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SER

TTIP

Transatlantic Trade and Investment Partnership

SOCIAL AND ECONOMIC COUNCIL

Advisory report on TTIP

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List of abbreviations used in trade and investment agreements

CETA = Comprehensive Economic and Trade Agreement. Draft trade and investment agreement between the EU and Canada.
BIT = Bilateral Investment Treaty. Existing bilateral investment treaties between countries.
GATS = General Agreement on Trade in Services. Agreement on the liberalisation of the trade in services under the auspices of the World Trade Organisation (WTO).
GATT = General Agreement on Trade and Tariffs. Agreement on trade and tariffs under the auspices of the WTO.
ILO = International Labour Organisation.
ICS = Investment Court System. Reference to the European Commission's proposal for an Investment Court System for arbitration between companies and governments on investment protection as a successor to ISDS.
ISDS = Investor to State Dispute Settlement. Current form of arbitration between companies and governments on investment protection.
OIE = The World Organization for Animal Health (formerly Office International des Epizooties). International "animal health watchdog" recognised in the SPS agreement.
SPS = Agreement on sanitary and phytosanitary measures under the auspices of the WTO. Agreement that allows countries to set their own national standards to protect humans, animals and plants against diseases and hazardous substances in food.
TBT = Agreement on technical barriers to trade under the auspices of the WTO.
TISA = Trade in Service Agreement. Negotiations on an agreement on trade in services that builds on the GATS.
TPP = Trans-Pacific Partnership. Draft agreement on trade and investment between the US and Australia, Brunei, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.
TTIP = Trans-Atlantic Trade and Investment Partnership. Negotiations on a trade and investment treaty between the EU and the US. Subject of this advisory report.
WTO = World Trade Organisation.

Foreword

Until recently, trade agreements were mainly a matter for specialists. However, the TTIP negotiations between the EU and the US are giving rise to a wide-ranging public debate. People are worried about issues such as the safety of their food, the undermining of democratic decision-making and the loss of jobs. This advisory report discusses these concerns *and* the guarantees that must be provided in a final trade agreement for the protection of public interests. In this way, it is making a contribution to a well-informed public debate about TTIP and to the search to achieve the right balance between promoting international trade in protecting public interests.

The advisory report formulates a number of principles which together can be used as criteria for the assessment of TTIP *if* the US and the EU are able to reach agreement:

- The EU and the US must strive to focus the globalisation process on increasing social prosperity that is sustainable. TTIP must be designed in such a way that third countries will also be able, on balance, to profit from it and it does not create a barrier to the accession of other countries or to a new multilateral agreement.
- TTIP is expected to establish a "gold standard" for future European trade and investment policy.
- Europe must be able to maintain its high level of protection in terms of legislation and regulation and to raise that level if necessary.
- There must also be sufficient scope for policymaking in future for governments to be able to adequately safeguard the levels of protection afforded to people and the environment and improve them if desired.

Flanking policies are needed in order to properly manage the effects of trade and investment agreements. Although trade liberalisation may on balance have a positive impact, the consequences may be negative and far-reaching for individual companies and for certain groups of workers.

In order to encourage the focused commitment of Parliament, citizens, industry, trade unions and civil-society organisations, for example through public debate, it is important for the negotiations to be as transparent as possible and for the Dutch Government to communicate the findings of the sustainability impact reviews to the House and the general public in good time.

By providing this advisory report, the SER hopes to contribute to a well-considered assessment of the content and procedures of TTIP by the Dutch Government and the Dutch Parliament.

This report does not express any judgment for or against TTIP. It cannot do so, as the negotiations are still ongoing. We have been informed about the position of the European Union and the Netherlands in the negotiations, but it is uncertain whether the end result will reflect the EU's position.

A committee chaired by Prof. Paul van der Heijden prepared the report. I thank Paul and the members of the committee for all the work they have done.

Mariëtte Hamer
Chair of the SER

Findings

Request for advice from Minister Ploumen
The Minister of Foreign Trade, Lilianne Ploumen, has consulted the Social and Economic Council (SER; the tripartite advisory body to the Dutch government) on guarantees for labour standards in the Transatlantic Trade and Investment Partnership (TTIP). The request refers to a number of concerns within society regarding TTIP, such as pressure on labour standards in Europe, job losses, and a loss of discretionary power in the area of public services. There are also concerns about the arbitration mechanism between investors and governments proposed in TTIP.

This advisory report discusses not only these concerns and objections but also the guarantees in TTIP for protecting public interests. It considers in particular – but not exclusively – protection in the social context, including the position of workers and the potential consequences that TTIP will have for them. The advisory report therefore covers a wider range of subjects than the original request.

Contribution to a well-considered assessment of TTIP
By providing this advisory report, the SER hopes to contribute to a well-considered assessment of the content and procedures of TTIP by the Dutch Government and the Dutch Parliament.

This report does not, however, express any judgement for or against TTIP. It cannot do so, as the negotiations are still ongoing. We have been informed about the position of the European Union and the Netherlands in the negotiations, but it is uncertain whether the end result will reflect the EU's position.

Background to TTIP
Since June 2013, the EU and the US have been negotiating on a comprehensive trade and investment agreement, the Transatlantic Trade and Investment Partnership (TTIP). A trade agreement between the EU and the US has long been under consideration. In the past, concern that a bilateral agreement of this kind could be detrimental to the global trading system was one of the reasons for caution. However, negotiations on renewing the global trading system have come to a standstill. An agreement between the US and the EU – given the great importance of these two trading blocs in the global market – can provide important components for a new multilateral agreement. Countries such as China and India can sign up to it at a later stage. TTIP can also strengthen the transatlantic alliance in an increasingly unstable world.

What are the US and the EU negotiating about?
The TTIP negotiations cover trade in goods and services and investment. Their aim is to improve market access, for example by lowering the trade tariffs for goods, improving regulatory cooperation to eliminate unnecessary barriers to trade ("non-tariff barriers"), and developing a common approach in such areas as intellectual property and the relationship between trade and sustainability.

Basic principles for assessing TTIP
The SER's advisory report is guided by the objective of social prosperity in its widest sense and efforts to achieve sustainable globalisation. This means that social prosperity encompasses not only material progress by promoting more growth in production per worker but also promoting social progress (i.e. prosperity and social cohesion) and a high-quality natural environment in which to live. By ensuring and maintaining a balance and cohesion between People, Planet and Profit, this approach creates the basis for sustainable development. The SER has set out this aim in detail in a number of advisory reports.

What foundations has this laid for the assessment of TTIP? It is important that the TTIP negotiations should cover trade *and* investment as well as the lowering of tariffs *and* the removal of unnecessary barriers to trade resulting from ineffective regulatory cooperation.

Based on the foregoing, the SER has formulated seven principles for assessing TTIP:

1. The EU and the US must strive to focus the globalisation process on increasing social prosperity that is sustainable, including in emerging economies and developing countries. Although the bilateral route offers the best prospects at the present time, efforts to arrive at a new wide-ranging multilateral agreement must continue. TTIP must be designed in such a way that third countries will also be able, on balance, to profit from it. The agreement should not create a barrier to the accession of other countries or to a new multilateral agreement. TTIP will thus contribute to reducing global inequality.
2. TTIP is expected to establish a "gold standard" for future European trade and investment policy. It should promote European values, including the protection of human rights and workers' rights, the environment, democracy, and the rule of law. The trade and investment policy must therefore promote inclusive growth and reduce inequality. Compliance with the core labour standards – freedom of association in trade unions, the right to collective bargaining, a ban on child labour, forced labour and discrimination – must be the mandatory foundation for the economic activity of the EU and all its trade and investment partners.
3. Europe must be able to maintain its relatively high level of protection, both in legislation and regulations and via other policy measures, and to raise that level if so desired. TTIP and its provisions for regulatory cooperation, liberalisation of the services market, lowering of tariffs, and arrangements for investment protection should not be detrimental to this.
4. Governments must retain sufficient scope for policymaking to be able to adequately safeguard and improve the levels of protection afforded to people and the environment. Shortcomings concerning decent work will be tackled, and transition problems and distributional effects dealt with by means of flanking policies. Agreements on regulatory cooperation, the liberalisation of the services market in the protection of investments should not put this scope for policymaking under pressure. This requires a proper balance to be struck between trade and investment interests and other justified public interests such as measures to protect people and the environment.
5. Governments must remain free to declare certain services – according to their own preferences – to be "of general public interest"; the method of organising and financing these services also belongs in principle to the sovereignty of the Member States. TTIP must not be detrimental to this.
6. In addition to enshrining human and workers' rights in the agreements themselves, flanking policies are needed in order to properly manage the effects of trade and investment agreements, so that they contribute to inclusive growth. As well as fundamental rights, flanking policy must also guarantee social dialogue, an active employment policy and social protection. Although TTIP may on balance have a positive impact, the consequences may be negative and far-reaching for individual companies and for certain groups of workers. Effective management of these adjustment processes is therefore necessary, with particular attention being paid to older workers with a lower level of education. Another desirable avenue is to pursue a facilitatory and supportive policy for promising clusters and sectors, focusing mainly on boosting their capacity to innovate. Such a policy is primarily the responsibility of the individual Member States, but deserves the support of the European Union. More generally, the globalisation process requires a national policy founded on two basic principles: 1) increasing income generation by means of a higher employment participation rate, productivity growth and an emphasis on comparative advantages;

2) providing income protection and easing the adjustment processes. Both principles are needed to key into the globalisation process and boost support for open markets.
7. Public support and transparency: to promote more effective involvement of the Dutch Parliament, the business community, the trade unions, and civil society organisations – including through public debate – it is essential for the negotiations to be transparent. The Dutch Government must also communicate the findings of the sustainability impact reviews to Parliament and the general public in good time.

Based on the above principles, the SER has assessed the guarantees in the EU's negotiating position for increasing social prosperity that is sustainable. Four major components of the negotiations were taken into consideration:
1. regulatory cooperation;
2. the exclusion of public services from the liberalisation of trade in services;
3. core labour standards and trade;
4. investment protection and arbitration.

This has resulted in the following conclusions:

1. Regulatory cooperation
Trade barriers consist of more than tariffs and quotas. They can also comprise divergent rules for products and services. The question is whether these trade barriers are actually unnecessary. One example is that the US often requires approvals for individual product varieties instead of the relevant product type. This means, for example, that each *colour* of lipstick must be retested individually even if the EU has determined that the relative *type* or brand of lipstick complies with the strict European cosmetics directive. This results in additional, unnecessary costs for European manufacturers, as the separate test for each colour does not add anything to product safety. Regulatory cooperation involves agreeing to recognise each other's test methods, technical standards and inspections and better cooperation in the development of new standards. The public's concern and objection to this is that regulatory cooperation will come at the expense of the levels of protection afforded to people and the environment.

The basic assumption for the SER is that the EU must be able to maintain and increase its relatively high level of protection, both in legislation and regulations and via other policy measures. TTIP and the regulatory cooperation which it envisages must not be a reason for reducing the levels of protection afforded to people and the environment. Regulation of those levels of protection is an important instrument for promoting social prosperity.

Where the levels of protection provided by the EU and the US are different, due care and caution must be exercised when arranging regulatory cooperation between them.

The European Commission’s proposals include safeguards to prevent impairment of levels of protection. These guarantees must be reinforced in a number of areas. The scope of regulatory cooperation in the European Commission’s proposal is too broadly conceived. It should focus on specific measures that lead to unnecessary barriers to trade.
- The mandate of the regulatory cooperation board and the sectoral boards should be defined precisely. This body should only have advisory powers. It must not interfere with democratic procedures, on either side of the Atlantic, for adopting legislation and regulations.
- All relevant stakeholders – including trade unions, the business community, environmental organisations and consumer organisations, etc. – should be able to make an equal, balanced, and meaningful contribution. This must be the starting point for refining the institutional framework for stakeholder involvement in regulatory

cooperation. This goes beyond merely consulting stakeholders about the regulatory board's annual report.

Transparency is of the greatest importance to avoid any semblance of one of the stakeholders dominating the consultation process. Both the European Parliament and the national parliaments must be kept properly informed about and involved in the recommendations for improving regulatory cooperation so that they can monitor the existing levels of protection to ensure that these are being maintained.

In order to guarantee democratic control of decisions that can be taken by a joint EU-US TTIP committee after the agreement has been concluded (TTIP as a "living agreement"), it is important to set out the powers of this committee in detail and involve the European Parliament fully in this process.

2. Exclusion of public services

The TTIP negotiations cover not only the trade in goods, but also the trade in services. The general public's concern and the objection to this is that the liberalisation of the trade in services could also affect public services and that, as a result, decisions to liberalise public services (e.g. in healthcare and education) may become irreversible.

The basic principle adopted by the SER is that governments must remain free to declare certain services – according to their own preferences – to be "of general public interest"; the method of organising and financing these public services also belongs in principle to the sovereignty of the Member States. TTIP must not be detrimental to this.
At the present stage, one can say that the EU's negotiating position is a step in the direction desired by the SER. It will only be possible to produce a genuine assessment based on the results of the negotiations.

3. Trade and core labour standards

The EU Member States have given the European Commission a clear mandate to make agreements on sustainable development as the parties' overarching objective. The EU and the US must endeavour to guarantee and facilitate compliance with international environmental and labour standards. They should lay down in TTIP that they will not promote trade and investment by lowering standards for the environment, labour and health and safety, or by adversely affecting the core labour standards. The public's concern and objections centre on compliance with existing labour standards, particularly in the US, and the unfair competition that could result from this. The US has ratified only two of the eight core ILO conventions – the convention on the elimination of forced labour and the worst forms of child labour.

The question is: how can TTIP effectively promote compliance with labour standards?

As stated in the assessment principles, TTIP is expected to set the "gold standard" for future European trade and investment policy. The EU should also use this "gold standard" in other trade and investment agreements, even though the terms may have to be tailored to its relationship with the country in question. It should promote European values, including the protection of human rights and workers' rights, the environment, democracy, and the rule of law. Compliance with the core labour standards – freedom of association in trade unions organisation, the right to collective bargaining, a ban on child labour, forced labour and discrimination – must be the mandatory foundation for the EU's economic activity and all its trade and investment partners.

First, effective safeguards – both substantive and procedural – will be needed to ensure that the US and the EU respect core labour standards and other important ILO

conventions that are relevant in the context of the ILO's Decent Work Declaration, both in law and in practice. The best route continues to be ratification and effective implementation by parties of the relevant core conventions and other major ILO conventions under the ILO's Decent Work Declaration. Until such time, TTIP must contain binding and detailed provisions setting out what the core labour standards are and what the parties must do to implement and comply with them. An important prerequisite is respect by the EU and the US for the core labour standards, including freedom of association in trade unions, and an agreement that failure to respect those standards should not create or retain comparative advantages. The European Commission's proposals in the sustainability chapter provide this binding substantive regulatory framework.

In order to implement these provisions, an effective monitoring mechanism will then need to be provided so that abuses can be identified promptly and parties can be encouraged to address them on that basis. This could involve regular reports by an independent secretariat – as also agreed in NAFTA – on the status of the implementation of the Decent Work Agenda in the EU and the US, including enforcement of and compliance with labour standards in practice.

Third, a mandatory mechanism must be provided for settling disputes – with proper involvement of the social partners and the ILO – so that abuses can be addressed. This presupposes that suitable and effective measures are in place to eliminate the abuses. Given past experience, it is desirable to seek ways to give this monitoring process "teeth" and set a gold standard for supervision and compliance.

Elements of this dispute resolution mechanism will be: a sufficient degree of independence from the parties; the ability to impose effective sanctions on the parties where necessary; reasonable time limits for completion.
Different variants for the mechanism may be considered and will have to be judged on their merits:

- For example, the establishment of a separate mechanism under the agreement to settle disputes relating to the sustainability chapter or a special tribunal to be convened to deal with disputes relating to labour standards. The types of sanctions, such as penalties or trade sanctions, if necessary supplemented by compensatory measures for the injured parties.
- Direct or indirect access to justice for third parties, such as civil-society organisations and trade unions (without high financial thresholds) through an independent secretariat as described above or through a national contact point.

Also relevant in the design and development of this dispute resolution mechanism is how the interests of investors will be protected (see below), so as to create a more complete and balanced system for settling disputes that will take account of everyone's interests.

4. Investment protection and the Investment Court System

TTIP contains not only agreements on trade but also agreements on foreign investment. These agreements concern market access and investment protection (non-discrimination of foreign investments, application of the principle of most favoured nation, fair treatment, unlimited capital transfer, compensation for unlawful expropriation) as well as arbitration in the event of breaches of this protection. Compensation can be claimed from the host country for any unlawful expropriation or discrimination by means of an arbitration procedure between companies and governments.
Agreements on market access and protection of foreign investment are currently set out in bilateral investment treaties. The twenty-eight EU Member States have a total of almost 1,200 of these treaties in force with countries outside the EU. The Netherlands has concluded over ninety of them. There are major public objections to the existing forms of investment protection and arbitration mechanisms in "old style" investment

agreements, i.e. the common forms of investment arbitration currently in use (ISDS – Investor to State Dispute Settlement). Because of these major objections and the increasing public debate and protest in this regard, the Council of Ministers of the EU has imposed stricter conditions on including an investment chapter in TTIP. The European Commission has proposed a modified mechanism in the form of an Investment Court System (ICS).

According to the SER, a separate investment arbitration mechanism in and between properly functioning and highly developed legal systems is not necessary. The SER believes that the "royal route" involves improving (national) legal systems in the countries concerned.

The basic principle adopted by the SER is that governments must retain sufficient scope for policymaking to be able to adequately safeguard and improve the levels of protection afforded to people and the environment in future. Agreements on investment protection should not put this scope for policymaking under pressure.

Existing ISDS mechanisms do not provide sufficient guarantees in this regard. They contain a number of shortcomings, such as their private nature, insufficient independence and impartiality of arbitrators, lack of transparency and insufficient coherence of rulings and their possible adverse effect on the discretionary power of states through such aspects as applying an excessively wide definition of the concept of indirect expropriation and the possibility of very high compensation claims being awarded.

The European Commission's proposals for a public Investment Court System (ICS) are a step in the right direction for addressing the shortcomings of the old ISDS. Important elements of a substantive nature are the explicit reference to the right of states to adopt measures aimed at protecting people and the environment, and the provision that such measures should not be considered as a form of indirect expropriation for which compensation can be claimed. Important elements of a procedural nature are the appointment of independent judges nominated by the EU and the US; the introduction of the possibility of appeal to a tribunal chaired by a resident of a third country; and incorporation of the UNCITRAL rules on transparency in arbitration: sessions are held in public, most court documents are published and third parties with a demonstrable interest in the dispute have a right to intervene.

The proposed ICS must be further improved in a number of respects if it is to actually function as an international judicial body with a public and independent character. Among other things, this involves the financial independence of arbitrators/judges with regard to the duration of the legal proceedings. The material safeguards should be aimed at ensuring that the Investment Court System only assesses *how* a government measure has been introduced and applied, and not *whether* the government is permitted to introduce a particular measure to protect people and the environment. An Investment Court System as outlined above would act as a safety net. In addition to the provision of adequate guarantees in TTIP, careful government action remains the best remedy against arbitration claims.

Various considerations are relevant to deciding whether or not an Investment Court System is necessary:

An ICS could provide a solution for as long as not every EU Member State and State of the United States has a properly functioning legal system. It is therefore relevant whether national systems can be expected, within the foreseeable future, to provide sufficient guarantees for investment protection (the "royal route").

A modernised system of dispute resolution in the form of an ICS can constitute a positive step if the intention is for it to replace and modernise existing investment agreements that still include an "old" ISDS. This does demand, however, that the proposed ICS be given a multilateral character. If TTIP were gradually to develop into a multilateral system which other countries could and would like to join, it would make more sense to establish a multilateral mechanism for settling investment and other disputes.

None of this alters the fact that – in the eyes of the trade union movement – there would still be a one-sided form of dispute resolution in the interest of foreign investors, without guarantees of a balanced consideration of interests in relation to other interests (public interests, people and the environment, labour standards). This aspect will have to be assessed within the context of whether TTIP will provide for mandatory and effective implementation, compliance and enforcement of the obligations in the sustainability chapter with regard to other (core) labour standards and therefore also provide for a mandatory disputes mechanism, and, if so, how it will achieve this.

Customisation in reducing tariffs in connection with EU animal welfare standards
Discussion of TTIP has become focused on non-tariff barriers to trade and on the protection of investments. The import tariffs applied by the US and the EU in trade between them are on average relatively low (only a few percent). Over half of all the trade in goods is already free from tariffs. Abolishing most of the remaining tariffs is not expected to have any major effects. However, there are a few tariff peaks (up to several dozen percent). These apply specifically to certain agribusiness segments. For the agricultural sector, the consequences for each subsector need to be considered, and appropriate measures should be put in place, if necessary, for each one. That may be the case if reducing the import tariffs in the EU undermines the sustainability of the relatively high animal welfare standards in the EU. Where this is the case, customisation will be required, e.g. in the form of tariff quotas, where the zero rate applies to part of the imports or by a gradual reduction in the tariffs.

Economic impact of TTIP
As a result of TTIP, both the US and the EU will be able to specialise further in the economic activities in which they are relatively good (have a comparative advantage). TTIP therefore has the potential to contribute to growth, prosperity, and employment. The various studies that are available on the effects of TTIP show greatly divergent results. The most authoritative studies point out that TTIP could provide Europe and the Netherlands with additional economic growth in the order of 0.5% to 2%, spread over ten years. This result does of course greatly depend on whether TTIP will actually succeed in eliminating unnecessary non-tariff trade barriers. It is therefore – and bearing in mind the lessons learned from NAFTA – reasonable to adopt a cautious approach to estimating its impact on growth.

In macro-economic terms, the changes associated with TTIP will be fairly limited and closely bound up with structural changes that occur under the influence of technological developments in any case. It is advantageous that US and EU specialisation occurs within and not between sectors. This makes it easier to adjust to an increasingly refined specialisation under TTIP.

On balance, slightly positive effects are expected on employment and wages. But with the broad concept of prosperity in mind, it is open to question where the potential prosperity gains will have their effect: for individual companies and certain groups of workers, the consequences may indeed be negative and severe. Effective management

of these adjustment processes is therefore necessary. The effects of a trade agreement will only manifest themselves gradually, after years have elapsed. This means that there is time to pursue effective flanking policy to mitigate the transitional effects. The SER believes that the policy must provide all citizens with sufficient guidance to enable them to respond well to changes and be assured of sufficient income protection. The SER therefore recommends focusing specific attention to this issue both within the EU and nationally and making best use of the available instruments – such as the European Social Fund and the Globalisation Adjustment Fund. This is important for workers – with particular attention being paid to older workers with a lower level of education – and for businesses. For example, the European Globalisation Adjustment Fund can be used to fund an individual service that helps redundant workers find work. This targeted approach to transitional issues is in keeping with analyses and recommendations in previous SER advisory reports.

Consequences for third countries
Initially, further liberalisation of trade between the US and the EU will result in a diversion of trade, which will disadvantage third countries. On balance, the effect on third countries can still turn out positive both through the creation of trade and through the impact of regulatory and procedural cooperation between the US and the EU via direct and indirect spillovers.

The EU and the US can boost the scope of these spillovers in different ways. In particular, the SER believes that careful consideration should be given to the suggestion that TTIP be regarded as an invitation to third countries to join in this liberalisation of trade in some way.

1. Introduction

Request for advice
On 4 May 2015, the Minister of Foreign Trade, Lilianne Ploumen, requested advice on how to guarantee labour standards in the Transatlantic Trade and Investment Partnership (TTIP).[1] How can the EU and the Member States guarantee that TTIP will not have a negative impact on our European social model, in particular on industrial relations, working conditions and employment terms, the advice going further than the usual provisions on labour in trade agreements? The request for advice refers to a number of concerns within society, such as the loss of discretionary powers in the area of public services, job losses and pressure on labour standards.

Nature of the advisory report
This report focuses on how to guarantee public interests, especially – but not exclusively – in the social dimensions, including the position of and possible consequences for workers. The request for advice refers to a number of concerns and objections within society regarding TTIP, such as pressure on labour standards in Europe, job losses, and the loss of discretionary power in the area of public services. There are also concerns about the arbitration mechanism between investors and governments proposed in TTIP.

This report discusses these concerns and objections within society *and* the guarantees in TTIP for the protection of public interests. It sets criteria for the final assessment of TTIP, which cannot take place until the negotiations between the EU and the US have been completed. They are expected to be completed in autumn 2016. Sections 4 and 5 of this report are largely based on the mandate given by the Council of Ministers to the European Commission for the negotiations and the proposals that the European Commission has made to the United States on this basis.

The report aims to contribute to a better informed debate about TTIP. Hence, it also contains a detailed discussion of what TTIP is about. It therefore covers a wider range of subjects than the request for advice.[2] However, it does not cover all aspects of TTIP, e.g. data protection. By providing this advisory report, the SER hopes to contribute to a well-considered assessment of the content and procedures of TTIP by the Dutch Government and Parliament and the European Parliament.

The SER advisory report is guided by the objective of social prosperity in its widest sense and efforts to achieve sustainable globalisation (see Section 2). It follows from this that the SER does not believe that TTIP should be a reason for lowering existing levels of protection for people and the environment. These levels must be assessed on their own merits and not as part of the drive to reduce trading costs. Europe must be able to maintain its high level of protection in terms of legislation and regulations. There must also be sufficient scope for policymaking in future for governments to be able to adequately safeguard these levels of protection and raise them if desired.

Reader's guide
In Section 2, previous SER recommendations are used to clarify the SER's starting point for analysing and assessing TTIP. Section 3 then goes on to discuss the relevant background information. This raises the following questions: what is the economic and geopolitical context of TTIP? Who is conducting the TTIP negotiations on behalf of the EU Member States? Who will take the ultimate decision about TTIP? Section 4 shows what the negotiations are about (and what they are not about), what the European Commission's mandate is and what proposals the European Commission has made to

1 See Appendix 1.
2 For this reason, the SER has also taken more time to respond to the request for advice.

the US on this basis. Section 5 concerns guarantees for public interests, especially in terms of social policy. It discusses what society's concerns are and what the proposed guarantees are and arrives at an assessment of these guarantees. Section 6 discusses the possible impact of TTIP on growth, prosperity and employment on the basis of existing studies.

Preparation of the advisory report
The advisory report was prepared by a committee under the chairmanship of Prof. Paul van der Heijden.[3] Section 6 on TTIP's economic effects was prepared by a working group of the committee under the chairmanship of Prof. Jacques Pelkmans.

[3] See Appendix 2 for the membership of this committee and its working group on economic effects.

2. Building blocks from previous SER recommendations

2.1 Aim of this section

This section indicates the SER's starting point for analysing and assessing TTIP. In recent years, the SER has published advisory reports on sustainable globalisation and the shifting economic balance of power.[4] The initiative for international corporate social responsibility (ICSR) is derived from the advisory report on sustainable globalisation.[5] Its main elements are discussed below. These advisory reports and the ICSR initiative form the basis of the SER's assessment of TTIP. The concluding section formulates four principles for assessing TTIP on this basis.

2.2 The broad concept of prosperity as a starting point

The broad concept of prosperity underpins the SER's policy recommendations. This means that social prosperity encompasses not only material progress by promoting greater growth in production per worker but also promoting social progress (i.e. prosperity and social cohesion) and a high-quality natural environment. By ensuring and maintaining a balance and cohesion between People, Planet and Profit, this approach creates the basis for sustainable development.[6] In other words, economic growth is sustainable if it is accompanied by social cohesion, a pleasant and healthy everyday environment and good environmental quality. In the SER's view, sustainable growth is the overriding concept. In it, inclusive growth represents the social dimension in particular.[7] It refers to growth that results in productive employment with proper jobs (decent work), which makes it possible to earn a living wage, provide a basic social security system and overcome poverty.[8]

The broad concept of prosperity corresponds to what is known in Europe as the "social market economy". This represents shared values such as solidarity and cohesion, equal opportunities and anti-discrimination, health and safety at work, universal education and healthcare, all embedded in a strong tradition of social dialogue and partnership. At global level, this is referred to as the Decent Work Agenda: promoting fundamental labour standards, employment, social protection and social dialogue.[9]

Services of general public interest are also part of the social market economy. The Member States of the EU are free to declare certain services – according to their own preferences – to be "of general public interest"; the method of organising and financing these services also belongs in principle to the sovereignty of the Member States. Services are referred to as being "of general public interest" when the government considers it necessary to guarantee access to these services for everyone, regardless of their economic, social or geographical circumstances, at an affordable price.[10]

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4 SER Advisory Report, 2008, *Duurzame Globalisering: een wereld te winnen* (Report on sustainable globalisation). SER Advisory Report, 2012, *Verschuivende Economische Machtsverhoudingen* (Report on the shifting economic balance of power). See also: SER Advisory Report, 2011, *Ontwikkeling door duurzaam ondernemen* (Development through sustainable enterprise).

5 The SER initiative for International Corporate Social Responsibility started at the end of 2008 and has resulted in various reports, recommendations and activities. For a summary, see: *http://www.ser.nl/nl/actueel/werkprogramma/imvo.aspx*

6 SER Advisory Report, 2008, *Duurzame Globalisering*, op. cit., p. 45;

7 SER Advisory Report, 2011, *Ontwikkeling door duurzaam ondernemen*, p. 22.

8 Ditto.

9 SER Advisory Report, 2008, *Duurzame Globalisering*, op. cit dem, p. 46; for the correlation between the socio-economic objectives of the SER and those of the EU, see also: SER Advisory Report, 2009, *Europa 2020: de nieuwe Lissabonstrategie* (Report on the Lisbon Strategy), pp. 26-27.

10 SER Advisory Report, 2005, *Dienstenrichtlijn* (Services Directive), p. 59.

From the broad concept of prosperity to sustainable globalisation
The world is becoming increasingly interconnected. It therefore makes little difference whether one is for or against globalisation. What matters is to manage this process effectively. On the basis of the broad concept of prosperity, this means that progress must be made towards sustainable globalisation. The liberalisation of trade and investment can only benefit social prosperity if it takes place within a context of flanking policy measures aimed at promoting sustainable development in three dimensions: economic, social and ecological.[11] From an economic point of view, this involves pursuing a facilitatory and supportive policy for promising clusters and sectors, focusing mainly on boosting their capacity to innovate. Such a policy is primarily the responsibility of the individual Member States, but deserves the support of the European Union.[12] The social aspect involves pursuing the flanking policy to safeguard minimum standards and effectively manage transitional problems and distributional effects resulting from trade and investment. Moreover it relates to the question of how the Netherlands can contribute to the promotion of Decent Work and the related respect for core labour standards.[13]

International trade results in countries being able to concentrate on what they are good at – developing their comparative advantage. Thanks to this specialisation – a process that is further enhanced by economies of scale and learning effects – all economies can improve. Specialisation does entail a redistribution of economic resources and manpower, giving rise to distributional effects and potentially producing losers and transitional problems. The income gap within countries has increased. The overriding reason for this is the combination of technological progress and the specialisation process accelerated by globalisation. This has made education even more important, leading to an increase in the differences between skilled and low-skilled workers. Institutions also have an important part to play, which explains why income differences in the Netherlands remain limited.[14] The impact of globalisation on prosperity in the broad sense depends mainly on the way we deal with the transitional problems and the distributional effects.[15]

Support for globalisation is under pressure owing to uncertainty in certain segments of society about the course of the globalisation process. The fear is that it is uncontrollable, undermining government scope for policymaking, and leading to continuous job losses, or the threat of such losses.[16] In its advisory report on sustainable globalisation, the SER argues that the government should have the scope to determine policy even in a more open economy and that its own policy choices become even more important. Addressing the issue of globalisation requires a country to clearly define government's primary tasks (a sound education system, a social welfare system that "activates" the labour force, and safeguards for public interests). The European Union (EU) plays a crucial role in influencing and shaping the globalisation process as such in terms of sustainability.

The importance of core labour standards and decent work
Sustainable globalisation involves respect for the core labour standards and the promotion of Decent Work. The Dutch government, employers' associations and trade unions, consumers and civil-society organisations expect companies to respect workers' rights, human rights and the environment while doing business. This is laid down internationally in the ILO Constitution and (binding) ILO Conventions, the OECD

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11 SER Advisory Report, 2008, *Duurzame Globalisering*, op. cit., p. 45-46.
12 SER Advisory Report, 2009, *EU2020: de nieuwe Lissabonstrategie*, p. 78.
13 Ditto, p. 169.
14 Ditto, p. 63. SER Advisory Report, 2012, *Verschuivende Economische Machtsverhoudingen* pp. 53-4.
15 SER Advisory Report, 2008, *Duurzame Globalisering*, op. cit., p. 64.
16 Ditto, p. 265.

Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights and ILO core labour standards which form part of them.[17]

2.3 Trade agreements and sustainable globalisation

In its 2012 advisory report on the shifting economic balance of power, the SER discussed what the emergence of China and other emerging economies would mean for the efforts to achieve sustainable globalisation.

The SER would first highlight the importance of joint action within the EU. Membership of the EU enables the individual Members States to cope more effectively with the globalisation process. Individual Member States are unable to influence or shape the rules of the game for the globalisation process in isolation. The EU, by contrast, *is* powerful enough to exert influence on that game, and to channel the globalisation process in a way that leads to sustainable growth in public prosperity.[18] The shifting economic balance of power therefore accentuates the importance of the EU in shaping and influencing the globalisation process in a way that leads to sustainable growth in public prosperity.[19]

The SER notes that it has not been possible, partly in view of the shifting economic balance of power, to reach multilateral agreements that are in keeping with the current phase of the globalisation process and focus on the liberalisation of the trade in services, investment, competition, protection of intellectual property, the elimination of non-tariff barriers and sustainability issues such as Decent Work. In view of the stalemate reached in the Doha Round of multilateral trade talks, bilateral agreements currently offer better prospects of success.[20] The recent wide and deep bilateral agreements encourage trade in intermediate goods and production networks and make it possible for countries to join the current phase of the globalisation process.[21] Three issues are key to the assessment of the bilateral agreements: 1. consequences for the EU and for partner countries; 2. consequences for third parties and the WTO; 3. the enforcement of the sustainability provisions.[22]

When identifying the possible consequences of trade and investment agreements, serious attention should also be paid to the possible impact on jobs, social protection and the social dialogue. Expertise in the area of Decent Work and the involvement of trade unions are of vital importance in this regard.[23] To promote more effective involvement of the Dutch Parliament, the business community, the trade unions, and civil society organisations – including through public debate – it is important for the Dutch Government to communicate the findings of the sustainability impact reviews to Parliament and the general public in good time.[24]

Bilateral agreements provide an opportunity to put sustainability, including Decent Work, on the agenda. This requires more than fine words and intentions, the enforceability of the agreements must be considered. The SER would refer in this connection to the effective enforcement of the sustainability provisions in bilateral treaties, and it supports the efforts of the Dutch Government to designate human rights

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17 SER, 2014, *Themarapportage due diligence* (Thematic report on due diligence), p. 7.
18 SER Advisory Report, 2012, *Verschuivende Economische Machtsverhoudingen*, op. cit., p. 139.
19 Ditto, p. 143.
20 Ditto, p. 162. In December 2013, WTO members did manage to conclude a multilateral agreement, e.g. on improving customs procedures (Trade Facilitation Agreement). This "Bali package" has not yet been ratified by all WTO members. See: *https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm*.
21 Ditto, p. 158.
22 Ditto, p. 157.
23 Ditto, p. 163.
24 Ditto, p. 163.

clauses in trade and other agreements with third countries as "essential", so that the EU can suspend the relevant treaty unilaterally in the event of non-compliance. The SER agrees with the Dutch Government that the terms may have to be tailored in accordance with its relationship with the country in question. The SER has previously noted that before the possibility of suspending a trade treaty is considered, the effectiveness of such a measure must be taken into account as well as the interests of the population in developing countries in market access to the developed countries. This makes it advisable to exercise caution in deploying political trade measures.[25]

Investment agreements: retaining both scope for policymaking and protection levels
In its advisory report on the shifting economic balance of power, the SER also discussed investment protection agreements. In the Lisbon Treaty, the EU acquired exclusive authority in the area of foreign direct investment. When seen in this light, it is logical for the European Commission to table proposals for a European investment policy, including a transitional scheme for producing EU investment agreements. The investment chapter in TTIP involves a wide variety of considerations.

According to the above advisory report, the new European investment agreements should not put direct or indirect pressure on the scope for policymaking in recipient countries with regard to legitimate public interests – without, however, giving way to covert forms of protectionism. This therefore demands careful consideration and a good balance between the protection of foreign investors and the protection of legitimate public interests in recipient countries.[26]

2.4 Building blocks for the assessment of TTIP

The SER's advisory report is guided by the objective of social prosperity in its widest sense and efforts to achieve sustainable globalisation. The SER has set this out in detail in a number of advisory reports. What foundations has this laid for the assessment of TTIP? It is important in this regard that the TTIP negotiations should cover trade *and* investment as well as the lowering of tariffs *and* the removal of unnecessary non-tariff barriers to trade.

Based on the foregoing, the SER has formulated seven principles:

1. The EU and the US must strive to focus the globalisation process on increasing social prosperity that is sustainable, including in emerging economies and developing countries. Although the bilateral route offers the best prospects at the present time, efforts to arrive at a new wide-ranging multilateral agreement must continue. TTIP must be designed in such a way that third countries will also be able, on balance, to profit from it. The agreement should not create a barrier to the accession of other countries or to a new multilateral agreement. TTIP will thus contribute to reducing global inequality.
2. TTIP is expected to establish a "gold standard" for future European trade and investment policy. It should promote European values, including the protection of human rights and workers' rights, the environment, democracy, and the rule of law. The trade and investment policy must therefore promote inclusive growth and reduce inequality. Compliance with the core labour standards – freedom of association in trade unions, the right to collective bargaining, a ban on child labour, forced labour and discrimination – must be the mandatory foundation for the economic activity of the EU and all its trade and investment partners.

3. Europe must be able to maintain its relatively high level of protection, both in legislation and regulations and via other (policy) measures, and to raise that level if

[25] Ditto, pp. 163-164.
[26] Ditto, p. 165.

so desired. TTIP and its provisions for regulatory cooperation, liberalisation of the services market, lowering of tariffs, and arrangements for investment protection should not be detrimental to this.

4. Governments must retain sufficient scope for policymaking to be able to adequately safeguard and improve the levels of protection afforded to people and the environment. Shortcomings concerning decent work will be tackled, and transition problems and distributional effects dealt with by means of flanking policies. Agreements on regulatory cooperation, the liberalisation of the services market and the protection of investments should not put this scope for policymaking under pressure. This requires a proper balance to be struck between trade and investment interests and other justified public interests such as measures to protect people and the environment.
5. Governments must remain free to declare certain services – according to their own preferences – to be "of general public interest"; the method of organising and financing these services also belongs in principle to the sovereignty of the Member States. TTIP must not be detrimental to this.
6. In addition to enshrining human and workers' rights in the agreements themselves, flanking policies are needed in order to properly manage the effects of trade and investment agreements, so that they contribute to inclusive growth. As well as fundamental rights, flanking policy must also guarantee social dialogue, an active employment policy and social protection. Although TTIP may on balance have a positive impact, the consequences for individual companies and for certain groups of workers may be negative and far-reaching. Effective management of these adjustment processes is therefore necessary, with particular attention being paid to older workers with a lower level of education. Another desirable avenue is to pursue a facilitatory and supportive policy for promising clusters and sectors, focusing mainly on boosting their capacity to innovate. Such a policy is primarily the responsibility of the individual Member States, but deserves the support of the European Union. More generally, the globalisation process requires a national policy founded on two basic principles: 1) increasing income generation by means of a higher employment participation rate, productivity growth and an emphasis on comparative advantages; 2) providing income protection and easing the adjustment processes. Both principles are needed to key into the globalisation process and boost support for open markets.
7. Public support and transparency: to promote more effective involvement of the Dutch Parliament, the business community, the trade unions, and civil society organisations – including through public debate – it is essential for the negotiations to be transparent. The Dutch Government must also communicate the findings of the sustainability impact reviews to Parliament and the general public in good time.

These building blocks together form the criteria for assessing the TTIP based on the current texts of the negotiations. They are also a guide to the analysis of TTIP in the sections to come.

3. Background

This section provides background information on the actual trade and investment relations between the EU and the US and TTIP. It attempts to paint a picture of the issues that are the subject of the negotiations and the background to these issues. That lays the foundations for the next section, which explains what the TTIP negotiations are about (and what they are not about). Like other recent trade agreements, TTIP covers not only trade in goods and services but also foreign investment. In addition, it not only concerns the abolition of import tariffs and quotas, but also, or more in particular, the elimination of non-tariff barriers resulting from diverging regulations.

This third section goes on to discuss the economic context of existing trade relations between the US and the EU (3.1), the possible significance of TTIP in a geopolitical context (3.2) and the decision-making process in the negotiations (3.3).

3.1 Context: close economic relations between the US and the EU

Close trade relations between the EU and the US…
The EU Member States and the US maintain close trade and investment relations. They are still each other's most important trade and investment partners. The trade in goods and services between them amounts to almost 900 billion euros annually (see Table 3.1). About 60 percent of the trade involves goods while 40 percent relates to commercial services. The EU has a trade surplus both in goods and in services.

Table 3.1 EU exports to and imports from the US in 2014 (billion euros)

	EU exports to US	EU imports from US	Balance
Goods	310.9	204.9	106
Services	193.6	182.1	11.6
Total	504.6 (18.3%)*	387 (12.2%)*	117.6

Source: European Commission. * Percentage of the EU's total exports and imports respectively.

The traditional measures of international trade shown above do not provide an accurate reflection of the added value of exports. International value chains for goods and services have been created by splitting up production processes. This means that exports consist not only of goods and services from a particular country, but, to a great extent, also of imported goods and services which have been incorporated into them. The added value of exports is therefore not the same as the exports themselves. Because most imports from China still consist of the *assembly* of high-tech products such as computers that have been developed elsewhere in the world, China's exports, when measured in terms of added value, are much less than the traditional measure based on the total value of its gross exports. The reverse is true of trade relations between the US and the EU: they are much larger in terms of added value than the traditional trade figures would suggest.[27]

... and investment relations between the EU and the US
In 2012, the direct investment flow from US citizens and companies to the EU amounted to approximately 133 billion euros. Direct investment from the EU to the US was about

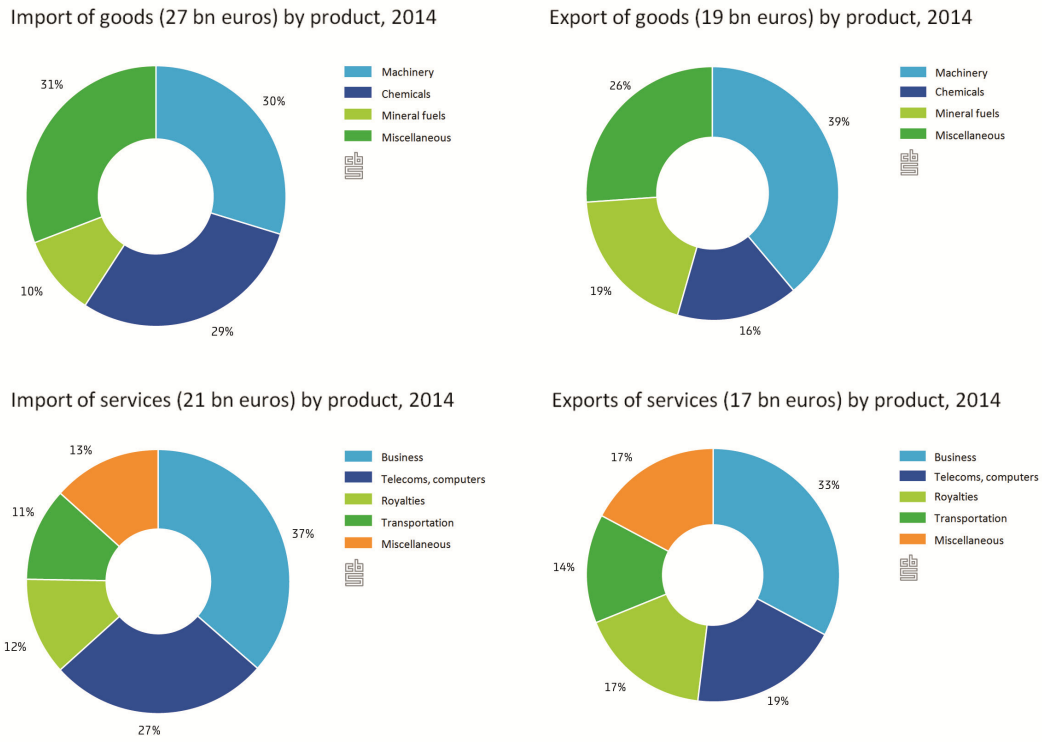
[27] For details, see D. S. Hamilton and J. Pelkmans, 2015, Rule-makers or rule takers? An introduction to TTIP, in D. S. Hamilton and J. Pelkmans (ed.), *Rule-makers or rule takers? Exploring the Transatlantic Trade and Investment Partnership*, pp. 4-7. They also point out that the added value approach shows that the importance of the trade in services in particular is much greater than the traditional figures indicate. For the application of the added value approach in the Netherlands, see: O. Lemmers, 2013, *Global value chains and the value added of trade*, CBS 2013; SER Advisory Report, 2008, *Duurzame Globalisering: een wereld te winnen*, pp. 90-31; SER Advisory Report, 2015, *Verhogen maatschappelijke welvaart via arbeidsinzet en arbeidsproductiviteit* [Labour participation and labour productivity key to increasing public prosperity], pp. 25-26.

94 billion euros.[28] The value of the total amount of direct investment from the US to EU member states and vice versa almost balances out: the value of US investment in the EU amounted to 1,652 billion euros (50 percent of total foreign investment); the value of investment from EU member states to the US amounts to 1,686 billion euros (62 percent of the total). That is much more than both of them have invested in Asia.[29]

The total value of portfolio investments from the EU to the US was 3,627 billion euros at the end of 2014.[30] In 2104, the US had invested 3,434 billion euros in European shares and securities.[31]

Close trade and investment relations also between the Netherlands and the US
In 2014, the Netherlands exported goods to the value of 19 billion euros to the US and imported goods to the value of 27 billion euros. As regards services, exports were worth 17 billion euros and imports 21 billion euros.[32] Figure 3.1 shows how the trade in goods and services between the Netherlands and the US is made up. It shows that most of the trade takes place within sectors (see below).

Figure 3.1 Trade in goods and services between NL and US (2014)



Source: Statistics Netherlands

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28 W.H. Cooper, 2014, EU-U.S. Economic Ties: Framework, Scope and Magnitude, Congressional Research Service, 7-5700, pp. 6-7.

29 http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/.

30 Data obtained from and compiled on the basis of the IMF's Coordinated Portfolio Investment Survey (CPIS): *http://data.imf.org/?sk=B981B4E3-4E58-467E-9B90-9DE0C3367363&sId=1424792073105&ss=1424792073105*. The IMF's figures are expressed in US dollars. The exchange rate used to convert to euros was 1 euro = 1.0855 US dollars. Portfolio investments as defined by the IMF consist of shares and investment fund shares (with a controlling interest exceeding 10 percent) and short and long-term debt instruments. Four countries account for almost 60 percent of the investment from Europe to the US: the UK, Ireland, Luxembourg and the Netherlands.

31 Almost three-quarters (73 percent) was invested in the UK, Ireland, Luxembourg and the Netherlands.

32 For a more detailed factsheet, see: *http://www.cbs.nl/NR/rdonlyres/9616DD05-3E69-4A05-BF93-E6734CF45DC4/0/2015FS10NederlandendeVS.pdf*

Based on added value (see above), exports from the Netherlands to the US are much greater. Based on the traditional trade figures above, the US is in seventh place of the countries to which the Netherlands exports at 4 percent of total exports (Germany is in first place with 25 percent). However, based on added value, the US is in third place at 10 percent of total exports and the difference between the US and Germany, which is also our biggest export country by this measure (14 percent), is much smaller.[33]

Our country has been a major investor in the US for many years. Conversely, the US has invested a lot of money in the Netherlands. This is true both of direct investment and of portfolio investment. The extent of investment relations is also determined by the fact that the Netherlands has many SFIs (Special Financial Institutions). These are Dutch-based subsidiaries of foreign enterprises which act as a financial intermediary between different components of the group of which they form part.[34] The assets and liabilities of these institutions mainly involve direct investments from one country to another country via the Netherlands or channelling funds raised abroad to the foreign parent company. Table 3.2 shows the investment relations between the Netherlands and the US with and without SFIs.

Table 3.2 Investment relations between NL and US (billions of euros)

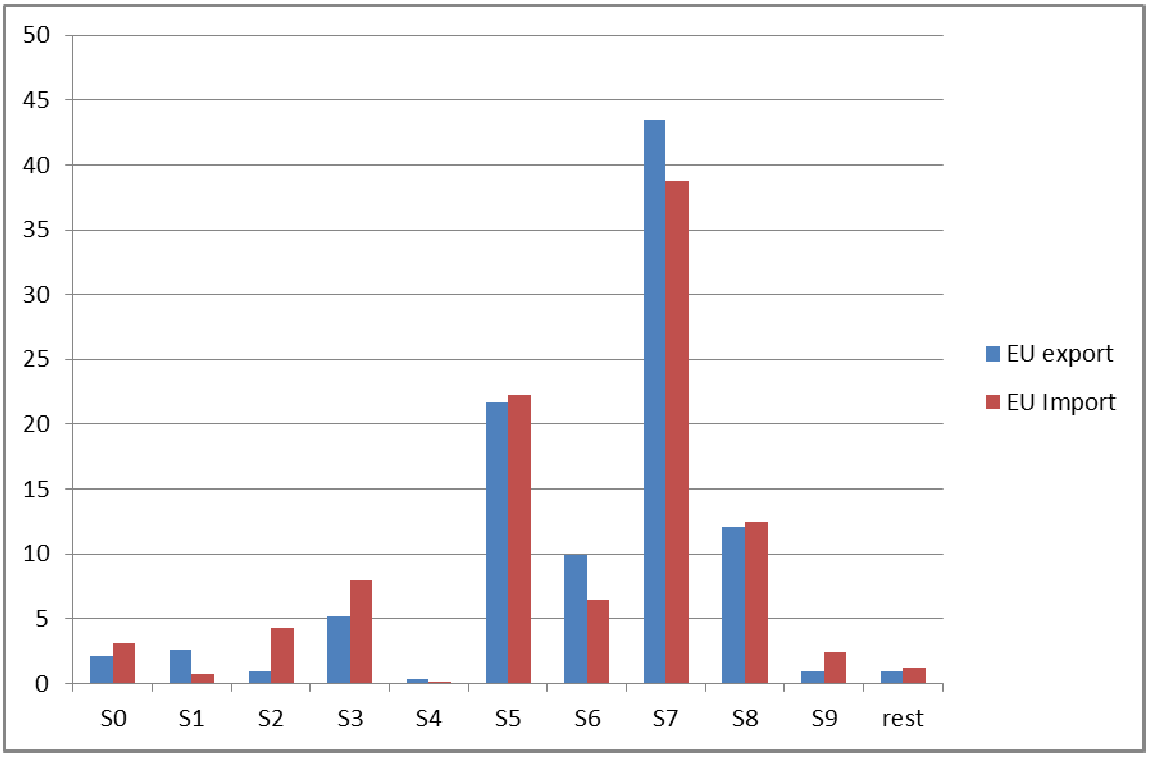
	Direct Investment		Portfolio Investment	
	NL > US	US > NL	NL > US	US > NL
Excl. SFIs	72[1]	65[2]		
Incl. SFIs	552[3] (436)[4]	704[5] (702)[6]	402[7]	361[8]

Source and key: 1: DNB table 12.6.2, period 2013; 2. DNB table 12.6.1, period 2013; 3. DNB table 12.19, period 2013; 4. Ditto, period 2014; 5. DNB table 12.18, period 2013; 6. Ditto, period 2014; 7. IMF, period end 2014; 8. Ditto.
DNB: http://www.dnb.nl/statistiek/statistieken-dnb/betalingsbalans-en-extern-vermogen/index.jsp
IMF: see footnote 30.

Breakdown of the trade between the EU and the US by sector
Trade is mainly concentrated within sectors. This is typical of trade relations between highly developed countries. It is therefore not true that the EU Member States specialise in one sector and the US specialises in another sector and that negotiations are conducted on this basis. Mutual trade relations for goods are closest in Chemicals (S5) and Machinery and Transport Equipment (S7); these sectors together account for over two-thirds of the trade in goods (see Figure 3.2).

33 ING, 2014, *Nederland Handelsland: herziening ranglijst belangrijkste exportlanden voor Nederland*, p. 3.
34 Definition from De Nederlandsche Bank (DNB – Dutch Central Bank).

Figure 3.2 – Structure of the trade in goods between the EU and the US (2014). (Vertical axis: share of sector in total EU export/import of goods).



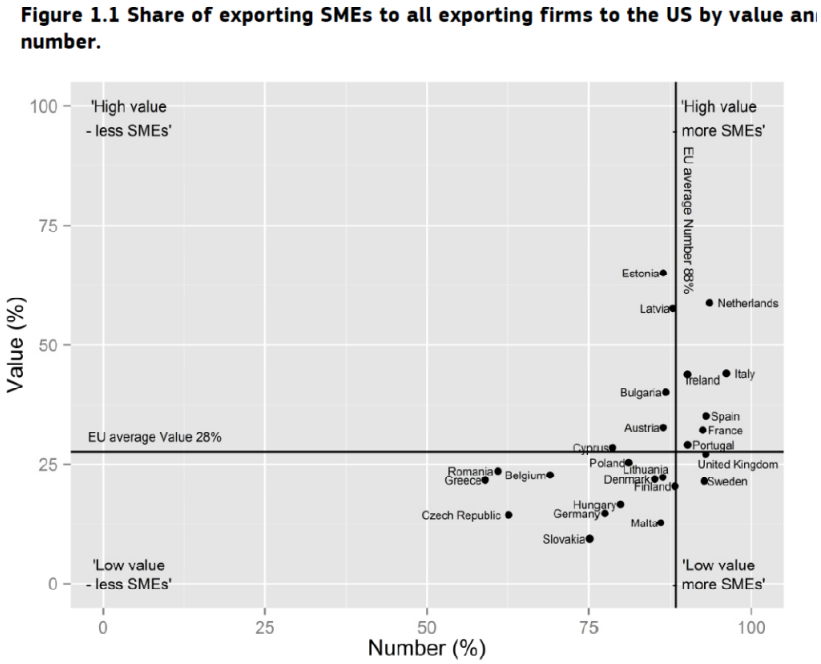
Source: Based on data from European Commission.
Key: The sectors are classified according to the Standard International Trade Classification (SITC1): S0: Food and live animals, S1: Beverages and tobacco; S2: Crude materials, except fuels; S3: Mineral fuels; S4: Animal and vegetable oils and fats; S5: Chemical products; S6: Manufactured goods classified chiefly by material (leather, steel, etc.), S7: Machinery and transport equipment; S8: Miscellaneous manufactured articles; S9 Commodities and transactions not classified elsewhere.

Substantial proportion of exports to the US made by medium-sized enterprises
It is mainly larger companies that export across the Atlantic. This does not detract from the fact that 28 percent of the value of exports from the EU to the US is accounted for by small and medium-sized enterprises (SMEs: businesses with up to 250 employees).[35] Of the 169,000 businesses in the EU that export to the US, 150,000 (88 percent) are SMEs.

These percentages are even higher for the Netherlands: 94 percent of exporters to the US are SMEs and SMEs account for 59 percent of the value of exports to the US. This means that our country enjoys a special position in the EU (see Figure 3.3): relatively much smaller companies (mostly between 50 and 250 employees) are already actively trading with the US and could also derive a direct benefit from improved access to this large market.

[35] The following passage is based on: European Commission, Report; *Small and Medium Sized Enterprises and the Transatlantic Trade and Investment Partnership*, Luxembourg 2014

Figure 3.3 – Share of SMEs in exports to the US, by number of companies and by value of exports



Source: US-TEC database breakdown by MS.

However, the fact remains that a large proportion of small and medium-sized enterprises do not export at all. Often, the product or service does not lend itself to this ("the local baker"). Their small scale can also be a handicap when operating in export markets. This does not alter the fact that as many as one third of small businesses (up to 50 employees, but excluding self-employed persons with no staff and sole traders) operate internationally.[36] But these activities are mainly focused on other European countries – Belgium and Germany in particular. Almost half of all medium-sized companies (50 to 250 employees) operate internationally. In this category, we also find the businesses that operate on the US market or have an ambition to do so.[37]

In the past, Dutch SMEs were found to be highly dependent on domestic expenditure. This proved to be a major handicap in the recent crisis.[38] A somewhat stronger international focus (both inside and outside the EU) could help reinforce the position of SMEs through the economic cycle.

Both direct and indirect effects

Even businesses that do not operate internationally themselves may experience the consequences of further liberalisation of trade with the United States. These indirect effects can be both positive and negative. A company may form part of – or supply to –

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36 ING Economisch Bureau, 2014, *MKB – Een derde kleinbedrijf doet zaken over de grens*, August 2014.

37 According to figures from the European Commission (Eurostat), about 6,100 Dutch SMEs exported to the US in 2012 (European Commission, Report; *Small and Medium-Sized Enterprises and the Transatlantic Trade and Investment Partnership*, Luxembourg, 2014, p. 6). In 2014, there were 10,620 medium-sized businesses (50-249 employees), 48,580 SMEs with 10 to 49 employees and 289,615 businesses with 2 to 9 employees in the Netherlands: see: *http://www.cbs.nl/nl-NL/menu/themas/bedrijven/publicaties/artikelen/archief/2015/steeds-meer-ondernemers-in-nederland.htm*. If we now compare the 6,100 SMEs that export to the US with the total number of SMEs with 2 or more employees (349,000), this produces a percentage of 1.7. If we take into account the fact that the export value of the small businesses (less than 10 employees) is low, and compare the 6,100 with the SMEs with 10 or more employees, the result is 10 percent (6100/(10620 + 48580)) x 100). For the distribution of export value by size of company: *http://www.staatvanhetmkb.nl/dashboard/internationaal*.

38 SER Report, 2014, *Verbreding en versterking financiering mkb*.

an international value chain that receives an additional boost from TTIP. On the other hand, competitive pressure is certain to increase on certain markets. That is tough on current suppliers (large and small) – but can be beneficial to buyers (who include SMEs as well as consumers). SMEs could also be affected by trade diversion, where Transatlantic trade replaces intra-European trade. Due to the importance of the SME sector to European employment, it is essential to gain a better idea of the extent and regional impact of these potential effects.

Trade barriers often weigh more heavily on smaller the companies
A survey has shown that the main barriers encountered by SMEs exporting goods to the US are compliance with food safety and food quality rules (SPS) and technical regulations (TBT) in general. Restrictions on the movement of people are often cited as a barrier to the exporting of services to the US.

For a substantial proportion of businesses, the costs associated with complying with the relevant regulations governing exports to the US amount to over 5 percent of their income from sales in the US. These costs are even more of a burden for smaller businesses. For SMEs, red tape and bureaucratic procedures, conforming to different national technical standards and complying with other regulations in various foreign countries constitute major barriers to exporting their products to the US. The costs associated with all of this are disproportionate and therefore often prohibitive for smaller businesses.[39] The reduction of unnecessary trading costs is therefore very much in the interests of smaller businesses in particular.

Enshrining of current trade and investment relations
The current trade relations between the EU and the US are for the most part enshrined in the WTO rules, the main principles being non-discrimination (by application of the "most favoured nation" principle and national treatment) and market access (see insert on WTO). The rules cover subjects including tariffs, trade in services, public procurement, technical standards, sanitary and phytosanitary measures and intellectual property.

The WTO and the basic rules for international trade

The World Trade Organisation (WTO) is an intergovernmental organisation dealing with the rules of trade between nations. The WTO monitors these rules and offers governments a platform and mechanism for settling trade disputes. WTO law consists of nineteen treaties (including a treaty on technical trade barriers and phytosanitary measures: see insert below) and the interpretations of those treaties by the WTO dispute panels and WTO Appellate Body. It consists of four categories of basic substantive rules:
• Rules on *non-discrimination*, including the *Most Favoured Nation* treatment obligation and the obligation to accord *National Treatment* to "like" foreign products (i.e. those that are the same as domestic products).
• Rules on *Market Access*, including rules on tariff and non-tariff barriers to trade.
• Rules on "unfair" trade, including rules on anti-dumping duties, subsidies and countervailing duties;

[39] European Commission, Commission Staff Working Document – *Impact Assessment Report on the future of EU-US trade relations*, SWD(2013)68 final, 12-3-2013, p. 46. From the American side, reference is made to the trade barriers experienced by smaller businesses in particular in exporting to the EU: US International Trade Commission, 2014, *Trade Barriers That U.S. Small and Medium-sized Enterprises Perceive as Affecting Exports to the European Union*, Investigation No. 332-541, USITC Publication 4455, Washington, DC.

• Rules on conflicts between trade liberalisation and other societal values and interests, including the general public policy exceptions, the national and international security exceptions, the economic emergency exception, the regional integration exceptions and the rules on special and differential treatment of developing countries.

Source: SER Advisory Report on sustainable globalisation (*Duurzame Globalisering*), pp. 187-8.

In addition, there are bilateral cooperation agreements between the EU and the US in areas including technical standards and veterinary measures.
Investment protection is now governed by bilateral treaties between the US and a few individual EU Member States. The Netherlands does not have an investment protection agreement with the US.[40]

A number of barriers to trade and investment flows exist despite the fact that trade and investment relations between the EU and the US are enshrined in WTO rules and bilateral agreements. Section 4 provides examples of this. The reasons for these barriers are many and varied. For example, the US and Europe have granted each other only limited concessions under the WTO agreements on government tenders.[41] And the existing bilateral agreements on technical and veterinary standards have a limited scope.[42] Because of this, trade barriers remain in these areas, such as "Buy American" provisions for public procurement (Section 4.5) and a US prohibition on the import of beef (Section 4.3). TTIP is an attempt to make progress on these and other points in order to foster trade and investment relations. For example, the position of the European negotiators is to get rid of the "Buy American" provisions and the import prohibition on beef where possible.

Public concerns about and objections to the effects of TTIP
Trade barriers can have a function in protecting people and the environment. There are concerns that any further lowering of trade barriers between the US and the EU will be at the expense of this protective function. In addition, doubts exist as to whether such lowering would have a positive effect on economic growth. For example, it may be asked whether European and Dutch businesses will be able to cope with stronger competition from the US. Is there indeed a "level playing field" or would TTIP open the door to allow competition from US companies to drive SMEs in Europe out of business?
If TTIP does lead to a little more economic growth, will this actually deliver jobs? And will these be jobs for lower-educated workers?

With TTIP, the US and the EU will grant each other the benefits of freer market access. This will inevitably lead to trade diversion, which will disadvantage third countries (including developing countries). Will these countries be left holding the baby?
In other words, will TTIP actually benefit our social prosperity? Important elements of this question are set out in detail in the sections below.

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40 However, there are provisions on the treatment of investors in the Friendship Treaty that the US and the Netherlands signed in 1956 (DAFT: Dutch-American Friendship Treaty). This treaty contains provisions on treating foreign investors on an equal footing with residents and foreign investors' access to the market. It did not, however, provide an arbitration mechanism. For details, see: C. Tietje and F. Baetens, 2014, *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, study for the Dutch Ministry of Foreign Affairs, appendix to TK 21 501-02, No. 1397.2014, p. 36.

41 For details, see: S. Woolcock and J. H. Grier, 2015, TTIP and Public Procurement, in: D. S. Hamilton and J. Pelkmans (ed.), *Rule-makers or rule takers? Exploring the Transatlantic Trade and Investment Partnership*, pp. 318-320.

42 For technical trade barriers, see, e.g.: M. Egan and J. Pelkmans, 2015, TTIP's Hard Core Technical barriers to trade and standards, in: S. Hamilton and J. Pelkmans (ed.), *Rule-makers or rule takers? Exploring the Transatlantic Trade and Investment Partnership*, pp. 67-68.

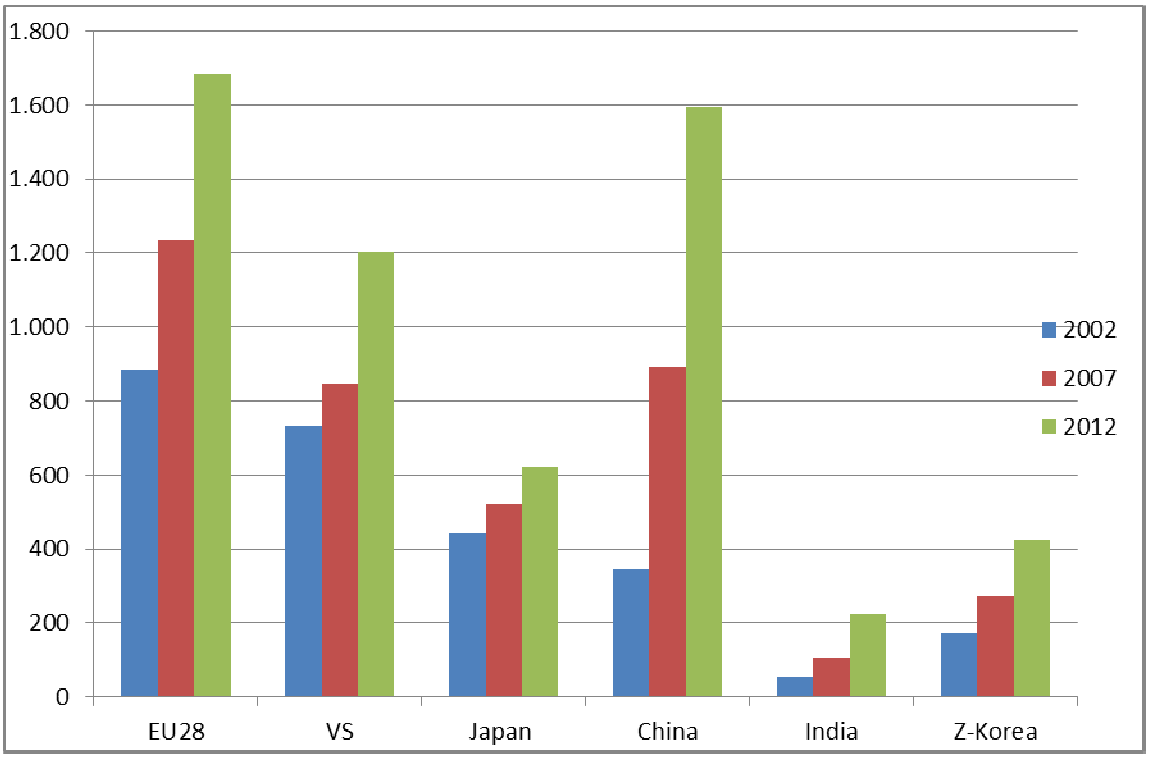
3.2 Geopolitical significance of TTIP

One of the principles adopted by the SER is that TTIP must set a "gold standard" for future European and trade policy (Section 2.4). An authoritative treaty between the EU and the US can have a global reach in the area of sustainability because of the predominance of the two trading blocs. TTIP can also strengthen the transatlantic alliance in an increasingly unstable world, with tensions arising from events such as Russia's annexation of the Crimea, China's expansionist tendencies in the Chinese South Sea, the Civil War in Syria and the disruption this is causing in the region.[43]

If agreement is reached on TTIP, it will be the biggest ever global trade agreement. The US and the EU together account for 47 percent of world imports, 43 percent of world exports, 35 percent of world income and 12 percent of the world's population.[44]

But the close trade relations between the EU and the US are taking place within a shifting economic balance of power. This is mainly due to the rapid emergence of China. Over a period of ten years, China has become the world's largest exporter of goods (see Figure 3.4). Only the EU as a trading bloc is bigger.[45]

Figure 3.4 – Exports of goods (bn euros) to the EU, US, Japan, China, India and South Korea, 2002-2012



Source: Eurostat. The EU28 statistics only relate to the trade with non-EU countries.

[43] See P. van Ham, 2014, *TTIP and the Renaissance of Transatlanticism*, Clingendael Report: "The TTIP will be indispensable for buying time and initiating the transatlantic renaissance that is needed to enter the post-Western era with confidence and from a position of strength" (p. 10).

[44] Steven Brakman, Tristan Kohl, Charles van Marrewijk, 2015, *The Impact of the Transatlantic Trade & Investment Partnership (TTIP) on Low Income Countries – Agreement heterogeneity and supply chain linkages*, p. 3.

[45] It should be noted, however, that – in terms of added value – China's exports are much less significant because it mainly assembles high-tech products which have been developed elsewhere (see above).

A trade agreement between the EU and the US has long been under consideration. In the past, concern that a bilateral agreement of this kind could be detrimental to the multilateral trading system was one of the reasons for caution. However, the situation has now changed. As the SER has previously noted, it has not been possible, partly in view of the shifting economic balance of power, to reach multilateral agreements that can match the current phase of the globalisation process and and that focus on the promotion of the trade in services, investment, competition, protection of intellectual property, the elimination of non-tariff barriers and sustainability issues such as Decent Work.[46]

This threatens to erode the multilateral system in the long term. Although reinforcement of the multilateral system is still the royal route for reaching widely supported agreements on how we should shape globalisation, bilateral treaties currently offer the best prospects for success. An agreement between the US and the EU – given the great importance of these two trading blocs in the total global market – can provide important components for a new multilateral agreement, which China and India will also sign at a later date.[47]

In October 2015, the US concluded a draft trade and investment agreement with Pacific Rim countries (TPP), which will further increase the pressure on China and India to cooperate on drafting new and better rules for the multilateral trading system (see insert).

This makes it more important to provide a prominent place in the architecture of TTIP, as an authoritative treaty with a global reach based on principles of sustainability, such as effective protection of the environment, for the recognition of the importance of public services and powerful guarantees on Decent Work.

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46 SER Advisory Report, 2012, *Verschuivende Economische Machtsverhoudingen*.

47 See also D. Hamilton and S. Blockmans, 2015, *The Geostrategic Implications of TTIP*, CEPS Special Report No. 105.

TTIP, TPP, CETA, TISA and more

In early October 2015, agreement was reached on the Trans-Pacific Partnership **(TPP)** between the US and Australia, Brunei, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The draft TTP agreement encompasses some forty percent of the world economy and would therefore be the biggest trade agreement since the WTO Uruguay Round. The legal aspects of the draft agreement now have to be "tidied up" first. It then has to be ratified by the countries.

The EU has concluded negotiations with Canada on a trade and investment agreement, the Comprehensive Economic and Trade Agreement **(CETA)**. This agreement still awaits ratification. The EU is negotiating a free-trade agreement with Japan.

The US and the EU have taken the lead in concluding a Trade in Service Agreement **(TiSA)** with 22 other WTO members and other countries willing to join. The negotiations are still in progress; a lot is still unclear and the matter is still the subject of public debate.

Another factor, in addition to this strategic consideration, is that the American and European leaders are seeking ways of helping to achieve higher economic growth and restore jobs. Against this background, a decision was taken at the end of 2011 to set up a bilateral High Level Working Group on Jobs and Growth with the task of assessing all the options for reinforcing transatlantic trade relations.[48] In its final report, this Working Group concluded that a comprehensive trade and investment agreement was the best way to promote trade and stimulate employment. The TTIP negotiations got underway in 2013, after President Obama had informed the US Congress and the Council of Ministers had given the European Commission a mandate.

The consequences of TTIP for third countries are discussed in Section 6.4. Also discussed are ways that the EU and the US can ensure that developing countries can also benefit from TTIP.

3.3 Democratic control: who takes the decision on TTIP?

The European Commission is negotiating with the US on behalf of the Member States
It is clear from the above that the European Commission is leading the negotiations. The background is that, under the Treaty on the Functioning of the European Union (TFEU), the EU has exclusive authority in the area of trade and foreign investment. This means that only the EU has legislative power and can conclude an international agreement. The TFEU states that the European Commission will conduct negotiations on establishing an international agreement in the area of trade and investment. The Commission does so within the terms of the mandate that it has received from the Council of Ministers and in consultation with a special committee of the Council of Ministers (the Trade Policy Committee). This mandate was published in 2014.

The Commission reports regularly to the Trade Policy Committee and the European Parliament (EP) on the progress of the negotiations. The negotiations are held in rounds which alternate between the US and Europe. Although there is no prior consultation with the EP, the results of the negotiations are explained by the negotiators in the European

[48] Letter to Parliament (*Kamerbrief*) 21 501-02, No. 1372.

Parliament and the US Congress.[49] As part of efforts to increase transparency, the European Commission decided in August 2015 to provide more detailed reports on its website.[50] In October 2015, a detailed report was published on the subjects discussed during the 11th round of negotiations.[51] The European Commission now publishes on its website almost all the proposals that it tables during the negotiations.[52] This is unusual when compared to previous negotiations on trade agreements. The European Commission will observe this level of transparency in all of its negotiations on trade and investment agreements.[53]

There is greater reluctance to share documents on the American side. Reading rooms were opened in American embassies in European capitals in 2015. However, they are not accessible to national parliaments or other stakeholders. The Americans' reluctance makes it difficult to find out how the parties are responding to each other's proposals and what trade-offs are taking place in the negotiations. In the reading room in Brussels, MEPs can view all the EU's negotiation documents, which are also shared with the Member States. Initially, this only applied to the chair and party leaders of the EP's international trade committee.[54] However, it now applies to all members on the insistence of the EP. This viewing is subject to the EP's general conditions for handling confidential documents.[55] The criticism of this system is that viewing in a reading room means that the documents concerned are still shared behind closed doors. This makes it difficult to provide solicited and unsolicited advice, which continues to be problematic in light of elected representatives having to assess complex material and in light of the necessity – due to the scope of TTIP – to conduct an open and informed debate on TTIP.

The European Commission organises regular consultations, e.g. during each round of negotiations, with representatives of the business community and civil society. Minister Ploumen does likewise: she does not regard transparency and consultation as the responsibility of the European Commission alone.[56]

The Council will ultimately decide whether an agreement is signed
Under Article 207 of the TFEU, the Council will decide by a qualified majority whether to sign a trade agreement. The situation is different with regard to the negotiations for and conclusion of agreements on the trade in services, the trade aspects of intellectual property and foreign direct investment. If the agreement contains provisions in areas where the TFEU stipulates a unanimous vote for measures that apply within the EU, the Council must also decide on these TTIP provisions by a unanimous vote.
The ministers in the Council are accountable to their national parliaments in this regard. National parliaments will have the greatest influence on the ultimate decision-making process in matters on which the Council must take a unanimous decision.

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49 Consultation does take place with the TTIP Stakeholder Advisory Group between negotiations. For details of the membership and the reports of this group, see: *http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/#advisory-group*

50 *http://ec.europa.eu/commission/2014-2019/malmstrom/blog/transparency-ttip_en*. The position taken with regard to the amount of tariffs and tariff lines is confidential. Transparency on this subject could harm the EU's negotiating position and affect markets.

51 *http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf*

52 *http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230*

53 European Commission, Trade for All: Towards a more responsible trade and investment policy, pp. 16-18. See: *http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154137.pdf*

54 See: *http://www.europarl.europa.eu/news/nl/news-room/content/20151202IPR05759/html/All-MEPs-to-have-access-to-all-confidential-TTIP-documents*. *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20150428+ANN-07+DOC+XML+V0//NL&navigationBar=YES*

55 See: *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20150428+ANN-07+DOC+XML+V0//NL&navigationBar=YES*

56 See TK 21 501-02, 1372 (Letter to Parliament of 22 April 2014 concerning TTIP).

The EP and the Council can only say yes or no to an agreement
Before the European Commission can submit a proposal to the Council to conclude an agreement, it must be approved by the European Parliament. Both the Council and the EP can only approve or reject an agreement and cannot make formal amendments to it. On a previous occasion, the EP declined to approve the *Anti-Counterfeiting Trade Agreement* (ACTA) on exchanging data with the US.

Guiding resolution of the EP
Although the EP has no prior say in the mandate to negotiate, it can make recommendations to the Commission which make it clear what criteria have to be met for it to approve any agreement. On 8 July 2015, the EP adopted a resolution which contained recommendations to the European Commission concerning TTIP by which it will assess an agreement.[57] This resolution states that the successful conclusion of TTIP is of high political importance. It calls upon the Commission to ensure that the TTIP negotiations lead to an ambitious, and balanced trade and investment agreement of a high standard that would promote sustainable growth and support the creation of high-quality jobs.

The EP wants to ensure that the high level of protection afforded to European consumers in terms of safety and health is guaranteed and that social, fiscal and environmental dumping is prevented. The EP also stresses that public services must be kept out of the agreement and that European geographical indications must be properly protected. Vulnerable agricultural and industrial products must continue to enjoy special treatment.

In order to save time at borders, the EP calls for the mutual recognition of equivalent standards. However, the EP wants the negotiators to ensure that in areas where there are major differences between US and European standards – e.g. chemicals or clones being allowed – the European standards will continue to apply. According to the EP, the proposed regulatory cooperation must fully respect existing decision-making procedures and the guarantees they contain as regards democracy, be transparent and guarantee the equal involvement of stakeholders.

The EP wants the sustainable development chapter to be binding and enforceable. It must aim at the full ratification, implementation and enforcement of the fundamental ILO conventions. To ensure that labour and environmental standards are implemented and respected, TTIP must build on the good practices of previous trade agreements, there must be an effective monitoring mechanism which also involves social partners and the implementation of and compliance with these standards must also fall within the scope of the general dispute settlement mechanism for the whole agreement.

The parties in the EP have reached a compromise on the way disputes between investors and countries should be settled. This compromise involves rejecting the old type of investment protection, but leaves open the possibility of creating a new mechanism. The EP believes that such a system must be transparent and subject to democratic principles and scrutiny. Disputes must be settled by publicly appointed, independent professional judges in public hearings. This must include an appellate mechanism, the jurisdiction of courts of the EU and of the Member States must be respected and private interests must not be allowed to undermine public policy objectives. In response, European Commissioner Malmström set out her proposals for reforming the system in a legal text that was submitted to the US (see Section 4.6, Table 4.3).

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[57] *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//NL*.

Section 5 discusses in detail the guarantees for the protection of public interests that the EP is asking for in the areas of public services, regulatory cooperation and ISDS.

Mixed agreement also requires consent of national parliaments
The progress of the decision-making procedure also depends on the nature of the agreement: is it an "EU-only" agreement or a mixed agreement? A mixed agreement is an agreement relating to subjects that fall within the competence of the Member States.[58] If it is a mixed agreement, TTIP will also have to be ratified by the national parliaments.[59] In the Netherlands, TTIP will be discussed by the Dutch Parliament and then by the Senate, partly based on advice from the Council of State.[60]

The European Commission's proposal to the Council to sign the agreement can be accompanied by a proposal for the provisional application of TTIP. This applies solely to the parts of it over which the EU has jurisdiction. The Commission can also table a proposal only to apply some of these parts provisionally. If a national parliament does not give its approval, a mixed agreement cannot take effect. However, the rejection of a mixed agreement by a Member State would not affect the provisional application of the EU part of the agreement. This part of the agreement would apply in full in all Member States. However, this has never happened to date.

On the initiative of the Dutch Parliament, twenty Member State parliaments have urged the Commission to classify TTIP as a mixed agreement. The Dutch Government also considers it to be a mixed agreement.[61] According to the Commission, this is ultimately for the Council to decide. Based on the experience of previous trade agreements with South Korea, Peru and Colombia, where (despite the fact that two of the three agreements required an EU-only signature) it was decided to sign them as mixed agreements, the Commission expects that the Council will also regard TTIP as a mixed agreement.

The Commission and the Council disagree in their interpretation of the Lisbon Treaty when it refers to a mixed agreement. According to the Commission, the free-trade agreements between the EU and Peru and Colombia related solely to matters within the competence of the EU. However, the Council decided they were mixed agreements. In response to the signing of the free-trade agreement with Singapore, the Commission has therefore requested the Court of Justice to clarify the matter.[62]

The Commission itself believes that it ultimately depends on the content of the agreement whether it will be regarded as an EU-only or
a mixed agreement. It will not give its opinion until its final proposal on whether to sign. At the same time, the Commission recommends that the European Council and the European Parliament should be fully involved in the negotiating process and the final concluding phase, so that – according to the Commission – full democratic control is guaranteed throughout the process. The Commission also emphasises that it keeps the Council and the European Parliament informed of progress after each round of negotiations. This proves – according to the Commission – that the institutional framework of the EU allows numerous opportunities for national authorities in the Member States to become involved in the negotiations for and approval of trade agreements.

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58 For a detailed explanation, see: *http://www.minbuza.nl/ecer/dossiers/externe-betrekkingen/exclusieve-en-gedeelde-externe-bevoegdheden-van-de-eu.html*

59 As stated above, national parliaments are involved in TTIP irrespective of the nature of the agreement via the responsibilities of the position held by their minister in the Council.

60 Letter to Parliament from Minister Ploumen of 8 May 2015, TK 21 501-02, No. 1499, p.3

61 Ditto.

62 *http://europa.eu/rapid/press-release_IP-14-1235_en.htm*

If the Council indeed decides that TTIP is a mixed agreement, the whole agreement will enter into force as soon as the Council, the European Parliament and the parliaments of the 28 Member States agree.

4. What are the negotiations about?

The TTIP negotiations have not yet been concluded. Nor is there any draft agreement as yet. What follows is an attempt to outline the subjects covered by the negotiations. Where possible, this has been based on more detailed proposals that the European Commission has tabled during the negotiating process. Reference is also made to the mandate or the guidelines that the European Commission has received from the Council.

This section has been structured as follows: Section 4.1 discusses the general principles contained in the negotiating mandate for TTIP. The subsequent sections discuss the following in the order shown:

- the removal of barriers *at* the border, mainly by lowering tariffs (4.2);
- the reduction of barriers *behind* the border through regulatory cooperation (4.3);
- the liberalisation of the trade in services (4.4);
- public procurement (4.5);
- the liberalisation and protection of foreign investment (4.6);
- sustainable development and trade (4.7).

Each section begins with an example of a trade barrier. It goes on to describe the mandate that the European Commission has been given in this regard. It then discusses the specific proposals, if any, that the European Commission tabled in the negotiations. Finally, there is a brief description of the main public concerns and objections, which are discussed in more detail in Section 5. This section also discusses the guarantees provided to address these concerns and objections.

4.1 General principles for the EU's mandate to negotiate TTIP

The EU has exclusive authority in the area of trade policy (including foreign investment). This means that the European Commission is negotiating with the US on TTIP on behalf of the Member States (see Section 3.3). The Commission does so within the terms of the mandate that it has received from the Member States via the Council of Ministers. This mandate was published in 2014. It sets out the principles for a TTIP agreement and determines its scope. It will be an important benchmark for the Council when assessing the draft TTIP agreement.

The negotiating mandate
The negotiating mandate states that the aim of TTIP is to promote trade and investment (including portfolio investment) between the EU and the US, thereby creating new opportunities for economic growth and jobs.[63] The routes to achieving this aim are improved market access, regulatory cooperation in areas such as intellectual property and the protection of labour and the environment.[64] The agreement must be fully consistent with WTO rules and requirements. The provisions on trade, services and regulatory cooperation must go further than the parties' commitments in existing WTO conventions.

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63 Council of Ministers, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directive 7, p. 4. This document was released on 9 October 2014: *http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf*.

64 Ditto, Directive 5, p. 3: "The Agreement shall be composed of three key components: (a) market access, (b) regulatory issues and Non-Tariff Barriers (NTBs), and (c) rules. All three components will be negotiated in parallel and will form part of a single undertaking ensuring a balanced outcome between the elimination of duties, the elimination of unnecessary regulatory obstacles to trade and an improvement in rules, leading to a substantial result in each of these components and effective opening of each other's markets."

The mandate states that TTIP should recognise that sustainable development is an overarching objective of the parties and that they will aim to ensure and facilitate respect for international environmental and labour standards.[65] Efforts must be made to achieve a high level of protection for the environment, workers and consumers as stated in the EU's acquis and Member States' legislation.[66] The EU and the US should lay down in the TTIP that they will not promote trade and investment by lowering standards for the environment, labour and health and safety, or by lowering the core labour standards.[67] TTIP must include the right to take measures to ensure the protection of health, safety, labour, the environment and cultural diversity.[68]

TTIP as a living agreement

The EU mandate provides for an institutional structure in TTIP that ensures an effective follow-up of TTIP provisions and which also promotes the achievement of innovative compatibility of regulatory systems. This is also referred to as a "living agreement" and is set out in the TTIP chapter headed "Regulatory Cooperation".
The insert below shows how this is set out in the agreement between the EU and Canada (CETA).

Powers of the CETA Joint Committee

It is set out in CETA that a CETA Joint Committee will be established. The aim of this is to ensure that new circumstances, such as technological advances or new scientific discoveries, can be taken into account when implementing the provisions of the agreement.

The power to take decisions in the CETA Joint Committee is described in detail in the agreement and is limited to principally technical issues and trade and customs matters, to implement the provisions of the agreement. Examples include the amendment of provisions on rules of origin, the acceleration of liberalisation deadlines, the amendment of the list of geographical indications, the mutual recognition of professional qualifications or the introduction of provisions to facilitate trade. Official representatives of the EU and Canada have a seat on the CETA Joint Committee. The provisions, which may be binding, are agreed by the mutual consent of both parties. The EU's agreement to a decision by the Joint Committee must be approved in advance by the Council of EU Ministers, based on a proposal by the Commission. The European Parliament must be informed accordingly.

This is the usual approach, which can also be found in other trade agreements, such as the agreement between the EU and South Korea. Not all technical decisions to implement agreements are submitted individually to national parliaments for approval. The Minister and the European Commission have the authority to take decisions on implementation independently, within the legal frameworks approved by national parliaments and the

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65 Ditto, Directive 8, p. 4: "The Agreement should recognise that sustainable development is an overarching objective of the Parties and that they will aim at ensuring and facilitating respect of international environmental and labour agreements and standards while promoting high levels of protection for the environment, labour and consumers, consistent with the EU acquis and Member States' legislation". See also Directive 6, p. 3, which states that the preamble should include the following: "The commitment of the Parties to sustainable development and the contribution of international trade to sustainable development in its economic, social and environmental dimensions, including economic development, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources."

66 Ditto, see quotation in previous footnote.

67 Ditto: "The Agreement should recognise that the Parties will not encourage trade or foreign direct investment by lowering domestic environmental, labour or occupational health and safety legislation and standards, or by relaxing core labour standards or policies and legislation aimed at protecting and promoting cultural diversity."

68 Ditto, Directive 6, p. 3; "The right of the Parties to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection of health, safety, labour, consumers, the environment and the promotion of cultural diversity as it is laid down in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, that they deem appropriate."

European Parliament. Examples include accepting the procedural rules for consulting civil society via a Civil Society Forum, taking a decision on who can participate in an expert panel and updating the definition of the concept of "originating status" in legislation. It may also be decided to scrap export levies, add geographical indications and abolish quotas.

With regard to the relationship between the Joint Committee and the Regulatory Cooperation Body: these two bodies each have a separate task. The Joint Committee takes technical implementation decisions, whereas the activities of the Regulatory Cooperation Body are confined to exchanging experiences, identifying lessons learned, discussing policy changes and possible alternatives, and discussing the impact this could have on EU-Canada relations. In the case of TTIP, the negotiations are still ongoing. The Netherlands has already indicated that it would be taking a close look at the "regulatory cooperation" chapter. As far as the Dutch Government is concerned, the powers of our own Parliament and the European Parliament must not be limited: that is a red line.

Source: Ministry of Economic Affairs

Public concerns and objections
There are public concerns about and objections to TTIP because the fact that it is a "living agreement" makes it possible that protective regulations will be continuously put up for discussion, resulting in postponement or cancellation. There are also concerns that the regulatory cooperation process will result in "lower standards" than socially desirable (see also Sections 4.2 and 5.2).

4.2 Market access: reducing barriers *at* the border

Examples and overall picture of barriers
Tariffs ensure that imported products and services are relatively more expensive than domestic production. This is disadvantageous to European or American companies exporting to the other side of the ocean.

To a great extent, the economic impact of TTIP depends on lowering non-tariff barriers (see below). The abolition of import tariffs in the trade between the US and the EU will not have a major impact. The import tariffs applied by the US and the EU since the Uruguay Round, which was concluded in 1994, add on average 1 to 2 percent to trading costs. Over half of all the trade in goods is free from tariffs. The EU only applies higher import tariffs to motor vehicles, beverages and tobacco and food products (see Figure 4.1). For example, the import tariff on motor vehicles and components imported from the US is 8 percent. On average, the US applies lower tariffs than the EU. The US import tariff on motor vehicles is 1.2 percent. The tariffs are still very high for some products, especially certain agricultural products.[69] The EU import tariff on dairy products from the US is over 50 percent.

[69] For more details, see: T. Josling and S. Tangermann, 2014, *Agriculture, Food and the TTIP: Possibilities and Pitfalls*, CEPS Special Report, pp. 5-6.

Figure 4.1: US and EU import tariffs (2011)

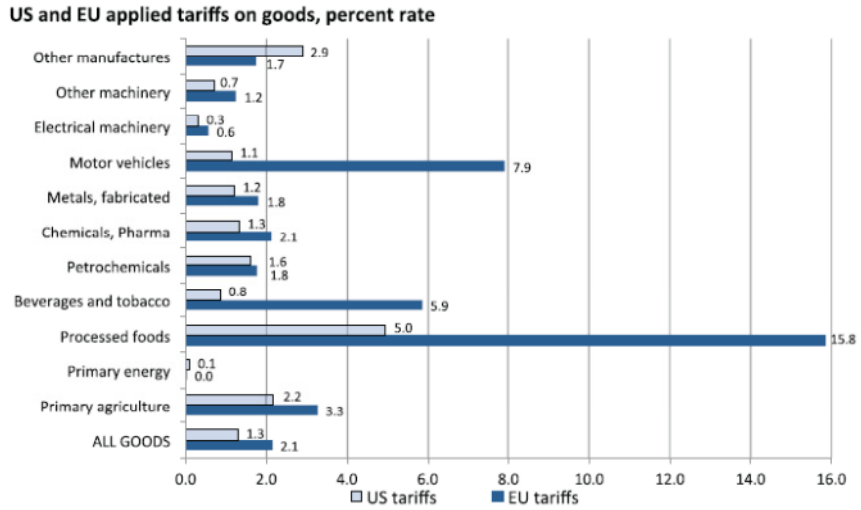

Figure 3. Applied (MFN) tariffs on transatlantic trade

Note: Values reported are for 2011 and are trade-weighted.

Source: WTO integrated database and the World Bank/UNCTAD WITS database.

Source: Peter Egger, Joseph Francois, Miriam Manchin and Douglas Nelson, 2015), Non-tariff barriers, integration and the transatlantic economy, *Economic Policy*, pp. 539-584, esp. p. 547.

As well as tariffs, customs procedures can also make imported products more expensive. What European companies complain about are expensive container inspections, complicated procedures and delays, which mean that they sometimes miss deadlines for their customers in the US.[70]

The negotiating mandate: options and proposals for lowering the barriers

The EU and the US are planning to abolish the remaining import tariffs where possible.[71] Any products which are currently subject to a high tariff can be selected for a gradual reduction to a zero-rated tariff over long transitional periods, the maintenance of tariffs for certain products, or the introduction of tariff quotas so that the low or zero-rated tariffs apply to a limited number of imported goods.[72] An impact study on the consequences for employment and the natural environment will have to provide detailed information on whether these options are actually desirable. This underlines how important it is for the results of the Sustainable Impact Studies (SIAs) on TTIP to be released promptly so that they can actually influence the negotiations and the political choices in this regard. Current practice means that, as a result, SIAs often arrive too late.

Customs procedures

The European Commission has made proposals to the US to make customs procedures faster, simpler and more transparent.[73] Both parties should commit themselves to fast, cost-efficient procedures that do not involve any unnecessary barriers. To achieve this, greater use should be made of information technology. The parties should also establish a central contact point. Furthermore, the proposal provides for agreements on such

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70 European Commission, 2015, Small and medium sized Enterprises and the Transatlantic Trade and Investment Partnership.

71 See Council of Ministers, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directives 10-12, p. 5.

72 T. Josling and S. Tangermann, op. cit., pp. 10-11.

73 *http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153027.pdf*

matters as expediting the release of goods, proportionate penalties, the re-importation of repaired goods and advance rulings.

Public concerns about animal welfare and trade-offs in the agricultural sector
There are public concerns that lowering tariffs in the agricultural sector may come at the expense of animal welfare measures, especially in the poultry and pork sector. As long as Europe is unable to impose welfare standards on imports from third countries and consumers are mainly motivated by the lowest prices, there will not be a level playing field and producers from outside Europe who do not have to meet the same animal welfare standards will have a competitive advantage. Import tariffs can be considered as compensatory measures. The abolition of import tariffs will put farmers in the Netherlands and Europe at a competitive disadvantage.

The guaranteed way of preventing this is to use a long transitional period when lowering certain tariffs, to adopt tariff quotas and additional flanking policy to ensure that a sector can adapt and not put animal welfare standards at risk (see the insert on TTIP and the competitive position of the European poultry sector). It appears that the European Commission has placed beef, poultry meat, pork, eggs and butter on the list of vulnerable products. This means that it may be possible to reach agreements on tariff quotas for these products. It must also borne in mind that the possible minuses in one sector may be compensated by possible plusses elsewhere (e.g. in the case of dairy products), so that the agricultural sector as a whole can benefit from the continuing opening-up of markets and lowering of tariffs.

TTIP and the competitive position of the European poultry sector

Battery cages have been banned in the EU for several years, which makes European eggs more expensive. The US does not impose such a general ban. California has banned the sale of egg products from battery cages but not their production. Will the competitive position of the Dutch poultry sector be put under pressure if the tariffs on eggs and egg products are abolished as part of TTIP? Similar concerns are also expressed in the pork sector.

In its advisory report on values of agriculture (2008), the SER noted that additional legal requirements with regard to animal welfare result in higher production costs and explicitly discussed this, taking the poultry sector as an example (see pp. 49-50 and 83-84 of this report). "As long as Europe is unable to impose welfare standards on imports from third countries and consumers are mainly motivated by the lowest prices, additional requirements will mean a loss of market share for farmers in the Netherlands and Europe and a deterioration in their competitive position". The EU tried to introduce the recognition of animal welfare as a "non-trade concern" in the WTO Agreement but encountered a lot of resistance. The US cannot be forced into banning battery cages. The effect of higher production costs on competitive position is mitigated by a relatively high import tariff on eggs and processed egg products. Lowering or abolishing this tariff will boost the position of third countries in the EU market for processed egg products. In any case the differences in feed costs and the exchange rate relative to the dollar are more important determinants of the European poultry sector's competitiveness than differences in accommodation costs.

TTIP will not undermine the EU's animal welfare standards but may result in more battery cage eggs being sold – mostly in processed products – in the EU. Consideration could be given to gradually reducing the tariffs to give the sector time to adapt and thus be able to focus on those market segments where customers are willing to pay for higher animal welfare standards. Alternatively, tariff quotas could be introduced whereby the low or zero-rated tariff would only apply to a limited number of imported

products. Continuing subsidies to farmers to encourage them to invest in animal welfare could be regarded as "green-box measures" (which are permitted). Finally, it should be borne in mind that lowering tariffs or increasing market access can benefit the European agricultural sector in other areas, e.g. the dairy or beef sectors. If we only look at the potential minuses, we will not be able to cash in on the potential plus.

Sources: SER Advisory Report, 2008, *Waarden van de Landbouw*; Letter to Parliament, 16 March 2015, on the competitive position of the poultry sector.

4.3 Non-tariff barriers: reducing barriers *behind* the border

The TTIP negotiations also aim to find ways of allowing EU and US regulations to converge, while retaining the existing level of protection. It is in this area in particular that the TTIP agreement can update trade rules.[74] Because this subject, combined with the proposed investment arbitration mechanism and the economic impact, is the main source of public concern, we deal with it at length at this point in order to get a clear idea of what exactly is involved.

The intention is to lower non-tariff barriers in the TTIP in four ways:
1. By making general (horizontal) agreements on cooperation between regulatory authorities (regulatory cooperation) (Section 4.3.2).
2. By making agreements on technical trade barriers (Section 4.3.3).
3. By making agreements on sanitary and phytosanitary measures (Section 4.3.4).
4. By making sectoral agreements on non-tariff barriers (Section 4.3.3).

4.3.1 What is it about? (And what is it not about?)

Examples
Trade barriers consist of more than tariffs and quotas. For example, the US does not accept EU standards for medical instruments or food-processing machines. European companies that manufacture these products have to have their products re-tested in the US or modify them to meet the local requirements. The US often requires approvals for individual product varieties instead of the relevant product type. This means that each *colour* of lipstick must be retested individually even if the EU has determined that the relative *type* or brand of lipstick complies with the strict European cosmetics directive.[75] In the US, a manufacturer of biodegradable tableware who conforms to the European standards will have to demonstrate that each individual cup or plate is biodegradable. This involves additional costs, which can be a particular burden for SMEs. It is not just about additional tests but also, for example, about *unnecessarily divergent regulatory requirements* in the area of labelling and packaging regulations, registration, inspections, conformity assessments, etc. The actual need for labelling regulations or inspections is not in dispute. It is impossible to determine in a general sense whether a specific measure will result in unnecessarily divergent regulatory requirements. This will have to be considered on a case-by-case and sector-by-sector basis. (see Section 4.3.5).

The differences in approach to risk may also result in certain products not being permitted. The US restricts the importation of European beef because of mad cow

[74] P. Chase and J. Pelkmans, 2015, *This time it's different: turbo charging regulatory cooperation in TTIP*, CEPS Special Report 110.

[75] These real-life examples are based on the presentation by K. Berden (Ecorys), Introduction to TTIP, during the TTIP conference organised by VNO-NCW on 11 November 2015.

disease. This was justified during the outbreak of mad cow disease at the end of the 1990s. The problem is that these restrictions are still in force, even though mad cow disease has long been under control in the EU.

General picture of trade costs due to non-tariff barriers
At this moment, non-tariff barriers are more important for the trade in most goods and services than tariff barriers but the trade costs that they generate are much more difficult to estimate than those of tariff barriers. Based on a survey of businesses, interviews with experts and desk research covering twenty sectors, Ecorys tried first to identify the non-tariff barriers and then quantity their effect on trade flows (for details, see Section 6.3). According to these calculations, the non-tariff barriers encountered by European firms when exporting goods to the US have an impact equivalent to a tariff of 25 percent (20 percent in the opposite direction). This figure would be as much as 75 percent in the case of the food-processing and beverage industries.

The Council's mandate: what is covered by the negotiations and what is not?
The main purpose of TTIP is to eliminate unnecessary trade barriers by means such as improving cooperation between regulatory and standardisation bodies (e.g. so that the number of inspections can be reduced), recognising each other's standards and increasing cooperation in developing new standards. The European Commission has received a mandate for this from the Council.[76]

However, the European Commission does not have a mandate to negotiate any change in underlying levels of protection for people, animals or the environment in TTIP. The Council mandate states that regulatory cooperation must respect the right to take measures to ensure a high level of protection.[77] Where these levels of protection or the assessment of potential risks diverge too much for this, it will be difficult, if not impossible, to remove the barriers through regulatory cooperation. Examples include genetically modified food or meat from animals treated with hormones. These subjects are not covered in the TTIP negotiations. TTIP will not make any changes in areas where the levels of protection diverge too much, as in protection from asbestos. The EU can currently ban the import of specific products containing asbestos; TTIP will not change this (see insert below).

TTIP and asbestos in brake linings

The European Union has issued regulations and directives covering the handling of asbestos. Directive 2002/78/EC states that brake linings on cars must not contain asbestos. The Netherlands implemented this directive in the Asbestos Products Decree [*Productbesluit Asbest*]. Member States have the power to ban the sale or distribution of brake linings containing asbestos. This therefore means that they can also ban imports of vehicles containing these brake linings. This is also in accordance with the WTO rules. The WTO Appellate Body ruled that France could refuse products from Canada because they contained asbestos. The relevant French measures was considered necessary and permissible to guarantee health and safety.

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[76] Council of Ministers, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directive 25: "The Agreement will aim at removing *unnecessary obstacles* [SER's italics] to trade and investment, including existing NTBs, through effective and efficient mechanisms, by reaching an ambitious level of regulatory compatibility for goods and services, including through mutual recognition, harmonisation and through enhanced cooperation between regulators."

[77] Ditto: "Regulatory compatibility shall be without prejudice to the right to regulate in accordance with the level of health, safety, consumer, labour and environmental protection and cultural diversity that each side deems appropriate, or otherwise meeting legitimate regulatory objectives, and will be in accordance with the objectives set out in paragraph 8."

The US bans some products containing asbestos. In 1989, the US Environmental Protection Agency (EPA) tried to extend that ban to include brake linings and other products. However, it was rebuffed on this point by a federal judge, with the result that asbestos is still permitted in American cars. The EU has the right to stop the importation of these cars. TTIP will not change this situation in any way. The negotiating mandate does not give the European Commission the authority to negotiate on changes to protection levels (and in this case, the European Commission would definitely not want to do so). What is agreed in terms of regulatory cooperation will not concern changes to these regulations. The provisions of Directive 2002/78/EC and other European regulations relating to the processing, removal and use of asbestos are not in dispute.

Sources: Directive 2002/78/EC, OJ L 267/23 of 04.10.2002; WTO dispute DS135, European Communities – Measures Affecting Asbestos and Products Containing Asbestos; U.S. Federal Bans on Asbestos: *http://www2.epa.gov/asbestos/us-federal-bans-asbestos*.

The precautionary principle and differences in methods used to assess risk by the EU and US

The approaches adopted by the US and the EU in the area of food safety have increasingly diverged in recent decades. The US and the EU take a different approach when assessing the risks to food safety posed by meat from animals treated with hormones or antibiotics and genetically modified plants. The EU is more cautious or risk-averse in these areas. It adopts the precautionary principle, which is described as follows in the WTO's SPS Agreement (see insert in Section 3.4.4):

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

It means that caution is required as long as risks cannot be excluded by scientific research. The EU does not permit meat from animals treated with hormones. However, some genetically modified organisms (GMOs) are permitted but Member States have the right to ban the cultivation of GMOs on their national territory. The Member States can do so even if this cultivation has been given the green light at European level after scientific assessment. The US tends to assume that there is no risk until such time as risks have been scientifically demonstrated. The application of the precautionary principle by the EU is therefore criticised by the US as being unscientific. The respective assessments of risks to human health and safety also diverge in other areas such as chemicals (see below) and cosmetics. However, four subtle distinctions should be made:
1. No-one is saying that the precautionary principle is better by definition. It can result in risks being overestimated and therefore hold back innovation.[78] However, the precautionary principle has ensured that compliance with health and safety regulations form a standard part of the requirements for a product to be permitted on the European market.
2. The US tolerates less risk in a number of areas. For example, it applies stricter standards for nitrogen emissions from cars than the EU ("dieselgate").
3. Neither is anyone saying that the US always lags behind in terms of assessing risk. For example, the US Food and Drug Administration (FDA) imposed a ban on trans fats in

[78] For a critical discussion of the use of the precautionary principle in the EU, see: G. Majone, 2002, What price safety? The precautionary principle and its policy implications*, Journal of Common Market Studies*, Vol. 40(1), pp. 89-109.

June 2015.[79] They were to disappear completely within three years. These vegetable oils, which undergo an industrial process to make them more solid, are used in the manufacture of products such as crisps and margarine and, according to the FDA, increase the risk of heart attacks. In Europe, only Denmark, Austria and Hungary have minimised the use of trans fats. They do not even have to be mentioned on labels in the EU.
Just as in the EU, dairy cattle treated with antibiotics have also been removed from production in the US. The milk from these cows does not comply with the "Grade A Pasteurized Milk Ordinance" and cannot therefore be used for human consumption. Milk is tested for residues of banned substances and if the same dairy farmer is found to have committed more than one offence, his licence may be revoked.
A study which investigated the way the US and the EU deal with a large number of potential risks has shown that the image of a more cautious EU arises from high-profile issues such as meat from animals treated with hormones and genetically modified organisms.[80]
4. Not all the differences in regulations and provisions relating to technical standards can be attributed to fundamental differences in the way risks are assessed. Some differences have arisen in an arbitrary manner. An example of this is the differences in the regulations covering car lighting systems.[81] TTIP is specifically aimed at removing the resulting unnecessary trade barriers where possible, without lowering levels of protection or safety.

The EU is endeavouring to include guarantees in TTIP that it will always be able apply the precautionary principle and that measures taken on the basis of this principle, such as the ban on meat from animals treated with hormones or the restrictions on genetically modified organisms will not be affected by what is agreed (see Section 4.3.4).

Public concerns about the continued use of the precautionary principle
Although, as far as we know, the precautionary principle applied by the EU is not up for discussion in the TTIP negotiations, it has been the subject of debate and a source of material for European lawyers ever since it was applied. The differences in the way risk is assessed by the US and the EU (see insert) could be a trigger point for reigniting the debate over this principle, with the risk that it will eventually be weakened or even abandoned.

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[79] For the ban on trans fats in the US, see *NRC Handelsblad 17 June 2015*.

[80] A wider-ranging study into risk assessment was conducted by J. Wiener et al, 2011, *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe*, RFF Press, Washington and London. David Vogel places particular emphasis on the divergence between the US and Europe. See D. Vogel, 2012, *The politics of precaution; regulating health, safety and environmental risks in Europe and the United States*, Oxford University Press. However, he bases his study on the treatment of animals with hormones and genetically modified organisms. He cites the far-reaching impact of mad cow disease as the main reason for the divergence between the US and EU in terms of risk assessment; it has also resulted in less tolerance of risks relating to food safety.

[81] For the differences in the lighting systems for cars and their implications in the real world, see: *http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153168.4.9%20Vehicles%20paper%20second%20test%20case.pdf* and C. Freund and S. Oliver, 2015, Gains from Convergence in US and EU auto regulations under TTIP, in: D. S. Hamilton and J. Pelkmans (ed.*), Rule-makers or rule takers? Exploring the Transatlantic Trade and Investment Partnership*.

4.3.2 Provisions on cooperation between regulatory authorities

The Council's negotiating mandate
The Council has given the European Commission a mandate to negotiate general arrangements on regulatory cooperation and the related institutional facilities.[82] The European Commission has submitted a proposal to the US on this basis for a chapter in TTIP on cooperation between regulatory authorities.[83] It mainly concerns procedures for cooperation between competent authorities; it does not contain an obligation to reach a specific outcome in terms of regulations or standards.[84] The TTIP agreement should contain the right to regulate with a view to protecting general interests. The first provision in the text makes it clear that a high level of protection for people and the environment must be assumed.[85] Fundamental principles, such as the precautionary principle, should be respected when assessing and managing risks.[86]

The proposal of the European Commission
The main elements of the European Commission's proposal with regard to regulatory cooperation are:[87]

- Information on proposed legislation and impact assessments should be shared at an early stage.
- Each party's stakeholders ("any interested natural or legal person") should be involved in the consultation on proposed legislation (see insert below: TTIP and REFIT).
- Impact assessments should take into account the international aspects, such as the other party's legislation and their impact on international trade or investment.
- A contact point should be established for bilateral contacts aimed at exchanging information on proposed legislation, planned impact assessments and stakeholder meetings, etc.

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82 See Council of EU Ministers, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directives 25 and 26: "The Agreement will include cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, evaluations, periodic review of existing regulatory measures, and application of good regulatory practices. The Agreement shall also include a framework for identifying opportunities and for guiding further work on regulatory issues, including provisions that provide an institutional basis for harnessing the outcome of subsequent regulatory discussions into the overall Agreement".

83 *http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf*

84 See Article 1, Section 2: "This Chapter provides a framework for cooperation among regulators and encourages the application of good regulatory practices. It will help identify and make use of possibilities for cooperation in areas or sectors of common interest. Its provisions do not entail any obligation to achieve any particular regulatory outcome."

85 See Article 1, Section 1a: "To reinforce regulatory cooperation thereby facilitating trade and investment in a way that supports the Parties' efforts to stimulate growth and jobs, while pursuing a high level of protection of inter alia: the environment; consumers; public health, working conditions; social protection and social security; human, animal and plant life; animal welfare; health and safety; personal data; cybersecurity; cultural diversity; and preserving financial stability."

86 See the NB in Article 1: "The provisions as set forth in this Chapter cannot be interpreted or applied as to oblige either Party to change its fundamental principles governing regulation in its jurisdiction, for example in the areas of risk assessment and risk management."

87 What follows is based on proposals of the European Commission which were published in May 2015. On 21 March 2016, the Commission published revised proposals: *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf*; *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf*. The main changes contained in the new proposals relate to institutional setup (which is left more open) and cooperation at non-central level (which becomes less stringent). In addition, more clarity is provided on the scope and the instruments and there is a greater focus on transparency. Where relevant, it is stated in footnotes where the revised proposals differ from the proposal published in May 2015.

- The possibility of mutual recognition or harmonisation should be explored in areas in which there are similar levels of protection.[88]
- Efforts to cooperate with third parties to develop international technical norms and standards should be intensified.
- A regulatory cooperation board should be established to oversee the implementation of the above elements and develop new initiatives for cooperation (see details below).[89]

Scope of the proposed cooperation

The proposed cooperation relates to regulations concerning, inter alia, the authorisation, licensing or qualification of goods and their characteristics and production methods.[90] It also concerns measures:

- at central level (for the EU, the European Commission) and at non-central level (for the EU, the Member States).[91]
- which can have a significant influence on both trade and investment.[92]

This makes the potential scope of the measures to be considered for cooperation very wide.

Appointment, composition and powers of the proposed regulatory board

The European Commission's proposal provides for the setting-up of a regulatory cooperation board or body. The US and the EU will appoint the members of this cooperation body.[93] It will be made up of representatives of the competent authorities

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[88] This is worded differently in the proposal of 21 March 2016. Mutual recognition or harmonisation is referred to as a possibility (Article x5, Section 1). However, it must follow the general principle that cooperation should aim at improving and not reducing standards of protection and does not in any way compromise the level of protection (Article x1. Section 2), see: *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf*.

[89] In the proposal of 21 March 2016, the institutional setup of the cooperation is left open for detailed interpretation. Only the aim is stated (oversee the application of the chapter, oversee specific and sectoral implementation and provide support in determining areas of common interest). Three principles are also formulated: political accountability, effective coordination and transparency. See Annex: *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf*

[90] See Article 3: "The provisions of Section II apply to regulatory acts at central level in areas not excluded from the scope of TTIP provisions, which: a) determine requirements or related procedures for the supply or use of a service5 in the territory of a Party, such as for example authorization, licensing, or qualification; or b) determine requirements or related procedures applying to goods marketed in the territory of a Party concerning their characteristics or related production methods, their presentation or their use." In the proposal of 21 March 2016, "regulatory measures" means "measures of general applicability concerning specific goods or services prepared by regulatory authorities" (Article x2, Section b, see: *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf*

[91] A distinction is made (see Article 3) between the provisions relating to good regulatory practices (early information on proposed legislation, stakeholder involvement, impact assessments,) and cooperation between regulatory authorities (exchange of information, joint actions). The first group, provisions concerning good practices, concerns only measures at central (EU) level. The second group concerning cooperation relates to measures both at central and at non-central level. For the EU, this also involves exploring the possibility of harmonisation in areas in which there is a similar level of protection (see Article 10).
In the proposals of 21 March, cooperation at non-central level is referred to as something that the EU and the US can promote and facilitate if the responsible authorities state that there is a need for it. It is up to these authorities to determine suitable modalities for cooperation (Article x7 in: *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf*

[92] This involves measures that relate to cooperation between regulatory authorities (see previous footnote).

[93] See: Article 14, Section 1 of the European Commission's proposal.

and regulatory agencies in the US and the EU.[94] Stakeholders will not be represented, but the intention is that the cooperation body will consult them.

The functions of the regulatory body are described in Article 14, Section 2 of the European Commission proposal:[95]

a. Preparation and publication of the annual programme for regulatory cooperation. This will refer to joint activities and provide a summary of ongoing initiatives.
b. Oversight of the implementation of what is agreed in the regulatory cooperation chapter.
c. Involvement in the technical preparation of the updating or amendment of specific sectoral measures. The internal procedures of the parties for drafting legislation must be respected. For the EU, this involves the exclusive right of the European Commission to take the initiative. The regulatory board will not be granted legislative powers.
d. The discussion of possible new initiatives proposed by the US or the EU or by the parties' stakeholders.
e. The preparation of joint initiatives in international forums.
f. Ensuring transparency in cooperation between the EU and the US.

Point c is yet to be completed.[96] In the notes to the proposal, the European Commission emphasises that the cooperation body will have a purely advisory function and not any kind of role in the drafting or pre-screening or reviewing of legislative proposals.[97]

TTIP and REFIT

In May 2015, EU Commissioner Frans Timmermans presented his "Better Regulation" agenda to provide better regulations for better results. The European Commission is planning to further open up the policymaking process and to listen more attentively to and consult those who implement and benefit from EU legislation. The Commission claims that opening up the policymaking process can make the EU more transparent and more responsible, but it will also ensure that the policy is based on the best available data and will be more effective. At all levels – local, regional, national and EU level – the Commission believes that those who experience the consequences of legislation are best placed to understand the effect that legislation will have and they can also provide information to improve the legislation. In addition, efforts will be made to ascertain how

94 See: Article 16, Section 1 of the Commission's proposal: "The RCB shall be composed of representatives of the Parties, including at the non-central level. It shall include senior representatives of regulators and competent authorities, as well representatives responsible for regulatory coordination activities and international trade matters at the central level. In addition, whenever the RCB considers cooperation in relation to specific regulatory acts at central or non-central level, the relevant regulators and competent authorities responsible for those acts shall be invited to participate in RCB meetings."

95 The institutional setup is left open in the proposal of 21 March 2016 (see Footnote 90).

96 Article 14, Section 2 contains a placeholder: ([Placeholder on technical preparation of proposals for the update, modification or addition of specific or sectoral provisions. Such updates, modifications or additions will be adopted in accordance with the internal procedures of each Party. The RCB will not have the power to adopt legal acts].

97 "This body would not have regulatory or rule-making competences, as also clarified in Article 14 paragraph 2 subparagraph c) of the EU proposal (Article 14 'Establishment of the Regulatory Cooperation Body'). The RCB would not be a joint decision-making body, but will have a consultative role. The adoption of regulations would remain in the hands of domestic regulatory and legislative bodies or institutions. Any future initiative to further regulatory compatibility would follow the democratic process of each side, in full respect on the European side of the role of EU Member States and the European Council and Parliament, respectively. Such activity will also be conducted with the necessary transparency. The RCB will not interfere with internal regulatory decision making by each side as it will not have any role of prior vetting or examination of draft regulations." See: *http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1%20Detail%20explanation%20of%20the%20EU%20proposal%20for%20a%20Chapter%20of%20reg%20coop.pdf*, p. 12.

existing measures can be made more efficient and effective. The latter will build on the ongoing "healthy regulation" programme (REFIT). Responsible EU Commissioner Timmermans wishes to emphasise that better regulation is not a question of "more" or "less" regulation and will not involve an adverse effect on levels of protection for people and the environment.

The better regulation programme – including REFIT – and the TTIP negotiations are two different processes. According to the Dutch Government, the REFIT programme will not anticipate possible results of the TTIP negotiations.

However, there are interfaces:
- Both TTIP and the better regulation programme and REFIT are aimed at removing unnecessary barriers to trade. TTIP focuses on regulatory cooperation between the US and the EU. The better regulation programme and REFIT focus on making future regulation and existing regulation respectively more effective and efficient.
- Both are aimed at involving stakeholders ("any interested natural or legal person") at an early stage in any consultation on proposed legislation.

Civil-society organisations and, in particular, the trade union movement, both at national and European level, have criticised REFIT and the better regulation programme and its agenda for reducing supposed "red tape", which they believe will initiate an attack on social legislation. There are also concerns about the possible connection between the questioning of the existing European acquis, e.g. in the area of working conditions, in the REFIT/Better Regulation programme and the unwillingness to continue improving existing rules (e.g. in the case of protection from carcinogenic substances) and the possible tendency to take account of the lower levels of protection in the US in advance.

Sources: Communication from the European Commission on better regulation for better results (COM(2015) 215); Answers to Questions raised in Parliament by members Jan Vos/Kerstens on the Trans-Atlantic Trade and Investment Partnership (TTIP) and labour standards, REACH, REFIT and chemical contamination of chicken, 21 May 2015. For details, see concerns about the connection between TTIP and the better regulation agenda: P. de Pous, 2016, *Better regulation: TTIP under the radar?*

Public concerns and objections

There are serious public concerns about and objections to the proposals for regulatory cooperation, because they could lead to a situation where trade interests will take precedence over the effective protection of people and the environment. These concerns and objections relate to the following points (for details, see Section 5.2.1):
- The proposed regulatory cooperation board and expert panels could make it possible for US companies to influence legislation.
- The assessment of what is to be considered an "unnecessary barrier to trade" – who decides and on what grounds? – is a key point of public concern. If it is then decided to equalise currently divergent levels of protection, this will have consequences for public prosperity. Where this leads to a lowering of protection levels for people and the environment, it will be to the detriment of the level of prosperity.[98]
- As a result, the regulatory cooperation board will be able to undermine the discretionary powers of the EP and the Council to pass laws. According to the critics, the mandate of the regulatory cooperation board is too broad and its legal status unclear. Will it only have the power to give advice or will it also be able to table proposals for legislation, thereby undermining the position of the European Commission?

[98] See: Martin Myant and Ronan O'Brien, 2015, *The TTIP's impact: bringing in the missing issue*, ETUI Working Paper 2015.01. This study is discussed in detail in Section 6.3.1.

- There are also concerns that the dynamics of mutual recognition of rules and the pressure of competition from goods and services produced under lower standards will set in motion a "race to the bottom" in both the US and the EU.

Also of concern is the convergence of the above with the European Commission's REFIT programme, which is regarded as an attempt to lower protection levels.

4.3.3 Agreements on technical standards

The negotiating mandate and the proposals of the European Commission
Building on the WTO Agreement on the subject, the Council has given the European Commission a mandate to negotiate arrangements on technical barriers to trade. The aim is to achieve a certain convergence of technical norms and standards and conformity assessments so as to avoid conflicting technical regulations and superfluous and costly conformity assessments.[99] Building on this, the European Commission has submitted proposals to the US.[100] The main elements of the Commission's proposal are:

- To incorporate the WTO Agreement on technical standards (TBT) (see insert).
- To improve cooperation between the competent authorities in the development of new technical standards and cooperation aimed at developing global technical standards.
- To notify the WTO of technical standards and exchange information on proposed and existing technical standards.
- To provide an opportunity to comment on each other's proposed technical standards.
- To review conformity assessments with the aim of reducing unnecessary burdens and, where possible, bring about mutual recognition of conformity assessments.
- To make a commitment not to create unnecessary barriers to trade when setting labelling requirements.

The TBT and SPS agreements of the WTO

The WTO has concluded agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary measures (SPS).

The aim of the TBT agreement is to find a balance between removing unnecessary trade barriers on the one hand and leaving scope to guarantee legitimate public interests on the other. The agreement makes a distinction between mandatory technical regulations and voluntary standards. Technical regulations must obstruct trade as little as possible, given their aim of achieving legitimate public objectives, such as protecting people and the environment. The agreement encourages countries to apply international standards as much as possible. Governments may deviate from these standards if necessary to protect human, animal or plant life or the environment.

The SPS agreement allows countries to set their own national standards to protect humans, animals and plants against sickness and hazardous substances in food. The

[99] A technical norm or regulation is defined in the WTO Agreement on Technical Barriers to Trade (TBT) as a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labelling requirements as they apply to a product, process or production method". A standard is defined in the same way, except that it is voluntary. A conformity assessment is a procedure for assessing whether a product conforms to the relevant requirements of a technical norm or standard. See: P. van den Bossche, 2008, *The law and policy of the World Trade Organization*, pp. 807-8.

[100] *http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153025.pdf*

agreement encourages governments to apply international standards. They may deviate from these standards where dictated by science or risk assessment.

The *Codex Alimentarius* is a collection of standards relating to food (and recognised by the SPS and TBT). The Codex Alimentarius Commission has also adopted a code of ethics that helps prevent the dumping of unsafe or poor quality food.

Source: SER Advisory Report on sustainable globalisation, p. 171. For the TBT agreement, see: WTO, 2014, Technical Barriers to Trade. WTO Agreement Series.

Public concerns and objections
There are particular concerns about the proposal to harmonise labelling requirements with a view to removing barriers to trade, as European labelling requirements would provide much greater transparency for consumers than the system used in the US. Consumer protection should be the guiding principle.

4.3.4 Agreements on sanitary and phytosanitary measures

Sanitary and phytosanitary measures are aimed at protecting human, animal and plant life against disease and harmful substances in food. WTO members have concluded the SPS agreement to cover this (see insert above). There has been a veterinary agreement between the US and the EU since 1999 on the inspection and welfare of animals and the inspection of animal products. However, the fact that the US is still restricting the importation of European beef owing to a past outbreak of mad cow disease shows that this agreement is not very effective.

The negotiating mandate and the proposals of the European Commission
The Council has given the European Commission the mandate to negotiate detailed agreements with the US to build on the SPS agreement and the related Codex Alimentarius. The precautionary principle should be respected in these agreements.[101] The European Commission has submitted a detailed proposal to the US on this basis.[102] It proposes incorporating the veterinary agreement into the relevant chapter of TTIP, improving it and expanding it to include phytosanitary measures aimed at ensuring food safety and preventing harmful diseases. The US and the EU are to express their commitment not to use these measures to obstruct trade unnecessarily with undue delays. There is also to be more openness with regard to relevant import regulations. In addition, the conditions and possibilities of mutual recognition and audits by monitoring bodies must be agreed.

[101] See Council of Ministers of the EU, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directive 25: "Provisions of the SPS chapter will build upon the key principles of the WTO SPS Agreement, including the requirement that each side's SPS measures be based on science and on international standards or scientific risk assessments, *while recognising the right for the Parties to appraise and manage risk in accordance with the level of protection that each side deems appropriate, in particular when relevant scientific evidence is insufficient* [SER's italics], but applied only to the extent necessary to protect human, animal, or plant life or health, and developed in a transparent manner, without undue delay. The Agreement should also aim at establishing cooperation mechanisms which will, inter alia, discuss equivalence on animal welfare between the Parties".

[102] *http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf*

Concerns in the agricultural sector
TTIP provides an opportunity to address a number of concerns in the agricultural sector (see insert).

TTIP and the approach to problems in the trade in agricultural products

The Dutch agricultural sector is facing a number of problems resulting from a lack of sanitary and phytosanitary regulatory cooperation.

- BSE rules. The animal disease BSE has been almost entirely eradicated, but the US still bans imports of beef and veal from Europe. This is not based on international scientific rules as laid down by the international animal health watchdog OIE in Paris. Only Ireland has recently been granted permission to export. The Netherlands has already been visited by US inspectors, but has still not received approval.
- Regionalisation for outbreaks of contagious animal diseases. In the event of such outbreaks, international rules allow countries to divide their territory into disease-free and contaminated zones. Trade and export from the free zones must be able to continue. This has been stipulated by the international animal health watchdog, OIE. However, the US does not yet recognise this type of "regionalisation".
- Extremely strict US phytosanitary requirements are an obstacle for European exporters of various plant products. A major example is apples and pears, on which eight EU Member States have been working hard, but have hardly made any progress in their negotiations with the Americans. The experience has been similar for tomatoes, bell peppers, cherries and ware potatoes.
- Currently, the EU cannot export lamb meat to the US as a result of US requirements that the animals be free from scrapie. This is despite the fact that the EU has an effective monitoring system. The US goes much further in its import requirements than the OIE considers justified on the basis of science.

TTIP provides an opportunity to address these problems, but success is not guaranteed. The European Commission's proposal for the chapter on sanitary and phytosanitary measures contains provisions for the timely removal of emergency measures when the danger from animal diseases abates and there is a possibility of establishing regional zones based on OIE guidelines. It also provides an opportunity to set up a joint management committee to coordinate phytosanitary requirements more closely. At the present time, the US and Europe have different priorities when it comes to agricultural products and public health: Europe rejects meat from animals treated with hormones, while the US is very apprehensive about animal diseases that can be transferred to humans. Cooperation in the TTIP agreement can help both the US and the EU to base their policy on a more rational debate.

4.3.5 Sectoral agreements

The negotiating mandate and the proposals of the European Commission
The European Commission has received a mandate from the Council to reach agreement on regulatory cooperation in specific sectors (e.g. chemicals, cosmetics, machines, medical equipment, transport equipment, pharmaceuticals, textiles and services).[103] This

[103] See Council of Ministers of the EU, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directive 25: "The Agreement will include provisions or annexes containing additional commitments or steps aimed at promoting regulatory compatibility in specific, mutually agreed goods and services sectors, with the objective of reducing costs stemming from regulatory differences in specific sectors, including consideration of approaches relating to regulatory harmonisation, equivalence, or mutual recognition, where appropriate. This should include specific and substantive provisions and procedures in sectors of significant importance to the transatlantic economy, including, but not limited to, automotives, chemicals, pharmaceuticals and other health industries, Information and Communication

may require more tailored solutions in view of the differences in protection levels and the way in which the relevant risks are assessed. If these differences are relatively minor, consideration can be given to proposals for harmonising future standards or mutual recognition of norms and standards. If there are major differences, consideration can be given to an early exchange of information, cooperation in developing a shared scientific approach, cooperation with regard to new products or materials or recognition of conformity assessments (assessment, usually by a third party, of whether the rules have been observed) of the country in which the goods were produced.

If there are major differences in standards or approaches, only less radical forms of cooperation will be possible, with any relaxation or lowering of requirements stipulated in each other's system being ruled out. One example of this is the chemicals sector, where the divergence between EU regulations (REACH) and US regulations is too great to allow harmonisation or mutual recognition. In this area, the EU's position is to reach agreement on:

- Cooperation in prioritising chemicals which have to be tested;
- Alignment of classification and labelling of chemicals;
- Cooperation in new areas (e.g. nanomaterial);
- Improved exchange of information and protection of confidential business information.

In the automotive sector, the US and the EU apply different technical regulations. These relate, for example, to the belt anchorage points and, as noted above, lighting systems for cars. The European Commission has investigated whether this could lead to real differences in terms of road safety. This does not really appear to be the case.[104] The mutual recognition of technical regulations could be appropriate in such cases.

Table 4.2 shows the differences in regulation for a number of sectors and the level of cooperation which the European Commission believes to be appropriate.

Table 4.2 – Differences in regulation between the EU and the US for a number of sectors

	Differences between EU and US	*Appropriate cooperation in this regard according to the European Commission*
Chemicals	European legislation (REACH) and US legislation (TSCA) differ in fundamental aspects. REACH states that any substance that comes on to the market must be tested by the manufacturer. In the US, this only applies to products preselected by the Environmental Protection Agency (EPA). REACH makes it possible for governments to demand from manufacturers all the data on substances and their potential risk. In the US, the EPA must make it clear why they need specific data.[1]	• Cooperation in prioritising chemicals which have to be tested; • Alignment of classification and labelling of chemicals; • Cooperation in new areas; • Improved exchange of information.[2]

Technologies and financial services, ensuring the removal of existing NTBs, preventing the adoption of new NTBs and allowing market access at a level greater than that delivered through horizontal rules of the Agreement. With regard to financial services, negotiations should also aim at common frameworks for prudential cooperation."

[104] For case studies on functional equivalence in seat belt anchorage points and headlights respectively, see: *http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153023.pdf*; *http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153168.4.9%20Vehicles%20paper%20second%20test%20case.pdf*

Cosmetics	European legislation and US legislation differ in fundamental aspects. EU uses a list of 1372 banned substances in cosmetics and is therefore stricter. But some products which are considered as cosmetics in the EU, such as sun creams with UV filter and toothpaste with fluoride, fall within the stricter medicines system in the US.[3] The same applies to two elements of lipstick. In addition, the US requires individual colours of lipstick to be tested; the principle is that individual products are tested and not a type of product.	• More cooperation in the area of scientific safety assessments and data requirements for added substances such as UV filters. • Modifying EU and US regulations to conform to international ISO standard for manufacturing cosmetics. • Encouraging alternatives to animal testing. • Cooperation aimed at harmonising test methods based on ISO standards (e.g. for determining protection factor of sun cream). • Cooperation in standardising labelling regulations (e.g. with regard to names of substances or protection factor). • Cooperation with regard to new materials and areas and within the international organisation, ICCR.[4]
Machinery and electronics (engineering products)	The European and US regulatory framework shows differences with regard to technical regulations and conformity assessments. The latter are generally stricter in the US because of safety requirements for the use of machinery and equipment on the shop floor.[5]	• More cooperation between regulatory bodies aimed at: early exchange of information on proposed measures; joint initiatives in international organisations; review of conformity assessments. • Promotion of cooperation between organisations that set standards, such as ISO. • Cooperation in the area of market supervision. • Greater transparency on rules and regulations.[6]
Automotive	The EU and US regulatory framework mainly shows differences with regard to testing and conformity assessment and safety and environmental regulations. However, the required safety levels are similar. The EU is generally stricter in terms of CO_2 regulations. The US is stricter with regard to nitrogen emissions. Unlike the EU, the US does not make a distinction between diesel and petrol engines. Differences in the area of conformity assessments.[7]	• Identification of areas involving functional equivalence of safety requirements and environmental regulations with the aim of achieving mutual recognition of technical regulations. • Use of each other's test methods to allow entry to the market (e.g. EU uses US test methods to check whether cars comply with US regulations and vice versa). • In areas where there is no equivalence and in new areas: increased cooperation within the framework of the international UNECE agreement.

Source: SER secretariat. Based on: *Chemicals*: **1.** D. Vogel, 2012, op. cit., pp. 170-171; United States Government Accountability Office, 2007, *Comparison of U.S. and recently enacted European Union approaches to protect against the risks of toxic chemicals*; for details, see: E. D. Elliot and J. Pelkmans, 2015, Greater TTIP Ambitions in Chemicals: Why and How? In: D. S. Hamilton and J. Pelkmans (ed). *Rule-Makers or Rule-Takers: Exploring the Transatlantic Trade and Investment Partnership*, pp. 438-440; 451-456; Ecorys, 2009, *Non-Tariff Measures in EU-US Trade and Investment – an Economic Analysis*, pp. 51-58; **2.** European Commission, 2015, *Inside TTIP*, pp. 22-23 ; *Cosmetics*; **3.** Ecorys, 2009, op. cit.;

pp. 63-66; **4.** *http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152470.pdf*; *Machinery and electronics*: **5. and 6.** *http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153022.pdf*; *Automotive:* **7.** Ecorys, 2009, op. cit, pp. 43-46; C. Freund and S. Oliver, 2015, Gains from Convergence in US and EU Auto regulations under TTIP, in: D. S. Hamilton and J. Pelkmans (ed*). Rule-Makers or Rule-Takers: Exploring the Transatlantic Trade and Investment Partnership*, pp. 507-513; D. Vogel, 2012, op. cit., pp. 116-7. 8. *http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152467.pdf*.

Public concerns and objections
The public concerns and objections focus mainly on the question of whether there are sufficient guarantees that the proposed form of cooperation in certain sectors cannot result in a lowering of the levels of protection.

4.4 Liberalisation of trade in services and exclusion of public services

Examples
The US Jones Act of 1920 states that a ship can only sail between two ports in the United States if it is built in the United States, has a US crew on board, sails under the flag of the United States and is US-owned. For this reason, only American companies dredge American seaports. The Dutch dredging sector therefore has no chance of operating in the United States and is calling for exceptions to the Jones Act and Dredging Act for dredgers.

This way of protecting one's own market is an example of a non-tariff barrier. Other examples in the service sector include insufficient mutual recognition of degrees and qualifications of service providers, restrictive rules on entry for service providers, restrictions on foreign ownership of shares in US companies, such as in the telecom sector.

Regulation and supervision of the services market means that improved integration of service markets requires not only the removal of barriers impeding access to a market in another country, but also, whenever possible, the removal of barriers *behind* the border that result from divergent regulations. TTIP is explicitly not about harmonising regulations, as is the case in the EU in specific areas and sectors of the services market. In the EU, for example, the content and duration of medical training has been harmonised. On the basis of this, the professional medical qualification obtained is recognised in all the Member States of the EU (see insert on recognition of professional qualifications). The proposal for recognition of professional qualifications in TTIP merely contains a framework for entering into voluntary agreements on the mutual recognition of US and EU professional qualifications.

Recognition of professional qualifications: the TTIP proposals compared with existing EU legislation

Barriers to the cross-border trade in services can mainly be attributed to differences in the requirements imposed on the exercise of certain professions, such as doctors, lawyers or architects. The European Commission's proposal for the trade in services in TTIP contains a chapter on the mutual recognition of professional qualifications. This chapter proposes a framework for making future agreements on mutual recognition of regulated professions. The proposal does not go nearly as far as the existing EU legislation.

State of play in the EU
The TFEU (Article 53) provides for the competence to issue directives for the mutual recognition of professional qualifications, in order to make it easier for persons to take up and pursue activities as self-employed individuals. On the basis of the above, the content and duration of training courses have to a great extent been harmonised for seven professions that are regulated in each Member State (doctors, nurses, dentists, vets, pharmacists,

midwives and architects). These professions are subject to the principle of automatic recognition of qualifications in each Member State.

The general system of recognition applies to regulated professions whose training requirements have not been harmonised. This is based on an individual assessment of diplomas and, if necessary, professional experience, for which the receiving Member State may request compensatory measures. A detailed legal framework has been established for this purpose. In addition, a system of recognition based on professional experience has been established for a number of commercial, craft and industrial occupations.

In order to facilitate recognition, a digital European professional card has recently been introduced. This card is issued by the Member State in which the professional qualifications or the professional experience has been acquired. The card is all that is needed to be able to perform temporary and occasional work in another Member State.

Proposal for TTIP
The procedure proposed by the European Commission for the mutual recognition of professional qualifications in TTIP provides for the establishment of a committee for the mutual recognition of professional qualifications. The US and the EU will encourage their relevant authorities or professional groups to make a joint proposal to this committee for a mutual recognition agreement for the profession concerned. This proposal will include an estimation of the extent to which the professional qualifications are mutually compatible. The committee will assess whether the proposal complies with the guidelines included in the proposal for a mutual recognition agreement and will then be able to instruct negotiators to establish such an agreement. An agreement will oblige the relevant authorities to treat a service provider from the other party in a similar way in similar cases. However, no provision has been made for an individual right of complaint, as is the case in the EU.

Sources: TTIP *http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf*; Directive 2005/36 concerning the recognition of professional qualifications (revised in 2013). Consolidated version: *http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=celex:02005L0036-20140117*. For a clear explanation, see : R.V.A. Bishoen and I.M. Welbergen, *Herziening richtlijn erkenning beroepskwalificaties*, NtEr, 2014, No. 1, pp. 8-16.

The negotiating mandate and the proposals of the European Commission
The European Commission has received a mandate from the Council to conclude an agreement on the liberalisation of the trade in services based on the WTO General Agreement on Trade in Services (GATS) (see insert on GATS).[105] This involves increasing market access and agreements to treat foreign service providers on an equal basis with national service providers. National treatment is closely connected to market access.[106] By way of an exception to national treatment, Member States will retain the right to exclude foreign service providers from the market, or to give national providers

[105] See Council of Ministers of the EU, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directives 15-17: "The aim of negotiations on trade in services will be to bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTAs, in line with Article V of GATS, covering substantially all sectors and all modes of supply, while achieving new market access by tackling remaining long-standing market access barriers, recognising the sensitive nature of certain sectors. Furthermore, the US and the EU will include binding commitments to provide transparency, impartiality and due process with regard to licensing and qualification requirements and procedures, as well as to enhance the regulatory disciplines included in current US and EU FTAs.
The Parties should agree to grant treatment no less favourable for the establishment in their territory of companies, subsidiaries or branches of the other Party than that accorded to their own companies, subsidiaries or branches, taking due account of the sensitive nature of certain specific sectors.
The Agreement should develop a framework to facilitate mutual recognition of professional qualifications."

[106] For details, see: W. Wang, 2012, On the relationship between market access and national treatment under the GATS, *The International Lawye*r, pp. 1045-1065.

precedence over foreign providers.[107] The mandate also tasks the Commission with reaching agreement with the US on transparency, impartiality and the proper administration of justice for the granting of permits. The Commission also has a mandate to reach agreement on qualification requirements and procedures and a framework for the mutual recognition of qualifications.

Under the mandate, the Commission must ensure that nothing in what has been agreed prevents the parties from applying their legislation and regulations on the entry and residence of natural persons. The mandate also states that the legislation and regulations and requirements of the EU and the Member States with regard to terms and conditions of employment will continue to apply.[108]

GATS

The 1994 WTO GATS agreement is, to a great extent, based on the specific commitments of WTO members in the area of market access and national treatment. These commitments were made separately, by sector, for each of the four modes of supplying services across borders:

1. From one country to another by post or electronic communication, without involving the movement of consumers or producers. Example: an American company that orders an analysis of market opportunities in the Netherlands from a Dutch research organisation.
2. By moving consumers to the country where the service is provided. Example: a Dutch tourist who goes to a hairdresser in New York.
3. By setting up a company in another country to provide services there. This therefore involves the permanent relocation of a producer. Example: a Spanish hotel chain that opens branches in New York.
4. By the temporary movement of a service provider (as a natural person) to another country. Example: an American architect (and his assistants) who is designing a new town hall in The Hague.

Countries (or the EU) therefore indicate in a schedule or list the extent to which they are bound by the agreement in GATS on market access and national treatment for each of the four modes of providing cross-border services for a sector that they wish to access. They do so in a separate annex, as will be the case in TTIP. TTIP is aimed at removing barriers in all these four modes of supplying services. The first two modes fall within cross-border services in TTIP. In practice, most barriers arise in the latter two modes.

Just like a large group of other EU Member States, including Denmark, Sweden and the United Kingdom, the Netherlands has not made many reservations in the GATS as regards private services. Other Member States, such as Belgium and Germany, have made more. This is mainly due to the differences in regulatory traditions between Member States:

- Germany is a federal country and has therefore made various reservations, which only apply in one or two states. For example, the restriction on buying property only applies in the state of Berlin.

[107] See First Letter to Parliament from Minister Koenders of 16 May 2015 with reference to the plenary debate on European General Considerations, Dutch Senate, session year 2014-2015, 34 166 B, p. 13.

[108] See Council of Ministers of the EU, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directive 18: "The Commission should also ensure that nothing in the Agreement prevents the Parties from applying their national law, regulations and requirements regarding entry and stay, provided that, in doing so, they do not nullify or impair the benefits accruing from the Agreement. The EU and Member States' laws, regulations and requirements regarding work and labour conditions shall continue to apply."

- German regulations mainly centre on market access, whereas in the Netherlands it is the activity of providing services itself that is regulated. Germany imposes many requirements, including the obligation to register with a professional association and makes specific reservations with regard to legal forms and share ownership requirements. The Netherlands much prefers to regulate the actual activity (e.g. by means of permit requirements). These requirements are not governed or restricted by trade agreements and therefore do not require reservations.
- The Netherlands has in recent decades been examining all of its legislation regulations to see whether it can make improvements and reduce administrative burdens. However, other Member States still have a lot of unnecessary or disproportionate requirements, which is also evident from their reservations.

Source: SER secretariat, exceptions for private services: Ministry of Foreign Affairs.

European Commission proposals
In addition to a chapter on cross-border services, the proposal tabled by the European Commission in July 2015 for the negotiations on services also contains a chapter on investment, the entry and temporary stay of natural persons to provide business services and on e-commerce.[109] The proposals for the chapters on investment and cross-border services follow the standard provisions of European trade and investment agreements on market access, national treatment and most favoured nation treatment, and provisions on exceptions. The chapter on temporary entry and stay identifies the categories of persons who are entitled to this for a particular type of work under specific conditions. Details are provided in an annex (see below).

The proposal also contains a chapter on creating a regulatory framework. It includes provisions to make granting permits and qualification procedures easier and more transparent and provisions on the recognition of professional qualifications (see previous insert on recognition of professional qualifications). In addition, this chapter contains sectoral provisions, including measures to improve market access for maritime traffic, such as dredgers.

The proposal also contains three annexes in which both the EU and the Member States provide details of the services and activities which will be subject to exceptions from the principle, e.g. national treatment (negative list), or the sectors to which market access will be granted (positive list).[110]

Temporary stay of natural persons with a view to providing services
Annex 3 contains provisions – in accordance with the Council mandate – to the effect that the temporary period of stay for natural persons for business purposes (specialists in setting up a company, managers, sales staff) satisfies the relevant requirements specified by the EU and the Member States, including those set out in collective wage agreements, and that the entry of natural persons may be suspended if their intent is to influence a labour dispute.[111]

Exclusion of public services
The Council mandate calls for the high quality of European public utilities to be respected in accordance with the protocol to the TFEU on services of general economic

[109] See: *http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf*.
[110] *http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf*
[111] See Annex 3, p. 121, footnote 3: "All other requirements of EU and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements. Commitments do not apply in cases where the intent or effect of their temporary presence is to interfere with, or otherwise affect the outcome of, any labour/management dispute or negotiation."

interest.[112] Services supplied under government authority must also be excluded.[113] These are non-commercial services provided on a non-competitive basis (e.g. activities that serve to maintain public authority). Audiovisual services must be outside the scope of the agreement.

On 20 March 2015, European Commissioner Cecilia Malmström and US Ambassador Michael Froman confirmed in a joint statement on public services that any trade agreements between the US and the EU will not impose restrictions on governments providing or supporting services in areas such as water, education, health and social services.

The proposal tabled by the European Commission concerning TTIP negotiations on services follows the GATS system (see above), as is usual in trade agreements. This means that it contains a general part and three annexes in which both the EU and all the individual Member States indicate the obligations they will enter into with regard to market access and the restrictions they will impose with regard to national treatment on the basis of which foreign suppliers of the market can be excluded or national suppliers can be given preferential treatment. The relevant provisions concerning the proposed exclusion of public services are included in the general part and in the annexes in which the EU and the individual Member States indicate the restrictions they will apply and those they will not, if public services are excluded. This results in a complex structure, which is discussed in greater detail in Section 5.3.2.

Concerns as to whether all public services have been excluded
The public concerns about the arrangements in TTIP on the deregulation of the trade in services focus on the issue of whether all public services have been excluded from the proposed liberalisation of the trade in services in TTIP. There is also the issue of whether a decision to liberalise public services by TTIP will become irreversible. That is the subject of Section 5.3.

4.5 Public procurement

Examples
Under US law, only iron, steel and industrial products wholly manufactured in the US can be used in the construction of roads, airports and railways funded by the federal government. US legislation contains many of such Buy America or Buy American clauses. One recent example is the American Recovery and Reinvestment Act of 2009.[114]

Options and proposals for lowering the barriers
The US and the EU have made agreements under the auspices of the WTO on the opening up of the public procurement market based on the principle of reciprocity. However, the EU will adopt a cautious approach in this regard as long as the US adheres to the Buy American provisions. The European Commission's position is principally to remove these provisions or prevent them from being further extended.[115] The Council

[112] See Council of Ministers of the EU, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directive 19: "The high quality of the EU's public utilities should be preserved in accordance with the TFEU and in particular Protocol No. 26 on Services of General Interest, and taking into account the EU's commitment in this area, including GATS."
[113] See Council of Ministers of the EU, 2013, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 11103/13, Directive 20: "Services supplied in the exercise of governmental authority as defined by Article I.3 of GATS shall be excluded from these negotiations."
[114] For details, see: S. Woolcock and J. Heilman Greir, 2015*, Public Procurement in the Transatlantic Trade and Investment Partnership*, CEPS Special Report, No. 100, pp. 15 et seq.
[115] *http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153000.3%20Public%20Procurement.pdf*

mandate specifically mentions addressing the Buy American provisions.[116] Its position is also to agree on the conditions for tendering procedures (non-discrimination, transparency, predictability and fairness) and on the timely announcement of public tenders on both sides of the ocean.

The agreements on public procurement within the framework of the WTO or TTIP cannot force governments to put items out to tender. It also remains possible to specify requirements – provided that they are non-discriminatory – with regard to working conditions in government contracts as laid down in ILO Convention 94.

Public concerns
Shielding all or part of the public procurement market from foreign suppliers can also be used as a tool to safeguard public interests and national employment. Admittedly, it is also possible to insert social clauses in public contracts in the EU on the basis of current legal frameworks. The concern is that these interests will be neglected under the pressure of opening up the public procurement market.

4.6 Protection of investment: from ISDS to ICS

4.6.1 Background to investment protection and arbitration

TTIP is not just about trade. Agreements on market access and protection of foreign investment are currently set out in bilateral investment treaties. These agreements offer foreign investors a degree of security and reduce the financial risk they run by investing in another country. The US has investment treaties with fifty-seven countries in force, nine of which are new EU Member States. The twenty-eight EU Member States have a total of almost 1,200 of these treaties in force with countries outside the EU. The Netherlands has concluded over ninety of them.[117]

In addition to the standard provisions from trade agreements, such as market access, the principle of non-discrimination and most favoured nation treatment, investment protection agreements also contain provisions of specific relevance to investment, such as fair treatment, unlimited capital transfer, compensation for unlawful expropriation and arbitration in the event of infringements of the investment protection agreement. Compensation can be claimed from the host country for any unlawful expropriation or discrimination by means of an arbitration procedure between companies and governments (ISDS: investor-to-state dispute settlement). A recent example is the case brought by television channel Al Jazeera against Egypt. The television channel is claiming 150 million dollars in compensation from Egypt for blocking its signal and seizing its property.[118] This is a remarkable case because, in this instance, it is the company and not the government that is basing the claim on public interest (i.e. freedom of expression). Another ISDS claim has been brought against Egypt by Veolia: this company is claiming compensation for increased costs incurred due to a rise in the Egyptian minimum wage. No ruling has yet been handed down in these two cases.

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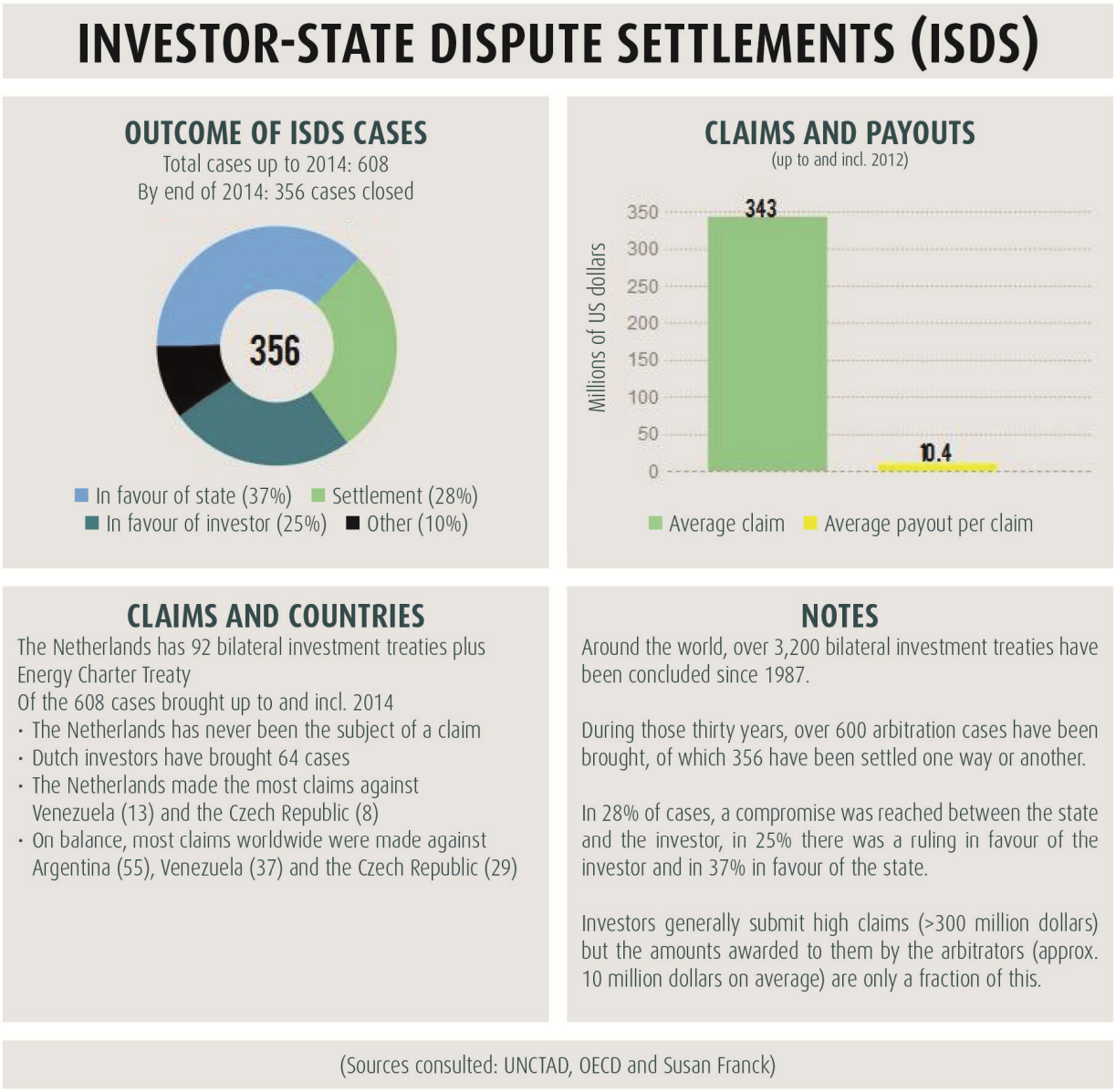
[116] Council of Ministers of the EU, 2013, op. cit., p. 10. "The Agreement shall also include rules and disciplines to address barriers having a negative impact on each other's public procurement markets, including local content or local production requirements, in particular Buy America(n) provisions, and those applying to tendering procedures, technical specifications, remedy procedures and existing carve-outs, including for small and medium-sized enterprises, with a view to increasing market access, and where appropriate, streamlining, simplifying and increasing transparency of procedures."

[117] At this point, it should be noted that various developing countries are reviewing and/or cancelling their bilateral investment treaties (BITs) because they believe that these treaties do not in fact help to attract foreign investment, whereas they make the recipient countries vulnerable to ISDS claims, with substantial perceived risks to the discretionary power to implement new regulations and set government budgets. For this reason, countries such as Indonesia and South Africa have recently cancelled their BITs with the Netherlands.

[118] This example is taken from TK, 21 501-02, No. 1397.

The infographic below explains a number of facts about ISDS at a glance.



It has been found that 28 percent of cases result in a compromise. In 37 percent of cases, the government is successful. This also happened recently in the case that Philip Morris had brought against Australia with regard to packaging regulations for cigarette packs.[119] In a quarter of cases, the investor is successful. In these cases, they usually receive a much lower level of compensation (on average 10 million dollars) than originally claimed.[120] The recent award of 1 billion euros in an expropriation case

[119] http://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging

[120] Van Harten and Malysheuski arrive at a higher average amount of 84 million dollars, based on 86 cases in which compensation was awarded (7,191 mln dollars/86). They state that this amount was overwhelmingly (over 90 percent) awarded to the largest companies. These data relate to "ordered compensation" by a Tribunal and not to the actual sums paid out, as shown in the infographic. In the words of the authors: "We did not attempt to track actual records of payment of awards or account

brought against Ecuador's government is an exception, which may lead to a higher average claim payout. The Netherlands has never yet received a claim (see also insert "More claims by US companies against the Netherlands as a result of TTIP?" in Section 4.6.4). Conversely, many cases have been brought by investors based in the Netherlands.[121] In 2013, the Netherlands was one of the countries from which most claims originated, including from "mailbox" companies. Its relatively high number of bilateral investment agreements, its relatively high number of bilateral tax agreements, its favourable tax climate and a highly developed legal consultancy sector make the Netherlands an attractive head office location for foreign companies.

4.6.2 The mandate from the Council of Ministers: modernising ISDS

The Lisbon Treaty grants the EU exclusive powers to conclude investment agreements as well as trade agreements. The Member States' existing bilateral agreements will gradually be replaced by European investment protection agreements. That is why the European Commission has been given the mandate to negotiate a chapter on market access and investment protection in TTIP. However, the Council of Ministers has set certain conditions in this regard. The chapter must first focus on providing a high level of protection for foreign investors, a level playing field *and* a guarantee that the scope for policymaking will be preserved for the EU and the Member States to take and implement non-discriminatory measures in the areas of social policy, the environment, safety and health and financial stability. Second, the Council believes it must contain a "state of the art" arbitration mechanism, with the following features:[122]

- transparency;
- independence of arbitrators;
- predictability, e.g. through the possibility of the parties giving a binding interpretation of provisions;
- protection from frivolous claims;
- prevention of forum shopping;
- the right of appeal against arbitrators' rulings.

Whether TTIP will include an investment chapter with a relevant ISDS will, according to the Council of Ministers, depend on whether the above conditions have been satisfied. This question will also be answered in light of the final balance of the Agreement.[123]

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for changes in ordered compensation due to set aside or annulment decisions" (p. 14). The data also relate to a more recent period (spring 2015 instead of late 2012, which includes the large claims against Ecuador (see main text)). See: G. Van Harten and P. Malysheuski, 2016, *Who has benefited financially from investment treaty arbitration? An evolution of the size and wealth of claims*, Osgoode Hall Law Studies, Research Paper 14.

[121] See E. Schram et al, *Nederland is spil in ISDS-systeem*. *http://longreads.oneworld.nl/nederland-is-spil-in-isds-systeem/*

[122] See Council of Ministers of the EU, 2013, op. cit., Directive 23, p. 9: "Enforcement: the Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, including through the possibility of binding interpretation of the Agreement by the Parties. State-to-state dispute settlement should be included, but should not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanisms. It should provide for investors as wide a range of arbitration fora as is currently available under the Member States' bilateral investment agreements. The investor-to-state dispute settlement mechanism should contain safeguards against manifestly unjustified or frivolous claims. Consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement, and to the appropriate relationship between ISDS and domestic remedies."

[123] See Council of Ministers of the EU, 2013, op. cit., Directive 22, p. 8: "After prior consultation with Member States and in accordance with the EU Treaties the inclusion of investment protection and investor-to-state dispute settlement (ISDS) will depend on whether a satisfactory solution, meeting the EU interests concerning the issues covered by paragraph 23, is achieved. The matter shall also be considered in view of the final balance of the Agreement."

4.6.3 The European Commission's proposals for an Investment Court System

Elements of the proposal
On the basis of the Council mandate, the European Commission has submitted proposals to the US for an agreement on investment protection including a modernised arbitration mechanism in the form of a bilateral Investment Court System (ICS).[124] The intention is for this to develop into a multilateral Investment Court System for all arbitration cases concerning investment agreements between the EU and third countries. The EU and Canada have agreed to include the Investment Court System in the EU-Canada Comprehensive Economic and Trade Agreement (CETA).[125]

The proposal contains the following elements (for details, see Table 4.3):
- Detailed determination of the scope of investment protection and arbitration: fair and equitable treatment, national treatment, most favoured nation treatment and the right to compensation for expropriation (see Table 4.3, No. 1).
- In connection with the above: enshrining of the right to regulate, e.g. by determining that measures aimed at protecting people and the environment are not a form of indirect expropriation (see No. 2).
- Independence of arbitrators, transparency of the proceedings, a new right for third parties to join in the proceedings and the right of appeal.[126] (see No. 3)
- Prevention of abuse and high and unjustified claims and forum shopping by mailbox companies (see No. 4).
- Commitment that the Investment Court will only apply relevant provisions of international law and disregard national law when assessing whether the provisions of the TTIP agreement are relevant (see No. 5).

Table 4.3 – The European Commission's proposals for the investment chapter in TTIP, including a bilateral Investment Court System (ICS).

Aspect	*Details in proposal*
1. Detailed determination of the scope of investment protection and arbitration	Article 3 (Section 2) states that the EU and US will treat foreign investors in a fair and equitable manner. Under this article, the following are among the measures considered breaches of the above obligation: denial of justice, fundamental breach of due process, discrimination on grounds of race, gender or religious belief and harassment or coercion (Article 3). Article 4 states that any compensation for war, etc. must also be paid to foreign investors. Article 5 (Section 2) states that the EU and the US will not expropriate

[124] *http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf*
[125] *http://europa.eu/rapid/press-release_IP-16-399_en.htm*
[126] In order to become a party to the dispute, you must have a cumulative claim: i) a direct and existing interest and ii) it must add (something) to the claim/defence of the parties between whom the dispute has arisen. Access is limited, in line with the current requirements in the Netherlands for interested parties in disputes in Dutch administrative law courts and the requirements under EU law. This right to actually participate as a third party in the proceedings is new and does not feature in any agreement. Third parties are also involved in dispute settlement proceedings through the application of the UNCITRAL Transparency Rules. In this way, all the information on the proceedings and underlying documents are made public and hearings will be in public. The principle is therefore that cases should be in public, unless there are reasons for deciding otherwise (Art. 18, TTIP investment chapter). Second, it will be possible for third parties to join in proceedings as a "friend of the court" or *amicus curiae* (Art. 23(5), TTIP investment chapter). This is consistent with proceedings under the UNCITRAL Transparency Rules. One well-known case was the World Health Organisation acting as *amicus curiae* in the Philip Morris case against Australia.

	or nationalise investors directly or indirectly (see also "right to regulate" below) except if there is a general public interest, there is due process, there is no discrimination against foreign investors and suitable and effective compensation is paid. The arbitration between investors and governments relates to the above provisions on investment protection and the application of national treatment and most favoured nation treatment in the chapter on services and investment (Article 1, Section 3).
2. The right to regulate	The right to regulate with a view to protecting public interests, e.g. consumer and social protection, is set out in Article 2 of the investment protection chapter.[127] This chapter also states that non-discriminatory measures such as consumer and social protection will not be regarded as a form of indirect expropriation (Article 5 and the related Annex 1). Annex 2 states that negotiations on a restructuring of government debt can never coincide with an arbitration claim.
3. Independence, transparency of arbitration mechanism and right of appeal	Establishment of a bilateral Investment Court System consisting of a tribunal of first instance and an appellate body with qualified and independent judges from the EU, the US and third countries who will be appointed for a fixed term and will be nominated by the EU and the US. The judges will hear cases on the basis of allocation (Section 3, Article 9). They will be bound by an ethical code of conduct stating, inter alia, that arbitrators cannot act as counsel for parties (ditto, Article 11). Cases will be heard under the "UNCITRAL Transparency Rules" (Article 18). A restricted right will also be created for third parties to become a party to the dispute (Article 23).
4. Prevention of abuse and high and unjustified claims and forum shopping by mailbox companies and multiple parallel proceedings	The proposal contains a number of provisions for countering the abuse of investment arbitration. Cases brought by companies which have acquired an interest for the purpose of thereby gaining access to the investment arbitration will not be heard (Article 15). The Agreement relates solely to investments of a fixed duration, commitment of capital and the expectation of profit and risk (definition of investment). Companies that lose their case must pay their own legal costs, unless the ICS considers this unreasonable in the circumstances (Article 28, Section 4). The ICS can dismiss a case if a similar claim has been submitted to another tribunal or a domestic court (Article 14). Article 28 (Section 2) states that the compensation awarded may not exceed the loss suffered by the investor. Article 28 (Section 3) prohibits the award of punitive damages.
5. Applicable legislation and relationship with national legislation	The investment arbitration relates to failure to comply with the investment protection provisions in the TTIP Agreement which have resulted in loss or damage for the claimant due to unlawful acts (Article 1.1). The tribunal will assess

[127] "The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity."

	whether the relevant provisions have been complied with. It will apply only relevant provisions of international law (Article 13). The domestic law should be disregarded in this process. If necessary, the tribunals must follow the prevailing interpretation of the domestic law. They may, where appropriate, ask the parties for a binding interpretation or for expert opinions.

Comparison of the Commission's proposals with the old ISDS
These proposals represent an implicit shift from a "private" arbitration mechanism, in which the company and the respondent country can appoint an arbitrator (plus an independent third party), to a "public" Investment Court System with independent arbitrators appointed by the EU and the US who hear cases on a rotation basis and which provides a right of appeal. The more public nature of the system is also reflected in the proposal to house the secretariat with UN institutions such as the Permanent Court of Arbitration or the international centre for the settlement of investment disputes (independent division of the World Bank).

Table 4.4. shows that the Commission's proposals not only go further than the existing bilateral investment treaties (BITs), they also go beyond the arrangements in the draft trade and investment agreement between Canada and the EU (CETA) and the draft agreement between the US and other Pacific Rim countries (TTP: see also below). The table splits the comparison into two parts.

- Material: what is meant by indirect expropriation? Has it been broadly conceived so that companies can invoke it with relative ease? Or has it been clearly defined so that measures aimed at protecting people and the environment fall outside its scope and therefore provide governments with greater protection from investment claims? A clear definition of indirect expropriation would limit potential claims to those for breach of fair and equitable treatment and non-discrimination provisions and to the compensation that would be payable in the event of *direct* expropriation. The arbitration would then concern only *how* government measures have been implemented and not *whether* a government should be allowed to implement a measure.
- Procedural: who appoints the arbitrators, how transparent is the process and is there a right of appeal?

Table 4.4 Comparison of existing bilateral investment agreements (BITs), CETA and TTP, with the European Commission's TTIP proposals

	Material: what has been determined, e.g. on indirect expropriation?	*Procedural: appointment of arbitrators, rights of appeal, etc.*
Existing BITs	Indirect expropriation has not been clearly defined.	Company and government can each appoint an arbitrator. There is also a third arbitrator.
CETA (draft agreement)	Indirect expropriation has been clearly defined. Non-discriminatory measures aimed at public interests such as consumer and social protection cannot be regarded as indirect expropriation.	Company and government can each appoint an arbitrator. There is also a third arbitrator. There is increased transparency. The EU and Canada have agreed that, after signing the draft agreement, they will replace it with a bilateral Investment Court System as in TTIP.
TPP (draft agreement)	As in CETA	As in CETA. A code of conduct for arbitrators has also been agreed.

European Commission proposal in TTIP	As in CETA	Establishment of a bilateral Investment Court System (ICS) consisting of a tribunal of first instance and an appellate body with qualified and independent judges from the EU, the US and third countries who will be appointed for a fixed term and will be nominated by the EU and the US. They will hear cases on a rotation basis.

Source: SER secretariat. The comparison between existing BITs and CETA is also based on S. Hindelang and C. Sassenrath, 2015, *The investment chapters of the EU's international trade and investment agreements in comparative perspective*. Study for the EP's DG for External Policies. For TPP and the European Commission proposal for ICS, see main text.

4.6.4 The US and ISDS

The US wants TTIP to cover investment protection, including ISDS, because it wishes to modernise its existing treaties with the new EU Member States and extend them to cover the EU.[128] As well as a guaranteed level playing field, the US also wants guarantees that governments will retain the right to regulate in the public interest.[129] The desire to agree on the harmonisation of investment protection is not only a factor in its negotiations with the EU. The inclusion of ISDS was also a hard requirement of the US in its negotiations with a number of Asian countries, Chile, Canada, New Zealand and Australia on the Trans-Pacific Partnership. The arrangements on investment protection in TTIP and TPP will, because of their scope, probably set the trend for other future bilateral and multilateral trade agreements.

In terms of the appointment and selection of arbitrators, the arrangements on investment protection that the US has agreed with other countries in the TPP Agreement are still based the "old" model in which both a company and a respondent government can each appoint one of the arbitrators and in which a third arbitrator from a country other than the respondent country is appointed and there is no right of appeal (see Table 4.4).[130] However, it also contains elements of the "new" model such as a more precise definition of what is meant by fair and equitable treatment and direct and indirect expropriation, a code of conduct for arbitrators, and a radical form of transparency.[131]

The Netherlands does not have a bilateral investment treaty with the US. Public concerns have been raised that TTIP will open the way to claims by US companies. These concerns are discussed in detail in the insert below.

More claims from US companies against the Netherlands as a result of TTIP?

The Dutch TV programme *Tegenlicht* devoted its attention to ISDS on 4 October 2015. The key issue was the claim that the American company Line Pine had made under the NAFTA agreement against the government of Quebec in Canada on account of the withdrawal of a licence to extract shale gas from under the basin of the St. Lawrence

[128] See EK 34 166 B, p. 18.

[129] See https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-5.

[130] See http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP-text/9.%20Investment%20Chapter.pdf, Article 9.21.

[131] See Article 9.6, 9.7 and Annex 9-C, 9.21 and 9.23, respectively.

river. This case was portrayed as an example of the American "litigation culture". The programme suggested that by including ISDS in TTIP the Netherlands could also be affected in the same way. It could lose its right of self-determination, for example, to stop gas extraction in Groningen.

This documentary covered three issues:
1. The actual case between Lone Pine and the Canadian government. Does it put the sovereignty of the Canadian government in doubt?
2. The growth in and impact of the number of claims against Canada under NAFTA. Is this an example of an American litigation culture that is getting expensive for the Canadian government and has made it reluctant to take measures to protect the environment?
3. The possible consequences for the Netherlands of including ISDS. Will the Netherlands also be confronted with the alleged American litigation culture? Are we losing our right of self-determination?

The following can be noted with regard to these questions.

It is a standard provision of trade and investment agreements – including NAFTA – that governments are entitled to expropriate, or take similar measures such as withdrawing licences, provided that this is done in the public interest, is accompanied by legal guarantees and is non-discriminatory and a reasonable amount of compensation is paid. Lone Pine feels aggrieved because the company believes that its licence has been withdrawn "without due process, without compensation, and with no cognizable public purpose". With regard to the last point, Lone Pine argues that the government of Quebec failed to explicitly cite the public interest of withdrawing the licence and did not wish to await the conclusion of an ongoing study by a strategic environmental assessment committee. Lone Pine does not dispute the right to withdraw a licence to protect the environment – governments do have that right – but the way in which it was done. The government of Quebec contends that it did act with due care, that the relevant NAFTA provisions were therefore not breached and that Lone Pine has not suffered any loss or damage.

It is now up to the arbitrators to rule whether the government of Quebec acted without due care and whether Lone Pine is entitled to compensation. An analysis of the cases brought against Canada by companies under NAFTA has found that the Canadian government has defended itself relatively successfully in recent years. Tietje and Baetens draw three conclusions on the basis of a detailed study of cases brought under NAFTA:
1. All of the cases in which the company was awarded compensation concerned the way in which a government measure had been taken and not the measure itself.
2. In those cases in which companies challenged the government measure – the right to regulate – the companies always lost the case. These first two points show that the best guarantee against unjustified claims is careful government policy.
3. There is nothing to indicate that the cases studied have resulted in regulatory chill. This does not mean that regulatory chill can never happen. This subject is hotly debated in the literature.

Baetens also puts the alleged American litigation culture into perspective. She points out that in 2013 the majority of claims came from the Netherlands, Germany, Luxembourg and only then the US. Of the top ten countries that generate the majority of claims, six are members of the EU. The BDI, the German employers' association, quotes UNCTAD figures, which show that the majority of claims made by investors against Member States of the EU were submitted from other EU Member States. The BDI also points out

that the number of cases brought by American companies under NAFTA has not increased in recent years, contrary to the worldwide trend.

The Netherlands is among the countries that have the most investment agreements (about 90) with other countries. Many American companies operate in these countries. These companies could already submit a claim against the Netherlands through a subsidiary or by realigning their activities. They could also turn to the Dutch courts if they felt aggrieved and believed that the Expropriation Act [*Onteigeningswet*] had not been properly implemented. TTIP will not change this in any way. In any case, this is not an argument for not including ISDS in TTIP: not only the situation in the Netherlands, but also the situation in other EU Member States and the US is of relevance.

Until now, the Netherlands has never had a claim made against it. This may be an indication that the Dutch government acts with due care. This remains the best guarantee against claims by foreign investors.

Sources: the Lone Pine claim and the Quebec government's defence are in the public domain and can be downloaded from: *http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng*. Tietje and Baetens' analysis of the Lone Pine and other NAFTA cases can be found in: C. Tietje and F. Baetens, *The impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, appendix to TK 21 501-02, No. 1397.2014, pp. 78-93. For a summary, see also: L. Poulsen, J. Bonnitcha and J. Yackee, 2015, Transatlantic Treaty Protection, in: D. S. Hamilton and J. Pelkmans (eds.), *Rule-Makers or Rule-Takers: Exploring the Transatlantic Trade and Investment Partnership*, pp. 166-170. These authors also list the options for American companies to make a claim via existing investment agreements (p. 159). They do believe in the existence of an American litigation culture (p. 165). For the data on the number of claims and their growth, see: F. Baetens, 2015, Transatlantic Investment Treaty Protection – a response to Poulsen, Bonnitcha and Yackee, in: Hamilton and Pelkmans, op. cit., p. 195; BDI, 2015*, International Investment Agreements and Investor-State Dispute Settlement: Fears, Fact, Faultlines*, p. 17.

4.6.5 Public concerns and objections

There are major public objections to the existing forms of investment protection and arbitration mechanisms in "old style" investment agreements, i.e. the common forms of ISDS.

This can be summarised as follows:

- There is one-sided protection of investors' interests, in which "private" corporate interests take precedence over public interests, e.g. environmental and labour standards, and there is no balanced consideration of interests.
- The possibility of high compensation claims leads to "regulatory chill", i.e. to a reluctance to take new legal measures aimed at improving the protection of human life, labour and the environment.
- There is not a level playing field, as domestic companies and investors do not have access; international investors do not have to exhaust domestic legal remedies first and can therefore bypass domestic courts.
- The arbitrators are not independent because they are also appointed by the investor in the capacity of claimant and there is a lot of money to be made.
- The procedure is not transparent, which leaves a lot of leeway for undue influence.
- ISDS leads to abuse via "forum shopping" and mailbox companies.

ISDS puts a powerful means of exerting pressure into the hands of large transnational companies to lobby against new regulation and for further deregulation.[132]

[132] See: G. Van Harten and P. Malysheuski, 2016, *Who has benefited financially from investment treaty arbitration? An evolution of the size and wealth of claims*, Osgoode Hall Law Studies, Research Paper 14.

Because of these major objections and the intensifying public debate and protest, the Council of Ministers has now imposed detailed conditions on including an investment chapter in TTIP and the European Commission has proposed an updated mechanism in the form of an ICS. However, according to critics, this new mechanism does not meet all the objections. For example, ICS is still not an independent and fully fledged judicial body, but continues to be a form of arbitration, in which arbitrators continue to hand down one-sided rulings on investment interests.[133] Government measures aimed at protecting people and the environment can still be challenged on the basis that they impose unnecessary restrictions on trade and arbitrators are paid according to the claims submitted. Furthermore, there is still not a level playing field, as foreign investors do not have to exhaust domestic legal remedies or provide evidence that they do not have reasonable access to domestic courts or cannot expect a fair hearing. They therefore dispute the need to include an arbitration mechanism of any kind between companies and governments (for details, see Section 5.5.1). Section 5.5 sets out systematically the public concerns and objections and the guarantees provided in the area of investment protection.

4.7 Sustainable development, core labour standards and trade

Mandate to reach agreement on sustainability
The Council of Ministers has given the European Commission a clear mandate to make agreements on sustainable development as the parties' overarching objective (see Section 4.1). The parties must endeavour to guarantee and facilitate compliance with international environmental and labour standards. The EU and the US should lay down in TTIP that they will not promote trade and investment by lowering standards for the environment, labour and health and safety, or by adversely affecting the core labour standards. The purpose of this chapter must be to agree that TTIP will not disregard the obligations that the parties have entered into in the area of labour and the environment. The Council wants any TTIP agreement to contain mechanisms to support the ILO Decent Work Agenda by ensuring that the parties implement the core labour standards effectively in their legislation and promote international cooperation on this issue.[134] This also applies to relevant multilateral agreements on the environment. The Agreement must also contain provisions in the area of corporate social responsibility. The Agreement must contain a mechanism for overseeing the implementation of the agreements that also involve civil-society organisations. It must also contain a dispute resolution mechanism. The economic, social and ecological impact of the Agreement must be analysed by means of an independent Sustainability Impact Assessment, which also involves civil-society organisations.

European Commission proposal
In accordance with this mandate, the European Commission submitted a detailed proposal on trade and sustainable development to the US negotiators on 6 November

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[133] See also the position of the "Deutsche Richterbund", the German association of judges and public prosecutors, No. 04/16 of February 2016 (*http://www.drb.de/cms/index.php?id=952*) and the position of the European Association of Judges: *http://www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf*.

[134] See Council of Ministers of the EU, 2013, op. cit., Directive 32, p. 15: "The Agreement will include mechanisms to support the promotion of decent work through effective domestic implementation of International Labour Organisation (ILO) core labour standards, as defined in the 1998 ILO Declaration of Fundamental Principles and Rights at Work and relevant Multilateral Environment Agreements as well as enhancing co-operation on trade-related aspects of sustainable development. The importance of implementation and enforcement of domestic legislation on labour and environment should be stressed as well. It should also include provisions in support of internationally recognised standards of corporate social responsibility, as well as of the conservation, sustainable management and promotion of trade in legally obtained and sustainable natural resources, such as timber, wildlife or fisheries' resources. The Agreement will foresee the monitoring of the implementation of these provisions through a mechanism including civil society participation, as well as one to address any disputes."

2015.[135] It contains four main elements, which are discussed briefly below. These proposals are in line with the European Commission's new trade strategy, which places greater emphasis on sustainability aspects.[136]

Overarching principles

The first proposal is that the parties reconfirm their commitment to sustainable development, economic and social development and environmental protection and to ensuring that trade and investment contribute to these goals. The provisions agreed in the sustainability chapter could contribute by:

- Reconfirming the objectives in the area of labour and environmental protection within a context of open and transparent trade and investment relations.
- Formulating and implementing policy that contributes to sustainable development.
- Promoting dialogue and cooperation between parties, including in relation to third countries.
- Encouraging the business sector, trade unions and other civil-society organisations to help to promote sustainability.
- Promoting public consultation, participation and debate with regard to sustainability aspects associated with the TTIP Agreement.

The parties confirm their right to regulate, where they will aim to ensure that their policy and laws continue to focus on improving the protection levels for labour and the environment.

Labour standards

It is proposed that the chapter on labour standards should contain a general section in which the parties reconfirm their commitment to the ILO Decent Work Agenda and the core labour standards. They will stress the need to enhance mutual support between trade policy and labour standards and the importance of the ILO Decent Work Agenda.[137]

The proposed chapter will contain details of each of the four core labour standards – freedom of association in trade unions and the right to collective bargaining, the elimination of forced labour, the effective eradication of child labour, and equality and non-discrimination. It will state what the labour standards involve and what the parties have to do to implement them. In addition, the chapter will also contain a number of provisions on collaboration in international organisations, such as the ILO.

Environmental agreements

It is proposed that, in the chapter on environmental agreements, the parties reconfirm their undertaking to ratify the agreements that they have signed, their intention to ratify other agreements and cooperate internationally, and their right to take measures to implement the agreements. This will be set out in detail for the agreements in the area of biodiversity, trade in protected flora and fauna (CITES Convention), sustainable forest

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[135] See: *http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf*.

[136] European Commission, 2015, Trade for all: towards a more responsible trade and investment policy. See: *http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf*

[137] See Article 4: "The Parties recognise the value of global standards and agreements on labour matters as fundamental instruments to promote and achieve decent work for all and stress the need to enhance the mutual supportiveness between trade and labour policies and rules. Accordingly, they agree to promote the development of their trade and investment relations in a manner conducive to the realisation of the Decent Work Agenda, as expressed through the International Labour Organisation (ILO) 2008 Declaration on Social Justice for a Fair Globalisation, in its four strategic objectives: 'a) employment promotion, b) social protection, c) social dialogue, d) fundamental principles and rights at work, and the cross-cutting issues of gender equality and non-discrimination.'"

management and trade in wood, sustainable fishing and trade, and responsible environmental protection and trade in chemicals and waste.

Horizontal agreements
It is proposed that the parties put on record that it is inappropriate to lower protection levels in the areas of labour and the environment in order to promote or influence trade and investment. This chapter will also contain provisions on transparency and public participation, sustainability impact assessments and corporate social responsibility based on, inter alia, the OECD Guidelines on Corporate Social Responsibility, the ILO core labour standards and the UN Guiding Principles on Business and Human Rights.

Institutional aspects and procedural guarantees
The European Commission proposal does not contain any provisions on institutional aspects such as oversight of the agreements, a dispute resolution mechanism or the involvement of trade unions and other civil-society organisations. The European Commission is planning first to obtain wide-ranging agreement with the US on the content of the proposals and only then to table proposals on how to organise oversight of the agreement and a mechanism for settling disputes in this regard.[138] The Commission believes that although the EU and the US are both keen to make the agreement binding and enforceable, they differ in their approach to non-compliance.

US trade agreements provide the option of imposing effective sanctions where necessary, including the termination or suspension of preferential status. Companies, NGOs and trade unions have the right to challenge the preferential status of specific products or countries.[139] A recent example was when Guatemala was threatened with sanctions for non-compliance with labour laws and the prosecution of trade union members.[140] In view of the geopolitical and economic power wielded by the US, any trade agreements entered into are asymmetrical, which means that the weaker partner would find it much harder to threaten the US with effective sanctions, if the situation arose. The question is whether the US will wish to include similar sanction mechanisms in an agreement with an equal trading partner such as the EU.

Public concerns and objections
Public concerns and objections centre on compliance with existing labour standards. The question is: how can TTIP effectively promote compliance with labour standards?
The US has ratified only two of the eight core ILO conventions – the convention on the elimination of forced labour and the worst forms of child labour. The core ILO conventions which the US has not ratified include the conventions on the freedom of association in trade unions and the right to collective bargaining. According to critics, the US does not comply with these conventions. They believe that this could lead to situations involving unfair competition with US companies that underpay and exploit workers, which could then result in a downward spiral in Europe.
There are also concerns that rulings under ISDS could undermine core labour standards. Section 5.4 discusses the public concerns and objections relating to core labour standards and the guarantees provided in relation to trade; Section 5.5 does the same, but in relation to investment protection.

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[138] See: *http://trade.ec.europa.eu/doclib/press/index.cfm?id=1393*

[139] See SER Advisory Report, 2008, *Duurzame Globalisering*, op. cit., pp. 193-194; H. Horn, P.C. Mavroidis and A. Sapir, 2008, *Beyond the WTO? An anatomy of EU and US preferential trade agreements*, Bruegel Blueprint 7; ILO, 2015, *Social Dimension of Free-Trade Agreements*; L. Compa, 2014, *Re-planting a field: International Labour Law for the Twenty-First Century*, Inaugural lecture on the acceptance of the Paul van der Heijden Chair in Social Justice, Leiden Law School.

[140] See L. Compa, op. cit, p. 14 and p. 18. The threat of sanctions against Bangladesh involved suspending tariff preferences. This was largely symbolic because garments from Bangladesh are not covered by US tariff preferences. Sanctions were threatened against Guatemala under the CAFTA trade agreement between the US and five Central-American countries and the Dominican Republic.

5. Guaranteeing public interests in the social arena

5.1 Introduction

The Treaty on the Functioning of the European Union (TFEU) states that the Union's action on the international scene must be guided by principles that provide for a high level of protection for workers, the environment and consumers and the associated respect for human rights and fundamental freedoms, the fight against poverty, and the promotion of good governance. In keeping with the foregoing, the SER has indicated (see Section 2) that the Union's trade and investment agreements should not restrict countries from promoting legitimate public interests in their policymaking.

This section focuses on the guarantees provided for in TTIP to maintain a high level of protection and allow countries the necessary discretionary power to enforce that level of protection. We look in succession at regulatory cooperation (5.2), the exclusion of public services from liberalisation of the trade in services (5.3), labour and trade (5.4), and investment protection and ISDS (5.5). Each section has the same structure. They begin by looking at public concerns and objections, go on to discuss the guarantees provided for, and then assess these guarantees in light of the concerns and objections that have been expressed. Readers must bear in mind that this is an assessment of provisional texts and proposals, in many cases based on the Union's negotiating position, in so far as these are publicly available. The final assessment by the European Council, the European Parliament, and the national parliaments can only take place once the entire treaty text has been finalised and submitted for ratification.

5.2 Regulatory cooperation

5.2.1 Public concerns and objections

The public has serious concerns about and objections to the proposals on regulatory cooperation because such cooperation could lead to a situation where trade interests take precedence over the effective protection of people and the environment.[141] These concerns and objections relate to the following points:

- The proposed regulatory cooperation board and expert panels (see Section 4.3.2) could allow (US) companies to influence legislation.[142] Prior to political decision-making, stakeholders would have the opportunity to lobby for whichever form of legislation is least disruptive to trade, paving the way for weaker standards and levels of protection under the influence of a powerful business lobby.
- By extension, the regulatory cooperation board could very well undermine the discretionary powers of the European Parliament and the European Council to pass laws.[143] Critics claim that the mandate of the regulatory cooperation board is far too broad, and that its legal status is unclear: is it purely an advisory body, or can it also table proposals for legislation, thereby undermining the position of the European Commission?

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[141] Platform Authentieke Journalistiek, SOMO and TNI, 2014, *Feiten of fabels: 7 claims over TTIP* (update September 2015: *10 claims over TTIP*); R. van den Dickenberg, *Waarschuwing: expertpanel kan TTIP wetten vertragen*, SC, 2-06-2015, p. 8. Conversely, there are worries in the US that European businesses and banks will undermine the level of protection in the US. See: http://www.citizen.org/tafta.

[142] Platform Authentieke Journalistiek, op. cit., p. 21; R. van den Dickenberg, *Waarschuwing: expertpanel kan TTIP wetten vertragen*, SC, 2-06-2015, p. 8.

[143] Speaking in the Dutch House of Representatives, the leader of the "Partij voor de Dieren" group, Marianne Thieme, claimed that she feared "regulatory clubs of multinationals and technocrats who will join forces in amending laws and regulations". Dickenberg, op., cit.

There are also concerns about the proposal to make TTIP a "living agreement", i.e. to build in the possibility of making binding agreements outside the scope of political decision-making after the Treaty has been concluded.[144] The process of regulatory cooperation in a "living" TTIP means that protective regulations could be continuously put up for discussion, resulting in postponement or cancellation. That would be the case both for new and existing regulations. Convergence with the Commission's REFIT programme is also significant in this regard. REFIT is generally seen as an attempt to lower levels of protection, even though the major problems that the world faces today (climate change, growing level of inequality, etc.) call for vigorous regulatory action on the part of governments.

Critics also worry that the dynamics of mutual recognition of rules and the pressure of competition from goods and services produced under lower standards will spark a "race to the bottom" in both the US and the EU.[145] And some believe that it is in any case impossible to amend the legislation without lowering standards.[146] Combined with an investment dispute resolution mechanism, the process of regulatory cooperation as it has been proposed could lead to "regulatory chill", i.e. a reluctance to enact new legislation that will offer the intended high level of protection. One of the key points of public concern is: who will be determining what an "unnecessary barrier to trade" is, and on which grounds will that determination be made?

5.2.2 Proposed guarantees

According to the mandate that the Council has given the Commission, regulatory cooperation should be geared towards removing unnecessary barriers to trade in a manner that respects the Member States' levels of protection as well as procedures, methods and principles, such as the precautionary principle (see Section 4.3.1).

Agreements about cooperation between the regulatory authorities
To achieve better regulatory cooperation, the Commission has followed the Council's guidelines and made a number of specific textual proposals for the TTIP negotiations (see Section 4.3.2). The Commission's "horizontal" proposal for closer cooperation between regulatory authorities in the relevant TTIP chapter offers the following guarantees for the protection of public interests:[147]

- The purpose of regulatory cooperation is to facilitate trade in a way that supports the parties' efforts to stimulate growth and jobs, while pursuing a high level of protection (Article 1.a).
- Each party has the right to adopt, maintain and apply measures at that level of protection (Articles 1.3 and 12.3).[148]
- The cooperation does not oblige the parties to achieve any particular regulatory outcome (Article 1.2).[149]

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[144] See, for example, SOMO et al., *Feiten en fabels: 10 claims over TTIP*, p. 28.
[145] Platform Authentieke Journalistiek, op. cit., p. 17.
[146] Idem p. 16; A. Jongerius and G. Oosterwijk, op. cit., p. 34.
[147] Textual Proposal by the European Commission for the USA for a chapter on regulatory cooperation. Made public on 4 May 2015. On 21 March 2016, the Commission published a set of revised proposals: *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf*; *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf*. Where relevant, we indicate in footnotes where the revised proposals deviate from the May 2015 text.
[148] In the 21 March 2016 proposal: Article x1.3: http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf; Article 1.2 in the chapter on good regulatory practices: *http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf*.
[149] In the 21 March 2016 proposal: Article x1.4; Article x1.2 adds that cooperation shall take place in areas "as considered appropriate by either Party." Article x3.b states that cooperation will take place

- Proposals for mutual recognition or harmonisation should not compromise the achievement of a high level of protection (Article 10.1).[150]
- The regulatory cooperation board (RCB) will not have the power to adopt legal acts (Article 14.2c).[151]
- The workings of the RCB will be transparent and stakeholders (including unions) will be involved in annual discussions and evaluations of its work (Articles 14.5, 15.2 and 15.3).

These guarantees are more specific than those set out in the draft text of the chapter on regulatory cooperation (Chapter 26) for CETA (Canada-EU Trade Agreement).[152]

In its *Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation*, the European Commission writes that Article 3 of the EU proposal determines the types of regulations that would be covered.[153]

> In essence these are regulations:
>
> - that contain precise requirements on how products should be designed to be marketed and used in the EU or the US;
> - that provide specific conditions for the supply of services, including for example licenses or qualification of service providers.
>
> By contrast, regulatory cooperation would typically not cover legislation that establishes a framework or principles, applicable generally and across sectors (such as in the area of company law, consumer protection or the protection of personal data, to name a few)."

Article 3 could provide such further clarification.[154]

In the same document, the Commission further emphasises the importance of transparency. It indicates that at a later point, it plans to present more detailed proposals on the institutional framework for sectoral agreements and the relevant stakeholder involvement:[155]

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in any areas "in relation to which both Parties have determined common interest." A footnote clarifies that "it will be up to the relevant authorities of each Party to determine their interest in a particular cooperation."

[150] The 21 March 2016 proposal states in Article x1.2 that "regulatory cooperation activities that aim at improving, and not reduce, undermine or otherwise compromise the level of protection in public policy areas…as considered appropriate by either Party'.

[151] As indicated in footnote 90, the 21 March 2016 proposal leaves the institutional modalities open and identifies the objectives and principles.

[152] See CETA Chapter 26, where the level of protection is mentioned only in Article 3: "The objectives of regulatory co-operation include: a) Contributing to the protection of human life, health or safety, animal or plant life or health and the environment..."

[153] *http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1%20Detail%20explanation%20of%20the%20EU%20proposal%20for%20a%20Chapter%20of%20reg%20coop.pdf*

[154] The 21 March 2016 proposal identifies regulatory measures as "measures of general applicability concerning specific goods or services prepared by regulatory authorities". Regulatory authorities here mean the authorities at EU level for the EU and at Federal level of the US.

[155] *http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153431.1.1%20Detail%20explanation%20of%20the%20EU%20proposal%20for%20a%20Chapter%20of%20reg%20coop.pdf*, p. 12. The 21 March 2016 proposal devotes a separate Article (x6) to transparency and public participation. Article x6.3 proposes the establishment of a Joint Regulatory Cooperation Program with Advisory Groups for the EU and US, "composed by business including small and medium sized enterprises, trade unions and public interests groups, ensuring a balanced representation of all interests concerned."

The RCB (regulatory cooperation board) would work closely with other institutional bodies and committees in TTIP and with sectoral work groups to avoid duplication and overlaps. The activities of the RCB or any similar body need to be transparent, and updates on its work would have to be regularly published. The RCB would adopt terms of reference and meet at regular intervals. The RCB should proactively interact with stakeholders, including businesses, consumers, NGOs and trade unions, in line with best practice.

The EU Commission intends to further develop its proposal on the institutional framework regarding regulatory cooperation and sectors, taking into account input from stakeholders, once negotiations have sufficiently advanced.

Agreements on sanitary and phytosanitary measures
The European Commission's proposal for a chapter on sanitary and phytosanitary measures states that the purpose of such a chapter is to "[f]acilitate trade between the Parties to the greatest extent possible while preserving each Party's right to protect human, animal of plant life and health in its territory and respecting each Party's regulatory systems, risk assessments, risk management and policy development processes" (Article 2.1). This means that the EU would at all times be able to maintain the precautionary principle and that measures based on that principle, such as the prohibition on meat treated with hormones or restrictions on GMOs, would not be affected by the agreements. The TTIP negotiations would not concern these matters.

Article 9.3 states that "[t]he final determination whether a sanitary measure maintained by an exporting Party achieves the importing Party's appropriate level of sanitary protection rests solely with the *importing* Party."

Sectoral agreements
The sectoral proposals are based on the idea that the degree of regulatory cooperation depends on existing differences in levels of protection and the way in which these are approached and enforced. If these levels diverge too much – as in the chemicals industry – then cooperation would be limited to the exchange of information and the cooperation in new chemicals (see Section 4.3.5).

Table 5.1 compares the public concerns discussed in Section 5.2.1 to the guarantees discussed in this section.

Table 5.1 – Public concerns about and objections to regulatory cooperation and proposed guarantees

Public concern	*Proposed guarantee for regulatory cooperation*
Lower levels of protection for labour, consumers and the environment.	The basic principle underpinning regulatory cooperation is the enforcement of a high level of protection. If such levels diverge too much or if the regulatory procedures concerning them are too different, then the specific matter concerned will be excluded from regulatory cooperation (for example food containing GMOs or the meat of animals treated with hormones) or the aim of such cooperation will be restricted (as in the chemicals industry). Proposals for mutual recognition or harmonisation would pertain only to those areas in which there are comparable levels of protection.

The question is: who is to assess whether there is equivalence in levels of protection, regulations and requirements, when are they to do so and on which grounds.	The regulatory cooperation board has an advisory and consultative role and is not competent to establish any laws or rules itself. Agreements in the chapter about regulatory and procedural cooperation do not oblige the parties to achieve any particular regulatory outcome. The right to regulate is established explicitly in the horizontal chapter on regulatory cooperation.
Expert panels and regulatory cooperation board will have too much influence on regulatory matters. Position of EP and Council will be undermined.	See above, plus the explicit provision that the parties must respect the internal legislative and regulatory procedures of the EU and the US.
Legal status of the regulatory cooperation board is unclear.	The EU and the US will appoint the members of the board. The board will be composed of EU and US representatives (relevant ministries/departments, regulatory agencies). The regulatory cooperation board will have an advisory and consultative role.
The influence of powerful and well-equipped stakeholders will be disproportionately large.	Transparency and the broad involvement of all stakeholders in annual discussions of the regulatory cooperation board's work.

5.2.3 Assessment

Further determination of scope of cooperation
Regarding the proposed guarantees against any lowering of the level of protection, the European Parliament asks the negotiators on both sides:

> to identify and to be very clear about which technical procedures and standards are fundamental and cannot be compromised, which ones can be the subject of a common approach, which are the areas where mutual recognition based on a common high standard and a strong system of market surveillance is desirable and which are those where simply an improved exchange of information is possible … to ensure similarly that it will not affect standards that have yet to be set in areas where the legislation or the standards are very different in the US as compared with the EU, such as, for example, the implementation of existing

(framework) legislation (e.g. REACH), or the adoption of new laws (e.g. cloning), or future definitions affecting the level of protection (e.g. endocrine disrupting chemicals).

Section 4.3.2 indicated that the intended scope of regulatory cooperation is very broadly conceived: both EU and Member States' measures that could have a significant influence on both trade and investment. What has yet to be determined is: who is to decide which of the Member States' measures will be allowed to have a significant impact on trade or investment, and how are they to decide. The question is whether such a broad scope is necessary given the intended aim, the more so because it feeds public disquiet about levels of protection. Regulatory cooperation could therefore also focus on measures that have a demonstrable *direct* impact on the international trade in goods and services. According to Chase and Pelkmans, laws and regulations aimed at wholly domestic matters, for example working hours, labour law, wage levels and air pollution standards, should be outside the scope of regulatory cooperation, even if those measures could have an indirect effect on trade.[156] Article 4.7 of the sustainability chapter is also important in this regard. It states that the parties "recognise that the violation of fundamental principles and rights at work cannot be … used as a legitimate comparative advantage and that labour standards should not be used for … protectionist trade purposes."[157] The scope of regulatory cooperation therefore requires further clarification. That is also true of the level at which regulatory cooperation is to take place: will that be primarily at EU or US federal level, or will it also involve the laws and regulations of the EU Member States and US states?[158]

Sufficient checks and balances

To remove concerns about the influence of the expert panels and the regulatory cooperation board, a sound system of checks and balances is needed. One possibility is to state more precisely what the mandate and working methods of the expert panels and the regulatory cooperation board will be, how the regulatory cooperation board will be held accountable, how the stakeholders will be involved in the same.[159] The European Parliament has also advocated this in its July 2015 resolution. It emphasises that TTIP should "fully respect the established regulatory systems on both sides of the Atlantic" and should preserve "the capacity of national, regional and local authorities to legislate their own policies, in particular social and environmental policies."

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[156] P. Chase and J. Pelkmans, 2015, *This time it's different: turbo charging regulatory cooperation in TTIP, CEPS Special Report 110*, p. 12.

[157] Full text: "The Parties recognise that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for arbitrary or unjustifiable discrimination or protectionist trade purposes".

[158] Article 2 of the Commission's proposal distinguishes between the central level (the EU and the US Federal Government) and the non-central level (being the central national authorities of an EU Member State, e.g. the national government of the Netherlands) and the central authorities of the US state. See: *http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf*

[159] For more details, see: A. Alemanno, 2015, The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional structures and democratic consequences, Forthcoming in *Journal of International Economic Law*.

The Dutch Government has identified three criteria for the regulatory cooperation board that it believes must be clearly stated:[160]

1. The board should only have advisory powers.

2. European and national democratic procedures must not be stymied.

3. All stakeholders, including civil-society organisations such as trade unions, must be able to contribute on an equal basis.[161]

Transparency is of the greatest importance to avoid any semblance of one of the stakeholders dominating the consultation process.

The EU mandate provides for an institutional structure that will ensure that TTIP agreements are followed up effectively while simultaneously promoting far-reaching compatibility of regulatory regimes. In order to guarantee democratic control of decisions that can be taken by a joint EU-US TTIP committee after the Treaty has been concluded, it is important to set out the powers of this committee in detail and involve the European Parliament fully in this process.

Conclusion
The basic assumption for the SER is that the EU must be able to maintain and increase its relatively high level of protection, both in legislation and regulations and via other policy measures (see Section 2.4). TTIP and the regulatory cooperation which it envisages must not be a reason for reducing the levels of protection afforded to people and the environment. Regulation of those levels of protection is an important instrument for promoting social prosperity.

Where the levels of protection provided by the EU and the US diverge, due care and caution must be exercised when arranging regulatory cooperation between them.

The European Commission's proposals include safeguards to prevent impairment of levels of protection. These guarantees must be reinforced in a number of areas:
- The scope of regulatory cooperation in the European Commission's proposal is too broadly conceived. It should focus on specific measures that lead to unnecessary barriers to trade.
- The mandate of the regulatory cooperation board and the sectoral boards should be defined precisely. This body should only have advisory powers. It must not interfere with democratic procedures, on both sides of the Atlantic, for adopting legislation and regulations.
- All relevant stakeholders – including trade unions, the business community, environmental organisations and consumer organisations – should be able to make an equal, balanced, and meaningful contribution. This must be the starting point for the further development of the institutional framework for involvement of stakeholders in regulatory cooperation. This goes beyond merely consulting stakeholders about the annual report of the regulatory board.

Transparency is of the greatest importance to avoid any semblance of one of the stakeholders dominating the consultation process. Both the European Parliament and the national parliaments must be kept properly informed about and involved in the

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[160] Letter from Minister Lilianne Ploumen to the Dutch Parliament concerning the report by the Foreign Affairs and Trade Council of 7 May 2015 in Brussels, TK 21 501-02, no. 1499, p. 2. According to the Minister, the EU fully supports these criteria.

[161] See also: Letter from Minister Lilianne Ploumen to the Dutch Parliament with answers to questions by MP Jasper van Dijk of 22 May 2015.

recommendations for improving regulatory cooperation so that they can monitor the existing levels of protection to ensure that these are being maintained.

In order to guarantee democratic control of decisions that can be taken by a joint EU-US TTIP committee after the agreement has been concluded (TTIP as a "living agreement"), it is important to set out the powers of this committee in detail and involve the European Parliament fully in this process.

5.3 Liberalisation of trade and exclusion of public services

5.3.1 Public concerns and objections

The most serious public concern about and objection to the liberalisation of trade is that it could also affect education, health care, water utilities, postal services, public transport and other public services. Critics have noted that the exception made for public services is a very narrow one that would expose public services that are financed privately in part or public services that compete with other providers to the pressure of liberalisation. There are also worries that once a decision has been taken to permit liberalisation under TTIP, it will be irreversible. Compared with other Member States, the Netherlands has made few reservations when it comes to the liberalisation of private services (see insert on GATS in Section 4.4). There is also concern that this will limit the leeway to set requirements for foreign commercial parties concerning universal service obligations and other performance-related demands. There are also worries that a TTIP investment dispute mechanism will make it difficult to reverse earlier decisions permitting liberalisation. This concern is discussed in Section 5.5.

5.3.2 Proposed guarantees for the exclusion of public services

On 20 March 2015, European Commissioner Cecilia Malmström and US Ambassador Michael Froman released a joint statement that was meant to remove some of the worries about public services. In their statement, they confirmed that "US 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. Furthermore, no EU or US trade agreement requires governments to privatise any service, or prevents governments from expanding the range of services they supply to the public. Moreover, these agreements do not prevent governments from providing public services previously supplied by private service suppliers; contracting a public service to private providers does not mean that it becomes irreversibly part of the commercial sector." These points relate to all tiers of government. The exclusion of public services concurs with the mandate that the Council has given the European Commission (see Section 4.4).

The European Commission has presented a proposal to the US concerning investments and cross-border supply of services in TTIP.[162] As customary in trade treaties, the proposal follows the GATS system (see Section 4.4). That means that it contains a section with general provisions and a number of annexes in which the EU *and* the Member States indicate which specific commitments or obligations they are entering into with respect to market access and which reservations they are making concerning national treatment allowing them to exclude foreign commercial providers or favour

[162] See: *http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf* and *http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf*.

national providers. This system produces a complex whole that can lead to misunderstandings.

The exclusion of public services was elaborated on in the European Commission's textual proposal as follows:

1. The draft treaty chapter does not apply to services "supplied in the exercise of government authority", meaning "services or activities which are performed neither on a commercial basis nor in competition with one or more operators" (Article 1-1.3.k). These are a limited number of public services related to the enforcement of government authority.

2. Annex III sums up the sectors where market access commitments will be undertaken for foreign investors and service providers. With regard to education, health, or social services, only **privately** funded services are covered.[163] The individual Member States can make specific exceptions in this regard, for example for privately funded education. The Netherlands will not do so in TTIP and has not done so in other treaties.

3. In the same Annex III, the EU states that "activities considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators" (p. 119).[164] TTIP therefore does not cover public services or a private operator that has been afforded the exclusive right to provide a specific service. The "ratchet effect", which makes a decision in favour of liberalisation irreversible, does *not* apply to this annex.[165] In other words, the liberalisation of a certain sector or other measures can be reversed where required. This definition of government tasks is therefore much broader than the definition given in Article 1.1 of services "supplied in the exercise of government authority". That definition has been kept purposely vague to give the parties leeway to determine for themselves what is meant by "activities considered as public utilities" (see also the insert below).

4. Annex II sums up the sectors, subsectors and activities for which the EU may maintain existing *and* adopt new measures that do not conform with the treaty obligations concerning National Treatment, Most-Favoured-Nation Treatment, Performance Requirements, and Senior Management and Boards of Directors. The exception also applies for new forms of service provision that that have yet to be classified. The EU and the Member States reserve the right to adopt measures in these areas and to shield the market against foreign service providers. This includes publicly financed education, health, or social services and water distribution services. The "ratchet effect" does *not* apply to this annex either. In other words, the liberalisation of a certain sector or other measures can be reversed where required.

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[163] See Annex III, p. 151 (educational services), p. 155 (health services and social services).

[164] A footnote clarifies that "[p]ublic utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific listing is not practical".

[165] Concerning the sectors listed in Annex III, the EU reserves the right to maintain existing laws or adopt more restrictive regulations that may be contrary to the commitments undertaken to allow foreign businesses access to the European market (market access, i.e. Chapter 3, Article 3-2 of the EU's proposal for a chapter on trade in services, investment and e-commerce).

5. The provisions of Annex II do not cover measures taken by government in connection with the quality of a service. This applies for all sorts of services, whether public, private or hybrid (see Annex II pp. 55-6), including universal service obligations guaranteeing that everyone can access services under the same conditions for a reasonable price.

In trade policy jargon, Annex II is a negative list and Annex III a positive list. But Annex III does make a reservation for public services, so it would be more accurate to refer to it as a hybrid list.

Examples: sewage and health care services
In GATS, the Netherlands has not made an exception for foreign providers of sewage services or for foreign health care insurers. They already have free access to the Dutch market. TTIP will not change this. However, the Dutch government does reserve the right to set requirements for providers of these services. Again, TTIP will not change this. The insert below describes the situation for sewage treatment.

TTIP and sewage treatment in the Netherlands

The Netherlands committed itself at an earlier point to liberalising the trade in services in the General Agreement on Trade in Services (GATS). It did not make an exception for sewage treatment services. Based on GATS Article XVI on market access, no quotas of any kind are permitted, while Article XVII obliges the Netherlands to treat foreign and domestic investors and service suppliers in the same manner. That means that the Netherlands has committed itself to opening the Dutch market almost entirely to foreign suppliers. That is what is stated in GATS Part III, page 297 (*https://www.wto.org/english/docs_e/legal_e/26-gats.pdf*). This already gives foreign suppliers, for example from Canada, the US or Japan, free access to the Dutch market, where they are treated no differently than Dutch suppliers in the same service sector. Because the Netherlands makes no specific exception for sewage treatment in GATS, it cannot insist on such an exception in any bilateral treaties – such as TTIP.

Nevertheless, governments are entirely at liberty to introduce their own regulations for <u>every</u> service (public, private or hybrid) relating to the quality of the service supply. This stipulation is worded as follows in every trade agreement:

"The list below does not include measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures when they do not constitute a market access or a national treatment limitation. Those measures (e.g. need to obtain a license, universal service obligations, need to obtain recognition of qualifications in regulated sectors, need to pass specific examinations, including language examinations, and non-discriminatory requirement that certain activities may not be carried out in environmental protected zones or areas of particular historic and artistic interest), even if not listed, apply in any case to services and services suppliers of other Parties."

In the European Commission's TTIP textual proposal, this passage can be found in Annex II, item 7 on pp. 55-6; see point 5 above.

At the same time, the annexes to CETA, TTIP and other trade agreements contain passages reserving the right of governments to place restrictions (or further restrictions) with respect to a public, private or hybrid service on service suppliers operating in a specific country owing to political, social or statutory changes. This concurs with the principle that preserves the right of governments to regulate within their territories (as

stated in the preamble of CETA, for example), but in the annexes on services, it is contained in the passage: "In all EU Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators." In the European Commission's TTIP proposal, this passage can be found in Annex III; see point 3 above.

The quality and accessibility of Dutch services, whether private, public or hybrid, are sufficiently guaranteed in this manner. Should it later turn out that it would be better to offer a service in another manner (for example by making it a government monopoly after all, by imposing additional requirements on suppliers, etc.), then that option remains open. This is how the Netherlands was able to introduce new regulations, for example the 2008 Act governing municipal water tasks [*Wet gemeentelijke watertaken*] and Chapter 10 of the Environmental Management Act [*Wet milieubeheer*], even though it was subject to the GATS rules.

In other words, no exception was made for sewage treatment services under GATS. TTIP will not change the present situation because foreign suppliers already have free access to the Dutch market. Even so, government retains its discretionary powers because 1) foreign suppliers must adhere to the same rules and laws as Dutch suppliers, 2) it may set up public monopolies or grant exclusive rights to private operators for the supply of services regarded as public utilities (regardless of the method of funding). Once again, TTIP will not change this.

Source: Ministry of Foreign Affairs, as edited by the SER secretariat

Foreign health insurers also already have access to the Dutch market and must abide by the same rules as those applying to Dutch health insurers. TTIP will therefore not change this.

In an open letter to the British Trade Minister, Ian Livingston, European Commissioner Cecilia Malmström clarified that TTIP would not interfere with the Member States' freedom to organise their health care system as they see fit in future:[166]

> We use a series of reservations in EU trade agreements to make sure that EU Member State governments (at all levels, from central government to local authorities) can continue to manage their public services however they see fit. For example, we reserve the right for governments to operate monopolies and grant exclusive rights for selected providers, whether these are public or private operators. We make sure that governments do not have to open up any of their public services markets (such as publicly-funded health services) to private operators if they do not want to, and that should they choose to do so, there is nothing to prevent them reversing this decision in future. Member States have the possibility to modulate reservations according to their needs as part of EU trade negotiations. The UK is covered by these reservations, has always followed this approach, and is free to decide to continue to do so in TTIP.

The European Commissioner also writes that if a Member State should decide to reverse a previous decision to liberalise the health care sector, it need not fear being slapped with an ISDS claim (unless it has expropriated property without providing any form of compensation). That is the subject of Section 5.5.

[166] *http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152665.pdf*

Table 5.2 compares the public concerns discussed in Section 5.3.1 to the guarantees discussed in this section.

Table 5.2 Public concerns about and objections to the liberalisation of services and the proposed guarantees

Public concern and objection	*Proposed guarantee*
The proposed exception made for public services is inadequate because it is too narrow in scope.	Services "supplied in the exercise of government authority" do not fall within the bounds of TTIP. The market will only be liberalised for privately funded education, health, social and other services. The EU's offer contains a reservation on market access for public services or a private operator that has been given the exclusive right to supply a specific service. The EU's offer contains a reservation on the National Treatment of publicly funded education, health and social services and possible new forms of service supply. This makes it possible to shield the market from foreign service providers.
Once decisions in favour of liberalisation are taken, the use of a negative list makes them irreversible.	The "ratchet effect", which makes a decision irreversible once it has been taken, does *not* apply to decisions to liberalise the market and also not to decisions to cease applying National Treatment. In other words, a decision to open up the market or to exclude foreign suppliers from it can always be reversed. Due care must naturally be exercised in such situations (see also Section 5.5.2).
The possibility of imposing universal service obligations on commercial service providers (e.g. qualifications in the child care sector) will be affected.	The commitments pertaining to National Treatment and Performance Requirements do not apply to universal service obligations guaranteeing that everyone can access services under the same conditions for a reasonable price. That is true for all services, whether public, private or hybrid.

5.3.3 Assessment

The joint statement by European Commissioner Cecilia Malmström and US Ambassador Michael Froman on 20 March 2015 (see above) is meant to remove public concern about the privatisation and outsourcing decisions (and the possibility of reversing such decisions), government's discretionary powers, and lower levels of protection.

The European Parliament's resolution of July 2015 (see Section 3.3) asks the European Commission to build on this statement and to exclude current and future services of general interest and of general economic interest (including, but not limited to, water, health, social services, social security systems, and education) from the scope of TTIP. This should ensure that "national and, where applicable, local authorities will retain the full right to introduce, adopt, maintain or repeal any measures with regards to the commissioning, organisation, funding and provision of public services as provided in the Treaties as well as in the EU's negotiating mandate; this exclusion should apply irrespective of how the services are provided and funded."

The European Parliament also asks for a positive list of services that are to be opened up to foreign companies and a negative list of sectors not covered by agreements on National Treatment, etc.

The textual proposals on services presented by the Commission in July 2015 appear to meet the European Parliament's requests. The proposals contain guarantees for the exclusion of public services. The European Commission and European Parliament want countries to have and retain the authority to decide whether services of general public interest should be operated publicly or privately.

The Commission is not excluding services of general *economic* interest from TTIP in advance. These are economic services, supplied to individual users for a charge, which have been designated by the EU or its Member States as subject to public service obligations based on the general interest criterion. Examples include the obligation to deliver the relevant service to all users within the territory at a uniform rate and subject to specified conditions, regardless of the profitability of the individual activity.[167] The importance of these services to the promotion of social and territorial cohesion is made clear in Article 14 of TFEU. Services of general economic interest include network sectors, such as telecommunications, electricity and postal services. US telecoms already have access to the European market; conversely, European companies want better access to the US telecoms market. The EU therefore has no interest in excluding such network sectors from scope of TTIP.

TTIP obviously also leaves open the option of imposing public service obligations or, with a view to doing so, of granting certain exclusive rights to service suppliers. TTIP appears to satisfy these conditions (see points 3, 4, 5 in Section 5.3.2 and the insert on sewage treatment, as well as the quote from Ms Malmström's letter).

Conclusion
The basic principle adopted by the SER is that governments must remain free to declare certain services – according to their own preferences – to be "of general public interest"; the method of organisation and financing these public services also belongs in principle to the sovereignty of the Member States. TTIP must not be detrimental to this.

At the present stage, one can say that the EU's negotiating position is a step in the direction desired by the SER. Only on the basis of the results of the negotiations will it be possible to produce a genuine assessment.

[167] See SER Advisory Report, 2005, *Dienstenrichtlijn*, pp. 59-60 and SER Advisory Report, 2010, *Overheid én markt: het resultaat telt!* (Government and Market: The Result Counts!), pp. 79-83.

5.4 Core labour standards and trade

5.4.1 Public concerns and objections

The US has ratified only two of the eight core ILO conventions – the conventions on the elimination of forced labour and the worst forms of child labour. Among the conventions that it has not ratified are those concerning freedom of association in trade unions and the right to collective bargaining.[168] As established various times following complaints by the ILO, the US also does not comply with these conventions in actual practice. For example, the US permits 16-year-olds to work in agriculture in what are often high-risk situations (involving the use of pesticides and working with harvesting and mowing machinery), permits work to be contracted out to prisoners, allows businesses to pursue anti-union strategies that keep trade unions at bay, and permits a great many states to restrict trade union operations[169] (see Appendix 3 on the US and the ILO). According to critics, this could lead to unfair competition with US companies that underpay and exploit their workers, in turn leading to a downward spiral in Europe.[170]

There are also concerns that ISDS rulings could undermine core labour standards. These concerns are addressed in Section 5.5 on investment protection.

5.4.2 Proposed guarantees

The mandate that the Council gave the European Commission states that TTIP must include mechanisms to support the promotion of the ILO's Decent Work Agenda through effective domestic implementation of the core labour standards in the parties' laws, as well by promoting international cooperation in this area.

The Commission's textual proposal for a Chapter on Labour and Trade (see Section 4.7) contains a number of guarantees that should force the US to respect the core labour standards as well.[171]

The *first* proposal is that, in accordance with the 1998 ILO Declaration, the parties commit to ensuring that their laws and practices respect, promote and realise the core labour standards in their whole territory, and for all.[172] The ILO Declaration establishes a number of principles and rights at work as fundamental labour standards of universal validity.[173] Even ILO members that have not ratified the relevant ILO conventions are therefore still bound to uphold these principles and rights.

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168 See Appendix 3 about the ILO and the US.

169 For material on right-to-work laws see:
http://www.usnews.com/debate-club/are-right-to-work-laws-good-for-states
http://www.nrtw.org/a/RTWresignIntro.htm
https://en.wikipedia.org/wiki/Right-to-work_law
http://www.aflcio.org/Legislation-and-Politics/State-Legislative-Battles/Ongoing-State-Legislative-Attacks/Right-to-Work

170 Letter by FNV official Catelene Passchier to Minister Lilianne Ploumen of 10 March 2015. See also A. Jongerius and G. Oosterwijk, 2015, TTIP: vier keer nee, tenzij. *S&D*, 72(3), pp. 33-34.

171 See: *http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf*

172 See Article 2: "In accordance with the obligations of all ILO members and the ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session in 1998 and its Follow-up, each Party shall: ensure that its laws and practices respect, promote, and realise within an integrated strategy, in its whole territory and for all, the internationally recognised core labour standards, which are the subject of the fundamental ILO Conventions."

173 Article 2 of the Declaration "[d]eclares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the

The *second* proposal is for the parties to commit to continue making sustained efforts towards ratifying the core ILO conventions. They should regularly exchange information on the ratification of these conventions and of "priority" conventions that the ILO has classified as being "up to date".[174]

The *third* proposal is that, in accordance with the ILO Decent Work Agenda, the parties should ensure the protection of:

- health and safety at work, including through relevant policies, systems and programmes, and the fostering and promotion of prevention and precautionary approaches;
- decent working conditions for all, including wages and earnings, working hours and other conditions of work in order to ensure a minimum living wage.

The *fourth* proposal is for the parties to commit to effectively implementing all ILO conventions that they have ratified. For all areas covered by up-to-date conventions, the parties should bear in mind the Recommendations adopted by the ILO. The parties should recognise the need for an adequate system of labour inspection to enforce their labour laws.

In the *fifth* proposal, the European Commission asks the parties to make more detailed agreements about each of the core labour standards (agreements that are included neither in CETA nor in TPP). The insert below gives Article 5 as an example: this is the Commission's TTIP proposal on freedom of association and the right to collective bargaining. Article 5.2 makes clear that this includes the right to form and join trade unions and the "inherent corollary" of the right to strike. Article 5.3 states what the parties must do to this end, for example offer adequate protection against acts of anti-union discrimination. See Appendix 4 for the provisions concerning the other core labour standards (elimination of forced or compulsory labour, abolition of child labour, and equality and non-discrimination in respect of employment and occupation).

Freedom of association in trade unions and the right to collective bargaining in the European Commission's TTIP textual proposal

Article 5: Freedom of association and right to collective bargaining

1. The Parties underline their commitment to protecting the freedom of association and the right to collective bargaining, and recognise the importance of international rules and agreements in this area, such as ILO Conventions 87 and 98, the UN Universal Declaration of Human Rights of 1948, the UN International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights of 1966.

Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation."
Article 5 "[s]tresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up."
For the full text of the Declaration and explanatory notes, see:
http://www.ser.nl/nl/publicaties/overige/2000-2008/2008/b27428.aspx

[174] This provision is missing in TPP but is identical to the one in CETA.

2. Accordingly, the Parties shall uphold and implement in their laws and practices the following key principles, as referred to in the instruments under paragraph 1:

a) the right to form and join trade unions and the inherent corollary of the right to strike,

b) the right to establish and join employers' organisations,

c) the effective recognition of the right to collective bargaining,

d) effective social dialogue and tripartite consultations.

3. To this end, the Parties shall:

a) implement effective domestic policies and measures for social dialogue, including where appropriate by involving employers and workers representatives in the formulation of or consultation on domestic labour policies and laws;

b) implement effective domestic policies and measures for information and consultation of workers through dialogue with workers including through permanent worker representation bodies in companies, such as works councils and encourage their active functioning in accordance with domestic laws;

c) provide adequate protection against acts of anti-union discrimination in respect of workers' employment;

d) maintain the right to negotiate, conclude and enforce collective agreements as well as to take collective action in accordance to domestic laws and practices;

e) enable and promote the organisation of employers' and workers' representation;

f) facilitate dialogue and exchanges between employers' and workers' organisations established in their territories;

g) promote and facilitate information and consultation of workers in companies at a transnational, including transatlantic, level;

h) promote worldwide implementation of the principles under paragraph 2, in particular through promoting adherence to relevant international instruments, including with regard to ratification where appropriate, as well as participation in relevant international processes and initiatives.

Source: European Commission,
http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf

The *sixth* proposal is for the parties to recognise the inappropriateness of weakening or reducing levels of protection afforded in environmental or labour laws in order to encourage or affect trade or investment. Parties may also not violate the core labour standards in order to gain a comparative advantage, nor may they use labour standards for protectionist purposes (see insert on the legal framework for banning the products of child labour).

Legal framework for the ban on products of child labour

The TTIP negotiating mandate that the Council gave the European Commission states that TTIP will include a general exception clause based on Articles XX and XXI of the

WTO's General Agreement on Tariffs and Trade (GATT). The exceptions in Article XX concern measures addressing the protection of public morals, the protection of human, animal and plant life or health, the protection of intellectual property rights, the products of prison labour, and the conservation of exhaustible natural resources. The extent to which these exceptions can be invoked so as to introduce certain measures depends on the material scope of the exceptions, the extra-territorial effect of the exceptions, and the proportional application of the exceptions.

In 2014, Dutch MP Roelof Van Laar drafted an initiative paper entitled *Verbied producten kinderarbeid* [Ban the products of child labour]. In her response to this paper, the Minister of Foreign Trade Lilianne Ploumen reveals how difficult it currently is to impose trade sanctions against (the worst forms of) child labour, given the present legal framework of the EU and WTO, but that trade sanctions against child labour should not be ruled out in advance. Given the scale advantages and the importance of a level playing field, the Minister prefers EU-level trade sanctions. But even when the protection of human rights and fundamental values – such as a ban on child labour – are involved, EU law initially regards such protections as barriers to trade, meaning that stringent demands are made on the grounds for such measures and that the proposed measures must satisfy the requirements of proportionality and effectiveness (i.e. they must be "fit for purpose").

The aforementioned WTO rules can also prevent parties from introducing an import ban on the products of child labour. Minister Lilianne Ploumen believes that a looser interpretation of GATT Article XX(a) is possible, however. This article makes it possible to prohibit the import of products on the ground of "public morals". Invoking this article already makes it possible to refuse products produced by forced labour, for example. In the Minister's view, one can make a plausible case for qualifying the ban on child labour as a moral imperative in the EU. At the moment, however, there is no WTO case law that upholds this broader interpretation of Article XX.

Moreover, an import ban that invokes public morals cannot lead to "veiled protectionism" or unjustified discrimination between countries; the relevant criteria are very strict. That was recently confirmed in a ruling by the WTO's Appellate Body in the dispute concerning the EU's trade regime for seal products. The Appellate Body determined that animal welfare is necessary to protect public morals in the EU and that trade measures can therefore be justified on the grounds of GATT, but that the EU would have to amend its Seal Regime so that it no longer discriminated without cause between seal hunters in Greenland and seal hunters in third countries. The WTO also tests such import bans on their proportionality.

The Dutch Government also considers the following options possible at EU level:

- More effective deployment of the EU's Generalised Scheme of Preferences+ (GSP+). This is an incentive measure that allows developing countries to pay lower or no duties on exports to the EU if they adhere to sustainability and good governance criteria.
- Broader support for the OECD Guidelines for Multinational Enterprises and the United Nations' Guiding Principles on Business and Human Rights.
- Possible roll-out of the Dutch approach to Sector Risk Analysis.

Sources: Van Laar initiative paper: *http://www.pvda.nl/data/sitemanagement/media/2014-6/PvdA_Van_Laar_Initiatiefnota%20Kinderarbeid.pdf*; Letter from Minister Lilianne Ploumen to the Dutch Parliament of 20 January 2015, on the request concerning MP Van Laar's initiative paper proposing a ban

on products produced by child labour. Letter from Minister Lilianne Ploumen to the Dutch Parliament, 2 October 2014, on the WTO ruling on the EU Seal Regime.

Finally, the European Commission proposes that TTIP should contain procedural mechanisms, for example one that monitors the implementation of the provisions and another that addresses any disputes concerning the application of the treaty provisions. However, the Commission wishes to first discuss the above proposals for material provisions with the US representatives before making specific proposals on institutional structure and procedural assurances (see Section 4.7).

Table 5.3 compares the public concerns discussed in Section 5.4.1 to the guarantees discussed in this section.

Public concern and objection	*Proposed guarantees*
With only two of the core ILO conventions ratified by the US and little enforcement of or compliance by US businesses with core labour standards, critics worry about unfair competition and downward pressure on European employment conditions.	Parties have committed to ensuring that they will respect the core labour standards in their laws and practices. They will continue to work towards ratification of all the core labour conventions. Parties undertake to guarantee decent working conditions for all, including wages and earnings, in accordance with the Decent Work Agenda. Parties commit to the effective implementation of all ILO conventions that they have ratified. Detailed provisions will include setting out what each of the core labour standards is, and what the parties must do to implement and comply with them. Parties recognise the inappropriateness of weakening or reducing levels of protection afforded in environmental or labour laws in order to encourage or affect trade or investment. Procedural guarantees, for example a mechanism that monitors the implementation of the provisions and another that addresses any disputes concerning the application of the treaty provisions.

5.4.3 Assessment

Two interrelated questions play a role when assessing the European Commission's proposals:

1. To what extent do they offer sufficient guarantees for the effective implementation of the ILO's core and other labour standards, both in national law and in labour practices, in accordance with the Council's mandate, and for the agreement that the parties will not weaken or reduce levels of protection in order to promote trade and attract investment?

2. What are the most suitable means of oversight, compliance and dispute resolution and what role should trade unions and civil society play in that regard?

In its 8 July 2015 Resolution (see Section 4.4), the European Parliament asks the Commission to ensure:

> that the sustainable development chapter is binding and enforceable and aims at the full and effective ratification, implementation and enforcement of the eight fundamental International Labour Organisation (ILO) conventions and their content.

The Commission's proposal calls on the parties to continue making sustained efforts towards ratifying the core conventions. Given the position of the US Senate on ratifying the ILO conventions, the question is whether it is realistic to include a clause in TTIP requiring the US to ratify all eight core conventions – as desirable as that might be.[175] Bearing this in mind, the European Commission has chosen to insert material guarantees into TTIP for adherence to the core labour standards; these take the form of more detailed agreements setting out what those standards are and what the parties must do to implement and comply with them (see point 3 in Section 5.4.2 above). The Commission is also still seeking suitable forms of oversight and dispute settlement (see below).

Four points are being addressed in this regard:

1. The way in which unions, employers' federations and other civil-society groups will be involved.

2. The way in which the ILO will be involved.

3. The way in which dispute settlement will be organised.

4. The way in which an "effective remedy" will be provided for in the event of violations, by means of sanctions or other instruments.

So far, the EU and the US have taken different approaches to the various issues in their trade agreements.[176]

EU trade agreements approach questions about labour standards in the form of intentions and place more emphasis on dialogue and consultation when addressing abuses.[177] They have separate procedures for settling disputes about violations of labour standards and other sustainability issues. American trade agreements offer the option of taking effective sanctions where necessary, for example cancelling or suspending preferential status. Such disputes are treated no differently in these agreements than other disputes concerning compliance with and the interpretation of the treaty

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[175] See Appendix 3.

[176] Recent EU trade agreements engage civil society by involving it in internal advisory groups and a common civil society forum. The internal advisory groups can make recommendations and issue opinions to the Committee for sustainable development (see the EU-South Korea free trade agreement, Article 13.12 and 13.13 and CETA Article 24.8 and 23.5. For TPP, see Article 19.14 for the internal advisory groups. See the main text for the ILO's involvement.

[177] See: H. Horn, P.C. Mavroidis and A. Sapir, 2008, op. cit. The authors refer in this connection to "legal inflation"; see also L. Compa, 2014, op. cit.; Van den Putte and Orbie, however, caution against exaggerating the US and EU differences on this point: "When looking at the practical implementation of social provisions in trade agreements, the 'de jure' distinction between hard enforcement (US) and soft engagement gets blurred. De facto, and despite numerous complaints and cases on labour provisions, the US also engages in cooperative activities and shies away from Legal enforcement". L. Van den Putte and J. Orbie, 2015, EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions, *The International Journal of Comparative Labour Law and Industrial Relations*, p. 270.

provisions. That makes it possible to impose sanctions such as fines or suspension of the treaty.

In its agreements with South Korea and Canada (CETA), the EU goes through a two-step process.[178] The first step is to allow a party to request a dialogue with the other party. If no satisfactory resolution is achieved, either of the parties can request mediation by an expert panel. If the case involves core labour standards, the panel must ask the ILO for input. The panel makes proposals for removing any abuses. The actions that the parties subsequently take are monitored by a Committee on Sustainable Development, consisting of representatives of both parties. The social partners are members of the "domestic advisory groups" (DAGs). They can use this channel to communicate their findings about the measures taken to the Committee on Sustainable Development. Disputes related to sustainability may only be settled according to *these* procedures, and not by means of the treaty's general dispute settlement procedure.

The free trade agreement between the EU and South Korea has demonstrated that this approach has its limitations. In 2013, conflicts arose between the South Korean government and the unions – a relationship that had long been under pressure, moreover. When the relevant DAG asked the European Commissioner for Trade to initiate consultations, it was refused and told to seek to resolve the dispute through other channels, such as the ILO supervisory mechanism. But these mechanisms had already been deployed against the abuses in South Korea, to no avail. This example shows that if the (government) parties are unwilling to resolve a dispute "amicably", there is no other mechanism available to enforce compliance with the agreed labour standards, meaning that workers, unions and other stakeholders have no "effective remedy" at their disposal.

The US follows a three-step process in the Trans-Pacific Partnership (TPP).[179] A party may first request a cooperative dialogue with another party. TTP makes it compulsory for all the parties to set up and maintain a "public submissions process" to deal with complaints about violations of the commitments to labour standards under the treaty. That means that civil-society organisations may also submit complaints to their respective contact points. The ILO is also called in to help in the search for solutions. The second step is a request for labour consultations.[180] The party making the request can be joined by other parties. If the labour consultations fail to produce a resolution within sixty days of the request being made, the case may be submitted to a panel (in this instance a panel of labour law experts). The composition and competences of these panels are described in the chapter on the settlement of disputes regarding *all* the provisions of the treaty, not only those pertaining to sustainability. The panels may impose fines as an ultimate remedy.[181] Such fines do not constitute redress for those involved; at best, their effect is preventive.

The US approach also clearly has its limitations, especially the long through-put times. In the single complaint that was brought by the US based on this approach, against Guatemala, it took no less than five years before the entire process of consultation, arbitration and so on led to a binding enforcement plan for the Guatemalan Government

[178] See the EU-South Korea free trade agreement: Articles 13.14, 13.15 and 13.16. For CETA, see Articles 24.9, 24.10 and 24.11.
[179] See TPP, Article 19.11 and 19.15.
[180] This second step does not officially follow the request or the conclusion of a request for dialogue. It is logical, however, that an attempt will first be made to resolve the problem through dialogue before going on to consultation.
[181] See TPP, Article 28.19.

in 2013. When Guatemala once again failed to implement this plan, the US requested that the arbitration panel be reconstituted. The panel had yet to issue its ruling in late 2015. That is why the US labour movement (AFL-CIO) believes that TPP does not offer an "effective remedy".

The best way to enforce internationally recognised labour standards like the freedom of association in trade unions is still for these standards to be implemented at national level and to establish an effective mechanism for settling national disputes of this kind. But because this ideal world is a far cry from reality, the ILO's supervisory and enforcement mechanisms are of huge importance. As the South Korean case shows, however, applying that mechanism in practice can be a lengthy and difficult process, and governments can ignore the ILO's opinions without suffering any negative consequences. Enforcement through the ILO has no "teeth". It can be supplemented by making binding agreements in bilateral free trade agreements such as TTIP. So far, however, both the EU and the US have been deficient in providing adequate procedural guarantees for the "duty to protect" and an "effective remedy" and in providing sufficient incentives to promote the "duty to respect" among businesses and investors.

As stated in the assessment principles described in Section 2.4, TTIP is expected to set the "gold standard" for future European trade and investment policy. The EU should also use this "gold standard" in other trade and investment agreements, even though the terms may have to be tailored to its relationship with the country in question. It should promote European values, including the protection of human rights and worker rights, the environment, democracy, and the rule of law. Compliance with the core labour standards – freedom of association in trade unions, the right to collective bargaining, and a ban on child labour, forced labour and discrimination – must be the mandatory foundation for the economic activity of the EU and all its trade and investment partners.

First, effective safeguards – both material and procedural – will be needed to ensure that the US and the EU respect core labour standards and other important ILO conventions that are relevant in the context of the ILO's Decent Work Declaration, both in law and in practice. The best route continues to be ratification and effective implementation by parties of the relevant core conventions and other major ILO conventions under the ILO's Decent Work Declaration. Until such time, TTIP must contain binding and detailed provisions setting out what the core labour standards are and what the parties must do to implement and comply with them. An important prerequisite is respect by the EU and the US for the core labour standards, including the freedom of association in trade unions, and an agreement that failure to respect those standards should not create or retain comparative advantages. The European Commission's proposals in the sustainability chapter provide this binding substantive regulatory framework.

In order to implement these provisions, an effective monitoring mechanism will then need to be provided so that abuses can be identified promptly and parties can be encouraged to address them on that basis. This could involve regular reports by an independent secretariat – as also agreed in NAFTA[182] – on the status of the implementation of the Decent Work Agenda in the EU and the US, including enforcement of and compliance with labour standards in practice.

Third, a mandatory mechanism must be provided for settling disputes – with proper involvement of the social partners and the ILO – so that abuses can be addressed and

[182] See: *http://www.dol.gov/ilab/trade/agreements/naalcgd.htm*

leading to satisfactory and effective measures to remove them. Given past experience, it is desirable to seek ways to give this monitoring process "teeth" and set a gold standard for supervision and compliance. Elements of this dispute resolution mechanism will be: a sufficient degree of independence from the parties; the ability to impose effective sanctions on the parties where necessary; reasonable time limits for completion.

Different options for the mechanism may be considered and will have to be judged on their merits:

- For example, the establishment of a separate mechanism under the agreement to settle disputes relating to the sustainability chapter or a special tribunal to be convened to deal with disputes relating to labour standards.
- The types of sanctions, such as fines or trade sanctions, if necessary supplemented by compensation for the injured parties.
- Direct or indirect access to justice for third parties, such as civil-society organisations and trade unions (without high financial thresholds) through an independent secretariat as described above or through a national contact point.

Also relevant in the design and development of this dispute resolution mechanism is how the interests of investors will be protected (see Section 5.5), so as to create a more complete and balanced system for settling disputes that will take account of everyone's interests.

5.5 Investment protection and the Investment Court System (ICS)

5.5.1Public concerns and objections

The concerns about and objections to ISDS (see Section 4.6.5) relate to the one-sided nature of the arbitration mechanism, the unbalanced consideration of interests, and the pressure that ISDS puts on government's discretionary powers and democratic scope. There are worries about an explosion in the number and size of claims, feeding into regulatory chill: when faced with a real or imminent sizeable claim and a foreign investor who invokes the arbitration mechanism, governments may feel reluctant to take measures to protect legitimate public interests. One of the examples given is the postponement of New Zealand legislation setting stricter rules for tobacco packaging pending a case that Philip Morris brought against Australia in a similar matter. Under NAFTA, Canada is the developed country that has had the most ISDS claims brought against it. Critical analyses reveal that this has indeed influenced Canadian policy: there are clear signs, for example, that investment claims or the threat of such claims have led to a considerable relaxation of environmental regulations.[183]

The existing copious trade and investment flows between the EU and US show that ISDS is not necessary in TTIP, and also not desirable given the risks posed to government's discretionary powers and public funds. These risks also play a role in other trade and

[183] Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, CEO/TNI, 2012. Tietje and Baetens point out that it is difficult if not impossible to find hard evidence of regulatory chill: too many factors influence government performance. They also point out that regulatory chill can, in theory, also arise if businesses approach a domestic court with a claim for damages. Finally, they comment that most cases won by investors concerned specific administrative decisions, for example the revoking of a permit or a refusal to pay suitable compensation for damage, and not a battle against general laws and rules. See C. Tietje and F. Baetens, *The impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, annex to TK 21 501-02, no. 1397, 2014, pp. 72-3. As noted earlier, the court of arbitration that considered the Philip Morris claim against Australia declared it inadmissible and thus rejected the claim.

investment treaties, for example CETA (between Canada and the EU). The investment relationship between the US and the EU's West European Member States has always depended on the rule of law on both sides. The US has only signed bilateral investment agreements with nine Central and Eastern European Member States, dating from before their accession to the EU.

The proposed arbitration mechanism in the TTIP investment chapter furthermore gives foreign investors privileged status by allowing them to bypass the domestic court system when submitting a claim against the government concerning a democratic decision intended to protect the environment or workers' rights, for example.[184] In that sense, there is no level playing field for domestic investors, a situation that could undermine the domestic court system. Investment tribunals are inclined to interpret investor rights very broadly and they leave an impression of bias. They also do their work behind closed doors, with no possibility of appeal.[185] The EU would find itself infected by the US "litigation culture".[186] Investment agreements do not, strictly speaking, directly prevent the authorities from regulating matters as they see fit. However, ISDS confers on a tribunal the power to rule on the legitimacy, necessity and proportionality of a government measure after the fact, under penalty of fines that can rise to hundreds of millions. The problem with investment protection treaties such as TTIP is that they mark the dividing line between public and private services. Those wishing to shift that dividing line could be forced by ISDS to dig deep into their pockets. One example is the ISDS cases that Achmea brought against Slovakia. The risk is that TTIP, CETA and other such treaties limit the discretionary powers of governments to take such action by admitting foreign investors and the possibility of claims.

The European Economic and Social Committee (EESC) summarises its objections against ISDS as follows:[187]

> The systematic shortcomings arising from the working of ISDS include opacity, lack of clear rules of arbitration, the lack of right of appeal, discrimination against domestic investors who cannot use the system, the fear that purely speculative investments are protected, which, inter alia, do not have the effect of creating jobs, and the fear of exploitation by specialist legal firms.

The EESC then "strongly urges" the Commission to consider the UNCTAD proposals[188] for the reform of ISDS and concludes that establishing a (multilateral) International Investment Court such as proposed by UNCTAD is the best way to ensure a democratic, fair, transparent and equitable system.

5.5.2 Proposed guarantees in the new ICS

The existing ISDS's shortcomings concern its democratic aspects (private nature, insufficient independence and impartiality of arbitrators, lack of transparency and

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[184] FNV letter of 10 March 2015; for an overview of concerns about ISDS, see also: AIV, 2015, *Internationale investeringsbeslechting: van ad hoc arbitrage naar een permanent investeringshof*, pp. 25-33 and H. Schepel et al., 2014, *Statement of Concern about planned provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)*, Kent Law School

[185] Platform Authentieke Journalistiek, op. cit., p. 24; A. Jongerius and G. Oosterwijk, op. cit., pp. 35-6.

[186] See e.g. A. Jongerius and G. Oosterwijk, 2015, op. cit., p. 35; Some et al., 2015, *Feiten en fabels, 10 claims over TTIP*, pp. 30-31.

[187] EESC advisory report on investor protection and investor to State dispute settlement in EU trade and investment agreements with third countries; Rapporteur Mr Sandy Boyle, 27 May 2015, http://www.eesc.europa.eu/?i=portal.en.rex-opinions.35922

[188] UNCTAD, *World Investment Report 2015*, pp. 164-173.

insufficient coherence of rulings) and the possible adverse effect on the discretionary power of states through such aspects as applying an excessively wide definition of the concept of indirect expropriation and the possibility of high compensation claims being awarded. There is broad agreement on these objections.

The Council of Ministers has imposed a number of conditions on including an investment chapter in TTIP (see Section 4.6). These conditions should guarantee that the EU and the Member States retain their authority to take and implement non-discriminatory measures in areas of social policy, the environment, health and safety, and financial stability. In the Council's view, the chapter must also provide for a "state-of-the-art" arbitration mechanism, transparency, independent arbitrators, predictability, appeal mechanisms, and protection against "frivolous claims". These conditions are partly informed by public concerns about and objections to the existing arbitration system in investment agreements.

The call for a thorough revamping of the existing ISDS has been widely echoed. In its Resolution (see Section 3.4), the European Parliament asks the Commission to:

> replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.

The EESC believes that "[i]f a catch all solution for resolving investment disputes is to be found, it cannot be based on a modest revamping of the current, ISDS system which has a very low level of public support" and concludes that establishing an International Investment Court is the best way to ensure a democratic, fair, transparent and equitable system.[189]

The Netherlands' Advisory Council on International Affairs (AIV) agrees that "from the rule-of-law perspective a permanent international investment court, with tenured judges, would be better equipped than ad hoc arbitration tribunals to rule on disputes involving matters of major public interest."[190] This is therefore the solution that the AIV favours.

Based on the Council's mandate and in response to public concerns and objections, the European Commission has made a number of proposals to the US concerning an agreement on investment protection that would replace the more "private" ISDS system with an investment court – the Investment Court System or ICS – that is more public in nature. The proposal is meant to eliminate the shortcomings of the existing ISDS system by offering a number of material guarantees (the right to regulate in the public interest, prevention of large claims for damage) and a number of procedural guarantees meant to reinforce the rule of law. Section 4.6 indicated how the ICS proposal differs on these points from the existing ISDS system.

The guarantees contained in the Commission's ICS proposal are both material and procedural in nature. The material guarantees are:

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[189] *http://www.eesc.europa.eu/?i=portal.en.rex-opinions.35922*

[190] Advisory Council on International Affairs, 2015, International Investment Dispute Settlement, no. 95, p 40. *http://aiv-advies.nl/download/9a2c1343-80f8-4c2f-a16d-ab992d31f7b7.pdf*.

- an explicit statement that states have the right to regulate within their territories, for example through measures necessary to achieve the protection of public health or the environment;
- the provision that such measures do not constitute indirect expropriation for which compensation may be claimed;
- a precise description of what constitutes fair and equitable treatment of investors;
- the provision that compensation may not exceed the loss suffered and a prohibition on awarding punitive damages;
- an obligation upon the tribunals to ask the EU and the US for a binding interpretation of TTIP provisions;
- exclusion of domestic or European law from the law applied by the arbitrators.

The procedural guarantees are:

- the establishment of an ICS composed of more independent judges appointed by the EU and the US;
- the requirement that the judges must meet strict technical and legal standards, that they may not participate in the consideration of any other investment disputes during their appointment, and that they must comply with certain ethical rules;
- the introduction of an Appeal Tribunal whose President is a national of a third country;
- the incorporation of the UNCITRAL Transparency Rules in arbitration: sessions are held in public, most court documents are published, and third parties with a demonstrable interest in a dispute have a right to join the proceedings;
- a ban on "forum shopping" and the possibility of rejecting unfounded claims at an early stage in the proceedings;
- provisions meant to counteract multiple and parallel proceedings.

The material guarantees are aimed at ensuring that the ICS only assesses *how* a government measure has been implemented (for example, is an expropriation sufficiently justified by a particular public interest, were the legal safeguards satisfactory, were foreign investors discriminated against, and was a reasonable compensation paid for the expropriation?). A tribunal therefore does not rule on *whether* a government should be allowed to implement a particular measure, but rather on whether the measure was implemented with due care (see also the insert "Can collective agreements that have been declared universally binding be submitted for investment arbitration?"). That applies even if a government should decide not to renew contracts with private health insurers because it intends to revert to a public health care system. European Commissioner Cecilia Malmström mentioned this explicitly In her open letter to the British Trade Minister Ian Livingston:[191]

> Thirdly, some people question whether including investment protection and Investor-State Dispute Settlement (ISDS) in TTIP would mean that in practice it would be difficult to bring a service back into the public sector, owing to the potentially high costs of losing an ISDS case. Whilst I understand that these questions are posed, I can categorically state that nothing in either the 3,000 existing investment agreements, or in the future TTIP, could prevent a service being brought back into the public sector or force the payment of compensation for such an action. Compensation would only be available if bringing a service back into the public sector involved nationalising property owned by foreign investors. As under UK law, in such cases, compensation would be required. Equally, the question may be whether a contract to provide services previously awarded to a private operator must be continued or risk an ISDS claim. There

[191] *http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152665.pdf*

> again, I can be categorical that deciding not to renew a contract would not give grounds for an ISDS claim. An investor has no property at stake in the potential continuation of a contract. In general terms, ISDS can only be used in limited circumstances to address unfair or discriminatory treatment towards foreign investors: for example, if a foreign investor is subject to a denial of justice, or manifestly arbitrary treatment, or, as noted, if their property is expropriated without compensation in a host nation. It is only then that investors could use treaty rights to address the unfair action by the state. These are the sorts of protections we want EU investors to have overseas, and therefore we offer ourselves.

What is also important is that arbitration would only apply to commitments covered under TTIP. That means that it would not apply to services that do not fall under liberalisation commitments, such as public services.

Can collective agreements that have been declared universally binding be submitted for investment arbitration?

On 22 July 2015, Euro MP Philippe Lamberts (Verts/ALE) asked the European Commission to what extent tripartite and *erga omnes* agreements such as universally binding collective agreements will be affected by the possible inclusion of an ISDS clause.

On 21 September 2015, the Commission replied as follows:

"EU agreements and investment dispute resolution mechanisms in particular cannot threaten the European Social Model. The EU approach on investment protection does not allow an investor to successfully seek compensation for a public policy measure, such as a collective agreement, as long as it us non-discriminatory. This is due to the following safeguards:

The drafting of the standards of investment protection has been clarified in order to avoid abuse claims. Notably: a) the 'fair and equitable treatment' has been limited to a closed list of protection that are guaranteed in the European legal systems (such as access to justice, prohibition of arbitrary conduct and the breach of due process) and the situations where an investor could claim a breach of legitimate expectations are limited by clear and strict requirements; b) the notion of 'indirect expropriation' has been explained in an annex which clarifies inter alia that measures taken for legitimate public welfare objectives do not constitute expropriation.

The Parties can adopt binding interpretations in order to avoid and/or correct unwarranted interpretation by the tribunals.

The reference to the right to regulate in the preamble of the agreements already gives a strong interpretative guidance. As stated in the Concept Paper regarding investment in the Transatlantic Trade and Investment Partnership and beyond, the Commission has proposed to strengthen this approach by inserting an operational provision (Article) which clearly confirms the rights of Governments to take measures to achieve legitimate public policy objectives, on the basis of the level of protection that they seem appropriate" [the Commission's October 2015 proposal contains a similar article on the right to regulate: see Section 4.6.3].

The European Commission thus refers to the material guarantees discussed above. One point that merits mentioning is that the Commission refers to a collective agreement as a "public policy measure". This is only the case, however, if the government makes the

agreement universally binding, thereby conferring on it the force of law. An agreement that has been made universally binding could potentially be the subject of a dispute between the government and a foreign investor. The Commission argues that as long as the collective agreement is non-discriminatory vis-à-vis foreign companies, foreign investors cannot dispute the measure. The responsibility for this lies with the parties that have concluded the collective agreement. The Dutch government's own benchmark for assessment would in any case never permit it to make a collective agreement universally binding if it contained a discriminatory provision of this kind.[192]

5.5.3 Assessment

In the SER's view, a separate investment arbitration mechanism is not necessary in a properly functioning and highly developed legal system.[193] It would have little added value for foreign investors in the Netherlands, for example. They can submit a claim to the Dutch courts citing both the Dutch Constitution (Article 14.1) and the Dutch Expropriation Act [*Onteigeningswet*] if they feel they have been treated unfairly and claim damages. Dutch law also offers many more options than the limited number of situations admissible for consideration by the ICS.

Another point is that the quality of the legal systems in the EU Member States and in the US and its states differs. In the EU, Bulgaria and Slovakia get low marks for the independence of their judiciary.[194] The SER believes that such matters should primarily be entrusted to the EU in any case.[195] The same is true for potential flaws in the legal system of the US and its states, where foreign investors have been discriminated against in a number of cases. The US Congress could adopt a law giving EU investors access to the US system of justice in the event of breaches of TTIP.[196] The SER believes that the "royal route" involves improving the legal systems in the countries concerned.

That raises the question of whether a separate TTIP mechanism is needed for arbitration between states and foreign investors. The SER considers as follows. An Investment Court could be set up to function mainly as a safety net with limited legal consequences (reasonable compensation only) and limited grounds for assessment (non-discrimination and fair and equitable treatment). This could provide a solution until such time as all the EU Member States and all the US States have a properly functioning legal system. That would also make it possible for domestic courts to apply international treaty provisions on investment protection.

Although the Dutch courts can already do so, that is not guaranteed everywhere.[197]

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[192] See: *http://wetten.overheid.nl/BWBR0028909/geldigheidsdatum_01-01-2016*, Article 5.3.d (violation of the principle of equal treatment).
[193] Compare AIV, 2015, op. cit, p. 20.
[194] F. Baetens, 2015, *Transatlantic Investment Treaty Protection – A response to Poulsen, Bonnitcha and Yackee*, CEPS Special Report No. 103.
[195] Dutch Minister of Foreign Affairs Bert Koenders warned his Bulgarian counterpart that small Dutch businesses were afraid to set up in Bulgaria because of the country's reputation for corruption (*Financieele Dagblad*, 08-10-2015).
[196] L. Poulsen, J. Bonnitcha and J. Yackee, 2015, op. cit., p. 13. Baetens considers this an unlikely risk. F. Baetens, 2015, op. cit., p. 5.
[197] For more details, see: M. Bronckers, 2015, Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements, *Journal Of International Economic Law*, pp. 21-22: "In the EU domestic courts cannot immediately replace ISDS or an international investment court. First, the EU institutions and the Member States would have to discontinue their campaign to prevent private parties from asserting rights based on bilateral trade agreements before domestic courts. Second, the EU Courts would need to accept that 'direct effect' of an international agreement can be different from, and more qualified than, 'direct effect' of EU law.

The establishment of an ICS could also represent a positive step if the intention is for it to replace and modernise existing investment agreements that still include the "old" ISDS. This does demand, however, that the proposed ICS be given a multilateral character. If TTIP were gradually to develop into a multilateral system which other countries could and would like to join, it would make more sense to establish a multilateral mechanism for settling investment and other disputes.

The proposed ICS must be further improved in a number of respects if it is to actually function as an international judicial body with a public and independent character. Among other things, this involves the financial independence of arbitrators/judges with regard to the duration of the legal proceedings.[198] The material guarantees should be aimed at ensuring that the Investment Court only assesses *how* a government measure has been implemented (for example, is the expropriation sufficiently justified by a particular public interest, were the legal safeguards satisfactory, were foreign investors discriminated against, and was a reasonable compensation paid for the expropriation?). An ICS should not assess *whether* the government should be allowed to implement a particular measure to protect people and the environment. In addition to the provision of adequate guarantees in TTIP, careful government action remains the best remedy against arbitration claims.

None of this alters the fact that – in the eyes of the trade union movement – there would still be a one-sided form of dispute resolution in the interest of foreign investors, without guarantees of a balanced consideration of other interests (public interests, people and the environment, labour standards). This aspect should be assessed within the context of whether TTIP will provide for mandatory and effective implementation of, compliance with and enforcement of the obligations set out in the sustainability chapter with regard to core labour standards as well as a mandatory disputes mechanism, and, if so, how it will achieve this.

UK environmental rights organisation ClientEarth argues that the inclusion of an arbitration mechanism in TTIP is incompatible with the autonomy of the EU legal order.[199] The organisation claims that inclusion of an arbitration mechanism in TTIP would imply setting up a system outside of, but binding on, the EU judicial system. Foreign investors would be able to sideline the EU law in this way. The binding interpretation of EU law would undermine the autonomy of the EU legal order and the powers of the EU courts and, more specifically, negatively affect the EU competition rules.

The European Commission's proposal for an ICS guarantees its compatibility with the autonomy of the EU legal order and EU competition law in a number of ways.

First of all, with respect to the draft chapter on investment protection, Article 2.4 states that:[200]

Thus, the EU institutions must be able to suspend the effect of such agreements in the event of non-reciprocal, imbalanced implementation by the EU's treaty partner of notably the agreements' economic or commercial chapters. Third, the quality of the judiciary in a substantial number of EU Member States needs to be improved, in terms of independence and efficiency, before it is reasonable to expect that the treaty partners of the EU can have sufficient confidence in its domestic courts".

[198] See also the position of the "Deutsche Richterbund", the German association of judges and public prosecutors, No. 04/16 of February 2016 (*http://www.drb.de/cms/index.php?id=952*).

[199] *http://ttip2016.eu/files/content/docs/Full%20documents/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf*

[200] *http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf*

> For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy [in EU state aid] and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex III.

This means that if the authorities decide that a certain subsidy should be regarded as a prohibited form of state aid according to EU competition law, and that subsidy must therefore be discontinued or reimbursed, the relevant investor cannot bring an ISDS case against their decision.

Second of all, Articles 13.3, 13.4 and 13.5 make it clear that the proposed tribunals will not consider the domestic law of either party part of the applicable law. [201] In those matters where the Member States have transferred competence to the EU, the direct effect and precedence of EU law makes it "the law of the land" and therefore part of domestic law.

The proposed tribunals may only determine whether a certain measure is inconsistent with TTIP provisions. They must further consider the domestic law as a matter of fact and would not have jurisdiction to determine its legality.

If it nevertheless becomes necessary for a tribunal to ascertain the meaning of a provision of the domestic law, it will follow the prevailing interpretation of that provision. If nevertheless required to assign a certain meaning to the relevant domestic law, it must ask for a binding decision interpreting that provision. The tribunal's own interpretation of the domestic law can never be binding.

Since the European Court of Justice is extremely vigilant when it comes to the autonomy of the EU legal order and its position as the highest court under EU law, it would be a sensible move for the European Commission to ask the Court for an Opinion clarifying whether the above guarantees are sufficient, as ClientEarth has suggested.

Conclusion
According to the SER, a separate investment arbitration mechanism in and between properly functioning and highly developed legal systems is not necessary.[202] The SER believes that the "royal route" involves improving the legal systems in the countries concerned.

The basic principle adopted by the SER is that governments must retain sufficient discretionary power to be able to adequately safeguard and improve the levels of protection afforded to people and the environment in future. Agreements on investment protection should not put this discretionary power under pressure.

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[201] See Article 13.3-5: "For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party.
For greater certainty, the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.
Where serious concerns arise as regards matters of interpretation relating to [the Investment Protection or the Resolution of Investment Disputes and Investment Court System Section of this Agreement], the … Committee may adopt decisions interpreting those provisions. Any such interpretation shall be binding on the Tribunal and the Appeal Tribunal. The … Committee may decide that an interpretation shall have binding effect from a specific date."

[202] Compare AIV, 2015, op. cit, p. 20.

Existing ISDS mechanisms do not provide sufficient guarantees in this regard. They contain a number of shortcomings, such as their private nature, insufficient independence and impartiality of arbitrators, lack of transparency and insufficient coherence of rulings and their possible adverse effect on the discretionary power of states through such aspects as applying an excessively wide definition of the concept of indirect expropriation and the possibility of punitive damages being awarded.

The European Commission's proposals for a public ICS are a step in the right direction for addressing the shortcomings of the old ISDS. The proposed ICS must be further improved in a number of respects if it is to actually function as an international judicial body with a public and independent character. Among other things, this involves the financial independence of arbitrators/judges with regard to the duration of the legal proceedings. The material guarantees should be aimed at ensuring that the ICS only assesses *how* a government measure has been implemented, and not *whether* the government should be allowed to implement a particular measure. An Investment Court System as outlined above would act as a safety net. In addition to the provision of adequate guarantees in TTIP, careful government action remains the best remedy against arbitration claims.

Various considerations are relevant when deciding whether or not an Investment Court System is necessary:

An ICS could provide a solution until such time as all the EU Member States and all the US States have a properly functioning legal system. It is therefore relevant whether national systems can be expected, within the foreseeable future, to provide sufficient guarantees for investment protection (the "royal route").

A modernised system of dispute resolution in the form of an ICS can also constitute a positive step if the intention is for it to replace and modernise existing investment agreements that still include an "old" ISDS. This does demand, however, that the proposed ICS be given a multilateral character. If TTIP were gradually to develop into a multilateral system which other countries could and would like to join, it would make sense to establish a multilateral mechanism for settling investment and other disputes.

None of this alters the fact that – in the eyes of the trade union movement – there would still be a one-sided form of dispute resolution in the interest of foreign investors, without guarantees of a balanced consideration of interests in relation to other interests (public interests, people and the environment, labour standards). This aspect will have to be assessed within the context of whether TTIP will provide for mandatory and effective implementation, compliance and enforcement of the obligations in the sustainability chapter with regard to core labour standards as well as a mandatory disputes mechanism, and, if so, how it will achieve this (see Section 5.4.3).

6. Potential influence of TTIP on growth, prosperity, and employment

6.1 Introduction: public prosperity as a guideline

TTIP will intensify trade between the US and the EU. The question is whether that will also lead to more economic growth and employment and whether everyone will be able to derive benefits from such growth. Based on recent empirical studies, this section (in conjunction with Appendix 5) proposes to paint the most accurate picture possible of TTIP's potential impact on social prosperity (or at least important components of the same).

Public prosperity as a guideline
Ultimately, the SER's main concern is not how TTIP will influence trade flows, but rather its impact on growth and employment – and, by extension, on public prosperity, taking into account the consequences for people and the environment. The SER applies a broad concept of prosperity (see Section 2). Public prosperity implies more than material progress, such as measured in GDP growth; it also encompasses social progress (well-being, social cohesion, a reasonable level of income equality) and a good quality environment (spatial and environmental). Ensuring and maintaining balance and cohesion between people, planet and profit points the way to sustainable development. The SER has explained these ideas in a set of recommendations that lay the groundwork for fair, sustainable, safe globalisation.[203]

Regulation of levels of protection for people and the environment is an important instrument for achieving social prosperity.

Structure of this section
The section is structured as follows. Section 6.2 looks at concerns about the potential effects of TTIP on prosperity and employment and shows how these are connected with a number of general insights about the consequences of liberalising international trade.

Section 6.3 looks at the bandwidth of outcomes of various studies that have explored the potential economic effects of continuing to liberalise trade under TTIP. Differences in the studies' methodologies and the projected potential elimination of non-tariff barriers play an important role in this context.

TTIP will also affect third countries. That is the subject of Section 6.4, which looks at direct and indirect spillover effects that are also important in the geopolitical sense.

Section 6.5 focuses on the possible impact of TTIP on the labour market and employment. It considers possible changes owing to more far-reaching forms of specialisation.

The final section discusses the main findings.

6.2 International trade and public prosperity

Differing types of trade agreements
The impasse in the WTO's multilateral negotiations on trade liberalisation has been an important spur to regional and bilateral trade or economic integration agreements. These agreements differ widely in their scope, depth and "institutional quality" (including

[203] SER Advisory Report, 2012, *Verschuivende Economische Machtsverhoudingen*.

their coerciveness). Two studies comparing 166 and 296 different agreements respectively have revealed that many past trade agreements had few if any economic effects. These are agreements of restricted scope and limited depth. Broad and deep agreements with instruments for monitoring compliance, on the other hand, do have effects.[204] In addition to European integration, examples include EFTA and NAFTA. The basic set-up of TTIP can be described as a broad, binding agreement that can add depth to pre-existing US-EU market integration. Its anticipated effects will be limited, however, owing to previous efforts to liberalise trade between the two (see Section 6.3.1).

Specialisation based on comparative advantages
International trade is not a zero-sum game in which one party's profits is the other's loss. According to prevailing economic theories, the growing international division of labour lowers barriers to trade and thus makes it possible for countries to better exploit their comparative advantages. Because countries (or rather, their businesses) specialise in what they are best at, they can achieve a higher level of prosperity.[205]

The advantages are mutual ones, even if a certain trading partner produces more efficiently in every market. The point is that countries focus on producing goods and services that outperform other goods and services that it produces *itself*.

This process of specialisation occurs because businesses and consumers choose goods and services that offer the best value for money. Consumers also benefit because they have access to a wider variety of products than the domestic market can offer them. Specialisation is enhanced by scale and learning effects and by technology transfer. Competition encourages companies to improve efficiency and forces them to modify their technology and organisation to reflect best practices in their sector. That in turn promotes investment in innovation. We can refer in this connection to the "California effect", whereby producers, once they have invested in meeting stringent standards, also have an interest in seeing those standards applied consistently by others.[206]

Market integration makes it possible to exploit scale effects, increasing the potential return on new investments and products. These scale effects offer an important explanation for trade specialisation within sectors and between countries at the same stage of development, such as the EU and the US.

In the current phase of globalisation, production processes are being divided into separate tasks that can be carried out in different countries. This is accompanied by robust growth in the international trade in intermediate products, leading to more transport movements. If the adverse effects of transport on nature and the environment are not internalised, they could, on balance, have negative consequences for public prosperity.

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[204] Tristian Kohl, 2014, Do we really know that trade agreements increase trade?, *Review of World Economics/Weltwirtschaftliches Archiv* 150(3), pp. 443-469; Tristan Kohl, Steven Brakman and Harry Garretsen, 2014, *Do Trade Agreements Stimulate International Trade Differently? Evidence from 296 Trade Agreements*.

[205] For more details, see: SER Advisory Report, 2008, *Duurzame Globalisering: een wereld te winnen*; SER Advisory Report, 2012, *Verschuivende economische machtsverhoudingen*.

[206] There is considerable evidence of the "California effect" for environmental standards: see D. Vogel, 1997, Trading up and governing across: transnational governance and environmental protection, *Journal of European Public Policy*, 4 (4); More recently, concerning automobile emissions standards: R. Perkins en E. Neumayer, 2012, Does the "California effect" operate across borders? Trading– and investing–up in automobile standards, *Journal of European Public Policy,* 19(2); K. Holzinger and T. Sommerer, 2011, "Race to the Bottom" or "Race to Brussels"? Environmental Competition in Europe, *Journal of Common Market Studies*, vol. 49 (2).

Public concerns about effects
Various concerns have been voiced in the public debate on TTIP about the potential effects of EU-US trade liberalisation. In addition to the concerns already discussed in Section 4, the following questions are being raised.

Lowering import tariffs and other barriers to trade will allow the US to put more pressure on competition in the EU. Can European and Dutch businesses handle more vigorous competition? Can we really say there is a "level playing field" or does TTIP offer US firms a perfect opportunity to drive European ones out of the market by exploiting the cost advantages of their own, more flexible rules?

To what extent will any TTIP-related growth also create more jobs? Jobs are constantly being lost to globalisation and technological advances. TTIP will add extra fuel to this tendency. And there is no saying whether new, suitable jobs will replace those lost. Older, low-educated workers are particularly vulnerable if they lose or are at risk of losing their jobs.

Twenty years ago, the US, Canada and Mexico signed the North American Free Trade Agreement or NAFTA. Expectations ran high at the time; NAFTA would bring new jobs and a lot of extra income for families. It would also promote real convergence between the three countries. But these expectations were never fulfilled. In the US, NAFTA is now associated with job losses and downward pressure on industrial wages; the number of new jobs in Mexico has been disappointing, while the agreement has had a huge impact on traditional sectors, especially agriculture.[207] The question, then, is whether NAFTA has influenced public prosperity for the better. US trade unions claim that NAFTA aggravated inequality in North America.[208]

The advantages of free trade between the US and the EU will inevitably result in a diversion of trade detrimental to third countries (including developing countries). In addition, the US and the EU intend to develop common standards under the TTIP banner, allowing them to set the rules for world trade and possibly cause developing countries to fall behind. Another related concern is that TTIP will erode the market protection that emerging and developing countries use to encourage local and more vulnerable sectors.[209]

This section looks at the above concerns in detail. We begin below with a number of general insights about the adjustment costs associated with trade liberalisation, and its possible effects on income distribution.

Adjustment costs
The literature teaches us that specialisation based on comparative advantages can lead to greater prosperity. But that process is associated with adjustment costs, and the positive effects largely make themselves felt only in the medium to long term. The specialisation process involves creating new jobs and doing away with existing ones. The associated costs will generally be lower as the international division of labour becomes more refined and specialisation takes place mainly within sectors (and not between them) – which is the case between the EU and US. It will be easier in such circumstances to productively redeploy labour and other factors of production that have become available.

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[207] See: Pardee Center Task Force Report, 2009, *The Future of North American Trade Policy: Lessons from NAFTA*, Boston University.
[208] AFL-CIO, 2014, *NAFTA at 20*, Washington, DC.
[209] Bas van Beek et al., 2015, Feiten & Fabels – 10 claims over TTIP, PAJ/SOMO/TNI, pp. 48-49.

The adjustment costs also depend on mobility between sectors or segments of the labour market. Mobility can be impeded by many different factors, for example differences in the skills required, lack of information, geographical mismatches, flaws in the functioning of the labour market, or workers' deficient job search skills. More specifically, it is harder for older and low-educated workers to find new jobs. The SER believes that policy must provide all citizens, especially these groups, with sufficient guidance to enable those affected to respond as fully as possible to changes and be assured of sufficient income protection.[210]

Distribution effects
While income inequality *between* countries has become smaller worldwide in recent years, as a rule income inequality *within* countries has increased. The growing level of inequality within countries has come to the attention of the OECD and the IMF, both of which have noted its possible negative consequences for economic growth and social cohesion.

The growing income inequality in many countries has multiple causes, but the main ones are technological advances and changes in government policy. Technological progress increases the demand for high-educated workers and lowers the demand for those in the middle segment. Globalisation – and that includes TTIP – can aggravate this effect.[211]

The removal of trade barriers makes some production factors more plentiful, leading to a decline in wages; it increases the demand for others, thus raising the associated wages. Because low-skill workers are plentiful in developing countries, the intensification of trade between developed and less developed countries generally puts pressure on the position of low-skill workers in the former. But that is not an issue in the case of TTIP, because the agreement involves trade between two blocs, the EU and the US, whose development status is more or less comparable. In addition, trade specialisation between the two is highly intra-sectoral, so that further liberalisation of trade between them will not lead to major shifts between sectors.

6.3 Estimated economic effects of TTIP

6.3.1 General comments

Trade between the US and the EU is already fairly intensive and ample, in part due to the low tariffs on industrial goods. That means that even relatively small shifts in trade can have a major impact on household disposable income.[212]

Low import tariffs make non-tariff barriers especially important
TTIP focuses on lowering the cost of trade between the EU and the US. On average, import tariffs between the two tend to be low anyway (see Figure 4.1), and abolishing them will not have any major macro-economic effects.[213]

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[210] SER Advisory Report, 2012, *Verschuivende Economische Machtsverhoudingen*, concerning Chapter 4.
[211] See: SER Advisory Report, 2012, *Verschuivende Economische Machtsverhoudingen*, pp. 51-54.
[212] Jacques Pelkmans et al., 2013, *EU-US Transatlantic Trade and Investment Partnership – Detailed Appraisal of the European Commission's Impact Assessment*, Study Ex-Ante Impact Assessment Unit, European Parliament (PE 528.798), p. 6.
[213] Customs duties are "own resources" that finance the EU's budget (after deducting 20% of the tariff revenue to compensate the Member States for collecting the duties). The current tariff revenue from the US is around €2.6 billion (see: Commission Staff Working Document, Impact Assessment Report on the future of EU-US trade relations, SWD (2013) 69 final, p. 55). That is a little less than 2% of the EU's budget, which is itself approximately 1% of the EU's GDP.

Low import tariffs mean that non-tariff barriers have become much more important to EU-US trade. These are barriers that arise owing to differences in policies and rules, making their assessment a much more complex and sensitive affair than import tariffs.

Non-tariff barriers: how "unnecessary" are they?
There are two questions that play a role when determining the *likely* economic effects of a *possible* lowering of non-tariff barriers:

- To what extent can non-tariff barriers be lowered without affecting underlying systemic preferences? In other words, to what extent are the barriers "unnecessary" ones that can be dismantled without affecting the desired level of protection?

- What precisely do these "unnecessary" barriers cost and what would be the benefits of dismantling them?

The second question is dealt with in more detail in Section 6.3.2 and in Appendix 5. It has further been shown that it is much more difficult to ascertain the economic impact of reducing non-tariff barriers than the impact of lowering a tariff.

The first question is the focus of a study by Myant and O'Brien.[214] They emphasise that regulations meant to protect people and the environment have benefits as well as costs for society. They mention the considerable societal benefits ascribed to existing forms of regulation in such areas as climate change, toxic substances, carcinogens in the workplace, the EU's environmental *acquis*, and the financial sector.

Myant and O'Brien draw attention to the nature of US-EU differences in regulation. They believe that where administrative procedures are duplicated or where differing procedures (such as safety testing) are focused on the same functional outcomes, it should be fairly easy to make gains by streamlining those procedures.

That is otherwise where the actual levels of protection – for example with regard to health and safety – differ. If the parties decide to align what are now diverging levels of protection, there will be consequences for public prosperity. Any outcome that lowers the level of protection for people and the environment will be at the expense of prosperity.

Basic principles
The SER considers that TTIP must not serve as an excuse to alter levels of protection for people and the environment. Such protection should be judged on its own merits, and not as part of efforts to reduce trade costs.

This basic principle corresponds with the mandates that both the EU and the US have given their negotiators, which rule out any lowering of protection levels. The European Parliament made a similar statement in its 8 July 2015 Resolution.

The foregoing basic principle means that moves to lower non-tariff barriers to trade must not entail reducing the levels of protection afforded to people and the environment. By the same token, it means that such moves must not entail any decline in prosperity that would have to be deducted from the prosperity gains achieved thanks to lower trade costs. The question, therefore, is which prosperity gains can in fact be achieved by lowering trade costs under these limiting conditions.

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[214] Martin Myant and Ronan O'Brien, 2015, *The TTIP's impact: bringing in the missing issue*, ETUI Working Paper 2015.01. See also: Werner Raza et al. (2014), *ASSESS_TIPP – Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP)*, Vienna (OFSE).

6.3.2 The basic methodology: two-step estimate

The basic methodology used in recent decades to estimate the potential economic impact of international free trade involves applying a general equilibrium model to calculate the effects of lower trade costs associated with liberalisation. General equilibrium models distinguish between different sectors and can therefore accurately predict the long-term impact of trade measures on the economy.

It is fairly easy to determine the extent to which lowering or abolishing import tariffs will lower the cost of trade. In the case of TTIP, however, non-tariff barriers are especially important. Separate research is needed to identify the extra trade costs generated by non-tariff barriers and the extent to which they can in fact be lowered. Simply estimating the impact of non-tariff barriers on costs is already a complex affair.[215] It involves making all sorts of assumptions that are, in reality, open to discussion.

The most thorough study of the costs accounted for by non-tariff barriers to US-EU trade was carried out by Ecorys[216] (step 1).

Based on its results, the Centre for Economic Policy Research (CEPR) used a general equilibrium model to calculate the economic impact[217] (step 2).

Step 1: determine the potential for lowering trade costs

Ecorys has mapped out the non-tariff measures and regulatory divergence (and associated costs) that restrict trade between the EU and the US. Based on an in-depth analysis of non-tariff measures in the various sectors, it estimates that a decade-long process of regulatory convergence could eliminate half of these barriers, if the political will exists.

Ecorys calls the scenario whereby the "actionable" non-tariff barriers are reduced as much as possible – with all tariffs, 25 percent of services non-tariff barriers, and 50 percent of government procurement non-tariff barriers being eliminated – the "ambitious scenario". This scenario would boost EU GDP by about 0.7 percent per year, and US GDP by 0.3 percent.

In a more limited scenario, Ecorys assumes that 25 percent of all non-tariff barriers and regulatory divergence between the US and EU is aligned.

Step 2: from trade cost reduction to economic impact on the EU

The elimination of trade barriers also has spillover effects on other sectors and third countries. A general equilibrium model takes the interaction between different markets into account. A partial model underestimates the impact of certain policy measures on the economy as a whole.

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[215] See for example: Marco Fugazza and Jean-Christophe Maur, 2008, Non-Tariff Barriers In Computable General Equilibrium Modelling, United Nations Conference On Trade And Development Policy Issues. In: *International Trade And Commodities Study Series No. 38*.

[216] Koen Berden, Joseph Francois, Martin Thelle, Paul Wymenga and Saara Tamminen, 2009, *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, Ecorys (study commissioned by the Commission's DG Trade).

[217] Joseph Francois, Miriam Manchin, Hanna Norberg, Olga Pindyuk, Patrick Tomberger, 2013, *Reducing Transatlantic Barriers to Trade and Investment*, Centre for Economic Policy Research (CEPR) (study commissioned by the European Commission).

General equilibrium models show the new equilibrium that could emerge in the longer term (say, after ten years) following the implementation of a specific change. These models have a micro-economic foundation. The supply side takes precedence, and it is assumed that price setting and wage formation are flexible enough to achieve a new equilibrium between supply and demand in the longer term.

Greater specialisation resulting from trade integration gives rise to adjustment costs. These models do not reveal the adjustment costs associated with a new equilibrium. If the capacity to adjust falls short, the new equilibrium will remain elusive. The model therefore does not predict future economic growth – and is also unable to identify an adjustment path – but it does reveal the *potential* for extra growth made possible by a policy change (in this case, a trade agreement). Whether, and if so, when that growth actually manifests itself depends on changes in effective demand and other factors.

Based on Ecorys's research, the CEPR used a general equilibrium model to calculate the potential long-term macro-economic impact of reducing non-tariff barriers to trade between the US and the EU.

Table 6.1 shows the CEPR's estimated macro-economic impact (in terms of extra GDP in 2027) stemming from the liberalisation of trade between the US and the EU. The table indicates that reducing non-tariff barriers in the trade in goods will have the biggest impact.

Table 6.1 – Macro-economic impact of removing trade barriers between the US and the EU (in % of extra GDP in 2027)

	EU	US
Tariffs only	0.10	0.04
Non-tariff barriers: services only	0.02	0.03
Non-tariff barriers: procurement only	0.02	0.01
Non-tariff barriers goods: Less ambitious scenario (Ecorys)	0.27	0.21
Non-tariff barriers goods: Ambitious scenario (Ecorys)	0.48	0.39

Source: CEPR (2013)

Impact on the Netherlands

In 2012, the Dutch Ministry of Economic Affairs asked Ecorys to consider the possible economic impact on the Dutch economy.

In the ambitious scenario, the Netherlands could see a national income gain of 0.25 percent (1.4 billion euros) in the short term, and 0.72 percent (4.1 billion euros) in the long term. In the limited scenario, the outcomes are about half, at 0.11 and 0.32 percent respectively. These outcomes largely match those for the EU in general, but they are higher than for the US overall (see Table 6.2).

Table 6.2 – Economic impact of TTIP for the Netherlands, the EU26 and the US in various scenarios and in the short and long term

Impact on national income, in %	Ambitious: full liberalisation of all "actionable" non-tariff barriers		Limited: partial liberalisation of "actionable" non-tariff barriers	
	Short-term	*Long term*	*Short-term*	*Long term*
Netherlands	0.25	0.72	0.11	0.32
EU26	0.25	0.73	0.16	0.32
US	0.13	0.28	0.05	0.13

6.3.3 Alternative calculations for EU

Bandwidth in estimated impacts
Since 2013, at least seven alternative studies have been published exploring the economic effects of TTIP for the EU and the US.[218] The bandwidth of outcomes is considerable. At the top end of the scale is the study by ifo[219] published by the Bertelsmann Foundation, which estimates that TTIP could boost US GDP growth by an extra 13 percent and EU GDP growth by an extra 5 percent. The bottom of the scale is defined by Capaldo,[220] who is unique in calculating a loss in EU GDP (rising to -0.5 percent in France and Northern Europe) and an increase in US GDP of 0.36 percent. Most of the other studies show TTIP leading to a long-term increase of between 0.5 and 2 percent in GDP.

The variation in these outcomes can be ascribed to:

- differences in the estimated reduction of trade costs;
- the fact that the studies are based on differing models. Three types of models were used: supply-driven models involving multiple sectors (general equilibrium models); single-sector supply-driven models (structural gravity model) and (single-sector) demand-driven models;
- possible additional assumptions (for example concerning spillover effects and/or the presumed capacity of economies to adjust).

6.3.4 Three types of study

The various studies that have explored the effects of TTIP can be divided into three groups. The standard method used in these studies is general equilibrium modelling. Some studies take a novel approach by applying structural gravity modelling. Finally,

[218] In addition, the effects on individual Member States have also been studied (Germany, Sweden and the Netherlands).
[219] G. Felbermayr et al., 2013, *Transatlantic Trade and Investment Partnership (TTIP): Who benefits from a free trade deal? Part 1: Macroeconomic Effects.*
[220] Jeronim Capaldo, 2014, *The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability*, Tufts University, Global Development and Environment Institute Working Paper no. 14-03.

one study uses short-term demand-driven modelling. The studies are discussed below by category.[221]

General equilibrium modelling
General equilibrium modelling is an effective tool for identifying the impact of trade and other policy measures on the economy, but it also has its limitations. It is the best type of modelling available for these sorts of questions, but it is far from ideal. Table 6.3 lists the pros and cons of general equilibrium modelling:[222]

Table 6.3 – Pros and cons of general equilibrium modelling for identifying trade effects.

Pros	*Cons/limitations*
Models the whole economy, including mutual supplies/exchanges. These are important for accurately estimating the ultimate impact of trade measures.	How realistic are flexible wages and prices? Employment effects depend on there being enough flexibility in adjustment processes (the capacity to achieve equilibrium in the labour market). The model offers no insight into adjustment costs.
Based on detailed data.	Difficult to include the dynamic effects of trade (productivity, competition, innovation, investment).
Replicable. Modelling has transparent outcome.	Comparative statistics: does not identify an adjustment path to a new equilibrium in the long term.

Table 6.4 compares the outcomes of four different studies based on general equilibrium modelling. The first is the CEPR study discussed in Section 6.3.2. The other studies are covered in more detail in Appendix 5.

Table 6.4 Features of four different TTIP studies based on general equilibrium modelling

Study	*Aggregation level*	*Outcome (compared with Ecorys/CEPR)*
Francois et al. (2013) - CEPR	11 regions	= Ecorys/CEPR
Francois et al. (2015)	12 regions and 5 EU countries	Larger effects: US 1 % EU 2 %
Fontagné et al. (2013)	13 regions	Comparable. Larger effects for services
Carrère et al. (2015)		Smaller effects: EU: 0.17%; US: 0.26%

General equilibrium modelling also considers the consequences for the labour market and wages. These effects are shown in Section 6.5.

Structural gravity modelling
A new methodological approach to analysing the effects of TTIP is the structural gravity model, which is used to estimate bilateral trade flows. Based on these estimates, it then becomes possible to estimate non-tariff barriers and other trade costs.

[221] For a more detailed discussion of the methodological aspects of the various studies on TTIP's economic impact, see: Eddy Bekkers, Hugo Rojas-Romagosa, 2016, *Literature survey on the economic impact of TTIP*, CPB Background Document.
[222] Based on: Pelkmans et al., op. cit, p. 16.

Structural gravity modelling has one advantage over general equilibrium modelling in that it functions at a lower aggregate level, with more than 100 different countries being differentiated. But that comes at a price: highly simplified modelling of the relationships between trade, production and consumption. The trade effects are extrapolated to the rest of the economy, as it were. As a rule, these are single-sector models, making it impossible to take sector-specific differences and changes into account.

Gravity analysis

Gravity modelling compares the scale of trade flows between two countries on the one hand with the size of their economies (or average income) and distance between them on the other. Distance is seen as a measure of the cost of trade between the two countries. Gravity modelling has been used to study international trade since the 1960s.

Structural gravity modelling also does not consider the consequences for the labour market, and must therefore be linked to a specific labour market model (see Section 6.5).

Table 6.5 Features of four different TTIP studies based on structural gravity analysis

Study	*Aggregation level*	*Outcome (compared with Ecorys/CEPR)*
Felbermayr et al. (2013a)	126 countries	Larger effects: Tariffs plus NTBs: EU 1.7%; US 2.2%; "Internal market": EU + 7%; US + 5%
Felbermayr et al. (2013b) (Bertelsmann)	126 countries	Much larger effects: US + 13% GDP; EU + 5% GDP
Felbermayr et al. (2014)	134 countries	Larger effects: US 2 – 3 % EU 1.5 – 2.5 %
Felbermayr et al. (2015b)	173 countries	Larger effects: US 5 % EU 4 %

Based in part on: Gabriel Felbermayr, Wilhelm Kohler, Rahel Aichele, Günter Klee, Erdal Yalcin (2015a), *Mögliche Auswirkungen der Transatlantischen Handels- und Investitionspartnerschaft (TTIP) auf Schwellenländer*, ifo Forschungsberichte 67, p. 31.

Demand-driven modelling

One researcher, Jeronim *Capaldo*, uses a different type of modelling: short-term demand-driven modelling. This is the only study that shows TTIP having a negative impact on growth and employment in the EU (but a positive impact on US GDP of 0.36 percent).[223]

To determine the degree to which non-tariff barriers would be reduced, Capaldo based his work on the Ecorys study; to estimate the impact of that reduction on the volume of trade between the TTIP countries, he drew from the CEPR study. However, he uses demand-driven modelling (UN Global Policy Model) instead of general equilibrium modelling and calculates net exports changes, "taking into account the global feedbacks

[223] Jeronim Capaldo, 2014, *The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability*, Tufts University, Global Development and Environment Institute Working Paper no. 14-03.

built into the GPM".[224] His outcome is surprising: under TTIP, the volume of trade will increase while EU exports will decline.

In fact, Capaldo approaches international trade as a zero-sum game: free trade only produces advantages if it increases net exports. His model does not include any adjustment of the economic structure to allow for changing relationships, preferences and options. Capaldo assumes that governments in TTIP countries will remain committed to fiscal austerity in the coming decade, leading to the long-term slow-down of the European economy. He also assumes that profits and investment will be sustained by growing asset prices, with all the associated risk of financial instability. These additional assumptions weigh heavily in determining the outcomes of the study.[225]

6.3.5 Explaining the differences

This section has discussed various studies that estimated the economic impact of TTIP. We divided these studies into three groups: general equilibrium modelling, structural gravity modelling, and a single case of demand-driven modelling. The outcomes of the various studies vary considerably. The table below identifies the main reasons for those differences.

The Ecorys/CEPR study discussed in Section 6.3.2 serves as the baseline for our comparison. Major deviations from this baseline are marked with an upper-case X; minor deviations are marked with a lower-case x.

Table 6.6 What accounts for the discrepancies in TTIP study outcomes (compared with the Ecorys/CEPR study)?

	Estimated size of trade cost reduction	*Economic impact of reducing trade costs*	
		Model	Additional assumptions
General equilibrium modelling	**x**		
Structural gravity modelling	**X**	**x**	
Capaldo's demand-driven modelling		**X**	**X**

Key: **x =** minor discrepancies; **X =** major cause of discrepancy

[224] It is unclear how, precisely, that happens.

[225] For a basic criticism, see: Matthias Bauer and Fredrik Erixon, *"Splendid Isolation" as Trade Policy: Mercantilism and Crude Keynesianism in "the Capaldo Study" of TTIP*, ECIPE (European Centre for International Political Economy) Occasional Paper 03/2015. The authors report they were unable to gain access to the relevant UN Global Policy Model.

6.4 Potential consequences for third countries: the importance of spillover effects

6.4.1 Introduction

Trade liberalisation between the US and the EU will also affect third countries. Liberalisation is not a zero-sum game; it will improve world economy as a whole, but will have disadvantages for a group of third countries. How big that group is and how significant the disadvantages will be depends on various factors, including the depth of TTIP and the extent to which it also dismantles trade barriers for third parties.

First of all, TTIP will result in a certain diversion of trade disadvantageous to third countries. TTIP will eliminate the preferential advantage of countries that have concluded preferential trade agreements with the EU and/or the US.

This may be compensated by extra growth in the EU and the US, which will create additional opportunities for exports. Reducing non-tariff barriers can also generate spillover effects; such a reduction by and under TTIP can also be beneficial for third countries.[226]

Some of these benefits are *direct* spillover effects that will accrue automatically to third countries. If the US and the EU agree on regulatory and procedural streamlining in matters of trade, then this qualifies as MFN treatment,[227] a cornerstone of the WTO, making it easier for firms in third countries to export to the EU and the US.

Additionally, there may be *indirect* spillover effects provided that third countries adopt certain standards and/or procedures to which the US and the EU agree within the context of TTIP. That could eventually make a TTIP standard a global standard.

6.4.2 Outcomes of empirical studies

The CEPR study estimates TTIP's direct spillover effects for the rest of the world at 20 percent. This means that reducing US-EU trade costs by 10 percent, for example, would lower trade costs with third countries by 2 percent. On balance, then, these TTIP spillover effects are projected – in both the ambitious and limited models – to produce an economic advantage for all other distinct regions of the global economy. One notable point is that the advantage for the ASEAN member states is relatively larger (+0.89 and +0.45 percent of GDP respectively) than for the EU (+0.27 and +0.48 percent respectively) or the US (+0.21 and +0.48 percent respectively). That is because the ASEAN member states have extremely high export quotas. The effects for China and India are limited (from 0.02 percent to 0.04 percent of GDP).

Felbermayr et al. (2015a)[228] have compared the various studies on the economic impact of TTIP. They have shown that, if spillover effects are discounted, TTIP will have negative impact on a large number of third countries. That impact is generally modest,

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[226] See: Francois et al., 2013, Section 4.2 and 5.2.4; Arjan Lejour, Federica Mustilli, Jacques Pelkmans and Jacopo Timini, 2014, *Economic Incentives for Indirect TTIP Spillovers*, CEPS Special Report no. 94; Felbermayr et al., 2015, Section 6.

[227] MFN: Most Favoured Nation.

[228] Gabriel Felbermayr, Wilhelm Kohler, Rahel Aichele, Günther Klee, Erdal Yalcin, 2015a, *Mögliche Auswirkungen der Transatlantischen Handels- und Investitionspartnerschaft (TTIP) auf Entwicklungs- und Schwellenländer*, ifo Forschungsberichte no. 67.

however: less than 1 percent of GDP, stretching out over a ten- to twelve-year period, or a decline in annual growth over that period of 0.1 percentage point at most. In studies that distinguish between different sectors and value chains, this primary impact of trade diversion is even smaller.

If spillover effects are added into the formula, then the impact on economic growth tends to be positive for the vast majority of third counties – and the positive impact on the TTIP parties is even bigger than without spillover effects to third countries. In other words, the US and the EU stand to benefit if they promote and facilitate spillover effects.

Felbermayr et al. (2015b) have also studied a number of third countries as separate cases. TTIP could have mainly negative consequences for Bangladesh and, to a lesser extent, Indonesia. Both countries' exports depend heavily on textile sales in the US and the EU. Removing import tariffs on clothing will improve the competitiveness of suppliers in Eastern and Southern Europe in the US market, to the detriment of non-TTIP producers.

An earlier study by CARIS[229] (University of Sussex) also pointed out the potential consequences for Bangladesh, Pakistan and Cambodia of removing MFN tariffs in transatlantic trade. These countries specialise in textiles, clothing and footwear and depend heavily on their exports of these products to the US and the EU. The CARIS study found, however, that the risk of these countries being displaced by EU or US-based suppliers was not very large; the EU and the US show no indication of being competitive suppliers of these products in each other's markets.

This study also looks specifically at the effects of reducing non-tariff barriers on low-income countries. If greater regulatory cooperation under TTIP were to lead to more restrictive sanitary and phytosanitary (SPS) standards, these developing countries will be vulnerable. At the same time, harmonisation or mutual recognition between the US and the EU will also have positive effects for third countries: third country products meeting the rules of one partner will also meet the rules of the other.

On technical barriers to trade (TBT), the main issue affecting low-income countries is the harmonisation of both labelling rules and the regulatory treatment of azo dyes in textiles and clothing. These standards are already being harmonised, but TTIP could accelerate that process. Harmonisation is likely to reduce trade costs, after some initial costs of adjustment.

A study carried out by the University of Groningen[230] at the behest of the Dutch Ministry of Foreign Affairs also focused on the consequences for low-income countries. This study builds on analyses of the heterogeneity of regional trade agreements discussed in Section 6.2. The researchers looked at 296 different trade agreements, with TTIP being among the broadest and deepest of this group.

Using gravity modelling, they estimated the effects of TTIP on foreign trade for all the countries of the world individually. Almost without exception,[231] the effects for low-income countries are mildly positive. Trade diversion remains limited and is generally more than compensated for by trade creation. The effects of TTIP on a number of

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[229] Jim Rollo et al., 2013, *Potential Effects of the Proposed Transatlantic Trade and Investment Partnership on Selected Developing Countries*, CARIS, University of Sussex.

[230] Steven Brakman, Tristan Kohl, Charles van Marrewijk, 2015, *The Impact of the Transatlantic Trade & Investment Partnership (TTIP) on Low Income Countries – Agreement heterogeneity and supply chain linkages*.

[231] Exceptions include Cambodia, Haiti and Chad.

middle-income countries – including China, Brazil and Mexico – and highly developed economies – specifically Canada and Japan – will, conversely, be negative on balance. The researchers also found that international supply chains are unlikely to offer much protection against TTIP-induced trade diversion – but that this will have little relevance for low-income countries because their producers do not participate in such chains.

6.4.3 How to mitigate negative consequences for third countries

The degree to which TTIP is likely to be detrimental to third countries depends largely on the precise details of the treaty itself. Important measures for mitigating the disadvantages for third countries include:[232]

- Compliance with the GATT Article 24 criteria for regional trade agreements. The purpose of a customs union or free trade region must not be to erect trade barriers for third countries.
- An open TTIP set-up that makes it possible for third countries to join TTIP (or parts of it).
- Flexible rules of origin (permitting a large export value-added share from third countries), and their inclusion in other EU and US bilateral agreements.
- Coordination of US and EU preferential trade regimes for groups of countries (such as sub-Saharan Africa). As a practical first step, the EU and the US could recognise each other's rules of origin so that imports regarded as preferential in the US will also be regarded as such in the EU, and vice versa.[233]
- Opening up the mutual recognition of standards to third countries or involving third countries in the development of new, common standards.

In addition, there are ways to mitigate or compensate for trade diversion effects outside the scope of TTIP. The EU and the US can lower MFN tariffs; for specific products that are important to developing countries (for example textiles and shoes), these tariffs exceed 10 percent. It is important to expedite the implementation of trade facilitation agreements (e.g. the streamlining of customs procedures). "Preference erosion" arising from TTIP can be compensated by deepening the preferential regimes for groups of developing countries.

Third countries can also take steps to liberalise trade in their own regions. For example, negotiations are already under way for a Regional Comprehensive Economic Partnership (RCEP) between the member states of ASEAN.

6.5 Effects on the labour market and employment

Lowering trade barriers clears a path towards further specialisation. As a result, countries can, in principle, achieve a higher real income. But there are also reallocation effects to consider: removing trade barriers will lead to shifts between and within

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[232] For a more complete list of ten ideas, see: Felbermayr et al., 2015a, pp. 161-170. See also: Rollo et al., 2013.

[233] Transparent and simple preferential rules of origin are also one of the targets that make up the Sustainable Development Goals adopted by the General Assembly of the United Nations in September 2015 (Goal 17.12). The tenth WTO Ministerial Conference in Nairobi (December 2015) took a decision on this matter. See also: Daniel Hamilton and Steven Blockmans (2015), *The Geostrategic Implications of TTIP*, CEPS Special Report no. 105; Eveline Herfkens, TTIP and Sub-Saharan Africa: A Proposal to Harmonize EU and U.S. Preferences, in: Daniel S. Hamilton (red.), 2014, *The Geopolitics of TTIP – Repositioning the Transatlantic Relationship for a Changing World*, Washington DC, pp. 151-166.

sectors and regions, and how this affects employment depends on existing labour market frictions.

The CEPR study – which is based on general equilibrium modelling – shows changes in employment between sectors. In the ambitious TTIP scenario, these changes could affect about 0.2 to 0.5 percent of the EU's working population. That is a mere fraction of the changes that will in any case arise due to the dynamics of the economy and advances in technology.

The biggest changes can be found in specific industrial sectors. The ambitious and limited scenarios show the output of electrical machinery in the EU declining by 7.3 percent and 3.7 percent respectively (2027 benchmark). That is due mainly to the direct spillover effects of regulatory cooperation, which would give third countries better access to US and EU markets. On the other hand, there are minor increases in the output of other machinery and motor vehicles. In the case of motor vehicles, the increase is entirely due to the reduction of non-tariff barriers, since the elimination of import tariffs is expected to have a negative impact on output in the EU.

The CEPR study further distinguishes between less skilled and more skilled workers, thereby revealing the distribution effects. Trade liberalisation in TTIP is expected to increase wages slightly for less skilled and more skilled workers in both the EU and the US, reflecting a certain rise in the demand for both types of labour.

Viewed across a longer time period, equilibrium unemployment can be traced to factors other than trade policy, more specifically to the institutions that influence the functioning of the labour market. Thanks to institutional reforms, the Netherlands has, over time, managed to lower its structural unemployment rate to 4 percent.[234] It is the adaptability of an economy that determines how effectively it can absorb sectoral shifts and how long it takes it to return to a situation of equilibrium unemployment.

Structural gravity modelling does not consider the consequences for the labour market and employment, and thus needs to be linked to another model. Felbermayr et al. (2013b) have linked the outcomes of trade modelling to a labour market model that allows for frictional (or search) unemployment and differences in labour market institutions.[235]

The researchers calculated two scenarios in their study: the elimination of tariffs under TTIP and further liberalisation based on the example of the EU and NAFTA. We have already commented on the – rather implausible – high outcomes of the latter scenario (EU GDP +5% and US GDP +13%). Our comments naturally also apply to the estimated effects on employment, unemployment and real wages. Nevertheless, it is clear that a more liberalised market under TTIP will have a positive impact on employment and real wages within the EU (and on the US). Third countries will feel negative effects, but on balance the impact on OECD countries will remain positive.

Table 6.7 shows possible long-term effects of abolishing import tariffs under TIPP (in other words, excluding the potential effect of removing non-tariff barriers) on employment, unemployment and real wages in the EU, the US and other OECD countries. In absolute terms, the number of jobs in the EU will rise by a few hundred thousand.

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[234] See: George Gelauff et al., 2014, *Roads to Recovery – Uncertain supply, fragile demand*, CPB.
[235] Based on data from 2009 (replacement ratios) and 2010 (employment and unemployment levels).

Table 6.7 Effects of abolishing tariffs on employment, unemployment and real wages

Country	Increase in employment (in %)	Change in unemployment rate (in % point)	Change in real wages (in %)
Netherlands	0.09	-0.08	0.40
Germany	0.12	-0.11	0.54
Belgium	0.02	-0.02	0.09
France	0.12	-0.11	0.54
UK	0.37	-0.34	1.72
Italy	0.16	-0.15	0.72
Spain	0.20	-0.16	0.92
Sweden	0.18	-0.16	0.85
Poland	0.15	-0.13	0.69
United States	0.20	-0.18	0.93

Based on: Felbermayr et al. (2013b), table 9.

Capaldo (2014), finally, not only predicts that the EU will experience a slight economic loss (and the US slight growth), but also a loss of 600,000 jobs in Europe, mainly in Northwest Europe. His scenario also sees wage incomes decline sharply, mostly in France (-5500 euros per worker) and Northern Europe (-4800 euros). Capital incomes, on the other hand, will rise.

6.6 Final comments

The ultimate impact of TTIP will be stretched out over a number of years and cannot be forecast in advance. Even after the fact, there will be no saying precisely what contribution TTIP may have made to economic growth in the Netherlands and Europe. That is because trade liberalisation between the EU and the US is too closely intertwined with underlying trends of advancing technology and globalisation.

Is NAFTA an example?
NAFTA has interesting lessons to teach us in that regard. A free trade agreement between the US, Canada and Mexico, it entered into effect in early 1994.[236] At the time, politicians said, varyingly, that it was a golden opportunity or a road to disaster in terms of growth and employment. Twenty years later, it is clear that neither scenario was correct.

Economists back then were generally much more conservative in their forecasts. They predicted fairly modest job growth in the US or emphasised a shift towards jobs that

[236] For background information on NAFTA, see: Angeles Villarreal, Ian F. Fergusson, 2015, *The North American Free Trade Agreement (NAFTA)*, Congressional Research Service Report.

would better reflect the comparative advantages of the participating economies. Events over the past twenty years have corroborated their insights.

Studies show that approximately 5 percent of annual job losses in the US can be ascribed to increased imports from Mexico. The number of jobs created by the rise in US exports to Mexico almost compensates for these losses. The resulting productivity gain has boosted business competitiveness in third markets, with overall benefits for employment.[237]

Critics of NAFTA tend to focus on the trade between US and Mexico – two countries that clearly differ in terms of prosperity. Very little, if any, criticism has been expressed of the intensification of economic relations between the US and Canada. In terms of prosperity, the EU is very similar to Canada. It is, then, mainly the "northern dimension" of NAFTA that appears to be relevant for TTIP – but with the comment that TTIP goes a step further than NAFTA did.

Chosen position limits potential impact of TTIP
The macro-economic effects of reducing and abolishing import tariffs are limited because trade tariffs between the US and EU are generally already low. That means that the impact of TTIP depends mainly on the extent to which the negotiators agree to reduce non-tariff barriers.

Their basic position *and* the position of the SER is that non-tariff barriers should only be reduced if and in so far as this does not negatively affect the underlying levels of protection for people and the environment. That means that only some of the present non-tariff barriers can be qualified as "unnecessary" and as such can be reduced or dismantled. To what extent TTIP will actually be able to lower existing non-tariff barriers is difficult to say in advance. That is partly why estimates of the economic impact of TTIP remain uncertain.

As a result of TTIP, both the US and the EU will be able to specialise further in the economic activities at which they are relatively good (have a comparative advantage). TTIP therefore has the potential to contribute to growth, prosperity, and employment.

The various studies that are available on the effects of TTIP show greatly divergent results. The most authoritative studies point out that TTIP could provide Europe and the Netherlands with additional economic growth in the order of 0.5% to 2%, spread over ten years. This result does of course greatly depend on whether TTIP will actually succeed in eliminating unnecessary non-tariff trade barriers. It is therefore – and bearing in mind the lessons learned from NAFTA – reasonable to adopt a cautious approach to estimating its impact on growth.

In macro-economic terms, the shifts associated with TTIP will be fairly limited and closely bound up with structural changes that occur under the influence of technological developments in any case. It is advantageous that US and EU specialisation occurs within and not between sectors. This makes it easier to adjust to an increasingly refined specialisation under TTIP.

On balance, slightly positive effects are expected on employment and wages. But with the broad concept of prosperity in mind, it is open to question where the potential

[237] Gary Clyde Hufbauer, Cathleen Cimino, Tyler Moran, 2014, NAFTA at 20: Misleading Charges and Positive Achievements, in: Peterson Institute for International Economics, *NAFTA 20 Years Later*, PIIE Briefing no. 14-3, pp. 6-29.

prosperity gains will have their effect: for individual companies and certain groups of employees, the consequences may indeed be negative and severe. Effective management of these adjustment processes is therefore necessary. The effects of a trade agreement will only manifest themselves gradually, after years have elapsed. This means that there is time to pursue effective flanking policy to mitigate the transitional effects. The SER believes that the policy must provide all citizens with sufficient guidance to enable them to respond as well to changes and be assured of sufficient income protection. The SER therefore recommends focusing specific attention to this issue both within the EU and nationally and making best use of the available instruments – such as the European Structural Funds and the Globalisation Adjustment Fund. This is important for workers – with particular attention being paid to older, low-educated workers – and for businesses. For example, the European Globalisation Adjustment Fund can be used to fund an individual service that helps redundant workers find work. This targeted approach to transitional issues is in keeping with analyses and recommendations in previous SER advisory reports.

Consequences for third countries
Initially, further liberalisation of trade between the US and the EU will result in a diversion of trade, which will disadvantage third countries. On balance, the effect on third countries can still turn out positive both through the creation of trade and through the impact of regulatory and procedural cooperation between the US and the EU via direct and indirect spillover effects.

Regulatory and procedural cooperation between the US and the EU will have direct and indirect spillover effects for third countries and in that way benefit both those countries and the TTIP partners. On the other hand, there are realistic concerns about trade diversion and displacement effects that can have a negative impact on GDP in third countries.

Appendix 1: Request for advice

Date: 4 May 2015

Subject: Advice on guaranteeing labour standards in TTIP

Dear Ms Hamer,

The EU and the US are currently negotiating a broad and ambitious trade agreement, the Transatlantic Trade and Investment Partnership (TTIP). This trade agreement is a hot topic in the media, the political world, civil society and the business sector. The purpose of TTIP is to remove unnecessary trade barriers between the EU and the US in order to promote trade, without this affecting our present standards. The Government believes that this agreement is important for the Netherlands, a country whose economic growth depends to a very great extent on exports. There are also concerns about TTIP. The Government therefore supports TTIP provided that it complies with a number of conditions.

One of the concerns expressed in discussions of TTIP is whether this agreement puts the preservation of the European social model at risk, with specific attention being focused on industrial relations and employment terms, including working conditions, both in Europe and the US. Some parties fear that a trade agreement with the US will put pressure on the EU to lower labour standards for reasons of competitiveness, or that it will lead to job losses. There are also worries that the governments of the EU Member States will lose their discretionary power with regard to public services. European Trade Commissioner Cecilia Malmström and chief US negotiator Michael Froman released a statement on 20 March 2015 in which they reconfirm that governments will retain their discretionary power to regulate public services.

It is customary for EU trade agreements to include a provision stating that the parties to the treaty will retain the power to establish their own labour standards, and therefore also to tighten up those standards. The EU's position is also that the parties to such agreements should not relax their labour standards in order to stimulate trade and investment. Another EU aim is for the parties to arrive at agreements about the ratification and implementation of the core conventions of the International Labour Organisation (ILO).

I would ask the Social and Economic Council to advise the Government on how the EU and its Member States can guarantee that TTIP does not have negative consequences for our European social model, in particular for industrial relations and employment terms, with its report looking beyond the customary provisions on labour in trade agreements. In connection with the ongoing negotiations and the current political and public debate concerning TTIP, I hope to receive your report in June 2015.

Lilianne Ploumen

Minister of Foreign Trade and Development Cooperation

Appendix 2: Members of the TTIP Committee and the Working Group on Economic Effects

Members	*Deputies*
Independent members	
Prof. P.F. van der Heijden (Chairperson)	
Prof. S. Klosse	
Prof. J.L.M. Pelkmans	
Members representing employers	
G. Dolsma (VNO-NCW/MKB)	
A.P.G. Schoenmaeckers (VNO-NCW/MKB)	
K. Verkerk (LTO Nederland)	
M. Visser (VNO-NCW/MKB)	
Members representing unions	
C.E. Passchier (FNV)	
G.J. de Roos (FNV)	Prof. K. Boonstra (FNV)
C.C.J. Muller (VCP)	
R.F. van der Woud (CNV)	A. van Wijngaarden (CNV)
Advisory member	
Dr H. Rojas-Romagosa (CPB)	
Ministerial representatives	
C. Bernard (Min. Social Affairs and Employment)	
R. Roosdorp (Min. Foreign Affairs)	M. Reichwein
Secretariat	
Dr B. van Riel	
M.G. Bos	

Members of Working Group on Economic Effects

Independent members

Prof. J.L.M. Pelkmans (Chairperson)

Members representing employers

P.M.C. van Kempen (VNO-NCW)

Members representing unions

C.C.H.J. Driessen (FNV)

Advisory member

Dr H. Rojas-Romagosa (CPB)

Secretariat

M. G. Bos

Appendix 3 (relating to Section 5.4):

The US and the ILO Conventions

The US has a complex relationship with the ILO. It is the largest member of the ILO and also its biggest donor. The US considers the ILO strategically important:[238]

> The ILO is strategically important to the United States' effort to strengthen competitiveness, extend democratic values worldwide and ensure global peace and prosperity. The US and the ILO have long shared common interests in helping to secure universal human rights through improvements in global living and working conditions. Both the US and the ILO have pledged to instill awareness and respect for democratic principles.

The US has included respect for the core labour standards in all its bilateral trade agreements since 1993. Nevertheless, it has ratified only 14 of the 189 ILO conventions, and only two of the eight ILO core labour conventions (those concerning the elimination of child labour and forced labour). On average, the EU's Member States have ratified many more of the ILO conventions, and all of its Member States have ratified the eight core labour conventions. The mandate that the Council gave the European Commission states that TTIP must include mechanisms to support the ILO's Decent Work Agenda through effective implementation of the core labour standards in the parties' laws.

This raises three questions:

- Why has the US not ratified most of the core ILO conventions?
- How does the US deal with core labour standards in its own trade agreements?
- Does the US respect the core labour standards in practice?

Why has the US not ratified most of the core ILO conventions?
In an earlier advisory report, the SER indicated that the US has not ratified most of the core ILO conventions owing to political concerns that international treaties would take precedence over local or state law.[239] That worry led the US Senate to adopt a resolution on this matter in 1988.[240] As Kelly Ross, AFL-CIO deputy policy director and a member of the ILO Governing Body, explained at the time:

> In October 1985, the tripartite President's Committee on the ILO (in which the US government agencies, the AFL-CIO and the US Council for International Business participate) agreed on three "ground rules" for consideration by the U.S. Senate of ILO conventions, and these "ground rules" were then incorporated into a declaration that the Senate adopted when it ratified Convention 144 in 1988. The three "ground rules" are as follows:
> 1) Each ILO convention will be considered on its merits on a tripartite basis;
> 2) If there are any differences between the convention and federal law and practice, these differences will be dealt with in the normal legislative process; and
> 3) There is no intention to change state law and practice by federal action through ratification of ILO conventions, and the examination will include possible conflicts

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238 *http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang--en/index.htm*
239 SER Advisory Report, 2008, *Duurzame Globalisering: een wereld te winnen*, p. 174. This statement was based in part on K. A. Elliot, R.B. Freeman, 2003, *Can labor standards improve under globalisation?*, p. 107.
240 *https://www.congress.gov/treaty-document/99th-congress/20/resolution-text*

> between federal and state law that would be caused by such ratification.
> On May 15, 2014, the President's Committee on the ILO reaffirmed support for these "ground rules", pledged to work towards the early and successful ratification of Convention 111, and called on the Tripartite Advisory Panel on International Labor Standards (TAPILS) to intensify its review of selected ILO conventions, including the five fundamental conventions that the U.S. has not ratified.
> The bottom line is that the AFL-CIO supports ratification without delay of all of the ILO fundamental conventions that the U.S. has not ratified. The "ground rules" should not be used as an excuse to delay ratification. We recognize that ratification by itself would not change U.S. law, which is why we are working domestically through the normal legislative process to bring U.S. law into conformity with the core ILO conventions.

The US will therefore only ratify the ILO conventions if existing US law and practice is already in accordance with the relevant convention. Ratification of an ILO convention by the federal government cannot, in and of itself, lead to changes in state law. The internal division of authority between the federal government and the states plays a role in this respect. Both are empowered to act in the area of social law.[241]

This practice is not, in fact, as far removed from European and Dutch reality as it seems. Here too, a bill to ratify a treaty is only submitted after establishing that existing legislation already complies with the treaty's demands; where that is not the case, then – assuming that ratification is desired – national law is first aligned with the treaty.

The US Senate's 1988 resolution was implemented by establishing the Tripartite Advisory Panel for International Labour Standards (TAPILS). The panel reviews whether ratification of ILO conventions requires federal or state law to be amended. If so, then ratification is not submitted to the Senate. A two thirds majority vote is required in the Senate to ratify an ILO convention.

TAPILS has concluded that the conventions concerning forced labour (no. 29), equal treatment (no. 100) and child labour (no. 138) would require US law to be amended substantially.[242] It has never reviewed ratification of ILO Convention 87 on freedom of association in trade unions and the right to organise, or Convention 98 on the right to collective bargaining. Ratification of ILO Convention 87 has been on the Senate's agenda for almost sixty years. It is clear, however, that these conventions would require far-reaching changes to American legislation. One example concerns the right of trade unions to be the exclusive representatives of workers, as set out in Article 9 of the 1935 National Labor Relations Act,[243] which was amended in 1947 by the Taft-Hartley Act. The Act made it possible for a state or territory to intervene in the way in which unions recruit and retain members and prevent "free rider" behaviour among workers who are employed within the state or territorial jurisdiction. States that have done so are known as "right-to-work states". Twenty-five states have introduced this type of legislation, and it is a subject of much public debate.

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[241] See A. Jacobs, 2003, *Sociale Rechten in Amerika*, p. 16-17. Jacobs shows (pp. 202-3) why determining the precise rights and duties of a particular labour relationship is therefore such a complex affair in the US.

[242] See: USCIB, 2007, US Ratification of ILO Core Labour Standards, Appendix 3. *http://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf*

[243] Article 9 NLRA: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment". See: *http://www.nlrb.gov/resources/national-labor-relations-act*

Core labour standards always included in US trade agreements
Even though it has not ratified most of the core ILO conventions, the US has nevertheless included respect for the core labour standards in all its bilateral trade agreements since 1993.[244] Agreements concluded since 1998 refer to the ILO Declaration of 1998 establishing a number of principles and rights at work as fundamental labour standards (see above) of universal validity. Even ILO members that have not ratified the relevant ILO conventions are therefore still bound to uphold these principles and rights. By way of example, the insert below gives the relevant provision in the draft Trans-Pacific Partnership (TPP) treaty.

Core labour standards in the TTP Treaty

Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

Source: Article 19.3 TPP Treaty

Since 2007, US trade agreements have included the option of imposing the same sanctions for repeated violations of the core labour standards occurring in a manner affecting trade or investment as are imposed when violating trade rules, e.g. fines or trade sanctions.[245] Companies, NGOs and trade unions also have the option of submitting a complaint against the preferential status of specific products or countries.[246] Recent examples are the threat of sanctions against Bangladesh in connection with factory fires (and later, the collapse of the Rana Plaza building) and against Guatemala for not complying with labour laws and for prosecuting union members.[247] It is important to note here that, given the US's geopolitical and economic might, the weaker partners in such cases will have a much harder time pressuring the US effectively by threatening sanctions. The question is whether the US will want to

[244] Respect for labour standards featured as a criterion for awarding poor developing countries preferential tariffs as far back as 1984. See also SER Advisory Report, 2008, *Duurzame Globalisering: een wereld te winnen*, pp. 193/194; for an overview of labour standards covered under US trade agreements, see also: H. Horn, P.C. Mavroidis and A. Sapir, 2008*, Beyond the WTO? An anatomy of EU and US preferential trade agreements,* Bruegel Blueprint 7 and ILO, 2015, *Social Dimension of Free Trade Agreements.*

[245] See: *https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf*

[246] See SER Advisory Report, 2008, *Duurzame Globalisering*, op. cit., pp. 193-194; H. Horn, P.C. Mavroidis and A. Sapir, 2008, op. cit; ILO, 2015, op. cit; L. Compa, 2014, *Re-planting a field: International Labour Law for the Twenty-First Century*, Inaugural lecture on the acceptance of the Paul van der Heijden Chair in Social Justice, Leiden Law School.

[247] See: L. Compa, op. cit, p. 14 and p. 18. The US suspended Bangladesh's preferred trade status. This was more a symbolic act because the duty-free privileges under the Generalized System of Preferences (GSP) do not apply to garments from Bangladesh. The sanctions against Guatemala were imposed within the context of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR); for a recent overview, see US Department of Labor and The Office of the United States Trade Representative, 2015, *Standing Up for Workers: Promoting Labor Rights through Trade*, *https://ustr.gov/sites/default/files/USTR%20DOL%20Trade%20-%20Labor%20Report%20-%20Final.pdf*.

include a similar sanction mechanism in a treaty with an equal trade partner such as the EU.

The US sees TTIP as an opportunity to raise the bar on labour standards:[248]

> T-TIP also presents a unique opportunity to raise the bar on labor. The European Union and United States have some of the highest labor standards in the world. T-TIP provides an opportunity for these two major players to develop a framework that not only reflects their own high labor standards but strengthens their collective capacity to address labor concerns in the dozens of developing countries whose largest trade and investment relationships are with the United States and the EU.
>
> Simply put — with TPP and T-TIP — we have a real opportunity to lock in the gains we have made in recent years to protect workers' rights, improve working conditions, shape globalization and level the global playing field for American workers.

EU trade agreements approach questions about labour standards in the form of intentions and place more emphasis on dialogue and consultation when addressing abuses.[249]

Does the US comply with the core labour standards?
The foregoing raises an interesting question: to what extent does the US itself respect the core labour standards cited in the ILO Declaration? The 2015 report by the ILO Committee of Experts on the Application of Conventions and Recommendations calls on the US to do more to comply with its obligations under Convention 189 on the worst forms of child labour.[250] This convention, which the US has ratified, obliges the signatories to act as quickly as possible to ban the worst forms of child labour. Children are defined as persons under 18 years of age; the worst forms of child labour include work that endangers the health and safety of children. The US permits 16-year-olds to work in agriculture and its efforts to foster safer working conditions for this group consist mainly of public service information campaigns. US unions believe that such campaigns often do not reach young migrant workers and argue that regulation should be brought into line with the ILO convention. The ILO Committee has called on the US Government: "to continue taking effective and time-bound measures to ensure that children under 18 only be permitted to perform work in agriculture on the condition that their health and safety are protected and that they receive adequate specific instruction. It requests the Government to pursue its efforts to strengthen the capacity of the institutions responsible for the monitoring of child labour in agriculture, to protect child agricultural workers from hazardous work."

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[248] US Department of Labor and The Office of the United States Trade Representative, 2015, *Standing Up for Workers: Promoting Labor Rights through Trade*, p. 52.

[249] See: H. Horn, P.C. Mavroidis and A. Sapir, 2008, op. cit. The authors refer in this connection to "legal inflation"; see also L. Compa, 2014, op. cit.; Van den Putte and Orbie, however, caution against exaggerating the differences between the US and the EU on this point: "When looking at the practical implementation of social provisions in trade agreements, the 'de jure' distinction between hard enforcement (US) and soft engagement gets blurred. De facto, and despite numerous complaints and cases on labour provisions, the US also engages in cooperative activities and shies away from Legal enforcement". L. Van den Putte and J. Orbie, 2015, EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions, *The International Journal of Comparative Labour Law and Industrial Relations*, p. 270. The US's cooperative activities and technical support efforts are also evident in: US Department of Labor and The Office of the United States Trade Representative, 2015, *Standing Up for Workers: Promoting Labor Rights through Trade*.

[250] ILO, 2015, *Report of the Committee of Experts on the Application of Convention and Recommendations*, report III (Part 1A), pp. 243-245.

Forced prison labour is also a problem in the US. Some states allow prisons to sell their inmates' labour to the private sector, for example to make number plates or military uniforms.[251] The ILO has received no complaints in this connection, however.

According to US unions, even the freedom of association and, therefore, the pay and protection of workers are under political pressure in the US. They claim that employers in the US have every opportunity to fight trade unionism and union activities. "Right to Work" legislation is eroding the financial and negotiating position of unions in a number of states. In the recent past, that legislation led to complaints being submitted to the ILO Committee on Freedom of Association.[252]

[251] Mary Jane Bolle, 2015, The International Labor Organisation (ILO): Background in brief, Congressional Research Service, p. 11.

[252] See e.g. L. Compa, 2012, Do International Freedom of Association Standards Apply to Public Sector Labor Relations in the United States? *Human Rights Review*, 13(3), pp. 373-378.

Appendix 4 (relating to Section 5.4):

Core labour standards in the European Commission's textual proposal for the chapter on trade and sustainability

In the European Commission's textual proposal for the chapter on trade and sustainability, it proposes that the parties make more detailed agreements on each of the four core labour standards. The main text includes an insert concerning the right to collective bargaining and the freedom of association. This appendix shows what the Commission envisages the parties agreeing to with respect to the remaining core labour standards (elimination of forced or compulsory labour, abolition of child labour, and equality and non-discrimination in respect of employment and occupation).

Article 6: Elimination of forced or compulsory labour

1. The Parties underline their commitment to eliminate forced or compulsory labour, and recognise the importance of international rules and agreements in this area, such as ILO Convention 29 and its Protocol, ILO Convention 105, the UN Universal Declaration of Human Rights of 1948, the UN International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights of 1966.

2. Accordingly, the Parties shall uphold and implement in their laws and practices the following key principles, as referred to in the instruments under paragraph 1:

a) the effective suppression of forced or compulsory labour, in all its forms, including with regard to trafficking in persons,
b) the prevention of the use of forced or compulsory labour,
c) the provision to victims of protection and access to appropriate and effective remedies.

3. To this end, the Parties shall:

a) implement effective domestic policies and measures, including the establishment and application of adequate deterrent measures for offences, to prevent and eliminate forced or compulsory labour, and provide protection to the victims;

b) exchange information and cooperate, as appropriate, on the prevention and elimination of forced or compulsory labour worldwide, including through the promotion of comprehensive approaches and international cooperation in this regard;

c) promote worldwide implementation of the principles under paragraph 2 in particular through promoting adherence to relevant international instruments, including with regard to ratification where appropriate, as well as participation in relevant international processes and initiatives.

Article 7 Effective abolition of child labour

1. The Parties underline their commitment to protect the rights of the child and to the abolition of child labour, and recognise the importance of international rules and agreements in this area, such as ILO Conventions 138 and 182, the UN Universal Declaration of Human Rights of 1948, the UN Declaration on the Rights of the Child of 1959, the UN International Covenant on Economic Social and Cultural Rights of 1966, the UN Convention on the Rights of the Child of 1989, and the Brasilia Declaration on Child Labour of 2013.

2. Accordingly, the Parties shall uphold and implement in their laws and practices the following key principles, as referred to in the instruments under paragraph 1:

a) the immediate and effective prohibition and elimination of the worst forms of child labour,

b) the effective abolition of all child labour,

c) the protection of children of compulsory schooling age from performing labour.

3. To this end, the Parties shall:

a) implement effective domestic policies and measures to protect children from performing hazardous work;

b) promote access to quality basic education to all children;

c) promote decent working conditions for young people in employment;

d) exchange information and cooperate, as appropriate, on the elimination of the worst forms of child labour worldwide, including through the promotion of comprehensive approaches in this regard;

e) promote worldwide implementation of the principles under paragraph 2, in particular through promoting adherence to relevant international instruments, including with regard to ratification where appropriate, as well as participation in relevant international processes and initiatives.

Article 8: Equality and non-discrimination in respect of employment and occupation

1. The Parties underline their commitment to equality and non-discrimination at the workplace, and recognise the importance of international rules and agreements in this area, such as ILO Conventions 100 and 111, the UN Universal Declaration of Human Rights of 1948, the UN International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights of 1966, the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979, the UN Convention on the Rights of Persons with Disabilities of 2006.

2. Accordingly, the Parties shall uphold and implement in their laws and practices the following key principles, as referred to in the instruments under paragraph 1:

a) ensuring equal opportunity and treatment in employment and occupation for all,

b) ensuring protection against all forms of direct and indirect discrimination as regards employment and occupation,

c) promote gender equality,

d) ensure equal remuneration for men and women for work of equal value.

3. To this end, the Parties shall:

a) implement effective domestic policies and measures to ensure equal opportunity and equal treatment in employment and occupation for all, with a view to preventing and eliminating any discrimination, direct and indirect, in respect thereof;

b) ensure the application of equal remuneration for women and men for work of equal value;

c) exchange information and cooperate, as appropriate, including through the promotion of integrated approaches in this regard, on:

i) the worldwide elimination of discrimination in employment and occupation,

ii) the worldwide promotion of gender equality at the workplace;

d) share experiences and information on measures to eliminate direct and indirect discrimination in the workplace and to ensure equal remuneration for women and men for work of equal value;

e) take adequate measures to ensure that persons with disabilities can enjoy their right to work on equal basis with others;

f) promote worldwide implementation of the principles under paragraph 2, in particular through promoting adherence to relevant international instruments, including with regard to ratification where appropriate, as well as participation in relevant international processes and initiatives.

Appendix 5 (relating to Section 6):

Estimating the economic impact of TTIP

The basic methodology: two-step estimate

The basic methodology used in recent decades to estimate the economic impact of international free trade involves applying a general equilibrium model to calculate the effects of lower trade costs associated with trade liberalisation. General equilibrium models distinguish between different sectors and can therefore accurately predict the long-term impact of trade measures on the economy.

It is fairly easy to determine the extent to which lowering or abolishing import tariffs will lower the cost of trade. In the case of TTIP, however, non-tariff barriers are especially important. Separate research is needed to identify the extra trade costs generated by non-tariff barriers and the extent to which they can in fact be lowered. The most thorough study of these costs was carried out by Ecorys[253] (step 1).

Based on its results, the Centre for Economic Policy Research (CEPR) used a general equilibrium model (covering 20 sectors and 11 regions) to calculate the economic impact[254] (step 2).

Both studies were carried out at the behest of the European Commission and are presented in Section 6.3 as benchmarks.

According to the CEPR, the macro-economic impact (in terms of extra GDP in 2027) stemming from the liberalisation of trade between the US and the EU will be limited. Table 1 indicates that reducing non-tariff barriers in the trade in goods will have the biggest impact.

Table 1 – Macro-economic impact of removing trade barriers between the US and the EU (in % of extra GDP in 2027)

	EU	US
Tariffs only	0.10	0.04
Non-tariff barriers: services only	0.02	0.03
Non-tariff barriers: procurement only	0.02	0.01
Non-tariff barriers: Less ambitious scenario (Ecorys)	0.27	0.21
Non-tariff barriers goods: Ambitious scenario (Ecorys)	0.48	0.39

Source: CEPR (2013)

Alternative calculations

Since 2013, at least seven alternative studies have been published exploring the economic effects of TTIP for the EU and the US.[255]

The variation in these outcomes can be ascribed to:

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[253] Koen Berden, Joseph Francois, Martin Thelle, Paul Wymenga and Saara Tamminen, 2009, *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, Ecorys (study commissioned by the European Commission's DG of Trade).

[254] Joseph Francois, Miriam Manchin, Hanna Norberg, Olga Pindyuk, Patrick Tomberger, 2013, *Reducing Transatlantic Barriers to Trade and Investment*, Centre for Economic Policy Research (CEPR) (study commissioned by the European Commission).

[255] In addition, there have been studies investigating the effects in individual EU Member States (Germany, Sweden and the Netherlands). For a more detailed discussion of the methodological aspects of the various TTIP studies, see: Eddy Bekkers, Hugo Rojas-Romagosa, 2016, *Literature survey on the economic impact of TTIP*, CPB Background Document.

- differences in the estimated reduction of trade costs;

- the fact that the studies are based on differing models. Three types of models were used: supply-driven models involving multiple sectors (general equilibrium models); single-sector supply-driven models (structural gravity model) and (single-sector) demand-driven models;

- possible additional assumptions (for example concerning spillover effects).

Step 1: Determine the trade costs of non-tariff barriers

Much of the economic impact of TTIP can be attributed to the costs associated with non-tariff barriers, but it is neither easy nor straightforward to identify these costs. To approximate their size, researchers have applied differing approaches.

To begin with, there is a difference between general equilibrium modelling and demand-driven modelling on the one hand and structural gravity analysis on the other. Structural gravity analysis merges the process of identifying trade costs and the process of estimating their economic effects. In general equilibrium modelling, on the other hand, calculating the trade costs is the first, and separate, step. Demand-driven modelling, finally, takes trade costs calculated by others as input.

The following dichotomy is relevant when comparing the various TTIP studies:[256]

- bottom-up estimates of trade costs for separate groups and products, based in part on input from experts. The Ecorys study is an example of this; it calculates sector-specific tariff equivalents in five separate steps;

- top-down estimates (*ex post*) of the effects of existing, comparable regional trade agreements using gravity analysis. All trade costs that cannot be ascribed to import duties are categorised as non-tariff barriers. Where previous, comparable trade agreements have reduced non-tariff barriers, the same reduction is applied for TTIP.

Top-down estimates also factor in dynamic effects (on productivity and innovation). Much of the outcome also depends on the precise trade agreements selected for being more or less comparable to TTIP.

Step 2: Determine the economic impact

The next step after calculating the size of the trade costs is to estimate the economic impact of lowering those costs. Lower trade costs lead to an adjustment in relative prices and in that way influence an entire economy.

The various studies that have explored the effects of TTIP can be divided into three groups. The standard method used in these studies is general equilibrium modelling. Some studies take a novel approach by applying structural gravity modelling. Finally, one study uses short-term demand-driven modelling. The studies are discussed below by category.

[256] For an in-depth analysis of the quantification of non-tariff barriers and a more refined categorisation of approaches, see: Koen Berden and Joseph Francois, 2015, *Quantifying Non-tariff Measures for TTIP*, CEPS Special Report No. 116.

General equilibrium modelling
General equilibrium modelling is an effective tool for identifying the impact of trade and other policy measures on the economy, but it also has its limitations.

Table 2 lists the features and outcomes of four different studies based on general equilibrium modelling, followed by a discussion.

The first study listed, *Francois et al.* (2013), was discussed in Section 5.3 as an example of the standard method. Francois and co-authors published a new study two years later (Francois et al. 2015). Although they used the same model as in the CEPR study, this time they took a top-down approach to non-tariff barriers based on structural gravity analysis. That explains why their outcomes are higher than those of the CEPR study.

Fontagné et al.[257] arrive at similar outcomes to Ecorys/CEPR. The authors used a gravity equation to calculate the costs of non-tariff trade barriers. Their results show much higher trade costs in services (see Table 3), so that reducing these barriers can be expected to have a bigger impact. Fontagné et al. assume a 25 percent reduction of existing non-tariff barriers for all goods and services (with the exception of public and audiovisual services).

Table 2 Features of different TTIP studies based on general equilibrium modelling

Study	*Calculation of NTBs*	*Spillover effects*	*Aggregation level*	*Outcome (compared with Ecorys/CEPR)*
Francois et al. (2013) - CEPR	Bottom-up	Yes	11 regions	= Ecorys/CEPR
Francois et al. (2015)	Top-down	Mix	12 regions and 5 EU countries	Larger effects: US 1% EU 2%
Fontagné et al. (2013)	Bottom-up	No	13 regions	Comparable. Larger effects for services
Carrère et al. (2015)	Top-down	No		Smaller effects: EU: 0.17%; US: 0.26%

Table 3 – Costs of non-tariff barriers in transatlantic trade (in equivalent import tariffs, in %)

	EU (Fontagné)	US (Fontagné)	EU (Ecorys)	US (Ecorys)
agriculture	48.2	51.3	56.8	73.3
Industry	42.8	32.3	19.3	23.4
services	32.0	47.3	8.5	8.9

General equilibrium models also consider the consequences for the labour market and wages. These effects are shown in Section 6.5.

A recent study by Carrère et al. (2015a)[258] goes a step further by estimating sector-specific labour market frictions for 25 OECD countries. According to these researchers,

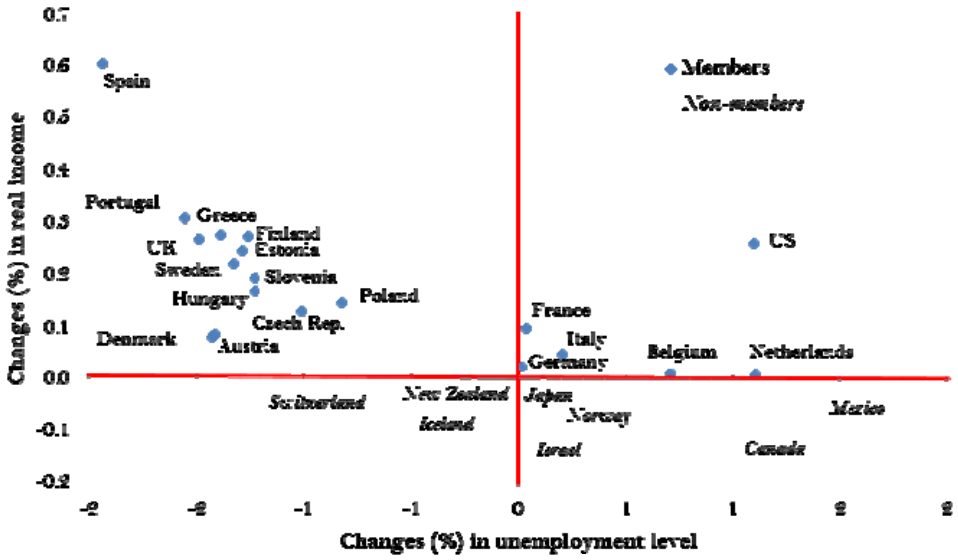
[257] Lionel Fontagné, Julien Gordon and Sébastien Jean, 2013, Transatlantic Trade: Whither Partnership, Which Economic Consequences?, *CEPII Policy Brief*, no. 1, September 2013
[258] Céline Carrère, Anja Grujovic, Frédéric Robert-Nicoud, 2015a, *Trade and frictional unemployment in the global economy*, CEPR Discussion Paper 10692. These authors also make use of general

reallocation can have both positive and negative effects on employment: positive if the transition is from a sector with stronger labour market frictions to one with weaker frictions, and negative if the reverse is true, or if reallocation takes place in a sector with relatively strong labour market frictions.

This approach suggests that frictional unemployment is a feature of a sector.[259] That is putting things much too simply: specific frictions become manifest in certain occupational groups or at certain educational levels, and are not sector-specific in nature.

Figure 1 illustrates the most significant outcomes of Carrère et al. (2015a). Note that the change in unemployment rate is expressed in percentages. A rise in unemployment of 1 percent implies an increase from 6.9 percent to 6.97 percent (a percentage *point* increase of 0.07). The size of the estimated reallocation effects – a few thousand jobs – leads one to assume that these effects can be easily absorbed if accompanied by a specific job transition policy.

Figure 1 TTIP-induced changes in unemployment level and real income (in %) for a number of countries



Source: Céline Carrère, Anja Grujovic, Frédéric Robert-Nicoud, 2015b, Trade agreements, trade deficits and jobs, *www.voxeu.org*, 3 September 2015.

Structural gravity modelling

A new methodological approach to analysing the effects of TTIP is the structural gravity model, which is used to estimate bilateral trade flows. Based on these estimates, it then becomes possible to estimate non-tariff barriers and other trade costs.

Structural gravity modelling has one advantage over general equilibrium modelling in that it functions at a lower aggregate level, with more than 100 different countries being differentiated. But that comes at a price: highly simplified modelling of the relationships between trade, production and consumption. The trade effects are extrapolated to the

equilibrium modelling. See also: Céline Carrère, Marco Fugazza, Marcelo Olarreaga, Frédéric Robert-Nicoud, 2014, *Trade in Unemployment*, CEPR Discussion Paper 9916.

259 Carrère et al., 2014, p. 3: "Concretely we define the unemployment rate of a sector as the trade-weighted average of the unemployment rate in each country. The idea is that countries with production bundle tilted towards sectors with strong labor-market frictions tend to have high unemployment rates."

rest of the economy, as it were. As a rule, these are single-sector models, making it impossible to take sector-specific differences and changes into account.

Structural gravity modelling also does not consider the consequences for the labour market, and must therefore be linked to a specific labour market model.

Table 4 Features of different TTIP studies based on structural gravity analysis

Study	*Calculation of NTBs*	*Spillover effects*	*Aggregation level*	*Outcome (compared with Ecorys/CEPR)*
Felbermayr et al. (2013a)	Top-down	No	126 countries	Larger effects: Tariffs plus NTBs: EU 1.7%; US 2.2%; "Internal market": EU + 7%; US + 5%
Felbermayr et al. (2013b) (Bertelsmann)	Top-down	No	126 countries	Much larger effects: US + 13% GDP; EU + 5% GDP
Felbermayr et al. (2014)	Top-down	Mix	134 countries	Larger effects: US 2 – 3% EU 1.5 – 2.5%
Felbermayr et al. (2015b)	Top-down	Mix	173 countries	Larger effects: US 5% EU 4%

Based in part on: Gabriel Felbermayr, Wilhelm Kohler, Rahel Aichele, Günter Klee, Erdal Yalcin, 2015a, *Mögliche Auswirkungen der Transatlantischen Handels- und Investitionspartnerschaft (TTIP) auf Schwellenländer*, ifo Forschungsberichte 67, p. 31.

This category consists of four studies published by *Felbermayr* (Ifo) and various co-authors. Across the board, their outcomes are higher than those of Ecorys/CEPR. The differences between the four studies are considerable, however, and not always easy to comprehend, Indicating that this method still requires some work.

Of the four studies conducted by Felbermayr et al.,[260] the one published by the Bertelsmann Foundation (2013b) shows the highest outcomes. Merely abolishing tariffs between the US and the EU would generate about 0.3 percent of extra GDP growth in the EU. An ambitious scenario of "deep liberalisation" – based on the example of the EU's internal market – could mean as much as 5 percent additional growth for the EU (and no less than 13 percent for the US). This deep liberalisation of EU-US trade in goods and services is unrealistic, however, and is clearly beyond the mandate of the TTIP negotiators. Given that US exports to the EU now represent approximately 3.5 percent of GDP, with very few, if any, trade barriers standing in their way, it is also unlikely that greater trade liberalisation will increase US GDP by as much as 13 percent.

[260] Gabriel Felbermayr, Mario Larch, Finn Krüger, Lisandra Flach, Erdal Yalcin, Sebastian Benz, 2013a, *Dimensionen und Auswirkungen eines Freihandelsabkommens zwischen der EU und den USA*, ifo Forschungsberichte 62; Gabriel Felbermayr, Benedikt Heid, Sybille Lehwald, 2013b, *Transatlantic Trade and Investment Partnership (TTIP) – Who benefits from a free trade deal? Part 1: Macroeconomic Effects*, Bertelsmann Stiftung; Rahel Aichele, Gabriel Felbermayr, Inga Heiland, 2014, *Going Deep: The Trade and Welfare Effects of TTIP*, CESifo Working Paper no. 5150; Gabriel Felbermayr, Benedikt Heid, Mario Larch, Erdal Yalcin, 2015b, Macroeconomic potentials of transatlantic free trade: a high resolution perspective for Europe and the world, *Economic Policy*, pp. 491-537.

In two other studies (2013a and 2014), Felbermayr et al. project the long-term effects for the EU at about 2 percent additional growth. In their most recent study, Felbermayr et al. (2015b) forecast a 4 percent rise in EU GDP (and a 5 percent rise in US GDP).

Table 5 Prosperity effects of various TTIP components or scenarios in Felbermayr et al.

Effect on EU real GDP (in %) of:	Felbermayr et al. (2013a)	Felbermayr et al. (2013b)	Felbermayr et al. (2014)
Abolishing import duties	0.1	0.3	0.0
Reducing NTBs	1.6		
Creating an internal market	6.7		
"Shallow TTIP" (like Mercosur, ASEAN)			1.6
"Deep TTIP" (like EU, NAFTA, US-Korea)		5.0	2.1
"Deep TTIP", including spillover effects			2.6

Demand-driven modelling

One researcher, Jeronim *Capaldo*, uses a different type of modelling: short-term demand modelling. This is the only study that shows TTIP having a negative impact on growth and employment in the EU (but a positive impact on US GDP of 0.36 percent).[261]

Capaldo bases his study on the Ecorys analysis of non-tariff barriers and "existing assessments" examining the impact on the volume trade between TTIP countries. However, he uses demand-driven modelling (UN Global Policy Model) instead of general equilibrium modelling and calculates net exports changes, "taking into account the global feedbacks built into the GPM". He does not explain how he does this, or why. His outcome is surprising: under TTIP, the volume of trade will increase while EU exports will decline. Capaldo explains this as follows:[262]

> A likely explanation for how EU-US trade could expand while EU net exports to the world could decline is that, in the EU's stagnating economy, domestic demand for lower-value added manufactures – in which the EU is relatively uncompetitive – will crowd out higher value-added ones. Indeed, our figures show an increase of net exports in almost every other region of the world except Europe, suggesting that higher demand for value added product will lead to higher net imports from Asian and African economies and from the US. Alternatively or additionally, TTIP could facilitate EU imports of manufactures assembled in the US with parts made in China and other regions.

[261] Jeronim Capaldo, 2014, *The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability*, Tufts University, Global Development and Environment Institute Working Paper no. 14-03.

[262] Capaldo, pp. 13-14.

In fact, Capaldo approaches international trade as a zero-sum game: free trade only produces advantages if it increases net exports. His model does not include any adjustment of the economic structure to allow for changing relationships, preferences and options. Capaldo assumes that governments in TTIP countries will remain committed to fiscal austerity in the coming decade, leading to the long-term slow-down of the European economy. He also assumes that profits and investment will be sustained by growing asset prices, with all the associated risk of financial instability. These additional assumptions weigh heavily in determining the outcomes of the study.[263]

Impact on and priorities for the Netherlands

In 2012, the Dutch Ministry of Economic Affairs asked Ecorys to consider the possible economic impact of TTIP on the Netherlands.[264] The resulting study builds on the organisation's previous study, discussed above. Once again, the researchers differentiate between an ambitious scenario (all non-tariff barriers reduced by 50 percent) and a limited scenario (reduction of 25 percent). Note that these scenarios do not line up perfectly with the mandates that were then issued to the TTIP negotiators.

In the ambitious scenario, the Netherlands could see a national income gain of 0.25 percent (1.4 billion euros) in the short term, and 0.72 percent (4.1 billion euros) in the long term. In the limited scenario, the outcomes are about half, at 0.11 and 0.32 percent respectively. These outcomes largely match those for the EU in general, but they are higher than for the US overall (see Table 8).

Table 6 – Economic impact of TTIP for the Netherlands, the EU26 and the US in various scenarios and in the short and long term

Impact on national income, in %	Ambitious: full liberalisation of all "actionable" non-tariff barriers		Limited: partial liberalisation of "actionable" non-tariff barriers	
	Short-term	*Long term*	*Short-term*	*Long term*
Netherlands	0.25	0.72	0.11	0.32
EU26	0.25	0.73	0.16	0.32
US	0.13	0.28	0.05	0.13

Ecorys then studied the effects on three top Dutch economic sectors: agro-food & horticulture; high tech systems and materials; and chemicals. The three sectors were selected based on the following criteria (see Table 7):

- share of sector in total Dutch exports;
- share of sector value added in Dutch GDP;
- presence of EU-US trade barriers in sector;
- benefits of aligning EU-US non-tariff measures (NTMs) (leaving aside whether alignment is in fact feasible).

[263] For a fundamental critique, see: Matthias Bauer and Fredrik Erixon, *"Splendid Isolation" as Trade Policy: Mercantilism and Crude Keynesianism in "the Capaldo Study" of TTIP*, ECIPE (European Centre for International Political Economy) Occasional Paper 03/2015. The authors report that they have not been able to access the relevant UN Global Policy Model.

[264] Ecorys, 2012, *Study on "EU-US High Level Working Group" – Final Report*, Rotterdam.

Table 7 – Importance of three top Dutch sectors and possible impact of TTIP

	Share in Dutch exports	Share in Dutch GDP	NTM trade costs	Change in export value after aligning EU-US NTMs
Agro-food & horticulture	10.2% 4.4%	4.4% 1.4%	73.3%	+ 512 m € + 446 m €
High tech systems & materials	10.9%	6.7%	16.8%	+ 533 m €
Chemicals	10.0%	2.2%	21.0%	+ 2,313 m €

The table shows that the alignment of EU-US non-tariff measures for chemical products *should* increase Dutch exports considerable, but *in reality* the degree of alignment envisaged by the researchers is well beyond reach, given the negotiating mandates that were given.

Ecorys also examined which barriers Dutch companies in the three top economic sectors face when doing business with and in the US. Based on this research, Ecorys has identified Dutch priorities to be addressed at the TTIP negotiating table.

Agro-food & horticulture
Overall tariffs between the EU and the US are generally low. Tariffs in the sector are often specific (e.g. related to a specific quantity, not the value). The weighted average tariff for this sector amounts to 2.1 percent (1.8 percent for agro-food and 3.4 percent for horticulture products). However, the sector has much higher tariffs for some products. The highest ad valorem equivalents (AVE) are those for tobacco, groundnuts, fructose, fresh cheese, milk and yogurt.

The Ecorys study identifies 24 sector-specific non-tariff measures that represent barriers to trade. They range from export subsidies and product or production standards that differ from international standards to a lack of harmonisation in the US. A further 18 cross-cutting (horizontal) non-tariff measures may also limit trade in this sector.

The Ecorys study identifies the following Dutch priorities in the TTIP negotiations, viewed from the sector's perspective:

Tariffs	Reduce/eliminate import duties (especially those that matter most in EU-US trade)
SPS	Dairy Grade A
	Ban on beef (BSE)
	Slow processing of Product-Risk Assessment applications for new plant varieties
Regulatory coherence	Differences in regulations between US states

Rules	Customs procedures
	Import licences

The insert below completes the picture by quoting the outcomes of a recent study by LEI Wageningen UR on the consequences of TTIP for the Dutch agro-food industry.[265]

LEI study on effects of an EU-US trade agreement on the Dutch agro-food sector

Van Berkum et al. (2014) of LEI Wageningen UR studied the possible effects of TTIP on the Dutch agro-food sector by examining four scenarios.

S1: all tariffs between the EU and the US reduced to zero;
S2: S1 plus 25 percent reduction of non-tariff barriers (the size being the difference between domestic and world market prices);
S3: S1 plus 25 percent reduction of non-tariff barriers for "sensitive" products (dairy and meat) and 75 percent for all other products
S4: S3 plus spillover effects to the rest of the world

The final two scenarios are unrealistic, since the underlying principle is to maintain existing levels of protection.

The table shows the estimated effects of the four scenarios on Dutch, EU and US GDP, in 2027, in %.

	S1	S2	S3	S4
Netherlands	0.02	0.89	4.29	6.70
EU27	0.02	0.81	4.06	6.85
US	0.05	1.02	4.83	6.34

Source: Van Berkum et al. , 2014, Table 4.3, p. 55.

The researchers observe that TTIP will have positive effects on Dutch, EU and US agro-food exports. They comment, however, that other countries exports will grow faster because the Dutch agro-food industry will be less competitive. In terms of value added and labour productivity, the Dutch agro-food sector lags behind other economic sectors.

The researchers have, incidentally, taken the most ambitious – but also most unrealistic – scenario 4 as their guideline. Scenario 1 – reducing all tariffs to zero – would mainly benefit Dutch dairy, meat, and oil & fat exports, followed by fruit and vegetables. It would also greatly increase US dairy and meat imports.

[265] S. van Berkum, M. Rutten, J. Wijnands and D. Verhoog, 2014, *Effects of an EU-US trade agreement on the Dutch agro-food sector*, LEI Wageningen UR. The effects were calculated using general equilibrium modelling (MAGNET).

High-tech systems and materials
This top economic sector has many different subsectors. Overall tariffs between the EU and the US are generally low. The weighted average tariff is 2.6 percent, although some products (such as glassware, titanium and roofing tiles) have higher tariffs (around 15 percent).

Non-tariff barriers play an important role here as well. From the Dutch perspective, the following issues merit prioritising:

- restrictions and prohibitions to trade and investment on grounds of national security;
- technical regulations, measures and standards, including certification issues (US standards that differ from international standards; non-functioning of system for safety standards);
- government procurement (Buy American Act);
- intellectual property rights (Americans claim IP rights very quickly, even on basis of just an email).

Chemicals
Overall tariffs between the EU and the US are low. The weighted average tariff is 1.5 percent. The top tariff (ad valorem equivalent) is 6.5 percent. These low tariffs are regarded as a significant barrier, specifically because of the large share of US-EU intra-company trade. That is why the Ecorys study identifies the reduction/removal of import tariffs as a priority for the Netherlands and the EU.

The sector is also not operating on a level playing field owing to the EU sugar import quota (which drives up sugar prices in the EU). Sugar is an important input for the chemicals industry. The sugar quota will be abolished in October 2017, however, eliminating this competitive disadvantage for the European and Dutch chemicals industry.

The Ecorys study identifies 19 sector-specific non-tariff barriers and another 23 horizontal barriers. The most important are related to health and safety standards. Often this involves differences in specific regulations or burdensome procedures for proving that requirements have been met. Table 7 above shows that if EU-US non-tariff measures are aligned, the export value is estimated to increase by 2.3 billion euros. Assuming that the existing levels of protection will be enforced, TTIP will only be able to manage a fraction of this.

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