



# EDUCATION AND TRADE UPDATE

April 2016

## 1. WTO

Since the launch of the Doha Development Agenda (DDA) in 2001 WTO members have not been able to reach agreement on concluding the DDA and as a result the relevance and future existence of the WTO has been questioned. Azevêdo, the WTO Director-General, has repeatedly warned of “paralysis” and “existential crisis” as many of the biggest members pursue their trade liberalisation efforts outside the WTO. The FTAs described below are a consequence of the stalemate at the WTO, which further weakens the relevance of the WTO. However there are minor exceptions to the stalemate at the WTO. One is the Bali Package, which was agreed upon during the ninth Ministerial Conference of December 2013. During the tenth Ministerial Conference of December 2015 an agreement was reached abolishing export subsidies for farm exports. However the aim of concluding the DDA was not reached, and on the contrary WTO Member acknowledged in the [Nairobi Declaration](#) that they are divided on the future of the DDA.

## 2. Comprehensive Economic and Trade Agreement (CETA)

The CETA (Comprehensive Economic and Trade Agreement) negotiations between Canada and the European Union were launched in May 2009 and a deal was concluded last October 2014. The signature of CETA is planned to take place during the EU-Canada Summit to take place in October in Brussels. The consolidated legally scrubbed [CETA text](#) has been published on EC website. The translation in to all EU languages is ongoing. The European Commission will submit CETA to the Council for approval in June/September and thereafter to the EP in autumn with a possible vote in early 2017. The Canadian government is promoting CETA, however it is much more open to meetings and consultations with unions than the previous government. The ratification process is a straight forward in Canada and expected to be very quick.

The CETA agreement is the template TTIP (Transatlantic Trade and Investment Partnership) negotiations and other free trade agreements that the European Union is seeking and therefore if CETA is ratified advocates for TTIP and other trade agreements will likely argue that these agreements are similar to CETA and that there no reason to worry. However, CETA includes a number of issues of great concern. CETA includes, among other things, the controversial ISDS (Investor-State Dispute Settlement) mechanism (however with a twist), the standstill and “ratchet” clause that locks-in existing levels of liberalisation, new restrictions on regulatory measures, and new rules on government procurement. Services are a major component in CETA and officials have commented that this part has taken considerable time to negotiate. The EU has made significant commitments in privately funded education services, even if the commitments vary slightly between member states because of specific exemptions taken. As a result, the EU and its member states are effectively opening the door to foreign for-profit education providers and are extending new rights to private investors that go beyond any existing trade commitments. A related problem of including privately funded education services into trade agreements originates from the mixed public and private characteristic of most education systems. Furthermore, there is not a single reference to any exception for public services or Services of General Interest from the scope of the agreement, only to governmental authority which is not adequate to protect public



services like education. Consequently, CETA threatens to lock-in and intensify the pressures of privatisation and commercialisation of education.

The EP adopted its [CETA recommendations](#) in 2011 where it calls for a State-to-State dispute settlement mechanism and the use of local judicial remedies to address investment disputes given the developed legal systems of Canada and the EU. A [recent study](#) comparing the CETA agreement with the EP's TTIP recommendations demonstrates that CETA deviates significantly from the EP's TTIP recommendations.

### 3. Trade in Services Agreement (TiSA)

The negotiations on the Trade in Services Agreement (TiSA) were proposed by the US and Australia in early 2012. TiSA negotiations arose in response to the ongoing impasse in WTO trade talks, including talks to expand the General Agreement on Trade in Services (GATS). The participants call themselves the "Really Good Friends of Services" and are the strongest advocates of service liberalisation. The negotiations are drawing out, however according to reports from [Canada](#) and the [European Commission](#), during the 16<sup>th</sup> round of negotiations TiSA participants agreed on a revised work plan, which aims for agreement on key Annexes by July 2016 and agreement on the remaining texts by September 2016. Furthermore, two revisions of the services offers are foreseen for May and October 2016. The TiSA participants include the EU, Australia, Canada, Chile, Taiwan, Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, South Korea, Switzerland, Turkey and the US. Uruguay and Paraguay left the negotiations in 2015. In the case of Uruguay it was due to public opposition to the potential serious consequences of TiSA.

The negotiations are held in secret and details on the proposed TiSA are therefore very limited. However, following a number of TiSA leaks, the European Commission created a dedicated page on TiSA in an attempt to increase transparency. However, the fact remains that TiSA is one of the most secret trade negotiations. In the EU the [TiSA mandate](#) was only published roughly 2 years after its adoption. On the EC's dedicated TiSA page the EU's initial service offer (2013) is published, which includes significant commitments in privately-funded education services, even if the commitments vary slightly between member states because of specific exemptions taken. As a result, the EU and its member states are effectively opening the door to foreign for-profit education providers. It is worrying that the European Commission has requested Member States to reconsider and limits their reservations taken in CETA for TiSA (and TTIP) negotiations. In the EU's proposed core text provisions there is not a single reference to any exception for public services or Services of General Interest from the scope of the agreement. Furthermore, the limitation for publicly-funded education is of very general character and *not defined*<sup>1</sup>. EC says that the EU has followed the same approach to public services since GATS, however the limitation differs between the different agreements. In contrast to the TiSA text referred above, in CETA

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<sup>1</sup> It reads “*The EU reserves the right to adopt or maintain any measure with regard to publicly-funded education services (CPC 92) and with regard to privately funded other education services (CPC 929)*”.



the definition is more comprehensive<sup>2</sup>. Another problematic issue concerns the *EU's public utilities reservation*, which lacks a clear definition<sup>3</sup>.

The lack of clarity of the public utilities reservation put the education sector in a vulnerable situation because it is not included in any of examples listed in the public utilities reservation. Furthermore, from the EU-Singapore the *EU does not seem to consider education a public utility* as there is no footnote to the public utility clause in privately-funded education services, whereas this is the case for other public services including health and social services. Another point concerns the *linkage between education services and e-commerce*, which becomes increasing important with the developments around e-learning and electronic education materials.

The European Parliament adopted its [TiSA recommendations](#) on 3<sup>rd</sup> February 2016. The recommendations underlined the need for the exclusion of “current and future services of general interest and services of general economic interest from the scope of application of the agreement (including, but not limited to, water, health, social services, social security systems and education, waste management and public transport)”. The EP reiterated that the European Union, national and local authorities should retain the full right to introduce, adopt, maintain, or repeal any measures with regard to the commissioning, organisation, funding, and provision of public services. The EP also stated that this exclusion should be applied irrespective of how the public services are provided and funded. It also called on the European Commission to recognise the significant importance attached by European citizens to high-quality public services that contribute to social and territorial cohesion. The EP further demands for the introduction of an unequivocal ‘gold standard’ clause. This clause could be included in all trade agreements and would ensure that the public utilities clause applies to all modes of supply and to any services considered to be public services by European, national or regional authorities, in any sector and irrespective of the service's monopoly status. This would include education, which was not previous the case. With just a few votes, the recommendations reject the inclusion of standstill and ratchet clauses that would make it impossible to reverse past liberalisations and lead to ever-increasing levels of liberalisation. The EP calls for enough flexibility to bring services of general economic interest back into public control; and maintain the right of the EU and Member States to modify their level of liberalisation.

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<sup>2</sup> It reads “*The EU reserves the right to adopt or maintain any measure with regard to the **provision of all education services which receive public funding or State support in any form, and are therefore not considered to be privately funded.***”

*The EU, except CZ, NL, SE, SK, reserves the right to adopt or maintain any measure with respect to the **provision of privately funded other education services (CPC 929), which means other than those classified as being primary, secondary, higher and adult education services.***

*Where the provision of privately funded education services by a foreign provider is permitted, participation of private operators in the education system may be subject to concession allocated on a non-discriminatory basis.*”

<sup>3</sup> “*In all Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.*”

*Public utilities exists in sectors such as related scientific and technical consulting services, R&D services on social science and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. **Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical.***

*This reservation does not apply to telecommunications and to computer and related services.”*



#### 4. Transatlantic Trade and Investment Partnership (TTIP)

The Transatlantic Trade and Investment Partnership (TTIP) is a comprehensive trade and investment agreement being negotiated between the European Union and the United States. The talks are intended to reduce or eliminate barriers to trade in goods and services, guarantee investor rights, and promote regulatory cooperation. The TTIP negotiations were initiated in July 2013 and 12 rounds of negotiations have taken place since. The last round of negotiations took place in Brussels on 22-26 February and two new rounds are scheduled before the summer. The negotiations have drawn out and the parties announced "a fresh start" to the negotiations in December 2014. The official aim is to conclude the negotiations before President Obama leaves office early next year, however this is generally considered rather unrealistic. The groundwork for negotiators began in 2011 when the EU and the US established the Higher Level Working Group on Jobs and Growth. Its mandate was to explore the feasibility and potential benefits of a comprehensive trade agreement covering all sectors. The working group concluded its mandate by recommending the launch of formal talks.

ISDS is so far the most controversial issue. The critiques of ISDS stress that modern democratic societies have developed ways to separate power, i.e. between the legislature, government, and courts. In contrast, ISDS concentrates power. The ISDS system gives arbitrators the power to review all decisions by legislatures, governments, and courts, and importantly it does not observe the separation of powers, it lacks basic institutional safeguards of judicial independence, and ultimately undermines democratic decision-making. The European Commission launched a public consultation on ISDS in TTIP in March 2014. The European Commission published the long anticipated [report](#) on the public consultation on ISDS in TTIP on 13 January 2015. The report presented an analysis of the almost 150.000 submissions received to the public consultation, of which 97% of the replies were opposed to the inclusion of ISDS in TTIP or are generally against TTIP. The European Commission has published a legal proposal for an investment court system in TTIP. This would mean that a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up instead of the Investor-to-State dispute settlement (ISDS) mechanism in the case of TTIP. While the proposal is an improvement compared to the ISDS mechanism, the court system would still on be available only to foreign investors and thereby giving only foreign investors special rights. In addition, it is highly unlikely that the US would agree to the proposal.

The [ETUCE Statement](#) on Investment Protection in EU Investment agreement stresses that the Investor-State Dispute Settlement (ISDS) is a flawed mechanism, which is contradictory to and limiting on the right to regulate. It raises specific concerns in respect to the education sector. Private companies could in the future challenge the quality and accreditation standards through ISDS if they felt these standards were "disguised barriers to trade" or "more burdensome than necessary". As emphasised in the ETUCE Statement: "These quality and accreditation standards are crucial to ensure the quality of education and therefore ISDS poses very significant risks to the education sector and democratic decision-making in general". More detailed information on the problems of ISDS is available in the study ["Modalities for investment protection and Investor-State Dispute Settlement \(ISDS\) in TTIP from a trade union perspective"](#).

A new set of services offers were exchanged during the round of negotiations taking place in July 2015 and they are currently under negotiations. In the EC report of the last round of negotiation it is mentioned that there was a short exchange on follow-up issues related to market access and that it was acknowledged that certain services, including public services, "play a special role for citizens". There has been disagreement between the EU and the US on which listing approach to adopt. The US traditionally uses the negative list approach, while the EU traditionally uses the positive list approach, but the EU's services offer is based on a hybrid approach consisting of a negative list regarding national



treatment and a positive list regarding market access. The European Commission published its revised services offer on 31 July 2015, however the European Commission has stated that they expect that majority of the changes will come later in the negotiations. The framework agreement of the EU's offer covers a very broad range of services, while there is not a single reference to any exception for public services or Services of General Interest from the scope of the agreement, only to governmental authority which is not adequate to protect public services like education. In contrast, the framework agreement repeatedly mentions that measures should "not be more burdensome than necessary". In addition, the services offer includes 3 annexes. Annex 1 and 2 applies the negative list and annex 3 applies the positive list. The reservation on public education (see footnote 2) is a better definition than the one included in GATS, however the protection may still be limited due to its location in the annexes rather than in the framework agreement. A proper carve-out in the framework agreement would apply to annexes and later revisions and thereby yield better protection to public services including education.

TTIP intends to include substantial regulatory cooperation including new rules, standards and procedures in a number of areas not covered by other trade agreements. There is also a proposal to establish a Regulatory Cooperation Body (RCB). This body would bring together representatives of regulatory agencies in the EU and US to monitor the implementation of commitments made and consider new priorities for regulatory cooperation including joint development of future regulations. The European Commission claims that the negotiators will establish the framework of such a regulatory cooperation and that regulators will do the "technical work". Nevertheless, the proposal would mean that the Cooperation Council would consider both new legislation and non-legislative acts. The regulatory cooperation could potentially imply potential serious implications for the education sector as the regulatory cooperation intends to cover authorisation, licensing and qualification requirements.

The European Parliament (EP) adopted with clear majority its [TTIP recommendations](#) on 8 July 2015. The Committee on international trade (INTA) was responsible for drafting the recommendations, but 14 other committees were involved in the process.

## **5. Trans-Pacific Partnership (TPP)**

The Trans-Pacific Partnership (TPP) is a comprehensive trade and investment agreement covering 40% of the global economy. The TPP was concluded on 5th October 2015 after more than 5 years of secret negotiations. On 5th November 2015, the full TPP text was released and on 26 January 2016 the legally [verified TPP text](#) was published. The following 12 countries are involved: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.

TPP poses potential serious impacts on the education sector based on an analysis of the final text. Firstly, there is no explicit carve-out of education, thereby exposing the sector to greater privatisation and commercialisation and threatening fee-free, public, and high-quality education. The TPP also places new restrictive rules on intellectual property, and includes the controversial ISDS (Investor-State Dispute Settlement) mechanism that gives foreign investors exclusive rights to challenge domestic laws and regulations, which they feel are unfavourable to their business, before private arbitration panels. For more information see [the EI Briefing Note on the Trans-Pacific Partnership \(TPP\)](#).

It is not evident that TPP will pass the US Congress, in particular not before the November 2016 presidential election. Accordingly, other TPP countries are also inclined to wait the outcome of the US presidential elections.