



European  
Commission

## **Transatlantic Trade & Investment Partnership Advisory Group**

*Meeting report, 27 February 2015*

## 1. Update and forward look

The Chair gave a report of the 8<sup>th</sup> negotiating round, covering the discussions on market access, regulatory issues including sectors and Technical Barriers to Trade (TBT) and rules including sustainable development. He explained how the Commission was preparing for the 9<sup>th</sup> negotiating round over the course of the next few weeks, and noted the proposals that should be forthcoming. He noted also that the Commissioner would be seeing her counterpart USTR Froman during March. After the 9<sup>th</sup> round, a further round is likely to be held in July in Brussels.

For the convenience of members of the group, the Commission will share a list of contact points on each negotiating topic. The [list of lead negotiators](#) remains available online.

The following points were raised in discussion:

- One member asked for more information about the US position on labour rights in the negotiations. The Chair explained the state of discussions to date in particular in relation to ILO core standards and the US "May 10" agreement.
- Several members asked for more details with regards to the progress on horizontal regulatory cooperation during the 8<sup>th</sup> round. The Chair explained that the US gave preliminary reactions to the [EU paper](#) tabled during the round. Further discussions will be needed within the EU with regards to scope and sub-central regulation, in particular for services sectors.
- One member asked for more information about the discussions on the automotive sector. The Chair agreed to investigate whether EU presentations made during the 8<sup>th</sup> round could be shared with the group.
- One member asked for an assessment of the situation with regards to regulatory cooperation on financial services. The Chair explained the state of play and noted the recent visit of Commissioner Hill to Washington DC.

## 2. Small and medium enterprises

Denis Redonnet, lead negotiator for the SME chapter, explained the EU approach and the state of play of the discussions. Primarily this chapter is about transparency: ensuring effective access to information about transatlantic trade issues (tariffs, customs, non-tariff barriers) for SMEs. In the EU's view this means creating something similar to the EU Export Helpdesk for EU exporters to the US, and US exporters to the EU. In effect this is therefore a resource commitment for both sides, to develop and maintain such a source of information. Other than this, the chapter would consolidate existing EU-US cooperation on SME issues in a way to ensure this is sustainable in the long term, and would also create an institutional mechanism (e.g. an SME Committee) to monitor how benefits from TTIP actually accrue to

SMEs on both sides of the Atlantic. This is important to allow the EU and the US to learn from what is agreed in TTIP and apply this experience to future work.

The following points were raised in discussion:

- One member offered strong support for the EU position and noted the importance of making sure proper attention is paid to maximising the benefits of TTIP for SMEs, not only using SME examples for communications purposes. The design of the deal will be crucial and the information portal is essential. The EU's business register portal is already a good basic tool for US (and other third country) SMEs seeking to make initial contact with potential EU partners, but EU SMEs do not have the same advantage when looking into the US. Mr Redonnet thanked the member for the support and advice and agreed to consider the points made.
- Beyond the SME chapter, the same member noted that other areas of TTIP will be crucial to ensure that benefits do accrue to SMEs: trade facilitation, to streamline customs procedures and make it easier to classify goods; rules of origin, which must be simple enough to comply with and attract the tariff preferences; and temporary posting of workers, for purposes of product installation for example. The EU could go even further by including the "Think Small First" principle in TTIP, in particular for the regulatory pillar. Mr Redonnet noted that EU and the US are already discussing whether the "Think Small First" principle could be included, looking at how it overlaps with the US version and how the policy might be drafted in treaty language.
- On rules of origin, another member strongly supported the need for simplicity and warned that it would be important certain industries do not make proposals that complicate this. The Chair welcomed specific suggestions from members on the substance for rules of origin, as the Commission intended to have proposals ready by the summer.
- One member inquired whether social regulation such as details on local labour law, health and safety, minimum wage requirements and so forth could also be included in the web portal. Mr Redonnet noted the suggestion.
- One member recommended that details on rules applying to services sectors in different US states also be included in the portal, in addition to transparency in the services part of TTIP. Mr Redonnet noted the suggestion.

The Chair recommended that the subjects of trade facilitation, movement of workers (mode 4) and rules of origin be scheduled for more detailed discussion at future meetings.

### **3. Investment protection and Investor-to-State dispute settlement**

Leopoldo Rubinacci, lead negotiator for investment, explained that the Commission's goal is to take this opportunity to improve the system for investment protection and investor-to-State dispute settlement (ISDS). Some improvements have already been made but there is still work to do, as evidenced by the recent consultation. The TTIP negotiation is a chance to move forward and set the agenda in this area. Mr Rubinacci set out the four areas identified by the [consultation report](#) in January 2015. These are:

- (a) Further working on the question of the right to regulate
- (b) Further increasing the legitimacy of the ISDS system, looking at the selection of arbitrators and the functioning of arbitral tribunals
- (c) Appeals. The Commission has stated in the past that this is a necessary improvement, and this is an opportunity now to come forward with a concrete proposal.
- (d) Clarifying the relationship between domestic remedies and ISDS.

The Chair invited views from members on these four areas. The following points were raised in discussion:

- One member asked whether jurisprudence (precedents set by past tribunals) could be considered as part of increasing the legitimacy of the ISDS system.
- One member explained that in his view, the practice of the CJEU and the Council of Ministers is clear with regards to the direct applicability of EU free trade agreements. The tendency is to exclude the possibility for natural or legal persons to claim rights directly from an FTA. It might be possible to change this in theory, but in practice it could lead (for example) to EU decisions being challenged by state courts in the US. This does not appear to be an optimal solution. In response, Mr Rubinacci confirmed that, for example, it is US practice to deny direct effect.
- One member asked what the EU's approach would be to parallel claims by investors seeking to use both a domestic route and an ISDS route. Mr Rubinacci confirmed that the EU would not allow parallel claims (as detailed in CETA and EU-Singapore).
- Several members were interested in the recent discussions between German Minister Gabriel and Commissioner Malmström with regards to the idea of a multilateral investment court, and how any proposals in TTIP might relate to this. Mr Rubinacci explained that an appeals system is fundamental to the Commission's approach and TTIP would be an excellent place to start, since the US are also interested in exploring it. Creating a bilateral system of appeal under TTIP could influence global policy. However, other longer term solutions might be explored.

- Several members noted the importance of going through the various alternatives proposed, in particular for the benefit of the European Parliament. One member asked why State to State dispute settlement would be impractical in the Commission's view. Mr Rubinacci explained that there would be a high risk that only claims of big companies, who have the resources to persuade the state that the case is worth bringing, would be defended. Furthermore, it would mean that investment disputes would be politicised in themselves and would become political issues between states. This is not likely to produce fair results.
- One member expressed concern that the issue of the right to regulate would be very difficult to clarify, as it is frequently the case that a new or revised regulation might appear – or be portrayed – to discriminate against some companies in favour of others. Mr Rubinacci noted that an investor must prove a breach of investment protection standards and a monetary damage or loss. New or revised regulations do not in themselves result in a breach of any of the investment protection standards.
- Several members asked for clarification of the difference between direct and indirect expropriation. Mr Rubinacci explained that direct expropriation occurs when there is a direct seizure of property whereas indirect expropriation occurs when an action of government results, indirectly, in an investor not being able to own, use, enjoy or dispose its investment. The CETA annex<sup>1</sup> makes the definition of expropriation in the context of ISDS very clear.
- Several members asked what "legitimate expectation" means in the context of ISDS. Mr Rubinacci noted that the ECJ has always taken a restrictive interpretation of what is legitimate in a wide range of cases. Clearly an investor cannot expect never to face changes in regulations or increases in costs. One member suggested that guidelines be used to help deal with the issue of uncertain definitions. Mr Rubinacci explained that CETA allows for the parties to agree on binding interpretations for the tribunal to follow. This is a powerful tool to ensure that the parties can retain control over the interpretations.
- Regarding the definition of Fair and Equitable Treatment (FET), Mr Rubinacci explained that this is very clearly defined in CETA, which has an exhaustive definition through a closed list. It is not possible to argue that an increase in costs is a breach of FET.
- One member asked whether, if the Commission's review of the options were to come to the conclusion that the conditions set by the Council mandate with regards to ISDS could not be met, the option of dropping ISDS would still be open.

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<sup>1</sup> Annex X.11, page 183 of full CETA text published on 26 September 2014:  
[http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

- One member asked about the process for provisional application in relation to ISDS. The Chair explained that the rules on provisional application of international agreements are laid down in the Treaty on the Functioning of the European Union (Article 218:5), and in line with these it will be the Council that decides on what can be provisionally applied in TTIP.
- One member asked how the Commission planned to consult further with stakeholders, and another asked for a paper with more details of the options under consideration. Mr Rubinacci explained that the Commission needed to take time to develop the ideas robustly, and would seek views of stakeholders once more detailed proposals are ready.

The Chair thanked members for their input and noted that the group would need to return to this discussion in due course. He concluded that the direction of travel for the Commission is clear: much greater clarity on the right to regulate, ensuring that ISDS procedures are closer to what we would expect from a judicial system, and an appellate body that must be operational in any agreement with the US (not merely an aspiration as it is in CETA). TTIP is an opportunity to make these changes for the better.

#### **4. Working methods**

This item was put back until the next meeting owing to lack of time.

## Attendees

### Members of the TTIP Advisory Group

BOWLES Edward (Financial services)  
DE POUS Pieter (Environment)  
DINGS Jos (Environment)  
FIELDER Anna (Consumers, alternate for Benedicte Federspiel)  
GOYENS Monique (Consumers)  
JENKINS Tom (Labour and trade union)  
KERNEIS Pascal (Services)  
LØGSTRUP Susanne (Health)  
MASSAY-KOSUBEK Zoltan (Health, alternate for Emma Woodford)  
NELISSEN Guido (Labour and trade union)  
NEUGART Felix (Small business)  
QUICK Reinhard (Manufacturing)

### Commission officials

GARCIA BERCERO Ignacio	Chair, TTIP Chief Negotiator
ALEXANDRU Gabriela	Official
DAWKINS Miranda (TRADE)	Official
REDONNET Denis (TRADE)	Official
RUBINACCI Leopoldo (TRADE)	Official