

IN-DEPTH ANALYSIS

Civil society's concerns about the Transatlantic Trade and Investment Partnership

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Abstract

When the EU and the US launched negotiations on the Transatlantic Trade and Investment Partnership (TTIP) in June 2013, civil society was invited to play 'a constructive and engaged part in defining the content' of this strategic deal. Interest in the TTIP has gone beyond its expected economic impact: the agreement has been seen by some as a way to strengthen the West's weakening grip on the world economy, and by others as a tool for big multinationals to secure unfair advantages at the expense of the rest of society. Civil society groups have come forward with various conditions, demands (including stopping the negotiations) and concrete proposals – in most cases to ensure that the TTIP represents their interests.

The TTIP requires extremely complex international negotiations, and its final content is still not known. The result will depend on the outcome of the negotiations and the extent to which they respond to civil society's concerns. However, much will also depend on the way the European Parliament and the Council agree to transpose the provisions of the new deal – if concluded and approved – into existing EU legislation.

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1 Introduction

As a result of globalisation and the explosion of the information society, international trade is no longer the exclusive domain of experts and practitioners in the field.

International trade agreements no longer deal solely with the exchange of goods. They now also include services, investments and regulatory cooperation, and involve an increasing number of trade-related issues.

Civil society's unexpected interest in the Anti-Counterfeiting Trade Agreement (ACTA) changed the way society

For many years, international trade relations were the exclusive domain of a handful of experts and practitioners in the field. Most of the General Agreement on Tariffs and Trade (GATT) and World Trade Organisation (WTO) rounds were negotiated *in camera*, and very little information was leaked. However, globalisation, huge increases in trade and the explosion of the information society have changed the situation.

After the 1998 WTO talks in Seattle were blocked by widespread protests, public discussions on international trade amplified. Civil society¹ – representing a wide range of interests – has paid increasing attention to the new trade initiatives being projected to compensate for the lack of results from the WTO negotiations on the Doha Development Round.

Civil society's growing interest in trade issues also results from a gradual shift that has occurred in the scope of trade negotiations. Until recently, trade liberalisation simply meant removing certain customs tariffs that hampered trade in goods, and – even in this limited context – a number of items were *de facto* excluded from agreements.

Progress in technology has enormously increased the range of products that can be exchanged for a profit. Moreover, international trade in services, once very limited, has become a focal point in international trade negotiations. Foreign direct investments (which in the case of the EU were the remit of Member States until the entry into force of the Treaty of Lisbon) have also been increasingly included in international negotiations.

Civil society's interest in trade peaked during the European Parliament's discussions on, and subsequent rejection of, the Anti-Counterfeiting Trade Agreement (ACTA) in 2012. This paved the way for a more organised and structured reflection on secondary aspects of trade that were not originally included in the GATT or in first-generation free trade agreements (FTAs) – for example the inclusion of tariff concessions solely for trade in goods.

Recent EU trade agreements incorporate issues that were not included in traditional commercial treaties, such as cultural exceptions, the protection of intellectual property rights (IPRs), remedies and dispute settlement.

Because so many tariff barriers have been gradually removed, the focus of negotiations has been free to shift to regulatory issues. The work of trade negotiators has also become more difficult because of the impact that regulatory issues may have on internal legislation (e.g. on safety or

¹ The term 'civil society' here refers to 'the wide array of non-governmental and not-for-profit organisations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil society organisations (CSOs), therefore, refer to a wide array of actors, including community groups, non-governmental organisations (NGOs), trade unions, indigenous groups, charitable organisations, faith-based organisations, professional associations, and foundations' ([World Bank](#)).

and institutions discuss the new elements in trade agreements.

consumer protection standards). The highly complex nature of these deals requires an advanced level of expertise in order to fully understand and evaluate the issues.

When the EU and the US formally launched negotiations on the Transatlantic Trade and Investment Partnership (TTIP) on 17 June 2013, the prospective agreement was presented as a joint undertaking of real strategic importance that would bring huge economic benefits, create jobs, shape an open and rules-based world, and help both parties to 'remain strong global players who set the standards for the 21st century'. European Commission President José Manuel Barroso called on civil society 'to play a constructive and engaged part in these negotiations'.

Since then, interest in the TTIP has gone well beyond its expected economic impact: it has been perceived either as a way to strengthen the West's weakening grip on the world economy or as a tool to secure unfair advantages for big multinationals at the expense of citizens and consumers. The TTIP has also been seen as a cornerstone of a new post-Doha-Round international trading system, in ways that are simultaneously positive and negative. It has therefore attracted the growing attention of interest groups which view the agreement under negotiation as a turning point in the EU's trade practices and as a threat to the system of rules and principles established in the *acquis communautaire* (the body of EU law).

TTIP is seen by some as a way of strengthening the West's weakening grip on the world economy, and by others as a tool that big multinationals can use to secure unfair advantages at the expense of citizens and consumers.

Within the Union, various individuals, groups and Member States have expressed concerns about the implications of the TTIP for quality of life, employment, the environment, health, cultural identity, freedom, privacy and democratic rights. Some claims reflect general anxiety about globalisation, an unbalanced division of power between international corporations and the rest of society, or the assumed dominance of the US as a negotiator.

This paper analyses the most common criticisms levelled at the TTIP by civil society, while also considering the explanations provided by the European Commission and other technical sources.

2 Transparency

One of the most prevalent concerns is the lack of transparency in TTIP negotiations.

One of the most prevalent concerns is the lack of transparency in the TTIP negotiations. This concern is not new. Even before the negotiations on the TTIP started, civil society organisations had expressed concerns about secrecy of trade negotiations undermining the democratic right of citizens to shape the policies that affect them. This was one of the main criticisms voiced during the negotiations on the Anti-Counterfeiting Trade Agreement (ACTA), which the European Parliament ultimately rejected. Since then, the Commission has considerably improved its communication on trade policy.

Talks on the TTIP still take place behind closed doors, as is the case with most international trade negotiations (see explanations on p. 7). Civil

Some groups argue that the information made available to certain business groups is disproportionately greater than the information provided to other stakeholders, e.g. non-profit groups.

society organisations have therefore called on the Commission to open up the negotiation process to the public by releasing the negotiating mandate, all documents submitted by the EU and the negotiating texts². Many stakeholders have also been irritated by the optimism of the Commission's communications³.

Many have argued that the information made available to certain business groups is disproportionate in comparison with that made available to other stakeholders such as trade unions and non-profit groups, and that recently published papers represent only a small fraction of all the relevant information⁴. Others have expressed doubts that the TTIP Advisory Panel, which is composed of [14 individual experts](#), actually constitutes a balanced representation of interests, as is claimed by the Commission.

'In its transparency factsheet, the Commission claims that "views of civil society play a crucial role" in EU trade negotiations and that it relies "on the information received from the public before the negotiations start" which reflects "a broad range of views".

But while an internal Commission document obtained through the EU's access to information rules shows that, to prepare the transatlantic trade negotiations, DG Trade has had at least 119 behind closed door meetings with large corporations and their lobby groups, it has had only a handful with trade unions and consumer groups'.

Global Policy Forum⁵

'The negotiating texts will be kept secret from the public but not from the approximately 600 corporate representatives who have been named "cleared advisors" for the United States'.

Magda Stoczkiewicz, Friends of the Earth Europe,
Erich Pica, Friends of the Earth US⁶.

Similar concerns have been voiced by the European Ombudsman, Emily O'Reilly. While recognising the efforts made by the EU institutions to make negotiations more transparent, she also raised the issue of unequal access to documents for different stakeholders.

² http://www.foeeurope.org/sites/default/files/foee_ttip-civil-society-transparency-call190514.pdf

³ Such as the 'huge gains' to be made from liberalising EU-US trade, which would translate into 'on average [...] an extra EUR 545 in disposable income each year for a family of four in the EU', European Commission MEMO/13/211 of 12 March 2013.

⁴ Busting the myths of transparency around the EU-US trade deal, [Global Policy Forum](#), 25 September 2013.

⁵ Ibidem.

⁶ EU and US both threatened by secret trade talks, EUObserver, 16 December 2013.

'I agree that not all negotiating documents can be published at this stage, there needs to be room to negotiate. However, concerns have been raised about key documents not being disclosed, about delays, and about the alleged granting of privileged access to TTIP documents to certain stakeholders. Given the significant public interest and the potential impact of TTIP on the lives of citizens, I am urging both these EU institutions to step up their proactive transparency policy'.

Emily O'Reilly
European Ombudsman⁷

The process of EU trade negotiations in a nutshell

Common commercial policy being the exclusive competence of the EU, negotiations on trade agreements are led by the European Commission based on the mandate given by the Council, and the result is approved by the European Parliament and the Council.

In the first stages of the general discussion about a potential trade agreement the Commission holds a public consultation. In the case of the TTIP this consultation has been carried out in several stages. The Commission has also set up a TTIP Advisory Group composed of experts who represent a broad range of interests, ranging from the environment, health, consumer and workers' rights organisations to various industry sectors.

Usually the Commission, together with the trade partner in question, holds a dialogue on the content and feasibility of the negotiations, known as a scoping exercise. In the case of the TTIP, this work was carried out at the meeting of the Transatlantic High Level Working Group on Jobs and Growth of 13 February 2013, led by Commissioner for Trade Karel De Gucht and US Trade Representative Ron Kirk.

The Commission then requests formal authorisation from the Council to open negotiations, known as 'negotiating directives', or a 'mandate' prepared by the Commission. This draft request is not made public, but it is shared with the European Parliament. Following internal discussions, the Council adopts the negotiating directives and authorises the Commission to negotiate on behalf of the EU.

The draft texts of the negotiations are not made public while the latter are under way, even when a chapter is 'closed', since the negotiations are not concluded until everything has been agreed. After each negotiation round and at other key points in the negotiations, the Commission informs the Council and the European Parliament and consults stakeholders.

The Commission has argued that no trade negotiations have been

The Commission has put forward detailed counterarguments in a factsheet on transparency in EU trade negotiations⁸, which include reasons why trade negotiations worldwide need to maintain a certain level of confidentiality. It

⁷ Ombudsman asks Council and Commission to publish more TTIP documents, [Press release no. 17/2014](#), 31 July 2014.

⁸ http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf

as transparent as those on the TTIP.

explains that trade partners worldwide tend to keep their positions secret, at least in part, because one aspect of the negotiating strategy necessary for achieving a better deal is not to reveal information on the other negotiating partner. The Commission document explains that transparency is ensured through direct and online contact with stakeholders. Such contact involves civil society dialogues in the form of public [consultations](#) (five since 2012), to which the Commission invites non-governmental organisations (e.g. Oxfam), consumer groups, industry associations and other interested parties. The Commission also produces assessments that evaluate economic, social and environmental sustainability of trade agreements.

The Commission has also argued that it supported the publication of the negotiation directives and repeatedly called on the Council to declassify them⁹.

This has in fact happened: on 9 October 2014, the Council decided to make the mandate public¹⁰.

Figure 1:
Public consultations on the TTIP held by DG Trade

Title	Closing date	Target audience
Initial General Public Consultation on EU-US High Level Working Group on Jobs and Growth	23 April 2012	all stakeholders
Public consultation on the future of EU-US trade and economic relations	27 September 2012	all stakeholders
The EU and the US call for input on regulatory issues for a possible future trade agreement	31 October 2012	all stakeholders
Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)	13 July 2014	all stakeholders
SME Survey in the context of the Transatlantic Trade and Investment Partnership (TTIP)	15 December 2014	EU businesses, with special focus on small and medium-sized enterprises

⁹ Statement of 15 July 2014 by Commissioner Karel De Gucht on TTIP (SPEECH/14/549), see: http://europa.eu/rapid/press-release_SPEECH-14-549_en.htm

¹⁰ Council of the EU Press release ST 14095/14, PRESSE 507, Brussels, 9 October 2014

3 Environmental and consumer safety issues

Some stakeholders see the TTIP as a potential threat to EU environmental and consumer safety regulations.

The EU employs a thorough risk assessment process to determine which genetically modified organisms (GMOs) are allowed onto the EU market.

Regulators in the US assume that GMOs are 'substantially equivalent' to traditionally grown products.

Some stakeholders see the TTIP as a potential threat to EU environmental and consumer safety regulations.

A study published by the European Parliament in 2013 identified several sectors where the US and EU systems fundamentally differ¹¹. Although the outcome of negotiations is still not known, the authors of the study maintain that the TTIP may impact upon EU provisions on the environment and consumer safety and that it may have a negative effect on the EU's right to regulate. The study recommends 'that the European Parliament pay very close attention to the precise wording of provisions regarding the environment, food safety, and investments set out in the final text in order to ensure that both parties are able to maintain the environmental and consumer protection standards that they deem necessary and appropriate, as provided for in the European Commission's negotiating mandate'.

The sectors identified by the study are as follows:

Genetically modified organisms (GMOs) have already been the subject of one WTO dispute between the US and the EU. Whereas the EU applies the precautionary principle and a thorough risk assessment process in determining which GMOs are allowed onto the market, regulators in the US assume that GMOs are 'substantially equivalent' to their non-GMO counterparts and allow them onto the market without a separate regulatory regime. According to certain stakeholders, the TTIP may well pave the way for a substantial liberalisation of GMO products in the EU¹².

Basic laws such as those that relate to GMOs or are there to protect human life and health, animal health and welfare, and environmental and consumer interests will not form part of the negotiations. Under EU rules, GMOs that have already been approved for use as food or animal feed or for sowing as crops can be sold in the EU. Applications for approval are assessed by the European Food Safety Authority (EFSA) and are then sent to Member States for their opinion. So far 52 GMOs have been authorised. Neither the safety assessment that EFSA carries out before any GMO is placed on the market nor the risk management procedure will be affected by the negotiations. The EU and the US already exchange information on policy, regulations and technical issues concerning GMOs. Cooperation of this sort helps minimise the effect on trade of our respective systems for approving GMOs.

¹¹ Ecologic Institute (2013), [Legal implications of the EU-US trade and investment partnership \(TTIP\) for the Acquis Communautaire and the ENVI relevant sectors that could be addressed during negotiations](#)

¹² Corporate Europe Observatory (2013), [An open door for GMOs? – take action on the EU-US Free Trade Agreement](#).

While the EU's legislation requires all chemicals on the European market to be registered, the US requires safety data to be submitted only in very specific circumstances.

The Commission has denied that the TTIP will lower standards for chemicals in the EU.

Consumers in Europe fear that the TTIP may result in chemically treated poultry being sold in the EU.

According to some organisations, the TTIP may damage the EU's aviation emissions trading system.

Chemical regulations differ significantly between the US and the EU. While the EU's REACH framework requires all chemicals on the European market to be registered with the European Chemicals Agency, including the submission of safety data, US legislation only requires the submission of safety data in very specific circumstances, and allows chemicals that were on the market prior to 1976 to remain on the market without any testing or registration requirement whatsoever. It is, however, possible that the TTIP will serve as an impetus for American legislators to strengthen their chemicals regulation regime in order to align it better with REACH, something which has been pushed in Congress by members of both major parties since at least 2005. NGOs look upon the TTIP platform on chemicals as too risky, since it may slow down 'progressive EU chemicals regulation implementation and, effectively, give the US a soft power of scrutiny over EU initiatives'¹³. Regulatory cooperation with the US is regarded as dangerous because the US is known for its lower chemicals standards, which expose US citizens to serious health risks.

The Commission rejects these allegations and has explained its negotiating position on chemicals vis-à-vis the TTIP in a detailed paper¹⁴.

Poultry pathogen reduction treatments (PRTs) are chemicals used to sanitise poultry intended for human consumption. They are a controversial topic in EU-US trade, having already been at the source of bilateral and WTO dispute resolution processes. While both parties possess comprehensive regulations governing the production and processing of poultry, since 1997 the EU has allowed only water to be used to wash poultry carcasses for sale on the European market, whereas the US allows its processors to use a number of different PRTs – including chlorine dioxide. The EU has upheld its standards in the interests of food safety, consumer confidence and industry competitiveness¹⁵. NGOs claim that the TTIP may result in a new system which allows chemically treated poultry to be sold in Europe despite the fact that this system of bleaching may harm consumer health.

The Commission dismisses this allegation in its position papers.

Aviation emissions are the source of an ongoing dispute between the US and the EU regarding the EU's emissions trading scheme (ETS), which was challenged by the US in 2011. The EU has recently offered a compromise solution, but the dispute is still awaiting settlement. The most important goal is the finalisation of a global, market-based instrument by the International Civil Aviation Organisation (ICAO) by 2016 to regulate travel originating or terminating in the EU, so as to ensure compliance with the EU's emissions trading system (ETS) requirements. The US does not have an

¹³ Chemical Watch (2013), [NGO platform: the TTIP should not deal with chemicals](#).

¹⁴ European Commission (2014), [EU position on chemicals](#).

¹⁵ BEUC, the European Consumer Organisation (2014), [What is wrong with chlorinated chicken](#) and Reuters (2014), [Germany's fear of 'chlorine chicken' complicates U.S. trade talks](#).

The Commission stresses that the overall environmental impact of the TTIP is likely to be modest.

equivalent programme to regulate aviation emissions, even though this sector is among the fastest-growing sources of greenhouse gases. NGOs claim that if the issue is not solved as part of a plurilateral deal, it may be discussed and resolved within the framework of the TTIP talks (with a substantial relaxation of the EU rules or even the full repeal thereof)¹⁶.

The Commission has not made statements on this issue, but has stressed that the overall environmental impact of the TTIP is likely to be modest, with only a very limited increase in global CO₂ emissions, which should be largely offset by the benefits of increased trade in environmental goods and services.

4 Jobs and workers' rights

Job delocalisation and deteriorating labour standards are viewed as some of the risks.

According to some commentators, the TTIP may also lead to a downgrading of any labour standards identified as 'barriers' to trade. This claim is based on the fact that the US has not ratified International Labour Organization (ILO) conventions on core labour standards such as collective bargaining, freedom of association and the right to organise. Businesses may attempt to use the TTIP as an opportunity to relocate production to places where wages and workers' rights are lowest, creating a 'race to the bottom' in order to reduce labour costs and increase corporate profits¹⁷. A number of stakeholders have also expressed concerns that the TTIP might result in drastic job delocalisation.

According to the Commission, wages are projected to rise by some 0.5 %, and labour standards will not be lowered.

A study by the Centre for Economic Policy Research (CEPR) produced for the Commission does not include figures on the TTIP's overall impact on job creation. It does, however, examine the potential impact on wages and on the redistribution of jobs among different sectors of the economy as sectors contract and expand as a result of the TTIP. Wages for both skilled and less skilled workers are projected to rise by around 0.5 %. Meanwhile, over the course of 10 years 0.7 % of the labour force is expected to move between sectors as a result of the TTIP. The Commission has pointed out, by way of comparison, that the average annual change in EU manufacturing employment between 2001 and 2007 was 2.1 %, and concluded that any movement of the labour force between sectors prompted by the TTIP ought therefore to be 'easily absorbed by these normal processes'. The Commission, of course, denies that the TTIP would lead to a lowering of the EU's labour standards, also pointing out that most of them have not been harmonised at EU level.

Agriculture: The Commission expects to reap great benefits from the inclusion of agriculture in the TTIP talks, stating that 'opening up agricultural markets will be a two-way street with benefits for both the EU and the US. The US is interested in selling more of its agricultural

¹⁶ The Sierra Club (2013), [The Transatlantic Free Trade Agreement: What's at Stake for Communities and the Environment](#).

¹⁷ Rosa Luxemburg Stiftung, TTIP (2013).

According to some NGOs, trade harmonisation could undermine jobs in farming and alter rural lifestyles.

commodities, such as maize and soy. EU exports to the US are mostly higher value food products like spirits, wine, beer, and processed food (such as cheese, ham and chocolate). The EU has a clear interest in being able to sell more of the top quality foods it produces to the US without unnecessary tariff or non-tariff barriers¹⁸.

According to some NGOs, trade harmonisation rules could entrench a massive industrial agriculture system, making it more difficult for small-scale, local and agro-ecological approaches to compete with large agro-business undertakings.

According to the Commission, US and EU negotiators are working to ensure that SMEs are in a position to take full advantage of the opportunities that an agreement would provide. The likely impact on agriculture is not, however, clearly mentioned in the papers published by the Commission.

5 Impact assessment methodology

Some critics contend that the impact assessment methodology used by the Commission's contractors is not entirely accurate.

Two impact studies on the TTIP have been conducted for the Commission, one in 2009 by Ecorys and the other in 2013 by the CEPR. Ecorys produced calculations of the cost savings for firms in each sector that would be generated by either removing regulations or introducing mutually recognised regulations known as non-tariff measures (NTMs) on both sides of the Atlantic. The CEPR then used these results as input for a model to predict the broader economic effects of eliminating regulations, depending on the degree to which they were removed. The results of the two studies are consistent with each other.

However, some stakeholders contend that upon closer inspection the impact assessment methodology used by the Commission's contractors proves not to be entirely accurate¹⁹. The study maintains that the cost of the NTMs to exporting firms was based on original data that were, to a large extent, unreliable. It also stresses that 'while the benefits of removing the NTMs for firms are taken into account, the potential costs to society of, for example, a lower level of food safety standards are not considered'. It concludes that the cost-benefit analysis systematically neglected the benefits of regulation to society as a whole.

The Commission has countered that the assessment of the TTIP's impact was based on the most up-to-date methodologies.

According to the study, the model in most sectors, including, remarkably, the finance and insurance sectors, is based on a perfect competition scenario. 'Perfect competition' means that any gains in costs are passed on to customers, and most of the gains from the deal as projected in the model are assumed to be in this form. This is considered a very optimistic but rather unrealistic scenario.

¹⁸ [European Commission \(2013\), FAQ on the EU-US Transatlantic Trade and Investment Partnership \(TTIP\)](#)

¹⁹ European Economists for an Alternative Economic Policy in Europe (2014), 'The deepening divisions in Europe and the need for a radical alternative to EU policies'.

According to the Commission, the best and most up-to-date impact assessment methodologies were applied in the above-mentioned studies, and all precautions were taken to streamline the results of the studies for the Commission²⁰.

6 Investor-to-state dispute settlement

Investor-to-state-dispute settlement (ISDS) is an arbitration instrument that grants a foreign investor the right to challenge a foreign government in court, typically in an international private tribunal. Although ISDS is included in many of the 1 400 bilateral agreements negotiated by individual Member States, it did not form part of any EU accords until the entry into force of the Treaty of Lisbon.

Traditionally, the key aim of the ISDS mechanism has been to protect investors from arbitrary administrative decisions in countries with little legal certainty. As this description does not apply to the EU or the US, many experts contend that the measure serves only the interests of large business groups. The main concern is that investment protection rules may be abused with a view to blocking countries' 'right to regulate' in areas such as the environment, health and public services. The worry is that investors may contest these rules if they undermine their interests or profits, even if the rules have been adopted democratically. Emblematic cases, in which investors have sought hefty compensation from governments (e.g., Philip Morris from Australia, and Vattenfall from Germany), have reinforced concerns that ISDS mechanisms may not always serve the public interest^{21, 22}.

Many fear that the inclusion of investor-to-state dispute settlement (ISDS) in the TTIP will block countries' 'right to regulate'.

'ISDS gives investors equal status with governments and allows them to enforce their rights via suits before international private tribunals, where private-sector lawyers are empowered to take decisions which might order governments to pay unlimited compensation to investors, without appeal.

The experience so far clearly shows that the ability of governments to enact legislation in the public interest may be severely curtailed by the threat of being confronted with compensation claims by big multinational firms'.

European Economists for an Alternative
Economic Policy in Europe (EuroMemo Group)
EuroMemorandum 2014²³

One of the most controversial issues is the notion of 'indirect expropriation', which allows an investor to claim not only for damages incurred in the past

²⁰ European Commission, [TTIP, The Economic Analysis Explained](#) (September 2013).

²¹ E.g. Philip Morris Asia Limited v. the Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12.

²² AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6.

²³ EuroMemo Group, EuroMemorandum (2014), ['The deepening divisions in Europe and the need for a radical alternative to EU policies, European Economists for an Alternative Economic Policy in Europe'](#).

but also for the estimated profit from the investment over the duration of its originally planned lifetime²⁴. Critics maintain that this is certainly an attractive prospect for investors and that it ties the hands of governments when it comes to adopting policies that could potentially be contested by investors.

According to the Commission, abuse of investor protection is more likely to occur if ISDS is not included in the agreement.

The possibility of the TTIP not containing provisions on ISDS has not been ruled out.

Initially, the Commission explicitly favoured the inclusion of ISDS in the TTIP. It argued that the potential risk of abuse of the mechanism stems from poorly defined rules and flaws in the functioning of international dispute settlement. The negotiated ISDS provisions in the TTIP would therefore prevent such abuses. The TTIP, as well as EU investment provisions that have already been negotiated (e.g. with Singapore and Canada), will serve to confirm 'as a standing principle' the parties' right to regulate and to pursue legitimate public policy objectives, such as social, environmental, security, and public health and safety objectives, and the promotion and protection of cultural diversity. The Commission has also promised that, through future investment agreements, it will prevent 'frivolous claims'²⁵.

Despite the Commission's reassurances, opposition to ISDS has grown. The governments of certain Member States have backed their representative civil society organisations^{26,27}. This has prompted the Commission to freeze negotiations on the issue and to organise a new consultation²⁸. The three-month online consultation, concluded on 17 July 2014, will help to assess attitudes in the EU towards ISDS and identify the main concerns that will be taken into consideration in the negotiations.

It is still possible that the TTIP will not contain provisions on ISDS.

7 Democratic rights

In the context of the TTIP, the question of democracy has been addressed from two angles: firstly, that of establishing whether the agreement's decision-making and negotiation processes are democratic, and secondly, that of identifying how the TTIP will affect democratic decision making in the EU and the US if the agreement is approved and implemented. The first concern has been expressed mainly with regard to the objectivity and quality of impact assessment, transparency and trade policy-making in the EU in general:

²⁴ Ibidem.

²⁵ See [European Commission Factsheet, November 2013](#).

²⁶ See [article in *The Financial Times* of 14 April 2014 by Shawn Donnan and Stefan Wagstyl](#).

²⁷ See [article in *Le Monde* of 15 April 2014 by Maxime Vaudano](#).

²⁸ The key issue being investigated by the Commission in the consultation was whether the EU's proposed approach to the TTIP could strike the right balance between protecting investors and safeguarding the EU's right and ability to regulate in the public interest.

'The Committee on International Trade (INTA) of the European Parliament is the only institution that regularly debates EU trade policy in public [...] But more and more INTA meetings are held "in camera", i.e. behind closed doors, or even in closed thematic sub-groups'.

Alternative Trade Mandate²⁹

Its [the TTIP's] rules will make the difference between a Trans-Atlantic New Deal, which envisions an important role for democratic decision making, and a Trans-Atlantic corporate hegemony that privatises the gains of trade while socialising the losses.

Bernadette Ségol, ETUC
Richard Trumka, AFL-CIO,
OECD's Trade Union Advisory Committee (TUAC)³⁰

Many fear that 'streamlining' of procedures to amend or adopt technical measures will circumvent democratic decision-making channels.

In fact, the question of democratic decision making once the agreement enters into effect underpins many aspects of the TTIP and is particularly acute in the context of ISDS (see section on ISDS) and regulatory issues. Various stakeholders are concerned about the 'streamlined procedure' envisaged to amend the sectoral annexes of TTIP or to add new ones through a simplified mechanism not entailing domestic ratification³¹. This is of particular concern to many agencies for two reasons, first because this simplified mechanism may affect such sensitive areas as food safety and environmental protection, and second, because the TTIP is likely to set a benchmark for future trade agreements.

Finally, [trade unions](#) have warned that democratic decision making in the workplace risks being undermined if the protection of workers is regarded as a trade barrier.

The Commission has stressed that negotiations on regulatory issues aim to cut red tape and streamline decision making on technical issues.

The Commission maintains that the TTIP will not automatically overrule, repeal or amend EU laws and regulations in order to liberalise trade, and that any changes to EU laws, rules or regulations that are proposed in order to liberalise trade would have to be approved by the EU's Member States in the Council and by the European Parliament. It also contends that during negotiations it is held to account by the Council and the directly elected European Parliament, which will approve or reject the agreement. The Commission's position on regulatory issues is that the provisions of the agreements will streamline decision making on technical issues and cut red tape that otherwise costs businesses time and money.

²⁹ <http://www.alternativetrademandate.org/wp-content/uploads/2013/05/democracy-paper-FINAL.pdf>

³⁰ Bernadette Ségol, General Secretary, European Trade Union Confederation (ETUC), and Richard Trumka, President of the AFL-CIO and of the OECD's Trade Union Advisory Committee (TUAC), ['The transatlantic trade deal must work for the people, or it won't work at all'](#), OECD Insights, 27 June 2014.

³¹ European Commission, initial EU position paper entitled ['Cross-cutting disciplines and Institutional provisions'](#).

8 Data privacy, the internet and intellectual property issues

In the EU the right to privacy is considered a fundamental right.

In the EU the right to privacy is considered a fundamental right and is enshrined in the Treaty of Lisbon (Article 16, TFEU), while the US Constitution does not contain any express right to privacy. According to civil society organisations, TTIP negotiations may therefore result in the undermining of a fundamental freedom. Concerns about how the US authorities handle data were highlighted during the debates on an EU agreement on the transfer of air passenger data to the US and Australia (the PNR agreement) and on the EU-US agreement on bank data transfer through the SWIFT system. These concerns were exacerbated by the spying scandal which arose as a result of the information disclosed by Edward Snowden in July 2013 and the subsequent media reports.

'The giants of the Net wish to weaken the European regime concerning protection of personal data in order to reduce it to the (almost non-existent) level of the United States, in this way authorising legal espionage which is quite lucrative for private firms, fully in line with ACTA'.

Stop TAFTA³²

'Data protection standards in the US and EU are starkly different and unbalanced. Contrary to in the EU, in the US there is no statutory recognition of privacy as a fundamental right'.

Friends of the Earth Europe
The European Consumer Organisation, BEUC
Transatlantic Consumer Dialogue, TACD
European Public Health Alliance³³

The Commission denies that the TTIP will lower EU standards on privacy and data protection.

In the context of TTIP, rights groups fear the unbalanced power held by the information and communication technology lobby, for which trade in data is a profitable business. Some TTIP critics also allege that the agreement will weaken internet freedom, as it would allow the rejected Anti-Counterfeiting Trade Agreement (ACTA), in particular the rules on the liability of digital internet service providers, to enter 'through the back door'.

The Commission denies that the TTIP will lower EU standards on privacy and data protection and gives assurances that the controversial provisions of the ACTA will not be introduced into the TTIP. Even if data privacy is regulated differently in the EU and the US, the Commission argues, these issues are covered under other frameworks, such as the Safe Harbor Framework³⁴, and cyber security is addressed in special working groups

³² Stop TAFTA, [Manifesto](#).

³³ BEUC, [Transatlantic Trade and Investment Partnership - Questions & Answers](#).

³⁴ The Safe Harbor Framework is based on a series of commitments that companies make in order to carry out trans-border data transmission to the US (with the exception of certain sectors, such as financial services).

that run parallel to the TTIP talks. Commissioner De Gucht has also confirmed that data protection is outside the scope of the TTIP³⁵.

In its communication entitled '[How much does the TTIP have in common with ACTA?](#)', the Commission made it clear that the agreement would not contain provisions on the enforcement of intellectual property rights³⁶. It admitted that the allegations of linkages between the TTIP and the rejected agreement might be based on a leaked draft document that contained a reference to the liability of internet service providers in the context of electronic commerce. The reference was later dropped.

9 Conclusions

The main concerns about the TTIP relate to the agreement's impact on the EU's domestic standards and rules, and to its economic outcome.

To avoid the risks suggested by TTIP critics, the EU must establish a viable system to guarantee that the agreement's provisions are appropriately implemented.

The TTIP involves extremely complex international negotiations, and its final content is still not known. Although the negotiation mandate issued by the Council is now public, its wording is so general that it leaves the Commission a great deal of room for manoeuvre.

Since ACTA was rejected, the Commission has learned that a more efficient communication strategy is essential in order to ensure political support for its initiatives. It has therefore significantly increased the quantity – and improved the quality – of the information it makes available to the public.

The overview of criticism of the TTIP provided in this paper demonstrates that, besides secrecy issues, a main point of concern is the agreement's overall economic impact and its effect on EU domestic rules. The risks are clear, but little is known at this stage as to how likely they are. Much will depend not only on the final result of the negotiations, but also on the way in which the EU (i.e. the European Parliament and the Council) agrees to transpose the provisions of the new deal into existing EU legislation.

In order to avoid the risks suggested by opponents of the TTIP, it is essential that the EU establish a viable system to guarantee appropriate implementation of the agreement's provisions, especially in the field of regulatory convergence. The European Parliament should propose a modern, dynamic *ex post* impact assessment system to verify whether administrative authorities are exceeding their regulatory powers. This is essential for the TTIP, but would also serve a purpose beyond the confines of the current project and should become a permanent feature of an EU system of checks and balances.

³⁵ Speech by Commission Vice-President Viviane Reding of 17 September 2013 on [data protection reform: restoring trust and building the digital single market](#).

³⁶ http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151673.pdf