

A U.S. Lawyer's Guide to the Transatlantic Trade and Investment Partnership

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The Transatlantic Trade and Investment Partnership (TTIP) is the latest attempt by the United States and the European Union (EU) to conclude a comprehensive free trade agreement. The TTIP would create the largest free trade area, in terms of both population and geographical size, in history. The purpose of the TTIP is to remove quantitative and regulatory barriers to trade and commerce between the U.S. and the EU. The objective is to enable consumers to buy and sell goods and services between the U.S. and the EU as easily as they can within the U.S. and the EU. The purpose of this article is to set forth the legal framework of the TTIP. This article does not argue for or against the TTIP, nor does it set forth the latest developments in the negotiations for the TTIP.

The TTIP Has Three Stated Objectives:

- Eliminate, as far as possible, all remaining quantitative trade restrictions between the EU and the U.S.;
- Reduce, or eliminate wherever possible, laws, rules, and regulations that limit the free movement of goods and services; and
- Enable private firms to litigate laws and regulations that impede the free movement of goods and services imposed by EU Member States and the U.S. through private arbitration rather than through the national courts.

The European Union

The EU is one of the most significant transnational political and economic organizations in the world. It originally was called the European Coal and Steel Community, then the European Economic Community or Common Market, then the European Community. Since 1993 it has been named the European Union, although the previous names continued to be used for certain purposes. The dream of a united Europe dates back to medieval times. In the 20th century the devastating experience of two catastrophic world wars compelled Europeans to transform the dream into a reality. The EU consists of 28 Member States that collectively occupy most of the land mass of Europe, has a gross domestic product almost equal to that of the United States, and has a population of almost 500 million people.

As the EU evolved, sovereign power was allocated on a fragmented basis by three foundation treaties, a series of amendments to those treaties, and special purpose treaties. In December 2007, the EU took the most significant step in its history toward rationalizing and establishing the allocation of power. The Member States signed the Treaty of Lisbon, which took effect on December 1, 2009.¹

The fundamental law of the EU is the Treaty of Lisbon. Although it's not quite a constitution, the Treaty of Lisbon gathers into one document several treaties that had governed the EU. The Treaty of Lisbon is essentially an amending treaty. It does not, nor is it intended to, replace the existing treaties. The Treaty of Lisbon consolidates and modifies the existing foundation treaties. The Treaty of Lisbon is somewhere between the U.S. Constitution and the Articles of Confederation.

A nation joins the EU only after a complex negotiation process and by agreement of each Member State.² Each Member State voluntarily concedes to the EU a measure of its national sovereignty and defers to EU decisions on policies, such as international trade, which the government of the Member State would otherwise make. The fundamental governance issue confronting the EU is and has been how and to what extent sovereign power is allocated between the EU as a supranational entity and the Member States as sovereign nations. The EU is less than a federal system but more than a con-federal system.³

Free Trade Agreements in Perspective

CONVENTIONAL FTAS

Since ancient times, empires, city states, and nations have concluded free trade agreements (FTAs). These agreements have proliferated since the dawn of the sovereign nation state system in 1648. An incident of national sovereignty is that a nation controls how, whether, and when items of value such as goods, services, or

intellectual property (referred to as items of trade) can move into or out of the territory of a nation. The methods of control are referred to as trade restrictions, which include tariffs, quotas, and regulatory requirements. An FTA is a legal obligation by which two or more nations mutually or collectively suspend that incident of national sovereignty and enable items of trade to move across national borders with few or no trade restrictions. Most FTAs are treaties that are binding contracts between nations. An FTA must be negotiated, approved, and ratified according to the national legislation of each signatory nation that governs concluding treaties. Also, most FTAs require a signatory nation to enact national legislation that implements the provisions of the FTA.

FTAs generally contain some but not all of the following elements:

- Free trade territorial areas (FTTAs) are territorial areas in each signatory nation in which no signatory nation imposes trade restrictions, but each signatory nation maintains its own trade restrictions on items of trade that move outside of the FTTA designated by each signatory nation;
- Customs unions in which signatory nations eliminate trade restrictions between or among the signatory nations but maintain trade restrictions as to non-signatory nations;
- Harmonizing regulations that govern the content, quality, category, and form of goods;
- Common markets in which signatory nations merge their respective economies into a single economy; and
- A procedure and forum for settling disputes that arise from the FTA.

THE TTIP AND WORLD TRADE ORGANIZATION

The World Trade Organization (WTO) was established in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT). The purpose of the WTO is to facilitate the elements of FTAs on a worldwide basis. The WTO also provides a legal and institutional framework for implementing and monitoring these agreements and for settling disputes arising from the international trade agreements. The WTO decides by a consensus of the 159 Member States and not by a formal vote. A Ministerial Council on which each Member State is represented makes major policy decision also by consensus and not by a formal vote.

The U.S., EU, and each Member State of the EU are Member States of the WTO. The FTAs of the WTO are not as comprehensive as the TTIP. Due primarily to its cumbersome decision-making process, the WTO is unable to implement FTA issues with sufficient alacrity. Also, because FTA negotiations of the WTO are conducted among nations that have vastly different economies and commercial practices, it is difficult for Member States to conclude agreements on the elements of FTAs. Consequently, even though some of the issues of the TTIP have been agreed upon in the WTO, the U.S. and the EU have decided to pursue the TTIP rather than negotiating through the WTO.

The TTIP: Background

The ambition of the TTIP is to secure agreement on all of the FTA elements and combine them into one comprehensive agreement. Although the U.S. and the EU have eliminated or lowered many restrictions on trade and commerce between them, significant disagreements on restrictions remain that impede the free movement of items of trade. In the early 1990s the U.S. and the EU signed the Transatlantic Declaration. Conceived in the wake of the dissolution of the Soviet Union and the reorganization of Eastern Europe, the purpose of the Transatlantic Declaration was to initiate regular meetings and discussions between the U.S. and the EU over a broad range of issues.

These meetings led to a series of formal communications between the U.S. and the EU on trade and commerce such as the Transatlantic Business Dialogue, Transatlantic Economic Partnership, and Transatlantic Free Trade Area. In 2011 the U.S. and the EU created a working group to study a comprehensive free trade agreement. The working group studied the economic and commercial dynamics of U.S.–EU trade and the effects of a comprehensive free trade agreement on U.S.–EU trade.⁴ The group recommended that the U.S. and the EU commence negotiations on a free trade agreement.⁵ In February 2013, President Obama and the president of the EU Commission, José Manuel Barroso, announced that negotiations would commence in July 2013. From July 2013 through May 2014, there have been five rounds of negotiations.

Issues for Negotiation

The subject matter of FTAs is usually limited to eliminating quantitative trade restrictions on market-to-market movement of items of trade. The TTIP differs from other FTAs because the TTIP is intended to be comprehensive. It would encompass all issues that arise from or are incident to virtually every aspect of free trade. The negotiating issues consist of six categories:

- Quantitative trade restrictions on the movement of items of trade,
- Regulatory regimes for industrial products,
- Regulatory regimes for agricultural products,
- Regulatory regimes for services,
- Regulatory regimes for intellectual property, and
- Rules for the conduct of business and commercial activities.

QUANTITATIVE RESTRICTIONS ON THE MOVEMENT OF ITEMS OF TRADE

A quantitative restriction on trade is a number that takes the form of a monetary addition to the cost of an item of trade, or a limit on the number of units of an item of trade that can enter the domestic market of a nation. Quantitative restrictions on the movement of items of trade are tariffs, quotas, and tariff rate quotas. The purpose of these restrictions is to protect producers in the domestic markets of nations. These restrictions are often issues in domestic politics as well as reasons for conflict between nations. In international politics, these restrictions are referred to as a policy of “protectionism” and also as “beggar thy neighbor.” Many historians consider these policies to be the cause of many of the wars that have erupted in history. Eliminating quantitative trade restrictions is an accepted means of eliminating the potential for war.

A tariff is a tax imposed by one nation on an item of trade that moves into the domestic market of that nation from another nation. The tariff is imposed by the receiving nation when the price of the item of trade that is moved into its domestic market is lower than the price of the same item of trade in the domestic market of the receiving nation. The purpose of the tariff is to make the price of the item of trade equal to or even greater than the price for which the same item of trade sells in the domestic market of the receiving nation.

A quota is a limit on the number of units of a particular item of trade a nation can move into the domestic market of the receiving nation. Like tariffs, the purpose of quotas is to protect domestic producers of the same item of trade. A nation usually imposes quotas where tariffs are impractical or the quality of the items of trade in the domestic market is inferior to the quality of the imports.

A tariff rate quota is a limit on the number of units of an item of trade a nation will allow to enter its domestic market without a tariff. The receiving nation imposes a tariff on units above that numerical limit.

Quantitative trade restrictions should be the least complex or least controversial in the negotiations. The U.S. and the EU have generally lowered or eliminated many of the quantitative trade restrictions on the bilateral movement of items of trade. However, some of these restrictions have remained in effect for particular items of trade such as certain agricultural products and clothing.

REGULATORY REGIMES FOR INDUSTRIAL PRODUCTS

The fundamental subject issue of the TTIP is the composition, quality, and method of production of industrial products. Both the U.S. and the EU have different regulatory regimes for three basic categories of products.

CHEMICALS

The EU has enacted the Registration, Evaluation, Authorization, and Restriction of Chemicals regulation. The U.S. counterpart is the Toxic Substances Control Act and the regulations promulgated under that act. These regulatory regimes govern how and when chemicals are approved for public use. The differences between the EU regulation and the U.S. act are highly technical. Generally, the EU regulation imposes more stringent testing standards and longer time periods for approval, which increase the production costs. The U.S. regulatory regime allows for lower costs through a more streamlined and shorter time period for approval. The TTIP negotiators must arrive at a common ground on the two regulatory regimes.

PHARMACEUTICALS

Similar to the chemical regulatory regimes, the EU and U.S. regulatory regimes for pharmaceuticals differ in terms of clinical testing, chemical composition, and manufacturing process. The EU regulatory regime is further

complicated by the fact that each Member State has its own regulatory regimes, which can differ from the EU regulatory regime. The U.S. has one regulatory regime, the U.S. Food and Drug Administration (FDA). The EU considers the FDA regulations to be unnecessarily burdensome, time-consuming, and, in some respects, discriminatory against non-U.S. pharmaceutical companies.

AUTOMOBILES

The primary differences between automobiles manufactured in the EU and the U.S. lie in the number and quality of safety components. The EU requires more such components and greater quality in those components. The U.S. manufacturers consider the EU requirements to be unnecessary to safety and unduly expensive. The TTIP negotiators will probably have to agree on these differences on a component-by-component basis.

REGULATORY REGIMES

FOR AGRICULTURAL PRODUCTS

The differences between the EU and U.S. regulatory regimes for agricultural products focus on dissimilar perspectives on health and safety. There are two basic categories:

SANITARY AND PHYTOSANITARY REGULATIONS

Sanitary and phytosanitary regulations set forth standards for the production and marketing of food for consumers. The U.S. and EU are already parties to many such regulations under the WTO. However, the U.S. and the EU fundamentally disagree on standards for processing meat and poultry for human consumption. The EU regulations prohibit the sale of meat and poultry that has been subjected to certain chemicals allowed by the U.S.

GENETICALLY MODIFIED ORGANISMS

The seeds and genes of certain plants and animals have been bioengineered to produce certain characteristics. The U.S. leads the world in the development and use of bioengineering technology. The EU has been reluctant to allow, but has not absolutely prohibited, bioengineered plants and animals from entering the EU markets.

REGULATORY REGIMES FOR SERVICES

The revenues from the purchase and sale of services are a rapidly increasing component of trade between the U.S. and the EU. In addition to companies that render services, companies that produce products also render services in connection with their products. Both the U.S. and the EU are signatories to the General Agreement on Trade in Services (GATS) promulgated by the WTO. The purpose of GATS is to enable service providers from one signatory nation to access the markets of another signatory nation, without discrimination in favor of local service providers. The force and effect of GATS is limited since signatory nations are able to restrict access to local markets to achieve certain national policies. TTIP would not allow any such restrictions and expand the types of services.

FINANCIAL SERVICES

The primary issue is whether the regulation of financial services should be included in TTIP. The international financial crisis of 2008 has caused regulators in the U.S. and the EU to reconsider the substance and application of existing regulatory regimes. As a compromise position, the U.S. and EU may agree to include provisions that will enhance market access, but issues involving the regulation of financial services should be negotiated apart from TTIP.

AUDIOVISUAL SERVICES

Audiovisual services are works that have either a sound or a visual component or both, the production or use of such works, or the equipment used to create and present such works. Television programs, films, music recordings, and commercial advertising are audiovisual services. The EU has adopted a directive on audiovisual services that enables Member States to regulate the content and dissemination of audiovisual works to protect cultural norms and to monitor the quality of these works. Several Member States, most notably France, have demanded that audiovisual services be excluded from TTIP.

REGULATORY REGIMES FOR INTELLECTUAL PROPERTY

GEOGRAPHICAL INDICATIONS

A product the name of which is associated with a geographical location where it is produced is a geographical indication (GI). The generic name of some products is so inextricably linked with the geographical location that the location itself implies the content and method by which the product is produced. The U.S. regulates GI through trade and service mark law. The EU regulates GI by granting exclusive rights to produce a product to a specific geographical location. Consequently, the EU law protects names of products that have GIs but are generic under U.S. trade and service mark law and cannot be protected. The U.S. is concerned that GIs, in effect, discriminate in favor of domestic producers.

COPYRIGHTS

The U.S. and the EU generally agree on the substance and extent of copyright protection on traditional copyrighted items, which is higher than the rest of the world. They disagree on whether and the extent to which an Internet service provider should be liable for infringing on copyrights or converting copyrights.

PATENTS

The U.S. and the EU generally agree on strict protection of patents. There are differences over the time for which the term of a patent can be extended. The U.S. does not limit extensions, while the EU limits extensions to five years. There are other differences over the protection of data derived from testing an item not yet patented. Alas, the U.S. does not allow for a generic pharmaceutical to be marketed as long as the patent for the brand name for the same pharmaceutical is in effect. The EU allows generic pharmaceuticals to be marketed even though a patent has been granted on the same pharmaceutical under a brand name.

REGULATORY REGIMES FOR E-COMMERCE

E-COMMERCE

The U.S. and the EU generally agree on the principles of allowing free commercial use of the Internet for business purposes. In contrast to other nations, the U.S. and the EU agree that a business entity that offers items of trade over the Internet should not be required to establish a domestic physical presence in the nation to which the business entity directs items of trade.

PRIVACY

The U.S. and the EU fundamentally disagree on issues of privacy over the Internet, especially in light of the revelations that the National Security Agency gathered electronic data on Europeans. The EU imposes and seeks to impose regulations that would require U.S. companies to obtain the approval of the EU before gathering personal information over the Internet and social media in Europe. The U.S. contends that such regulations will discriminate against U.S. companies.

RULES FOR THE CONDUCT OF BUSINESS AND COMMERCIAL ACTIVITIES

ENTRY OF ITEMS OF TRADE THROUGH CUSTOMS

Even though the U.S. and the EU generally agree on simplifying the entry of items of trade through customs, differences remain. The EU has uniform customs regulations. However, the customs agencies of each Member State administer the regulation. This system results in different customs treatment for the same item of trade from Member State to Member State. There is a process through which an exporter can appeal to the EU the customs treatment of a Member State on the grounds that the customs practice deviates from the uniform customs regulation of the EU. The U.S. asserts that this system and process essentially protects domestic producers. If the exporter is dissatisfied with the ruling rendered through the appeal process, the exporter must resort to the judiciary of the Member State.

DISPUTE SETTLEMENT

As with most FTAs, the TTIP will institute an internal process through which disagreements that arise from the TTIP are resolved. The primary issue is whether disagreements that arise from any of the TTIPs are submitted to the dispute settlement process, or only disagreements arising from selected provisions of the TTIP.

The U.S. participants in the TTIP negotiations will raise issues of the loss of sovereignty if the U.S. allows a non-U.S. dispute settlement regime to be imposed on U.S. persons. The U.S. Senate has raised these issues in connection with the United Nations Convention on the Law of the Sea as well as the WTO.

Adoption of the TTIP and Trade Promotion Authority in the U.S.

The U.S. Constitution empowers Congress to regulate commerce with foreign nations and to impose tariffs on imported items of value.⁶ The Constitution is silent on the power or authority of the president on foreign trade and commerce. However, the president is authorized to negotiate treaties and international agreements.⁷ Both branches of government must act to implement any FTA. The president must negotiate the terms of the FTA, and then Congress must enact legislation to implement the terms of the FTA that the president has negotiated.

Until 1974, Congress enabled the president to conclude certain elements of an FTA within a set period of time and within certain substantive limits without Congress having to implement the elements the president has negotiated or having the ability to amend such elements.⁸ In response to efforts by Congress to reclaim its authority over the control of foreign commerce, in 1974, and later in 2002, Congress enacted certain limits on the authority of the president to conclude FTAs, but maintained legislative procedures that expedited the enactment of the FTA the president has concluded.⁹ These expedited legislative procedures were called “fast track” authority and are now referred to as trade promotion authority.

The primary issue arising from the trade promotion authority is whether Congress must enact an FTA without members of Congress being able to offer amendments to the FTA that the president has concluded. If Congress can amend or eliminate any term of an FTA that the president has already concluded, then foreign nations will be reluctant to negotiate with the president, especially on comprehensive FTAs such as the TTIP. Conversely, FTAs, especially the TTIP, are complex and affect every sector of the economy. Congress must be able to implement FTAs through standard legislative procedures, which include offering amendments to any FTA that the president concludes.

Automatic trade promotion authority expired in 2007 and has not been renewed. Under the current practice, the president must notify Congress and consult with Congress and private sector interests in connection with any FTA. The president must also attempt to achieve certain objectives in negotiating an FTA. After the president executes the FTA, the president must submit the FTA, a draft legislation that implements the FTA, and a statement of administrative action that sets the reasons in support of the FTA. Congress is still able to authorize an FTA to be implemented without amendments by passing special rules. However, Congress is no longer bound by trade promotion authority so that any term of the TTIP that the president concludes can be amended or eliminated by Congress. Ultimately, the TTIP must be ratified by two-thirds vote of the U.S. Senate.

Adoption of the TTIP in the EU¹⁰

The EU acts through the institutions that the Member States have established in the treaties upon which the EU was founded.¹¹ The EU institutions are the European Parliament, the European Council, the Council of the European Union, European Commission, Court of Justice of the European Union and the General Court, European Central Bank, and the European Court of Auditors. The EU institutions relevant to negotiating and concluding international trade agreements are the European Commission, the Council of Ministers, and the European Parliament.

The EU acts in policy areas, referred to as competences, in which the Member States have conferred on the EU the authority to act.¹² With respect to each competence, the EU acts either exclusively as an entity or shares the competence with the Member States or supports the acts taken by the Member States.¹³ The EU has exclusive competence in common commercial policy, which includes international trade agreements such as the TTIP.¹⁴

The more complicated issue is which subjects are within the commercial common policy. Traditionally, the Member States have narrowly defined the common commercial policy so that subjects of interest to the Member States would be within the shared competence of the EU and the Member States rather than the exclusive competence of the EU. This issue is substantially resolved by the Treaty of Lisbon. Common commercial policy includes tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, the commercial aspects of intellectual property, foreign direct investment, uniformity in liberalization, export policy and protection of trade with respect to dumping, countervailing duties, and government subsidies.¹⁵

EUROPEAN COMMISSION

The European Commission performs the executive function of the EU.¹⁶ It consists of one commissioner from each Member State. The commissioners are charged with pursuing the interests of the EU and not the interests of their respective Member States. The European Commission represents the EU in the TTIP negotiations. When the negotiations conclude, the European Commission will initial the TTIP and recommend it to the Council of Ministers for signature.

COUNCIL OF MINISTERS

The Council of Ministers exercises legislative and budgetary functions jointly with the European Parliament. Each Member State has one representative on the Council. The Council generally votes by a qualified majority. There are certain decisions on subject areas of the TTIP that require a unanimous vote:¹⁷

- Trade in services, the commercial aspects of intellectual property, and foreign direct investment that include provisions for which unanimity is required for the adoption of internal rules;
- Trade in cultural and audiovisual services that risk prejudicing the EU's cultural and linguistic diversity; and
- Trade in social, educational, and health services that risk seriously disturbing the national organization of such services and prejudicing the responsibility of the Member States to deliver them.

The Council of Ministers will sign and ratify the TTIP as long as the European Parliament consents to the ratification.¹⁸

EUROPEAN PARLIAMENT

The European Parliament performs a legislative function similar to that of the U.S. House of Representatives. The Parliament exercises legislative and budgetary functions jointly with the Council of Ministers and represents the interests of the people of the EU.¹⁹ The European Commission and the Council of Ministers must keep the European Parliament informed as to each stage in the process of the negotiation of the TTIP. Once the Council of Ministers has ratified the TTIP, the European Parliament must consent to that ratification.

Conclusion

There are many other subject issues for negotiation, such as government procurement, labor, environment, and state-owned enterprises. Most of the subject issues derive from scientific or technical bases. Scientific and technical experts are participating in the negotiations. Experience in negotiating FTAs demonstrates that differences can be resolved as long as the resolution is made on scientific or technical grounds. However, if the actual motivation for scientific and technical differences is to protect domestic producers, discriminate in favor of domestic producers, or grant preferences to domestic producers, then it is less likely that these differences can be resolved. Also, the U.S. is a common law jurisdiction while the EU is primarily a civil law jurisdiction. There are differences in the method of interpreting statutes and regulations between common law systems and civil law systems. These differences must be reconciled in the language of the provisions in any final FTA instrument.

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Notes

¹ See generally Roger J. Goebel, *Supranational? Federal? Intergovernmental? The Government Structure of the European Union After the Treaty of Lisbon*, 20 Colum. J Eur L 77 (Fall 2013).

² As of January 1, 2014, the Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom.

³ See generally McCormick and Olsen. *The European Union: Politics and Policies*, 5th Ed. Westview Press (2014).

⁴ For economic and commercial benefits of TTIP, *see* Karl De Gucht, European Commissioner for Trade, *The Future of TTIP—The Benefits and How to Achieve Them*, Speech/14/214, Apr. 10, 2014; European Commission, *Transatlantic Trade and Investment Partnership*, Sept. 2013.

⁵ High Level Working Group Report dated Feb. 2013.

⁶ U.S. Const. Article I Section 8.

⁷ U.S. Const. Article III.

⁸ Reciprocal Trade Agreements Act of 1934.

⁹ Trade Act of 1974; Bipartisan Trade Promotion Authority Act of 2002.

¹⁰ *See generally* Youri Devuyt, *European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements*, 12 J Int'l Bus & L 259 (Spring 2013).

¹¹ TEU Art. 13.

¹² TEU Art. 5(1).

¹³ TFEU Art. 2.

¹⁴ TFEU Art. 3(1)(e).

¹⁵ TFEU Art. 207(1).

¹⁶ TEU Art. 17(1).

¹⁷ TFEU Art. 207(4)(b).

¹⁸ TFEU Art. 218(6).

¹⁹ TEU Art. 14(1).