

**Report of the 68. Conference of Ministers for European Affairs
from the German Länder**

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TOP 8: TTIP and other EU trade agreements with third countries

Report

– Courtesy Translation –

1. Background

The world trading system has been experiencing a profound change for some time now. Global supply and value chains have become rather the rule than the exception to the rule. Global companies are facing a multi-faceted set of challenges. Despite global tariff reductions by 90% within the framework of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), a variety of non-tariff trade barriers continue to be in place.

On top of the negotiations in the context of the WTO, additional multilateral (such as the Trade in Services Agreement, TISA) and bilateral trade agreements are being negotiated, aiming at further opening up the international markets. For the EU, these are in particular the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) and the Transatlantic Trade and Investment Partnership between the EU and the US (TTIP).

The aforementioned agreements constitute a new kind of comprehensive free trade agreements, which go far beyond the reduction of tariffs and affect a number of policy areas. Thus, the respective impact assessment proves more diverse and complex.

Reconciling the economic interest in breaking down trade barriers and the public interest in government regulation (for instance based on regulatory and social policy considerations) poses a particular challenge.

In view of the potentially far-reaching consequences of these complex agreements the global civil society calls for more transparency in negotiations and for more civil society participation. This became particularly clear during the protests against ACTA in the summer of 2012 and in the ongoing public discussions on TTIP.

2. CETA

The negotiations on the Free Trade Agreement between the EU and Canada lasted 5 years and were concluded in September 2014 according to the chief negotiators. The draft agreement is currently in the process of legal review and translation. It remains unclear to which extent amendments could still be effected.

CETA aims to enhance the trade and investment flows between the two parties by facilitating market access and harmonizing regulations (e.g. safety standards, technical standards and competition rules). The draft text also includes rules on investor protection allowing for investor-state arbitration.

From a full-scale implementation of the agreement the EU Commission expects an increase of the bilateral trade volume in goods and services by 22.9% (approximately EUR 25.7 billion). The tariff savings for EU exporters would amount to approximately EUR 500 million per year. Furthermore, the EU Commission expects an increase in employment and up to additional EUR 11.6 billion in economic growth per year (EUR 5.8 billion of which in services). Canada is hoping for a trade increase of 20%, amounting to approximately CAD 12 billion of additional income.

There is a substantial overlap between the CETA negotiating mandate and the TTIP negotiating mandate, presenting identical language in some parts. For example, key issues such as the level of consumer protection and public services bear great resemblance in both mandates. The same applies to energy and climate policy considerations.

The legal proofing and translation process is expected to be completed in 2015. Subsequently the Council of the European Union is required to take a decision on the formal signing of CETA. Should the Council confirm the view that CETA is a 'mixed agreement' dealing with both EU and national competences, following the Council decision and the consultation of the European Parliament the ratification process will further require ratifications by the EU member states' parliaments. Experience has shown such process to take approximately two years. However, according to common praxis of the EU, those provisions solely pertaining to trade will be applied provisionally, pending the complete entry into force following ratification by EU Member States. It is not yet decided whether and how amendments can be requested and renegotiations can be effected.

3. TTIP

The EU and the US have been negotiating the Transatlantic Trade and Investment Partnership since June 2013. It is covered by the negotiating mandate of the EU Council of Ministers of 17 June 2013. In accordance with the mandate, the agreement comprises three main components: Market access (a), Regulatory cooperation (b) and Rules (c). All three components are being negotiated simultaneously and are intended to be part of an overall package.

The European Parliament adopted a resolution on TTIP on 23 May 2013. The opening of negotiations is welcomed in principle; at the same time, the European Parliament advocates strongly a transparency of negotiations. The European Parliament is currently working on a new resolution to TTIP. According to current plans, the matter will be considered in plenary session on 10 June 2015.

The German Bundesrat (Federal Council) has welcomed the opening of negotiations in its resolution of 7 June 2013 (BR-Drs. 464/13). It considers the TTIP as an opportunity to address the economic and financial crisis and the high unemployment rate in some of the EU Member States with a common transatlantic agenda in the field of sustainable promotion of competition.

The European Committee of Regions addressed this matter and adopted a resolution to TTIP at its plenary session on 13 February 2015.¹ In this resolution, the European Committee of Regions requests from the European Commission to guarantee an early involvement and participation of the regional, municipal and local level in the negotiations.

So far, nine rounds of negotiations were held. The EU negotiators will be accompanied by experts from the respective Directorates-General of the European Commission and the various regulatory authorities. The Member States will be informed in the relevant Council bodies and the European Parliament will be informed in the Committee on International Trade on the progress of negotiations. The Federal Ministry for Economic Affairs and Energy will inform the German Länder. In addition to that, the European Commission has appointed, in the end of January 2014, a 16-member advisory group, composed of experts from the fields of consumer protection, agriculture and health, the unions and the economy. Commissioner responsible is the Trade Commissioner Cecilia Malmström, on the US side, the Trade Representative of the United States, Michael Froman, is the politically responsible person.

Currently, there are no finished negotiated treaty documents which can be conclusively assessed.

According to the calculations by the EU-Commission, the free trade association between the EU and the USA with a total of 800 million citizens would create 400,000 new jobs in the EU and lead to an annual increase in GDP of 0.5 percent. Small and medium-sized enterprises (SMEs) should benefit in particular.

The main issues in the current discussion on TTIP are the following:

a) Transparency of negotiations

The confidentiality regarding the negotiating documents has been amply criticized in public.

¹ For further information see website of the European Committee of Regions:
<http://cor.europa.eu/de/news/Pages/ttip-potential.aspx>

The German Bundesrat and the sector-specific conference of ministers for trade stressed in all relevant decisions, the need for maximum transparency in the negotiations and the earliest possible information of the Federal Government by the European Commission and the involvement of all relevant social groups in the public debate.

In response to the wide demand for greater transparency, the Commission has expanded significantly the range of information on the negotiations on its Internet site (partly in German) since the end of 2013.

On 9 October 2014, the Council of the European Union agreed to the publication of the aforementioned TTIP-negotiating mandate, it is now available in German.² At the beginning of January, The EU Commission started for the first time, within the framework of the transparency offensive announced by Trade Commissioner Cecilia Malmström in November, to release negotiating documents on the internet.

b) Investor-state dispute settlement (ISDS) and investment protection rules

One of the most controversial issues is the investor-state arbitration that would enable investing companies to claim against the authorities of the host country for compensation in case of a violation of an investment protection guarantee directly in front of an international arbitration tribunal rather than in front of the courts of a Signatory State. According to critics, ISDS rules present a potential risk of circumvention of state law and judicial procedures. They find the financial consequences of such actions for damages cannot be assessed at present. In early August, the German Cabinet stated that, in principle, it deemed investment protection between developed countries unnecessary.

The President of the European Commission, Jean-Claude Juncker, pointed out in his speech before the European Parliament on 22 October 2014 that the negotiating mandate in no way obliges the Commission to approve of an investor-state dispute settlement regime. He assured that the Commission won't enter into any agreement that would limit for the parties the access to national courts or that would allow secret courts to have the final say in disputes between investors and States.

The European Commission has carried out a public consultation between 27 March and 13 July 2014 on investment protection and ISDS in the TTIP. After completing the analysis of almost 150,000 replies, the Commission presented a factual report that was published on 13 January 2015. The results subsequently were subject of discussion with experts, the European Parliament and stakeholders.

With regard to the aforementioned public consultation, the German Bundesrat (Federal Council) adopted its resolution on 11 July 2014 (BR-Drs. 295/14) reiterating, that investors should in principle be instructed to seek redress through the national courts. It further regards specific investment protection provisions and dispute settlement

² <http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Ttip/transparenz-ttip.html>.

mechanisms in the investor-state relationship between the EU and the USA as superfluous and very risky.

The Federal Minister of Economic Affairs, Sigmar Gabriel, is now calling for a public trade and investment court along with a determinate mechanism for the appointment of independent judges in order to replace the current system of private arbitration, and to enable appeals against arbitration rulings. At their meetings on 25 March and 7 May 2015 the European Trade Ministers acknowledged that a reform of the current ISDS system is needed. The right of states to adopt regulations in the public interest must be preserved.

On 6 and 7 May 2015 Trade Commissioner Cecilia Malmström presented a concept paper to the European Parliament and the European Union Foreign Affairs Council (Trade) addressing the section in question of the proposed TTIP Agreement. The paper revisits the four key issues that had been identified through the previous consultation process (the right to regulate, the functioning of arbitral tribunals, the appellate mechanism, the relationship between ISDS and domestic courts) and is intended to serve as the basis for developing a stance for upcoming negotiations. The Commission therein generally adheres to their conviction that a modernized ISDS-regulation would serve the EU's interest as well as the interest of European investors.

The language of the agreement should clearly define causes of action for investors so as not to curtail regulatory sovereignty of the States. It should also include well-defined criteria for the choice between ISDS and domestic courts. All arbitrators should be appointed from a roster of qualified judges with relevant experience, pre-established by the Parties to the Agreement without regard to any particular dispute; this could be seen as a first step towards establishing a permanent international arbitration court. It should further include a bilateral appellate mechanism that could be modelled after the WTO Appellate Body with permanent judges. In the long term such a permanent court could be extended to a multilateral framework. In their first reactions both the European Parliament Committee and the Council generally welcomed the proposal. However, the Commission still doesn't endorse the idea of re-considering and reassessing the trade agreement with Canada (CETA), as this could draw the whole agreement into question.

c) Standards of protection

One goal of TTIP is breaking down non-tariff trade barriers that arise in particular by different standards of protection. This goal should be achieved in accordance with the negotiating mandate by high regulatory compatibility in goods and services. Instruments like mutual recognition, harmonization and improved cooperation between the regulatory bodies should lead to a regulatory compatibility. The negotiating mandate allows for the respective Parties to observe a preferred level of protection when regulating in the areas of health, safety, consumer, labor, the environment and cultural diversity should remain untouched. The Commission has repeatedly reiterated that they will adhere to this program.

A substantial difference between the regulatory approaches of the EU and the USA is the precautionary principle. In the EU, the precautionary principle is expressly enshrined in the Treaty on the Functioning of the EU (Art. 191 TFEU) and is considered by the Court as a general principle of law, which does not only apply in environmental law, but in particular in food law and the protection of health (ECJ Coll. In 2001, I-9713 para. 29).

In the US, the risk prevention in terms of the precautionary principle is only weakly developed. The tendency is to decide more in favor of liberty. In turn, however, large punitive damages can be awarded if there is harm caused by wrongdoing. For example, in the field of chemicals the different regulatory approach is very clear: While in the EU under the REACH regulation on chemicals over 1000 chemicals are banned, in the US are only 8 chemicals banned. As part of the negotiation of the Agreement the provisions and procedural rules regarding the justification and review of protection standards of the EU and Member States must be carefully examined and negotiated.

The German Länder have expressed concerns related to the different standards of protection. The German Bundesrat prompted in its resolution of 7 June 2013 (BR-Drs. 464/13) to pay special attention to the achievements of the EU in the field of social, environmental, food, health, data protection standards and consumer rights. To achieve and ensure the highest possible level of protection for the European and American consumers, the higher standard of each partner country should be accepted or recognized. In May 2014 the sector-specific conference of ministers for consumer protection advised against compromising the achieved European standards and stressed that the EU and the US approaches towards food safety are disparate and won't be compatible in the foreseeable future. The sector-specific conference of ministers for environment shares this view – in particular regarding safety standards in genetic engineering, chemicals law and in the field of nanotechnology. They are particularly opposed to the opening up of the EU with regard to new risk technologies such as fracking.

In the field of social and labor protection standards, political actors and civil society organizations in the EU demand the maintenance of EU standards. In particular, compliance with the standards in accordance with the ILO core labor standards in the context of the trade agreement is required.

d) Safeguarding the capacity of local governments, especially with regard to local public services and public procurement law

Public services are typically provided by enterprises and institutions at a local level within a local government framework. These services primarily consist in the so-called "services of general economic interest". In the German understanding this comprises infrastructural public services (municipal and regional water management, municipal energy, waste and housing management, public transport, public ports, public network industries and deployment, provision of financial services in public

ownership, public health, social and educational institutions, public hospitals and emergency services, public cultural facilities) as well as public social security systems (especially statutory health and nursing care insurance).

The TTIP negotiating mandate stipulates that the agreement should respect the high quality of public utilities in the EU. In particular the high quality of Services of general interest should be safeguarded due to their extraordinary importance. Services supplied in the exercise of governmental authority are excluded from the negotiations.

The Agreement should also at enhanced mutual access to public procurement markets at all administrative levels and in the fields of public utilities, ensuring in particular the principle of national treatment. At large, the agreement should also address state monopolies, state-owned enterprises and enterprises with special or exclusive rights.

The German municipalities are concerned that TTIP could entail far-reaching commitments to grant market access to lucrative services to private providers. This could be the case if the liberalization would be carried out based on the “negative list” approach, meaning that all sectors will be liberalized that are not subject to explicit exemptions or limitations. Other problems could arise from the so-called “Ratchet” or “Standstill” regulations that could preclude potential remunicipalization. The European Commission counters these concerns by reaffirming that TTIP won’t hinder local authorities from remunicipalizing previously privatized facilities in compliance with the general rules. In addition to their concerns regarding the market access in general, German municipalities caution against jeopardizing recent reforms in European procurement and competition law by way of international trade agreements.

In a Joint Declaration of 20 March 2015 the European Trade Commissioner, Cecilia Malmström, and the US Trade Representative, Michael Froman, warrant that U.S. and EU trade agreements do not prevent governments, at any level, from providing or supporting services in areas such as water, education, health, and social services. They further stated that the agreements won’t impede governments’ ability to adopt or maintain regulations to ensure the high quality of services and to protect important public interest objectives, such as the protection of health, safety, or the environment. The same holds true for TISA, for that matter.

e) Classification as a "Mixed Agreement"

Controversial is the classification of TTIP, as well as from CETA, as so-called “Mixed agreement”. This would be the case if the examination of the draft documents would lead to the conclusion that parts of legislative powers of the Member States are affected. This is what the Cabinet of Germany currently assumes.

The classification as a mixed agreement would result in, that beside the European Parliament and the European Council all EU Member States have to agree and ratify the Agreement in accordance with their respective national level procedures

A final assessment will only be possible when the final contract text is presented. The European Commission considered CETA for a long time as a mere EU agreement which does not require Member States' ratification. This attitude has recently eased. Now, the responsible Trade Commissioner Cecilia Malmström does not exclude a shared competence from the outset.³

The Legal Service of the Council and a report commissioned by the Federal Ministry for Economic Affairs and Energy, created by Prof. Dr. Franz C. Mayer (University of Bielefeld) assess CEA as a mixed agreement. In particular, the provisions on investment protection affected Member State responsibilities, such as portfolio investments, regulations regarding termination of Member States' investment protection agreements, expropriation and property protection. Furthermore, Member State competence in areas such as criminal law, traffic law, the recognition of professional qualifications and occupational safety were recorded.

The German Bundesrat is of the opinion that a free trade agreement between the EU and the US can only be concluded as a mixed agreement (resolution of 11 July 2014; BR-Drs 295/14). The sector-specific conferences of minister are of the same opinion in all relevant decisions.

If no consensus on the classification as a mixed agreement can be made, a clarification of competencies between EU and Member States by the ECJ could be required.

In Germany, the approval of the German Bundesrat is required under the national procedure in the context of ratification if competences by the Länder are also affected. The Federal Ministry for Economic Affairs and Energy has determined the affection by the Länder's competences by CETA and already prospectively by TTIP.

f) Outlook and schedule

The aim is to conclude negotiations on the TTIP by the end of 2015. The next round of negotiations will take place in Brussels from 13 to 17 July 2015.

4. Central questions for the discussion

- How does the European Commission assess the effect of TTIP's bilateral approach regarding the future of WTO's multilateral approach?
- In which way can investor protection be guaranteed without the need of applying the Investor-state dispute settlement?
- What are the safeguards to ensure that established EU standards, especially in terms of social, working, environment, agricultural, groceries, health and consumer protection standards will be preserved?
- TTIP's economic profit is said to be primarily derived from the up to 50% reduction of non-tariff barriers to trade; at the same time the high level of protec-

³ The current referral to the European Court of Justice of an analogous question by the European Commission concerning the trade agreement with Singapore goes along the same line.

tion standards is supposed to be preserved. How are these two statements compatible?

- How can be assured that the democratically legitimized institutions of the EU and Germany won't be restricted in their scope for decision- making by a future Regulatory Cooperation Council?
- Considering the fundamentally diverging understandings of public services within the EU – how can be assured that the reservations regarding public services that have been expressed by German municipalities are taken into account?
- Which are the alternatives for liberalizing the trade in public services by way of the negative list approach? Which effect may TTIP have on the European public procurement law?