



“Regulatory rollback: how TTIP puts the environment at risk”

Position paper on the proposed Transatlantic Trade and Investment Partnership (TTIP)

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Introduction

Summer 2013 saw the start of the negotiations between the EU and the USA on what has been called the biggest bilateral trade deal in EU history. The trade relationship between the European Union (EU) and the United States (U.S.) is the biggest in the world, with more than \$2.2 billion of goods and services traded every day across the Atlantic. The EU and the U.S. economies account together for about half of global GDP and for nearly a third of world trade flows – almost \$1 trillion annually. There is over \$3.5 trillion in two-way direct investment. EU companies in the U.S. support over 3 million jobs. With tariffs between the EU and USA already very low, a primary focus of these negotiations is on curbing regulation, including through further expanding the role of especially created extrajudicial tribunals which would allow investors to bypass national courts and challenge governments for passing regulations that harm their interests.

The high levels of confidentiality that are applied to the TTIP negotiations and the piecemeal release of documents by both negotiating parties stands in the way of any analysis of what exactly is being negotiated and hinders an assessment of its impacts. Nevertheless, a review of demands made by the main industry groups on both sides of the Atlantic who are supporting the negotiationsⁱ, as well as the few papers and statements of negotiators that have been made available to the publicⁱⁱ or leaked, show that a central aim of these ongoing negotiations is deregulation of present public interest policies and preventing the development of new ones. Corporate pressure for such deregulation is indeed the likely explanation for the high political priority given to TTIP by some European politicians at a time when the public good needs to be served by Europe taking a stronger stance in relation to US policies on climate change or mass surveillance. Experiences from some earlier agreed Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) point out several problematic issues. All in all, the Transatlantic Trade and Investment Partnership that we see emerging would pose a direct threat to the EU’s ability to implement and develop new regulations to address pressing environmental challenges.

These negotiations follow hot on the heels of another bilateral agreement between the EU and Canada (the Comprehensive Economic and Trade Agreement or CETA) that was concluded in October 2013 at a political level between Commission President Barroso and Canadian Prime Minister Harper and is due to be put before Member States and the European Parliament for approval towards the end of 2014 or early 2015. Although the text of this deal is likely to remain a secret until the 'legal scrubbing' has been concluded, elements of the deal have come out through conversations and leaked documents, such as the inclusion of an Investor State Dispute Settlement Mechanism, which tend to reinforce the environmental concerns around the TTIP.

The purpose of this paper is to outline the EEB's position, main concerns and recommendations to policy makers who are directly or indirectly involved in the negotiations on TTIP or in the next steps for CETA.

Key concerns:

Although the impacts of these negotiations go far beyond the environmental field, this paper primarily focuses on the most imminent and direct impacts on environmental protection. These come from a number of horizontal chapters and instruments as well as from possibly more far-reaching sector-specific agreements and have particular implications for a number of environmental issues.

In expressing concerns about the potential environmental implications of TTIP, the EEB does not here take a position in relation to trade and investment agreements per se or attempt to address broader issues concerning the relationship between increased trade and investment flows and sustainability. Removal of unnecessary barriers to trade and investment is on the face of it a legitimate objective. But where those 'barriers' serve fundamental purposes such as the protection of the environment, working conditions or public health, they cannot be considered unnecessary. Indeed it is essential to ensure that those purposes are not compromised in any way by any such agreement but rather are supported by it.

'Regulatory Cooperation or Coherence'

Under this chapter, as proposed by the EU, a set of rules, procedures and bodies would be set up to ensure closer regulatory co-operation.ⁱⁱⁱ The purpose would be to explore trade-facilitative solutions when it comes to enhancing regulatory compatibility by way of recognition of equivalence, mutual recognition or reliance and exchange of data and information. The chapter would foresee a commitment from both parties to regularly apprise the other side of any regulatory or legislative initiative with a potential significant trade impact as of the planning stage. A Regulatory Cooperation Council (RCC) would be established which would consist of senior level regulators and trade representatives. The RCC would prepare a yearly Regulatory Programme- which outlines the planned and ongoing regulatory cooperation activities and develops joint proposals on how to deepen regulatory cooperation. The RCC would be assisted by sectoral ad hoc working groups and would 'interact' with a multi stakeholder advisory committee consisting of business, consumer representatives and trade unions.

Industry from both the EU and US sides^{iv} has strongly pushed for the RCC and risks combining an EU approach to regulatory cooperation with a US approach of business being a co-writer of legislation.

Investor-State Dispute Settlement (ISDS) Mechanisms – offshore tribunals to protect corporate interests

Investor State Dispute Settlement mechanisms have existed since the 1950s but it is only in recent years that they have been used more frequently, following their inclusion in bilateral deals between the EU, US and mostly developing countries. A commonly used argument for such mechanisms is to ensure that domestic companies do not enjoy preferential treatment over foreign investors, although few examples if any have so far been provided to prove the potential seriousness of this problem in either the EU or US, nor has it been established that other mechanisms are not adequate to deal with it if/when it arises.

In reality however, such tribunals regularly provide companies unprecedented means of attacking government policies they consider not to be in their interest. It would allow them to bypass the domestic justice system and seek compensation for revenues that they would claim to have benefitted from under an investment deal. These tribunals are generally composed of three private sector attorneys who often rotate between being 'judge' and bringing the case for a company against government. Only 15 lawyers have been involved in 55% of the total cases known to date^v. It is not possible to appeal their decisions and there is no limit to the amount of money a tribunal can order a government to pay.

The last 10 years has seen a doubling of the number of cases^{vi}, which – when settled in favour of the corporation – require governments to fork out hefty fines paid by the tax payer. Examples of such cases are US energy company Lone Pine suing Canada for \$250 million over a fracking ban in Quebec, Chevron versus Ecuador where Chevron used ISDS to overturn a court ruling requiring them to pay \$18 billion in fines, or Vattenfall versus Germany, whereby in 2012, Swedish energy giant Vattenfall launched an investor-state lawsuit against Germany seeking €3.7 billion in compensation for lost profits related to two of its nuclear power plants^{vii}. The inclusion of this mechanism in a deal between the EU and US, which both the EU and the US are supporting, can be expected to lead to a significant further expansion of such lawsuits on behalf of any of the 75.000 firms cross-registered in both the EU and US and, perhaps even more significantly, cause a 'legislative chill' effect in some areas, including environment. Even if a final deal contains a section on the parties maintaining the right to regulate, the inclusion of an ISDS mechanism would tend to make it unaffordable for the EU to exercise this right with any degree of ambition or leadership in those areas.

Instead of including an investor state dispute settlement mechanism, whether in a more extreme form as used by countries like the Netherlands, Germany and the UK or a milder form as the Commission claims to be supporting, a chapter on investment protection could simply recognize that both the EU and US already have well functioning court systems where an investor can be certain to defend its rights.

Fast track ratification of amendments to TTIP

A further point of concern is a proposal by the EU for a streamlined procedure to amend the sectoral annexes of TTIP or to add new ones through a simplified mechanism not entailing domestic ratification procedures. This would allow a deal to be struck on, for example GMOs, at a later stage, which could then be added to the agreement without further ratification procedures. It would effectively be an open

and continuous invitation for backroom deals with limited democratic oversight. Especially in combination with proposals for a Regulatory Cooperation Council, this would make TTIP an open-ended affair and a very effective instrument to curb the further development of environmental policies.

Uncertain economic gains, mostly dependent on roll back of public policy

Various claims are made about the expected benefits from an eventual deal about jobs and growth that TTIP could deliver and it is because of this prospect that these negotiations have been getting traction and strong support from Commission President Barroso and US President Obama. The European Commission has produced an impact assessment (commissioned to the Centre for Economic Policy Research as well as drawing on studies by ECORYS)^{viii}, which is now widely used to claim that a deal could lead to 'millions of euros of savings to companies and create hundreds of thousands of jobs. It is expected that every year an average European household would gain an extra €545 and our economy would be boosted by around 0.5% of GDP, once the deal was fully implemented.'

Despite the fact that these figures are the result of a limited modeling exercise using highly unrealistic assumptions about levels of removal of Non Tariff Barriers (NTB) – without assessing the benefits such 'barriers' bring in terms of protection public health, environment or workers' rights – they continue to be widely quoted and referred to as a given. It also raises the question as to whether or not this study meets the Commission's own internal standards for impact assessment and better regulation, which are otherwise so rigorously applied in EU environmental policy making. The reality is that only the scenario with the highest levels of NTB removal assessed in the study produced the widely-quoted increase of €120 billion to the EU economy (amounting to the aforementioned 0.5% of EU GDP). According to the study itself, however, it does not occur instantly, and it does not represent a boost to annual growth of 0.5%. The EC study estimates that it would take ten years for the agreement to have full effect, during which period the impact on annual economic growth would not be 0.5%, but 0.05%, and for ten years only. Furthermore, this is, as previously stated, the most extreme of the study's scenarios for what might actually be achieved in the negotiations. For its more realistic scenarios, the study estimates an increase in GDP after ten years of little more than 0.1%, i.e. an increase in the annual GDP growth rate of 0.01% for the ten year period. The figures on the other side of the Atlantic are little better. The projected increase in GDP in the US as a result of removing the few remaining tariffs (which are higher on the EU side) would be \$20.5 billion^{ix}, which – as a comparison – is a fifth of the impact that the introduction of the Apple iPhone5 is estimated to have had on US GDP^x.

Much of the gains that are claimed by TTIP proponents would however derive from the removal of 'non tariff barriers' or 'trade irritants' which include health, safety, environmental and financial sector regulation. There are no figures for the financial implications of this, though. None of the above mentioned studies have assessed the potential costs in the form of, for example, more environmental pollution and degradation of ecosystems and their services as a result of removing such barriers. These would only be assessed, if at all, as part of a Sustainability Impact Assessment (SIA), which only started several months after the start of the negotiations. It is still unclear how this will impact the outcome of the negotiations. The fact that the political decision to proceed with the TTIP negotiations was taken by

the EU without there being a credible assessment of the full potential costs resulting from the removal of NTBs indicates a deeply flawed, politically skewed decision-making process.

Non-Transparent procedures

Unlike international negotiations on, for example, a new climate treaty, the negotiations on TTIP are taking place in a culture of secrecy. Negotiating documents and positions are only released partially, often omitting the most important elements. Only a limited number of member state representatives and MEPs are informed in more detail about the development, but on a confidentiality basis. The prospective members of a TTIP Advisory Group, that was proposed a couple of months after the negotiations started and after the Commission realised the political risk the negotiations were running into and that would consist of both industry and civil society stakeholders, have also been asked by the Commission to treat certain information received as confidential. Only at the very end of the negotiations will the text of the final agreement be provided to the European Parliament and EU Ministers of Foreign Affairs, who then only have a choice between approving or rejecting the deal. This lack of transparency is not acceptable.

Climate and energy policies

At a time when Europe is struggling to find the political will to put into place climate and energy policies that would be effective enough to tackle climate change, a number of provisions negotiated under TTIP could directly threaten both existing policies and the ability to develop new ones. The potential chill effect from a RCC and ISDS could come from the stated objective of 'eliminating or reducing technical barriers to trade' through a process by which 'equivalence' or 'mutual recognition'^{xi} of existing standards would be determined, or from an obligation to change existing standards to new internationally agreed ones as part of TTIP. Examples of such 'technical barriers' that have been listed by either negotiators or the industry groups pushing for this deal are **energy efficiency labels, fuel efficiency standards for cars, green or sustainable public procurement policies, regulation of unconventional fossil fuel extraction including shale gas and tar sands, sustainability standards for bio-energy and the banning of f-gases in appliances such as refrigerators and freezers**^{xii}. This could mean for example that it would become near-impossible to close a well known loophole in the EU's regulation of car emissions by which emission levels from cars are in reality 23% higher than those results the car industry reports from the test laboratories. More fundamentally however, the existing problems to strengthen EU's climate policies would not benefit from a TTIP-based US involvement in the process.

Chemical policies

The EU's flagship chemicals policy, REACH, was one of the most fiercely debated pieces of EU environmental law, both during the creation of REACH as well as during its implementation. As a result, some of the most contentious issues are still to be resolved by EU lawmakers, including how to address Endocrine Disrupting Chemicals, cocktail effects and new materials such as nano. Not surprisingly, **REACH has been claimed by the US chemicals industry as the largest trade barrier for US Chemical manufacturing**^{xiii}. At the same time, for REACH to achieve its principled objective of protecting people's health from hazardous chemicals, much more remains to be done by the EU. The TTIP could undermine

REACH implementation by including provisions that would hamper REACH implementation directly, for example through business confidentiality clauses or slowing down the already cumbersome process by which Substances of Very High Concern will be identified, or indirectly through a system of 'mutual recognition', by which a company could be able to turn to the other side of the Atlantic if its substances would fail to be approved in the EU.

Agriculture and food safety including GMOs

Threats to policies on sustainable agriculture and food arise principally through negotiations on Sanitary and Phyto Sanitary restrictions (SPS). Here, industry on both sides is pushing for the 'elimination and reduction of non-tariff barriers such as SPS measures that are not based on science'^{xiv}. This could mean that the burden of proof as to whether a product is safe or not would fall on the authorities and allow companies to claim scientific uncertainty to secure market access for their product. If so, it would directly undermine the application of the treaty-legislated precautionary principle, which allows the EU or a government to act in the face of a certain degree of scientific uncertainty. More specifically, this could mean it would become a lot harder for European countries to not authorize **GM crops**, or to continue refusing to import **chlorinated chickens, pork from pigs fed with ractopamine growth drug** or fruits with higher **pesticide residues** than currently allowed in the EU. A particular threat comes to **EU food labeling** and in particular organic food labeling, where the planned revision of the EU organic food regulation could be used to undermine standards directly or again indirectly through mutual recognition rules.

In addition to food safety concerns, there are potential implications for animal welfare, where in the US the federal regulator does not take animal welfare into account as regards food and drug safety, except through the Humane Slaughter Act that only covers the last day of the animals live^{xv}. Moreover, the use of antibiotics as a growth promoter is still allowed in the US, unlike in the EU where this has been phased out and is now banned. TTIP could also make it more difficult to address the prophylactic use of antibiotics, whereby these drugs are frequently given to whole herds or flocks via their feed and water as a preventive measure, which happens both in the EU and US and which is linked to growing resistance to antibiotics among humans^{xvi}.

Key demands:

Given the clear and imminent potential threat to environmental protection and to the associated benefits for European citizens, the EEB calls for:

- EU negotiators to provide full public access to all negotiating documents, and to ensure that a comprehensive Sustainability Impact Assessment is rapidly finalized and used as a basis for further negotiations, including a decision on whether to proceed with the negotiations at all;
- The European Parliament and EU Member States to firmly reject the recently agreed CETA deal with Canada as it is understood to include an Investor State Dispute Settlement mechanism, which the Sustainability Impact Assessment commissioned by the European Commission advised not to include.
- The European Commission to work to ensure that TTIP excludes mechanisms for regulatory cooperation, investor state dispute settlement, fast track ratification as well as deeper forms of regulatory cooperation in the field of energy, climate, chemicals, agriculture and food, and other areas where environmental policy risks to be weakened.
- The European Parliament and Member States to stand ready to reject a final TTIP deal should the Commission fail to exclude any of the above contentious issues.

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ENDNOTES

- ⁱ See: http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/jobs-growth/consultation-on-regulatory-issues_en.htm
- ⁱⁱ Available at DG Trade website: <http://ec.europa.eu/trade/policy/in-focus/ttip/resources/>
- ⁱⁱⁱ Link to leaked EU negotiating paper on RCC: <http://corporateeurope.org/sites/default/files/ttip-regulatory-coherence-2-12-2013.pdf>
- ^{iv} BusinessEurope and US Chamber of Commerce; "Regulatory Cooperation in the EU-US Economic Agreement", October 2012, page 4. <http://corporateeurope.org/sites/default/files/businesseurope-uschamber-...>
- ^v Profiting from Injustice, available at:
<http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf>
- ^{vi} http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf
- ^{vii} Overview of ISDS cases from the US and Canada available at: <http://www.citizen.org/documents/investor-state-chart.pdf>
- ^{viii} Reducing Transatlantic Barriers to Trade and Investment, An Economic Assessment, Centre for Economic Policy Research available at: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf and EC Impact Assessment Report available at: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf
- ^{ix} http://www.ecipe.org/media/publication_pdfs/a-transatlantic-zero-agreement-estimating-the-gains-from-transatlantic-free-trade-in-goods.pdf
- ^x <https://mm.jpmorgan.com/EmailPubServlet?h=-825pgod&doc=GPS-938711-0.html>
- ^{xi} Reference to non tariff barriers
- ^{xii} Overview and further references at: <http://www.citizen.org/documents/TAFTA-climate-factsheet.pdf>
- ^{xiii} At: <http://www.socma.com/PressRoom/index.cfm?subSec=3&sub=71&articleID=4382>
- ^{xiv} Overview and further references at: <http://www.citizen.org/documents/TAFTA-food-factsheet.pdf>
- ^{xv} Compassion in World Farming, TTIP Briefing
- ^{xvi} While most of the examples given here relate to areas where the EU has a more progressive regulatory regime than the US, there are other examples where a more progressive approach in the US could be similarly undermined by TTIP, e.g. in relation to air pollution standards or regulation of the financial sector.