

## IN-DEPTH ANALYSIS

# The Transatlantic Trade and Investment Partnership (TTIP): The sluggish state of negotiations

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### ABSTRACT

Ten rounds of negotiations on the EU-US Transatlantic Trade and Investment Partnership (TTIP) over the past two years have produced scant results. Since the talks were launched – with high expectations – in June 2013, negotiators have shied away from addressing real substance or tackling difficult issues. The political objectives of the EU mandate and those expressed by the European Parliament in its recent resolution on the TTIP, as well as the US Congress's objectives as specified in the Trade Promotion Authority (TPA) Act, have been clear: all recommend eliminating tariffs and dismantling non-tariff barriers to further liberalise transatlantic markets and promote higher rates of growth and job creation. In early October 2015, the negotiating parties finally presented upgraded proposals on how to eliminate tariffs. They will also need to present offers on access to public procurement markets and begin discussions on the new Investment Court System (ICS), as proposed by Trade Commissioner Cecilia Malmström on 16 September 2015. The Trans-Pacific Partnership (TPP), the other major trade agreement that had occupied US negotiators (to a greater extent, in fact, than the TTIP), was agreed on 5 October 2015. If TTIP negotiations are to close before US President Barack Obama leaves office – disrupting the negotiating process and possibly ushering in a less trade-friendly president – the process will have to be considerably speeded up.

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# 1 Timetable

<b>Political launch of negotiations:</b>	17 June 2013 (in the margins of the G8 Summit at Lough Erne, Northern Ireland)
<b>Negotiating rounds:</b>	<p>1st round: 8-12 July 2013 in Washington, DC</p> <p>2nd round: 10-15 November 2013 in Brussels</p> <p>3rd round: 16-20 December 2013 in Washington, DC</p>
	<p>The first three negotiating rounds were introductory; the negotiators focused on understanding each other's approach to the range of topics to be covered by the agreement (<u>core areas</u>: (1) market access (tariffs, services/investment, and public procurement); (2) regulatory part (compatibility and cooperation); and (3) rules and identifying areas of convergence and divergence).</p>
<b>Continuation of negotiations:</b>	<p>4th round: 10-14 March 2014 in Brussels</p> <p>5th round: 19-23 May 2014 in Arlington, Virginia</p> <p>6th round: 13-18 July 2014 in Brussels</p> <p>7th round: 29 September - 3 October 2014 in Chevy Chase, Maryland</p> <p>8th round: 2-6 February 2015 in Brussels</p> <p>9th round: 20-24 April 2015 in New York</p> <p>10th round: 13-17 July 2015 in Brussels</p>
	<p>From the fourth round onwards, negotiators have been working on the architecture of the agreement as well as the scope and depth of individual chapters. Ahead of round four, the two sides had exchanged initial tariff offers (excluding sensitive products). During the ensuing rounds, discussions continued on issues such as trade in goods and services, trade-related rules, regulatory cooperation, government procurement, environmental protection and labour rights, energy and raw materials, and opportunities for small and medium-sized enterprises (SMEs). Amongst the more problematic issues that have surfaced are public procurement, a specific chapter on access to energy markets and how to deal with investment protection as well as protection of EU geographical indications (GIs).</p>
<b>Forthcoming round:</b>	19-23 October 2015 in Miami, Florida
<b>Political stocktaking (21-23 September 2015):</b>	Commissioner Cecilia Malmström and USTR Michael Froman assessed the state of play and discussed how to move forward before the 11th round of negotiations.
<b>Positions of Parliaments:</b>	<p>European Parliament's Resolution on 'Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' of 8 July 2015;</p> <p>US Congress adopted the Trade Promotion Authority (TPA) Act on 24 June 2015 which entered into force on 29 June 2015.</p>

## 2 Rationale behind the Transatlantic Trade and Investment Partnership (TTIP)

The EU and the US are one another's largest economic partners. Together, they represent about half of the world's gross domestic product and one third of global trade.

Negotiations on the Transatlantic Trade and Investment Partnership (TTIP) were initiated with the desire to free bilateral trade and investment of barriers, thereby boosting economic growth and creating jobs.

The economies of the EU and the US represent about half of global gross domestic product (GDP) and a combined market of 800 million consumers. The transatlantic market for goods has increased further and reached EUR 516 billion in 2014. Industrial sectors such as machinery and appliances, chemicals and transport equipment account for around 60 % of all goods exchanged in both directions. Trade in services had also gone up in both directions and reached EUR 341 billion in 2013. Transatlantic trade therefore continues to account for more than one third of world trade. With regard to foreign direct investment (FDI), the EU and the US are the two leading investors. The EU and the US are also the largest investors in each other; in 2013 the EU had an investment stock of EUR 1 687 billion in the US, and the US had an investment stock of EUR 1 652 billion in the EU<sup>1</sup>. In the aftermath of the global economic and financial crisis, the magnitude of this transatlantic economic exchange was the principal motivation behind the idea of boosting growth and creating jobs on both sides of the Atlantic via a better-integrated transatlantic market.

Average EU-US bilateral customs duties are already low at less than 2 %. While more than half of EU-US trade in goods is not subject to customs duties, tariffs on the remaining products range from 3 % for basic goods such as raw materials to 30 % for clothes and footwear. These existing tariffs in transatlantic trade and numerous behind-the-border obstacles to trade in goods and services - together with the magnitude of the transatlantic exchange - legitimise the overall aim of the TTIP, which is to remove the remaining customs duties on goods and restrictions on services, as well as to gain better access to public procurement markets and make it easier to invest. Furthermore, transatlantic trade and investment should be facilitated by removing existing behind-the-border barriers, for example by closer regulatory cooperation. An impact assessment by the Commission showed that the TTIP could potentially increase the size of the EU economy by around EUR 120 billion (or 0.5 % of GDP) and the US economy by EUR 95 billion (or 0.4 % of GDP)<sup>2</sup>.

Meanwhile, ten rounds of negotiations have taken place since mid-2013. Negotiators have been working on the architecture of the agreement as well as the scope and depth of individual chapters. Ahead of the 4th round,

<sup>1</sup> European Commission, DG Trade website, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>

<sup>2</sup> [TTIP, the economic analysis explained](#), September 2013.

Ten rounds of TTIP negotiations have taken place so far. Initial enthusiasm has given way to some scepticism.

the two sides exchanged initial tariff offers (excluding sensitive products). During the ensuing rounds, discussions continued on issues such as trade-related rules, regulatory cooperation, government procurement, environmental protection and labour rights, energy and raw materials, and opportunities for small and medium-sized enterprises (SMEs). Proposals for market access to service sectors were exchanged during the 10th round and revised offers on how to eliminate tariffs on goods on 2 October 2015. Amongst the problematic issues that have surfaced are public procurement, a specific chapter on access to energy markets, and investment protection, specifically the issue of dispute settlement resolution between investors and host states.

This paper will look at the state of play of these negotiations against the backdrop of the objectives that are spelled out in three significant reference documents<sup>3</sup>:

- 1.) The EU negotiating mandate which was made publically available on 9 October 2014<sup>4</sup>
- 2) The European Parliament's resolution on the 'Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', adopted on 8 July 2015<sup>5</sup>
- 3) Trade Promotion Authority (TPA) for the office of the US President of 29 June 2015<sup>6</sup>. (TPA authorises the office of the President to 'enter into trade agreements with foreign countries [including with the EU] for the reduction or elimination of tariff or non-tariff barriers [at least] before July 1, 2018'.

Obtaining TPA<sup>7</sup> can be seen as a major achievement on the part of President Barack Obama. The debate had focused on the Trans-Pacific Partnership (TPP) agreement. Passage by both chambers in Congress was preceded by an intense debate between Republicans and Democrats. In the end, it were the leaders of the Republican Party who managed to overrule representatives of the Democrats, the party of the President, by cleverly

<sup>3</sup> Citations from these reference documents will be abridged, see boxes below.

<sup>4</sup> Council of the European Union, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 9 October 2014,

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/145014.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf)

<sup>5</sup> European Parliament, Resolution adopted on 8 July 2015 on the 'Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)'

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN>

<sup>6</sup> US Congress, Bipartisan Congressional Trade Priorities and Accountability Act of 2015, <https://www.congress.gov/bill/114th-congress/house-bill/2146>

<sup>7</sup> In the US, TPA for the president ensures that trade agreements negotiated by the administration, respective the US Trade Representative (USTR), receives an up-or-down vote when the deal is submitted to Congress - without further amendment of individual provisions or chapters. Throughout the negotiation process, the President must consult regularly with Members of Congress.

manoeuvring the 'trade package' through both the House of Representatives and the Senate. The Republican-controlled Senate finally passed the TPA legislation (60-38) on 24 June 2015.

## 3 Specific chapters of the TTIP

### 3.1 Market access to goods

EU mandate:

- eliminate all duties on bilateral trade;
- special treatment of the most sensitive products.

The goal will be to eliminate all duties on bilateral trade, with the shared objective of achieving a substantial elimination of tariffs upon entry into force and a phasing out of all but the most sensitive tariffs [mainly on agricultural goods] in a short time frame. In the course of negotiations, both Parties will consider options for the treatment of the most sensitive products, including tariff rate quotas. All customs duties, taxes, fees, or charges on exports and quantitative restrictions or authorisation requirements on exports to the other Party which are not justified by exceptions under the Agreement shall be abolished upon the application of the Agreement.

EP Resolution:

- market access offers should be reciprocal;
- eliminate all tariffs ... while caring about sensitive agricultural and industrial products.

... to ensure that the market access offers in the different areas are reciprocal, equally ambitious and reflect both parties' expectations, underlines that the different proposals for those areas must be balanced;

... to aim at the elimination of all tariff duties while respecting that there are a number of sensitive agricultural and industrial products on both sides for which exhaustive lists will have to be agreed upon during the negotiation process; to foresee for the most sensitive products appropriate transitional periods and quotas and in a few cases their exclusion.

TPA:

- expand competitive market opportunities for US exports;
- create fairer and more open conditions for trade by eliminating tariff and non-tariff barriers.

Trade in goods [...] to expand competitive market opportunities for exports of goods from the United States and to obtain fairer and more open conditions of trade, including through the utilization of global value chains, by reducing or eliminating tariff and non-tariff barriers and policies and practices of foreign governments directly related to trade that decrease market opportunities for United States exports or otherwise distort United States trade; and

(B) to obtain reciprocal tariff and non-tariff barrier elimination agreements [...].

[The TPA Act contains specific provisions on Trade in Agriculture, in particular SPS measures, see section 3.6.1, below]

State of play:

In February 2014, the parties exchanged their initial tariff offers (removing customs duties on goods, including industrial, consumer and agricultural products, whereby sensitive items were left out). The reciprocal offers that

For access to goods markets and upgraded offers on how to dismantle tariffs were exchanged on 2 October 2015.

the US side presented at that time fell short of the EU's expectations.

Upgraded offers on how to dismantle tariffs were exchanged on 2 October 2015. According to publicly available information, these revised offers cover a wide range of products from various sectors but do not yet spell out commitments with regard to sensitive products, mainly in the area of agriculture; a normal practise in the course of negotiations, as sensitive tariff lines are always kept for juggling during the end-game of the negotiations.

What was already taken up in the market access to goods chapter during the 10th round of negotiations, were certain elements of the goods' text, such as articles related to customs duties, licensing and definitions. Moreover, the negotiators held an in-depth discussion on the wine text proposed by the EU, the spirits text proposed by the US and other non-tariff issues.

## 3.2 Market access to Services and Establishment

EU mandate:

- liberalise - for each other - access to service markets at the highest level ... covering substantially all sectors and all modes of supply;
- tackle existing barriers;
- follow the national treatment principle;
- take account of the sensitive nature of certain specific sectors;
  
- facilitate mutual recognition of professional qualifications
  
- guard existing labour laws and work conditions.

Public services shall be excluded from TTIP, as shall audio-visual services.

The aim of negotiations on trade in services will be to bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTAs, in line with Article V of GATS, covering substantially all sectors and all modes of supply, while achieving new market access by tackling remaining long-standing market access barriers, recognising the sensitive nature of certain sectors. [...], [I]nclude binding commitments to provide transparency, impartiality and due process with regard to licensing and qualification requirements and procedures, as well as to enhance the regulatory disciplines included in current US and EU FTAs.

The Parties should agree to grant treatment no less favourable for the establishment in their territory of companies, subsidiaries or branches of the other Party than that accorded to their own companies, subsidiaries or branches, taking due account of the sensitive nature of certain specific sectors.

[...] develop a framework to facilitate mutual recognition of professional qualifications.

[...] The Commission should also ensure that nothing in the Agreement prevents the Parties from applying their national law, regulations and requirements regarding entry and stay, [...] The EU and Member States' laws, regulations and requirements regarding work and labour conditions shall continue to apply.

The high quality of the EU's public utilities should be preserved in accordance with the TFEU [...].

Services supplied in the exercise of governmental authority as defined by Article 1.3 of GATS shall be excluded from these negotiations.

Audio-visual services will not be covered by this chapter.

EP Resolution:

- increase market access for services according to a 'hybrid list' approach (positive lists for market access and negative lists for national treatment);
- attain market access to US maritime and air transport services;
- keep public services out of TTIP;
- ensure mutual recognition of professional qualifications;
- include market access to financial services.

[...] to increase market access for services according to a "hybrid list approach", using for market access "positive lists", whereby services that are to be opened up to foreign companies are explicitly mentioned and new services are excluded while ensuring that possible stand-still and ratchet clauses only apply to non-discrimination provisions and allow for enough flexibility to bring services of general economic interest back into public control as well as to take into account the emergence of new and innovative services and using [a] "negative list approach" for national treatment.

[...] address and remove the current US restrictions on maritime and air transport services owned by European businesses as a result of US legislation such as the Jones Act, Foreign Dredging Act, the Federal Aviation Act and the US Air Cabotage law. [...].

[...] exclude current and future Services of General Interest as well as Services of General Economic Interest [...], (including but not limited to water, health, social services, social security systems and education), to ensure that national and if applicable local authorities retain the full right to introduce, adopt, maintain or repeal any measures with regards to the commissioning, organisation, funding and provision of public services as provided in the Treaties as well as in the EU's mandate; [...].

To strive hard to ensure mutual recognition of professional qualifications, [...];

To combine market access negotiations on financial services with convergence in financial regulation at the highest level, [...];

TPA:

The US's negotiating objective regarding trade in services is to

- expand competitive market opportunities for US services;
- reduce or eliminate barriers (including regulatory and other barriers).

The principle negotiating objective of the United States regarding trade in services is to expand competitive market opportunities for United States services and to obtain fairer and more open conditions of trade, including through utilization of global value chains, by reducing or eliminating barriers to international trade in services, such as regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operation of service supplies.

Recognizing that expansion of trade in services generates benefits for all sectors of the economy and facilitates trade, the objective [...] should be pursued through all means, including through a plurilateral agreement with those countries willing and able to undertake high standard service commitments for both existing and new services.

State of play:

The first offers on market access to services were exchanged before summer 2014. As a result, the 7th negotiating round (29 September through October 2014) was devoted to explaining the individual elements

Revised offers on market access to services were exchanged during round 10 (13-17 July 2015).

These offers exclude public services and cross-border supply of audio-visual services.

of these offers. These were complemented by revised offers for market access to the services sectors that were exchanged during the 10th round of negotiations<sup>8</sup> (13-17 July 2015). Once again, discussions during the subsequent round focused on explaining respective proposals and interests.

According to the Commission's explanation, the 'text lays down the main definitions, principles and obligations that both sides agree to implement as regards the measures they apply (or will apply) affecting trade in services.' Cross-border supply of audio-visual services is excluded. There is also a general reservation with regard to public services, such as health, education, social services and water. Moreover, the EU has kept out access to the financial services market from the offer. The EU signals that an offer in this area will follow as soon as it is known whether financial services will also be included in the chapter on regulatory cooperation.

However, the services chapter includes principles that govern 'the right of individuals to enter and stay temporarily in the territory of the other Party with a view to supplying a service ("temporary presence of service suppliers or 'mode 4"').

With regard to establishment, the principles involve 'commitments not to impose certain kinds of "quantitative" barriers ("market access", e.g. restrictions on the number of investors), commitments not to discriminate against investors of the other Party ("national treatment"), commitment not to extend to the other Party any more favourable treatment than would be provided to a third party ("most favoured nation treatment")'. These commitments exclude audio-visual services and subsidies and obligations with regard to government procurement.

The current discussions are based on a 'hybrid approach', meaning that for the schedule of the services offer a 'positive list' approach is used, whereby only services explicitly mentioned are covered, whereas a 'negative list' approach is chosen for national treatment, which should apply to all services except those excluded in the offer.

Respective proposals on 'key principles with a view to promoting e-commerce [reserve] ...the Parties' ability to pursue legitimate policy objective such as consumer protection'.

Apparently, the US offers foresee access to the sub-federal level, but exclude sectors such as aviation, a sector that is also excluded from the TiSA negotiations (which only cover ground services such as baggage handling).

Liberalisation of service markets should follow the 'hybrid approach' – that is, using a 'positive list' for services that will be opened and a 'negative list' for national treatment (which will apply to all services except those mentioned).

<sup>8</sup> EU proposal on services, investment and e-commerce for the Transatlantic Trade and Investment Partnership, 31 July 2015, [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153669.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf)

### 3.3 Investment protection

#### EU mandate:

- negotiate investment liberalisation and protection with the aim of attaining highest levels and standards;
- include investor-state dispute settlement (ISDS), if a satisfactory solution is achievable.

[...] to negotiate investment liberalisation and protection provisions including areas of mixed competence, such as portfolio investment, property and expropriation aspects, on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date. After prior consultation with Member States and in accordance with the EU Treaties the inclusion of investment protection and investor-state dispute settlement (ISDS) will depend on whether a satisfactory solution, [...] is achieved. The matter shall also be considered in view of the final balance of the Agreement.

[...] respective provisions should provide for the highest possible level of legal protection and certainty for European investors in the US, [...] for the promotion of European standards of protection [...], provide for a level playing field for investors in the US and in the EU, [...], without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, stability of the financial system, public health and safety in a non-discriminatory manner. [...]

[...] standards of treatment and rules [should include] fair and equitable treatment [...], national treatment, most-favoured nation treatment, protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation, full protection and security of investors and investments, [etc.].

Enforcement: the Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, [...]. State-to-state dispute settlement should be included, but should not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanism. [...] [C]ontain safeguards against manifestly frivolous claims. [...] [P]ossibility of creating an appellate mechanism [...] appropriate relationship between ISDS and domestic remedies.

#### EP Resolution:

- include a comprehensive chapter on investment, both with regard to market access and protection;
- replace the ISDS system with a new system,

To ensure that the TTIP contains a comprehensive chapter on investment including provisions on both market access and investment protection, [...] investment protection provisions are limited to post-establishment [...] and focus on national treatment, most-favoured nation, fair and equitable treatment and protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation, [...] the right to regulate in the public interest, clarifying the meaning of indirect expropriation and preventing unfounded or frivolous claims; [...]

To ensure that foreign investors are treated in a non-discriminatory fashion,

which is subject to democratic principles and scrutiny as well as transparency, an independent judicial system, including an appellate mechanism.

while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interest cannot undermine public policy objectives

TPA:

- reduce or eliminate artificial or trade distorting barriers to foreign investment;
- do not accord foreign investors in the US greater rights with respect to investment protection than US investors;
- seek to improve mechanisms used to resolve disputes between an investor and a government.

[...] the principle negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, [...] by reducing or eliminating exceptions to the principle of national treatment; freeing the transfer of funds relating to investments; reducing or eliminating performance requirements, forced technology transfers, and other unreasonable barriers to the establishment and operation of investments; seeking to establish standards for fair and equitable treatment, [...], providing meaningful procedures for resolving investment disputes; seeking to improve mechanisms used to resolve disputes between an investor and a government through mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims; [...] efficient selection of arbitrators and the expeditious disposition of claims; procedures to enhance opportunities for public input into the formulation of government positions; and providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements; [...] ensure the fullest measure of transparency in the dispute settlement mechanism [...].

State of play:

On 16 September 2015, the European Commission presented a new proposal on investment protection and a new Investment Court System (ICS), including:

On 16 September 2015, the European Commission published an outline for the chapter on 'investment' in the TTIP<sup>9</sup>, proposing – amongst other things – the setting-up of an Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP). Earlier, the European Commission had made available a concept paper<sup>10</sup> which indicated individual reform elements that should be enacted via the TTIP. According to the European Commission, the issue of investment protection should move from the current ad hoc arbitration towards a special Investment Court System. First

<sup>9</sup> European Commission, text proposal on Chapter II - Investment, 16 September 2015, [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)

<sup>10</sup> Investment in TTIP and beyond – the path for reform [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)

- the right to regulate
- the establishment of a new court system, including a Tribunal of First Instance and an Appeal Tribunal, each with publically appointed judges

This would build on internationally accepted standards of protection...

...and introduce new provisions for dispute resolution.

of all, there should be- an article on the right to regulate which states that investment protection provisions shall not prevent governments from regulating for public policy purposes and that the TTIP will not prevent the EU from enforcing its state aid law. Moreover, the concrete text proposal will contain provisions that

- establish a new court system , comprising of a Tribunal of First Instance, the "Investment Tribunal", with 15 publicly appointed judges (five EU nationals, five US nationals and five nationals of third countries) and an Appeal Tribunal with six publicly appointed members (two EU nationals, two US nationals and two nationals of third countries); furthermore, the EU draft proposal should build on internationally-accepted standards of investment protection, including
- guarantee of fair and equitable treatment and physical security of investment;
- compensation for losses due to war, armed conflict, civil strife or a state of emergency;
- compensation for expropriations (direct or indirect) and nationalisation of investments;
- a guarantee for the free transfer of funds.

The EU's text proposal for the TTIP should also include elements of an already-reformed system as contained in the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Singapore free trade agreement (EUSFTA), i.e. as follows:

- full transparency with regard to documents and public access to the hearings;
- a binding code of conduct for arbitrators
- a ban on 'forum shopping' and/or bringing multiple claims;
- early dismissal of frivolous or unfounded claims, and
- the principle that the loser pays all expenses.

According to the European Commission, before submitting its formal textual proposal to the US partner, its outline should be discussed with the Member States in the Council as well as with the European Parliament.

### 3.4 Public procurement

EU mandate:

- enhance mutual access to public procurement markets at all administrative levels (national, regional and local).

[...] aim for the maximum ambition, complementing the outcome of the negotiations of the revised Government Procurement Agreement in terms of coverage (procurement entities, sectors, thresholds and services contracts, including in particular public construction). [...] [E]nhance mutual access to public procurement markets at all administrative levels (national, regional and local), and in the fields of public utilities, covering relevant operations of undertakings operating in this field and ensuring treatment no less

favourable than that accorded to locally-established suppliers. [...] [I]nclude rules and disciplines to address barriers having a negative impact on each other's public procurement markets, including local content or local production requirements, in particular Buy America(n) provisions, and those applying to tendering procedures, technical specifications, remedy procedures and existing carve-outs, including for small and medium-sized enterprises, with a view to increasing market access, and where appropriate, streamlining, simplifying and increasing transparency of procedures.

EP Resolution:

- obtain non-discriminatory access to public contracts in the US both at federal and sub-federal level.

... given the huge interest on the part of European companies, notably SMEs, in obtaining non-discriminatory access to public contracts in the US both at federal and sub-federal level, for example for construction services, civil engineering, transport and energy infrastructure and goods and services, [...] [remedy], in line with the principle of reciprocity, the large disparity that currently exists in the degree of openness of the two public procurement markets on both sides of the Atlantic by significantly opening up the US market (still governed by the Buy America Act of 1933) at federal and sub-federal level alike building on [...] the Agreement on Government Procurement (GPA) and by removing the restrictions that currently apply at federal, state and local level alike in the United States, [...]

Ensure [...] open, non-discriminatory and predictable procedural requirements ensuring equal access for EU and US companies, especially SMEs, when tendering for public contracts, [...]

[...] to promote common sustainability standards [...] at all federal and sub-federal levels of government [...]

TPA  
(no objectives spelled out)

[no specific objectives spelled out]

State of play:

No offers exchanged as yet.

No market access offers for public procurement have been exchanged so far. Discussions at the technical level have taken place so as to better understand each other's public procurement procedures and discuss general rules for public procurement, which go beyond the disciplines agreed in the Government Procurement Agreement (GPA). Opening up US public procurement markets continues to be one of the most sensitive issues within the TTIP negotiations as the US has signalled no willingness to review its "Buy America" provisions<sup>11</sup> in procurement legislation. The EU hopes that the US offers will substantially increase market access at sub-federal level.

<sup>11</sup> The existing 'Buy American' Act of 1933 requires the US Federal Government to buy American-made iron, steel and manufactured goods wherever possible.

### 3.5 Regulatory issues and non-tariff barriers

#### EU mandate:

- remove unnecessary obstacles to trade and investment, including NTBs;
- guarantee the right to regulate in accordance with existing standards.

[...] aim at removing unnecessary obstacles to trade and investment, including NTBs, through effective and efficient mechanisms, by reaching an ambitious level of regulatory compatibility for goods and services, including through mutual recognition, harmonisation and through enhanced cooperation between regulators. Regulatory compatibility shall be without prejudice to the right to regulate in accordance with the level of health, safety, consumer, labour and environment protection and cultural diversity that each side deems appropriate, or otherwise meeting legitimate regulatory objectives [...]

#### EP Resolution:

- ensure that regulatory cooperation promotes a transparent, effective and pro-competitive environment ... while developing and securing the highest levels of protection of health and safety in line with the precautionary principle ... whilst fully respecting regulatory autonomy.

To ensure that the regulatory cooperation chapter promotes a transparent, effective, pro-competitive environment through the identification and prevention of potential future non-tariff barriers to trade [...] while developing and securing the highest levels of protection of health and safety in line with the precautionary principle [...], consumer, labour, environmental and animal welfare legislation, [...] whilst fully respecting regulatory autonomy, [...] to include cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, [...] [identify] technical procedures and standards [...] [that] cannot be compromised, [...] can be subject to a common approach, [...] where mutual recognition based on a common high standard and a strong system of market surveillance is desirable [...]; [identify] where legislation (e.g. REACH), or the adoption of new laws (e.g. cloning), or future definitions affecting the level of protection (e.g. endocrine disruptive chemicals); [...] any provisions on regulatory cooperation in the TTIP do not set a procedural requirement for adoption of Union acts concerned by it nor give rise to enforceable rights in that regard;

#### TPA:

- attain increased transparency and opportunities in developing regulations;
- ensure that proposed regulation is based on sound science, cost benefits analysis, risk assessment or other objective evidence.

[...] to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations; to require that proposed regulation be based on sound science, cost benefits analysis, risk assessment, or other objective evidence; to establish consultative mechanisms and seek other commitments, as appropriate, to improve regulatory practices and promote increased regulatory coherence, including through transparency in developing guidelines, rules, regulations and laws for government procurement and other regulatory regimes; the elimination of redundancies in testing and certification, early consultations on significant regulations; the use of impact assessments; the periodic review of existing regulatory measures; and the application of good regulatory practices; to seek greater openness, transparency, and convergence of standard development processes and enhance cooperation on standard issues globally; [...]

State of play:

Considerable ground has been covered on this, the most complex chapter.

According to the textual proposal of 4 May 2015<sup>12</sup> in the chapter on 'regulatory cooperation', the Commission will aim to '... pursu[e] a high level of protection of inter alia: the environment; consumers; public health, working conditions; social protection and social security; human, animal and plant life; animal welfare; health and safety; personal data; cybersecurity; cultural diversity; and preserving financial stability'.

Greater regulatory coherence should be achieved by reducing '... unnecessary burdensome, duplicative or divergent regulatory requirements affecting trade or investment, particularly given their impact on small and medium sized enterprises, by promoting the compatibility of envisaged and existing EU and US regulatory acts'.

The proposed provisions envisage closer regulatory cooperation at central and non-central level with regard to issues such as duplication in procedures, inconsistent product requirements and double testing, but also to agree on some common "good regulatory practices", which allow regulators on both sides of the Atlantic to inform their counterparts early on in the process of any regulatory measure in the pipeline, which may affect trade

This chapter's aim should be achieved by mutual recognition of equivalence, harmonisation/alignment, common rules and/or the application of international rules. Cooperation amongst EU and US regulators would be central to the implementation of the regulatory cooperation chapter. A specific 'Regulatory Cooperation Body', composed of regulators in charge of monitoring the application of the regulatory provisions of the TTIP, would advise decision-makers. This 'Regulatory Body' would not have any decision-making powers.

Horizontal regulatory issues focus on good regulatory practices with regard to transparency and early warning, stakeholder consultation and impact assessment of regulatory acts.

In the field of horizontal regulatory issues including regulatory cooperation and rules (Technical Barriers to Trade and Sanitary and Phytosanitary measures), the negotiations have focused on good regulatory practices (transparency and early warning, stakeholder consultation, impact assessment of regulatory acts) with regard to transatlantic trade and investment relations.

After explaining to each other the prevailing regulatory system and the respective decision-making procedure, the negotiators began working to identify common factors between EU and US proposals and specific areas where it will be possible to achieve closer regulatory convergence without impairing existing levels of safety standards.

Earlier, the EU and the US had identified nine specific sectors (cars,

<sup>12</sup> TTIP - Initial Provisions for Chapter [ ] - Regulatory Cooperation, 4 May 2015  
[http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153403.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf)

The frontrunners for closer regulatory cooperation should be the following sectors:

pharmaceuticals, medical devices, cosmetics, engineering, textiles, chemicals, pesticides and Information & Communication Technology (ICT)) which should be the frontrunners for closer regulatory convergence.

After the 10th round of negotiations, the negotiators stated that the following progress in this regulatory and rules section has been made:

Technical Barriers to Trade (TBT), including how to improve the frameworks for conformity assessment with applicable technical regulations dealing with health, safety and any other legitimate public goals; on standards and transparency with regard to participation in the other party's standardisation processes;

Discussions relating to sector-specific matters advance at different speeds depending on the area of cooperation. While in some areas, the scope of cooperation is clearly identified, in others it still needs to be elaborated, so as to be certain regarding where precisely regulatory cooperation is feasible.

- cars,

Cars: including the possibilities for recognition of equivalence of regulatory approaches, which would prevent retrofitting EU and US cars as much as possible; revision of the UN 1998 Agreement's working methods; various possibilities for expediting harmonisation and cooperation in research;

- chemicals,

Chemicals: continued progress in particular on two pilot projects, the assessment of priority chemicals and classification and labelling of substances respectively; first discussion on US proposal for another pilot project with regard to analysing differences in calculating the classification of mixtures, with possible consequences for safety data sheets. Given the different regulatory approaches, regulatory cooperation in this area is of limited scope, but nevertheless of economic importance for the industry;

- pharmaceuticals,

Pharmaceuticals: with participation from EU and US regulatory agencies, the two sides discussed topics such as: progress on systems' assessment of respective Good Manufacturing Practices (GMP); cooperation on bio-similarity generics; finalising reforms to the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH) and the exchange of confidential information between regulators;

- medical devices,

Medical devices: discussion of areas that should be included in the TTIP such as, Medical Devices - Quality Management System audits, Unique Device Identification (UDI) and Regulated Product Submission (RPS);

- cosmetics,

Cosmetics: focusing on attaining approximation of safety assessment methods and streamlining the authorisation procedure in the US for ingredients such as UV-filters;

- textiles,

Textiles: focusing on labelling textile fibre names, textile safety requirements such as silk flammability testing;

- ICT,

Information and Communication Technologies (ICT): exchange of information on different ongoing ICT initiatives in areas such as: semantic

- engineering, and syntactic compatibility of health records; encryption; e-labelling; cooperation in market surveillance; e-accessibility;
- pesticides. Engineering: continued search for areas for future cooperation;  
Pesticides: continued dialogue on regulatory cooperation in areas such as: global zoning; Maximum Residue Level (MRL) harmonisation; or extrapolation of field study results;  
According to the European Commission, the first tangible results could be incorporated into the 'joint political review' that will be made available in late 2015. This review should also include more details on respective objectives, the scope covered so far, the relationship with other chapters, and the practical aspects of implementing these regulatory cooperation provisions.

## 3.6 Rules

### 3.6.1 Sanitary and phytosanitary measures (SPS)

EU mandate:

- provisions should build on the WTO SPS Agreement;
- SPS measures in TTIP should be based on science and on international standards or scientific risk assessment and recognise the right of the Parties to appraise and manage risk deemed appropriate.

[...] establish provisions that build upon the WTO SPS Agreement and on the provisions of the existing veterinary agreement, introduce disciplines as regards plant health and set up a bilateral forum for improved dialogue and cooperation [...]. [Taking the EU-US veterinary agreement as a starting point and ensuring that] SPS measures be based on science and on international standards or scientific risk assessment, while recognising the right for the Parties to appraise and manage risk in accordance with the level of protection that each side deems appropriate, in particular when relevant scientific evidence is insufficient, [...] applied [...] to protect human, animal, or plant life or health. [...] [E]stablish provisions for the recognition of equivalence, implementation of pre-listing of food-producing establishments, preventing implementation of pre-clearance, recognition of disease-free and pest-free health status of the Parties [...]

EP Resolution:

- protect European SPS standards and procedures against the backdrop of the multilateral SPS and TBT agreements;
- no agreement where there are different SPS rules in place in the EU and the US.

To base negotiations on SPS and TBT measures on the key principles of the multilateral SPS and TBT agreements and to protect European SPS standards and procedures; to aim [...] at the elimination or significant reduction of excessively burdensome SPS measures including related import procedures; [...] to ensure that pre-approvals, obligatory protocols or pre-clearance inspections are not applied as a permanent import measure; to achieve increased transparency and openness, mutual recognition of equivalent standards, exchanges of best practices, [...] strengthening of cooperation in international standard-setting bodies; [...]

To recognise that, where the EU and the US have very different rules, there will be no agreement, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the cloning of animals for farming purposes, [...]

To encourage the US side to lift the ban on beef imports from the EU;

TPA:

- Increase competitive opportunities for US agricultural products through SPS robust rules that encourage the adoption of international standards and require a science-based justification.

[...] to obtain competitive opportunities for United States exports of agricultural commodities in foreign markets [...] through robust rules on sanitary and phytosanitary measures that encourage the adoption of international standards and require a science-based justification [...], improve regulatory coherence, promote the use of systems-based approaches, and appropriately recognize the equivalence of health and safety protection systems of exporting countries; require that measures are transparently developed and implemented, are based on risk assessment that take into account relevant international guidelines and scientific data [...], improve import check processes, including testing methodologies and procedures, and certification requirements, [...].

State of play:

The EU's textual proposal on "Sanitary and Phytosanitary Measures (SPS)" in TTIP was made publically available on 7 January 2015 and tabled during discussions with the US in the September/October 2014 round<sup>13</sup>. The EU proposal repeats the objectives of this chapter, spells out the Parties' rights and obligations, as well as applicable definitions against the backdrop of international SPS agreements and rules; the requirement to designate 'Competent Authorities', how SPS measures are to be applied, SPS import procedures, general and specific SPS import requirements; trade facilitation measures, elimination of redundant control measures.

The proposal also includes the establishment of equivalence, requirement to adapt to regional conditions with regard to animals, animal products and animal by-products as well as plants and plant products, audit and verification requirements, description of standards applying to export certificates, import checks and fees, transparency, technical consultation, emergency measures, animal welfare, functioning of the 'Joint management committee' as well as the intention to collaborate in international fora (multilateral and bilateral) and to recognise the achievements of and continue working under the framework of the EU-US Veterinary Agreement.

Textual work on the SPS chapter was begun during the July 2015 round.

During the 10th round, negotiators began work on the text of this chapter. They reported good progress on some articles. Discussions should continue in between official rounds.

<sup>13</sup> EU's textual proposal of 7 January 2015, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153026.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf)

### 3.6.2 Intellectual property rights

EU mandate:

- TTIP should provide for even higher protection of IPR and recognise EU Geographical Indications (GIs).

[...] reflect the high value placed by both Parties on intellectual property protection and build on the existing EU-US dialogue [...]. [A]ddress areas most relevant for fostering the exchange of goods and services with IP content, [...] provide for enhanced protection and recognition of EU Geographical Indications [...] in a manner that complements and builds upon the TRIPS [...]; [no] provisions on criminal sanctions

EP Resolution:

- Include an ambitious, balanced and modern chapter on IPR, including recognition and enhanced protection of GIs.

Include [...] an ambitious, balanced and modern chapter on [...] intellectual property rights, including recognition and enhanced protection of geographical indications and reflect[ing] a fair and efficient level of protection, without impeding the EU's need to reform its copyright system and while ensuring a fair balance of IPRs [in] the public interest, in particular the need to preserve access to affordable medicines by continuing to support the TRIPS flexibilities; [...] remain committed and engaged in global multilateral patent harmonisation discussions [...]; to ensure that the IPR chapter does not include provisions on the liability of internet intermediaries or on criminal sanctions as a tool of enforcement, [...]

To secure full recognition and strong legal protection of EU geographical indications, [...] guarantee the labelling, traceability and genuine origin of these products for consumers and the protection of the know-how of producers [...];

TPA:

- further promote adequate and effective protection of IPRs, while ensuring a standard of protection similar to that found in the US.

[...] to further promote adequate and effective protection of intellectual property rights, [...] ensuring accelerated and full implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights [...] with respect to meeting enforcement obligations [...] ensuring [...] a standard of protection similar to that found in the United States; providing strong protection for new and emerging technologies and new methods of transmitting and distribution products embodying intellectual property; including in a manner that facilitates legitimate digital trade; prevention or eliminating discrimination [...] ensuring that standards of protection and enforcement keep pace with technological developments, [...] providing strong enforcement [...] prevention or eliminating government involvement in the violation of [IPR], including cyber theft and piracy.

State of play:

The EU proposal for the article on 'Customs enforcement of intellectual property rights'<sup>14</sup>, made publically available on 31 July 2015, reiterates - amongst other things - that each party will have to ensure consistency with its obligations under the GATT and TRIPS agreements. Moreover, each side will facilitate procedures for a right holder to lodge an application with the customs authorities for the formal determination of IPR infringements of goods under customs control and suspected of being counterfeit trade mark goods; counterfeit geographical indication goods; pirated copyright goods or devices, products or components which are primarily designed or produced for the purpose of circumventing protection measures. The EU's draft provisions on international agreements relating to intellectual property of 31 July 2015<sup>15</sup> which list 16 different agreements and conventions, to which both the EU and the US are committed, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Patent Law Treaty, the Trademark Law Treaty, were discussed during the 10th round of negotiations. Furthermore, there should be general principles that stress the importance of intellectual property as a tool for innovation, growth and jobs.

Exploratory work on the IPR chapter has commenced.

During the 10th round, negotiators also explored a range of technical questions related to IPR and exchanged updates on the respective legislative processes. On geographical indications (GIs), the negotiators continued to look into potential conflicts related to the EU GI shortlist on the US territory (pre-screening) and on legal alternatives to the US trademark system. There has not been any US commitment as yet and, politically, this is one of the most controversial issues in the US.

The negotiators have different positions on geographical indications (GIs) and anti-piracy policy on the internet.

Although the EU and the US are interested in high standards for IPRs and the promotion of strong policies against counterfeiting, their positions differ strongly on two main issues: geographical indications (GIs) and anti-piracy policy on the internet.

The US rates the EU's position on the use of GIs on the basis of the relevant EU regulation as a protectionist measure. The US, currently protects GIs through trademark law. If the US were to accept the EU's proposed terms, the EU could reserve GIs for cheese such as 'parmesan' and 'feta', and for meat such as 'bologna', although all these names are also commonly used in the US. From a US perspective that protects GIs through trademark law, it would appear to be very difficult to find a solution with the TTIP negotiations.

<sup>14</sup> EU's proposal for Article XX on Customs enforcement of intellectual property rights, made publically available on 31 July 2015,

[http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153672.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153672.pdf)

<sup>15</sup> Draft provisions on International Agreements relating to Intellectual Property, 31 July 2015, [http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153673.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153673.pdf)

EU-US differences, for example on the liability of internet service providers for infringing content on their networks, which is also dealt with by the Anti-Counterfeiting Trade Agreement (ACTA), deepened when the European Parliament refused its consent to the Anti-Counterfeiting Trade Agreement (ACTA). The fact that the EU is not a party to this plurilateral agreement on copyrights and trademarks raises questions on the part of the US over the possibility of developing a comprehensive IPR chapter within the TTIP<sup>16</sup>.

### 3.6.3 Trade and sustainable development

EU mandate:

- TTIP should promote sustainable development by facilitating trade in environmentally-friendly goods and encouraging decent work through effective domestic implementation of ILO core labour standards.

[...] include commitments by both Parties in terms of the labour and environmental aspects of trade and sustainable development. [...] [M]easures to facilitate and promote trade in environmentally friendly and low carbon goods, energy and resource-efficient goods, services and technologies, including through green public procurement and to support informed purchasing choices by consumers. [...]

[...] include mechanisms to support the promotion of decent work through effective domestic implementation of International Labour Organisation (ILO) core labour standards, as defined in the 1998 ILO Declaration of Fundamental Principles of Rights at Work and relevant Multilateral Environment Agreements [...] include provisions in support of internationally recognised standards of corporate social responsibility, as well as the conservation, sustainable management and promotion of trade in legally obtained and sustainable natural resources, such as timber, wildlife or fisheries' resources.

The economic, social and environmental impacts will be examined by means of an independent Sustainability Impact Assessment (SIA), involving civil society, [...]

EP Resolution:

- Make sure that the sustainable development chapter will be binding and enforceable and aim at the full as well as effective ratification, implementation and enforcement of eight

To ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO's Decent Work Agenda and the core international environmental agreements; [...]

To ensure that TTIP supports the use and promotion of green goods and services, including through facilitating their development, [...] tapping into the considerable potential for both environmental and economic gains offered by the transatlantic economy and complementing the on-going

<sup>16</sup> Congressional Research Service, Transatlantic Trade and Investment Partnership (TTIP) Negotiations, 4 February 2014, <https://www.fas.org/sgp/crs/row/R43387.pdf>

fundamental ILO conventions;

- equally, be ambitious and binding with regard to environmental standards.

plurilateral negotiations on the Green Goods agreement [...]

[develop] ambitious and binding common sustainability standards for energy production and energy efficiency [including] EU energy labelling and eco-design directives [...] enhance cooperation on energy research, development and innovation and promotion of low-carbon and environmentally friendly technologies;

TPA:

- Ensure that trade and environmental policies are mutually supportive while seeking to protect the environment;
- Respect for workers' rights and the rights of children consistent with core labour standards of the ILO.

To ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;

To promote respect for worker rights and the rights of children consistent with core labour standards of the ILO [...] and an understanding of the relationship between trade and worker rights;

To seek provisions in trade agreements under which parties to those agreements ensure that they do not weaken or reduce the protections afforded in domestic environmental and labour laws as an encouragement for trade;

State of play:

Negotiations on this chapter have not yet begun.

According to the European Commission's position paper<sup>17</sup>, the Commission wants to build upon the EU and US's high levels of protection for the environment and workers and safeguard basic rules that protect labour laws, based on ILO instruments, i.e. Decent Work Agenda, ILO core labour standards and other ILO standards, as well as to promote Corporate Social Responsibility in EU and US companies. With regard to environmental protection, the European Commission also intends to promote trade and investment in green goods and services.

As for conflict resolution in this field, the Commission proposes a transparent and independent mechanism that will also engage interested parties from civil society.

On 7 January 2015, the European Commission presented its outline for the Sustainable Development Chapter in the TTIP<sup>18</sup>. This chapter goes beyond the provisions currently found in the EU's existing free trade agreements, notably regarding the right to regulate and levels of protection. It reiterates in greater detail each Party's right to regulate its own domestic

<sup>17</sup> Trade and sustainable development, Initial EU position paper, [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151626.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf)

<sup>18</sup> EU Position Paper on Trade and Sustainable Development Chapter /Labour And Environment in TTIP, 7 January 2015, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153024.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf)

environmental, labour and social laws at levels that are deemed appropriate. At the same time, it encourages high levels of protection. Moreover, labour provisions on the freedom of association and right to collective bargaining, elimination of forced or compulsory labour as well as child labour and commitments with regard to non-discrimination in respect of employment and occupation have been included. The environmental part would recognise the values of global environmental governance and rules, including Multilateral Environmental Agreements and the UN Framework Convention on Climate Change as well as the commitment to implement the latter in domestic laws.

### 3.6.4 Customs and trade facilitation

EU mandate:

- Facilitate trade by promoting modern and effective border controls and anti-fraud measures.

[...] provisions to facilitate trade between the Parties, while ensuring effective controls and anti-fraud measures. [...] [I]nclude inter alia commitments on rules, requirements, formalities and procedures of the Parties related to import, export and transit, [...] going beyond commitments negotiated in the WTO. These provisions should promote modernisation and simplification of rules and procedures, standard documentation, transparency, mutual recognition of standards and cooperation between customs authorities.

EP Resolution

... [generally keep in mind] that the purpose of TTIP is to facilitate trade in genuinely US and EU made products ...

TPA:

- Strengthen capacity with regard to customs and trade facilitation.

[...] to work to strengthen the capacity of United States trading partners to carry out obligations under trade agreements by consulting with any country [...] concerning that country's laws relating to customs and trade facilitation, [...]

State of play:

The European Commission tabled the EU's initial proposal for a legal text on "Customs and Trade Facilitation"<sup>19</sup> in TTIP before the fourth round in March 2014, spelling out several provisions.

These provisions include rules on data and documentation, use of information technology, release of goods, customs brokerage, facilitation/simplification and de minimis, transit and trans-shipment, fees and charges, electronic payment, goods re-entered after repair, pre-shipment inspection, risk management, post-clearance audit, advance rulings, penalties, appeals, international standards, internet publication and enquiry points.

<sup>19</sup> European Union's textual proposal made publically available on 7 January 2015, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153027.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153027.pdf)

Good progress has been made on the consolidated text.

The use of information technologies, such as electronic exchange of customs information and related data, should substantially facilitate customs clearance for the import, transit or export of goods. During the 10th round (13-17 July 2015), the negotiators made further progress regarding the consolidated text of this chapter.

### 3.6.5 Trade-related energy and raw materials

EU mandate:

- Special provisions on energy and raw materials.

[...] include provisions addressing trade and investment-related aspects of energy and raw materials. [...] ensuring an open, transparent and predictable business environment in energy matters and [...] ensuring an unrestricted and sustainable access to raw materials.

EP Resolution:

- Call for a dedicated chapter on energy and raw materials.

[...] dedicating a specific chapter to energy, including industrial raw materials; [in order to] facilitate energy exports, so that the TTIP would abolish any existing restrictions or impediments of export for fuels, including LNG and crude oil, [...]

TPA:

[no specific objectives on energy and raw materials]

State of play:

During the 10th round, negotiators focused on which raw materials to include and on Modes of Cooperation for Energy and Raw Materials. The EU would like to see a dedicated chapter on energy in the TTIP, which would refer to some disciplines in this area based on the principles of a free and fair energy market as well as a reciprocal commitment, which would seek non-discrimination, and the elimination of import and export duties and other restrictions.

Negotiators have worked on the identification of the kinds of raw materials to be included.

Currently, the US law dating back to 1938 prevents export of natural gas (restrictions that do not apply to crude oil), if this threatens national security conditions. At the same time it establishes that national interest is self-verified when a country has an FTA in force with the US. In the absence of such an FTA, export of natural gas requires the respective permit.

### 3.6.6 Small and medium-sized enterprises

EU mandate:

- Specific provisions regarding SMEs

The Agreement will include provisions addressing trade-related aspects of small and medium-sized enterprises.

EP Resolution:

- Special chapter for SMEs that facilitates transatlantic trade and investment.

[...] includes a specific chapter on SMEs [...] by eliminating double certification requirements, by establishing a web-based information system about the different regulations and best practices, by facilitating access to support schemes for SME, by introducing 'fast-track' procedures at the border [...]; [it will] establish mechanisms for both sides to work together to facilitate SMEs' participation in transatlantic trade and investment, [...]

TPA:

- Facilitate equal access to international markets for SMEs.

To ensure that trade agreements afford small businesses equal access to international markets, equitable trade benefits, and expanded export market opportunities, and provide for the reduction or elimination of trade and investment barriers that disproportionately impact small businesses;

State of play:

The initial textual proposal of the EU on "Small and Medium-Sized Enterprises" was made publically available on 7 January 2015<sup>20</sup>. This proposal recognises SMEs' contribution to economic growth, employment and innovation and repeats the aim of enabling SMEs to benefit from the opportunities created by the TTIP. The centrepiece of the SME chapter is the provision that invites each Party to set up a website or webpage 'that provide[s] information [covering both the central level as well as those lower than Federal (US) or Union (EU) level] that can be useful to any person interested in trading, investing, or doing business in that Party'. The information that will be provided should include: customs regulations and procedure; regulations and procedures concerning intellectual property rights; a registry of technical regulations in force; sanitary and phytosanitary measures relating to importation and exportation; rules on public procurement and a database containing public procurement notices; business registration procedures; information on programs supporting SME internationalisation; as well as any other information which the Party considers to be helpful for SMEs.

Good progress has already been made on the consolidated text, in particular with regard to respective EU/US websites for SMEs.

During the 10th round, further progress was made on the consolidation of the text proposal, in particular the section on cooperation provisions, exchange of information and the presentation of various EU and US websites. The US proposal on the institutional set-up should be discussed further in the next round.

### 3.6.7 Other rules

EU mandate:

- trade and competition.

[...] aim at including provisions on competition policy, [respectively] on antitrust, mergers and state aids;

EP Resolution:

- competition,
- state-owned enterprises,
- rules of origin.

[...] include an ambitious chapter on competition ensuring that European competition law is properly respected [...] in the digital world; [create fair conditions so that] private companies can compete with state-owned or state-controlled companies ... state subsidies to private companies should be regulated and subject to a transparent control system;

[...] rules of origin [should] aim at reconciling the EU and US approaches

<sup>20</sup> European Union's initial textual proposal, 7 January 2015, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153028.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153028.pdf)

TPA:

- state-owned enterprises.

Eliminate or prevent trade distortions and unfair competition favouring state-owned and state-controlled enterprises; [...] prevent discrimination and market-distorting subsidies [...] promote transparency;

State of play:

Discussions are underway on rules for competition, state-owned enterprises, state-to-state dispute settlement and procedures for how to deal with rules of origin.

With regard to other trade and investment-related rules, during the 10th round of negotiation, the parties have been defining shared values on competition (including on procedural fairness and a non-prejudice basis), state-owned enterprises (discussion on the basis of substantive provisions of the respective text proposals) and State-to-State Dispute Settlement (with the aim of establishing an effective mechanism for resolving any disputes between the parties on the interpretation and application of the TTIP, discussions focused on rules of procedure, on the EU's proposal for a voluntary and complementary mediation mechanism as well as on the compliance phase.

The negotiators also discussed rules of origin procedures on the basis of an oral presentation by the EU. Furthermore, there was progress on the consolidation of texts with regard to General Provisions.

## 4 Conclusions

After more than two years, negotiations have shifted into low gear.

While the overall objectives coincide, it seems that the devil has hidden in the details.

Today, two years and ten rounds of negotiation since negotiations on the TTIP were launched in the summer of 2013, it is obvious that the process is moving slowly, hampered by blockages on several issues. This sluggishness comes despite the fact that the two sides' general political objectives – as spelled out in the EU negotiating directives and the US Trade Promotion Authority (TPA) Act – are not significantly different in most areas. There are, of course, divergences: the political objectives described in the TPA Act are more assertive when it comes to US economic interests than are the demands in the EU mandate. More generally, the TPA is not focused on a single agreement, but includes, in addition to the TTIP, the Trans-Pacific Partnership (TPP), the Trade in Services Agreement (TiSA) and others yet to come. In the case of the TTIP, the European Parliament is not responsible for the lack of progress between the negotiators, the European Commission and the US administration. Parliament's position has admittedly been more defensive than that of either negotiating party, as demonstrated in the EP Resolution of July 2015. But the house has been sufficiently open – including on the contentious issue of investment protection – that the Parliament cannot be blamed for the talks' generally laborious advancement.

The US has been focused on Asia and the TPP negotiations rather than the TTIP with Europe.

Some observers have argued that the US delayed progress with the EU while prioritising negotiations on the Trans-Pacific Partnership (TPP)<sup>21</sup> and refraining from engaging with politically-sensitive issues such as public procurement and cooperation in the financial services sector. The TPP negotiations started in 2011 – i.e. earlier than those on the TTIP with the EU – and, according to the US, were to be terminated before the TTIP negotiations could become a priority. Recently, on 5 October 2015, the TPP negotiations were finally closed – at a second ministerial meeting in Atlanta (Georgia, US), after nine days of talks, including five days of round-the-clock negotiations in which President Obama himself intervened. The most contentious issues – those that were not resolved at the ministerial meeting in Maui (Hawaii, US) on 28-31 July 2015 – included market access for dairy products, data exclusiveness for biologic medicines and rules of origin for the automobile sector, as well as some other, remaining bilateral automobile issues between the US and Japan. For a number of reasons – including notably the spirit of compromise the US demonstrated with its TPP partners – the EU now hopes that the TTIP negotiations will accelerate and move significantly closer to their defined aspirations.

All the reference documents (the EU mandate, EP resolution and TPA Act) insist that a future transatlantic agreement should open markets by eliminating duties and reducing non-tariff barriers and behind-the border obstacles to trade and investments. Although both the EU and the US have highly-industrialised economies with less diverse structures than those of their trans-pacific partners, the TTIP negotiations have revealed that it is not easy to resolve the long-standing and well-known sensitive issues between the EU and the US. The TTIP process has also revealed different negotiating tactics: the EU has come forward with concrete proposals in at least seven chapters of the future agreement, while the US has adopted a 'back-loading' approach, leaving its position open until a later stage of the negotiation process. For both partners, the negotiating dynamics differ from those adopted in the past, as neither the EU nor the US has ever negotiated a comprehensive trade and investment deal with a partner of a similar economic size.

The most contentious issues:

The most problematic transatlantic issues, which are sensitive for both sides, are the following:

- unrestricted market access for US exporters of agricultural goods in EU Member States: (offensive US interests, confronting defensive EU interests because of conflicting sanitary and phytosanitary (SPS) rules);

<sup>21</sup> TPP will be a regional FTA being negotiated among the US, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

- market access to agricultural goods and public procurement tenders,
  - special rules for energy products and raw materials,
  - protection of geographical indications (GIs),
  - market access to the US' transport sector.
- market access for EU suppliers to public procurement tenders in the US, including those at sub-federal level (offensive EU interests set against defensive US interests, in particular because of the existing 'Buy American' Act of 1933, which requires the US Federal Government to buy US-made Iron, steel and manufactured goods wherever possible);
  - insertion of a separate chapter on Energy and Raw Materials (an offensive EU interest, for which the US believes that no special treatment will be necessary);
  - protection of geographical indications (GIs) for European food products (a defensive US interest);
  - removing restrictions to the US transport sector, in particular restrictions to US maritime and air transport services created by US legislation such as the Jones Act, Foreign Dredging Act, the Federal Aviation Act and the US Air Cabotage law (a defensive US interest).

The US's reaction to the EU's new proposal on the resolution of investment disputes, which includes an 'Investment Court System', is still uncertain.

The closure of negotiations on the Trans-Pacific Partnership (TPP) creates a new situation for the EU.

The areas in which the TPP agreement obtained strong commitments may prove similarly successful within TTIP.

Moreover, it is still unclear how the US will react to the upcoming EU proposal on investment disputes and a new Investment Court System. Apart from the question of whether or not financial services are included in the regulatory cooperation chapter, the closer cooperation that the partners have been aiming for – and on which considerable progress has been made – has proved much more complex than originally thought.

The fact that the TPP negotiations are now closed creates a new situation for the EU. If the US declares that the TTIP negotiations are the new priority in trade and investment negotiations, the process should speed up. The TPP deal includes notable relevant achievements<sup>22</sup>, including:

- wide-ranging tariff elimination on industrial goods (covering 6 500 tariff lines);
- tariff reductions on agricultural products such as poultry, soybeans and fruit, as well as on textiles and apparel;
- opening additional services sectors;
- strong and enforceable labour provisions, comparable to those negotiated between the EU and the US.

All these may help the EU attain similar commitments within the TTIP.

<sup>22</sup> Congressional Research Service (CRS), The Trans-Pacific Partnership (TPP): First Take, 7 October 2015

With regard to trade-related rules, the twelve TPP countries agreed to the following:

- adopt a single set of rules of origin
- protect intellectual property rights (IPR) for patents and copyrights as well as biologic medicines; and
- develop sanitary and phytosanitary (SPS) rules that build on WTO SPS rules for identifying and managing risks in the least trade-restrictive way.

While the EU long insisted that the TTIP would allow it to 'set the rules' in cooperation with the US, the TPP has done this first.

These achievements on trade-related rules in the trans-Pacific region are a mixed blessing for the EU. While the EU long insisted that the TTIP would allow it to 'set the rules' in cooperation with the US, the TPP has in fact reached this important 'finish line' first. The EU must now follow the trans-pacific region's lead in this regard instead of occupying the driver's seat.

The TPP also includes certain also weak points from a European point of view:

- very little liberalisation of public procurement markets,
- an emphasis on the protection of trademarks at the expense of geographical indications, and
- a long (bilateral US-Japanese) transition period for phasing out tariffs on automobiles.

In other areas – including liberalisation of public procurement and protection of geographical indications – the TPP falls short of the EU's aspirations.

The modesty of these arrangements could remove incentives for a more ambitious TTIP agreement in these areas.

The TPP includes an investor-state dispute settlement (ISDS) clause containing various reform elements.

With regard to investment, in particular investment protection, the Congressional Research Service reports that the TPP contains a reformed investor-state dispute settlement (ISDS) clause that requires heightened evidence to prove claims, establishes a new code of conduct for arbiters and clarifies the government's right to regulate in the public interest. Apparently, the TPP partners do not intend to establish a new, independent court system for disputes between investors and states. This will make it more difficult for the EU to obtain US agreement on a new Investment Court System (ICS).

In Europe, the TTIP negotiations face increasing opposition, although it remains unclear how the TTIP's naysayers will be affected by the TPP agreement – or by the EU's more demanding position in relation to the US.

While trans-Pacific partners reached a comprehensive agreement for 800 million consumers that sets new international rules for trade and investment, the TTIP's

When introducing her new trade and investment strategy to Members of Parliament's Committee on International Trade (INTA) on 15 October 2015, Trade Commissioner Cecilia Malmström reiterated that the TTIP talks were 'the most ambitious and strategic trade negotiations that the EU has ever

success is uncertain: rallies against the Partnership are ongoing in Europe.

For the TTIP to be agreed, the process will have to be considerably accelerated.

As for all international agreements, the European Parliament would have to give its consent for the TTIP to move forward.

undertaken', the conclusion of which would remain one of the EU's priorities<sup>23</sup>. She also stated that the Commission would look ahead and focus on the Asia-Pacific Region, Australia and New Zealand – countries that have recently concluded the TPP agreement with the US. The discussion during the INTA meeting also revealed that the Commissioner would welcome a fairer discussion of the content of the TTIP negotiations. Earlier, at a public event on 17 September 2015, the Trade Commissioner reminded the governments of all 28 EU Member States that they must explain the value of the TTIP to their citizens.

If the negotiation process is to be accelerated, all outstanding topics – including offers on access to public procurement, progress in the regulatory chapter and the chapter on investment protection – must be addressed without delay. Otherwise, reaching a political understanding on the content of the TTIP before the end of 2015 – and wrapping up the negotiations before the presidential elections in the US in November 2016 – remains an elusive goal.

The European Parliament, which will be required to give its consent to the TTIP (as will the US Congress), will continue to follow the course of the negotiations closely.

<sup>23</sup> European Commission, Trade for All - Towards a more responsible trade and investment policy, 15 October 2015  
[http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)