POLICY PAPER 99 ► OCTOBER 2013

CHALLENGES AND PROSPECTS OF A TRANSATLANTIC FREE TRADE AREA

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SUMMARY

Negotiations with a view to setting up a free-trade area between the United States and the European Union got off the ground in July 2013 with two major goals, namely: to seek a fresh boost for the economy in order to allow it to emerge from the crisis; and to circumvent the obstacle of the deadlock over the multilateral negotiations in Doha. The central issue concerns regulatory non-tariff barriers essentially of a regulatory nature.

These negotiations have been meticulously prepared. The high-level working group set up by the US and the EU in 2001 to boost trade and cooperation between the two partners, submitted a road map on 11 February 2013 for the elimination of all residual tariff barriers on industrial goods, allowing for transition periods for sensitive products. In the agricultural sector, tariff hurdles would be lowered in a gradual but substantive fashion. In the service industry, it is a matter of consolidating the highest level of deregulation already achieved by each of the two partners in trade agreements. The group urged that public procurement be opened up at every level. The European Commission's 14 June negotiating mandate comprises three parts: market access, regulatory convergence, and trade regulations making it possible to address global challenges.

1. The report first offers an overview of the current state of play. The two partners together account for virtually one half of the world's economy and for 30% of world trade. Greater convergence in the regulatory field would lead to the adoption of common standards, to standards mutually recognised and to the consolidation of indicative standards set by the OECD. The Europeans will be setting its sights primarily on the protectionist practices that still exist in the United States and on public procurement, which is less open in that country than it is in Europe. The issue of intellectual property rights is also going to encounter obstacles in the shape of divergent viewpoints. The report also analyses the situation in countries bound to the two partners by free-trade agreements, and in that connection it argues that linkups need to be devised, in particular through the cumulation of rules of origin (see pages 5 to 9).
2. The report goes on to assess the negotiations' aims, obstacles and means. France is insisting that cultural products and public procurement of weapons be excluded from the purview of the negotiations. Regulatory convergence is going to be difficult both in the financial sector, on account of American reticence, and in the agricultural, health and phytosanitary fields, where European and American concerns differ. The new measures that the Americans would like to introduce in the field of dispute settling could prove to be the most sensitive aspect of the negotiations because they will be very difficult to transfer into a multilateral context (see pages 10 to 13).
3. And finally, the impact of the partnership, particularly on growth and employment, needs to be assessed with caution. The specific aspects of the European model must be safeguarded in such different areas as the environment, the definition and defence of public assets and personal data protection (see pages 13 to 15).
4. The report makes six recommendations (see pages 17 to 18):

- The negotiations should be conducted, on the European side, with the aim of mainstreaming the results at a later date.
- It would be preferable for the partnership to be able to benefit, when the time comes, from a stable monetary framework.
- After an audit designed to ensure their independence, regulatory agencies would benefit from being better coordinated on both sides of the Atlantic and from being strengthened in Europe.
- The new dispute settlement mechanism between investors and the host state should be examined in particular depth in order to come up with a proper balance between considerations of sovereignty and considerations of responsibility.
- Europe's negotiators must take care to ensure that the treaty's measures are effectively implemented at the various different levels of the American institutional edifice.
- It is going to be necessary to beef up the programmes designed to facilitate a restructuring of the areas most heavily impacted by the partnership.

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INTRODUCTION

The reality of globalisation has been substantiated since the end of World War II by the fact that the growth rate of international trade and cross-border investment is higher than that of production.

The principle of the negotiation of a transatlantic trade and investment partnership was approved during the EU-US Summit in 2011. President Obama referred to it in his State of the Union Address early in 2013 and his initiative was warmly welcomed immediately on the European side. Commitment by both parties dates back to 13 February, and the Commission's negotiating mandate dates back to 14 June (this mandate, which can be found in the annex, comprises three main elements: market access, regulatory convergence and trade rules addressing shared global challenges). The project was launched on the occasion of the G8 Summit in Northern Ireland on 17 June.

The current project was brought to fruition by Chancellor Merkel and by the European Institutions, the Commission, the Council and the Parliament (resolutions of October 2012 and May 2013), and can be connected directly to proposals made by Sir Leon Brittan and indirectly to those made by Peter Mandelson, two Trade Commissioners raised in the British tradition of free-trade. This tradition, in its purest expression, advocates unilateral trade disarmament, on a non *quid pro quo* basis and without reciprocity, by maintaining that a country practising free trade alone would in any case be at an advantage, given that it would be in a position to procure its resources at the best price. One should hasten to add that this version of free trade has been expressly rejected by the European Commission, and therefore by its Trade commissioners, who have always perceived negotiation as being established on the exchange of equivalent concessions, if one excludes the initiative such as "Everything but Arms" in favour of the least developped countries, that Pascal Lamy, the then European Commissioner for Trade, had the Council and the Parliament adopt in 2001. In 2006, Peter Mandelson instigated the "Global Europe" strategy of bilateral liberalisation, which took over from the significantly more multilateral politics favoured by his predecessor.

> "THE UNITED STATES AND THE EUROPEAN UNION ARE SEEKING A NEW LEASE OF LIFE FOR THE ECONOMY"

The United States and the European Union are two partners seeking a new lease of life for the economy: the crisis has had devastating effects on both sides of the Atlantic – economic stagnation, public indebtedness, growth of inequalities, increased unemployment, all of which has accentuated the contrast with the accelerated development of Asia, Latin America and Africa, in emerging countries in particular.

Both potential partners are encouraged by the usual lobby groups, industrialists and chambers of commerce, to seek new markets following the stalled multilateral trade negotiations at Doha.

For Europe, the partnership would appear as a response to the concerns raised by the pivotal focus of the US towards Asia and the Pacific: a transatlantic agreement would constitute an anchor, a reference. In this regard, it would, in theory, have some chance of digging deeper, of going further than the Trans-Pacific Partnership, which appears as the trade policy element of the pivot, all the more so as Japan has just joined the negotiation. Both partnerships have set themselves ambitious objectives, specific to a 21st century agreement, in terms of standards applicable to work, environmental protection measures, intellectual property protection measures, public procurement, and the treatment of state-owned enterprises. For Europe, the transatlantic partnership project also appears as the opportunity to take advantage of the experience acquired, in terms of convergence of regulations, at the time of the assembly of the single market. For the Americans, the partnership may also

be viewed as a useful lever for their Asian 'linchpin' and as a means to strengthen their negotiating position in relation to China.

For a Democratic administration in the US, signing a free-trade agreement has become a normal way to draw on support in the business world by distancing itself from certain protectionist instincts of the trade unions (Kennedy's Trade Expansion Act, Clinton's NAFTA). For President Obama, it could also be seen as a further attempt to end the paralysing political polarisation that has characterised the running of US institutions since the Republicans regained control of the House in 2010.

Before discussing the outlines of the upcoming negotiations, we shall start by setting the scene and looking at the current situation. We will then make some critical observations on the prospects opened up by the partnership. To conclude, we will formulate possible scenarios and make recommendations.

1. State of play

1.1. The weight of both partners and the state of their relations

A high level EU-US working group on employment and growth, led by Karel de Gucht, EU Trade Commissioner, and Ron Kirk, United States Trade Representative (USTR, before he handed over to Michael Froman in early 2013), was created in 2011 to examine the means to increase trade and co-operation between both sides of the Atlantic. The final version of its report, produced after the Interim Report of June 2012, dates from 11 February last and advocates a general agreement that could lead to the drafting of rules and standards applicable at international level (cf. *infra,* II A 3.). Two days later, the highest political authorities on both sides of the Atlantic endorsed the main conclusions of this report. The working group built on the work previously accomplished by the Transatlantic Economic Council, created in 2007 by Angela Merkel and by George W. Bush, on diverse work carried out since 2000 on reconciling regulatory differences between the United States and the European Union and most probably also on the enhanced free-trade agreements recently signed by both the United States and the European Union with South Korea.

> "THIS IMPLIES, FOR THE EU AND THE US, STRENGTHENING THEIR NEGOTIATING POSITIONS AND ENCOURAGING THE EMERGENCE OF INTERNATIONAL STANDARDS IN KEEPING WITH THEIR WISHES"

In terms of investment, the reference document is entitled "Shared Principles for International Investment" dating from April 2012. In this, the US and the EU express their desire to work together to promote open, transparent and non-discriminatory investment policies at global level. In doing so, both partners will of course be strengthening their negotiating positions and encouraging the emergence of international standards in keeping with their wishes. But it is already clear that the rules concerning the opening of markets to foreign investors, just like the open and transparent mechanisms for settling disputes between investors and public authorities, or the rules relative to indirect expropriation, remain too vague to be applied as they stand: both partners will have to further deepen these aspects of cross-border investment, as they had tried unsuccessfully to do, as part of the larger framework of the negotiation on a Multilateral agreement on investment (MAI), negotiations that ended in failure in late 1998. Europe is the world's leading investor and it is in its best interests to draw from effective mechanisms to protect its interests abroad.

Bilateral economic relations are marked by customs duties, which are already almost insignificant (in the region of 4 to 5%) – even though some tariff peaks remain in sectors such as railway construction, turbines, textiles, clothing and footwear, special steel, certain vehicles, jams, chocolate and cheese, and even though customs duties on transatlantic trade represent almost €6 billion in total, which corresponds to 2% of EU fiscal revenue. The real problem concerns the existence of non-tariff trade barriers, and especially of diverging

regulations; transatlantic integration is already well advanced in the case of the largest European and US companies. In 2009, 55.9% of US imports from France involved trade inside the same companies and the same could be said for 27.7% of French imports from the United States: one of the most tangible expressions of globalisation over the past decades corresponds to the appearance of multinational value chains. Measures taken to facilitate the operation of these chains have had a much greater effect on international trade than reducing customs duties. Litigation about bilateral relations between the two entities remains limited: restrictions giving rise to World Trade Organisation (WTO) disputes concern less than 2% of trade.

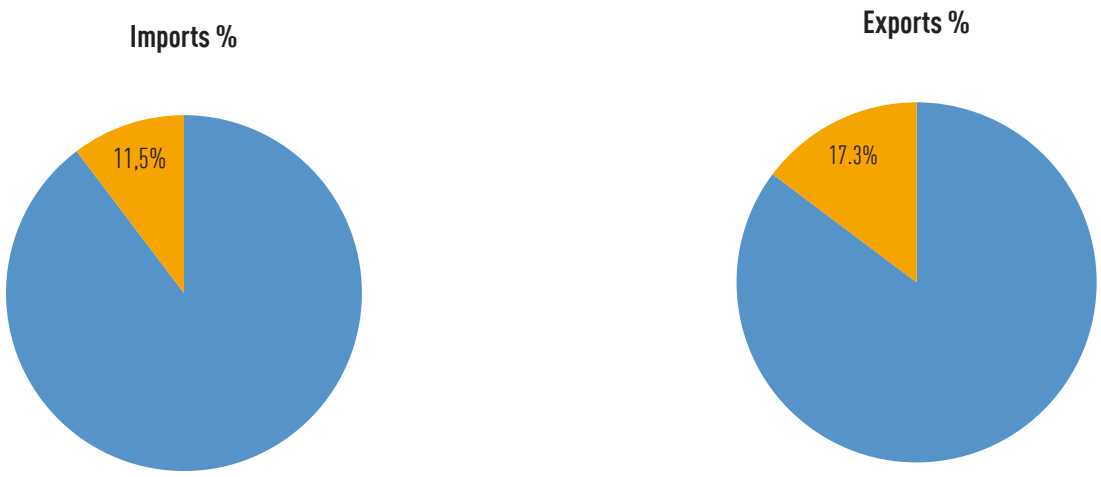
1.1.1. The weight of both partners on the world economic scene.

The US and the EU together represent $30 trillion in annual production, i.e. just under half of the world economy. Trade between both partners represents 30% of world trade.

1.1.2. The imbalance in bilateral trade is due to goods more than to services

Trade between the US and the EU, corresponding to a total of almost $1 trillion, therefore represents approximately one third of world trade.

Figure 1 ► US share of European trade: imports et exports



Source: EUROSTAT, European Commission, 2013

Bilateral trade in goods amounted to €455 billion in 2011, with a positive balance for the EU of over €72 billion. The US was the EU's third largest supplier, selling it €192 billion of goods representing 11% of total EU imports. At the same time, the US was the EU's main export market, buying €264 billion of EU goods, representing 17% of total EU exports. Machinery and transport equipment was the top sector for bilateral trade (€71 billion of imports and €104 billion of exports for the EU), followed by chemicals (€41 billion of imports and €62 billion of exports for the EU). Bilateral trade in services was worth €282.3 billion in 2011, with a positive balance for the EU of €5.5 billion. The US was the EU's top partner for trade in commercial services, with its imports reaching €138.4 billion, representing 29% of total EU imports, and exports of €143.9 billion (around 24% of total EU exports). The number of EU jobs dependent on exports towards the US is estimated at 5 million.

1.1.3. Investing on the other side of the Atlantic

Investing accross the Atlantic is a growth sector. In 2011, US companies invested €150 billion in the EU and EU firms €123 billion in the US. In the same year, cumulated US investment in Europe reached €2 trillion, i.e. 50% of all US investment abroad, and EU investment in the US €1.6 trillion. Some 7 million people work for European firms in the US or American businesses in Europe. US investment in Europe is concentrated in the

financial sector (70%). One third of EU investment in the US is in the manufacturing sector, which in value, corresponds to two times US investment in the same sector in Europe. There are restrictions on investment by the other partner in certain sectors such as defence, shipbuilding, television or airline companies, in the name of reciprocity, cultural diversity or considerations relating to national security.

1.2. Comparative views on the most differentiated sectoral regulations, which appear as impediments to enhanced economic integration

1.2.1. The traditional stumbling blocks: culture and agriculture

A preferential agreement such as that which is envisaged is only permissible, under the terms of Article XXIV of the GATT/WTO, if it is of a general nature, i.e. if it applies to most goods and services traded. Under these conditions, it did not seem possible to exclude agriculture.

1.2.2. Services, beginning with the financial and banking sector, energy and other sectors particularly sensitive to environmental regulations

"FINANCIAL SERVICES HAVE EVERY CHANCE OF BECOMING ONE OF THE THORNIEST FILES"

Financial services have every chance of becoming one of the sectors where it will be difficult to obtain co-operation, a co-operation without which it is difficult to see how the desirable consistency between regulations from one side of the Atlantic to the other could be reached. This is partly due to the fact that the European financial crisis is not really resolved and that in the absence of resolution, EU negotiating positions are not always easy to define. In the energy sector, pressure exerted in the name of competitiveness to relax EU legislation relative to the exploitation of shale gas could increase: in the US, gas costs three times less than in Europe. Negotiations should not call into question the right of States to regulate these sectors but they should grant European operators privileged access to US energy sources.

1.2.3. Chemicals, pharmaceuticals, and automobile industries

Existing procedures for the marketing of new pharmaceutical products differ on both sides of the Atlantic. The same applies more generally to safety standards. In their free-trade agreement with Korea, the Americans ensured the restrictive nature of the rules governing the marketing of generic drugs as long as the original patent remained in effect. Before granting the marketing authorisation of a generic drug, the Korean government must in fact verify that the patents in effect are respected. More precisely, when a generic drug manufacturer applies to market his drug, invoking the fact that the results obtained by another product (in terms of efficacy and safety) have received the requested authorisation, he will not be allowed to market his drug so long as he has not contacted the manufacturer of the other product and obtained his consent. US customs duties on imports of chemical products amount to just 1.2% but non-tariff barriers on these same products entering the US market amount to an additional 19.1%. Concerning the automobile industry, customs duties applied by Europe on imports of US vehicles are at 10%, but non-tariff barriers correspond to an additional 25.5%. Negotiations in this area should focus on safety standards and on emission standards, considering that the universal standards advocated by the United Nations Economic Commission for Europe are not recognised by the US. Harmonisation of safety standards and removal of tariff barriers should benefit European manufacturers.

1.3. Horizontal regulations, expected to change and converge to encourage enhanced economic integration

It is clear that there exists major convergence between both sides of the Atlantic, regarding standards applying to the environmental and social fields, including in terms of labour laws. This undoubtedly explains why the major US trade union AFL-CIO expressed its support for the launch of negotiations, an unprecedented event. This convergence can also be observed as regards the conditions to be met so that a product can be marketed. The differences between both sides of the Atlantic have for a long time been of a philosophical nature: while the US focused on weighing up the costs and benefits of a new product, using market forces and litigation to resolve the situation if necessary, Europe focused on the principle of precaution that made the marketing of a new product or technique conditional on obtaining proof that it was not dangerous. The Americans are now poundering the possibility of integrating a human factor in their cost-benefit analysis, whereas the Europeans are wondering if the price to be paid for certain additional precautionary elements is not too high. The drafting of the Commission's negotiating mandate corresponds to a relatively flexible interpretation of the precautionary principle (cf. Annex, article 25).

1.3.1. Patents, trademarks, copyrights and other forms of intellectual property protection

The same does not apply to intellectual property protection systems, which differ significantly on both sides of the Atlantic, except perhaps in terms of brands, copyright and patents (the Cooperative patent classification system, dating from last January, which was implemented by the US and by the EU, and which aims for greater global harmonisation, could serve as a working base). In the US, however, legislation relative to patents gives rise to numerous and costly litigation proceedings, something the Obama administration is endeavouring to tackle. Some four thousand proceedings relative to patents are launched each year in the courts. The International Trade Commission (ITC), as its name suggests, has competence for disputes affecting cross-border trade. Furthermore, Americans emphasise brands but practically ignore the concept of geographical origin, which is vital for Europeans to fight what they consider to be foreign imitations of their wines, cheeses and hams. The EU favours a multilateral agreement with legal effect and under the terms of which, registered geographical origins, not just limited to wines and spirits, would be certified and recorded. The Americans hold on to the idea of a voluntary register, with no binding value, and only for wines and spirits. Regarding trademarks and copyrights, it would be necessary to specify in particular the responsibility incurred by Internet service providers in case of infringements.

1.3.2. The economic role of the State: public procurement, competition policy and State aids to companies

> "THE EU AND THE US AGREE ON THE IDEA OF OPENING PUBLIC PROCUREMENT AT ALL ADMINISTRATIVE LEVELS"

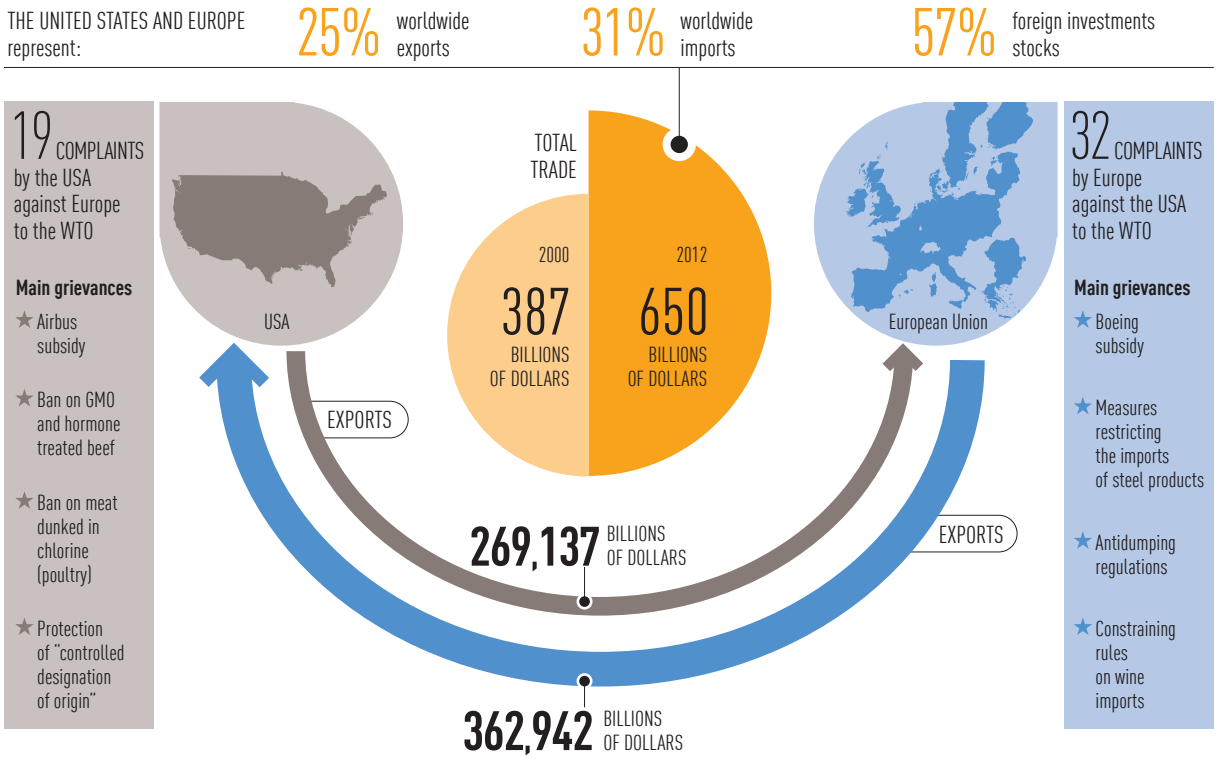
In Europe, companies the activities of which are based on public procurement represent 25% of GDP and some 31 million jobs. Today almost 70% of the US public procurement market is closed to foreigners. Conversely, on the European side, public markets are open on the whole to US companies even though this results from unilateral decisions that go beyond reciprocal openings negotiated within the framework of public procurement agreements. The US, in past negotiations, has tended to focus more on the opening of public procurement markets at central administration level, whereas the EU has sought to further open these markets at state and local authority level. The fact remains that the two potential partners agree on the idea of opening public markets at all administrative levels by applying the principle of national treatment.

Differences observed in terms of competition policies can be partly explained by the fact that Americans focus on consumer protection whereas the Europeans tend to worry more about having a level playing field, which, in practical terms, means a strengthening of the disciplines to which State subsidies are subjected. But this should not mean there will be a strate confrontation, and negotiations should lead to the strengthening of some WTO disciplines on subsidies regarding, for example, relations between State-owned and private enterprises.

1.3.3. Rules of origin and the issues raised by linking the partnership with other free-trade zones of which the US and the EU are members

The EU is about to sign an association agreement with Canada, an agreement that is drawing a lot of attention from US negotiators. The free-trade agreement that binds the US to its Canadian and Mexican neighbours (NAFTA) has had a greater effect on the US economy than any other external factor. It is therefore conceivable that Canada and Mexico will ask to become stakeholders in negotiations on the US side, in the same way that Turkey, for example, might ask to become a stakeholder on the European side. In practical terms, the agreement should allow for the possibility of cumulation, in other words, for the possibility of extending the rules of origin to countries having signed free-trade agreements with one or the other of the two partners (cf. Annex, article 11).

Figure 2 ► Trade between the US and Europe



Source: *Center for Transatlantic Relations*, Johns Hopkins University : WTO in « Le Monde » 15 March 2013

2. Negotiation of a Transatlantic Partnership Agreement: objectives, obstacles and means

2.1. Objectives: recovery, the succession of Doha and more specific concerns

Stimulating growth through a supply-based policy: the objective of free-trade agreements is to open new markets, thereby increasing supply and competition on these markets, which leads to reduced costs and to, theoretically at least, increased purchasing power.

> "THE PARTNERSHIP COULD SERVE AS A DRIVING FORCE FOR A NEW WORLD TRADE ORDER"

The idea is to **bridge the Doha Round** chasm by granting the two WTO giants the responsibility for opening new avenues that are compatible with the rules of the World Trade Organisation in the services and agriculture sectors, as well as in those of intellectual property and public procurement, and delineating them, by agreeing to new standards, thus enabling these developments to be included in the framework of new multilateral trade negotiations at a later stage. The partnership could thus serve as a driving force for a new world trade order. It should be recalled that there is a WTO agreement on the Trade-Related Aspects of Intellectual Property Rights, known as TRIPS, which will serve as a reference and a starting point for negotiations in this area (one should note that this agreement recognises registered geographical origins, but that the protection it gives them is more theoretical than real for products other than wines and spirits). There are also two other WTO agreements with repercussions on trade and on sanitary measures, known as the Technical Barriers to Trade Agreement and the Sanitary and Phytosanitary Measures Agreement. A fourth agreement concerns public procurement (Agreement on Government Procurement).

For the EU, these negotiations may be seen as the opportunity to **call into question certain bastions of US protectionism**, such as the "Buy American" provisions, which impose national preferences for public procurement, the Helms-Burton Act of 1996, relative to sanctions against foreign companies taking advantage of US assets expropriated by Cuba, and other similar laws that are applicable extraterritorially (disputes between EU countries and the US on the extraterritorial application of US laws dates back to the 1950s), sea and air transport, since it is reserved for US firms, to the detriment of British, French and German interests, financial (starting perhaps with the insurance market) and port services, as well as some more or less camouflaged State aids, in the aeronautics industry, for example. A free-trade agreement with the US could also be designed to encourage the rationalisation of the European defence industry, which is the long-term condition to ensure its survival in the face of competition from American companies (and even though defence procurement is in theory excluded from the negotiation, at France's request). The Europeans are interested in the US financial sector, whose unsatisfying regulations were a major cause of the 2008 crisis. They also criticise the discrimination endured by European financial establishments in the US: legal proceedings launched against merchant banks for misdemeanours such as the circumvention of trade sanction policies or money laundering firstly targeted European establishments.

In terms of investment, the possibility for a foreign company to bring a claim directly against a State on the territory of which it has invested, for breaches of its obligations, by using the dispute settlement mechanism, has always been a politically sensitive point, insofar as it concerns sovereignty issues. In fact we need look no further for the causes of failure of the MAI project referred to above. It has once again become a topical issue with the negotiation of the transatlantic and transpacific partnerships: the US will insist to obtain the recognition of such a right and the Europeans will not be against it. With such a provision, we would abandon the traditional framework of international law where treaties are signed by States and create rights and obligations for each other alone. And yet NAFTA, in its Chapter 11, already provides for this type of remedy and would thus have created a precedent. Resistance in the past has often come from developing countries, concerned

"THE DISPUTE SETTLEMENT MECHANISM QUESTION IS POLITICALLY SENSITIVE"

about defending their independence against the means likely to be used by large foreign companies, but it also came tacitly, and under the influence of NGOs, from representatives of developed countries, critical of the persons chosen to mediate, since they only hailed from the private sector. On this last point, positions may be shifting : the idea of appointing referees, who, because of their professional background, are better able to uphold the general interest, when appropriate, as opposed to private interests, is gaining ground. The fact remains that it will be particularly difficult to reach an agreement on this subject within a multilateral framework.

The High level working group report resembles a road map. It aims at eliminating all residual tariffs on industrial goods by organising transition periods for sensitive products. Concerning tariff barriers on trade of agricultural goods, the objective is to reduce them progressively and substantially. Non-tariff barriers, mainly regulatory, will be the main subject of the negotiations. Existing regulations will have to be aligned and it will have to be ensured that they no longer differ in the future. The key sectors are automobiles, especially from an electronic components viewpoint, machine-tools, electrotechnical goods, chemicals, nanotechnologies and regulations applying to certain computer functions. In the services sector, trade liberalisation should aim more particularly at financial services, health services, transport, financial markets, IT, telecommunications and aeronautics. The idea would be to consolidate the highest level of liberalisation already reached by each of the partners in its trade agreements, while trying to open access to new markets. Regarding services, the reference for the EU, insofar as the highest level of liberalisation can be found there, would be the free-trade agreement signed with Korea. The US and the EU have launched negotiations within the WTO with a view to signing an international services agreement; they differed on reverting to negative lists, identifying services that would be excluded from the agreement, or to positive ones, where only the sectors covered by the agreement would be identified. The EU until now has only negotiated once on the basis of negative lists, with Canada, and even then, under very special circumstances. But both parties now agree on a hybrid framework, combining a negative list for disciplines relating to national treatment and a positive one for commitments made in relation to market access. It is worth adding that most of the services excluded from the bilateral agreements signed so far deal with issues of defence and national security. The report advocates the opening of public procurement markets at all levels.

2.2. Barriers

Competences sharing. Negotiations will not be made easy by the sharing of competences concerning regulatory powers between, on the one hand, the US Federal Government and the European Union as such, and on the other hand, the American states and the member states of the EU. This division differs according to the sector. In the services sector, for example, the US Federal Government and the EU as such do not have exclusive competence and, as far as the EU is concerned, it should be stressed that the internal market remains incomplete. Regarding investment, there is currently a series of bilateral investment agreements between the US and EU member states, which corresponds to the fact that investment only became on exclusive Community competence with the Lisbon Treaty. This also explains the United States' greater interest in issues raised by investment as well as the greater experience of their negotiators in this domain. Since 2010, the European Commission has sought to bring bilateral investment agreements signed by the member states into the Community framework. The free-trade agreement signed with Canada will therefore contain Community provisions relative to investment. In the US, it should be noted that only 37 States approved the WTO agreement on public procurement. The Federal Government in fact has little means to encourage State government and local authorities to open their public procurement markets. It will thus undoubtedly be easier for European negotiators, at least initially, to attack the "Buy American" clauses linked to procurement contracts awarded by the Federal Authorities (these were plentiful during the fiscal stimulus measures of 2009 which forced the States to use iron and steel produced in the US for the infrastructure projects receiving Federal funding) rather than trying to force open public procurement markets awarded by the State government and local authorities.

"CULTURAL GOODS AND SERVICES WERE WITHDRAWN FROM THE COMMISSION'S NEGOTIATING MANDATE"

Cultural goods and services production. According to certain sources, cultural goods and services occupied third place in US exports towards the EU. The cultural exception, a concept dating from the General Agreement on Trade in Services (GATS), signed some 20 years ago, provides that sovereign States can limit market access to cultural productions within their territory in order to promote their own artists. Cultural goods and services were withdrawn from the Commission's negotiating mandate on 14 June, in the name of this exception, after France's announcement that it would oppose any negotiations in which culture would not be excluded. For France, where the Lescure report was delivered to the government on 13 May (proposing some 80 reform suggestions to maintain the French cultural exception) it concerns preserving the status quo of the various laws that determine the production and broadcast quotas of European and French works on radio and television, in the name of the protection of cultural diversity guaranteed by the EU treaties. One must bear in mind that this cultural exception only concerns the audiovisual sector (cinema, television, radio and music), even though the implications of its extension to all digital cultural services is considerable: it is important to safeguard growing digital online services in the audiovisual sector – such as catch-up TV or video on demand – from the voracious appetite of giants such as Google, Amazon or Netflix, the online films distributor with some 30 million subscribers in the US (cf Annex, articles 9 and 21). To do this, the European directives of 2000 and 2010 relative to e-commerce and audiovisual media services respectively, must be revised.

Agriculture, sanitary and phytosanitary issues, hormones and GMOs. Since the 1980s, international trade organisations have dealt with disputes arising from the EU's refusal to import goods made from animals that have been given growth hormones, and also with the EU's introduction of prior authorisation procedures for products derived from biotechnologies such as Genetically Modified Organisms (GMO). Concerning "collective preferences" (GMOs, chemical decontamination of meat, etc.), France has managed to preserve the European acquis (genetically modified seeds are forbidden, in practice) and national legislation. The Europeans will be set on removing US restrictions on imports of European dairy products. They will respond to US attacks against the price support mechanisms of the Common Agricultural Policy (CAP) by condemning the modus operandi of the rice, soya, corn, wheat and cotton markets, which are largely subsidised in the US. We can see a hint of change in the US position in the fact that Connecticut has become the first US State to adopt a law on the labelling of GMOs on foodstuffs. This law will only come into force, however, if four other States, including a neighbouring State, adopt similar laws. GMO derivatives – corn, soya – may be present in 60 to 70% of processed food in the US, according to GMO critics. In addition to vertical/sectoral measures, if the agreement is signed, it will contain horizontal provisions relating to regulatory co-operation (transparency, consultation mechanisms). Europe has important interests to preserve in the sanitary and phytosanitary fields.

2.3. How to move forward in the negotiations, in practice

The negotiations, which began on 8 July in Washington, are pitting some 150 negotiators against each other. Before the government shutdown, it was planned that they would resume on 7 October in Brussels. On the US side, the objective of concluding negotiations in November 2014 has been mentionned, but does not appear to be very realistic. This deadline corresponds to the upcoming US legislative elections and therefore the end of a period considered to be particularly conducive to the smooth running of negotiations, from a political point of view. Europe, for its part, has no reason to comply with the US electoral calendar, but is, however, eager to maintain the political momentum associated with the preparation and the launching of the negotiations.

2.3.1. A global agreement rather than partial agreements of a more modest nature

"NOTHING IS AGREED UNTIL EVERYTHING IS AGREED"

Regarding hypothetical partial agreements, these could violate article XXIV of the GATT which, let us recall, provides that preferential agreements are only acceptable insofar as their scope is broad, in other words, where the non-covered sectors remain the exception. In fact, this avenue is closed (cf. Annex, article 5). The EU, through the High level working group, maintained that a broad and complete agreement was necessary, one that would encourage the exchange of concessions, and the group's report clearly took a stance to this effect (a "single undertaking": nothing is agreed until everything is agreed.)

2.3.2. Harmonisation or mutual recognition

Progress in the area of standards will be measured in terms of the definition of common standards or in terms of mutual recognition. It could also take the form of consolidation of standards defined by the Organisation for Economic Co-operation and Development (OECD), insofar as these are currently most often of a non-binding nature. It is widely known that harmonisation of health standards is a long-standing source of friction and that one of the major debates that is taking shape concerns the localisation of data: neither harmonisation nor the mutual recognition of health standards are very promising avenues. We should also be aware that past negotiations which were based on the mutual recognition of standards relative to determined sectors or goods yielded disappointing results due to strong opposition by regulatory agencies intent on preserving their independence.

2.3.3. Reciprocity

Reciprocity in market access conditions is an objective often highlighted by negotiators. With the exception of steel products, which will be addressed at a later stage, the Europeans have complained about US tariff peaks on their exports of processed foods (such as cheeses), textiles, leather and glass, not to mention quantitative restrictions on fishery products. The US, for its part, has criticised EU demands regarding the identification of wines, the remission of customs duties for rice imports from certain origins and the conditions underlying the implementation of commitments made in the Uruguay Round of negotiations on the cereal trade. But it is in the service sector that these disputes based on the absence of reciprocity in trade tend to proliferate, in the fields of air transport, telecommunications, sea transport, broadcasting and television or digital commerce.

3. Critical appraisal of prospects opened by the partnership

Several economic studies have sought to assess the impact of a transatlantic partnership on trade and growth. The European Commission commissioned one by the Centre for Economic Policy Research in London. It was prepared under the management of Joseph François and was completed in March 2013. The German Ministry of the Economy commissioned another study by the Bertelsmann Foundation. The latter study was prepared by economists from the IFO Institute in Munich. References to other evaluation and forecasting work can be found in the bibliography, with the latest study by the Peterson Institute for International Economics deserving perhaps a special mention.

3.1. Review of the main sectors where a convergence of regulations can be expected

3.1.1. What is the risk that the expected gains from economies of scale and increased competition will be overshadowed by the negative effects of excessive concentration?

> "AFTER A PERIOD OF INCREASED COMPETITION, THE AWARENESS OF THE ECONOMIES OF SCALE COULD LEAD TO A CONSOLIDATION PHASE"

It is worth recalling the decision made in 2001 by the European Commission's Directorate General for Competition to prevent the merger of two major US companies, Honeywell International and General Electric, on the grounds that if merged, they would have too strong a position on the European market, even though the merger proposal had already been approved by the US authorities. Regarding the partnership proposal, one could expect, after an initial period marked by increased competition, a second period marked by the awareness of the economies of scale made possible by the expansion of the market, leading to a consolidation of the industrial structures. The authorities in charge of defending competition on both sides of the Atlantic will most likely face a major challenge to prevent the emergence of new dominant positions.

3.1.2. Analysis of the balance of power in some selected sectors

On the US side, sectors such as services in general and chemicals should prove to be aggressive due to their force and the way they are organised. On this side of the Atlantic, the same could probably be said of the German automobile, electronics and machine-tool industries. It is the top of the range models in the European car industry that should benefit from greater access to the US market: the industry in its entirety is marked by overcapacity, which, in a more open trade environment, makes rationalisation and consolidation measures more likely. The balance of power being as it is, Europe should be seen to be particularly vigilant in defending its regulations on dangerous chemicals and ensure that the prohibition of non-therapeutic antibiotics in animal feed is maintained.

In the agri-food sector, the US exports mainly raw agricultural products for which the structural increase in global prices has changed things somewhat: with a few exceptions, the prices of agricultural goods in Europe today are not that different from those prevailing on world markets. EU exports towards the US are essentially made up of processed goods with a greater added value and make the EU a net exporter towards the US in the agri-food sector. Reform of the CAP provided Europe with new room to manoeuvre:farmers now benefit mostly from direct aid decoupled from production. This is considered acceptable by the WTO insofar as it does not distort in trade. It would seem that farm subsidy schemes have been left out of the negotiations. One will recall that public support accounts for 12% of farmers' revenue in the US, as against 21% in the EU.

3.1.3. The financial and banking sector

It would be appropriate to take account of the foreseeable impact of the different financial methods of companies on both sides of the Atlantic. While European companies tend to turn to banks, US companies, especially once they have reached a certain size, lean towards recourse to financial markets. The Americans have indicated that they do not wish to address financial regulation within the framework of the partnership. One could wonder if the Europeans should follow them on this line, given the amount of US investment in Europe in this sector, but especially due to the advantages resulting from harmonised regulation, which, by definition, would deprive banks of the possibility of arbitrating in favour of the least restrictive system for them. Lessons learned from the 2007-2008 crisis are not the same on both sides of the Atlantic: the Europeans are tempted to rigorously separate merchant banks and deposit banks, and seek to define a single scheme to which all their financial establishments would be subjected, whereas the Americans seem more inclined to use conventional instruments such as liquidity ratios to put an end to excessive leverage effects. In any event, it would be appropriate to agree on a mechanism to put an end to the activities of a financial institution faced with insolvency without having to resort to public funding.

3.2. Skepticism concerning the foreseeable impact of increased productivity on employment

3.2.1. Limits of the Ricardian free-trade theory

The Ricardian free-trade theory holds that opening up to international competition leads to specialisation, through the principle of comparative advantage, and from this to greater production, at any given level of resources, in terms of capital and labour. But it ignores unemployment, in that it supposes that production factors are fully employed, and also the volatility of exchange rates, even though the dollar-euro rate has remained stable in the medium to long term, after an initial turbulent period.

The objective of free-trade agreements is to create access to new markets; as such they are part of a supply-based policy. In order for economic benefits to result in social benefits, in terms of productivity gains, this supply-based policy should be accompanied by domestic policies designed to compensate the effects of competitivity shocks, notably in the realm of qualifications.

Without such support measures, we should be skeptical of the impact that the planned partnership could have on economic recovery on both sides of the Atlantic. The solution must be sought elsewhere: an increase in the propensity to consume. The increase in wage inequalities observed for several years now, has lead to a drop in the latter, which needs to be addressed, by for example diminishing the brutal nature of certain debt reduction policies, which does not in any case mean once again embarking on deregulation of financial establishments, or, another possibility, encouraging the generalisation and strengthening of automatic stabilisers. There is frequently a tendency to forget that investment, which, for some, is the only really legitimate component of demand, is not an end in itself, that it is only justified as a response to anticipated consumption, without which it is just a waste of resources.

3.3. The European model under fire

> "THE ISSUE IS TO PRESERVE THE SPECIFIC NATURE OF THE EUROPEAN MODEL"

The issue is to preserve the specific nature of the European model. For several years now, the share of intra-European trade in the total foreign trade of the 28 EU member states has been decreasing. This reflects Europe's more open approach to the outside world as well as its greater integration in global value chains, trends that are not necessarily questionable in themselves. It is also the counterpart of faster growing markets outside Europe, the development of trade flows appearing here as a consequence rather than a cause of the unbalanced development of production centres. These trends would be even more pronounced if the Atlantic partnership were to become a reality.

Environmental concerns (especially measures taken to fight the causes of climate change, airplane emissions, for example), the willingness to defend public goods against temptations of appropriation by a predatory private sector (the basis for the caution shown towards certain regulatory projects, involving intellectual property rights, with clear hegemonic aspirations), the protection of privacy and reservations relating to the nature of cross-border data transmissions, are some of the characteristics of a European model that is not in tune with the priorities associated with American negotiators. Others can be mentioned, such as research on living organisms, social inequalities, the importance of public services, high risk financial products and the protection of personal data. Regarding gases emitted by planes, both parties have commenced negotiations with the International Civil Aviation Organisation with a view to reaching an agreement in the short term. Concerning respect for privacy and protection of personal data, European regulations that are based on the principle according to which personal data cannot be used without the Internet user's knowledge, are aimed primarily at cross-border service providers and companies operating in the IT sector. The EU has increased

the level of protection for its citizens and to this end has strengthened regulations applicable to companies. More precisely, proposals made in January 2012 by the European Commission will target personal data processed outside the EU by companies doing business within the EU and offering their services to its citizens. American companies as well as others, whose activity is web-based, would thus be directly concerned. A draft framework agreement regulating the transfer of data between the US and the EU came up against the stumbling block of non-discrimination. There is in fact a law in the US (the Foreign Intelligence Surveillance Act) allowing the US to intercept international telephone communications and information circulating on electronic networks provided that its citizens are not concerned, which means that, with regards to this legislation, the Europeans do not have the same protection and the same legal remedies as the Americans. While Europe places emphasis on protection of privacy, the US has a tendency to just focus on the free flow of information.

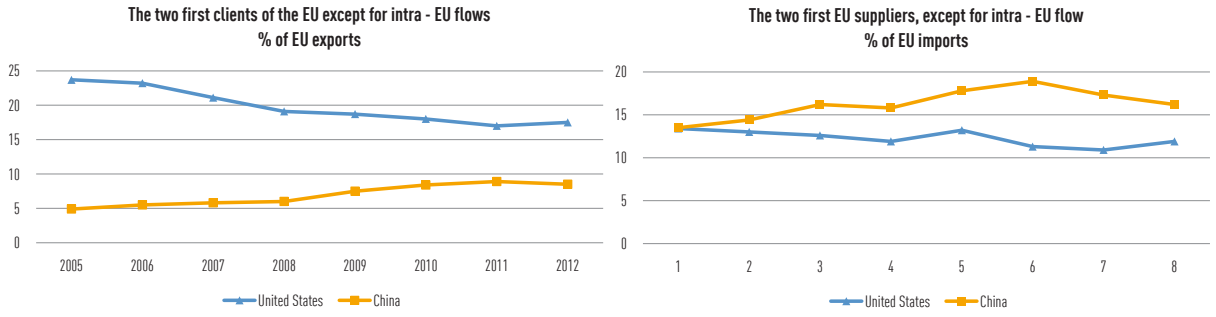
Nor should it be seen as unreasonable to believe that the European model, and the European social model in particular, are increasingly attractive for the Americans (universal health coverage, achieved by the Obama administration, would be an interesting sign of this development; the position held by the aforementioned AFL-CIO, is partly explained by the recognition that European labour law is more advanced than its US counterpart and that consequently, American workers do not have to worry about European competition, at least from the point of view of their social benefits).

Conclusions - Scenarios and recommendations

Completion of the negotiations in the short term (late 2014) is not the most likely scenario, especially if the Obama administration lacks a 'fast track' negotiating mandate, which, in current circumstances would seem to be the most likely scenario. However, with the necessary political will, an agreement within a shorter time frame does not seem to be out of reach.

It should be easy to reach partial agreements, including on the convergence of certain sectoral regulations. One could start by imagining methods that would settle both quickly and thoroughly the recurring disputes that arise in sectors such as aircraft construction or steel. Given the state of public finances on both sides of the Atlantic, this is not the time for granting subsidies to those principally concerned, which should encourage the emergence of acceptable compromise solutions. Failure or gridlock should not of course be excluded.

The EU should approach these negotiations with the will, in a latter phase, to generalise the results, i.e. to place them within the WTO multilateral framework. This concern would lead it to negotiating without taking a position too distant from that held by other large trading powers, starting with China, the world's leading exporter, India, Russia, Japan and Brazil, regarding, for example, a settlement mechanism for disputes between private investors and States (which shall be discussed later). The EU, in parallel to the negotiations, should strengthen its communication systems with these countries, which, if not regularly consulted, should at least be regularly informed. The same should also be the case, naturally, for Turkey, member of the EU Customs Union. Such an approach would be justified by an inclination toward multilateralism rather than by taking account of the theory of international trade, which holds that bilateral international trade agreements have two types of effect, that of increasing trade between both partners, but also a diversion effect, insofar as both partners take a portion of trade that was conducted before with third parties. When bilateralism corresponds to half the world's economy, one might be right in not paying too much attention to the diversion effect.



Source: European Commission

At the very least, we should reflect on the introduction of a stable monetary framework (return to a fixed exchange rate system ?), without which a free-trade agreement will remain excessively vulnerable. We should keep in mind that it will be difficult to reconcile fixed exchange rates, freedom of capital movements and an independent monetary policy and that in the case of an imbalance, it would be better to have a system based on corrective adjustment measures imposed on both parties rather than unilateral measures imposing all the adjustment burden on the debtor.

The necessary convergence of sectoral regulations, one of the objectives of the proposed agreement, should be sought through greater coordination of the activities of the relevant agencies on both sides of the Atlantic and through the enhancement of the role of these agencies on this side of the sea. The regulatory powers in Europe are in fact dispersed among European authorities and national authorities, and the powers of the former are far from being as extensive as those of their American counterparts. Without a redistribution of power, we may witness a David and Goliath-style battle. It would also be helpful to begin with an audit of the existing

agencies, to determine how much they have been impacted by the phenomenon of capture, where the economic interests that they are supposed to monitor have ultimately turned the situation around to their benefit to the point where they can dictate to the agencies on what they should do.

> " IT IS NECESSARY TO SEE TO THE RECONVERSION OF SECTORS THAT COULD NOT RESIST NEW COMPETITION FROM OUTSIDE "

If the partnership ever sees the light of day, it will have a dispute settlement body for disputes arising in sectors newly exposed to competition, in the same manner as what is provided for in the free-trade agreements signed by South Korea with the US as well as with the EU. It would be useful to learn from how the WTO's Dispute Settlement Body (DSB) operates to make the partnership's instrument as effective as possible. The most sensitive issue in the negotiations could well be the introduction of a dispute settlement mechanism, in addition to the conventional dispute settlement mechanism for disputes between the two partners, for disputes between a private investor and the State where the investment is made. Governments will become liable for changes in policies that affect foreign investors where previously they bore no such responsibility. This will restrict their scope for initiative, more particularly perhaps in sectors such as the environment and public health.

The classification of legal obligations, which should lead to placing international treaties at the very top of the legislative and regulatory framework, is not always understood in this manner by Americans. This point will call for special vigilance from the European negotiators. The same goes for the notion of public service or services of public interest.

The logic behind market-opening treaties, according to which the benefits outweigh the losses, should be made clearer and less painful by strengthening existing mechanisms on both sides of the Atlantic to facilitate the reconversion of sectors that could not resist new competition from outside.

The open multilateral trading system, cornerstone of the OECD and the WTO, survived the 2007-2008 crisis, whereas it succumbed to the ravages of economic nationalism during World War I, and, once again, to the same type of forces triggered by the Great Depression in 1929 (the US resorting to the Smoot-Hawley tariff in 1930, the UK rejecting free-trade in favour of imperial preference in 1931-1932). Not only did it survive, but in doing so, it continued to allow hundreds of millions of human beings to escape from extreme poverty. The fact remains that the 2007-2008 crisis is not yet over and the open multilateral system is therefore not out of the woods just yet. Certain countries in Western Europe are experiencing unprecedented unemployment rates, rates not even seen during the darkest hours of the Great Depression, although it is true that the material condition of the unemployed today is better than it was some 80 years ago. As long as such imbalances persist, the vision of tomorrow's world, as seen by the OECD and the WTO, is sure to appear fragile.

ANNEX : NEGOTIATION MANDATE

Directives for the negotiation on a comprehensive trade and investment agreement, called the transatlantic trade and investment partnership, between the European Union and the United States of America

Nature and Scope of the Agreement

1. The Agreement will exclusively contain provisions on trade and trade-related areas applicable between the Parties. The Agreement should confirm that the transatlantic trade and investment partnership is based on common values, including the protection and promotion of human rights and international security

2. The Agreement shall be ambitious, comprehensive, balanced and fully consistent with World Trade Organisation (WTO) rules and obligations.

3. The Agreement shall provide for the reciprocal liberalization of trade in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments.

4. The obligations of the Agreement shall be binding on all levels of government.

5. 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 others markets.

Preamble and General Principles

6. The preamble will recall that the partnership with the United States is based on common principles and values consistent with the principles and objectives of the Union's external action. It will refer, inter alia, to:

- Shared values in such areas as human rights, fundamental freedoms, democracy and the rule of law;

- 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;

- The commitment of the Parties to an Agreement in full compliance with their rights and obligations arising out of the WTO and supportive of the multilateral trading system;

- 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;

- The shared objective of the Parties to take into account the particular challenges faced by small and medium-sized entreprises in contributing to the development of trade an investment;

- The commitment of the Parties to communicate with all relevant interested Parties including the private sector and civil society organisations.

Objectives

7. The objectives of the Agreement s to increase trade and investment between the EU and the US by realizing the untapped potential of a truly transatlantic market place, generating new economic opportunities for the creation of jobs and growth through increased market access and greater regulatory compatibility and setting the path for global standards

8. The Agreement should recognize 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. The Agreement should recognize 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.

9. The Agreement shall not contain provisions that would risk prejudicing the Union's or its member states' cultural and linguistic diversity, namely in the cultural sector nor limit the Union and its Member States from maintaining existing policies and measures in support of the cultural sector given its special status within the EU and its Member States. The Agreement will not affect the capacity of the Union and its Member States to implement policies and measures to take account of developments in this sector in particular in the digital environment.

Market Access

Trade in Goods

10. Duties and other requirements regarding imports and exports

The goal will be to eliminate all duties on bilateral trade, with the shared objective of achieving a substantial elimination of tariffs upon entry into force and a phasing out of all but the most sensitive tariffs in a short time frame. In the course of negotiations, both parties will consider options for the treatment of the most sensitive products, including tariff rate quotas. All customs duties, taxes, fees, or charges on exports and quantitative restrictions or authorisation requirements on exports to the other Party which are not justified by exceptions under the Agreement shall be abolished upon the application of the Agreement. The negotiations shall address concerns regarding remaining obstacles to trade in dual use items that affect the integrity of the single market.

11. Rules of origin

Negotiations will aim at reconciling the EU and US approaches to rules of origin in a manner that facilitates trade between the parties and that takes into account the rules of origin of the EU and the interests of the EU producers. They should also aim at ensuring that administrative errors are dealt with appropriately. Following

presentation of an analysis by the Commission of its possible economic consequences, and in prior consultation with the Trade Policy Committee, the scope for cumulation with neighbouring countries that have concluded Free Trade Agreements (FTAs) with both the EU and the US will be considered.

12. General exceptions

The Agreement will include a general exception clause based on Articles XX and XXI GATT.

13. Anti-dumping and countervailing measures

The Agreement should include a clause on anti-dumping and countervailing measures, acknowledging that any of the Parties may take appropriate measures against dumping and/or countervailing subsidies in accordance with the WTO Agreement on Implementation of Article VI of the General agreement on tariffs and Trade 1994 or the WTO Agreement on Subsidies and Countervailing Measures. The Agreement should establish a regular dialogue on trade defence matters

14. Safeguards

To maximise liberalisation commitments, the Agreement should contain a bilateral safeguard clause by which either Party may remove, in part or in full, preferences where a rise in imports of a product from the other Party is causing or threatening to cause serious injury to its domestic industry.

Trade in Services and Establishment

15. 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 regards to licensing and qualification requirements and procedures, as well as to enhance the regulatory disciplines included in current US and EU FTAs.

16. 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.

17. The Agreement should develop a framework to facilitate mutual recognition of professional qualifications.

18. The agreement will not preclude the enforcement of exceptions on the supply of services justifiable under the relevant WTO rules (Articles XIV and XIVbis GATS). 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.

19. The high quality of the EU's public utilities should be preserved in accordance with the TFEU and in particular Protocol n°26 on Services of general Interest, and taking into account the EU's commitment in this area, including GATS.

20. Services supplied in the exercise of governmental authority as defined by Article I.3 of GATS shall be excluded from these negotiations.

21. Audiovisual services will not be covered by this chapter.

Investment Protection

22. The aim of negotiations on investment will be to negotiate investment liberalisation and protection provisions including areas of mixed competence, such as portfolio investment, property and expropriation aspects, on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date. 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.

23. As regards investment protection, the objective of the respective provisions of the Agreement should:

- Provide for the highest possible level of legal protection and certainty for European investors in the US,
- Provide for the promotion of the European standards of protection which should increase Europe's attractiveness as a destination for foreign investment,
- Provide for a level playing field for investors in the US and in the EU,
- Build upon the Member States' experience and best practice regarding their bilateral investment agreements with third countries,
- And should be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, stability of the financial system, public health and safety in a non-discriminatory manner. The Agreement should respect the policies of the EU and its member States for the promotion and protection of cultural diversity.

Scope: the investment protection chapter of the Agreement should cover a broad range of investors and their investments, intellectual property rights included, whether the investment is made before or after the entry into force of the Agreement.

Standards of treatment: the negotiations should aim to include in particular, but not exclusively, the following standards of treatment and rules:

a. fair and equitable treatment, including a prohibition of unreasonable, arbitrary or discriminatory measures,

b. national treatment,

c. most-favoured nation treatment,

d. protection against direct and indirect expropriation, including the right to prompt adequate and effective compensation,

e. full protection and security of investors and investments,

f. other effective protection provisions, such as an "umbrella clause",

g. free transfer of funds of capital and payments by investors,

h. rules concerning subrogation

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 trhough 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.

Relationship with other parts of the Agreement: investment protection provisions should not be linked to the market access commitments on investment taken elsewhere in the agreement. ASDS shall not apply to market access provisions. These market access commitments may include, when necessary, rules prohibiting performance requirements.

All sub-central authorities and entities (such as States or municipalities) should effectively comply with the investment protection chapter of this Agreement.

Public procurement

24. The agreement shall aim for the maximum ambition, complementing the outcome of the negotiations of the revised Government procurement Agreement in terms of coverage (procurement entities, sectors, thresholds and services contracts, including in particular public construction). The Agreement will aim at enhanced mutual access to public procurement markets at all administrative levels (national, regional and local), and in the fields of public utilities, covering relevant operations of undertakings operating in this field and ensuring treatment no less favourable than that accorded to locally established suppliers. The Agreement shall also include rules and disciplines to address barriers having a negative impact on each others' 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.

Regulatory Issues and Non-Tariff barriers

25. The Agreement will aim at removing unnecessary obstacles 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. 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. To this end, the Agreement shall include provisions related to the following matters:

- *Sanitary and phytosanitary measures (SPS)*

On SPS measures, the negotiations shall follow the negotiating directives adopted by the Council on 20 February 1995 (Council Doc 4976/95). The Parties shall establish provisions that build upon the WTO SPS Agreement and on the provisions of the existing veterinary agreement, introduce disciplines as regards plant health and set up a bilateral forum for improved dialogue and cooperation on SPS issues. In areas covered

by the existing EU-US veterinary agreement, the relevant provisions should be considered as the starting point of the negotiations. 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 rights 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, 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 with will, *inter alia*, discuss equivalence on animal welfare between the Parties.

The Agreement should seek to achieve full transparency as regards sanitary and phytosanitary measures applicable to trade, in particular establish provisions for the recognition of equivalence, implementation of pre-listing of food-producing establishments, preventing implementation of pre-clearance, recognition of disease-free and pest-free health status of the Parties and the principle of regionalisation for both animal diseases and plant pests.

- *Technical regulations, standards and conformity assessment procedures*

Building on the Parties' commitments under the WTO Agreement on Technical Barriers to Trade (TBT), the Parties shall also establish provisions that build on and complement such provisions, with a view to facilitating access to each other's markets, and establish a mechanism for improved dialogue and cooperation for addressing bilateral TBT issues. The objectives of these provisions would be to yield greater openness, transparency and convergence in regulatory approaches and requirements and related standards-development processes, also with a view to adopting relevant international standards, as well as, *inter alia*, to reduce redundant and burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardisation issues globally. Consideration should also be given to provisions on labelling and means of avoiding misleading information for consumers.

- *Regulatory coherence*

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.

- *Sectoral provisions*

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 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.

26. 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.

27. The Agreement shall be binding on all regulators and other competent authorities of both Parties.

Rules

Intellectual Property Rights

28. The Agreement shall cover issues related to intellectual property rights. The Agreement will reflect the high value placed by both Parties on intellectual property protection and build on the existing EU-US dialogue in this sphere.

29. Negotiations should, in particular, address areas most relevant for fostering the exchange of goods and services with IP content, with a view to supporting innovation. The negotiations shall aim to provide for enhanced protection and recognition of EU Geographical Indications through the Agreement, in a manner that complements and builds upon the TRIPS also addressing the relationship with their prior use on the US market with the aim of solving existing conflicts in a satisfactory manner. After prior consultation with the Trade Policy Committee, additional IPR issues shall be considered in the negotiations.

30. The Agreement shall not include provisions on criminal sanctions

Trade and sustainable development

31. The Agreement will include commitments by both Parties in terms of the labour and environmental aspects of trade and sustainable development. Consideration will be given to measures to facilitate and promote trade in environmentally friendly and low carbon goods, energy and resource-efficient goods, services and technologies, including through green public procurement and to support informed purchasing choices by consumers. The Agreement will also include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the labour and environmental domain as a necessary condition for sustainable development.

32. 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 implantation of these provisions through a mechanism including civil society participation, as well as one to address any disputes.

33. The economic, social and environmental impacts will be examined by means of an independent Sustainability Impact Assessment (SIA), involving civil society, and will be undertaken in parallel with the negotiations and will be finalised ahead of the initialling of the Agreement. The SIA will aim to clarify the likely effects of the Agreement on sustainable development, as well as to propose measures (in trade and non-trade areas) to maximise the benefits of the Agreement and to prevent or minimise potential negative impacts. The Commission shall ensure that the SIA is conducted in regular dialogue with all relevant stakeholders from civil society. In the course of negotiations, the Commission shall also maintain a regular dialogue with all relevant stakeholders from civil society.

Customs and Trade facilitation

34. The Agreement shall include provisions to facilitate trade between the Parties, while ensuring effective controls and anti-fraud measures. To this end it shall include *inter alia* commitments on rules, requirements, formalities and procedures of the Parties related to imports export and transit, at a high level of ambition, going beyond commitments negotiated in the WTO. These provisions should promote modernisation and simplification of rules and procedures, standard documentation, transparency, mutual recognition of standards and cooperation between customs authorities.

Sectoral Trade Agreements

35. The Agreement should, where appropriate, review, build on and complement existing sectoral trade agreements, such as the Agreement between the European Community and the United States on trade in wine, in particular with regard to negotiations of terms under Annex II of the 2005 Agreement, the Agreement on Mutual Recognition between the European Community and the United States and the Agreement between the European Community and the United States of America on customs cooperation and mutual administrative assistance in customs matters.

Trade and Competition

36. The Agreement should aim at including provisions on competition policy, including provisions on antitrust, mergers and state aids. Furthermore, the Agreement should address state monopolies, state owned enterprises and enterprises entrusted with special or exclusive rights.

Trade related energy and raw materials

37. The agreement will include provisions addressing trade and investment related aspects of energy and raw materials. Negotiations should aim at ensuring an open, transparent and predictable business environment in energy matters and at ensuring an unrestricted and sustainable access to raw mterials.

Small and Medium-Sized Enterprises

38. The Agreement will include provisions addressing trade-related aspects of small and medium-sized enterprises

Capital Movement and Payments

39. The Agreement will include provisions on the full liberalisation of current payments and capital movements, and include a standstill clause. It will entail carve out provisions (e.g. in case of serious difficulties for monetary and exchange rate policy, or for prudential supervision and taxation), which will be in accordance with the provisions of the EU Treaty on the free movement of capital. Negotiations shall take into account the sensitivities attached to the liberalisation of capital movements not linked to direct investment.

Transparency

40. The Agreement will address issues of transparency. To this end, it will include provisions on:

- The commitment to consult stakeholders in advance of the introduction of measures with an impact on trade and investment;

- The publication of general rules and measures with an impact on international trade and investment in goods and services;

- Transparency as regards the application of measures having an impact on international trade and investment in goods and services;

41. Nothing in this Agreement should affect EU or Member State laws regarding public access to official documents.

Other Rules Areas

42. Following analysis by the Commission and in prior consultation with the Trade Policy Committee and in accordance with the EU Treaties, the Agreement may include provisions regarding other areas related to the trade and economic relationship where, in the course of negotiations, mutual interest was expressed in doing so.

Institutional Framework and Final provisions

43. Institutional framework

The Agreement will set up an institutional structure to ensure an effective follow up of the commitments under the Agreement, as well as to promote the progressive achievement of compatibility of regulatory regimes.

44. The Commission will, in a spirit of transparency, regularly report to the Trade Policy Committee on the course of the negotiations. The Commission, according to the Treaties, may make recommendations to the Council on possible additional negotiating directives on any issue, with the same procedures for adoption, including voting rules, as for this mandate.

45. Dispute settlement

The Agreement will include an appropriate dispute settlement mechanism, which will ensure that the Parties observe mutually agreed rules.

The Agreement should include provisions for expedient problem-solving such as a flexible mediation mechanism. This mechanism will pay special attention to facilitating the resolution of differences in NTB issues.

46. Authentic languages

The Agreement which shall be equally authentic in all official EU languages, shall include a language clause.

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ISSN 2256-9944

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