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POLICY BRIEFING

Transatlantic Trade and Investment Partnership (TTIP): State of Play

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*The views expressed in this policy briefing are those of the authors alone and do not necessarily reflect those of the organisations they are affiliated with.

SUMMARY

The Transatlantic Trade and Investment Partnership (TTIP) is a proposed free trade agreement between the USA and the EU. Negotiations between the two parties began in July 2013, with the latest 9th round of talks having taken place 20-24 April 2015 in New York City. The agreement, once concluded, would be one of the broadest trade agreements in operation, covering not only traditional barriers to trade (such as tariffs and quotas), but also many wide-ranging regulatory barriers to trade and investor protection. The following policy briefing reflects on the current state of the talks (in May 2015). It draws on both official sources and interviews with relevant participants.[1] It focuses on the issues of regulatory cooperation (including the specific case of GMOs that prominently featured as an issue during the latest round of talks); the controversial issue of investor-state dispute settlement (ISDS) and the broader issue of transparency in the negotiations. It finds that while the negotiations are still slow-moving, and many of the ambitions of the business community unmet, there is still a risk of deregulation.

CURRENT STATUS OF THE NEGOTIATIONS

1. Regulatory cooperation: 'race to the bottom' and regulatory chill

- **This is the key component of the TTIP negotiations: reducing barriers to transatlantic trade which result from differences in regulations between the EU and US (e.g. car safety standards or the classification of chemicals)**
- **It is split into 'sectoral' negotiations (e.g. motor vehicles and chemicals) and a 'horizontal' chapter, which seeks to encourage regulatory exchanges between EU and US regulators**
- **Given the difficulties in bridging (significant) regulatory differences in 'sectoral' negotiations, business is particularly keen on the 'horizontal' chapter. Critics fear**

[1] The authors attended the stakeholder event at the 9th Round of TTIP talks held at the Hilton Hotel (Avenue of the Americas) in New York on 23 April 2015. Here they held discussions with various EU and US negotiators, NGO representatives, journalists and academics. In order to preserve their anonymity, no specific references to any conversations are made in this policy brief.

will inhibit the ability of governments to regulate in the public interest ('regulatory chill') and thus lead to a 'race to the bottom' in standards

In addition to discussing several sector-specific chapters on regulatory convergence, (which aim to reduce barriers to trade arising from differences in regulation for such areas as motor vehicles or chemicals,[2] Sanitary and Phytosanitary (SPS) measures and Technical Barriers to Trade [TBT]), TTIP negotiators have debated 'horizontal' regulatory cooperation. Policymakers and others have often been keen to talk about a 'harmonisation' of regulations – that is to say, the adoption of a common standard to be applied by both the EU and the US. However, the most likely approach (based on the EU's position papers and several discussions held with participants in NY) is likely to be one premised on mutual recognition – where each side merely acknowledges the 'equivalence' of the other party's standards. This is much more likely to create a downward pressure on regulation where there is a difference between EU and US standards. Mutual recognition allows firms to simply meet the less onerous requirement. As such, it is much less likely to allow the EU and US to 'set global standards' as is often claimed by policymakers defending the deal (De Ville and Siles-Brügge 2015a,b).

Difficulties remain in negotiating the various sectoral regulatory cooperation chapters, resulting in many business groups (especially in the United States) being privately sceptical of the feasibility of achieving significant regulatory cooperation. As a result, the business community appears to be largely hoping for a significant 'horizontal regulatory cooperation chapter', which would both increase regulatory 'transparency' and lead to greater regulatory convergence after TTIP comes into force, reinforcing the image of it being a 'living agreement'. The European Commission's updated textual proposal was tabled during the 9th round of negotiations, where it is believed that the negotiators focused heavily on the issue. Based on this document, 'horizontal regulatory cooperation' would be achieved by introducing a process of 'regulatory exchange' between both parties, ultimately overseen by a 'Regulatory Co-operation Body' (RCB) (European Commission, 2015a).

This would imply that EU and US legislators would have to provide the other party's designated 'Focal Point' with a list of planned legislative acts, which would be analysed for their potential

[2] The other sectoral chapters cover cosmetics, engineering, medical devices, pesticides, information and communication technology, pharmaceuticals and textiles.

disruption to transatlantic trade prior to implementation. Given opposition from EU Member States to the inclusion of this provision, an earlier version of the Commission's proposal, which was published in February 2015, had only included such provisions at the central level (the supranational EU level and the US federal level), with 'placeholders' for non-central authorities, i.e. EU Member States and US States (European Commission 2015b). In the latest version of the draft chapter, as tabled in New York, the non-central level has been reintroduced, but the procedures for such 'exchanges' are less onerous in nature than for central authorities. Crucially, there are also provisions to encourage further regulatory cooperation following regulatory exchanges; whereby parties may suggest regulatory harmonisation, mutual recognition or merely a 'simplification of regulatory acts' in a given area. Stakeholders are also encouraged to input into the work of the RCB.

As a result of these proposals, critical NGOs and others fear this may lead to further 'regulatory chill'. This would manifest as the inhibiting of government's ability to regulate in the public interest, as regulation is increasingly seen as an irritant to trade and business voices are privileged in the consultation process (De Ville and Siles-Brügge 2015a; CEO *et al.* 2014). Interestingly, despite the broad agreement of the business community on both sides of the Atlantic that such provisions would be desirable (US Chamber of Commerce and BUSINESSEUROPE 2012), EU and US negotiators apparently disagree about the scope of the chapter. It would appear US negotiators merely want provisions on transparency, through regulatory information exchange. They are less keen for the chapter to contain provisions that push regulatory convergence, partly because they do not wish to upset independent and powerful federal regulatory agencies in the US and those at the State level.

2. Genetically Modified Organisms (GMOs): further transatlantic spats

- **This is one of the areas in which the EU and US approach to regulation differs fundamentally: the EU largely bans GMOs on a 'precautionary basis', while the US's 'science-based' approach to risk assessment means they are widely available**
- **EU negotiators have repeatedly stressed that this is a 'red line' in the TTIP talks**
- **During the latest round of negotiations US negotiators have pushed the EU to relax its GMO regime, under pressure themselves from American agribusiness**

- **While deregulation in the EU's GMO regime is unlikely given the contentiousness of the issue, there is evidence to suggest that the TTIP negotiations themselves may be inducing 'regulatory chill'**

Genetically Modified Organisms (GMOs) are often cited by critics as an example of the potential dangers of a 'race to the bottom' and 'regulatory chill' when it comes to concerns about regulatory convergence in TTIP. The EU adopts a relatively more stringent approach to regulation premised on the 'precautionary principle' – whereby the cultivation and sale of such products is *de facto* heavily restricted, even in the absence of incontrovertible scientific evidence that they cause harm to human health or the environment. The US, in turn, emphasises a 'science-based' approach to such risk management, where products are only banned where there is such evidence (Vogel 2012). As a result, GMOs are widely sold and consumed throughout the US.

US agribusiness is extremely keen for TTIP to move the EU towards this model of risk regulation concerning GMOs (and other food safety/environmental issues), and thus is unimpressed with the European Commission's repeated statements that GMOs (and other areas of food safety) are off-limits. In fact, agribusiness as a whole is too enthused about TTIP and the prospects for moving the EU towards the US model of risk regulation.

In this vein, it was interesting to note that the 9th Round of TTIP talks in New York was marked by a very public disagreement over the issue. In the middle of the negotiation rounds, on 22 April, the Commission published its proposal for a reformed GMO approval process in the EU. The basis of the proposal was a provision that allows individual Member State opt-outs from decisions to approve GMO varieties for use in food or animal feed (European Commission 2015c). At the stakeholder briefing and Q&A session held on Thursday 23 April (as well as at the press conference held on Friday 24 April), the US chief negotiator, Dan Mullaney, publicly berated the EU for this new proposal in the presence of the EU's chief negotiatior, Ignacio García Bercero. This was on the grounds that such measures were inconsistent with the EU's international trade commitments[3] and the Single Market (AFP 2015).

[3] Measures like a ban on GMOs have to be justified using appropriate and timely scientific risk assessment according to the WTO's SPS agreement. It is on these grounds that the US first challenged the EU's *de facto* GMO restrictions at the WTO in the 2000s (Pollack and Shaffer 2009).

While it is unlikely that major concessions will be made on the issue of GMOs, given the political contentiousness of the issue and the repeated assurances made by the Commission that the issue is non-negotiable, this is development is interesting insofar as it suggests that the negotiations themselves may also be a source of 'regulatory chill' – inhibiting regulatory decision-making for fear of offending the other party. NGOs have pointed to such developments in a number of areas, most notably the EU's Fuel Quality Directive. Here, the Commission ultimately decided not to label imports from the Canadian 'tar sands' as 'dirty' following lobbying from the Canadian government (De Ville and Siles-Brügge 2015a; Crisp 2014).

3. Investor-state dispute settlement (ISDS)

- **Proposed provisions on ISDS would allow foreign investors to sue states in independent tribunals if they breach their investor rights, as defined under the agreement**
- **Whilst the debate in the US has been more focused on the Trans-Pacific Partnership, ISDS is one of the most controversial issues to emerge out of TTIP negotiations in Europe. It is widely considered to limit the ability of governments to regulate in the public interest and is seen to give considerable leverage to multinational firms.**
- **Negotiations on this issue have been suspended since early 2014 while the EU developed its position and a public consultation launched during this period garnered almost 150,000 responses**
- **The European Commission has recently proposed a series of, so far vaguely formulated, reforms to ISDS, but these have still been the subject of considerable criticism**

Investor-state dispute settlement (ISDS) has become one of the most contentious aspects of the proposed agreement. ISDS essentially enables private investors to sue investment host states in independently constituted tribunals, if said states breach their obligations under investment treaty provisions. ISDS is not a new phenomenon; it can be traced back to investment treaties dating back to the late 1960s. However, its potential inclusion in TTIP has sparked public outcry, particularly in Europe, where opponents are concerned that it may be used by multinationals to contest the regulatory decisions taken by governments in the pursuit of higher profits. Recently a

number of European Parliament committees passed a series of resolutions on TTIP, (intended to feed into an overall resolution authored by the International Trade Committee), many of which voiced concerns over ISDS.[4]

As a result of public opposition within the EU to the inclusion of ISDS in TTIP, the EU Commission launched a public consultation on the subject in 2014. The Commission suspended negotiations on ISDS in order for the Commission to carry out its consultation and consider its response. The Commission received almost 150,000 (largely negative) consultation responses. It is understood that the US negotiators have also taken the issue off the table for the time being, in order to give the EU Commission time and space to reconcile its position on the matter. It is thought that negotiations may resume on ISDS over the coming months.

On 5th May 2015, the European Commission released a concept paper entitled 'Investment in TTIP and beyond – the path for reform' (European Commission 2015d). Crucially, and despite the more critical position vis-à-vis ISDS adopted by other Committees (see above), these recommendations for reform were endorsed 'as a basis for negotiations on a new and effective system of investment protection' by the European Parliament's International Trade Committee in its resolution on TTIP on 28 May 2015 (European Parliament 2015b). This came on the back of a compromise between the Social Democratic group and the centre-right European Peoples' Party after the former had initially voiced opposition to ISDS, possibly in exchange for stronger language on labour rights (Gheyle 2015). This (non-binding, but politically significant) resolution will still have to be voted in the Parliament's plenary in June 2015, where more political jostling on ISDS is to be expected, especially from the Social Democrats. Returning to the Commission's concept paper, this outlines four areas for reform of investment protection:

i) Right to regulate

The Commission proposes to strengthen the right to regulate by drafting a provision which will explicitly refer to the EU and US governments' right to regulate in order to achieve legitimate policy objectives. Furthermore, the Commission proposes the inclusion of a provision which clarifies that governments can discontinue state aid when such aid is expressly prohibited by the competent state authorities (thus directly addressing the difficulties in the Micula case;

[4] These include the Employment and Social Affairs; Environment, Public Health and Food Safety; Constitutional Affairs; Petitions and Legal Affairs Committees (European Parliament 2015a).

ICSID Case No. ARB/05/20). In essence, this is a proposed 'rebalancing' of investment agreements so that they are geared less towards investor protection.

ii) Improving the establishment and functioning of arbitral tribunals in order to increase legitimacy of the ISDS system

The Commission proposes the creation of a roster of approved arbitrators, (who would be selected by the EU and US government), and the requirement that persons appointed to the roster must be eligible to hold judicial office in their home jurisdiction. Furthermore, it suggests that third party submissions be accepted in cases where the third party has a direct and existing interest in the outcome of the dispute.

iii) Appellate mechanism

There is a proposal to include a bilateral appellate mechanism for ISDS in TTIP which would review errors of law and fact in order to increase legitimacy, transparency and predictability. It is suggested that the mechanism could be modelled on the WTO Appellate Body.

iv) Addressing the relationship between ISDS and domestic courts

The Commission wants to avoid parallel claims from investors through either: a 'fork in the road' provision (which would require investors to make an irrevocable choice between domestic courts and ISDS at the beginning of proceedings) or a 'no U-turn' clause (which would require investors to waive any right to domestic litigation once ISDS proceedings have been initiated).

The concept paper concludes that the proposals for reform should be viewed as 'stepping stones' towards the creation of a multilateral system and eventually the establishment of a permanent court.

The concept paper has been criticised by many commentators as lacking in real substance (e.g. Van Harten 2015). Many feel that it simply reiterates what has been advanced previously, and that it does not provide any additional meaningful details about proposed reforms. The only novel proposal is the reference to the establishment of a permanent court, which is in itself, very vague. This suggestion also raises many questions and practical concerns e.g. funding and staffing issues of the proposed court. Moreover, it is doubtful whether there is enough political will to be

able to move forward with such an institution at the present time. It would seem that the US government may be set to reject the proposals contained in the EU concept paper, with US Undersecretary for International Trade at the Commerce Department, Stefan Selig alluding to such a position on 11 May (*EurActiv* 2015).

There has been far less public opposition to the inclusion of ISDS in the TTIP agreement in the USA. In part, this may be because a wider debate about the utility of ISDS in investment treaties took place in the US prior to the latest update to the US Model Bilateral Investment Treaty in 2012. But more significantly, attention in the US appears to be more focused on the conclusion of the Trans-Pacific Partnership (TPP) between the US and Pacific Rim states (which is further down the negotiating track than TTIP), where the inclusion of ISDS has also attracted some controversy (Weisman 2015).

4. Transparency

- **There has been much criticism of the secrecy surrounding the TTIP negotiations**
- **In response the European Commission recently released a number of its negotiating positions and allowed more MEPs access to negotiating documents**
- **Despite the increased transparency, the 'consolidated text' on which both parties are negotiating is still not public (at least in part as a result of the US's position on access to documents)**
- **The US remains far less transparent than the EU; it has only recently announced the opening of a series of 'reading rooms' across the EU for national politicians**

There has been much concern throughout the ongoing negotiations that the TTIP is being negotiated in secret. The EU Commission has made some progress in this regard, having published a limited number of EU negotiating proposals and related documents. It has also granted all MEPs access to negotiating documents, (including the 'consolidated text' of the agreement, featuring proposals from both sides), in so-called 'reading rooms'. US negotiators have, thus far, refused to make public any of their negotiating documents, stressing the value (as Dan Mullaney did during the stakeholder Q&A session on 24 April) of the US's trade advisory group system. Here, representatives from business, unions and other interested parties are briefed in secret on the state of negotiations. The US's policy on access to documents has also

prevented the publication of the consolidated text of the agreement - a key demand of NGOs and politicians campaigning for greater transparency. Under increasing pressure, the US has recently decided to open a series of 'reading rooms' in EU member states – enabling national officials and politicians, but not civil society, academics or trade unions – to access the texts (Crisp 2015).

It is unclear, however, what readers will be able to do with the information they access, as they will be bound by confidentiality rules. Without full access to consolidated texts or negotiating proposals and texts, suspicions are likely to remain about the content of the proposed agreement. Interestingly, the European Ombudsman, who had previously investigated the European Commission and Council following a complaint into the lack of transparency surrounding the negotiations, recently argued that the EU should do more to press the US on the issue of transparency (European Ombudsman 2015).

CONCLUSIONS

- **The initial optimism that negotiations could be completed within two years has been dashed, with 2017 seen as a more realistic completion date at present by negotiators**
- **The main risk from TTIP comes from the proposed 'horizontal' regulatory cooperation chapter, which could inhibit the ability of governments to regulate if this is seen to inhibit transatlantic trade**
- **While the agreement is heavily politicised in Europe, debate in the US remains focused on the TPP**

Despite the initial optimism voiced by negotiators that TTIP could be completed 'on a one tank of gas' and within 'two years', the pace of negotiations remains slow (Bauer 2015). With EU 'red lines' on issues such as GMOs, US business is less enthused about TTIP than the public rhetoric would suggest (one attendee of the stakeholder event we talked to noted that this was one of the worst attended). Given the difficulties in sectoral regulatory cooperation negotiations, businesses on both sides of the Atlantic are pinning their hopes on 'horizontal provisions' which would strengthen the role of commercial considerations in domestic rule-making. While the US and the EU have yet to make significant progress on a common text, this is less down to disagreements on principles and more a matter of domestic regulatory politics on both sides, as this is where the principal risk of deregulation lies. Negotiations on ISDS, meanwhile, remain suspended, pending

an EU review of its negotiating position. It has so far touted vague reform proposals, although these have been met with considerable criticism.

Significantly, the controversy surrounding the TTIP negotiations is a predominantly European phenomenon. The US may well be in the midst of a high-profile debate concerning whether Congress should grant the Executive 'fast-track' negotiating authority – the ability to present trade agreements to Congress for an up-or-down vote without amendments – considered key to advancing the administration's trade agenda. But opposition to the Trade Promotion Authority (TPA) bill from trade unions and other civil society groups is largely focused on the damage that agreeing to the TPP would provoke. TTIP has been almost entirely absent from the debate so far and it remains to be seen when and whether it will become as politicised on the other side of the Atlantic as in Europe.

REFERENCES

AFP (2015), 'US Officials "Disappointed" the EU Wants to Let Member States Decide Whether to Allow GMO products', Business Insider UK, 25 April. Available from: http://uk.businessinsider.com/afp-us-says-new-eu-plan-for-gmo-imports-is-no-solution-2015-4?r=US

Bauer, A. (2015), 'L'Union européenne va proposer un meilleur système de règlement des différends', *Les Echos*, 10 April. Available from: http://www.lesechos.fr/journal20150410/lec1_monde/0204290313846-i-gnacio-garcia-bercero-lunion-europeenne-va-proposer-un-meilleur-systeme-de-reglement-des-differends-1109932.php

CEO, Friends of the Earth Europe and Lobby Control (2014), 'TTIP: Covert Attacks on Democracy and Regulation', September. Available from: http://corporateeurope.org/sites/default/files/ttip_covert_attacks.pdf

Crisp, J. (2014) 'Canada Tar Sands Will Not Be Labelled 'Dirty' After All', 17 December, *EurActiv*. Available from: http://www.euractiv.com/sections/energy/canada-tar-sands-will-not-be-labelled-dirty-after-all-310910

Crisp, J. (2015), 'US to Open TTIP Reading Rooms Across EU', *EurActiv*, 29 April. Available from: http://www.euractiv.com/sections/trade-society/us-open-ttip-reading-rooms-across-eu-314175

De Ville, F. and Siles-Brügge (2015a), *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Cambridge: Polity Press)

De Ville, F. and Siles-Brügge (2015b), 'TTIP's False Progressive Promise', *Policy Network Political Observatory*, 23 April. Available from: http://www.policy-network.net/pno_detail.aspx?ID=4891&title=TTIPs-false-progressive-promise-

EurActiv (2015) 'US rejects EU proposal for investment court, insists on retaining ISDS', 11 May, *EurActiv*, http://www.euractiv.com/sections/trade-society/us-rejects-eu-proposal-investment-court-insists%20-on-retaining-isds-314501

European Commission (2015a), 'TTIP – Initial Provisions for Chapter [] – Regulatory Cooperation'. 4 May. Available from: http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf

European Commission (2015b), 'Initial Provisions for Chapter [] Regulatory Cooperation', 10 February. Available from: http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf

European Commission (2015c), 'Review of the Decision-Making Process on GMOs in the EU: Questions and Answers', 22 April. Available from: http://europa.eu/rapid/press-release_MEMO-15-4779_en.htm

European Commission (2015d), 'Investment in TTIP and Beyond – The Path for Reform', 5 May. Available from: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

European Ombudsman (2015), 'Decision of the European Ombudsman Closing Initiative Inquiry OI/10/2014/RA Concerning the European Commission'. Available from: http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark

European Parliament (2015a), 'EU-US Trade Deal: 14 Committees Have Their Say', 14 April. Available from: http://www.europarl.europa.eu/news/en/news-room/content/20150220STO24366/html/EU-US-trade-deal-14-EP-committees-have-their-say

European Parliament (2015b), 'Compromise Amendments on Draft Report containing the European Parliament's Recommendations to the Commission on the Negotiations for TTIP', 28 May. Available from: https://polcms.secure.europarl.europa.eu/cmsdata/upload/c60d0958-eed1-48af-9845-78682231492f/List%20of%20Compromise%20Amendments.pdf

Gheyle, N. (2015), 'Take-away from the Compromise on TTIP', 28 May. Available from: http://www.eutradepolitics.ugent.be/?q=content/take-away-compromises-ttip

ICSID Case No. ARB/05/20, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, Final Award of 11 December 2013.

Pollack, M.A. and Shaffer, G.C. (2009), When Cooperation Fails: The International Law and Politics of Genetically Modified Foods (Oxford: Oxford University Press)

US Chamber of Commerce and BUSINESSEUROPE (2012), 'Regulatory Cooperation in the EU-US Economic Agreement', October. Available from: http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/jobs-growth/files/consultation/regulation/9-business-europe-us-chamber_en.pdf

Van Harten, G. (2015), 'A Parade of Reforms: The European Commission's Latest Proposal for ISDS', 6 May. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603077

Vogel, D. (2012), *The Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States* (Princeton, NJ: Princeton University Press).

Weisman, J. (2015), 'Trans-Pacific Partnership Seen as a Door for Foreign Suits Against US', 25 March, *The New York Times*. Available from: http://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html

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