

GUEST EDITORIAL

Negotiating the Transatlantic Trade and Investment Partnership (TTIP)

Context and scope of TTIP

The 8th round of Transatlantic Trade and Investment Partnership negotiations between the USA and the EU took place on 2–6 February 2015. The negotiations started in July 2013 and, despite the initial momentum and continuous reassurance from both sides that the agreement is a high policy priority,¹ the reality has predictably been slow progress and sometimes difficult negotiations – with some uncertainty on both sides as to how much the deal was really wanted. Tortuous progress in trade negotiations is nothing new, but TTIP has generated a large amount of comment, criticism and debate and the reasons for that are interesting, as well as the main lines of the debate itself.

The TTIP has drawn attention to itself – even while the negotiations are in progress – in three ways: in its context and projected content, in the controversy generated especially by its coverage of investment protection issues, and as an exemplar of the changed institutional climate of trade negotiations since the entry into force of the Lisbon Treaty.

The TTIP is the most important of a so-called “new generation” of preferential trade agreements (PTAs) that have been negotiated by the EU since 2006. In that year, DG Trade published a Communication, “Global Europe: Competing in the World” which, following Council endorsement, launched a strategy of seeking to conclude ambitious PTAs with economically significant trading partners.² Despite assurances by both Commission and Council that this strategy was intended to complement and not detract from the EU’s commitment to multilateralism and the WTO, no doubt part of the motivation for the new bilateral policy was a frustration with the lack of progress in WTO negotiations. It was also a response to the United States’

1. In a press conference on 5 Feb. 2015 the EU Chief Negotiator Ignacio Garcia Bercero, referring to meetings between Commissioner Malmstrom and USTR Ambassador Michael Froman in December 2014 and January 2015, said “we have received a clear instruction to intensify our talks and make as much progress as possible this year”.

2. The EU has since 2006 negotiated free trade agreements with South Korea, Singapore, Colombia, Peru and Ecuador, Ukraine, Georgia and Moldova, as well as Canada (the Comprehensive Trade and Economic Agreement, hereafter “CETA”), and negotiations are ongoing with India, Malaysia, Vietnam, Thailand, Japan and now the USA.

policy of seeking bilateral trade agreements, especially in the Asia-Pacific. Hitherto EU-USA trade relations have been essentially governed by WTO most-favoured-nation (MFN) disciplines accompanied by mutual recognition agreements³ and a degree of regulatory cooperation.⁴ The conclusion of a far-reaching bilateral agreement between two of the biggest players in the WTO – and each other’s biggest trading partners – would of itself be a significant development. The TTIP is designed to go beyond existing WTO commitments, especially in relation to services, regulatory cooperation, public procurement, the protection of intellectual property rights, and investment. The negotiating directives for TTIP, released in October 2014,⁵ specify that the agreement should cover regulatory issues and non-tariff barriers, “rules” and market access. Market access is certainly not unimportant, especially as far as services and establishment are concerned,⁶ but the innovatory aspects of the agreement lie more in the approach to regulatory issues and the “rules” which impact trade.

Regulatory cooperation and rules

In matters of regulation the EU’s aim is to build on (without duplicating) existing WTO commitments on SPS and TBT,⁷ to address regulatory impact assessment, to negotiate specific commitments for some goods and services sectors, and to establish an improved framework for regulatory transparency, cooperation, and compatibility. This is one area where the TTIP is envisaged as a “living agreement”, with continuing exchanges between regulators, and institutional provision for the amendment of the regulatory annexes. A long-term goal may be a substantial degree of regulatory mutual recognition

3. See e.g. Agreement on mutual recognition between the European Community and the United States of America, O.J. 1999, L 31/3.

4. A Transatlantic Economic Council was established in 2007 to provide a framework for dialogue. Proposals for a transatlantic free trade agreement (TAFTA) go back to the 1990s but have not (so far) borne fruit.

5. Council Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013, Council doc. 11103/13, declassified 9 Oct. 2014.

6. Market access should, in line with Art. V GATS, cover substantially all services sectors and all modes of supply and according to the negotiating directives will be based on “the highest level of liberalization captured in existing FTAs” (Council doc. 11103/13, cited previous footnote, para 15). Some of the controversy surrounding the TTIP negotiation has been over the scope of services liberalization and the extent to which Member States’ public services will be protected by EU and national level reservations. Audiovisual services were excluded from the negotiating directives.

7. The WTO agreements on sanitary and phytosanitary measures (SPS) and technical barriers to trade (TBT).

or functional equivalence,⁸ but the EU's initial position paper published in July 2013 was careful to specify that "TTIP provisions shall not affect the ultimate sovereign right of either party to regulate in pursuit of its public policy objectives and shall not be used as a means of lowering the levels of protection provided by either party".⁹ Indeed in this paper the Commission espouses the idea that regulatory cooperation will promote more efficient regulation through exchanges of best practice, as well as contributing to the objective of promoting international standards. It seems clear from the reports of the negotiating rounds, including the round held in February 2015, that the regulatory negotiations differ from standard offer-based trade negotiations, and are in themselves a process of regulatory cooperation. At their best, they would operate as a collaborative effort, aimed at a greater mutual understanding of different regulatory approaches. To see the negotiations in this way requires a degree of trust in the regulatory negotiators of both parties, in particular in their judgement over whether a specific requirement is unnecessary duplicative red tape, or whether this is a case where the aim of regulatory cooperation should be to find ways of making two very different systems function better together in practice without sacrificing their standards.¹⁰ Trust and transparency are linked: trust between regulators requires as a minimum a high degree of transparency, and regulatory negotiations of the collaborative type being attempted with TTIP must promote transparency in order to build public trust in the outcomes. And in fact the degree of transparency on the EU's negotiating position as far as the regulatory issues are concerned is already remarkable if compared with past practice: in addition to the initial regulatory position papers, the Commission has published its first textual proposals on regulatory cooperation, drafted for the 8th round of negotiations held in February 2015.¹¹ We will return to the question of transparency, as it has proved to be a central issue for the TTIP negotiations.

8. "In general terms (although this may not be applicable in all cases), the ultimate goal would be a more integrated transatlantic market where goods produced and services originating in one party in accordance with its regulatory requirements could be marketed in the other without adaptations or requirements", Initial EU Position Paper on "Trade, Cross-cutting disciplines and Institutional provisions", 16 July 2013, p. 3. In addition to this "horizontal" paper, position papers have been published on both SPS and TBT.

9. Several initial position papers, which were presented during the first round of negotiations in July 2013, were subsequently published by the Commission; see <trade.ec.europa.eu/doclib/press/index.cfm?id=943>. In May 2014, the Commission published EU negotiating positions on a number of sectors, including chemicals, cosmetics, pharmaceuticals and motor vehicles. These ranged from the relatively modest (classifying and labelling chemicals) to more ambitious (recognition of safety standards for motor vehicles).

10. Chemicals regulation is cited as an example of the latter, where the aims could include sharing information on test results and seeking agreement on classification and labelling.

11. Council document tradoc 153120.

Within the concept of “rules” we find *inter alia* competition, the protection of intellectual property rights (IPR), trade and sustainable development, and investment protection and investor-State dispute settlement (ISDS). Data protection does not appear in the negotiation directives,¹² although if the precedent of the Comprehensive Trade and Economic Agreement with Canada (CETA) is followed the provisions on e-commerce may require the parties to adopt or maintain laws or regulations on the protection of personal data of users of e-commerce, as well as provisions on the treatment of personal information in the course of financial data processing. The EU’s desiderata on IPR include the protection of Geographical Indications and some specific copyright issues such as public performance and broadcasting rights. The inclusion of enforcement of IPR, including criminal sanctions, is said to be unnecessary given existing levels of enforcement in both parties, but no doubt also reflecting a desire on both sides to avoid accusations that the TTIP will somehow resurrect the defeated ACTA.¹³

Given the post-Lisbon context of the TTIP negotiation,¹⁴ it is of interest to see explicit references in the negotiating directives to shared values as a basis for the agreement, including a commitment to human rights and fundamental freedoms, sustainable development, WTO compliance, and the “right of the Parties to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection of health, safety, labour, consumers, the environment and the promotion of cultural diversity”.¹⁵ The EU’s initial position paper on trade and sustainable development points out that sustainable development is a fundamental principle of EU external action generally, including its trade policy.¹⁶ It is thus appropriate that the TTIP would envisage not only principles governing the parties’ domestic regulation

12. In a speech in Washington in October 2013, Viviane Reding, then the Justice Commissioner, said that the inclusion of data and data protection could derail the TTIP: “I warn against bringing data protection to the trade talks. Data protection is not red tape or a tariff. It is a fundamental right and as such it is not negotiable.” SPEECH/13/867, 29 Oct. 2013.

13. The Anti-Counterfeiting Trade Agreement (ACTA) was signed by the EU and 22 of its Member States on 26 Jan. 2012, but was then defeated in the European Parliament in July 2012; Matthews and Žiková, “The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union”, 44 *International Review of Intellectual Property and Competition Law*, (2013), 626.

14. According to Art. 21(1) TEU the Union is mandated to build partnerships with third countries which share its foundational principles and values.

15. Council Directives for the negotiation of TTIP, cited *supra* note 5.

16. Council document, tradoc 151626. According to Art. 207(1) TFEU, the EU’s Common Commercial Policy shall be “conducted in the context of the principles and objectives of the Union’s external action.” These general principles and objectives are to be found in Arts. 3(5) and 21 TEU.

and trade relations with each other, but also their contribution to the promotion of these principles through their participation in multilateral fora and their relations with third States. The EU proposes to include recognition of the parties' right to regulate their own domestic labour and environmental standards, the promotion of trade in environmentally friendly (e.g. energy efficient) goods, green procurement, a commitment to implement and promote the ILO's decent work and core labour standards, and the promotion of corporate social responsibility.

These aspects of the TTIP (broadly, those concerned with regulation and rules) reveal an interesting dynamic. On the one hand, the EU is attempting to pursue its strategy of "deep and comprehensive free trade agreements" (DCFTA) which will incorporate many of its regulatory priorities as part of a liberalization package that goes beyond existing WTO commitments, and which in some of their manifestations have sought to promote the EU's own approach to regulation.¹⁷ On the other hand, the EU is clearly aware that the USA, as a result of its economic weight and its own regulatory traditions, poses different kinds of challenge and we can see the EU seeking something a little different. It is endeavouring to build a collaborative relationship on a broad range of regulatory issues and rules, the aim of which is not limited to (although it includes) facilitating EU-US bilateral trade relations. The EU is also seeking to enlist the USA as a collaborative partner in promoting and improving international standards and it presents the TTIP as in some respects a model: "A strong competition chapter in TTIP could serve as an example that other countries could follow, too";¹⁸ "Closer regulatory cooperation between the EU and the US under TTIP could give a push to the development, update and implementation of international regulation and standards. If the US and the EU agree on an approach the chance of it being adopted by others is much higher".¹⁹ In his briefing, at the end of the February 2015 round of negotiations, the EU chief negotiator made this point too: "We also believe that agreeing rules on certain areas could help us project our shared values more globally and contribute, to the extent possible, to the development of future global rules and standards".²⁰ This collaborative or partnership-based approach is reflected in the overall tenor of the regulatory proposals which certainly emphasize the commitment to reducing regulatory barriers, but

17. As to the latter, see e.g. the Association Agreement with Ukraine signed in June 2014.

18. European Commission Factsheet on competition in TTIP <trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153019.6 Competition SoE Subsidies merged.pdf>.

19. European Commission, "TTIP and Regulation, An Overview", 10 Feb. 2015, p. 5.

20. TTIP Round 8 – final day press conference, comments by EU Chief Negotiator Ignacio Garcia Bercero, Brussels, 5 Feb. 2015, tradoc 153110, p. 3.

which also emphasize the ultimate autonomy of each party to decide its own regulatory priorities.²¹

Investment protection and investor-State dispute settlement

This approach seems at first sight also to characterize the aspect of the TTIP which has attracted most attention, the provisions on investment protection and ISDS, but the similarity conceals a rather different relationship between the agreement and its context. For the EU, the TTIP is significant in that it is proposed to include provisions on investment protection that go beyond any previous agreement apart from the CETA. Earlier PTAs of this new generation, such as the agreements with Korea, Colombia and Peru, and Singapore have included chapters on establishment, with national treatment and MFN clauses linked to market access commitments, but not the investment protection rules such as fair and equitable treatment traditionally found in bilateral investment treaties (BITs). The negotiation directives for the TTIP provide that the aim of the EU will be “to negotiate investment liberalization and protection provisions ... on the basis of the highest levels of liberalization and highest standards of protection that both Parties have negotiated to date.” A list of desiderata for investment protection is included, including fair and equitable treatment, references to preserving the right to regulate for legitimate public policy objectives, and requirements for “effective and state-of-the-art” ISDS.

The EU Member States have concluded over 1400 BITs and the CETA and TTIP are intended as early steps in developing an EU *acquis* in this field which would ultimately replace many of these bilateral agreements.²² The Commission’s approach has been to recognize that certain aspects of the standard investment protection and ISDS regimes are unsatisfactory, and to seek to improve these through bilateral PTAs such as CETA and TTIP (as well as through work in multilateral bodies such as UNCITRAL). Since the

21. Thus the EU’s initial textual proposal for the chapter on regulatory cooperation specifies that: “The provisions of this Chapter do not restrict the right of each Party to maintain, adopt and apply measures to achieve legitimate public policy objectives ... at the level of protection that it considers appropriate, in accordance with its regulatory framework and principles”. Tradoc 153120, Art. 1(2).

22. Since the coming into force of the Lisbon Treaty, foreign direct investment (FDI) has been brought within the EU’s Common Commercial Policy and thereby its exclusive competence (Art. 207(1) TFEU). Regulation 1219/2012 of 12 Dec. 2012 (O.J. 2012, L 351/40) establishes a transitional arrangement for the provisions on investment protection in BITs between Member States and third countries, requiring their notification to the Commission and authorizing their continuation until replaced by an agreement between the EU and the relevant third country; new BITs may also be concluded by Member States, subject to conditions.

Commission has said that it achieved a satisfactory result in the CETA,²³ it is possible to gain an idea of the current policy from the CETA text,²⁴ and indeed this was the text used by the Commission as a reference in 2014 when conducting an online opinion survey on ISDS in the TTIP.²⁵ The EU negotiators have sought to address concerns about both investment protection and ISDS by planning to include in the first place a clearer expression of the right to regulate and definitions of (indirect) expropriation and fair and equitable treatment, with the possibility of binding joint interpretations by the parties, and in the second place improvements to ISDS procedures, including consideration of appellate procedures and provisions on conflict of interest and transparency. Opinions differ widely on the extent to which these adjustments will really address the perceived problems; the Commission, in its report on the online consultation exercise on ISDS, has acknowledged that among the respondents the “collective submissions reflect a wide-spread opposition to investor-State dispute settlement (ISDS) in TTIP or in general”.²⁶ Negotiations have not yet started on this part of TTIP and the Commission is to consult more widely before deciding how to structure its negotiating position. This discussion will include subjects such as the protection of the right to regulate, the functioning of arbitral tribunals, the relationship between domestic judicial systems and ISDS, and the possibility of an appellate mechanism to review ISDS decisions.²⁷

This is not the place for an assessment of the Commission’s reference text on ISDS and its critics; but the actual framing of the exercise prompts some reflection. The consultation and report are certainly valuable but, as the Commission points out, the consultation was conducted under circumstances “where the Council has unanimously entrusted the Commission to negotiate high standards of investment protection and ISDS within TTIP, provided that the final outcome corresponds to the EU interests”.²⁸ Thus the focus has been on crafting the best possible rules (and assessing whether and how they can be

23. Factsheet on Investment Protection and Investor-to-State Dispute Settlement in EU agreements, 26 Nov. 2013, tradoc 151916, p. 2.

24. The text of the CETA is undergoing legal revision before the procedure for its signature and conclusion is launched. The draft text of CETA is available at: <trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>.

25. European Commission Report on online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), 13 Jan. 2015, SWD(2015) 3 final.

26. *Ibid.*, p. 14. Collective (as opposed to individual) submissions amounted to approximately 145,000 of the 150,000 responses.

27. *Ibid.*, p. 28; proposals have been made, by among others Germany’s minister of economy Sigmar Gabriel, to establish public forms of ISDS such as an independent trade and investment court which would be able to hear appeals against arbitral rulings.

28. *Ibid.*, p. 26.

improved) in the light of inevitably different views on the balance between the right to regulate and investment protection, and on how to handle dispute settlement. As with some of the other aspects of the TTIP, the Commission presents us with the aim of influencing the broader international framework: to use its new external powers and the opportunity of the potentially highly influential CETA and TTIP agreements to re-shape investment protection and ISDS and to re-balance and improve the existing model: “The EU can draw on lessons from how the arbitration system has worked so far in order to make changes to the system of investment protection. With its global economic weight, the EU is in a strong position to convince its trading partners of the need for clearer and better standards”.²⁹ The more basic question of whether investment protection and ISDS is actually needed or should be accepted at all, could – in this consultation exercise – only be considered in a provisional way and subject to the possible success of the EU’s efforts to reform the existing system.³⁰ It may be true that the EU and the USA can together agree an ISDS mechanism that is a substantial improvement in terms of transparency and clarity on the current BITs system. But there is nevertheless a need to consider the place of ISDS in the agreement as a whole, and the place of investment protection and ISDS within the broader framework of the EU’s international regulatory efforts, including sustainable development.

If the aim of TTIP is to improve the regulatory environment for investors in both the EU and USA, then it is by no means obvious that special protection for foreign investors is needed. We should remember that BITs are generally stand-alone investment agreements, whereas the investment protection provisions in the TTIP would be embedded in an agreement which puts much emphasis on improving the regulatory environment and trade-related rules – to the benefit (it is argued) of both domestic and foreign enterprise. If these efforts pay off, and the TTIP brings about more transparent, effective regulation, removing unnecessary obstacles through sophisticated forms of regulatory cooperation and collaboration, then it is difficult to see the added value of investment protection, especially as by definition it will not be targeted at all those doing business in the EU or USA, but only at non-domestic investors. The considerable effort that will be needed in fine-tuning an acceptable investment protection regime might be better spent on other aspects of the agreement, especially those connected to the overall regulatory environment. The potential linkage between investment protection

29. Factsheet on Investment Protection..., cited *supra* note 23, p. 3. A concrete example of this approach is the Commission’s espousal of the UNCITRAL rules on transparency in ISDS agreed in 2013 and the UN Convention on transparency, adopted by the UN General Assembly in December 2014.

30. Factsheet on Investment Protection ..., cited *supra* note 23, p. 26.

and sustainable development may be innovatory but if the EU's global aim is to promote good regulation then a strategy which places regulation on the defensive, and a debate couched in terms of whether there are sufficient safeguards protecting the right to regulate, is an essentially reactive stance.

The context of the TTIP as a whole is also telling when it comes to ISDS. The purpose of ISDS is to enforce the investment protection rules through arbitration; a specific type of remedy is created for the additional protection offered to foreign investors. If we look to CETA as a model, we find that elsewhere in the agreement private party enforcement in domestic courts is denied. Under Article 14.16 of CETA:

“Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.”

This denial of direct effect as an express provision of EU trade agreements is relatively new.³¹ The agreements of the 1970s, 1980s and 1990s, either straightforward trade agreements or trade provisions embedded in broader association or partnership and cooperation agreements, were regularly found to create directly effective rights.³² In 1994, the preamble to the decision concluding the WTO agreements on behalf of the EC expressly excluded for the first time the possibility of direct effect as far as the Community was concerned.³³ The Council decision approving the signature of the free trade agreement with the Republic of Korea in 2011 contained a similar exclusion, this time in the body of the decision.³⁴ Clauses similar to that found in the CETA are included in the free trade agreements with Singapore and with

31. Semertzi, “The Preclusion of direct effect in the recently concluded EU Free Trade Agreements” (2014) 51 CML Rev. (2014), 1125.

32. Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, EU:C:1982:362; Case T-115/94, *Opel Austria v. Council*, EU:T:1997:3.

33. Decision 94/800 O.J. 1994, L 336/1, recital 11.

34. Decision 2011/265 O.J. 2011, L 127/1. Art. 8 provides, “The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals.” Although perhaps stronger than a Preamble statement, such a provision can certainly only apply to the legal effect of the agreement within the EU. The ECJ has always held that the issue of direct effect is subject to the interpretation of courts only where the parties themselves have not determined the legal status of the agreement in their domestic legal systems: see e.g. Case 104/81, *Kupferberg*, at para 17. A unilateral statement such as this is not necessarily determinative of the issue but will of course be strong evidence of the intention of the EU party (see e.g. Case C-149/96, *Portugal v Council*, EU:C:1999:574, paras. 47–48). In contrast, more recent agreements such as the agreement with Singapore and the CETA include a provision on absence of direct effect in the body of the agreement itself.

Colombia and Peru, and there is no reason to doubt that the same would be the case with the TTIP.³⁵ As a result private enforcement of the agreement, except by foreign investors via ISDS arbitration, is excluded. It is not then simply a matter of providing an additional option for dispute settlement under the agreement for one category of enterprise, but the exclusion of domestic courts entirely. As the Court of Justice has recently forcefully reminded us, the EU is not a State,³⁶ and international agreements which seek to subject the EU to external adjudication have to be designed very carefully so as not to upset the specific characteristics and the autonomy of the EU legal order, including its judicial system which has “as its keystone” the preliminary ruling procedure.³⁷ Difficulties in ensuring that the conditions established by the ECJ are met in an ISDS regime are easy to foresee, especially given that international investment arbitral tribunals are not “courts or tribunals of a Member State” within the meaning of Article 267 TFEU,³⁸ and in the absence of even the possibility of recourse to domestic “ordinary” courts with the right to make a preliminary reference.³⁹ These issues aside, the rationale for permitting investor-State arbitration for foreign investors only, while excluding court-based enforcement, does not obviously follow from the investment or other objectives of the agreement.

So if the EU’s approach to the TTIP, emphasizing bilateral cooperation as a basis for seeking to influence international standard-setting, has a clear rationale in the context of the regulatory elements of the agreement, this is much less clear in the case of investment protection and ISDS. The context for these rules, derived from national BITs, is quite different, and the EU, which seeks to develop a holistic trade policy based on “deep and comprehensive” trade agreements, needs to think more deeply about how the business environment for investors within domestic and foreign markets can be improved. Simply importing the provisions of Member State BITs, even in an

35. For a detailed analysis of the varying types of clause see Semertzi, *op. cit. supra* note 31.

36. Opinion 2/13, *ECHR*, 18 Dec. 2014, EU:C:2014:2454, para 156.

37. Opinion 2/13, *ECHR*, paras. 174–6. In particular, the ECJ is concerned to protect the uniform interpretation of EU law and the exclusive jurisdiction of the ECJ based on Art. 344 TFEU. International agreements concluded by the EU are regarded by the Court as “an integral part” of Union law: Case 181/73, *Haegeman*, EU:C:1974:41, para 5.

38. Case 102/81, *Nordsee v. Reederei Mond*, EU:C:1982:107.

39. Cf. Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, EU:C:1999:269 in which it was held that in order to ensure the uniform interpretation of Union law, “irrespective of the circumstances in which it is to be applied”, national courts faced with an application for annulment of an arbitration award must be able to consider compatibility with the Treaties and if necessary make a reference for a preliminary ruling. Proposals to establish some form of specialized trade and investment court or appeal tribunal to handle ISDS (see note 27 *supra*) would need to be carefully designed to ensure the compatibility with Union law of an “external” dispute settlement mechanism; for a recent example of the challenges this can pose, see Opinion 1/09, *European Patent Court*, EU:C:2011:123.

improved version, may not be the best solution, given the “thicker” integration envisaged by the new generation of EU agreements. The Commission, in the case of TTIP, is carrying out the instructions it has been given on investment protection in the negotiating directives. It is duty-bound to try to make these work in the light of its perception of the Union interest and the agreement it is possible to achieve. As it has said several times, rightly, the final result will need to win the assent of the European Parliament and be approved by the Council.⁴⁰ Nevertheless, the Commission will also have to weigh up the real merits of any (reformed) investment protection and ISDS provisions if the cost of including them is the risk of failure of the agreement as a whole and thus ultimately a failure to deliver on the Council’s mandate.

Transparency

The fact that it is possible to write about the TTIP while the negotiations are still ongoing is itself worthy of note. The release of information on the TTIP, especially since the publication of the negotiating directives in October 2014, is remarkable. DG Trade has published factsheets and the EU’s initial position papers, and is now starting to publish its initial textual proposals on some topics. It is significant that these texts involve the regulatory and “rules” aspects of the agreement. It is not envisaged that the Commission will publish its negotiating positions on market access in tariffs, services, investment and procurement; these are still regarded as confidential so as to protect the EU’s negotiating position.⁴¹ Nor will the EU publish joint negotiating texts unless it has the agreement of the USA negotiators. But there is no doubt that the TTIP marks the start of a new approach to transparency in trade negotiations that is very much to be welcomed. The change is a response to the need to “make a case for TTIP”, to dispel rumour and shape the argument in the face of widespread anxiety and campaigning. It is also a response – building upon the start made with earlier agreements, including the ACTA, although too little too late in that case – to the changed role of the European Parliament, which must now give its assent to trade agreements and has the right to be kept informed throughout the negotiation.⁴² But it also reflects the character of this

40. The negotiating directives themselves provide that the final decision on inclusion of investment protection and ISDS will depend on whether the negotiations have produced a satisfactory solution meeting the EU’s interests. This of course is true in principle for every element of the agreement, but it is significant that these issues are signalled as needing specific assessment.

41. Communication to the Commission concerning transparency in TTIP negotiations, 25 Nov. 2014, C(2014) 9052 final. Cf. Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43, Art. 4(1).

42. Art. 218(6) and (10) TFEU.

new generation of trade agreements. Where their provisions include issues of regulatory rule-making, the power of assent (or dissent) to a final text on a take-it-or-leave-it basis, although important, is no real substitute for involvement in the shaping of legislation. The publication of the EU's positions at different stages of elaboration and thinking, together with openness to consultation and debate, helps to fill a gap which is becoming evident as international agreements are increasingly quasi-legislative in nature.

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