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# EU-US negotiations on TTIP

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A survey of current issues

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IN-DEPTH ANALYSIS

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Two years after the start of the TTIP negotiations, the European Parliament has decided to submit new recommendations to the European Commission. The draft recommendations on the negotiations adopted on 28 May in the Committee on International Trade (INTA) will need to be discussed again in Committee after a substantial number of amendments were submitted, resulting in the postponement of discussion in plenary initially planned for 10 June. This overview looks at the issues still outstanding in the negotiations, from both the EU and the US perspective, and the major positions that had been adopted by INTA which will now to be reconsidered in the Committee.

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## EXECUTIVE SUMMARY

Negotiations on the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States reached their ninth round in New York in April 2015. Discussions have covered a broad range of topics, and substantial work undertaken, in particular on the chapters of the agreement covering customs and trade facilitation, services, SMEs, sector-specific regulatory cooperation, and tariffs. Several issues remain highly controversial on both sides: Investor-state dispute settlement (ISDS), Geographical Indications (GIs), the horizontal regulatory cooperation mechanism, and a separate chapter on energy. The tenth round of negotiations is due to be held in July 2015, in Brussels.

New draft recommendations on TTIP were adopted by the Committee on International Trade (INTA) on 28 May 2015, two years after negotiations began, and will need to be discussed and voted in plenary before submission to the European Commission (the Union's negotiator). In the past year, support for TTIP across Europe has varied. Member States such as Germany and Austria have seen the rise of an anti-TTIP movement, whose main concerns are data protection, ISDS and regulatory cooperation (particularly the potential impact of TTIP on food-safety regulations). The draft recommendations adopted by INTA reflect these political sensitivities, and differ substantially in tone from the Parliament's earlier recommendations, of May 2013, in that they indicate more precise directions in which the EP would like future negotiations to go.

The discussion and vote in plenary planned for 10 June was postponed in view of the large number of amendments submitted to the draft recommendations. In particular a significant number of amendments sought to reopen the compromise struck in INTA on ISDS, proposing an approach based on the Commission's concept paper, with a view to creating a permanent (quasi-court-like) resolution mechanism, with opposition to any reference to ISDS persisting in some parts of the chamber.

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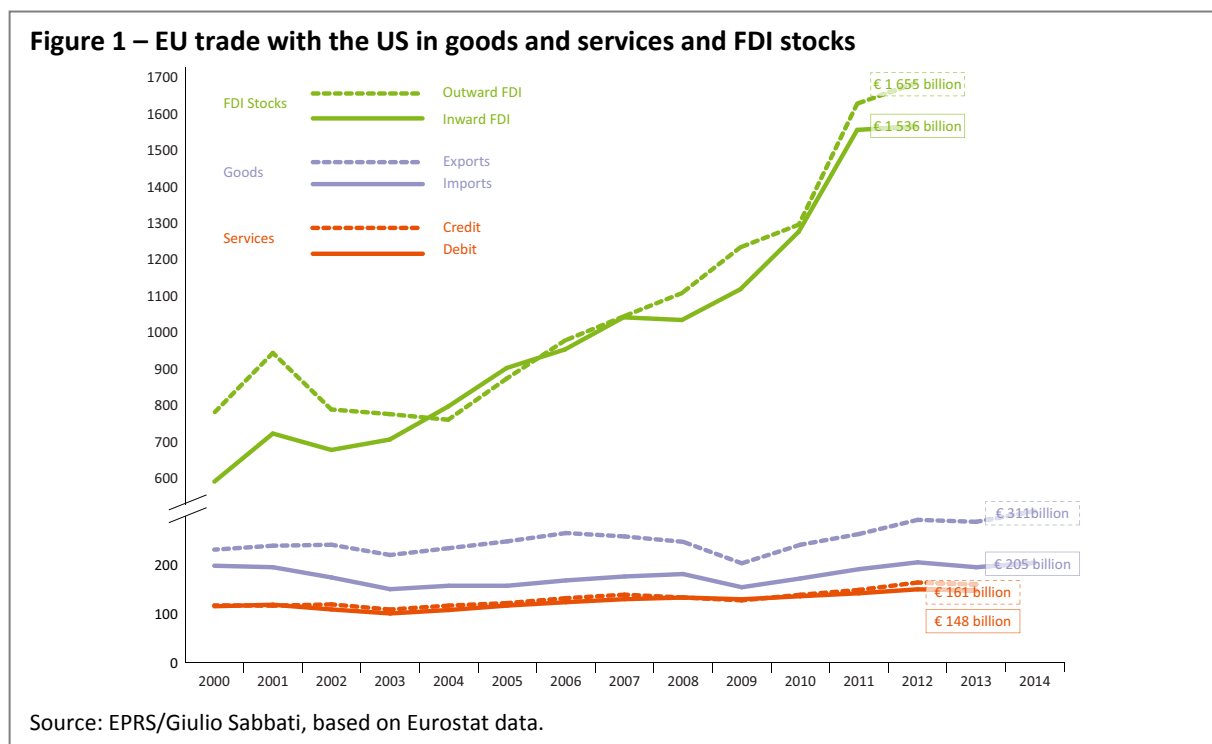
**List of main acronyms used**

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

## 1. TTIP negotiations: current situation

### 1.1. Introduction to the TTIP negotiations

The United States remains the European Union's top trading partner, with a 15.2% share of total EU trade. In 2014, the US was the EU's top export market, worth €310 766 million in exports, and the second EU import market, accounting for €204 802 million.<sup>1</sup> Of the firms exporting to the US, 88% were reported to be small and medium-sized enterprises (SMEs),<sup>2</sup> and 10 million European jobs depend on those exports.<sup>3</sup> While TTIP would only be the US's third biggest FTA market for trade in goods, TTIP would represent its biggest market for services and investments.<sup>4</sup>



<sup>1</sup> European Commission – DG Trade, [European Union, Trade in goods with USA](#), 2014.

<sup>2</sup> [2015 European Commission Report on 'Small and Medium-sized Enterprises and the Transatlantic Trade and Investment Partnership'](#).

<sup>3</sup> See, [DG Trade website](#).

<sup>4</sup> S. I. Akhtar and V. C. Jones, [Transatlantic Trade and Investment Partnership \(TTIP\) Negotiations](#), CRS Report, June 2014. This CRS report shows data from 2012 according to which TTIP would be the third largest trade in goods market after TPP and NAFTA, while TTIP would represent the biggest market for trade in services followed by TPP and NAFTA. 2012 Historical cost-based data for FDI present TTIP as the largest market for investments, with US inward FDI worth US\$1 642 billion, and US outward FDI equal to US\$2 238 billion. US inward and outward FDI for TPP were worth respectively US\$620 billion and US\$934 billion, while for NAFTA they reached respectively US\$240 billion and US\$432 billion. The report also present a table comparing 2012 GDP data; TTIP represents the largest market with US\$32 269 billion GDP (totalling a share of 45% of world GDP), followed by TPP with US\$27 558 billion GDP and NAFTA with US\$18 681 billion GDP.

Both markets have substantially and multilaterally liberalised their trade in goods (in 2013, simple average applied tariffs amounted to respectively 5.5% for the EU and 3.2% for the US).<sup>5</sup> However, some tariff peaks remain, and substantial gains would be achieved by reducing duplication in regulatory procedures or requirements,<sup>6</sup> and from the further opening of services, procurement<sup>7</sup> and investment markets. Therefore, the EU and the US launched negotiations on TTIP with the aim of achieving a comprehensive trade agreement that would set a new standard, in particular for regulatory cooperation and rule-based trade liberalisation.

A study from the Centre for Economic Policy Research (CEPR), undertaken for the European Commission in 2013<sup>8</sup> estimated that, under a comprehensive agreement, EU GDP could increase by between €60 and €120 billion, and US GDP by between €49.5 and €94.9 billion, depending on how ambitious liberalisation of trade and investment turned out to be. EU exports of goods and services to the US might increase by 28%, equivalent to an additional €187 billion. Overall, total exports could be expected to increase by 6.0% in the EU and 8.0% in the US. Potential gains would stem primarily from the reduction of tariffs, elimination of non-tariff barriers (NTBs) to trade in goods and in services, and from opening up public procurement.

Negotiations reached their ninth round in April 2015.<sup>9</sup> Discussions have covered a broad range of topics,<sup>10</sup> and substantial negotiation has taken place, in particular on the chapters concerning customs and trade facilitation, services, SMEs, sector-specific regulatory cooperation, and tariffs. Several issues remain highly controversial on both sides: investor-state dispute settlement (ISDS), geographical indications (GIs), the horizontal regulatory cooperation mechanism, and a separate chapter for energy. The tenth round of negotiations will be held in July 2015, in Brussels.

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<sup>5</sup> See: WTO, [Tariff Profiles](#), 2014.

<sup>6</sup> European Commission – DG Trade, [Transatlantic Trade and Investment Partnership - The Economic Analysis Explained](#), September 2013.

<sup>7</sup> S. Woolcock and J. Heilman Grier, [Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations](#), CEPS, February 2015.

<sup>8</sup> Joseph Francois, Miriam Manchin, Hanna Norberg, Olga Pindyuk and Patrick Tomberger, [Reducing Transatlantic Barriers to Trade and Investment: an Economic Assessment](#), Centre for Economic Policy Research (CEPR), 2013.

<sup>9</sup> European Commission, [Report of the ninth round of negotiations for the Transatlantic Trade and Investment Partnership](#) (New York, 20-24 April 2015).

<sup>10</sup> [Further documentation on negotiation rounds](#) can be found on the DG Trade website.

**Table 1: Previous rounds of negotiations<sup>11</sup>**

Negotiation Round	Overview and videos of final press conferences
First Round: 8-11 July 2013, Washington DC	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I080437">http://ec.europa.eu/avservices/video/player.cfm?ref=I080437</a>
Second Round: 11-15 November 2013, Brussels	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I083455">http://ec.europa.eu/avservices/video/player.cfm?ref=I083455</a>
Third Round: 16-20 December 2013, Washington DC	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I084931">http://ec.europa.eu/avservices/video/player.cfm?ref=I084931</a>
Fourth Round: 10-14 March 2014, Brussels	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I087318">http://ec.europa.eu/avservices/video/player.cfm?ref=I087318</a>
Fifth Round: 19-23 May 2014, Arlington (VA)	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I089461">http://ec.europa.eu/avservices/video/player.cfm?ref=I089461</a>
Sixth Round: 14-18 July 2014, Brussels	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I091332">http://ec.europa.eu/avservices/video/player.cfm?ref=I091332</a>
Seventh Round: 29 September-3 October 2014, Chevy Chase (MD)	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I093277">http://ec.europa.eu/avservices/video/player.cfm?ref=I093277</a>
Eight Round: 02-06 February 2015, Brussels	<a href="http://ec.europa.eu/avservices/video/player.cfm?ref=I098660">http://ec.europa.eu/avservices/video/player.cfm?ref=I098660</a>
Ninth Round: 20-24 April 2015, Washington DC	<a href="http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153394.pdf">http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153394.pdf</a>

## 1.2. Procedures and political background in Europe

The European Commission negotiates towards a TTIP agreement on the basis of a mandate issued by the Council,<sup>12</sup> which placed some limits on the negotiations: for example introducing the 'cultural exception'.<sup>13</sup> The Commission has a duty to keep the Parliament informed throughout the negotiations. Once negotiations are completed and the Council has given authorisation for signature of the agreement, the Council is required to ask the European Parliament for its consent for ratification.<sup>14</sup> If TTIP takes the form of a 'mixed agreement' (i.e. covers areas of both EU and Member State competences), then the final text will also have to be ratified by each Member State in accordance with their national procedures.<sup>15</sup>

With a view to securing the Parliament's consent and complying with the reporting requirements, the Commission has regular dialogue with the Parliament and has published its position papers and textual proposals. However the Parliament, conscious of the need to access the US perspective to get a clearer picture of the issues outstanding and possible compromises, had asked its US counterparts for similar efforts in transparency. While the US tries to engage stakeholders on a wide range of negotiating issues, confidentiality of draft

<sup>11</sup> Idem.

<sup>12</sup> [Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America.](#)

<sup>13</sup> For further information on the cultural exception in TTIP, see discussion on audiovisual services below.

<sup>14</sup> See [article 218\(6\) TFEU](#).

<sup>15</sup> For a short overview of the treaty negotiation procedure in the EU, refer to this [European Commission document](#): DG Trade (September 2013), Trade Negotiations Step by Step.



proposals remains non-negotiable in the US approach to trade talks.<sup>16</sup> The draft recommendations adopted by INTA request further transparency, allowing Members of the European Parliament access to all negotiating documents, including the consolidated text. Considering the possibility of a mixed agreement, the draft recommendations encourage Member States also to involve national parliaments.

Support for the TTIP negotiations varies greatly across EU countries (see figure 2 below).

Germany and Austria see lowest public support for TTIP, where the political debate is focused on data protection, ISDS and regulatory cooperation (in particular with respect to food-safety regulations). The draft recommendations adopted by the INTA Committee on 28 May 2015 reflect these political sensitivities and differ substantially in tone from the Parliament's Recommendations of May 2013. They indicate precise directions in which the institution would like to see future negotiations go. In particular, they give the opportunity to the Commission to submit further reforms on the ISDS mechanism and call for it to present a proposal for a permanent resolution mechanism. However, some MEPs remain of the idea that ISDS should remain out of the final TTIP agreement. Following the large number of amendments submitted to the draft recommendations, the discussion and vote in plenary, scheduled for 10 June, was postponed and the draft recommendations will now revert to INTA.

### 1.3. Political background to the negotiations in the US

A survey conducted by the Pew Research Center finds Americans to be mostly in favour of a trade agreement with the EU (53% of Americans would find a trade agreement between the EU and the US 'good').<sup>17</sup> However TTIP is not at the heart of public debate. The Trans-Pacific Partnership (TPP) is currently the controversial trade agreement in the US because of the fear of losing jobs to Asian countries.<sup>18</sup> Consequently, TTIP will come before Congress only after TPP, and maybe even after revision of the African Growth and Opportunity Act (AGOA).

The current priority of the Office of the US Trade Representative (USTR) is to pass trade promotion authority (TPA) through Congress, which should give fast-track authority for the next five years.<sup>19</sup> TPA is a type of broad negotiation mandate, which provides a general orientation for US negotiators to follow, as well as the objectives the US wants to achieve during negotiations. However TPA is not as detailed as the negotiating mandate given to the Commission, as it is not specific to a particular negotiation. TPA should cover both TPP and TTIP negotiations. Even though TPA is unspecific, once in force, it might nevertheless constrain the US negotiating position. The USTR could use TPA requirements to put pressure on negotiating partners to accept US negotiating objectives. Indeed once TPA is passed, it will grant fast-track procedure to only those agreements that comply with the stated negotiated objectives.

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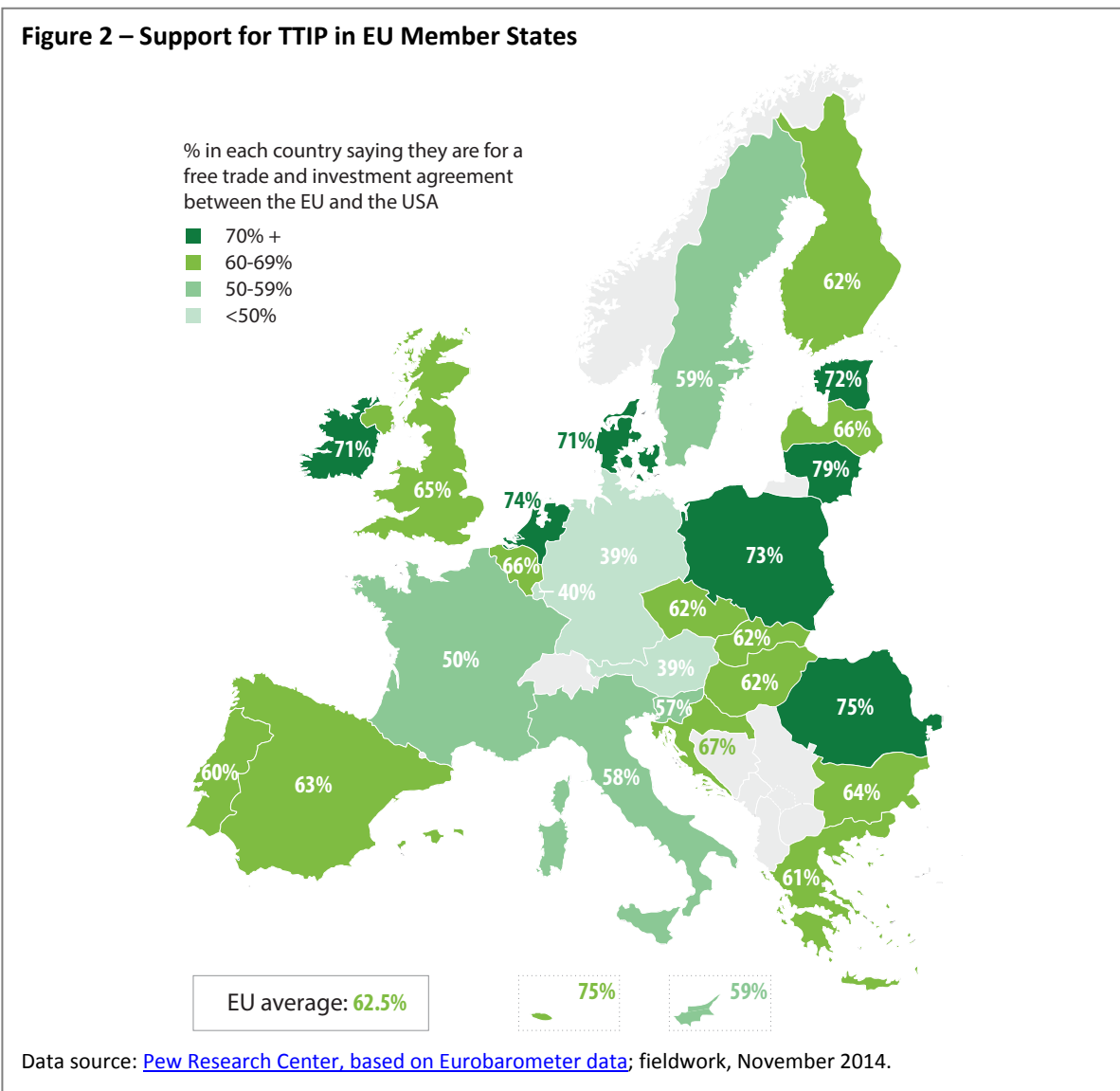
<sup>16</sup> USTR website, [Transparency and the Obama Trade Agenda](#).

<sup>17</sup> [Pew Research Center report](#).

<sup>18</sup> The Economist, [Fighting the secret plot to make the world richer - As America inches towards a big trade deal with Asia, Barack Obama faces a showdown with his party](#), 2015.

<sup>19</sup> The 2015 Trade Promotion Authority bill: [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#); see also I. F. Fergusson and R. S. Beth, [Trade Promotion Authority \(TPA\): Frequently Asked Questions](#), 27 May 2015.

The main objectives stated in the draft TPA 2015, which may have relevance to TTIP negotiations, are: dismantling of trade barriers (tariff as well as non-tariff) in goods, particularly agricultural goods; expanding opportunities in services including cross-border data flows and digital industries; promoting regulatory coherence; ensuring science- and risk assessment-based sanitary and phytosanitary measures (SPS); and making sure that Geographical Indications (GI) systems are not improperly used. The Senate passed the TPA with amendments on 22 May 2015 and it is due to go before the House of Representatives, which is not considered an easy task, due to controversy in the US over TPP, which is in turn linked to TPA. Amendments expressing similar concerns to those animating the European debate, were submitted in the Senate: *inter alia* an amendment aiming at facilitating trade of SMEs; and one concerning the use of ISDS<sup>20</sup> in trade agreements.



<sup>20</sup> The latter amendment (known as the Warren amendment) was ultimately rejected by the Senate, [US Senate Press Gallery](#), 22 May 2015.

## 2. Outstanding issues in the negotiations: sector by sector analysis

### 2.1. Market access

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

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

**Table 2: Average EU tariff levels<sup>21</sup>**

Summary	Total	Ag	Non-Ag	Other Information	
Simple average final bound	5.2	13.5	3.9	Binding Coverage	100
Simple average MFN applied (2013)	5.5	13.2	4.2	Binding Coverage	100
Trade weighted average (2012)	2.6	8.4	2.2	Ag: Tariff quotas (in %)	11.3
Imports in billion US\$ (2012)	2 063.7	125.5	1 938.2	Ag: special safeguards (in %)	23.9

Source: WTO Tariff Profile, 2014

**Table 3: Average tariff levels of the US<sup>22</sup>**

Summary	Total	Ag	Non-Ag	Other Information	
Simple average final bound	3.5	4.9	3.3	Binding Coverage	100
Simple average MFN applied (2013)	3.4	5.3	3.1	Binding Coverage	100
Trade weighted average (2012)	2.1	4.1	2.0	Ag: Tariff quotas (in %)	4.5
Imports in billion US\$ (2012)	2 183.7	106.8	2 076.9	Ag: special safeguards (in %)	2.9

Source: WTO Tariff Profile, 2014

While Most Favoured Nation (MFN) applied tariffs are generally low, some peaks persist in agricultural goods, as can be seen in the 2014 WTO Tariff Profiles reporting the frequency distribution of tariff lines (see tables 4 and 5).<sup>23</sup> Tariff peaks are significant in the EU where 26.7% and 5.2% of tariff lines are subject respectively to duties higher than 15% and higher than 50% (see table 4). In the US, distribution variations are less significant: 5.5% and 0.9% of tariff lines are subject respectively to duties higher than 15% and higher than 50% (see table 5). As a consequence, one of the major objectives of the negotiations on market access is the dismantling of tariff peaks in agricultural products. This is also one of the objectives that can only be achieved in the context of an FTA between the US and the EU, considering the current state of play of agricultural negotiations in the WTO.

<sup>21</sup> [WTO 2014 Tariff Profiles](#).

<sup>22</sup> Idem.

<sup>23</sup> Idem.

**Table 4: Tariff peaks in agricultural goods tariffs for the EU<sup>24</sup>**

Frequency distribution (Agricultural products)	Tariff lines and import values (in %)								NAV %
	Duty-free	0<=5	5<=10	10<=15	15<=25	25<=50	50<=100	>100	
Final Bound	32.3	9.6	15.6	13.0	10.5	11.6	4.6	0.8	32.0
MFN applied (2013)	31.3	9.8	16.7	13.2	11.8	9.3	4.5	0.7	32.1
Imports (2012)	45.5	11.4	17.4	9.6	8.7	3.4	4.1	0.1	26.2

Source: WTO Tariff Profile, 2014

**Table 5: Tariff peaks in agricultural goods tariffs for the US<sup>25</sup>**

Frequency distribution (Agricultural products)	Tariff lines and import values (in %)								NAV %
	Duty-free	0<=5	5<=10	10<=15	15<=25	25<=50	50<=100	>100	
Final Bound	30.2	44.3	13.1	4.3	3.0	1.6	0.4	0.5	41.3
MFN applied (2013)	30.8	45.8	12.4	4.6	3.0	1.5	0.4	0.8	41.4
Imports (2012)	41.0	36.2	12.5	7.0	1.7	0.7	0.6	0.2	4.0

Source: WTO Tariff Profile, 2014

The main issue concerning liberalisation methods relates to the tariff schedules: the EU would like to retain some longer phase-out periods, instead of the immediate liberalisation approach favoured by the US.

While recognising the objective to achieve an ambitious agreement, the draft recommendations adopted by INTA called for a *balanced* approach to liberalisation. Accordingly, the draft not only mentioned the necessity to account for the sensitivity of some products, but also suggested that negotiations should consider the maintenance of some quotas or the creation of a list of excluded goods.

**Box 1: Extract from the draft recommendations of 1 June 2015, on market access offers<sup>26</sup>**

*(b) regarding market access:*

- (i) 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;*
- (ii) 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; noting that CETA could be a good point of reference in this regard to foresee for the most sensitive products appropriate transitional periods and quotas and in few cases their exclusion;*

<sup>24</sup> See footnote 21.

<sup>25</sup> Idem.

<sup>26</sup> European Parliament - Committee on International Trade, [Report containing the European Parliament's Recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership \(TTIP\)](#), (2014/2228) published on 1 June 2015.

Further contentious agricultural market access issues relate to the European ban on hormone-treated beef, poultry processed with pathogens, and the European genetically modified organism (GMO) approval regime.<sup>27</sup> US domestic lobbies are especially strong in these areas, however they remain controversial in the EU and therefore the Commission does not intend to negotiate on them.

**Box 2: Extracts from draft recommendations of 1 June 2015, related to food safety<sup>28</sup>**

*N. whereas President Juncker has clearly reiterated in his Political Guidelines that he wants a balanced and reasonable trade agreement with the United States and that - while the EU and the US can go a significant step further in recognising each other's product standards and working towards transatlantic standards- the EU will not sacrifice its (food)-safety, health, animal health, social, environmental, and data protection standards and cultural diversity; recalling that the safety of the food we eat, the protection of Europeans' personal data and its services of general interest are non-negotiable unless the aim is to achieve a higher level of protection; (...)*

*(c) regarding regulatory cooperation and coherence pillar and NTBs:*

- (i) (...) to ensure similarly that it will not affect standards that have yet to be set in areas where the legislation or the standards are very different in the US as compared with the EU, such as, for example, the implementation of existing (framework) legislation (e.g. REACH), or the adoption of new laws (e.g. cloning), or future definitions affecting the level of protection (e.g. endocrine disrupting chemicals); to ensure that any provisions on regulatory cooperation in the TTIP do not set a procedural requirement for the adoption of Union acts concerned by it nor give rise to enforceable rights in that regard;*

Finally, US concerns on agricultural product market access also stems from EU Geographical Indications (GI) measures. The US cheese industry lobbies heavily against GIs, and the US wine industry fears changes to the 2006 US-EU Agreement on Trade in Wine.<sup>29</sup> This agreement will certainly be included in the TTIP, but the EU aims to extend protection to other products (such as spirits). The EU also wants to include a list of EU and American GIs to be protected.<sup>30</sup> However, ensuring the proper use of GIs is a US priority, illustrated by their inclusion in the draft TPA.<sup>31</sup>

<sup>27</sup> The recent modification of the European GMO regime, allowing Member States to decide whether to allow access of GMO products to their markets has obviously raised US objections. [USTR press release](#), April 2015.

<sup>28</sup> See footnote 26.

<sup>29</sup> For further information, regarding the US wine sector position and GI, refer to: R. Johnson, *The US Wine Industry and Selected Trade Issues with the European Union*, CRS Report, April 2015.

<sup>30</sup> For documents on the EU position with respect to GIs, refer to the [Position Paper on Intellectual Property](#) (March 2015) or to the [Factsheet on Intellectual Property Rights and Geographical Indications in TTIP](#) published by DG Trade.

<sup>31</sup> Refer to the TPA negotiating objectives for trade in agriculture. See: [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

**Box 3: Extracts from draft recommendations of 1 June 2015, on geographical indications<sup>32</sup>**

*(d) regarding the rules: (...)*

- (xvi) to ensure that TTIP includes an ambitious, balanced and modern chapter on and precisely defined areas of intellectual property rights, including recognition and enhanced protection of geographical indications and reflects 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 and the public interest, in particular the need to preserve access to affordable medicines by continuing to support the TRIPS flexibilities;*
- (xix) to secure full recognition and strong legal protection of EU geographical indications and measures to deal with improper use and misleading information and practices; to guarantee the labelling, traceability and genuine origin of these products for consumers and the protection of the know-how of producers as an essential part of a balanced agreement;*

**2.1.2. Rules of origin**

Currently, rules of origin are not a controversial subject. However, systems of rules of origin in EU FTAs and US FTAs are very different. Areas which may lead to discussion in the negotiations are valuation rules in the automotive sectors and the proposal for a 'cumulation of origin' with Mexico (i.e. parts produced by affiliates in Mexico would count as having been produced in the US or the EU). Were cumulation of origin with Mexico to be discussed, the US is likely to prefer to limit its application to certain sectors, such as the automotive industry, instead of inserting an all-encompassing cumulation principle. A less ambitious compromise could be to include a similar provision to that included in the draft CETA (see Box 4 below), which allows future agreements on the conditions to extend cumulation to inputs sourced by a non-Party with whom both Parties have a FTA.

**Box 4: Extract from Article 3 on cumulation of the draft protocol on rules of origin in CETA<sup>33</sup>**

- 8. Subject to paragraph 9, where, as permitted by the WTO Agreement, each Party has a free trade agreement with the same non-Party, a material of that non-Party will be taken into consideration when determining whether a product is originating under this Agreement.*
- 9. A Party shall give effect to paragraph 8 only once provisions with effect equivalent to paragraph 8 are in force between each Party and the non-Party and upon agreement by the Parties on the applicable conditions.*
- 10. Notwithstanding paragraph 9, where each Party has a free trade agreement with the United States, and upon agreement by the Parties on the applicable conditions, a Party shall give effect to paragraph 8 when determining whether a product of Chapters 2, 11, headings 16.01 through 16.03, Chapter 19, heading 20.02 and 20.03 and subheading 3505.10 is originating under this Agreement.*

<sup>32</sup> See footnote 26.

<sup>33</sup> See [consolidated draft CETA](#) (September 2014).

**Box 5: Extracts from draft recommendations of 1 June 2015, on rules of origin<sup>34</sup>**

*(b) regarding market access: (...)*

*(xxvi) to ensure that the negotiations on rules of origin aim at reconciling the EU and US approaches and at establishing effective rules of origin, thereby avoiding that rules of origin are undermined by other agreements, to consider the negotiations as an opportunity to move towards common standards for compulsory origin marking of products; given the conclusion of the negotiations for the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada and the potential upgrade of the EU-Mexico free trade agreement, the possibility and scope of cumulation will need to be considered; however to keep in mind that the purpose of TTIP is to facilitate trade in genuinely US and EU made products and not to allow imports from third countries, therefore exclusions for certain products will need to be considered on a case by case basis and exclusions from all type of cumulation should be granted for sensitive sectors;*

**2.2. Trade in services****2.2.1. An overview of trade in services**

Trade in services is particularly important for the US: TTIP would represent its largest market for services.<sup>35</sup> Services are also the main sector of EU inward foreign direct investment (FDI) from the US. For this reason, the US would like greater openness from the EU in services. Up to now, the EU has fostered greater openness through earlier individual FTAs than through the GATS system. The US is therefore negotiating for greater market access through TTIP and the Trade in Services Agreement (TiSA). Services liberalisation has been fostered in US trade agreements through a negative approach, considered as the more comprehensive liberalisation technique. Until recently, the EU favoured a positive approach to liberalisation, and it is likely that the approach to liberalisation of services in TTIP will mimic the hybrid approach likely to be adopted in TiSA.<sup>36</sup> During recent press conferences, chief negotiators suggested the use of a hybrid approach, mixing positive and negative approaches to market access and national treatment.<sup>37</sup>

**Box 6: Positive, negative and hybrid approach to liberalisation of services**

There are two main approaches to specific commitments for liberalisation in services: positive commitment list approach, and the negative list approach. The first indicates that no commitment has been made unless specified in the commitments list, while the latter makes explicit a general obligation to liberalise that is then restricted by a list of specific exceptions. The negative commitment approach obviously has a stronger liberalisation effect, as liberalisation is the rule and not the exception. In the discussions on a Trade in Services Agreement (TiSA), a hybrid approach for the scheduling of commitments has been proposed that would use a positive approach for market access and a negative approach for national treatment.<sup>38</sup>

<sup>34</sup> See footnote 26.

<sup>35</sup> S. I. Akhtar and V. C. Jones, [Transatlantic Trade and Investment Partnership \(TTIP\) Negotiations](#), CRS Report, June 2014.

<sup>36</sup> A. Lang and C. Conyers, [Financial Services in EU Trade Agreements](#), 2014, European Parliament.

<sup>37</sup> [Questions and answers at the press conference of the ninth round of TTIP negotiation](#).

<sup>38</sup> A. Lang and C. Conyers, [Financial Services in EU Trade Agreements](#), 2014, European Parliament.



In the TTIP services chapter, two main issues for discussion remain. The first is the definition of new services,<sup>39</sup> where the US wants to discuss what Parties understand by new services. To define what a new service is, the EU currently applies the 1991 United Nations Provisional Central Product Classification (CPC), i.e. any goods not included in the 1991 CPC will be considered a new service.<sup>40</sup> This definition is challenged by the US.

Another important point concerning market access for services is professional qualifications. Progress has been achieved for the status of architects, but the discussion on other qualifications is lagging behind. The US would like EU Member States involvement to deal with qualifications not harmonised at EU level.

The INTA Committee had taken on board the hybrid liberalisation approach to trade in services adopted by negotiators. However, the draft recommendations specified that a positive approach should be used for market access, while a negative approach could be taken on national treatment. The draft recommendations addressed the exclusion of new services, without specifying the main issue of the definition of a new service. Finally, the text called for mutual recognition of professional qualifications.

**Box 7: Extracts from draft recommendations of 1 June 2015, on services<sup>41</sup>**

*(b) regarding market access: (...)*

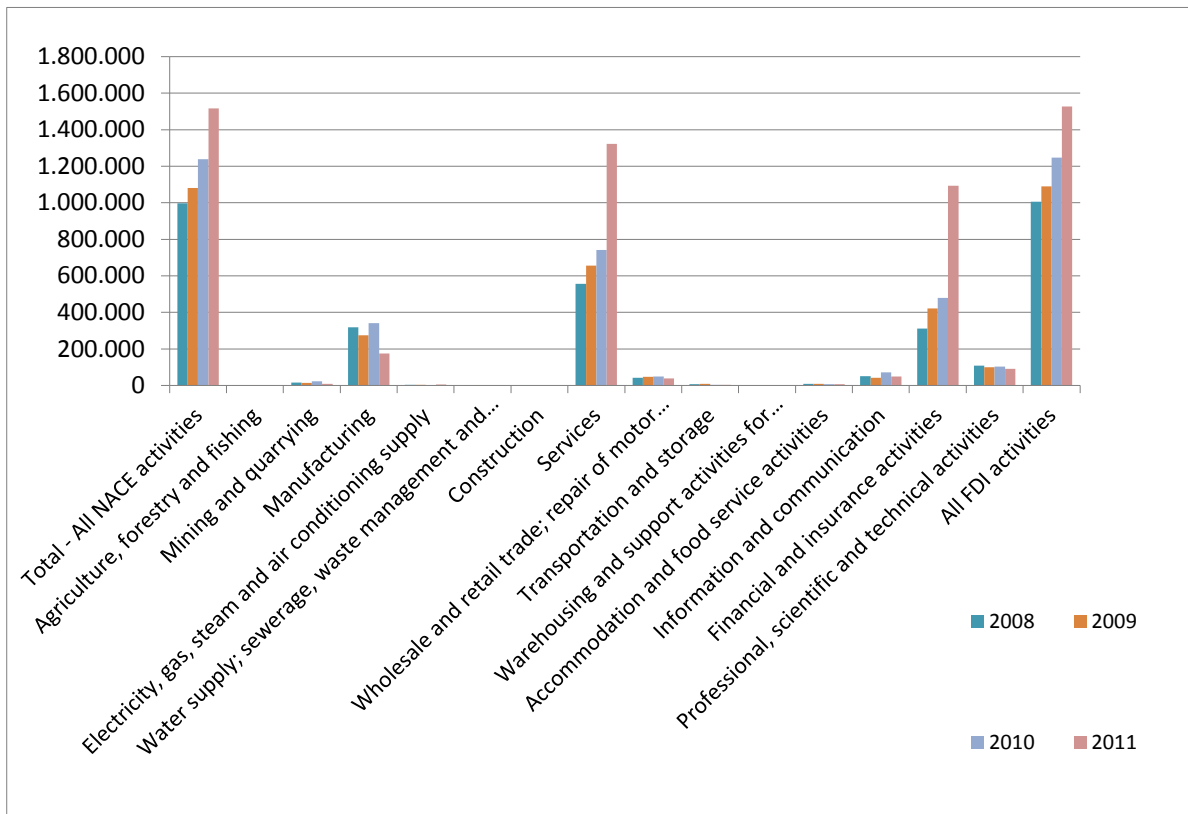
- (v) to increase market access for services according to a "hybrid list approach", using for market access "positive lists", whereby services that are to be opened up to foreign companies are explicitly mentioned and new services are excluded while ensuring that possible stand-still and ratchet clauses 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 "negative list approach" for national treatment";*
- (vi) the negotiations should meaningfully 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 and in relation to capital restrictions on foreign ownership of airlines, which seriously hinders market access for EU companies as well as innovation in the US itself; (...)*
- (viii) to strive hard to ensure mutual recognition of professional qualifications, notably via the creation of a legal framework with federal states that have regulatory powers in this domain, in order to enable EU and US professionals to practise on either side of the Atlantic and to facilitate mobility of investors, professionals, highly -skilled workers and technicians between the EU and the US in sectors covered by TTIP;*

<sup>39</sup> The definition of new services can be particularly important in a chapter on service liberalisation, as new services may receive a particular treatment; for example in the CETA chapter on cross-border trade in services, Parties are allowed to derogate from market access rules or non-discrimination rules (national treatment and MFN) when regulating new services. Refer to the understanding included in the draft [CETA](#) (annex X on cross-border trade in services).

<sup>40</sup> For an example, see: the understanding included in the draft [CETA](#) (annex X on cross-border trade in services).

<sup>41</sup> See footnote 26.



**Figure 3 – EU inward FDI from the US per sector (Direct investment stocks – € million)**

Data source: Eurostat, 2015.

### 2.2.2. Public-private sector

One of the main areas of contention in services is the relation between private and public services. The US would like non-discrimination to apply and therefore wants equal competition for and openness to private sector services. The EU and the US, however, issued a joint statement on public services (see box 7 below). The text of the joint statement clearly reaffirms:

- that governments have a right to provide public services,
- that nothing in TTIP will amount to an obligation to privatise,
- that countries retain the discretion to define the public-private balance.

The draft recommendations that were adopted by INTA in May further clarified the Committee's understanding of what the meaning of the public sector exclusion should be: national and local authority retain full right to modify and introduce provisions with respect to the commissioning, organisation, funding and provision of public services. The text also contained a non-exhaustive list of areas to be covered by the exclusion.

**Box 8: EU-US Joint Statement on Public Services<sup>42</sup>**

*Ambassador Froman and Commissioner Malmström (...) confirmed that U.S. and EU trade agreements do not prevent governments, at any level, from providing or supporting services in areas such as water, education, health, and social services.*

*Furthermore, no EU or U.S. trade agreement requires governments to privatize any service, or prevents governments from expanding the range of services they supply to the public. Moreover, these agreements do not prevent governments from providing public services previously supplied by private service suppliers; contracting a public service to private providers does not mean that it becomes irreversibly part of the commercial sector.*

*Ambassador Froman and Commissioner Malmström also noted the important complementary role of the private sector in these areas. Private sector activities can improve the availability and diversity of services, to the benefit of people in the United States and the European Union. Defining the appropriate balance between public and private services is up to the discretion of each government.*

*Finally, Ambassador Froman and Commissioner Malmström also confirmed that EU and US trade agreements do not impede governments' ability to adopt or maintain regulations to ensure the high quality of services and to protect important public interest objectives, such as the protection of health, safety, or the environment.*

*The United States and the European Union are following this same approach in TTIP and TiSA.*

**Box 9: Extract from draft recommendations of 1 June 2015, on public services<sup>43</sup>**

*(b) regarding market access: (...)*

*(vii) to build on the joint statement reflecting the negotiators' clear commitment to exclude current and future Services of General Interest as well as Services of General Economic Interest from the scope of application of TTIP, (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 negotiating mandate; this exclusion should apply irrespective of how the services are provided and funded;*

**2.2.3. Financial services**

Financial Services are equally important for the US and the EU (see data in tables 6 and 7 below). Financial services are one of the major sectors of US FDI in the EU (see figure 3 above). Because of the importance of the sector, the US is supportive of openness in financial services, but currently excludes cooperation on financial regulation issues as requested by the EU. Indeed the EU requested inclusion of cooperation on prudential regulation in TTIP due to the divergence and incompatibility of some EU and US regulations. Prudential regulations often include extraterritoriality provisions, making compliance extremely costly and difficult for firms operating on both sides of the Atlantic.<sup>44</sup>

<sup>42</sup> See: [EU-US Joint Statement on Public Services](#).

<sup>43</sup> See footnote 26.

<sup>44</sup> Laura Puccio, [TTIP and regulation of financial markets – Regulatory autonomy versus fragmentation](#), EPRS, June 2015.

**Table 6: US exports and imports in total financial services in US\$ million (insurance excluded)**

	Exports				Imports			
	2006	2007	2012	2013	2006	2007	2012	2013
All countries	47 882	61 376	76 605	84 066	14 733	19 197	16 975	18 683
European Union	20 131	24 644	28 785	32 009	8 166	11 091	7 821	8 989

Data source: [Bureau for Economic Analysis \(BEA\), October 2014](#).

**Table 7: US exports and imports in total insurance services in US\$ millions**

	Exports				Imports			
	2006	2007	2012	2013	2006	2007	2012	2013
All countries	9 445	10 841	16 534	16 096	39 382	47 517	53 203	50 454
European Union	2 621	2 776	3 717	3 478	13 346	16 541	12 586	11 580

Data source: [Bureau for Economic Analysis \(BEA\), October 2014](#).

Therefore, the EU's TTIP proposal on financial services<sup>45</sup> originally included discussions regarding the introduction of provisions aiming at more systematic cooperation and facilitating the negotiation process toward recognition, such as:

- Timely adoption of international standards,
- Mutual consultation before adopting new measures,
- Joint examination of existing rules,
- Assessing possibilities for equivalence.

The second measure proposed by the Commission, suggesting mutual consultation before adopting new measures, is particularly controversial for the US. Such an ex-ante mutual consultation was seen – by some US observers – as a potential imposition of a delay in the process of implementation of the Dodd-Frank Act. The US may be open to discussing an ex-post consultation mechanism similar to the existing EU-US Financial Market Regulatory Dialogue.

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<sup>45</sup> [The EU proposal for Financial Service Regulation Cooperation in the TTIP](#).

**Box 9: Extract from draft recommendations of 1 June 2015, on financial services<sup>46</sup>**

*(b) regarding market access: (...)*

- (x) to combine market access negotiations on financial services with convergence in financial regulation at the highest level, in order to support the introduction and compatibility of necessary regulation in order to reinforce financial stability, to ensure adequate protection for consumers of financial goods and services and support ongoing cooperation efforts in other international forums, such as the Basel Committee on Banking Supervision and the Financial Stability Board; to ensure that these cooperation efforts do not limit the EU and member states regulatory and supervisory sovereignty, including their ability to ban certain financial products and activities;*

**2.2.4. Audiovisual and digital services**

Two further contentious areas in services are the audiovisual sector and the digital service sector.

The US is aware that the EU will not negotiate audiovisual services in TTIP, as these fall outside the Commission's negotiating mandate. The US is, however, concerned that there are no discussions on the definition of audiovisual services (and therefore on the scope of that exception). The draft recommendations of 1 June 2015 specified some aspects considered part of this broader cultural exception.<sup>47</sup>

**Box 10: Extracts from draft recommendations of 1 June 2015, on audiovisual services<sup>48</sup>**

*(b) regarding market access: (...)*

- (xviii) to ensure in the agreement, in full compliance with the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, that the parties, reserve their right to adopt or maintain any measure (in particularly those of a regulatory and/or financial nature) with respect to the protection or promotion of cultural and linguistic diversity, in line with the relevant Articles as established in the Treaty on the Functioning of the European Union, as well as media freedom and media pluralism, irrespective of the technology or distribution platform used and keeping in mind that the mandate given to the European Commission by the Member States explicitly excludes the audiovisual services;*
- (xix) specify that nothing in the agreement shall affect the ability of the EU or EU Member States to subsidise and provide financial support to cultural industries and cultural, educational, audiovisual and press services;*
- (xx) confirm that fixed book price systems and price fixing for newspapers and magazines will not be challenged by the obligations under the TTIP agreement;*

Regarding digital services, negotiation is likely to take place, as cross-border data flows are one of the main US negotiating objectives within the TPA.<sup>49</sup> However, the EU is wary of the implications of cross-border data flows, and the digital industry of data protection. The US

<sup>46</sup> See footnote 26.

<sup>47</sup> On difference in approach to the cultural exception, refer to: B. Natens, A comparative analysis of audiovisual services in selected US and Japanese regional trade agreements: lessons for the European Union, Leuven Centre for Global Governance Working Paper, 2014.

<sup>48</sup> See footnote 26.

<sup>49</sup> See the TPA negotiating objectives for digital trade in goods and services and cross-border data flows. Refer to [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

mass surveillance programme undertaken under their counter-terrorism policy, and in particular the US National Security Agency (NSA) scandal, has been linked in some Member States to the debate on TTIP, making data protection a key issue outstanding. The draft recommendations went as far as linking Parliament's consent to TTIP to the dismantling of US mass surveillance programmes and the introduction of a proper redress mechanism for EU citizens.

**Box 11: Extracts from draft recommendations of 1 June 2015, on data protection<sup>50</sup>**

*(b) regarding market access: (...)*

*(xii) to ensure that the EU's acquis on data privacy is not compromised through the liberalisation of data flows, in particular in the area of e-commerce and financial services, while recognizing the relevance of data flows as a backbone of transatlantic trade and the digital economy; to incorporate, as a key point, a comprehensive and unambiguous horizontal self-standing provision, based on Article XIV of the General Agreement on Trade in services (GATS), that fully exempts the existing and future EU legal framework for the protection of personal data from the agreement without any condition that it must be consistent with other parts of the TTIP; to negotiate provisions which touch upon the flow of personal data only if the full application of data protection rules on both sides of the Atlantic is guaranteed and respected to cooperate with the United States in order to encourage third countries to adopt similar high data protection standards around the world;*

*(xiii) to keep in mind that the consent of the European Parliament to the final TTIP agreement could be endangered as long as the US blanket mass surveillance activities are not completely abandoned and an adequate solution is found for the data privacy rights of EU citizens, including administrative and judicial redress, as stated in the paragraph 74 of the Parliament resolution of 12 March 2014;*

*(xiv) to ensure that the trust between the EU and US, which was damaged by mass surveillance scandals, be rapidly and fully restored;*

### 2.3. Public procurement

Public procurement is an area of particular importance for the EU, which has substantially opened up its public procurement market, whilst US liberalisation of its own procurement market is considered insufficient.<sup>51</sup> The main problem for the US is that the procurement market is divided between a Federal procurement market, which can be opened by the Federal Government; and the State procurement market, which remains a prerogative of States (according to the Constitutional division of competence between Federal and State level). The US Constitution remains above US-concluded treaties; therefore the US can only open federal level procurement and cannot impose the opening of State and local level public procurement.

The US will involve States so that they can also agree to open their procurement, but the Federal level cannot force States to do so. The US had already involved States in the Agreement on Government Procurement (GPA).<sup>52</sup> Of the 50 US States, 37 agreed to comply

<sup>50</sup> See footnote 26.

<sup>51</sup> The US liberalisation of the procurement market has been found to be less comprehensive in the US: S. Woolcock and J. Heilman Grier, [Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations](#), CEPS, February 2015.

<sup>52</sup> For more information on the GPA, see the [WTO website](#).

with the GPA.<sup>53</sup> Normally the Buy-American Act (Federal level only) is waived for GPA and FTA partners.

**Box 12: Extracts from draft recommendations of 1 June 2015,  
on access to US public procurement markets<sup>54</sup>**

*(b) regarding market access: (...)*

*(xxi) 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, to have an ambitious approach to the chapter on public procurement, while respecting the compliance of the chapter with the new EU public procurement and concession directives, with a view to remedying, 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 American Act of 1933) at federal and sub-federal level alike building on commitments made in 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; and to set up mechanisms to guarantee that commitments entered into by the US federal authorities will be honoured at all political and administrative levels;*

*(xxii) to ensure, with the aim of creating open, non-discriminatory and predictable procedural requirements ensuring equal access for EU and US companies, especially SMEs, when tendering for public contracts, that the US increases the transparency of the adjudication process in force on its territory; (...)*

*(xxiv) to ensure that the US states are included in the negotiation process in order to achieve meaningful results in opening up US public procurement contracts to EU companies;*

## 2.4. Energy markets

The EU proposed the introduction of a distinct chapter on energy and raw materials. The main aim of this chapter would be to include specific liberalisation provisions aiming at open, competition-friendly and rule-based market access. The objective was also to provide a framework for discussions on energy efficiency. This EU proposal was submitted for the first time during the most recent negotiation round (held on 24 April 2015 in Washington DC).

The US remains cautious about the idea of having a separate chapter for energy.<sup>55</sup> The US does not want the energy chapter to become an exception within the commercial chapters; the main question for the US side being to understand why the EU wants a separate chapter to deal with energy, what the coverage of the said chapter should be (should it be broader than just gas and oil?), how this chapter should be written and how it would be incorporated within the rest of the agreement. Some discussion of these issues took place during the last negotiating round.<sup>56</sup> A major US interest is related to natural gas market access (licences granted on a national treatment basis and without delays).

<sup>53</sup> Refer to [annex 2 of the US appendix to the GPA](#).

<sup>54</sup> See footnote 26.

<sup>55</sup> Intervention by the US negotiator at the [Ninth negotiating round press conference](#).

<sup>56</sup> Speech by the EU negotiator at the [final press conference of the ninth negotiating round on 24 April 2015](#).

**Box 13: Extracts from draft recommendations of 1 June 2015, on a separate chapter on energy<sup>57</sup>**

(d) regarding the rules: (...)

- (vii) *to retain the objective of dedicating a specific chapter to energy, including industrial raw materials; to ensure that in course of the negotiations the two sides examine ways to facilitate energy exports, so that TTIP would abolish any existing restrictions or impediments of export for fuels, including LNG and crude oil, between the two trading partners, with the aim of creating a competitive, transparent and non-discriminatory energy market thereby supporting a diversification of energy sources, contributing to security of supply and leading to lower energy prices emphasises that this energy chapter must integrate clear guarantees that the EU's environmental standards and climate action goals must not be undermined; to encourage EU-US cooperation to end fuel tax exemptions for commercial aviation in line with the G-20 commitments to phase out fossil fuel subsidies;*
- (viii) *to ensure that the right of either partner to govern and to regulate the exploration, exploitation and production of energy sources remains untouched by any agreement, but that the principle of non-discrimination is applied once exploitation is decided; to keep in mind that nothing in the agreement should undermine legitimate non-discriminatory democratic decisions with regard to energy production, in accordance with the precautionary principle; to ensure that access to raw materials as well as to energy should also be granted on a non-discriminatory basis for companies from either the EU or the US and quality standards for energy products must be respected, including those for energy products related to their impact on CO2 emissions such as the one enshrined in the Fuel Quality Directive;*
- (ix) *to ensure that TTIP supports the use and promotion of green goods and services, including through facilitating their development, and simplifies their exports and imports thereby tapping into the considerable potential for both environmental and economic gains offered by the transatlantic economy and complementing the on-going plurilateral negotiations on the Green Goods agreement with the aim of contributing to fight combat global warming and to create new jobs in the "green economy";*
- (x) *to ensure that TTIP serves as a forum for the development of ambitious and binding common sustainability standards for energy production and energy efficiency, always taking into account and adhering to existing standards on both sides such as the EU energy labelling and eco-design directives and to explore ways to enhance cooperation on energy research, development and innovation and promotion of low-carbon and environmentally friendly technologies;*

## 2.5. Small and medium-sized enterprises

Both the US and the EU attach importance to a chapter on small and medium-sized enterprises (SMEs). Table 8, taken from a study by the Commission, provides data on the importance of SMEs in trade with the US. Although their traded value only represents 28% of total EU firms exporting to the US, 88% of all EU firms exporting to the US are SMEs.<sup>58</sup> However in some EU countries, SMEs are important in terms of exporter numbers as well as trade value (this is true for the Netherlands, Italy, Ireland, Spain, Estonia, Latvia).<sup>59</sup> SMEs are

<sup>57</sup> See footnote 26.

<sup>58</sup> [2015 European Commission Report on 'Small and Medium-sized Enterprises and the Transatlantic Trade and Investment Partnership'](#).

<sup>59</sup> Idem.



also important for the US; a reference to promoting SME trade could be included in the TPA.<sup>60</sup>

**Table 8: Breakdown of the total number and value of EU companies exporting goods outside of the EU and to the US by size category<sup>61</sup>**

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

Data source: European Commission, 2015.

The current proposal, submitted by the EU only, includes incorporating discussions on SME that have (already) taken place under the Transatlantic Economic Council (EU-US SME Dialogue) and to supplement this with an exchange of information and data on market access for SME.<sup>62</sup> The draft recommendations adopted in the INTA Committee suggested to introduce further features, such as the proposal for fast-track procedures and a forum to engage SME stakeholders (see box 14 below).

**Box 14: Extracts from draft recommendations of 1 June 2015, on a separate chapter on SME<sup>63</sup>**

*(d) regarding the rules: (...)*

*(xii) to ensure that TTIP includes a specific chapter on SME's in TTIP based on the joint commitment of both negotiating parties and aims at creating new opportunities in the US for European SMEs (including micro enterprises), on the basis of SME exporters' actual reported experience, for instance 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 or by eliminating specific tariff peaks that continue to exist; it should establish mechanisms for both sides to work together to facilitate SMEs' participation in transatlantic trade and investment, for instance through a common SME 'one-stop shop' with SMEs stakeholders playing a key role in its establishment, which would provide specific information they need to export to, import from or invest in the US, including on customs duties, on taxes, on regulations, on custom procedures and on market opportunities;*

<sup>60</sup> [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

<sup>61</sup> The table is taken from the [2015 European Commission Report on 'Small and Medium-sized Enterprises and the Transatlantic Trade and Investment Partnership'](#).

<sup>62</sup> For the text proposal submitted by the EU on SMEs, refer to the DG Trade [website](#) with the negotiating positions of the EU.

<sup>63</sup> See footnote 26.



## 2.6. Investment chapter (including ISDS-related issues)

### 2.6.1. Introduction to the main issues

In 2011, EU FDI stocks in the US amounted to €1 651.6 billion and US FDI stocks in the EU amounted to €1 685.5 billion.<sup>64</sup> Investment access and protection is therefore critical to EU-US economic relations.

The chapter on investment protection has attracted public debate in Europe, where provisions on investor-state dispute resolution is currently the most controversial issue. The proposed use of arbitration has led to much criticism:<sup>65</sup>

- Firstly, commentators find that awards from different arbitral tribunals are inherently inconsistent and incoherent. In particular, when rules create a liability for states due to legislation or regulation, these rules are considered as potentially limiting sovereign power to regulate, even when such legislation is legitimate, for environmental concerns for example, because of the consequences this legislation may have on the operations of foreign business. In particular, rules on indirect expropriation and legitimate expectations could be interpreted in such a way as not to allow regulatory change. Uncertainty concerning how rules may be interpreted and the situation in which State liability can be invoked, are considered to create a 'chilling effect', i.e. states would prefer not to regulate an issue simply from fear of litigation. Proof of such a 'chilling effect' is difficult to verify, but concerns persist.
- The concept of forum shopping – the idea that foreign controlled firms will locate operations or headquarters in countries in order to access specific rights under an investment agreement.
- Confidentiality has long been a characteristic of arbitration. This lack of transparency of arbitration fora still persists as most fora require the parties' consent in order to publish information on the disputes.
- All fora will require the arbitrator to act in an impartial and independent way, however many critics point out that arbitrators may have provided past counsel to the parties, and therefore might not be as neutral as expected.
- Arbitration costs are often shared by parties (not based on the rule that the loser pays the costs), moreover when a country loses a claim, damages tend to be high.

These criticisms are not only limited to the EU, but are also present in the US. However the US and EU approach to these critical voices is different. While the US aims to reform substantive rules, so that discretion of arbitrators in interpreting the investment protection chapter is limited, it does not feel the necessity to substantially modify the procedural rules of arbitration.<sup>66</sup> At the same time, amendments passed in the Senate on TPA include revision of the ISDS mechanism, as well as the introduction of an appellate mechanism.<sup>67</sup> On

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<sup>64</sup> Data can be found on the [DG Trade website page on the United States](#).

<sup>65</sup> An overview of this criticism is presented in Marta Latek, [Investor-State Dispute Settlement \(ISDS\) – State of play and prospects for reform](#), EPRS, January 2015; see also: Ortolani et al. (2014), [Legal Instruments and Practice of Arbitration in the EU, European Parliament](#) - Policy Department on Citizens' Rights and Constitutional Affairs.

<sup>66</sup> The USTR position can be found on the USTR [website](#). Further information on ISDS can be found [on the USTR blog](#).

<sup>67</sup> [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

the other hand, the EU wants both to address the substantive law on the protection of investments as well as the procedural rules of ISDS.

### 2.6.2. Substantive rules

Some of the Parliament and EU civil society concerns regarding the substantive rules for the protection of foreign investments (i.e. indirect expropriation or the fair and equitable treatment) are also US concerns and the US has substantially improved its FTA provisions to avoid limitations to regulatory authority.<sup>68</sup>

#### **Box 15: Extracts from draft recommendations of 1 June 2015, on investment protection rules<sup>69</sup>**

*(d) regarding the rules: (...)*

*(xiv) to ensure that investment protection provisions are limited to post-establishment provisions 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; standards of protection and definitions of investor and investment should be drawn up in a precise legal manner protecting the right to regulate in the public interest, clarifying the meaning of indirect expropriation and preventing unfounded or frivolous claims; free transfer of capital should be in line with the EU treaty provisions and should include a prudential carve-out not limited in time in the case of financial crises;*

### 2.6.3. Investor-state dispute settlement (ISDS)

The EU's procedural concerns regarding arbitration are not totally shared by the US. The US is convinced that safeguards on the interpretation of substantive rules will suffice to tackle the ISDS issues, as they limit discretion of arbitrators, guaranteeing the rights of states to regulate, as well as avoiding forum-shopping or frivolous suits. Moreover the US has always won arbitration cases. It considers therefore that appellate review of cases must remain limited (and is in principle not in favour of review of investment awards), and also favours ICSID as a forum for arbitration. The US is not keen on domestic court proceedings as an alternative dispute resolution framework. Under US FTAs, foreign investors would normally have the choice either to pursue claims in domestic courts under domestic law, or bring claims in front of arbitral tribunals under the FTA chapter on investment. If domestic courts are chosen, the investor could be required to first exhaust the domestic remedies, before being able to access arbitration, and in such a case arbitral tribunals will probably review the domestic court case only if the investor can make a claim on grounds of denial of justice.

Only once has the US not included ISDS in an FTA, i.e. the US-Australia FTA (AUSFTA) where disputes have to be solved in domestic courts or via state-to-state dispute settlement (with diplomatic protection) and only in exceptional cases via arbitration (see box 16 below for the AUSFTA provision). There are two reasons why such a system will be difficult to obtain under TTIP: in AUSFTA the US had only to account for the judicial system of one foreign country (Australia), the systems in EU Member States are very different and the US does not trust all EU Member States equally on the independence and impartiality of their judicial

<sup>68</sup> Laura Puccio, Investment rules in trade agreements – Evolution and issues in light of the TTIP debate, EPRS, (forthcoming); see also on US concerns and ISDS: M.A. Weiss, S.I. Akhtar, B.J. Murill, D.T. Shedd, [International Investment Agreements \(IIAs\): Frequently Asked Questions](#), CRS Report, May 2015.

<sup>69</sup> See footnote 26.

system.<sup>70</sup> Moreover, the US favours the arbitration system, as this maintains some of the salient features of international public law, i.e. the sovereign consent obligation both to the dispute as well as to the panel instituted. Finally, we need to keep in mind that the US already has ISDS with some Member States. As TTIP provisions on ISDS will repeal the BITs existing between some EU Member States and the US, the US will lose the arbitration path with those countries with which international arbitration was previously applicable. It will be difficult therefore for the US to accept a clause on domestic courts in TTIP without any further concessions.

**Box 16: Article 11.16 AUSFTA: consultations on investor-state dispute settlement<sup>71</sup>**

1. *If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.*
2. *For greater certainty, nothing in this Article prevents a Party from raising any matter arising under this Chapter pursuant to the procedures set out in Chapter 21 (Institutional Arrangements and Dispute Settlement). Nor does anything in this Article prevent an investor of a Party from submitting to arbitration a claim against the other Party to the extent permitted under that Party's law.*

The European Commission is trying to bring forward proposals to counter criticism on ISDS. The concept paper presented in May to the INTA Committee by the Trade Commissioner appears to have been rejected by the US. The main issue of contention is the proposed permanent appellate mechanism. The main reason for the US rejection could be the wide scope of appeal suggested (not only including errors of law but also a limited jurisdiction to hear errors of fact), as well as the permanent character of the appeal mechanism proposed. However the US seems open to negotiate some reform of the ISDS mechanism. Public opinion in the US is also calling for some changes to the ISDS framework and therefore the draft TPA submitted to the House of Representatives explicitly requires revision of the ISDS mechanism, as well as the introduction of some sort of appellate mechanism.

The draft recommendations of 1 June 2015 called for the creation of a permanent dispute-settlement mechanism (a quasi-court-like system).

<sup>70</sup> L. Poulsen, J. Bonnitca and J. Yackee (March 2015), [Transatlantic Investment Protection](#), CEPS.

<sup>71</sup> [Australia-US FTA](#) final text.

**Box 17: Extracts from draft recommendations of 1 June 2015, on ISDS<sup>72</sup>**

(d) regarding the rules: (...)

(xv) to ensure the applicability of international agreements, to bring an end to the unequal treatment of European investors in the US on account of existing agreements of Member States; to ensure that foreign investors are treated in a non-discriminatory fashion and have a fair opportunity to seek and achieve redress of grievances while benefiting from no greater rights than domestic investors:

- to build on the concept paper recently presented by Commissioner Malmström to INTA Committee on May 7 and the ongoing discussions in the Trade Ministers' Council and to use them as a basis for negotiations on a new and effective system of investment protection, as they provide very welcome proposals for reform and improvement,
- taking into account the EU's and the US' developed legal systems, to trust the courts of the EU and of the Member States and of the United States to provide effective legal protection based on the principle of democratic legitimacy, efficiently and in a cost-effective manner,
- to propose a permanent solution 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 and the jurisdiction of courts of the EU and of the Member States is respected,
- in the medium term, a public International Investment Court could be the most appropriate means to address investment disputes;

## 2.7. Regulatory issues

### 2.7.1. Regulatory divergences and gains from TTIP

The study commissioned by the Commission on Non-tariff Measures (NTMs) under TTIP finds substantial economic benefits to be reaped from reducing the trade costs of transatlantic regulatory divergences. The headline figures reported for the ambitious scenario where all actionable NTMs<sup>73</sup> are removed are:<sup>74</sup>

- For the EU, removing all actionable NTMs would translate to an increase in GDP (€122 billion per year) and exports (+2.1%). Sector-wise, EU benefits would come mainly from gains in trade in motor vehicles, chemicals, pharmaceuticals, food and electrical machinery.<sup>75</sup>
- For the US, benefits from removing actionable NTMs are estimated at €41 billion per year for GDP and 6.1% for exports. US benefits would mainly accrue to the electrical machinery, chemicals, pharmaceuticals, financial services and insurance sectors.<sup>76</sup>

<sup>72</sup> See footnote 26.

<sup>73</sup> Actionable NTMs are those that can be reduced via negotiation.

<sup>74</sup> European Commission, [Non-Tariff Measures in EU-US Trade and Investment - An Economic Analysis - Highlights of the study](#), 18 December 2009.

<sup>75</sup> Idem.

<sup>76</sup> Idem.

The benefits from greater regulatory convergence are recognised on both sides of the Atlantic. The draft TPA submitted for approval by the US Congress stipulated regulatory convergences as one of the key objectives in FTA negotiations.<sup>77</sup>

Businesses on both sides of the Atlantic are particularly aware of the gains to be achieved from regulatory coherence. Industrial lobbies in the chemical (particularly in plastics) industry, as well as in pharmaceuticals and the automotive industry, are hoping for maximum dismantling of duplicated administrative procedures and even for harmonisation of some standards.

Current negotiations do not include starting discussion on full mutual recognition of standards or harmonisation. Rather, they look at specific areas of regulation where equivalence can be granted, therefore, the result will be less comprehensive than initially expected.<sup>78</sup>

### 2.7.2. Sanitary and phytosanitary (SPS) and technical barriers to trade (TBT) rules

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

Within the TTIP negotiation, there are two areas of disagreement on SPS:

The first issue concerns 'zoning', which means that, if there is an outbreak of e.g. an animal disease in a specific area of a country, the whole country would not be (automatically) subject to import restrictions, but restrictions would only apply to the area concerned. The question is how to divide 'safe' from 'contaminated' zones. The US, following a strictly scientific approach, divides regions depending on their natural conditions and their related propensity to develop a certain regulated organism of phytosanitary concern. The EU instead would like to clarify that the term 'Protected Zone' should apply to any geographical area in the EU in which that organism *is not established* (so far), in spite of (generally) favourable (natural) conditions and its presence in other parts of the Union.<sup>79</sup>

The second area of contention is the US demand for inclusion in the SPS provision of risk assessment based on science. This is a major US priority, as it was referenced in the TPA.<sup>80</sup> The EU has a different approach to risk assessment.<sup>81</sup> The main difference lies in how to manage uncertainty from scientific results or insufficient studies on a particular risk.

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<sup>77</sup> [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

<sup>78</sup> Further elements on regulatory issues per sectors were given by Ignacio Bercero during the [press conference held on 24 April 2015](#).

<sup>79</sup> See the [EU text proposal](#).

<sup>80</sup> See, TPA negotiating objectives for agricultural products: [Bipartisan Congressional Trade Priorities and Accountability Act of 2015](#).

<sup>81</sup> D. Vogel, Risk Regulation in Europe and the United States, Yearbook of European Environmental Law vol.3, 2003.

**Box 18: Extracts from draft recommendations of 1 June 2015, on TBT and SPS<sup>82</sup>**

(c) regarding regulatory cooperation and coherence pillar and NTBs:(...)

- (ii) *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 in the first place at the elimination or significant reduction of excessively burdensome SPS measures including related import procedures; in particular 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 dialogue between regulators and stakeholders and strengthening of cooperation in international standards-setting bodies; to ensure in negotiations on SPS and TBT measures, that the high standards that have been put in place in order to ensure food safety, human, animal or plant life or health in the EU are not compromised in any way;*

### 2.7.3. Regulatory cooperation mechanism

In February 2015, the EU proposed a draft proposal for the institution of a horizontal regulatory cooperation mechanism. The proposal was further detailed in April 2015, to allow for discussion during the ninth round of negotiations.

The proposal submitted by the EU<sup>83</sup> included the institution of a cooperation framework among regulators in order to foster further possibilities for cooperation. The system would include:

- an early information requirement on planned legislation and regulation,
- a rule on non-discriminatory consultation of stakeholders,
- a requirement that the impact assessment include consideration of the impact on international obligation of the party, as well as on international trade and investment.

For legislation and regulation, which is predicted to have a substantial impact on the other party, the EU proposal included the establishment of a bilateral cooperation mechanism, which should promote regulatory compatibility through joint examination of possibilities to achieve: mutual recognition or equivalence in part or in full of regulatory acts; harmonisation; or simplification.

Whilst the US also wants regulatory cooperation, it remains careful about creating a superstructure that could infringe upon domestic legislative powers. A horizontal mechanism for cooperation will be introduced, but will probably be less ambitious than the initial EU proposal.

The draft recommendations of 1 June 2015 further specified the main requirement to be respected by a regulatory cooperation body within TTIP in order for the latter not to infringe on domestic legislative power. Indeed, the draft text clarified that any direct implementation of the recommendations enacted by a regulatory cooperation body would be considered a breach of the EU Treaties.

<sup>82</sup> See footnote 26.

<sup>83</sup> See the [EU text proposal for a regulatory cooperation mechanism](#).

**Box 19: Extracts from draft recommendations of 1 June 2015, on Regulatory Cooperation Body<sup>84</sup>**

(c) regarding regulatory cooperation and coherence pillar and NTBs:(...)

*(viii) to fully respect the established regulatory systems on both sides of the Atlantic, as well as the European Parliament's role within the EU's decision-making process and its democratic scrutiny over EU regulatory processes when creating the framework for future cooperation while at the same time ensuring the utmost transparency and being vigilant about having a balanced involvement of stakeholders within the consultations included in the development of a regulatory proposal and not do delay the European legislative process; to specify the role, the composition and the legal status of the Regulatory Cooperation Body, taking into consideration that any direct and compulsory application of its recommendations would imply a breach of the law-making procedures laid down in the Treaties; to also monitor that it fully preserves the capacity of national, regional and local authorities to legislate their own policies, in particular social and environmental policies;*

The focus of TTIP negotiations has mainly been the sector-specific chapters on regulatory cooperation.<sup>85</sup> The approach in each sector will be different, depending on the comparability of the transatlantic regulatory frameworks. For the moment, equivalence is being discussed for some regulatory aspects of the automotive sector. There have been discussions on the mutual recognition of quality management system audits. The approach in the chemicals sector seems to focus on cooperation on assessment of priority chemicals, as well as alignment on classification and labelling of substances; equivalence is not currently discussed in the chemical sector.<sup>86</sup>

The sector specific chapters were planned to cover nine sectors: cars, chemical, pharmaceutical, medical devices, cosmetics, textiles, ICT, engineering and pesticides. The EU hopes to achieve sufficient progress on the possible regulatory outcomes that can be achieved in all nine sectors over the coming months.<sup>87</sup>

The importance of regulatory cooperation is acknowledged throughout the draft recommendations adopted by INTA. In particular, recognition of equivalence of the greatest number of vehicle safety regulations would be considered one of the main achievements of TTIP negotiations.

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<sup>84</sup> See footnote 26.

<sup>85</sup> Further elements on regulatory issues per sectors were given by Ignacio Bercero during the [press conference held on 24 April 2015](#).

<sup>86</sup> See the [outline proposal](#) submitted by the EU on chemicals.

<sup>87</sup> For the EU positions on all nine sectors refer to the DG Trade [website](#) on EU negotiating positions on TTIP. For a more in-depth analysis of transatlantic differences in five sectors see: Kommerskollegium, [Regulatory Co-Operation and Technical Barriers to Trade within Transatlantic Trade and Investment Partnership](#), March 2014.



**Box 20: Extracts from draft recommendations of 1 June 2015, on regulatory cooperation<sup>88</sup>**

(c) regarding regulatory cooperation and coherence pillar and NTBs:(...)

- (iv) *with regard to the horizontal regulatory cooperation chapter, to foster bilateral regulatory cooperation in order to avoid unnecessary divergence, particularly as regards new technologies and services, for the benefit of European and US competitiveness and consumer choice; to achieve this through enhanced information exchange and to improve the adoption and implementation of international instruments, whilst respecting the subsidiarity principle, on the basis of successful precedents such as ISO standards or under the United Nations Economic Commission for Europe's (UNECE) World Forum for Harmonisation of Vehicle Regulations (WP.29); to remember that the recognition of equivalence of the greatest possible number of vehicle safety regulations based on a verified equivalent level of protection would be one of the most important achievements of the agreement; to ensure that the prior impact assessment for each regulatory act should measure its impact on consumers and the environment next to its impact on trade and investment; to promote regulatory compatibility without compromising the legitimate regulatory and policy objectives and the competences of the EU and US legislators;*
- (v) *to aim to continue to guarantee a high level of product safety within the Union while eliminate unnecessary duplication of testing that causes a waste of resources, in particular on low-risk products;*

## 2.8. Chapters on sustainable development, environment and labour

In the chapters on the environment and labour, the US is likely to wish to follow guidelines similar to NAFTA,<sup>89</sup> or to its subsequent trade agreements (for example, US-Chile).<sup>90</sup> The US does not consider these issues controversial, as the EU and the US are comparable in development levels. These are contentious issues for the US mainly in their negotiations with developing or emerging economies. In general, these chapters include international measures to which both parties have agreed, as well as rules reaffirming the regulatory power of the parties. Special provisions to protect a country's right to enact environmental and labour rules are normally also included in US investment protection chapters.<sup>91</sup> For the US, it is important that state-to-state dispute settlement provisions cover commercial, environmental and labour chapters equally.

The EU will submit its draft negotiation proposal for the next round of negotiations in July 2015.

<sup>88</sup> See footnote 26.

<sup>89</sup> For the full text of the North American Agreement on Environmental Cooperation, see the website of the [Society of American States](#); For the full text of the North American Agreement on Labour Cooperation, go also to the website of the [Society of American States](#).

<sup>90</sup> See [chapter 18 and 19 of the US-Chile FTA](#) for an example of the standard provisions on environment and labour contained in US FTA.

<sup>91</sup> See [article 12 and 13 of the 2012 US BIT Model](#).



**Box 21: Extracts from draft recommendations of 1 June 2015, on sustainable development chapter<sup>92</sup>**

*(d) regarding the rules: (...)*

- (ii) to ensure that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) conventions and their content, the ILO's Decent Work Agenda and the core international environmental agreements; provisions must be aimed at further improving levels of protection of labour and environmental standards; an ambitious trade and sustainable development chapter must also include rules on corporate social responsibility based on OECD Guidelines for Multinational Enterprises and clearly structured dialogue with civil society;*
- (iii) to ensure that labour and environmental standards are not limited to the trade and sustainable development chapter but are equally included in other areas of the agreement, such as investment, trade in services, regulatory cooperation and public procurement;*
- (iv) to ensure that labour and environmental standards are made enforceable, by building on the good experience of existing FTAs by the EU and US and national legislation; to ensure that the implementation of and compliance with labour provisions is subjected to an effective monitoring process, involving social partners and civil society representatives and to the general dispute settlement which applies to the whole agreement*
- (v) to ensure, in full respect of national legislation, that employees of transatlantic companies, registered under EU member state law, have access to information and consultation in line with the European works council directive;*
- (vi) to ensure that the economic, employment, social, and environmental impact of TTIP, is also examined by means of a thorough and objective ex-ante trade sustainability impact assessment (SIA) in full respect of the EU Directive on SIA, with clear and structured involvement of all relevant stakeholders, including civil society; asks the Commission to conduct comparative in-depth impact studies for each Member State and an evaluation of the competitiveness of EU sectors and their counterparts in the US with the aim to make projections on job losses and gains in the sectors affected in each Member State, whereby the adjustment costs could be partly taken up by EU and Member State funding;*

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<sup>92</sup> See footnote 26.

### 3. Main references

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