



## Transatlantic Trade and Investment Partnership (TTIP<sup>1</sup>)

### Update no.1, April 2014

This Update follows a **background paper** published by EUA in January 2014 and available at: [www.eua.be/Libraries/Higher\\_Education/TTIP\\_background\\_paper\\_jan\\_2014.sflb.ashx](http://www.eua.be/Libraries/Higher_Education/TTIP_background_paper_jan_2014.sflb.ashx)  
The two documents are best read in sequence.

- EUA's primary concern is with eventual EU-US agreements in the area of services, which might impact on higher education. At this stage, it is not possible to say whether HE services will feature in the deal.
- The bilateral TTIP negotiations now under way are not stand-alone. Ultimately, they must conform to the rules of the World Trade Organisation (WTO). They must also be consistent with EU law.
- TTIP is foreshadowed by more advanced negotiations in other arenas: the Trans-Pacific Partnership (TPP), in which the US has a major stake; and the EU-Canada Comprehensive Economic and Trade Agreement (CETA), for which political agreement has been reached, but the technical details not yet fleshed out.
- Also under way are preparations for a Trade in Services Agreement (TiSA), in which over 40 WTO countries are active, including both the EU and the US.
- Recent events in Ukraine have transformed the back-drop to the TTIP negotiations. The EU is urgently considering how to reduce its dependency on Russian supplies of oil and natural gas. The US is an obvious alternative source. However, its apparent leverage over the TTIP talks has to be seen in the context of the US government's weakness at home. The outcomes of TTIP remain unpredictable.

This Update concerns **TTIP as it stands at the beginning of April**. It covers the current context and the issues that may prove to be of relevance to EUA members and to the European HE sector at large.

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<sup>1</sup> Also known (in the US) as T-TIP and as TAFTA

## European HEIs urgently need to consider how TTIP could affect their operations.

1. The fourth round of negotiations
2. Market access to higher and adult education (HE and AE) providers
3. Mutual recognition of professional qualifications
4. Public procurement
5. e-commerce and data protection
6. Intellectual property rights (IPR)
7. Investor-state dispute settlement (ISDS)
8. The question of transparency
9. Future developments

### 1 The fourth round of negotiations

1.1 The **fourth round** of negotiations took place in March. They followed six months of exploratory exchanges, during which each side studied the other's regulatory regime(s) and assessed the divergences. The focus now shifts to initial proposals.

Going into the talks, the **European Commission's** public position was as follows:<sup>2</sup>

Commissioner De Gucht said he also hoped for ambitious proposals to open up their [EU and US] respective markets even further than at present. These include:

- substantive reduction of duties and tariffs on agricultural and industrial goods;
- laying the ground for a first exchange of offers in services so that EU and US firms can compete on equal terms;
- allow EU firms to bid for public contracts in the US;
- and improved access and transparency on procurement rules

De Gucht also stressed the need for progress on so-called 'rules' issues. These include measures to:

- spur trade whilst respecting social rights and the environment protection frameworks ('sustainable development');
- enable EU firms to import energy and other raw materials from the US;
- ensure that, for specialized food and drinks products from specific regions in Europe, only those products can be marketed as such in the US ('geographical indications' or 'GIs');
- and ensuring governments treat companies in which they have a majority stake ('state-owned enterprises') the same as any other firm.

The **US position** was posted in March as a set of Objectives.<sup>3</sup> In summary, the US seeks:

- to eliminate all tariffs on agricultural, industrial and consumer products

<sup>2</sup> [http://europa.eu/rapid/press-release\\_STATEMENT-14-12\\_en.htm?locale=en](http://europa.eu/rapid/press-release_STATEMENT-14-12_en.htm?locale=en)

<sup>3</sup> [www.ustr.gov/about-us/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View](http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View)

- to achieve reciprocal market access in textiles and apparel
- to eliminate or reduce non-tariff barriers
- to achieve greater compatibility of EU and US regulatory practices, while maintaining existing levels of health, safety and environmental protection
- to achieve greater clarity regarding rules concerning country of origin
- to improve access to the EU services market 'on a comprehensive basis', improve due process and regulatory cooperation, and 'obtain additional disciplines in certain service sectors'
- to facilitate the use of e-commerce in support of trade in goods and services
- to facilitate the movement of cross-border data flows
- to create a level playing-field in investment protection and dispute resolution
- to increase access to EU government procurement markets
- to formalise the EU and US shared belief in strong intellectual property rights
- to regulate more fairly and transparently the operation of state-owned enterprises
- to strengthen EU-US cooperation on the facilitation of transatlantic trade by SMEs
- to achieve agreements on transparency, anti-corruption, competition policy and dispute settlement

1.2 Both sides intend TTIP to be a '**living agreement**', i.e. not to reach a once-and-for-all conclusion, but to evolve incrementally as global, regional and bilateral contexts permit.

1.3 The position statements are difficult to read. At one and the same time they are general, technical, coded, and designed to meet the objections of particular stakeholder groups. They have, broadly speaking, a **dual purpose**: to extract concessions from the other side, in the framework of a shared push for greater liberalisation; and to create precedents for future World Trade Organisation (WTO) negotiations... or, as a recent *Financial Times* article put it, to write the rules of world trade before China gets the chance.

1.4 An additional, and now urgent, headline motive is the need to address the likely disruption of energy markets triggered by **events in Ukraine**. The US sells fuel onto the open world market, but it can target exports to specified client countries only within the framework of a trade agreement. The geo-strategic imperative to use TTIP as the foundation stone of an economic NATO thus gives huge impetus to the talks.

1.5 This does not mean that TTIP is a done deal. Many **obstacles** remain. The US environmental lobby is hostile, believing that TTIP would drive up fossil fuel production and CO<sub>2</sub> emissions. In any case, President Obama does not have the Trade Promotion Authority allowing him to fast-track trade deals. For this, he requires a much stronger majority in Congress, which he seems unlikely to get. He has first to win over sceptics on his own side, who regard the North American Free Trade Agreement (NAFTA) as having had a damaging effect on the US labour market.

1.6 TTIP raises a number of issues which have potential **relevance to the European higher education sector**. The following comments draw on press coverage, position papers by lobby groups, documentation generated by the DG Trade Civil Society Dialogue, a public hearing in the European Parliament on 17 March, as well as leaked information posted on the internet (see section 8 below on transparency).

## 2 Market access to higher and adult education providers

2.1 The **EU negotiating mandate** aims to bind the EU and the US to the highest degree of service liberalisation envisaged in the WTO's General Agreement on Trade in Services (GATS). Education is one of the twelve discrete service areas defined in GATS. 'Higher' and 'adult' are separate categories of provision, but it is clear that the distinction does not translate easily into practice, since many HEIs operate in both modes in ways that cannot always be disaggregated. While respecting the sensitivity of certain sectors, TTIP aims to go beyond GATS. The audiovisual market is explicitly excluded,<sup>4</sup> but there is no indication of which others might be 'sensitive'. In general, the EU wants its service providers to have no less favourable opportunities for establishment and market access in the US than do domestic US providers.

2.2 As a resource for its negotiators, the EU has commissioned a '**trade sustainability impact assessment**'. A draft is publicly available<sup>5</sup> for comment (this window closed on 8 April) and was discussed at a DG Trade Civil Society Dialogue meeting on 1 April. The final text is due in December. While it refers to services as 'the sleeping giant', it makes no specific reference to education.

2.3 At the DG Trade stakeholder meeting on 12 March, the chief negotiators responded to a **question posed by EUA**. Did their proposals include higher and adult education? Dan Mullaney for the US replied that they were not excluded and that it would be useful to include them, but that no discussions had so far taken place. EU negotiator Ignacio Garcia Bercero confirmed that the US had expressed an interest in adult education, but that it was not clear whether this also covered higher education.

2.4 The situation is far from clear. Education services which are unambiguously private (i.e. **for-profit services**) cannot be excluded *a priori*. The scope of the EU's Services Directive neither explicitly includes nor excludes education. When the Commission supports the right of private education providers wishing to enter a particular national market, it uses the Treaty's provisions on freedom of establishment, rather than the Directive.

2.5 Such situations bring into the open the tension between the EU's exclusive competence in the Single Market and its complementary competence in the field of education. Should education feature in TTIP proposals, Member States are likely to fall into two opposing camps – for and against liberalisation and 'commodification'. Both EU and US negotiators regularly point out that, in line with GATS, **public services** are excluded. This offers no clarity regarding HE, since many European 'public' HEIs have a status which satisfies neither of the two GATS criteria: they do not, unambiguously, supply services in the exercise of governmental authority; nor are these services necessarily supplied on a basis which does

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<sup>4</sup> During the European Parliament public hearing, the EU negotiator also excluded the water industry, but without supplying any detail. As far as health is concerned, the British Medical Association has received assurances that healthcare provision will 'not be part of the talks'. See <http://bma.org.uk/news-views-analysis/news/2014/february/doctors-leaders-reassured-over-transatlantic-healthcare-market>

<sup>5</sup> At [www.trade-sia.com/ttip/wp-content/uploads/sites/6/2014/02/TSIA-TTIP-Draft-Inception-report.pdf](http://www.trade-sia.com/ttip/wp-content/uploads/sites/6/2014/02/TSIA-TTIP-Draft-Inception-report.pdf)

not compete with other providers. Moreover, the standard economists' triple criterion of a public good – non-rival, non-excludable and non-rejectable – is not met by HE.

2.6 The tension between private and public is reflected in the debate concerning the basis on which the negotiations on services should be conducted. Should they start from negative or positive lists? The negotiators, the proponents of greater liberalisation, and those on the centre-right, prefer the **negative list**: this sets out in advance those areas which will not feature, either because one side is determined to exclude them or because they are already excluded by other agreements. Negotiations in TTIP will indeed proceed from the negative: what is on the table, subject to horse-trading, is unspecified at the outset and revealed only gradually and only by each negotiating team to the other. **AE and HE, not having been excluded, may therefore be tabled, either for their intrinsic market interest or to be used as bargaining counters.**

2.7 The case for the **positive list**, from which more accurately defined public services would be excluded, was succinctly made by the UK Trade Union Congress (TUC) in its written evidence to a UK parliamentary committee:

13 In addition, we would wish to argue that any liberalisation obligations should only apply to services using a 'positive list' approach as used in GATS. The wording of public services in the agreement should not create ambiguity as to what is classified as a public good. Public services should not be seen in the minimal definition of 'services in the exercise of governmental authority' as defined in Article 1.3 of GATS (which should also cover services provided by sub-national levels of government) or 'public utilities'. Rather they should be more broadly defined using terminology used by the EU Treaties to include provision of public goods such as education and health.<sup>6</sup>

2.8 An additional consideration is what the term 'education' might cover **beyond the core activities** of course provision. This may vary considerably among Member States and illustrates the need for HE sectoral representative bodies to take stock of TTIP and to express a view. 'In the higher education sector, [the written evidence continues] the TUC is concerned about access to the market in student loans, and access to public sector research grants.'<sup>7</sup> Further information on what constitutes educational services is contained in section 4 below (public procurement).

2.9 Whatever precedents may exist in the **EU-Canada CETA**, they are invisible. The *European Voice* of 23 January reported that the EU will grant access to Canadian technical, technology, energy and environmental services, while Canada will open up to EU financial, telecom, energy and maritime services. No mention here of education. The full details of the CETA are not expected until the summer. The Canadian Trade Justice Network has launched a petition calling for its immediate publication.<sup>8</sup>

<sup>6</sup> Written evidence to the House of Lords sub-committee on external affairs p.164,

[www.parliament.uk/documents/lords-committees/eu-sub-com-c/TTIP/TTIPwrittenevidencevolumeFINAL.pdf](http://www.parliament.uk/documents/lords-committees/eu-sub-com-c/TTIP/TTIPwrittenevidencevolumeFINAL.pdf)

<sup>7</sup> op.cit. p.165

<sup>8</sup> See the website mentioned in section 8.5 below

### 3 Mutual recognition of professional qualifications

3.1 The **EU mandate** (para.17) considers that TTIP ‘should develop a framework to facilitate mutual recognition of professional qualifications’. This is an area of HE provision in which, in Member States and the three EEA countries, the EU has exclusive competence. The Parliament’s public hearing on TTIP was convened by the Internal Market and Consumer Affairs Committee. IMCO had been the lead committee handling the amendment of the Directive on the recognition of professional qualifications.<sup>9</sup> Members asked no questions of the negotiators, which suggests that they regard the proposal as unproblematic.

3.2 The **European Services Forum** (ESF)<sup>10</sup> is strongly in favour of market access to the US by European professional service providers. At the DG Trade stakeholder presentations event on 12 March, it called for mutual recognition of accountancy, architecture, engineering and legal qualifications, a call echoed by the UK Law Society.

3.3 **Existing EU legislation** (Directive 2005/36/EC, now amended as Directive 2013/55/EU) allows the recognition of the professional qualifications held by third country nationals, if they are long-term residents, refugees, holders of Blue Cards, or scientific researchers.

3.4 There also exist **bilateral recognition agreements**, covering certain professions and disciplines. Under the Directive, a professional incoming from Quebec and duly recognised by France, for example, may be recognised by other Member States and EEA countries after having practised for three years in France.<sup>11</sup>

3.5 The **wide-ranging recognition agreement** now on the TTIP agenda has no functioning precedent, although it is rumoured to be pre-figured in the CETA. Politically, TTIP would appear to be problematic on the US side, since it would require acceptance by all 50 US states, where recognition practice differs widely.

3.6 The mutual recognition regime proposed for TTIP raises **questions**, among which are:

Which professions? All or only some?	Those cited by ESF (para.3.2 above) are covered by the sectoral chapter of DIR 2013/55/EU (architecture), by the General System of the same Directive (accountancy and engineering) and by dedicated Directives <sup>12</sup> in the case of law.
Will inclusion in TTIP affect or lengthen ongoing legislative	DIR 2013/55/EU will be in transposition until January 2016. The General System includes professions that are regulated

<sup>9</sup> EUA closely followed the legislative process. See the material posted at <http://www.eua.be/eua-work-and-policy-area/building-the-european-higher-education-area/bologna-and-professional-qualifications.aspx>

<sup>10</sup> Most ESF members are major corporates, but it also includes the Architects’ Council of Europe (ACE), the *Bundesverband der Freien Berufe* (BFB), the European Federation of Engineering and Consultancy Organisations (EFCA), and the *Fédération des Experts Comptables Européens* (FEE).

<sup>11</sup> A leaked DG Trade document, ‘Modified EU draft proposals on trade in services, investment and electronic commerce’ (3 July 2013), suggest that the three-year requirement will be carried into TTIP. For the sources of leaks, see section 8 below.

<sup>12</sup> The Lawyers’ Services Directive (LSD) of 1997 and the Lawyers’ Establishment Directive (LED) of 1998

processes?	in some Member States, but in different ways, and unregulated in others. The two law Directives have just begun their review process.
Will the current intra-EU 'mutual evaluation' process be linked to TTIP?	Member States are currently assessing how far their professions might be de-regulated or more lightly regulated, with the dual aim of boosting cross-border service delivery and introducing a greater degree of automaticity into the recognition of qualifications.
Will the healthcare professions be included?	It seems unlikely, given that they were excluded from the Services Directive. On the US side, the wide variation in state practice will constitute a major barrier.
How will inclusion in TTIP reflect the gradual alignment of EU law on professional qualifications with the Bologna Process?	DIR 2013/55/EU, unlike the previous legislation which it amended, allows – in certain circumstances – the use of the European Credit Accumulation and Transfer System (ECTS) and reference to the European Qualifications Framework (EQF).
Will the assimilation of the Morgenbesser ruling into EU law have any bearing on TTIP?	Morgenbesser allows professional traineeships to be undertaken in any Member State, irrespective of where the professional qualification is delivered, and to enjoy full recognition. Particular attention has to be paid to the role of the supervisor.
How will EU and national requirements related to continuing professional development be accommodated in TTIP?	The current EU position is that Member States must report to the Commission, by the end of the transposition period, on how they 'encourage' CPD in the seven sectoral professions, six of which are healthcare professions. It is not clear whether extending this requirement to all US states would allay existing anxieties about patient safety.
Will US HEIs be allowed to participate in the new Common Training Frameworks?	CTFs are designed to allow a vanguard of Member States to design competence-based curricula into which other MSs may subsequently opt. Third countries are welcome as academic partners in curriculum development, but the amended DIR makes no specific mention of whether third country graduates would enjoy any special status.

## 4 Public procurement

4.1 Para.24 of the **EU negotiating mandate** states that the TTIP agreement 'will aim at enhanced mutual access to public procurement markets at all administrative levels (national, regional and local), and in the fields of public utilities, covering relevant operations of undertakings operating in this field and ensuring treatment no less favourable than that accorded to locally established suppliers.' The precise US ambitions are unknown, but both chief negotiators publicly agree on the principle of opening up procurement. Difficulties are anticipated on the US side, which has to bring 50 states into line.

4.2 On 6 April the **revised WTO agreement on government procurement**<sup>13</sup> came into force for the ten parties which have formally accepted it; they include the EU and the US. The

<sup>13</sup> See [www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)

agreement features new provisions on electronic procurement, anti-corruption measures and environmental safeguards.

4.3 Simultaneously, **new EU Procurement Directives** were published in the *Official Journal* (28 March)<sup>14</sup> and will have a two-year transposition period. Essentially, they have a triple aim: to ease access by SMEs to the public procurement market; to clarify procedures; to use public procurement more strategically in support of public policy and environmental objectives.

4.4 The new **Directive 2014/24/EU on Public Procurement** makes special provision for 'certain' educational services. These are 'services to the person' [...] 'with a limited cross-border dimension'. Recital 114 goes on:

Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services.

Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.

Contracts for services to the person above that threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate.

Article 4 sets the threshold at EUR 750,000. Only public service contracts to an equal or greater value are required to comply with the heavy touch procedures set out in the Directive. Article 74 indicates that the 'services to the person' concerned are those listed in the Common Procurement Vocabulary (CPV) between items 800000000-4 and 806600000-8 inclusive.<sup>15</sup> The list includes higher education services (code 80300000-7). Article 77 explicitly cites HE as a service for which contracting authorities are allowed scope to reserve the right for certain categories of organisations to participate in procurement procedures.

4.4 How far **European HE** is already involved in public procurement practices and how this might develop in the future is unclear. Do national and regional public authorities in the EU routinely outsource HE and AE services by tender? How does practice differ between Member States? Are there examples of cross-border procurement of HE services? This merits investigation, particularly if the EU agrees to extend its procurement horizon across fifty US states. Public procurement has not yet been discussed by the TTIP negotiators.

<sup>14</sup> See <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2014:094:FULL&from=EN>

<sup>15</sup> See the Official Journal L/74 205, 15.3.2008, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:074:0001:0375:EN:PDF>



## 5 e-commerce and data protection

5.1 e-commerce is linked to the wider problem of **transatlantic data flows**, which are already controversial, thanks to the Snowden revelations. In theory, EU citizens enjoy much greater privacy protection than their US counterparts, but it is widely considered that major US corporates routinely breach it. President Obama's promised 'Consumer Privacy Bill of Rights' has never been forthcoming, leaving US practice subject only to self-regulation.

5.2 EU Directive 95/46/EC on Data Protection does not allow the transfer of personal data to non-EU jurisdictions with weaker privacy laws.<sup>16</sup> Arrangements now in place offer US companies the opportunity to meet EU privacy standards; this is the so-called **safe harbor** regime,<sup>17</sup> designed by the US and to which more than 3 000 US companies have signed up. However, in response to public anxiety, the Commission reported in late 2013 on deficiencies in its implementation.<sup>18</sup>

5.3 Parliament has gone further. In March it called for the abandonment of safe harbor and for its replacement by the self-explanatory principle of 'Our house, our rules'. It went on to threaten a **veto of TTIP** should the US fail to give adequate data protection to EU citizens:

### **Transatlantic Trade and Investment Partnership Agreement (TTIP)**

72. Recognises that the EU and the US are pursuing negotiations for a Transatlantic Trade and Investment Partnership, which is of major strategic importance for creating further economic growth;

73. Strongly emphasises, given the importance of the digital economy in the relationship and in the cause of rebuilding EU-US trust, that the consent of the European Parliament to the final TTIP agreement could be endangered as long as the blanket mass surveillance activities and the interception of communications in EU institutions and diplomatic representations are not completely abandoned and an adequate solution is found for the data privacy rights of EU citizens, including administrative and judicial redress; stresses that Parliament may only consent to the final TTIP agreement provided the agreement fully respects, inter alia, the fundamental rights recognised by the EU Charter, and provided the protection of the privacy of individuals in relation to the processing and dissemination of personal data remain governed by Article XIV of the GATS; stresses that EU data protection legislation cannot be deemed an 'arbitrary or unjustifiable discrimination' in the application of Article XIV of the GATS;<sup>19</sup>

5.4 None of these issues have yet been taken up by the negotiators. Their express purpose is, once again, to bring a larger swathe of **SMEs** into active transatlantic e-commerce.

<sup>16</sup> A new EU General Data Protection Regulation, updating the Directive, is scheduled to be adopted later this year.

<sup>17</sup> See [http://export.gov/safeharbor/eu/eg\\_main\\_018476.asp](http://export.gov/safeharbor/eu/eg_main_018476.asp)

<sup>18</sup> See [http://ec.europa.eu/justice/data-protection/files/com\\_2013\\_847\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/com_2013_847_en.pdf)

<sup>19</sup> EP resolution on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs, [www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2014-0139&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2014-0139&language=EN)

5.5 **HE e-learning activities** – those that are traded – are presumably compliant with the EU’s Directive 2000/31/EC on Electronic Commerce. Whether fee-based MOOCs and other e-learning provision will develop in ways that test the limits of existing legislation is impossible to say. At issue would be concerns about consumer protection, quality assurance, data protection, intellectual property, the for-profit or not-for-profit status of the provider, and the growth of public-private partnerships.

## 6 Intellectual property rights (IPR)

6.1 On this matter the **EU mandate** is not specific. It wishes to ‘build on existing EU-US dialogue’, to consider ‘additional IPR issues’, and to ‘builds upon the TRIPS’.<sup>20</sup> It has recently completed a consultation<sup>21</sup> on copyright; part of its conclusions will no doubt involve the audiovisual sector, which in any case is excluded from TTIP.

6.2 One of the few clear references is to the EU **Geographic Indicators (GIs)**, of which there are many (Parma ham is the familiar example). In the US similar products are trade-marked rather than certified by region. TTIP would look for ways of easing the tensions generated by the incompatible indication systems.

6.3 EU and US TTIP documentation implies that negotiations in this area will be relatively unproblematic. Nothing, it is suggested, will provoke controversy in the manner of the 2011 **Anti-Counterfeiting Trade Agreement (ACTA)**, which was thrown out by Parliament on the grounds that it infringed civil rights.

6.4 Until more is known about the content and direction of TTIP negotiations, it is hard to say how **IPR practice in HE** might evolve beyond what is already familiar to European HEIs.

## 7 Investor-state dispute settlement (ISDS)

7.1 This a particularly controversial feature of TTIP and other trade deals. It gives foreign companies the **right to sue** national and regional governments for compensation, whenever their access to markets is unfairly impeded by local legislation and whenever their ‘legitimate’ expectations – as inward foreign investors – are frustrated.

7.2 ISDS is already built in to some 1 400 **bilateral investment treaties (BITs)** signed by individual EU Member States. However, it is only since the entry into force of the Lisbon Treaty that the EU, too, has had the necessary legal competence.

7.3 Those who wish to see **ISDS in TTIP** say that it makes sense to follow established custom and practice, that it is a powerful instrument to counter protectionism, and that it will act as a useful precedent in future deals (EU-India has been cited in this context). The US negotiating team is strongly in favour. The EU now appears cautious, to the point at which it

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<sup>20</sup> The WTO’s Agreement on Trade-related aspects of Intellectual Property Rights

<sup>21</sup> See [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)

has opted for (or been forced into) a prior public consultation which will close on 21 June.<sup>22</sup> Conscious of the lack of transparency in this area, it has announced plans to give EUR 100k to help the UN set up a database of ISDS disputes.

7.4 Opposition from the public sector and environmental lobbies is vociferous. Among the **counter-arguments** are the following: ISDS by-passes local regulators and legislation; it gives foreign companies more rights than indigenous ones; it undermines good regulatory practice; it affords no reciprocal rights to sue; it encourages mischievous claims which are paid for by the tax-payer; it encourages forum-shopping;<sup>23</sup> it places governments under duress; it has only an uncertain relationship to international treaties on e.g. human rights and environment; and finally, it is unnecessary, since other legal remedies exist.

7.5 The **relevance to European HE** is low, but the situation could change if major US corporations are given easier access to the HE and AE sectors.

## 8 Transparency in the TTIP negotiations

8.1 Transparency has been an issue throughout. Both sides report in general terms on progress made, but negotiations take place behind closed doors. Bernadette Ségol, general secretary of the **European Trade Union Confederation (ETUC)** has protested that the mandate given to the Commission by the Council of Ministers has never been published: “We hear that Germany led the opposition to that. The United States have seen it – with or without the help of the NSA. Why not our citizens?”<sup>24</sup>

8.2 **EU chief negotiator Ignacio Garcia Bercero** has said:<sup>25</sup>

*We certainly think that this issue is very important, so that as the negotiations proceed we can keep a maximum of information flowing to the public, while of course respecting the need to have confidentiality in the negotiating proposals. That is inevitable, but we would want to discuss with the United States what further steps can be taken to promote more transparency in the negotiations. You know, by the way, that we still have a problem to which we do not have a solution, which is how to share with member states and the European Parliament negotiating proposals that we have received from the United States. We have not found a solution to that issue, but we hope to be able to have found an understanding with the United States soon.*

8.3 To date, the US has not made public its first set of proposals. **Chief negotiator Dan Mullaney** has pointed out that it nevertheless consults widely. It appears sensitive to the accusation that its sectoral advisory boards lack broad representation (particularly in the

<sup>22</sup> See [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)

<sup>23</sup> The most cited example is that of Philip Morris, which is said to have had recourse to the Hong Kong legal jurisdiction in order to challenge Australian legislation on unbranded cigarette packs.

<sup>24</sup> [www.euractiv.com/trade/eu-canada-free-trade-deal-opens-news-533400?utm\\_source=EurActiv%20Newsletter&utm\\_campaign=3fa3ea36c5-newsletter\\_weekly\\_update&utm\\_medium=email&utm\\_term=0\\_bab5f0ea4e-3fa3ea36c5-245356445](http://www.euractiv.com/trade/eu-canada-free-trade-deal-opens-news-533400?utm_source=EurActiv%20Newsletter&utm_campaign=3fa3ea36c5-newsletter_weekly_update&utm_medium=email&utm_term=0_bab5f0ea4e-3fa3ea36c5-245356445)

<sup>25</sup> [www.parliament.uk/documents/lords-committees/eu-sub-com-c/TTIP/ucEUC160114ev16.pdf](http://www.parliament.uk/documents/lords-committees/eu-sub-com-c/TTIP/ucEUC160114ev16.pdf) Note that these comments are taken from the uncorrected minutes (p.30) of a public hearing by the UK House of Lords EU Scrutiny Committee.

field of energy); it is embarking on a ‘re-chartering’ of existing boards and setting up a ‘public interest advisory board’ to address issues of public health and consumer protection.

8.4 The **European Parliament** urges greater transparency. It wants to accompany the negotiations as they proceed, in order not to be left with a take-it-or-leave-it option on the final TTIP text. How far this can be the case is uncertain. IMCO follows developments closely. The Economic and Monetary Affairs Committee (ECON) sent a delegation to Washington to discuss financial services with Treasury and Trade officials. The lead, however, is taken by the International Trade Committee (INTA), whose chair – Portuguese Socialist Vital Moreira – told the IMCO hearing that there has never been a less secretive trade negotiation than TTIP: all the Parliament’s committee chairs have all the relevant papers. This revelation appeared to take some members of IMCO by surprise.

8.5 Interested lobby groups on both sides of the Atlantic are very active. The general public, on the other hand, relies on press reports. These in turn draw on stakeholder statements, as well as on **official and leaked sources**:

<p>Official information sources:</p> <p>European Commission DG Trade  <a href="http://ec.europa.eu/trade/policy/in-focus/ttip/">http://ec.europa.eu/trade/policy/in-focus/ttip/</a></p> <p>US Trade  <a href="http://www.ustr.gov/ttip">www.ustr.gov/ttip</a></p>	<p>Leaked information sources:</p> <p><a href="http://eu-secretdeals.info/ttip/">http://eu-secretdeals.info/ttip/</a>          [for TTIP and EU-Canada CETA]</p> <p><a href="http://www.tradejustice.ca/leakeddocs/">www.tradejustice.ca/leakeddocs/</a>          [for EU-Canada CETA]</p> <p><i>NB Documents leaked in trade negotiations are rarely final versions</i></p>
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## 9 Future developments

9.1 Both the EU and US chief negotiators intend to progress all areas of negotiation throughout 2014, but do not expect completion before 2015. Tentative dates for future meetings are 19-23 May and 14-18 July.

9.2 The effect that a **new European Parliament and Commission** will have on TTIP negotiations is unpredictable but critical. The latest Votewatch survey (2 April) shows the centre-right and centre-left to be on level terms in the contest for the new Parliamentary seats.

9.3 Significant, too, will be the **US mid-term elections**, given the expected growth of protectionist sentiment.

**Correction and comments** to this Update are very welcome – to [howard.davies@eua.be](mailto:howard.davies@eua.be)