

## Negotiating the IP Chapter of an EU–US Transatlantic Trade and Investment Partnership: Let’s Not Repeat Past Mistakes

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On 13 February 2013, United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso announced that, based on recommendations from the EU–US High Level Working Group on Jobs and Growth co-chaired by United States Trade Representative Kirk and European Trade Commissioner De Gucht, the United States and the European Union will each initiate the internal procedures necessary to launch negotiations on a Transatlantic Trade and Investment Partnership (TTIP).

The TTIP is envisioned as an ambitious trade and investment agreement to promote international competitiveness, jobs, and growth. It will take prominence in high-level diplomatic conferences. United Kingdom Prime Minister David Cameron, for instance, has made clear that he wants to use his chairmanship of the G8 this year to promote trade liberalisation as a driver for economic growth and, in particular, to make progress on TTIP as the most ambitious bilateral trade deal in recent times. Preparations are now under way on both sides of the Atlantic – the US administration is consulting Congress, and Member States are discussing how the EU should handle the negotiations. The preparatory work should conclude soon, allowing formal negotiations between the EU and the US to commence this summer. Already the ground work is in place in the EU. On 12 March 2013, the Commission decided to request Member States’ agreement to open negotiations for a TTIP with the US.

So what can we expect from the IP Chapter of the TTIP? The EU–US High Level Working Group on Jobs and Growth has already reported that both parties are committed to maintaining and promoting a high level of intellectual property protection, including enforcement, and to cooperating extensively. The Working Group has also stated that the two sides will sustain and enhance their work on IP

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issues, and has recommended that both sides explore opportunities to address a limited number of significant IP issues without prejudice to the outcome. Yet that official statement tells us little about what IP issues are really likely to be negotiated in the TTIP.

We learnt a little more in late May 2013, on this occasion from the EU Member States' draft negotiating mandate to the Commission. The draft mandate stated that the TTIP should: (1) be and fully consistent with WTO rules and obligations; (2) refer to shared values in such areas as human rights, fundamental freedoms, democracy and the rule of law; (3) complement the provisions of the TRIPS Agreement; (4) address areas most relevant for fostering the exchange of goods and services with IP content, with a view to supporting innovation; and (5) provide for enhanced protection of EU geographical indications. All this is laudable, but of greater concern is the fact that elsewhere the draft negotiating mandate to the Commission appears remarkably open-ended, with the inclusion of text which specifies that both sides should explore opportunities to address other unspecified but so-called "significant" IP issues. Moreover, while the draft negotiating mandate to the Commission on paper includes a commitment to address issues of transparency and, to this end, include a commitment to consult stakeholders in advance of the introduction of measures with an impact on trade and investment, in practice it is notable that there is also the proviso in the draft mandate which specifies that nothing in the Agreement should affect the EU or Member State laws regarding access to official documents. Lack of transparency to key negotiating documents and draft texts of the TTIP is clearly a possibility and secrecy could well, therefore, be the likely outcome.

So, as speculation as to the likely content of the IP Chapter of the TTIP begins in earnest and rumours start to circulate, clear parallels can be drawn with the recent unsuccessful attempt to negotiate an Anti-Counterfeiting Trade Agreement (ACTA) which would include the EU. As with ACTA, concerns are already being raised in the EU institutions about secrecy and transparency during the TTIP negotiations. MEPs have asked for more transparency but the European Commission and Member States are maintaining that the draft text of the TTIP should be kept secret in order to ensure the smooth running of trade negotiations. Concerns about the implications of this approach will resonate strongly with those who recall similar debates about secrecy and lack of access to the draft text of ACTA. It was the reputation of secrecy and lack of transparency which did much to undermine the legitimacy of ACTA and spread rumours, some unfounded, about its contents.

Meanwhile the similarly named, but entirely separate, Trans-Pacific Partnership (TPP) is being negotiated in a different forum by Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, the United States, Singapore and Vietnam. Plans for the TPP were announced on 12 November 2011 with the intention of enhancing trade and investment among the TPP partner countries, promoting innovation, economic growth and development, and supporting the creation and retention of jobs.

The TPP is intended as a vehicle for Asia-Pacific-wide economic integration by substantially reducing reduce tariffs and by helping to open up trade in goods and services. It is also intended to boost investment flows between the countries and

further boost their economic growth. Yet, while the IP Chapter of the TPP has reportedly grown to over 80 pages of text, much of it not yet agreed and including bracketed text with suggestions and alternative wording, as with ACTA, secrecy and lack of transparency remain overriding concerns. The TPP countries have not released any texts or negotiating positions to the public, and the only publicly-available information about the contents of the TPP IP Chapter is from a leaked draft US proposal from February 2011.

As with the TPP, the IP Chapter in the EU–US TTIP is likely to raise the most challenging of the trade issues to be resolved. Excessive secrecy cannot assist generating public support and momentum in favour of its ultimate adoption. Secrecy is a flaw in the process and, as with ACTA, can only increase the prospects of misinterpretation and alarmist concerns about the scope and applicability of the IP protection and enforcement provisions contained in the draft TTIP agreement. Conversely, greater transparency and wider access to negotiating texts has the ability to improve the quality of debate and contribute to the legitimacy of the TTIP negotiating process to great effect.

If negotiators are to learn the lessons of ACTA's demise in the EU and the problems already being experienced by TPP negotiators elsewhere, openness and transparency should be the key strategy for the TTIP as EU and US negotiators prepare to begin the hard work of not only drafting text for the IP Chapter but also doing so in a way that convinces stakeholders and the public at large that the TTIP is an endeavour worthy of widespread support.