

Options and possibilities in TTIP: two sectors and the mother of controversial issues.

European Union Studies Association's 14th Biennial Meeting

Boston, March 5-7, 2015.

Leif Johan Eliasson
East Stroudsburg University
jeliasson@esu.edu

Draft - Comments appreciated

Introduction

In 2013 the European Union (EU) and the United States (US) began negotiating the Transatlantic Trade and Investment Partnership (TTIP). Although tariff lines average 3-4%, the rates for certain categories and individual products are much higher,¹ so removing or reducing tariffs in a €700bn annual bilateral trade relationship translates into large savings for the companies involved (especially small and medium sized enterprises), and ultimately lower consumer prices.² Yet TTIP is primarily about reducing or eliminating 'behind the border' restrictions to trade and investments, so-called technical barriers to trade (TBS), focusing in particular on attaining various degrees of regulatory convergence, while in the process setting dominant international standards.³

The costs of complying with differences in regulatory and technical product standards across the Atlantic vary by sector and product line, but estimates range from the equivalent of adding 10-20% tariffs up to 73%.⁴ Neither transatlantic partner assesses the effects of proposals on transatlantic trade or business activities. The Office of Information and Regulatory Affairs (OIRA) assesses the impact of major US legislation; the Commission assesses most new EU legislation.⁵ The EU requests public feedback on a proposed law (directive or regulation), and third parties can submit proposals, but no comment period applies when it comes time to write the rules for the same law; the opposite applies in the US. A Regulatory Impact Coordination Council (or similar) in TTIP, serving as a liaison between regulators, would also be useful in TTIP. There are only a few vague guidelines for OIRA and the Commission references to assess the impact of regulations on trade; one study found that a Transatlantic Regulatory Impact Assessment on product safety regulations applied on both sides of the Atlantic would improve real American and European income by .05-.1 percent by cutting compliance costs for business.⁶

There are general commitments to cooperate on removing additional regulatory barriers, increase transparency, enhance mutual understanding of respective systems, and align regulations with international standards, while respecting both sides' laws. There are many ways to remove horizontal and vertical differences between two regulatory systems, including harmonization (identical processes and measures), mutual recognition (e.g. the 2004 EU-US agreement on marine equipment, and the 2012 agreement on organic food), or equivalency (e.g. the 1996 EU-US veterinary agreement).⁷ While a regulation may act as a TBT, in reality it often reflects genuinely different constituent preferences and strategies, thus serving desired public and social objectives, e.g. on health or financial stability, and not all such differences can or should be eliminated.⁸

Trade agreements always suffer the same problem, albeit to varying degree: how to convince domestic constituents, stakeholders, and legislators to accept short term pain for certain sectors (which vary by agreement) in exchange for long-term gains for the country or region as a whole. Political structures, cultural norms, and institutional factors make this endeavor very sensitive in several areas, e.g. public procurement, pharmaceuticals, chemicals, audiovisual services, Sanitary and Phytosanitary measures (SPS - i.e. food safety and animal and plant health) even between close allies. Americans and Europeans vigorously defend their own protectionist policies in certain sectors; insist on greater access to the other's market in select sectors, while trying to placate domestic stakeholder and consumer demands. This balancing act can be very difficult when attempting complex, multifaceted agreements.

Europe and the US also tend to seek Preferential Trade Agreements (PTAs) and Free Trade Agreements (FTAs) with the same countries and regions, and even where there are significant similarities in policy objectives and recognized processes, no two treaties signed by the EU and the US are identical. The EU and the US have used their size and attractiveness to extract greater concessions from, and reforms in, other signatories, resulting in (a) longer transition periods with higher retained tariffs on imports to the EU/US during those transitions; (b) greater recognition of their own standards, coupled with greater access to the other's markets; (c) exclusion of goods and services the EU/US wanted to protect (e.g. domestic shipping and air transport in the US; GMs and audiovisuals in the EU). As a percentage of GDP the Canada-EU agreement (CETA), KOREA-EU FTA (KOREU), and KOREA-US FTA (KORUS) all provide greater growth as a percentage of GDP to the Canadian and Korean economies, but the regulatory changes required of the two were far greater, thus solidifying the influence of the EU and US. TTIP is a negotiation between economic equals who share similar norms and values. While that should enable significant

progress, the size and ambitious scope of TTIP also give rise to numerous technical and political challenges, from differing interpretations of regulations and requirements to extensive anti-TTIP interest group campaigns, which in turn have weakened public support.

This paper discusses three sectors in TTIP: food and agriculture (including SPS), motor vehicles, and ISDS. The purpose is to provide some context for the debate, and background on the challenges facing the sectors (autos excluded), before discussing potential policy paths. It is argued that there is room for compromise on food (especially SPS and GMOs) through differentiated labelling and higher tariff rate quotas (TRQs); a few modifications in the automobile chapter could result in the first global vehicle, and an ISDS with significantly revised parameters is necessary for completion of TTIP.

Agriculture and Food Safety

While agricultural and food products constitute a relatively small portion (4-5%) of transatlantic trade (€23bn annually in 2012, with a substantial European trade surplus), tariff levels are higher than in other sectors, averaging 9 % in the US (with applied American beverage tariffs of 16% and maximum MFN rates of 300%), and 14% in the EU (with applied tariffs on dairy imports hovering above 50%, and maximum MFN tariffs of 600%).⁹ Eliminating applied tariffs on most products face little resistance, but approval nonetheless remains dependent on progress in other areas.

The GATT excludes measures protecting human, plant, or animal health (Art. 20) from market liberalization. However, SPS measures are included in most agreements, and with regulatory issues at the forefront of TTIP, SPS measures, particularly risk assessment, are at or near the top of the list of contentious issues. The US agricultural industry and Congress want recognition of American standards as equivalent to those in the EU, and expanded market access for poultry, dairy, and beef.¹⁰ Without the latter a deal is highly unlikely; farm groups and Congressional representatives threaten to withhold support absent substantial progress on poultry and beef market access.¹¹ European dairy, beef, and sugar farmers also want greater access to the US market – the impending abolishment of EU milk and sugar quotas leave producers needing new markets – while the EU seeks to maintain its current policies on pathogen reducing techniques (PRTs), hormones, and GMs. European environmental and consumer groups express great resistance to accepting American standards, or altering what many Europeans believe are higher (‘safer’) EU standards.¹²

The *precautionary principle*, which states that no action should be taken if the consequences are uncertain or possibly dangerous, is often attributed to Europe, and blamed

for its resistance to new technologies even though there is little difference between the EU and US in the number of areas guided by this principle.¹³ The European Food Safety Agency (EFSA) conducts risk assessments using independent, peer-reviewed scientific studies, as well as stakeholder input, while lending greater weight to any uncertainty in the scientific study (the input, contingencies) vis-à-vis the resulting probability of risk, than does the US Food and Drug Administration (FDA). The FDA provides approval in the absence of ‘meaningful harm’, preferring to take prohibiting action only when there are scientific findings of harm.¹⁴ The result is a greater likelihood of rejection as a precautionary measure in the EU. This is also visible in the political approval process (the Council). Citing inconclusive scientific studies on the long-term safety of PRTs such as chlorinated rinse for poultry (the EU allows diluted chlorine washes for lettuce), hormone treated beef, and various Genetically Modified Organisms (GMOs) proposed for the EU market, they are excluded from the Commission’s negotiating mandate.¹⁵ This does not necessarily make the EU more, as compared to differently, risk averse. Europe accepts traditional foods (e.g. raw milk products or fermented fish) often deemed unsafe in the US, where new food technologies are more readily accepted. The US interprets WTO’s agreement on SPS as allowing practices currently rejected in the EU and Korea. Bans on poultry treated in accordance with standards approved by the American Food and Drug Administration (FDA) are deemed political, and unacceptable to the US Congress, which insists that ‘...science-based justification be provided for a sanitary or phytosanitary measure if the measure is more restrictive than the applicable international standard [and] and appropriately recognize the equivalence of health and safety protection systems of exporting countries.’¹⁶

Similarly, in regards to beef from cattle treated with hormones (common in the US) a 1998 WTO Appellate panel reaffirmed that the EU’s ban was not based on a proper risk assessment and not compliant with the WTO SPS agreement, while acknowledging that governments can act out of prudence regarding risk to human life, and that risks can be ascertained not only in laboratories but also in societies.¹⁷ Regulators even have the discretion to deemphasize the statistical probability of risk in favor of social concerns. As Sunstein (2002) argues ‘[i]f government cannot dissipate fear through information, it might be well advised to regulate, at least if regulation will eliminate fear in a relatively inexpensive manner.’¹⁸ Whether a regulation is ‘expensive’ is a subjective assessment that varies by society. However, part of the associated costs necessarily reflects citizens’ willingness to pay for increased perceptions of safety. The EU’s failure to alter its regulations as a result of the WTO ruling resulted in the US imposing annual duties of 100% on \$100m worth of EU

agricultural exports. A 2003 EU directive allowing limited use of one hormone failed to assuage America's stance, and though it later (in 2007) lessened duties in return for increased hormone-free beef quotas, the EU remains technically non-compliant.¹⁹

Notwithstanding the lack of a uniform definition of protectionism in the WTO the US insists that it doesn't 'want to force European consumers to eat food they reject; rather, we want Europe to follow the advice of its own food safety authority and to give European consumers a choice, rather than to persistently ignore science-based decision making for political ends.'²⁰ Yet food, and therefore food safety, is an essential part of life; its significance to most European far exceeds its nutritional value, and thus caution prevails.²¹ Processes and products deemed safe by EFSA are often stuck for year awaiting political approval. Member States rejected a GM corn (MON810), which, like dozens of other GMOs, was deemed safe by EFSA.²² Another GMO, Maize 1507, still awaits Commission approval after 14 years, despite an ECJ decision criticizing the approval process.²³ American seed companies have also largely abandoned hope of expanded access for GM seeds in the EU, at least in the near term.²⁴ The 2015 amendments to the 2001 EU GMO Directive allow member states to decide which of the approved GMOs to allow domestically, while a country banning a particular GMO cannot prohibit imports of products from other EU states allowing the use of the same GMO.²⁵ While several countries supported an all-out ban, the European Parliament was equally insistent on downplaying scientific findings, stating that a decision on GMO use should '[c]onfer at least as much weight to the opinions of democratically elected governments as to the views of the scientific community.'²⁶ The EU's chief science adviser urged more evidence-based decisions, even asserting that GMO opponents suffered from 'a kind of madness,' only to be forced out following political outcry over her views.²⁷ Stakeholders (the food industry) also accuse the media of being a 'driver of controversy with terms such as 'Frankenfood' fuelling citizen concerns,' and media headlines to this effect were not difficult to find in 2014.²⁸ Some have accused certain member states even undermine the EFSA by criticizing the agency and/or not voting in support of decisions based on its risk assessments, which, in turn, feed into the general lack of trust in the EU, and citizens' skepticism to EFSA.²⁹ The prevailing norm of objection to GMOs in the EU (with the partial exception of Spain and the Netherlands) is thus deeply entrenched.

Despite differences, both sides insist they can achieve a 'constructive' SPS chapter in TTIP.

KOREU, KORUS, CETA

The previous agreements solidified more than altered aspects of EU and US food-related policies. KOREU progressively eliminates tariffs, reaching nearly 98% of all agricultural exports by 2031; KORUS removes 97%, but with shorter transition periods.³⁰ KORUS, KOREU, and CETA all exclude the most ‘contentious’ agricultural products from tariff elimination or exports (mainly rice, beef, pork, and poultry, in various combinations in the three treaties). KOREU allows agricultural safeguard measures, incorporates and reaffirms commitments to the WTO Agreement on SPS, denies the use of dispute settlement provisions on any issues related to SPS measures, and establishes a committee to work on, among other things, enhancing mutual understandings of procedures and to oversee implementation of the agreement. KORUS is similar, but adds an emphasis on using risk-based and scientific findings to resolve SPS disputes.³¹ CETA goes further. Both sides vow to work on establishing equivalencies in each other’s inspection and certification systems, a first for both, and a recognition of the greater similarities between the EU and Canada on issues related to food.

Policy

TTIP should go beyond the tariff reduction and recognition model in CETA. While the US was disappointed with the EU’s initial offer, the Commission then tabled ‘the most extensive tariff reduction ever.’³² TTIP could omit the same sensitive products as were excluded from KOREU, CETA, and KORUS, focusing on tariff elimination over 10-20 year transition periods in remaining products, while including safeguard measures. This would in effect set a global standard by accepting that certain agricultural products can now be legitimately exempted based on reasons of ‘serious domestic interests’.³³ However, this would likely prove unacceptable to Congress. The released text (January 7, 2015) of the EU’s proposal for the SPS chapter proposes incorporating and expanding the Veterinary Agreement, abiding by Codex residual levels (where both parties currently fall short on certain grains and legumes), and mutually recognizing conformity assessments (Art. 8); there are guarantees that US/EU regulations will not be lowered (Art 9.3) as final determination of ‘appropriate level of sanitary protection’ is made solely by the importing country (Art. 7:10). In case an emerging regulation hampers trade, EU calls for a ‘technical dialogue’ at the request of the exporting country for the purpose of ensuring the importing country chooses the most practicable and least trade-restrictive solution.

Notwithstanding outcry from NGOs likely to interpret the ‘technical dialogue’ as ceding to American SPS standards, regulators have shown themselves able to agree on

equivalencies for products and processes, as evidenced during the 2011-2013 High Level Working Group's assessment of potential for a transatlantic agreement.³⁴ As good will gestures at the start of TTIP negotiations the EU agreed to accept lactic acid washes in beef slaughterhouses and allow imports of American pigs for breeding and processing; the US will, on a country-basis, resume imports of EU beef.³⁵ Equivalency should be possible on individual items, such as oyster testing (the US tests the waters, the EU the oysters; an EU assessment confirmed equal levels of protection) or juice (where definitions vary across American states).³⁶

Beef hormones are unlikely to be resolved in TTIP negotiations, but European preferences for organic beef, and the latter's rapid growth in the US, could increase the potential for American exports if the EU expands the TRQ for hormone (ractopamine) free beef (even if the US/Canada fail to meet the entire current quota), significantly reduces tariffs, and guarantees that safeguard measures cannot be applied on items with TRQs.³⁷ Emulating CETA by separating bison (which must be organic under US law) from beef tariff lines and TRQs would signal a political willingness to accommodate US exporters while countering seemingly hyperbolic European criticism of American practices. Differentiated labeling (as with products in the EU containing GMOs) should be tabled as an option for beef and poultry, replacing market access restrictions and offering consumers a choice. American farmers and producers, fearing stigmatization and the high costs of compliance, and European consumer groups, fearing mislabeling and cross contamination, will object. However, expanded market access and consumer choice could suffice to overcome these objections if American producers are guaranteed transitional tax deductions for increased costs, and the labelling agreement is implemented with a decade-long transition period and specific safeguard measures (such as suspended imports in case of proven cross-contamination. Full access to the US market for European grade-A dairy and beef will also be a necessary part of such an agreement, and it needs to be explained (sold) to a skeptical European public with a deftness thus far largely absent among supporters of an ambitious TTIP.

Automobiles

As automotive equals, the EU and the US are partners and competitors. 10 percent of bilateral trade is in autos and auto parts, and the EU and US combined account for a third of global production and sales; the EU produces more, while the US is the largest market (OICA, 2013). Elimination of all vehicle tariffs (e.g. small trucks and SUVs face American tariffs of 25%) is assumed a TTIP minimum; with similar levels of safety (accident statistics per capita

are nearly identical), divergent standards on things like headlights, windshields, or side impact testing, remain the focus. The automobile sector has seen some of the greatest, often industry-led, adoption of common standards, and business leaders urge transatlantic partners to ‘...act now...making use of first-mover advantage’ to create a transatlantic auto market that improves competitiveness and sets global standards.³⁸

Unlike culturally sensitive SPS measures, transatlantic convergence based on data-driven safety regulations and product standards for motor vehicles are not of serious concern on either side of the Atlantic, with the partial exception of environmental groups’ fears of stalled improvements on emissions standards.³⁹ American and European labor unions are not, per se, opposed to harmonized vehicle standards; they fear an agreement may lead to further economic competition and a race-to-the bottom for workers. American unions view TTIP as a chance to raise workers’ protection to those embedded in EU legislation (not to mention possible wage increases), while European trade unions fear offshoring of manufacturing to the less expensive and largely non-unionized American south.⁴⁰

CETA, KORUS, KOREU

The two Korean agreements provide valuable insight into potential compromises in TTIP. There should be no need for the tariff re-imposition safeguard of KORUS, nor the duty-drawback in KOREU, but including the former could placate labor union fears of potential trade distortions.⁴¹ KOREU and CETA require recognition of the equivalency of United Nations Economic Commission for Europe (UNECE) standards for auto products in place upon entry of the respective treaty; Korea also agreed to bring another 29 domestic safety standards in line by mid-2016, the 17 standards recognized by Canada as equivalent to its own, a first for a NAFTA member has done this, and it agreed that all future standards must be based on UNECE standards, while KORUS includes the mutual harmonization of regulations with the US on 42 items related to vehicle standards.⁴² All CETA motor vehicle provisions include references to coordination, cumulation, or harmonization with the US upon the entry of a prospective EU-US agreement.⁴³ Along with the stipulations in KOREU, KORUS, and CETA that future harmonization of parts standards be through or compatible with the World Forum for Harmonization of Vehicle Regulations (WP.29) within the UNECE framework should serve all interested stakeholders, as well as multilateral-minded interest groups. Korea also agreed in both treaties that remaining differences (not subject to equivalence or harmonization) must be applied without creating market access problems, and that all tests

carried out in the EU/US, under EU/US standards, are accepted in Korea, an equivalence standard ripe for inclusion in TTIP, thereby creating equivalence.

The real consequential results of the three agreements stems from the combination of Rules of Origin requirements (RoOs), TRQs and MFN clauses, and which through TTIP could create the first global vehicle. All three require a minimum of 55 percent of the regional value content (RCV, or vehicle value, averaged over a year), even if the calculation methods differ slightly.⁴⁴ Importantly, Canadian and American auto parts are interchangeable and indistinguishable in mutual trade, and CETA contains a commitment to recognize cumulation with the US through TTIP, after which RCV falls to 40%.⁴⁵ CETA also exempts annually for 7 years 100,000 Canadian automobile exports falling short of the RoO requirement, explicitly in anticipation of TTIP and cumulation with the US, a quota far exceeding the country's exports. Such as formula, if doubled, could be usefully applied in TTIP.

A MFN clause in KOREU allows the application of KORUS emissions standards (while Korean levels are based on California standards, KORUS exempts 25,000 vehicles annually per manufacturer) since 2013.⁴⁶ Since UNECE standards (applied in CETA) equal those in California, the remaining provision needed in TTIP to enable a global vehicle based on RoO and emissions standards is an exemption-quota for tariff American free exports to the EU until US emission standards improve. Mutual recognition of crash testing standards would also significantly reduce costs. Establishing a joint committee to continuously work on further harmonization of auto parts not only lower costs but increase jobs, in part by taking market shares from suppliers in third countries. While a form of trade diversion, employment opportunities in manufacturing should appeal to labor unions.

Policy

The possible options outlined above are also intended to convey a larger point: that the motor vehicle sector, specifically automobiles, could serve as an example of how business interest and consumer concerns are compatible. The automotive industry prefers a MRA covering all assembled vehicles, achieved through harmonization of all new regulations.⁴⁷ The incremental harmonization of standards (or recognition of their equivalence) relying primarily on UNECE standards, and conducted in conjunction with Canada through the numerous references to inclusion, *cumulation* and MFN applicable in case of an agreement between the EU and US, would accomplish the desired EU outcome, where a '[j]oint EU-US approach would create a basis for genuine international leadership on motor vehicle regulations through *reinforcement* of the UNECE framework.⁴⁸ The U.S. is unlikely to sign on to the 1998

UNECE agreement, but it would be possible for the EU and US to lead other members in a new agreement on technical regulations that incorporates aspects or recognizes the equivalence of many UNECE standards, while agreeing on new safety and products standards going forward.⁴⁹ CETA calls for the EU and Canada to consider harmonizing applicable CETA provisions with a future EU-US agreement, while Canada agrees to continue recognition of UNECE standards unless they are lower than Canadian or NAFTA standards.⁵⁰ The inclusion of the latter recognition in TTIP (based on equivalency) should also appeal to labor unions and environmental advocates by showing how standards are raised - not lowered - through PTAs.⁵¹ Safeguard measures against import surges, while unlikely to be used given comparable production levels, costs, and sales across the Atlantic, would also address manufacturers' and unions' concerns.⁵² So, allowing MFN on all UNECE conforming parts or their recognized equivalent, regional cumulation on RoO, and agreeing to mutual recognition of conformity assessments on test and safety inspections could yield the first global vehicle, which would benefit producers and consumers alike.⁵³ That should be the public communications headline.

Investor State Dispute Settlement

The furor generated around a half-century old policy, which until 2013 remained an obscure feature of international law to all but industry experts, lawyers, and a fraction of academia, correlates with the commencement of TTIP negotiations and the conclusion of CETA. Investor State Dispute Settlement systems (ISDS), long used in Bilateral Investment Treaties (BiTs), ensure foreign investors have access to non-legislative, de-politicized legal redress for compensation when a host country's government violates the terms of the treaty; it ensures '...a state will bind itself to comply with international law or with decisions of a tribunal that would apply international law principles to define its duties.'⁵⁴ The purpose of an investor-state arbitration system is to thus encourage capital inflows and associated investments (e.g. technology) while reducing the risk of arbitrary and discriminatory, legal and political action. In other words risks associated not related to the market place. EU Member States have signed 1,400 BiTs with varying forms of investor-state arbitration systems; the US 48.⁵⁵

After adoption of the Lisbon Treaty the Commission declared that the EU's investment policies would include both liberalization and protection, including ISDS.⁵⁶ A 2012 joint EU-US statement on principles guiding investments also included ISDS.⁵⁷ The European parliament acknowledged ISDS can be included in treaties when necessary,⁵⁸ and it

is included in KOREU and CETA. ISDS is part of KORUS, and Congress insists on its inclusion in TTIP.⁵⁹ EU Trade Commissioner Malmström noted when releasing the Commission's response to its 'consultation' ISDS in January, 2015 that the Commission will not remove ISDS from TTIP, but continue a dialogue with stakeholders and NGOs on refining its composition, while waiting until late in negotiations before (formally) reinserting ISDS in negotiations.⁶⁰

Given prior agreements and commitments, ISDS, or a proximate arbitration system is likely necessary in order for TTIP to survive. The question is, in what format?

The Debate

The debate among policy makers, researchers, and stakeholders have come to center on a) whether ISDS threatens public policy making, and b) whether domestic court systems can adequately and reliably address investor concerns. Advocacy groups and some policy makers variably argue that ISDS prevents policy flexibility, while thwarting the principle of legitimate decision making by providing companies legal redress against democratic government decisions by enabling suits in international tribunals or other agreed criteria for arbitration.⁶¹ References to high-profile suits against governments (e.g. Vattenfall vs. Germany) are meant to highlight the threat to governments' abilities to regulate in the public interest.

90% of existing BiTs have never experienced challenges, a plurality (40%) of ISDS cases deal with sectors heavily dominated by state intervention (oil, gas, mining and power), and most cases involve developing states with weak and/or politicized judiciaries. Though the number of cases globally have risen over the past decade, the rise corresponds to increased investment levels, and the percentage of cases filed by an actor correlates with investment stock.⁶² EU investors use ISDS more than their American counterparts, and the state prevails in most cases, both within the EU and globally.⁶³ Pursuing a claim through the dispute settlement system is time consuming (cases average several years), very expensive, and therefore something companies wish to avoid.⁶⁴ It is also noteworthy that the majority of American companies filing suit are not corporate giants, but rather small- and medium-sized entities.⁶⁵

US TTIP negotiators, and the Commission's negotiating mandate all insist that ISDS does not impede governments' legislative and regulatory independence, while allowing for legitimate investor claims when discriminated against based on nationality, denied due process, or company assets are expropriated without compensation.⁶⁶ Academic studies and

policy papers highlight how treaty language explicitly guarantee states' rights to regulate to protect health, the environment, and other areas in the public interest, and only one case where public policy was altered as part of a negotiated settlement, not an arbitration panel's decision.⁶⁷

What about using the domestic system? Ikenson argues in a 2014 paper that investments are by nature risky; ISDS encourages discretionary investments and socializes private risks, while presuming that domestic courts are inadequate to cope with legal challenges. However, Kleinheisterkamp (2014), maintains that international investors can use domestic courts, and that investment arbitration clauses cannot compensate for, nor override, weak local laws (US district courts are not bound by international treaties). Others argue that ISDS is necessary for that very reason; arbitration would be the only resort.⁶⁸ Most domestic laws generally treat foreign entities differently than national ones, and states can change relevant laws and regulations to fit a political whim or popular demand.⁶⁹ An ISDS provides a neutral venue when domestic courts have difficulty separating domestic and international obligations; to enforce obligations of the host government when steps taken legally under domestic law violate treaty provisions against discrimination, expropriation or obstruction of transfer.⁷⁰

KOREU, KORUS, CETA

KOREUS and CETA include detailed ISDS provisions; KORUS' provisions preceded the US 2012 Model BiT and thus are less defined. Both Korean agreements exclude SPS measures from ISDS provisions, while CETA includes ISDS on SPS measures and financial services. CETA includes a more transparent ISDS, narrower language, and explicit exceptions for where ISDS applies (but still referencing GATT article 20 and GATS art. 24). Either side can still adopt prudential measures, while allowing private challenges only against action lacking a mutually recognized prudential character.⁷¹ 'Mail box' companies are explicitly prevented from filing claims (thus preventing the Philipp Morris case against Australia which was filed by a subsidiary out of Hong Kong).⁷² Tribunals may only rule on what is explicitly included in the treaty, have enhanced authority to dismiss cases as unwarranted or lacking legal merit and can make recommendations to the Trade Committee if a dispute regarding the interpretation of any part of the agreement arises at any time during proceedings, the Committee on Service and Investments' interpretation is binding on any Tribunal.⁷³

Policy

Advocates of omitting ISDS argue domestic courts suffice, developed countries traditionally exclude ISDS in BiTs, or that a state-to-state dispute settlement system (EU-US) with institutionalized consultative bodies tasked with seeking acceptable remedies in disputes is preferable;⁷⁴ these fall short of what is needed in a credible and effective TTIP. Replacing ISDS with a state-to-state (US-EU) system of dispute settlement and explicit and unequivocal guarantees of equal treatment to national investors becomes legally challenging given other obligations and benefits ascribed to national citizens and corporations.⁷⁵ China latter has for years sought to be classified as a market economy by the US and EU, and excluding ISDS from developed states' agreements would set a dangerous precedent if/when China achieves its desired status but retains a weak judiciary. Australia included an ISDS in its PTA with South Korea, calling it 'A Modern balanced mechanism with explicit safeguards for legitimate public welfare regulation,' omitted the provision in the FTA with Japan, but in the recently agreed (November 2014) Australia-China FTA ISDS was deemed necessary to 'enable Australians to invest in China with greater confidence'.⁷⁶ EU and US companies also want guaranteed resort to international arbitration should they fall out with Chinese courts.⁷⁷

Thousands of BiTs involving EU states, and with weaker state rights, would also remain in place if TTIP fails.⁷⁸ Omitting ISDS would thus leave companies greater legal recourse against a fellow member state than with the US government. 'Old' EU members do not wish to give up their own intra-EU BiTs with judicially weaker members; several West European companies would not have ventured deep into Eastern Europe and elsewhere if not for the protection offered by ISDS.⁷⁹ There are also American doubts about some EU Member States' judiciaries; likewise some American States have shown disregard for international agreements (e.g. Texas on consular access).⁸⁰ A majority of EU member states (primarily small and midsized, natural-resource-poor members), expressly support ISDS, insisting it can both safeguard legitimate European public policy objectives and ensure that European investors are adequately protected from American treaty circumvention, such as local favoritism, 'padded contracts,' and 'pork-barrel politics'.⁸¹

The *Mucula v. Romania* case points to the potential conflict between existing BiTs and EU laws – specifically whether BiTs signed prior to EU membership can allow policies illegal under EU law, and what to do when Commission decisions conflict with sovereign obligations – but such problems, and the *Vattenfall* case, could be avoided with the narrower language.⁸² Even prior to the 2015 release of the Commission's ISDS Public Consultation Report it was evident that ISDS provisions would be based on refining the text used in CETA and the 2012 US Model BiT (section B); the comments upon the report's release confirm such

expectations.⁸³ CETA's explicit list of infractions against which a company can file suit, and the August 2014 EU Regulation clarifying financial responsibility in all future ISDS disputes against EU states or the Union itself, represents the type of strengthened language and enhanced safeguard provisions that should satisfy skeptics while assuring investors.^{84 85} Requiring claimants to first exhaust domestic legal avenues (thus banning simultaneous dual-track litigation) and thereafter agree to mediation, while requiring losers to pay all litigation costs, would further deter claimants by raising the already significant costs of suits, thus cutting the number of cases.⁸⁶ Furthermore, specified language on arbitrator 'code of conduct', 'right to regulate', 'indirect expropriation', and 'due process'; allowance for state submissions and clarifications during tribunals, requiring ISDS procedures to be transparent in all areas short of corporate trade secrets and agreeing an appellate mechanisms for tribunal decisions, all add to the clarity of purpose with ISDS while narrowing the legal base for suits. Some of these ideas appear, in slightly varied language, in the 2012 US Model BiT, the 2014 Commission ISDS reform proposals, and the CETA text, thus providing common ground for agreement.⁸⁷

It is the rather vague language from, and cases under, existing BiTs which appear to stoke opposition; the above changes address some key objections by ISDS critics. The assumption in TTIP is after all that with 29 democracies ISDS will be very infrequently utilized – good governance' countries are rarely sued, and when they are, they tend to prevail – and aforementioned modifications will further lower that probability.⁸⁸ But omitting ISDS altogether will weaken the stated goal of TTIP as precedent setting through higher standards, undermine attempts at its inclusion in future agreements (with China), counter a majority of member states' and business organizations' preferences, and significantly lessen the likelihood that Congress approves TTIP.⁸⁹

Conclusion

TTIP's ambitious agenda of regulatory recognition and/or convergence, of setting precedents for future agreements, is testing the limits of accommodation and compromise on both sides of the Atlantic. There are policy options for compromises to satisfy the majority of interest involved, but it will require convincing key constituencies of the necessity for change,; arguably easier on automobiles, and possibly ISDS, than on food issues. Yet with potential agreements mimicking or expanding on existing language in KORUS, KOREU and CETA, US and EU officials, as well as business, should highlight the congruencies with these agreements, where sealing TTIP can create the embryo of a global, western values-based market place with 900 million consumers on three continents.

References

Abbott, R., et al. (2014). 'Demystifying Investor-State Dispute Settlement (ISDS)', Brussels: ECIPE Occasional paper 5/2014.

<http://www.ecipe.org/media/publication_pdfs/OCC52014_1.pdf>

Agreed Minutes on regulations pertaining to automotive fuel economy and greenhouse gas emissions, Added to the Free Trade Agreement Between the United States and the Republic of Korea, December 3, 2010.

Australian Government (2013), 'Fact Sheet: Investor-State Dispute Settlement (ISDS)' Department of Foreign Affairs and Trade, at: <http://www.dfat.gov.au/fta/kafta/guides/fact-sheet-isds.html>

Bipartisan Congressional Trade Priorities Act of 2014, H.R. 3830, introduced 19.1.2014.

European Commission Directorate General for Trade, CETA Consolidated Text, Brussels, 5 August, 2014, <http://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf>

Canis, Bill and Lattanzio, Richard (2014), 'U.S. and EU Motor Vehicle Standards: Issues for Transatlantic Trade Negotiations,' Congressional Research Service, R43399.

Center for Strategic and International Studies (2014) 'Investor-State Dispute Settlement: A Reality Check A Report by the Scholl Chair in International Business at CSIS' Working Paper at http://csis.org/files/publication/141029_investor_state_dispute_settlement.pdf

Chase, Peter (2011), 'The United States, The European Union, and International Investments', The German Marshall Fund, Economic Policy Program, July 1

Commission Regulation (EU) 619/2011 laying down the methods of sampling and analysis for the official control of feed as regards presence of genetically modified material for which an authorisation procedure is pending or the authorisation of which has expired, *Official Journal of the European Union*, L166, 25.6.2011, pp. 9-15.

De Ville, Ferdi and Siles-Brugge, Gabriel (2015). 'The Transatlantic Trade and Investment Partnership and the Role of Computable General Equilibrium Modelling: An Exercise in Managing Fictional Expectations.' *New Political Economy*. DOI:[10.1080/13563467.2014.983059](https://doi.org/10.1080/13563467.2014.983059)

Deutsche Welle (2013) 'Transatlantic coalition rejects anti-consumer trade deal', 13 June 2013.

Echols, Marsha A. (1998), 'Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws', *Columbia Journal of European Law*, Vol. 4 (2)

Ecorys (2009), 'Non-tariff measures in EU-US trade and investment: An economic analysis', Report for the European Commission, Rotterdam, Reference: OJ 2007/S 180-219493.

Erixon, Frederick & Bauer, Mattias (2010), *A Transatlantic Agreement: Estimating the Gains from Transatlantic Free Trade in Goods*. Occasional Paper 4, Brussels: European Center For International Political Economy.

Erixon, Frederick (2014), 'Investor-state disputes have put a spanner in the works for TTIP' *European Voice*, 19 June, 2014.

European Commission (2010) Evaluation of the EU Legislative Framework in the Field of GM Food and Feed (Final Report), Directorate General for Health and Consumers, July 12, http://ec.europa.eu/food/food/biotechnology/evaluation/docs/evaluation_gm_report_en.pdf.

European Commission (2012), Statement of the European Union and the United States on Shared Principles for International Investment, European Commission, http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf

European Commission (2013) Fact Sheet on Investor Protection and Investor-to-State-Dispute Settlement in EU Agreements, Executive Summary, November.

European Commission (2013a), 'Issues paper Communicating on TTIP – Areas for cooperation between the Commission services and Member States', November 7, at <http://corporateeurope.org/trade/2013/11/leaked-european-commission-pr-strategy-communicating-ttip> [accessed May 9, 2014]

European Commission (2013b) EU-US Transatlantic Trade and Investment Partnership Trade Cross-cutting Disciplines and Institutional Provisions, EU Commission, Initial EU position paper July.

European Commission (2013c), 'Transatlantic Trade and Investment Partnership: The Economic Analysis Explained,' Tradoc 151787.

European Commission (2014), European Commission Trade, Countries, United States, Retrieved from <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> [accessed 23 July 2014].

European Commission (2015), 'Textual Proposal Sanitary and Phytosanitary Measures (SPS),' January 7, at http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=146

Euractiv (2014), 'ISDS clause: a gateway to future trade deals' Special report, December 9, 2014 at <http://www.euractiv.com/sections/ttip-and-arbitration-clause/isds-clause-gateway-future-trade-deals-310648>

EFSA (2008) Scientific Opinion of the Panel on Biological Hazards on a Request from DG SANCO on the assessment of the possible effect of the four antimicrobial treatment substances on the emergence of antimicrobial resistance,' *European Food Safety Agency Journal* 2008, 659, pp.1-26.

European Parliament (2014), Commission Hearings, September 29, retrieved from <http://www.elections2014.eu/en/new-commission/hearing/20140917HEA64702> [accessed October 28, 2014]

Falkehed, Magnus (2014), 'Fransmän röker och dricker – men friska som få' *Dagens Nyheter*, December 29 at <http://www.dn.se/nyheter/varlden/fransman-roker-och-dricker-men-friska-som-fa/>

Felbermayr, G., Heid, B. & Lehwald, S. (2013), *Transatlantic Trade and Investment Partnership (TTIP): Who benefits from a free trade deal?* Global Economic Dynamics Paper, Gütersloh: Bertelsmann Stiftung.

Francois, Joseph et al (2013) 'Reducing Transatlantic Barriers to Trade and Investment – An Economic Assessment', Final Report for the European Commission, Contract TRADE10/A2/A16, Center for Economic Policy Research, London.

Fontagné, Lionel et al (2013). 'Transatlantic Trade: Whither Partnership, Which Economic Consequences?' Centre d'Etudes Prospectives et d'Informations Internationales Internationales Policy Brief No. 1

Fox, Benjamin (2014), 'Germany opposes EU-US investor protection scheme,' *EUObserver*. 15 March.

Frank, Susan (2014) 'Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide', Washington and Lee Public Legal Studies Research Paper Series 2014-13

Freund, Caroline (2014), *Encouraging a Manufacturing Renaissance through the Transatlantic Trade and Investment Partnership*, presented at the Peterson Institute for International Economics, Washington DC, 2 May, 2014.

Free Trade Agreement Between the United States of America and the Republic of Korea of 30 June 2007.

Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part. (2011) *Official Journal of the European Union* L127, 14.05.2011, pp. 1-1487.

Fulponi, Linda et al (2011), 'Regional Trade Agreements - Treatment of Agriculture', *OECD Food, Agriculture and Fisheries Working Papers*, No. 44, OECD Publishing. doi: 10.1787/5kkg53fmnjxv-en

Garcia, Maria. (2013), 'From Idealism to Realism: EU Preferential Trade Agreement Policy', *Journal of Contemporary European Research* Vol. 9(4) 521-541.

Goyens, Monique (2014) 'The Micula case: When ISDS messes with EU law,' October 27, <http://www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/>

Hamilton, Daniel (ed) (2014), *The Geopolitics of TTIP; Repositioning the Transatlantic Relationship for a Changing World* Center for Transatlantic Relations , Johan Hopkins University

Ikenson, Dan (2014), *The Investor-State Dispute Settlement Mechanism: An Examination of Benefits and Costs* Presented at CATO, Washington DC, 20 May.

Johnson, Renee (2012), 'U.S.-EU Poultry Dispute on the Use of Pathogen Reduction Treatments (PRTs)', Congressional Research Service, November 19, R40199.

Jones, Vivian and Platzer, Michaela (2011), 'The Proposed U.S.-South Korea Free Trade Agreement (KORUS FTA): Automobile Rules of Origin ' Congressional Research Services, Report R41868, June 15.

Josling, Tim and Tangermann, Stefan (2014), 'Agriculture, Food and the TTIP: Possibilities and Pitfalls', *Center for European Policy Studies*, Special Report no. 99, December.

Keating, D. (2014) 'Member states warn Juncker against ISDS concessions' *European Voice*, October 22.

Korea-Australia Free Trade Agreement (2013), 'Quick Guide: Key Investment & Investor-State Dispute Settlement (ISDS) Outcomes', Department of Foreign Affairs and Trade, at <http://www.dfat.gov.au/fta/kafta/guides/quick-guide-key-investment-and-isds-outcomes.html>

Kraus, D. (2014), Italian and European Business, presentation at the Peterson Institute for International Economics, Washington DC, 2 May, 2014.

Kleinheisterkamp, J. (2014), 'Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?', LSE Working Papers, London: London School of Economics, <http://dx.doi.org/10.2139/ssrn.2410188>

Kleinheisterkamp, J. and Poulsen, L. (2014), 'Investment Protection in TTIP: Three Feasible Proposals.' Blavatnik School of Government, The Global Economic Governance Program, Policy Brief, December.

Lavranos, Nikos (2014), 'Interference of the European Commission in the enforcement of arbitration awards: The Micula case,' Global Investment Protection IG at <http://www.globalinvestmentprotection.com/>

Layne, Christopher (2014), *After the Fall, International Politics, U.S. Grand Strategy, and the End of the Pax Americana*, New Haven: Yale University Press.

Lester, Simon (2013), Liberalization or Litigation? Time to Rethink the International Investment Regime, Policy Analysis no. 730, Washington DC: Cato.

McNulty, Kathleen (2005), 'Trade Policy Monitoring The US - EU Veterinary Equivalency Agreement: Content and Comparison 2005' Global Agricultural Information Network, Report Number: E35219 10/24/2005.

- Monahan, Ken (2012), 'US Exports would avoid \$6bn a year in tariffs in a U.S. –EU Trade deal', Bloomberg Government Study, November.
- Morrall III, J. (2011), *Determining Compatible Regulatory Regimes between the U.S. and the EU*, Washington DC: United States Chamber of Commerce.
- O'Hara O'Connor, Erin and Frank, Susan (2014) 'Foreign Investments and the Market for Law' *University of Illinois Law Review*, 1617-1659
- OECD, WTO and World Bank Group (2014), *Global Value Chains: Challenges, Opportunities, and Implications for Policy*. Report prepared for submission to the G20 Trade Ministers Meeting, Sydney, Australia 19 July, 2014.
- OICA (2013), International Organization of Motor Vehicle Manufacturers, <http://www.oica.net/category/production-statistics/>
- Parker, Richard and Alemanno, Alberto (2014), 'Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and the US Regulatory Systems, CEPS Special Report no. 88, MAy.
- Pew (2014), *Support in Principle for U.S.-EU Trade Pact, But Some Americans and Germans Wary of TTIP Details*, Pew Research Center's Global Attitudes Project, Washington DC.
- Pew (2012), *The American-Western European Values Gap American Exceptionalism Subsides*, Pew Research Center's Global Attitudes Project, Washington DC.
- Public Citizen (2014) 'U.S. Experience Shows Structural Incentives Favoring Corporations in Investor-State System Not Fixable via Changes to Trade Pact Terms' December 16 at <http://www.citizen.org/documents/ISDS-cannot-be-fixed.pdf>
- Renda, Andrea et al (2013), 'Assessing the Costs and Benefits of Regulation Study for the European Commission, Secretariat General', Final Report, Brussels, Center For European Policy Studies, December 10.
- Schico, Luca (2012), 'Member State BiTs After the Lisbon Treaty: Solid Foundation or First Victims of EU Investment Policy', College of Europe, Research Paper in Law, 02/12
- Shi, Z. (2013), *Is the US-EU Trade Pact a Way to Balance China?*, Brussels: Carnegie Europe, Retrieved from <http://carnegietsinghua.org/2013/06/17/is-u.s.-eu-trade-pact-way-to-balance-china/gand> [accessed 4 August, 2014]
- Sien, Isis A.R. (2007), 'Beefing up the Hormones Dispute: Problems in Compliance and Viable Compromise Alternatives', *The Georgetown Law Review* 95 (2), pp. 566-590
- Siles-Brügge, Gabriel (2011), 'Resisting Protectionism after the Crisis: Strategic Economic Discourse and the EU–Korea Free Trade Agreement', *New Political Economy* 16 (5), pp.627-653.
- Spiegel, Peter (2014) 'EU trade chief faults Washington and Berlin for deal stalemate' *Financial Times*, September 25, p. 3

Sunstein, Cass R (2002), 'The Laws of Fear,' Harvard Law Review, Vol. 115 (4), pp. 1118-1169

Tietje, Christian and Baetens, Freya (2014) 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership' Study prepared for: Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands Reference: MINBUZA-2014.78850

Transatlantic Consumer Dialogue (2014,) 'The European Commission's Public Consultation on Modalities for Investment Protection and ISDS in TTIP Response of the Transatlantic Consumer Dialogue ' July, at <http://tacd.org/wp-content/uploads/2014/07/TACD-Response-to-EU-Consultation-on-ISDS-FINAL-2.pdf>

Transatlantic Consumer Dialogue (2013), 'Resolution on Investor-State Dispute Resolution in the Transatlantic Trade and Investment Partnership' October, Doc.no 15/13, at <http://test.tacd.org/wp-content/uploads/2014/01/TACD-TTIP-Resolution-on-Investor-State-Dispute-Resolution-in-the-Transatlantic-Trade-and-Investment-Partnership.pdf>

UNCTAD (2014) *Recent Developments in Investor-State Dispute Settlement*, New York and Geneva: United Nations Conference on Trade and Development. UNCTAD, Issue Note.

UNCTAD (2010a) 'Investor-State Disputes: Prevention and Alternatives to Arbitration ' Geneva and New York: United Nations at http://unctad.org/en/docs/diaeia200911_en.pdf

UNCTAD (2010b) 'Investor-State Disputes: Prevention and Alternatives to Arbitration ' Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, 29 March 2010, Lexington, Virginia, USA.

UNCTAD (2006), *Preserving flexibility in IIAs: The use of reservations*, New York and Geneva: United Nations Conference on Trade and Development.

WEF (2014), *Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?*, Cologne/Geneva: World Economic Forum.

Whittington. L. (2014), 'Implementing Canada-EU free-trade deal could take another two years,' *The Star*, 24 April, 2014, p.3.

Wiener, Jonathan. et al (2010), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe* RFF Press.

WTO (2014), *China –Anti-dumping and countervailing duties on certain automobiles from the United States*, World Trade Organization Dispute Settlement Report WT/DS440/R.

¹ E.g. 90% on certain European cheeses and 55% on leather products entering the US; 60% on US dairy products entering the EU

² European companies pay almost 12 billion dollars annually in tariffs to the US, while American companies pay nearly approximately \$7bn to the EU. Monahan, 2012.

³ The estimated economic gains from an ambitious TTIP remain contested. Numerous studies assessing the economic benefits of reduced or eliminated tariffs and NTBs, find, on average, that removing all tariffs along with half of all NTBs is estimated to boost EU and US GDP by 0.4 -0.8 percent annually, with roughly 80% of benefits stemming from removing NTBs; the annual economic benefits for the rest of the world are projected by the EU Commission to be €100bn (Francois 2013: 54; Felbermayr, Heid and Lehwald 2013: 19; EC 2013c; Erixon and Bauer 2010). For a significant criticism of the methodology producing these figures see De Ville and Siles-Brügge, 2015. Studies showing very low potential trade diversion effects include WEF, 2014; cf. OECD, WTO and World Bank Group, 2014.

⁴ Francois et al, 2013; Ecorys, 2009.

⁵ See Parker and Alemanno, 2014. A new 'regulatory scrutiny board' is to replace the Commission's Impact Assessment Board in 2015, but it remains unclear if this includes any additional requirements for assessing the impact on or from trade relations. EU Commission Press Release 18 December 2014, http://europa.eu/rapid/press-release_IP-14-2761_en.htm.

⁶ Morrall, 2011:7, 32, and Annex D. Compliance costs are relative to the status quo. Calculating the cost of regulations for business domestically, let alone the impact of regulatory diversion on bilateral ties, is very challenging. Renda et al (2013) assess the EU's system of RIA and comments that while the US RIA system assesses only federal regulations (secondary, mostly technical regulations) which require uniform implementation, the EU's RIA is fraught with difficulties given the numerous national differences in assembly and conveyance (i.e. comparability) of data and implementation and enforcement across the EU (p. 7). The authors note that standard cost models were not meant to accurately reflect costs, but rather provide a 'birds eye view' of the stock of legislation relying as they do on estimates and assumptions of human behavior (p. 60). However, there is little doubt that regulatory harmonization would yield savings.

⁷ The veterinary agreement has internal limitations and requisites to equivalency (see McNulty, 2005, esp. p. 5ff). The EU and the US have also worked together to establish standards through international standard setting bodies, such as the International Standardization Organization and the International Medical Device Regulatory Forum; 17 medical device standards were mutually recognized by 2014. The EU and the US exchanged proposals for institutionalizing this process in TTIP in May 2014.

⁸ Domestic regulations cannot be altered through bilateral negotiations. Regulators discuss and coordinate across the Atlantic; standards and processes can be agreed or mutually recognized in some form through treaties, and appendices may clarify regulatory goals or purposes, but regulations must be adopted through domestic legislative procedures.

⁹ EU's applied tariffs are higher than America's in most categories of agriculture and food; the estimated value of NTBs on each varies by study, Ecorys (2009) looks at each category within agriculture and food, whereas Francois et al (2013) assess the sector as a whole, resulting in higher estimated costs in the latter.

¹⁰ Prior to the 1997 EU ban on poultry undergoing certain pathogen reducing techniques, particularly antimicrobial rinses (water plus a chemical) with chlorine dioxide, acidified sodium chlorite, or other similar and FDA approved rinses, US exports to the EU were four times higher than in 2011, and most of current exports are believed to be transshipments (the end destination is outside the EU). Cf. Johnson, 2012.

¹¹ A member of Congress with a large agricultural constituency said he 'could not ensure support for TTIP absent access for his voters' products.' (Personal conversation Washington, July 2014). A member of the US negotiating team, from USTR, conveyed that 'without a deal on poultry there is no deal.' (Personal conversation Washington, January 2015).

¹² E.g. BEUC, 2014; Institute for Agriculture and Trade Policy, Pew Attitudes Study 2014.

¹³ Based on quantitative and qualitative assessment of 100 randomly selected risks out of 2878. Wiener et al 2010.

¹⁴ The US preemptively set fishing quotas and banned lead in gasoline and toys years earlier than the EU.

¹⁵ cf. e.g. EFSA, 2008; EU Regulation 619/2011; Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, Council of the European Union, at <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

¹⁶ Quotes from the ‘Bipartisan Congressional Trade Priorities Act of 2014’, p. 6-7; cf also ‘To establish trade negotiating objectives with respect to the application of sanitary and phytosanitary measures to agricultural products, and for other purposes.’ H.R. 6538, introduced 9/21/2012.

¹⁷ DISPUTE DS26 European Communities — Measures Concerning Meat and Meat Products (Hormones) World Trade Organization, Appellate Body ruling (February, 1998, p. 124ff, 186ff at http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds26sum_e.pdf Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994)

¹⁸ P. 1168

¹⁹ For an excellent overview of the hormone treated beef dispute see Sien, 2007.

²⁰ Ambassador Gardner's Remarks before the EP's Committee on International Trade United States Mission to the European Union, September 3, 2014 at

http://useu.usmission.gov/gardner_inta_sept0314.html. Complicating such requests is that in the late 1990s 10-15% of US hormone free beef exported to the EU was found to contain hormones, raising concerns about inspection procedures. Sien, 2007, p.572

²¹ cf. Echols, 1998:543; Krauss, 2014; Thibaut de Saint Pol and Claude Fischler in Falkehed, 2014; Echols, 1998. Even the German Federal Institute for Risk Assessment found American PRTs for chicken to be safe. See ‘Verbraucherschutz: Behörde hält Chlorhühnchen für unbedenklich’ *Spiegel Online*, June 10, 2014, at

<http://www.spiegel.de/forum/gesundheit/verbraucherschutz-behoerde-haelt-chlorhuehnchen-fuer-unbedenklich-thread-128635-1.html>

²² Source, EU Register of authorized GMOs at

http://ec.europa.eu/food/dyna/gm_register/index_en.cfm

²³ The EU Commission has deemed the US approval process for new plants, often taking a decade or more, unacceptably long, and therefore constituting a trade barrier in SPS. See EU SPS: Sanitary and Phytosanitary Issues, no. 105334 at

http://madb.europa.eu/madb/sps_barriers_details.htm?barrier_id=105334&version=13

²⁴ ‘Monsanto gives up on new GM crops in EU,’ www.eubusiness.com, July 18, 2013.

²⁵ The amended directive would not impact the assessment process for GMOs conducted by the European Food Safety Agency under Directive 2001/18/EU of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration OJL 106, 17/04/2001, and Regulation (EU) No. 1829/2003 the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJL 268 8/10/2003.

²⁶ Amendment 4. Draft European Parliament Legislative Resolution on the Council position at first reading with a view to the adoption of a directive of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory.

²⁷ Anne Glover led the establishment of the pan-European network of scientists in 2013, while calling for more evidence based approach to policy ('Evidence-based Union? A new alliance for science advice in Europe,' *The Guardian*, June 23, 2013). She was also quoted from her presentation at European Network on Soil Awareness, 19 September, 2013, as saying 'No other foodstuff has been so thoroughly investigated as GM,...No scientist will ever say something is 100 per cent safe but I am 99.99 per cent certain from the scientific evidence that there are no health issues with food produced from GM crops. Just about every scientist I know supports this view. Opposition to GM, and the benefits it can bring, is a form of madness I don't understand.' ('Madness' of opposition to GM crops says Glover,' *The Scotsman*, October 20, 2013). On abolishing her position see e.g. "European Science's Great Leap Backward,' *The New Yorker*, November 21, 2014; 'Juncker Science The European Commission's chief scientific adviser falls afoul of the green lobby.' *Wall Street Journal*, December 1, 2014.

²⁸ Commission 2010:144. Even the Commission acknowledged that the lack of available GM-labeled products in Europe makes it difficult to evaluate public acceptance of GMOs but also that more information about the scientific risk assessment that GMOs actually undergo before authorization was needed (Commission, 2010 p. 52). Examples of media headlines included: Frankenfood debate over GMOs in Europe and the United, *Slate*, June 14; Europe Dreads America's Chlorinated Chickens *Business Week* August 8; 'Chlorine chicken, hormone beef? European fears over American 'Frankenfood' imports' *The Independent*, December 5, 2014;

²⁹ Commission, 2010

³⁰ WTO, World Tariff Profiles, 2013

³¹ Article 8.3 of KORUS

³² Commission representative, Washington, January 2015.

³³ Further evidence is found in Fulponi et al (2011), who find that while 90% of all agricultural tariff lines were eliminated across 55 FTAs and RTAs, only 72% of tariffs in dairy and sugar products were eliminated, and the transition period in sectors subject to tariff elimination were much longer than in other sectors, averaging more than 15 years.

³⁴ USTR representative, Washington, January, 2015.

³⁵ The Commission's February 2013 approval applies to EU slaughter houses and US imports (Commission Regulation (EU) No 101/2013 of 4 February 2013), and followed an EFSA risk evaluation (EFSA Journal, 2011, 9(7):2317).

³⁶ SPS: Sanitary and Phytosanitary Issues, no. 085114 at

http://madb.europa.eu/madb/sps_barriers_details.htm;jsessionid=03901C75450387AF87FF05CDB5C14295?barrier_id=085114&version=6

³⁷ Natural/Organic beef has grown much faster than normal beef (hormones allowed) since 2012. In 2014 sales were up 20% in value and 5% in pounds sold, compared to 7% and – 6.7% for normal beef. Source: Beefretail.org, owned by Cattlemen's Beef Board & National Cattlemen's Beef Association. CETA bans safeguards on TRQs and reduced tariffs items, see Chapter 13(8):3; For bison, see CETA Section 3, annex X.5: 12.

³⁸ Freund, 2014

³⁹ It should be noted that in some categories, such as nitrogen and non-methane gases, American national emission standards are stricter than EU standards. Cf. Canis and Lattanzio, 2014, p. 2.

⁴⁰ Cf. AFL-CIO, 'U.S.-EU Free Trade Agreement (TTIP)', at <http://www.aflcio.org/Issues/Trade/U.S.-EU-Free-Trade-Agreement-TTIP> and German IG Metal 'Freihandelsabkommen sofort stoppen' at <http://www.fr-online.de/wirtschaft/freihandelsabkommen-eu-usa--freihandelsabkommen-sofort-stoppen-,1472780,26460308.html>

⁴¹ Duty drawbacks are refunds on tariffs paid on parts from third countries when a final vehicle or part is exported to the EU. There is a safety clause capping refunds at 5% in case of a significant rise in foreign sourcing (10% at the time of signing). Duty drawbacks can lower the final value by lowering input costs, simultaneously making it easier to reach the 55% RVC threshold.

⁴² KORUS ch.2, sec. A, D, F; KOREU Annex 2-C, art. 1-9.

http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145157.pdf .

⁴³ See e.g. Chapters XX, 84-87 and related cross-references and Annexes. Cumulation means parts from other countries with which the parties have an FTA are counted as originating domestically for the sake of RoO.

⁴⁴ KORUS 2 A-D; CETA 4 (17):1-6; 87: 01-04. The difference between the ex-works price calculation (EU concept) and the build-down valuation method, preferred by American manufacturers and included in KORUS is that the build-down method includes the cost of foreign inland freight, excluded from the ex-works price. Jones and Platzer, 2011, p. 12, fn. 28, and Appendix A. Cumulation or regional cumulation have been practices by the EU and US in several agreements. They allow those parts originating within countries with FTAs with either the EU or US, or in a given region, to count as domestic, thus de facto lifting the TRQ on auto goods not meeting the RoO.

⁴⁵ Chapter 81:01, ft. 69 Add in NAFTA provisions, where the slightly higher RoO requirement (62.5%) is offset by the legal recognition in and the regional ‘cumulation’ practices applied in all three agreements (which would cover Mexico, a large supplier of auto parts)

⁴⁶ Since 2010 exports were 1,000-5,000 per manufacturer the limit become de facto irrelevant, allowing the export of American vehicles without modifications.

⁴⁷ Testimony by Governor Matt Blunt, President of the American Automotive Policy Council, House of Representative subcommittee on Energy and Commerce Committee hearing, July 24, 2013.

⁴⁸ The Transatlantic Trade and Investment Partnership (TTIP) Regulatory Issues, ‘EU position on motor vehicles,’ EU Commission, p. 1. Author’s emphasis.

⁴⁹ Ibid

⁵⁰ Cooperation in the Field of Motor Vehicle Regulations, p. 91ff, Articles V and VII of draft CETA (permanent placement undecided).

⁵¹ The two have successfully cooperated elsewhere in establishing standards, e.g. the 1992 MRA on all aspect of aviation equipment(covering 90% of global large passenger aircrafts), or leading work in the International Medical Device Regulatory Forum, where 17 medical device standards had been mutually recognized by 2014. This sector was also among the first where the EU and US exchanged formal texts for TTIP, in May 2014.

⁵² The EU experienced a decline in Korean auto exports in 2013-14, see European Commission Monitoring Report, monthly statistics at http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150159.pdf

⁵³ The most homogenized car, the Ford Fusion, is only 80% similar across the Atlantic, OICA 2013.

⁵⁴ O’Hara O’Connor and Frank, 2014: 1643.

⁵⁵ cf. Lester, 2013.

⁵⁶ “Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a Comprehensive European International Investment Policy”, (Communication), COM 2010 343 final, p. 5.

⁵⁷ EC, 2012

⁵⁸ European Parliament (Plenary), text adopted on 23 May 2013 in Procedure 2012/0163(COD), P7_TAPROV(2013)0219, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0219+0+DOC+XML+V0//EN>

⁵⁹ Compared with KORUS, KOREU includes fewer rights under an ISDS, bans trade sanctions when violations of workers' rights and environment provisions occur, and covers fewer services (e.g. audiovisual).

⁶⁰ European Commission Fact Sheet, 2013:7-8; Speech at Dauphine University in Paris December 14, 2014; Press Release, 13 January http://europa.eu/rapid/press-release_IP-15-3201_en.htm

⁶¹ Public Citizen, TACD, Green MePs, International tribunals include the International Center for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), Permanent Court of Arbitration (PCA), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC), and the International Chamber of Commerce in Paris (ICC).

⁶² CSIS p. 7-8. The EU has 47% of outward FDI stock and 52% of cases were filed by European companies; for the US the figures are 24% and 22% respectively.

⁶³ UNCTAD 2014; Donnan 2014a; Abbott, et al 2014; In 2012 60% of all new cases were filed by European companies, only 7.7% by American. European Commission Fact sheet, 2013: 9

⁶⁴ Frank, 2014: 13

⁶⁵ UNCTAD (2014) show that a majority of cases globally are filed by European companies, many against European governments, especially east and central European states.

⁶⁶ US lead negotiator Malloney in Fox, 2014; H.R. 4358, sec. 2, par. 4G; CETA_{Adr}, 2014:7; EU lead negotiator Garcia Bercero at the Transatlantic Association for Consumer Dialogue meeting Washington DC, June 24, 2014; cf. 2012 US Model BiT; European Commission ISDS Fact sheet 2013..

⁶⁷ E.g. US 2012 Model BiT; Tietje and Baetens, 2014: 60 ff; Frank, 2014.

⁶⁸ Erixon, 2014; Tietje and Baetens, 2014.

⁶⁹ Erixon, 2014, p. 4-5.

⁷⁰ Chase, 2011:3-4.

⁷¹ CETA Chapter 10, sec. 3, Art. 3 and Chapter 15, Art. 15 and Annexes

⁷² CETA Chapter 10, sec. 1, Articles 1-3.

⁷³ CETA Chapter 10, sec. 6, Articles 27, 29-30.

⁷⁴ Goyens, 2014; Kleinheisterkamp and Poulsen, 2014.; Kleinheisterkamp, 2014.

⁷⁵ E.g. Erixon and Bauer, 2010; Erixon, 2014

⁷⁶ Korea Australia Free Trade Quick Guide; Press Release 2014

⁷⁷ Hans Stråberg, Europe Co-Chair for the Trans-Atlantic Business Dialogue, Chairman Atlas Copco, Utrikespolitiska Institutet October 13, 2014.

⁷⁸ EU Trade Commissioner Malmstrom, Speech at Dauphine University in Paris December 14, 2014;cf. European Fact Sheet ISDS 2013 Nine existing BiTs between the US and European states will be superseded by TTIPs language after a transitional period. Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries", officially adopted on 12 December 2012 (Official Journal L351/40 of 20 December 2012).

⁷⁹ Hans Stråberg, Europe Co-Chair for the Trans-Atlantic Business Dialogue, Chairman Atlas Copco, Utrikespolitiska Institutet October 13, 2014.

⁸⁰ Schico, 2012; personal conversations with EU Commission staff and USTR staff, June 24, 2014 and January 9, 2015.

⁸¹ Keating, 2014; Whittington, 2014

⁸² For contrasting opinions see Goyens, 2014 and Lavranos, 2014; The European Commission, State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award Micula v Romania of 11 December 2013, at http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf. Judging by the language in Methanex vs. United States (2005) and Article 352 TFEU it appears the plaintiffs have the stronger case.

⁸³ Cf. Eliasson 2014;

⁸⁴ CETA Chapter 10, Section 1, Article 3; Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. OJ L 257, 28.8.2014, p. 121–134

⁸⁵ The nine existing BiTs between the US and European states will be superseded by TTIPs language after a transitional period. Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, officially adopted on 12 December 2012 (Official Journal L351/40 of 20 December 2012).

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:En:PDF>

⁸⁶ Frank, 2014 finds that costs, complexity and time commitments means suing a state is really the last remedy a company decides to pursue.

⁸⁷ Some of these changes have been mooted by the US and the EU in the 2012 US Model BiT (especially Articles 6 and 12, and Annex B) and the European Commission Fact Sheet, 2013. CETA Chapter 33, Annexes I and II.

⁸⁸ There has been no ISDS case between the United States and an EU-15 member, and only six of cases between a U.S. investor and post 2004 EU states (Abbott, et al 2014). Cf. Frank, 2014.

⁸⁹ Keating, 2014; ‘Trading and being treated fairly: Why European industry needs investment protection’ by the American Chamber of Commerce, BusinessEurope, the European Services Forum, the Transatlantic Business Council and the European Round Table of Industrialists, in Euractiv 13 January, 2015.