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The Transatlantic Trade and Investment Partnership: Controversies and Barriers Faced in the Ongoing Trade Negotiations

CARTER GANTZ*

I. Introduction

A. WHAT IS THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP?

In the summer of 2013, the United States (U.S.) and the European Union (EU) began negotiations for the Transatlantic Trade and Investment Partnership (TTIP), a proposed free trade agreement (FTA) between the two economies.¹ If signed into law and ratified by all parties, the TTIP would impact numerous American and European industries (including their pharmaceutical, agricultural, and financial industries, to name a few) in potentially far-reaching and important ways.² But in order to become law, the TTIP parties will first have to overcome several practical challenges and barriers to trade. While advocates for the finalization and implementation of the TTIP contend that there are many benefits to its completion, the proposed trade agreement is not without criticism and controversy.³ Many of these trade barriers and criticisms revolve around differences in the parties' agricultural sectors. This article examines the current state of agricultural trade between the U.S. and the EU, barriers faced in current TTIP negotiations, and the potential implications of a ratified TTIP on the parties' respective agricultural sectors.

The TTIP aims to make the markets on both sides of the Atlantic more accessible to each other by removing several barriers that limit trade between the two parties.⁴ Current trade barriers include differences in tariff rates and also non-tariff measures (NTMs) that often involve regulatory

* J.D. Candidate 2017, Southern Methodist University Dedman School of Law. I would like to thank my family and friends for their love and support.

1. *TTIP: What is at Stake for EU Agriculture?*, FARM EUROPE (June 9, 2015), <http://www.farm-europe.eu/travaux/ttip-what-is-at-stake-for-eu-agriculture/>.

2. Leala Padmanabhan, *TTIP: The EU-US Trade Deal Explained*, BBC (Dec. 18, 2014), <http://www.bbc.com/news/uk-politics-30493297>.

3. *TTIP: What is at Stake for EU Agriculture?*, *supra* note 1.

4. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, DIRECTORATE-GENERAL FOR INTERNAL POLICIES; POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES, 11 (2014), http://www.europarl.europa.eu/RegData/etudes/STUD/2014/514007/AGRI_IPOL_STU%282014%29514007_EN.pdf.

differences.⁵ For instance, many products are made more expensive than necessary because they must undergo double testing from both the U.S. and the EU, thereby increasing costs and slowing the process of trade.⁶ Thus, standardizing certain regulations between the two parties to the agreement would create less need for double testing, which would speed up the trade process and make it cheaper, resulting in an increased amount of overall products traded. This is easier said than done, however, as the differences in the parties' agricultural regulations are at times vast.

B. THE CURRENT STATE OF TTIP NEGOTIATIONS

As previously mentioned, the initial TTIP negotiations between the U.S. and the EU took place in the summer of 2013.⁷ To become law, the EU will have to present the deal to the European Council and the European Parliament, both of which must agree to the terms of the deal.⁸ The trade agreement will also require separate ratification from all twenty-seven remaining member states of the EU, as well as U.S. Congress.⁹ Many negotiating rounds have taken place since the summer of 2013, with the fourteenth round having concluded on July 15th, 2016.¹⁰ However, the last few negotiating rounds have had lengthy interim periods, suggesting stalled negotiations and a lack of progress.¹¹ The deal had an original deadline of December 2015 for a draft text, which passed due to delays in the negotiations.¹² The EU's chief negotiator, Garcia Bercero, cited the 2016 U.S. Presidential election cycle as a primary reason as to why the "conclusion of the agreement . . . [required] more time than 2015," as the

5. *The EU-US Transatlantic Trade and Investment Partnership*, EUROPEAN COMMISSION (Jan. 10, 2015), http://ec.europa.eu/ireland/key-eu-policy-areas/transatlantic-trade-investment-partnership/index_en.htm.

6. *Id.*

7. *Id.*

8. Padmanabhan, *supra* note 2.

9. There were twenty-eight members of the EU, but the UK recently left the EU following a people's referendum. *Id.*; Jennifer Rankin, Jon Henley, Philip Oltermann and Helena Smith, *EU leaders call for UK to leave as soon as possible*, *The Guardian* (June 24, 2016), <http://www.theguardian.com/politics/2016/jun/24/europe-plunged-crisis-britain-votes-leave-eu-european-union>.

10. *Conclusion of the 14th TTIP Negotiation Round 15 July 2016: Statement by Ignacio Garcia Bercero EU Chief Negotiator for TTIP*, EUROPEAN COMMISSION (July 15, 2016), http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154811.pdf.

11. The thirteenth round of negotiations took place in April of 2016, and the twelfth round was in February. *Report of the 13th Round of Negotiations for the Transatlantic Trade and Investment Partnership: (New York, 25-29 April 2016)*, EUROPEAN COMMISSION (May 24, 2016), http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154581.pdf; *The Twelfth Round of Negotiations for the Transatlantic Trade and Investment Partnership (TTIP): Public Report – March 2016*, EUROPEAN COMMISSION (Mar. 23, 2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154391.pdf; Patrick Wintour, *US seeking bilateral trade deal with UK to press EU on TTIP*, *THE GUARDIAN* (July 20, 2016), <https://www.theguardian.com/us-news/2016/jul/20/us-seeking-bilateral-trade-deal-with-uk-to-press-eu-on-ttip>.

12. *Id.*

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busy election cycle has hindered U.S. lawmakers' abilities to focus on the deal.¹³ Tim Bennett, director general and chief executive officer of the Transatlantic Business Council, has said that finalizing TTIP negotiations by the end of 2016 is possible.¹⁴ TTIP advocates favor finishing the deal by the end of 2016, as negotiations are unlikely to pick back up quickly following the 2016 and 2017 elections being held in the U.S., France, and Germany.¹⁵ TTIP faces particularly strong opposition in the EU states of France and Germany, and certain U.S. Presidential candidates have voiced strong opposition to the United States' past and pending trade deals.¹⁶ This growing anti-trade sentiment from politicians and the general public alike runs directly counter to traditional U.S. trade positions. Thus, depending on the outcome of the U.S., German, and French elections, it could be very difficult to effectively continue TTIP negotiations if they are not concluded by the end of 2016.

**C. AGRICULTURAL EFFECTS OF THE NORTH AMERICAN FREE
TRADE AGREEMENT**

In 1994, the U.S., Canada, and Mexico entered into an FTA named the North American Free Trade Agreement (NAFTA).¹⁷ In the agricultural sector, NAFTA removed tariffs on goods, but did not remove subsidies.¹⁸ These tariff removals had the biggest effect on Mexican agricultural farmers, who suffered a 19 percent drop in employment.¹⁹ From 1991 to 2007, two million Mexican farmers lost their jobs.²⁰ This was mostly due to the higher average productivity levels in the U.S. agricultural sector coupled with large subsidies for U.S. production.²¹ While NAFTA proponents knew that Mexican farmers would not be able to compete, they predicted that displaced Mexican farmers would gain new employment in higher productivity agricultural and industrial jobs.²² But this did not occur, and instead resulted

13. *Id.*

14. The Transatlantic Business Council is a "cross-sectoral business association representing global companies headquartered in the U.S. and EU." *History and Mission*, TRANS-ATLANTIC BUSINESS COUNCIL, <http://www.transatlanticbusiness.org/about-us/history-mission/>; Rosella Brevetti, *U.S., EU look to Conclude TTIP talks in 2016*, BLOOMBERG BNA (Jan. 8, 2016), <http://www.bna.com/us-eu-look-n57982065951/>.

15. *Id.*

16. *Full transcript: Donald Trump's jobs plan speech*, POLITICO (June 28, 2016), <http://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>; Wintour, *supra* note 11.

17. Mark Weisbrot, Stephan Lefebvre, & Joseph Sammut, *Did NAFTA Help Mexico? An Assessment After 20 Years*, CENTER FOR ECONOMIC AND POLICY RESEARCH, 4 (Feb. 2014), <http://www.cepr.net/documents/nafta-20-years-2014-02.pdf>.

18. *Id.* at 13.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

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in a mass emigration of Mexican farmers to the U.S.²³ Despite these negative consequences for Mexican farmers, NAFTA's implementation has ultimately resulted in increased agricultural trade between the three countries, as the elimination of tariffs and other trade barriers has enabled both producers and consumers to appropriately respond to changing economic conditions.²⁴

D. THE STATE OF AGRICULTURAL TRADE BETWEEN THE U.S. AND EU, AND CHALLENGES FACING THE TTIP NEGOTIATIONS

In 2012, the EU had a surplus of about six billion euros in agricultural trade with the U.S., in stark contrast to an overall deficit in agricultural trade with the U.S. in the 1990s.²⁵ Only 8 percent of the EU's agricultural imports originated from the U.S. in 2012, compared to 21 percent in 1992.²⁶ This drastic change in trading behavior between the two economies came as a result of the new, large trading partners for both the U.S. and the EU, not from altered trade policies.²⁷

In 2010, U.S. tariffs on imported EU agricultural goods averaged at 6.6 percent, compared to an overall 2.2 percent tariff average.²⁸ EU tariffs on imported U.S. agricultural goods averaged at 12.8 percent, compared to an overall 3.3 percent tariff average.²⁹ When the agricultural tariffs for both parties are so much higher than the overall tariff averages between them, this demonstrates a tariff barrier to trade in the U.S. and EU agricultural sectors. If these tariffs were lowered, that could open up the markets to more trade. But this is not the only hurdle to overcome, as several other NTMs pose legitimate threats to the ability to increase trade between the parties and to finalize and implement the TTIP.³⁰ These NTMs include both sanitary and phytosanitary (SPS) measures and the role of geographic indicators.³¹ In addition, the proposed inclusion of an investor-state dispute settlement (ISDS) mechanism into the TTIP is subject to much controversy, and could

23. Mark Weisbrot, Stephan Lefebvre, & Joseph Sammut, *supra* note 17, at 14.

24. Steven Zahniser, *NAFTA's Impact On U.S. Agricultural Trade: An Overview*, UNITED STATES DEPARTMENT OF AGRICULTURE ECONOMIC RESEARCH SERVICE, 10 (July 2002), http://www.ers.usda.gov/media/888749/wrs0201c_002.pdf.

25. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 10, at 14.

26. *Id.* at 15.

27. *Id.*

28. *Id.* at 22.

29. *Id.*

30. *Id.*

31. *Id.* at 53; see also Michael Scaturro, *EU Agriculture Groups Advocate Food Standards*, BLOOMBERG BNA (Sept. 11, 2015), http://news.bna.com/tldn/TDLNWB/split_display.adp?fedfid=75475052&vname=itdbulallissues&wsn=499899000&searchid=26028614&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0.

have pronounced effects on not only the U.S. and EU's agricultural sectors, but all sectors involved in the trade agreement.³²

II. Barriers to Trade in the TTIP: Non-Tariff Measures

A. SANITARY AND PHYTOSANITARY MEASURES

Sanitary and phytosanitary measures are cautionary measures taken by governments to protect humans, animals, and plants from diseases, pests, contaminants, and things of the like.³³ The measures apply to production procedures for domestic food as well as domestic plant and animal diseases.³⁴ The World Trade Organization (WTO)—of which both the U.S. and the EU are members—entered into force the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) in 1995 in an effort to standardize the process through which countries make their rules for food safety as well as animal and plant health.³⁵ The agreement allows for countries to set their own health and safety standards, but their standards must be based on science and necessary to plant and animal health.³⁶ Because the function of SPS measures inherently works to restrict trade, the SPS Agreement was purposefully designed to prevent the use of SPS measures for protectionist purposes.³⁷ Thus, the desired effect of requiring SPS measures to have a basis in science was to prevent countries from creating unnecessary barriers to trade while still maintaining a sovereign government's right to enact measures it deems appropriate to provide for its populace's safety.³⁸

As it relates to SPS measures, the EU is said to follow the “precautionary principle,” while the U.S. is said to apply a “science-based approach.”³⁹ The EU's position is that, where there is an absence of clear understanding as to the health-related effects of a certain process or procedure, it is better to exercise caution than to implement the process or procedure.⁴⁰ Thus, companies within the EU have the burden of proving that a certain technique is safe.⁴¹ In contrast, the U.S. requires scientific evidence to prove that a technique is unsafe. Thus, the U.S. commonly requires that the

32. Elvire Fabry & Giorgio Garbasso, “ISDS” in the TTIP: *The Devil is in the Details*, NOTRE EUROPE – JACQUES DELORS INSTITUTE, 1 (Jan. 16, 2015), <http://www.institutdelors.eu/media/ttipisds-fabrygarbasso-nejdi-jan15.pdf?pdf=ok>.

33. *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORGANIZATION (May 1998), https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *TTIP: What is at Stake for EU Agriculture?*, *supra* note 1.

40. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 63.

41. *Id.*

government prove that a technique is unsafe in order to prevent a private company from implementing it.⁴²

The differences in SPS measures between the U.S. and the EU comprise several of the barriers to trade that must be overcome in the TTIP negotiations. For instance, while the use and sale of genetically modified organisms (GMO) is commonplace in the U.S., the EU's approval for the sale of GMOs is very limited.⁴³ Similarly, the use of growth hormones in beef, such as recombinant bovine growth hormone (rBST), is the industry norm in the U.S., while the use of such hormones in animals (as well as the importation of meat treated with such hormones) is banned in the EU.⁴⁴ American fears of bovine spongiform encephalopathy (BSE, also known as "mad-cow disease") have also proven to impede agricultural trade, as the U.S. remains wary of the reliability of EU procedures to test for the disease.⁴⁵

1. *The Role of GMOs*

Genetically modified organisms are organisms whose genetics have been altered in a non-naturally occurring way, such as by the introduction of genes from different organisms.⁴⁶ In terms of food production, the technique is largely used in order to simultaneously increase yield production and lower production costs (as a result of increased weed control and lower labor costs).⁴⁷ The technique is controversial, however, as it raises both health and competitive advantage concerns.⁴⁸

Following the "science-based approach," the U.S. argues that the use of GMOs has been proven safe, and that their exclusion from the EU market is based on irrational consumer fears.⁴⁹ The health concerns over the use of GMOs appear to be rooted in the cultural differences between what American and European consumers are concerned about in terms of food safety.⁵⁰ While the main concern of American consumers is bacterial contamination, European consumers are more concerned with the unknown effects of GMOs, arguing that U.S. assessments of their effects are incomplete, misguided, and ignore unsettling concerns such as the increase in pesticide-resistant "superweeds" that have developed as a result of GMO use.⁵¹ The differences in public opinion over the proper use of GMOs has

42. *Id.*

43. *Id.* at 59.

44. *Id.* at 59-60.

45. *Id.* at 51.

46. *Food, Genetically modified*, WORLD HEALTH ORGANIZATION (2015), http://www.who.int/topics/food_genetically_modified/en/.

47. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 59.

48. *Id.* at 63-64.

49. *Id.* at 63.

50. *Id.*

51. *Id.*

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affected the trade of products containing GMOs from the U.S. to the EU, but some EU officials argue that European consumers are irrational in their fear that the TTIP will flood a GMO-free market with tainted products, because the EU annually imports sixty kilograms of GMO feed per person.⁵² European consumers may have incorrect notions as to the amount of GMOs that they already consume, and thus needlessly create barriers to trade as their EU representatives are forced to cater to their concerns. Despite this, the European Commission has repeatedly assured its populace that the EU's high food safety standards will not be weakened by the TTIP and that no EU state will be forced to import GMOs that have not already been approved by EU regulators.⁵³

Perhaps a more tangible concern regarding GMOs in the TTIP context is that EU farmers fear that their inability to use GMOs will put U.S. farmers at a competitive advantage.⁵⁴ While the EU's official policy technically supports the co-production of GMO and ordinary crops, EU farmers face strict regulations that effectively prevent them from producing GMO crops unless large areas of uncultivated land surround them.⁵⁵ As previously mentioned, a benefit of GMO production is lower production costs.⁵⁶ Thus, if liberalized trade lowered EU tariffs on imported GMO-products from the U.S., EU farmers—who are effectively restricted from using such production techniques—would be adversely affected, as local merchants would opt for the cheaper options.⁵⁷

Yet another problem surrounding the GMO issue is the EU's insistence on labeling GMO products it imports from the U.S.⁵⁸ The U.S. has historically resisted the labeling of GMO products, both domestically and in its trade agreements.⁵⁹ But the U.S. has recently given ground on the issue in regards to its exported GMO soybeans.⁶⁰ In the case of the U.S. soybean industry, they have indicated that they are more willing to allow for EU GMO labeling provided that they put labels on soybeans that do not contain GMOs, rather than labeling soybeans as containing them.⁶¹ While regulatory convergence between the U.S. and the EU has been achieved in this respect, it appears that convergence is less likely with regard to

52. Michael Scaturro, *supra* note 31.

53. *The EU-US Transatlantic Trade and Investment Partnership*, *supra* note 5.

54. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 59.

55. Roxanne Palmer, *EU GMO Policy Paradox: Farmers Can't Plant GM Corn, but it can be Imported*, *INTERNATIONAL BUSINESS TIMES* (Apr. 25, 2013, 3:40), <http://www.ibtimes.com/eu-gmo-policy-paradox-farmers-cant-plant-gm-corn-it-can-be-imported-1217873>.

56. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 59.

57. *Id.* at 66.

58. *Id.* at 64.

59. *Id.*

60. *Id.*

61. *Id.*

restrictions being lifted on EU farmers and the appeasement of a GMO-wary European populace.⁶²

2. *The Role of Growth-Hormones and Antibiotics*

Currently, the U.S. is allowed to export 46000 tons of hormone and antibiotic-free beef to the EU.⁶³ But the U.S. has been reluctant in supplying this type of beef because of high EU tariffs on beef that render the production unprofitable.⁶⁴ One of the largest NTMs preventing increased trade between the U.S. and the EU is the EU's outright ban on hormone-treated beef. Most U.S. beef production involves the use of injected hormones, such as rBST, or feed additives, such as ractopamine.⁶⁵ The EU, on the other hand, permits neither the use of these procedures by its own producers nor the importation of any beef subjected to such treatments (the EU does, however, allow the importation of dairy products that have been subjected to rBST treatments).⁶⁶ U.S. beef producers have long lamented over the regulatory barriers that deny them access to the EU market and once again condemn the EU regulations as lacking a scientific basis, arguing that no evidence has been provided that indicates negative impacts on consumers from the use and consumption of hormone-treated beef.⁶⁷

Should regulatory convergence occur on this issue in the TTIP negotiations, resulting in a lifted EU ban on the importation of hormone-treated beef while still preventing local producers from accessing the market, EU beef producers fear that this too would provide a competitive cost advantage for their U.S. counterparts.⁶⁸ The EU has not waived on these bans, however, as concerns for human and animal safety and a fear of a decline in beef and dairy sales have trumped all other considerations.⁶⁹ As meat industry officials from the EU have noted, hormone and antibiotic growth issues "aren't negotiable at all" and "[t]he expectation by civil society is too high . . . there's no room at all for changing this position through TTIP."⁷⁰

62. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 64, 66.

63. Michael Scaturro, *supra* note 31.

64. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 55.

65. *Id.*

66. *Id.* at 59-60.

67. *Id.* at 59.

68. *Id.* at 60.

69. *Id.* at 59-60.

70. Michael Scaturro, *supra* note 31.

3. *U.S. Concerns Regarding Bovine Spongiform Encephalopathy (BSE)*

As previously mentioned, bacterial contamination is the primary concern of U.S. consumers in terms of food safety.⁷¹ As a result, fears of BSE-related risks have curbed the importation of EU beef and developed a barrier to agricultural trade.⁷² EU authorities have requested higher importation of EU beef on the part of the U.S. for a long time, and as a good-faith gesture in the TTIP negotiations, the U.S. recently allowed the importation of beef from countries that the World Organization for Animal Health (OIE) determined pose a “negligible” risk of BSE.⁷³ But there are still significant and costly barriers for the EU countries who have not been given this “negligible” risk status to overcome if they want to export beef to the U.S., as the U.S. requires that it determine that the beef inspection systems of any country that wants to export beef to the U.S. provides an “equivalent level of protection” as U.S. inspection systems in terms of human health.⁷⁴

B. GEOGRAPHIC INDICATORS

The use (or non-use) of geographic indicators is yet another ongoing NTM sticking point in the TTIP negotiations. Geographic indicators are used simply to identify a specific product as originating from a specific area of the world.⁷⁵ For example, advocates in the EU dairy industry support the inclusion of geographic indicator provisions in the TTIP that prevent U.S. production companies from labeling foods as “parmesan” or “feta,” as those cheeses must be produced in their respective regions of Italy and Greece in order to properly receive those labels.⁷⁶ Similarly, the Idaho potato industry favors the inclusion of geographic indicator provisions that would prevent European potato producers from using their Idaho name brand.⁷⁷ Even if provisions are included in the TTIP that protect certain name brands, it still does not guarantee compliance by the party subject to the restriction.⁷⁸ For example, even though past agreements between the U.S. and the EU contained geographic indicator provisions that protect certain European wine names, the U.S. has continued to label domestically produced wines with those European names, contending that the protected wine names are “semi-generic.”⁷⁹

71. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 63.

72. *Id.* at 51.

73. *Id.*

74. *Id.*

75. Sean Ellis, *U.S-EU trade agreement could benefit agriculture*, CAPITAL PRESS (Oct. 29, 2014, 10:12 AM), http://www.capitalpress.com/Nation_World/Nation/20141029/us-eu-trade-agreement-could-benefit-agriculture.

76. *Id.*

77. *Id.*

78. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 53.

79. *Id.*

III. Tariff Barriers to Agricultural Trade in the TTIP

In terms of overall transatlantic trade, tariff barriers have been significantly reduced over the last several decades.⁸⁰ However, as hinted at *supra*, tariffs on transatlantic agricultural trade remain well above the overall average.⁸¹ In 2010, the highest average tariffs on agricultural EU exports were for tobacco (21.8 percent), dairy (20.2 percent), and sugar (18.7 percent).⁸² The highest average tariffs from the EU on U.S. exports were much higher than in the U.S., with meat at 45.1 percent, dairy at 42 percent, and sugar at 24.3 percent.⁸³ Clearly, these high tariffs (particularly those from the EU) are designed to discourage foreign trade in a particular commodity and encourage domestic business transactions and the sale of local goods, which is counter to the aims of the TTIP.⁸⁴ But while tariffs remain high in some agricultural sectors, it is important to note the overall trends. On the U.S. side, tariffs on dairy products fell from 35.1 percent to 20.2 percent from 2004 to 2010, and sugar tariffs fell from 29.1 percent to 18.7 percent.⁸⁵ In the EU, meat tariffs fell from 58.1 percent to 45.1 percent, and sugar tariffs fell from 29 percent to 24.3 percent.⁸⁶ These statistics can be taken as positive signs that, while there may be a long way to go in terms of tariff barriers in the TTIP negotiations, the barriers are at least trending in the right direction.

IV. Investor-State Dispute Settlement Mechanisms

The TTIP's inclusion of an Investor-State Dispute Settlement (ISDS) mechanism into its provisions is one of the more controversial issues surrounding the emerging trade deal.⁸⁷ This mechanism allows private companies to make direct claims against a state for perceived unfair treatment by the state's government.⁸⁸ The alleged unfair treatment often takes the form of discrimination (the state offers superior treatment to national investors or other foreign investors) or prohibitive regulations that impede the foreign investors' profits and ability to efficiently operate their business in the country.⁸⁹ These claims against national governments are submitted to an arbitral tribunal rather than a national court, as the goal is to

80. *Id.* at 21.

81. *Id.* at 22.

82. *Id.* at 21.

83. *Id.*

84. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 11.

85. *Id.* at 21.

86. *Id.* at 22.

87. *The EU-US Transatlantic Trade and Investment Partnership*, *supra* note 5.

88. Padmanabhan, *supra* note 2.

89. Elvire Fabry & Giorgio Garbasso, *supra* note 32, at 4.

provide a neutral, depoliticized form of dispute settlement with a predictable framework that guarantees the preservation of all concerned parties' rights.⁹⁰

The inclusion of an ISDS mechanism is less of a trade barrier between the U.S. and the EU in the TTIP negotiations than it is an issue of heavy opposition by national populaces.⁹¹ Critics claim that these mechanisms undermine the functions of a democracy and the ability of a sovereign national government to effectively legislate on behalf of its own citizens.⁹² For example, if a country implemented laws making it difficult for foreign tobacco companies to enter their market in an effort to curb the smoking habits of its populace, those foreign companies could potentially sue the national government in private arbitration if an FTA had provided for foreign trade in that industry.⁹³ In terms of how these mechanisms could affect the EU's agricultural sector as a result of TTIP implementation, the European populace may harbor fears that U.S. agricultural companies could sue and prevail against their governments for not allowing the importation of GMO foods.⁹⁴ For instance, Monsanto (a U.S. agricultural giant widely known for their GMO use) could potentially sue an EU nation if the TTIP provided for liberalized GMO trade between the U.S. and the EU and an EU nation implemented laws that prohibited the importation of GMO crops, thereby decreasing Monsanto's profits and their ability to conduct business in the nation.⁹⁵

Despite these concerns, statistics show that "the use of ISDS has become commonplace and is now a reality of the investment world."⁹⁶ While the EU has only ratified one treaty that contains an ISDS mechanism (and entered into two FTAs containing them that have yet to be ratified), the U.S. has signed ISDS agreements with fifty-seven countries.⁹⁷ Although critics claim that ISDS mechanisms undermine democracy, proponents argue that both investors and state economies benefit from the mechanisms as a result of their neutrality, swiftness, predictability, and enforceability.⁹⁸ Regardless, civil opposition to the TTIP's ISDS provision continues to grow.⁹⁹

V. Conclusion

The original December 2015 deadline for the TTIP came and went with no new binding free trade agreements between the U.S. and the EU. While negotiations have continued into 2016 (albeit sporadically), the fate of TTIP

90. *Id.* at 3.

91. Padmanabhan, *supra* note 2.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Commonly Asked Questions About the Food Safety of GMOs*, MONSANTO, <http://www.monsanto.com/newsviews/pages/food-safety.aspx>.

96. Elvire Fabry & Giorgio Garbasso, *supra* note 32, at 3.

97. *Id.* at 9.

98. *Id.* at 13.

99. Padmanabhan, *supra* note 2.

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appears precarious in light of heightened civil and governmental opposition, as well as the many tariff and non-tariff barriers that continue to prevent an agreement between the two parties. The EU is worried that an implemented TTIP will be prejudiced in favor of increased trade while sacrificing food safety, while the U.S. wants to ensure that it recognizes overall economic and societal gains from the trade deal.¹⁰⁰ In the aftermath of the British exit from the EU, U.S. lawmakers are trying to gain leverage over the reticent EU by quickly negotiating and finalizing a bilateral FTA with the UK.¹⁰¹ U.S. officials see this as a way of pressing the EU to speed up their TTIP negotiations with the U.S. and finalize the deal before a new President takes office in 2017.¹⁰² If the TTIP is ever finalized and implemented, it would likely result in increased agricultural and overall trade between the world's two largest economies.¹⁰³ The question remains, however, exactly how increased trade would affect the U.S. and EU economies, as well as how the affected civil populations would respond to the trade deal.

100. Manuel Perez-Rocha, *TTIP: Why the World Should Beware*, INSTITUTE FOR POLICY STUDIES, 42 (May 2015), <http://www.ips-dc.org/wp-content/uploads/2015/06/TTIP-BEWARE-june2015.pdf>.

101. Wintour, *supra* note 11.

102. It is also seen as a way to strengthen the U.S.-UK economic relationship in the aftermath of the British exit from the EU. *Id.*

103. Quantitative analysis suggests that a fully implemented and ambitious TTIP will increase EU agricultural exports to the U.S. by 60 percent and agricultural imports from the U.S. by 120 percent by the year 2025. *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, *supra* note 4, at 47.