (GMP) inspections.

- **Medical Devices:**

Exchange of information and best practices: exchange of information on the state of play of EU legislation on medical devices and on *in vitro* regulation.

Discussions or interests on harmonisation: ensure compatibility and interoperability of the EU and US database for Unique Device Identification UDI (the US database is already functional).

Alignment with international standards: alignment of the EU to the requirements of the International Medical Device Regulatory Forum (IMDRF) for a Unique Device Identification; the US asked the EU to adopt the IMDRF Medical Device single audit programme.

¹⁶¹ The [United Nations Economic Commission for Europe](#) (UNECE).

¹⁶² [UN GTR 6](#) and [UN GTR 6 notifications](#).

¹⁶³ The unique identifier makes it possible to ensure the authenticity of a medicinal product by giving the medicinal pack a unique identifier (comprising [in the EU](#): a serialisation number, a code, a national reimbursement number, the batch number and an expiry date).

¹⁶⁴ [The International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use](#) (ICH) brings together the regulatory authorities and pharmaceutical industry to discuss scientific and technical aspects of drug registration. Its main aim is to achieve worldwide harmonisation, while maintaining safeguards on quality, safety, and efficacy, and regulatory obligations to protect public health.

¹⁶⁵ The [International Generic Drug Regulatory Programme](#) (IGDRP).

¹⁶⁶ [The Commission's proposal](#) suggested doing this within the Conference for harmonisation of technical requirements for the registration of medicinal products (ICH).

¹⁶⁷ In particular, this would aim at exchanges of information regarding scientific assessment of generic products and at developing converging requirements for the presentation of active substance master file/ drug master file or BCS (Biopharmaceutics Classification System) biowaiver assessment reports.

- **Cosmetics:**

Exchange of Information and best practices: cooperation on EU and US safety assessment methods for cosmetic ingredients; EU proposal on alternatives to animal testing; the EU has expressed no interest in the discussions on the batch of colorants testing.¹⁶⁸

Cooperation and other activities in international cooperation fora: reinforce cooperation within the International Cooperation on Cosmetics Regulation (ICCR).

Alignment with international standards: discussions on promoting the use of the International Nomenclature of Cosmetic Ingredients for ingredients labelling.¹⁶⁹

- **Textiles**

Exchange of information and best practices: cooperation provisions on labelling, safety requirements and market-driven standards; coordinating process for the designation of new names for fibres; discussions on the US approach to flammability testing; discussion on care labelling in the USA.

Alignment with international standards: International Organisation for Standardisation (ISO) names and labelling for fibres.¹⁷⁰

- **ICT**

Exchange of information and best practices: regulatory dialogues on e-health, encryption and e-labelling, cooperation in market surveillance, software-defined radio, specific absorption rates for mobile phones and e-accessibility; market surveillance activities for ICT products.

Discussions or interests on harmonisation: discussions on software-defined radio, specific absorption rates and e-labelling are oriented toward building convergence of regulation.

- **Engineering**

Discussions still focus on how to identify areas where cooperation could be established and which process to use (for instance, equivalence, harmonisation and dialogues).

- **Chemicals**

Exchange of information and best practices: information exchange on regulatory differences concerning priority chemicals, classification and labelling of substances; discussions on the possibility to facilitate data exchange between regulators.

- **Pesticides**

Exchange of information and best practices: data sharing on geographical zones and crop groupings; cooperation in other areas.

Cooperation and other activities in international cooperation fora: cooperation within the CODEX Alimentarius and OECD.¹⁷¹

Discussions or interests on harmonisation or cooperation: project on minor uses:¹⁷² contacts have been established between the EU minor uses coordination facility and the US IR4 project.¹⁷³

¹⁶⁸ The EU has mentioned that its industry is not interested in continuing discussions on this topic. Commission report of the 13th TTIP negotiation round [fn 61].

¹⁶⁹ [International nomenclature of cosmetic ingredients for ingredients labelling.](#)

¹⁷⁰ [International Organisation for Standardisation \(ISO\) and fibres labelling.](#)

¹⁷¹ [Codex Alimentarius; OECD on pesticides.](#)

¹⁷² Definition of minor use given by the [OECD](#): 'Minor uses, which include the majority of specialty crops, are the uses of pesticides where the potential use is not large to justify its registration from an applicant's perspective alone. A key driver for minor uses can be the lack of economic return to an applicant from the registration of those uses. (...) Typically minor uses involve crops grown on a small scale (minor crops) and often are high value specialty crops. Additionally, minor uses can involve uses within major crops in terms of controlling minor pests and diseases. This results in a situation where specialty crop industries are either without or are lacking sufficient access to pest control products to adequately protect those crops.'

2.8. Chapters on sustainable development, environment and labour

In the chapters on the environment and labour, the USA is likely to wish to follow guidelines similar to NAFTA¹⁷⁴ or to its subsequent trade agreements (for example, US-Chile).¹⁷⁵ The USA does not consider these issues controversial, as the EU and the USA are comparable in development levels. In general, these chapters include international measures to which both parties have agreed, as well as rules reaffirming the regulatory power of the parties. Special provisions to protect a country's right to enact environmental and labour rules are normally also included in US investment protection chapters.¹⁷⁶ For the USA, it is important that state-to-state dispute settlement provisions cover commercial, environmental and labour chapters to an equal extent.

In its July 2015 resolution Parliament requested that the sustainable development chapter be enforceable and that it should envisage implementation of all eight International Labour Organization (ILO) conventions, as well as core environmental agreements, and aim at further improving levels of labour and environmental protection. It also requested the inclusion of corporate social responsibility based on OECD guidelines for multinational enterprises and structured dialogue with civil society.

The EU tabled its draft textual proposal in October 2015. On labour standards, the EU proposal inserted an obligation to respect core labour standards, such as: 1) freedom of association and effective recognition of the right to collective bargaining; 2) the elimination of all forms of forced or compulsory labour; 3) the effective abolition of child labour; and (4) the elimination of discrimination in respect to employment and occupation. The proposal also includes obligations to comply with key principles and to introduce implementation measures on core labour standards associated to ILO conventions not yet ratified by the USA (see Table 11 below).¹⁷⁷ Furthermore, the proposal states an obligation to 'make sustained efforts toward ratifying ILO conventions and protocols' and an obligation to ensure health and safety at work and decent working conditions (which would include ensuring a minimum living wage). Finally, it includes a provision aiming at cooperation in third countries (with a particular emphasis on least developed countries) on trade and labours matters. During the last round of negotiations, the EU and the USA agreed on including commitments to core ILO labour standards and how to effectively enforce them, and on discussing options for a provision on cooperation in third countries. The two parties also showed interest in introducing provisions on the protection of health and safety at work.

¹⁷³ The US IR4 project is a US Government-funded research programme to facilitate registration of sustainable pest management technology for specialty crops and minor uses; see: [The IR4 project, the specialty crops program](#), USDA brochure.

¹⁷⁴ For the full text of the North American Agreement on Environmental Cooperation, see the [Society of American States](#) website; consult the [Society of American States](#) website again for the full text of the North American Agreement on Labour Cooperation.

¹⁷⁵ See [Chapters 18 and 19 of the US-Chile FTA](#) for an example of the standard provisions on environment and labour contained in a US FTA.

¹⁷⁶ See [Articles 12 and 13 of the 2012 US BIT Model](#).

¹⁷⁷ Only [two ILO fundamental conventions](#) are currently in force in the USA, [the remaining eight](#) are not yet ratified.

Table 11: Key principles proposed by the EU in its TTIP textual proposal of October 2015 and the associated core labour standards and ILO convention

Core labour standards	Article in the EU proposal	Key principles in the EU proposal	ILO convention associated and US ratification status
Freedom of association and effective recognition of the right to collective bargaining	Article 5	a) the right to form and join trade unions and the inherent corollary of the right to strike, b) the right to establish and join employers' organisations, c) the effective recognition of the right to collective bargaining, d) effective social dialogue and tripartite consultations.	ILO Convention 87 (not ratified by the USA) ILO Convention 98 (not ratified by the USA)
The elimination of all forms of forced or compulsory labour	Article 6	a) the effective suppression of forced or compulsory labour, in all its forms, including with regard to trafficking in persons, b) the prevention of the use of forced or compulsory labour, c) the provision to victims of protection and access to appropriate and effective remedies.	ILO Convention 29 (not ratified by the USA) and its Protocol ILO Convention 105(not ratified by the USA)
The effective abolition of child labour	Article 7	a) the immediate and effective prohibition and elimination of the worst forms of child labour, b) the effective abolition of all child labour, c) the protection of children of compulsory schooling age from performing labour.	ILO Convention 138 (not ratified by the USA) ILO Convention 182 (ratified by the USA)
The elimination of discrimination in respect to employment and occupation	Article 8	a) ensuring equal opportunity and treatment in employment and occupation for all, b) ensuring protection against all forms of direct and indirect discrimination as regards employment and occupation, c) promoting gender equality, d) ensuring equal remuneration for men and women for work of equal value.	ILO Conventions 100 (not ratified by the USA) ILO Convention 111(not ratified by the USA)

Data source: Author from [EU text proposal of October 2015](#); for the US ratification status, the [ILO website](#) (last accessed June 2016).

With respect to environmental concerns, Table 12 below summarises the key commitments suggested in the EU proposal.¹⁷⁸ For each key commitment, the EU proposal specifies the obligation to introduce effective domestic policies for achieving some related policy objectives; obligations to comply with existing international obligations on the subject; and obligations to cooperate. During the 13th round, some convergence or common understanding was achieved with respect to two big areas: the conservation and management of fisheries, and the sustainable management of wildlife (including combatting illegal trade in wildlife).¹⁷⁹ The USA asked for clarification on the introduction by the EU of a commitment with respect to waste management.¹⁸⁰

¹⁷⁸ [EU textual proposal](#) on sustainable development of October 2015.

¹⁷⁹ Commission report of the 13th TTIP negotiation round [fn 61].

¹⁸⁰ *idem*.

Finally, as requested by the Parliament, the Commission introduced in its proposal an article on corporate social responsibility (CSR),¹⁸¹ stipulating that the parties would recognise the role of CSR, would support internationally recognised guidelines and CSR principles (such as the OECD guidelines on multinational enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, ISO 26000, and the ILO Tripartite Declaration of Principles). Parties would also agree to promote the introduction of internationally agreed guidelines and principles within public initiatives by governments, companies and investors. During the 13th round, the EU made a detailed description of this provision and presented some initiatives it had taken in this field.¹⁸²

Table 12: Environmental commitments suggested in the EU textual proposal of October 2015

Commitment	Article in EU proposal	Specific international agreement or instruments cited	Type of obligation mentioned		
			Implementing domestic policies	Compliance with international obligations	Cooperation
Conservation and sustainable use of biological diversity	Article 11	none	X	X	X
Combating illegal trade in threatened, including endangered, and other protected species of wild fauna and flora, their parts and derived products	Article 12	Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)	X	X	X
Sustainable forest management	Article 13	CITES, UN Forum on Forests or the International Tropical Timber Organization	X		X
Conservation and sustainable management of fisheries stocks and aquatic ecosystems	Article 14	United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas; the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU; the FAO Code of Conduct for Responsible Fisheries; measures by Regional Fisheries Management Organisations	X	X	X
Sound management of chemicals throughout their life cycle, and of waste	Article 15	none	X		X

Data source: Author from the [EU textual proposal](#) on sustainable development of October 2015.

¹⁸¹ [EU textual proposal](#) on sustainable development of October 2015.

¹⁸² Commission report of the 13th TTIP negotiation round [fn 61].

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The negotiations on a Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA aim at achieving a comprehensive trade agreement with renewed liberalisation efforts in trade, services and investments, while at the same time aiming at regulatory cooperation and rule-based trade.

Since the completion of the 13th round of negotiations on TTIP in April 2016, the European Commission and the USA have been working to achieve substantial progress before the next round takes place in July 2016. As those negotiations get under way, this in-depth analysis examines progress to date and looks at the various issues that are still outstanding.

This is a publication of the
Members' Research Service

Directorate-General for Parliamentary Research Services, European Parliament



PE 586.606
ISBN 978-92-823-9561-5
doi:10.2861/407441

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