



EI Education and Trade Update – March 2018

Introduction

International trade developments have been characterised by rupture, adjustment and continuity.

The rupture comes from the international trade policy of the Trump Administration in the US. Most remarkable, is the current lack of American leadership within international trade policy. Previously, the US was one of the key protagonists, but it is now conspicuous in its absence. The change in US policy has meant that issues that previously were launched within the World Trade Organisation (WTO) and then taken to either bilateral or multilateral trade negotiations because of the stalemate in the WTO, are being brought back to the WTO arena. However, the 11th WTO Ministerial Conference of 2017 did not result in any concrete multilateral outcomes. While there has been a freeze in several major international trade negotiations that include the US, there is still no clear indication from the US Administration whether it will still engage at a later stage or withdraw from those negotiations. Nevertheless, in the case of the Trans-Pacific Partnership (TPP), the US withdrew from the agreement in January 2017. One year after the withdrawal of the US, the remaining 12 countries in the TPP announced that they agreed to a revised TPP. The official signing of the agreement is expected to take place in early March 2018. In the case of the North American Free-Trade Agreement (NAFTA), its renegotiation was initiated on 16th August 2017 under the threat that the US would otherwise withdraw from the 23-year-old agreement. So far 6 rounds of negotiations have taken place with limited progress.

While many major international trade agreements involve the US, there has nevertheless also been adjustment and continuity in international trade policy in the sense that the EU has intensified and expanded on already ongoing international trade negotiations and initiated new trade negotiations. The European Commission is regularly [updating the current status of its international trade negotiations](#).

EI study: What Educators Need to Know About Global Trade Deals

The EI study *What Educators Need to Know About Global Trade Deals* explores the economic, political and social conditions, development agendas, combinations of actors and regulatory instruments, which together have challenged the idea of, and conditions for, education as a public service and a human right by locking in a market and profit-based framing of education in trade deals.



How and why has this state of affairs emerged? How and why has education, as an entitlement and human right, been reframed as ‘an education services sector’? What part is the government playing in opening up education to private sector interests and for-profit companies, and enabling it to be part of trade deals? And, finally, what are the implications of this market/trade framing for democratic education and sustainable futures?

This study shows that global trade deals matter to educators because the overall purpose of these negotiations is to reframe education and treat it as a tradeable services sector open to investors. In addition, trade agreements introduce new regulatory frameworks and mechanisms to ensure that education not only continues rapidly down the path of further market liberalisation, but that the interests of investors are protected by limiting government’s policy-making spaces. The research concludes with 10 reasons for saying NO to trade deals in education and why. Furthermore, it also sets out steps that would take us away from a narrow focus on economism and profits, to one that guarantees the rights of all citizens to have a say over theirs and the next generation’s future.

The study is available [here](#).

The recording of the webinar with the study’s author Susan Robertson is available [here](#). It includes the following:

- 1) Overview of why it is important for educators and trade unions to be informed about free trade agreements;
- 2) Update on the state of play of the main trade deals;
- 3) 10 reasons to reject free trade agreements;
- 4) Questions & Answers.

World Trade Organisation (WTO)

Since the launch of the Doha Development Agenda (DDA) in 2001 WTO members have not been able to reach agreement on substantive issues and as a result the relevance and future existence of the WTO is being questioned. Nevertheless, WTO members managed to decide on the Trade Facilitation Agreement in 2013 and to phase out agricultural export subsidies in 2015. Roberto Azevêdo, the WTO Director-General, was prolonged into a second term, which started on 1 September 2017. As a result of the current US international trade policy some issues are being pushed back to the WTO. The [11th WTO Ministerial Conference](#) took place on 10-13 December 2017 and became notorious for the [Argentine government's decision to ban WTO-accredited NGO representatives](#). The Argentine government claimed that banned NGO representatives “made explicit calls for violence on social media”.



The Ministerial Conference itself did not result in any concrete multilateral outcomes. Instead it resulted in four joint statements of so-called like-minded countries. The statements were on [services domestic regulation](#), [e-commerce](#), [investment facilitation for development](#) and [an informal work program for micro, small and medium-sized enterprises](#). While time will tell whether and when the WTO members will be able to reach agreement on these issues, EI will keep monitoring WTO developments, in particular around e-commerce and domestic regulations. It is essential to keep track of the developments and be wary of the links between education and e-commerce. Those links are not at the forefront in the e-commerce discussions, however a WTO agreement on e-commerce could have important implications for the education sector with different forms of online education, including MOOCs, but also in terms of data flows, privacy safeguards and data mining issues. Domestic regulation disciplines of services could also have important implications for the education sector where domestic regulations, including accreditation, performance and quality requirements and standards, are viewed as a barrier to international trade in services.

Comprehensive Economic and Trade Agreement (CETA)

The CETA (Comprehensive Economic and Trade Agreement) entered into provisional application as of 21 September 2017 and accordingly most of the agreement is being applied with the exception of investment protection, investment market access for portfolio investment (but not market access for foreign direct investment) and the Investment Court System. So far 5 EU Member States have ratified CETA: Croatia, Denmark, Latvia, Portugal and Spain. The [full CETA agreement](#) is available on the European Commission (EC) website. In September 2017, [Belgium requested the opinion](#) of the European Court of Justice (ECJ) on the Investment Court System (ICS) in CETA. As part of a deal struck with the Wallonian regional government, the Belgian federal government is asking the ECJ if the CETA investment provisions are compatible with EU law, including the supremacy of the European Court of Justice and the right of access to courts and to an independent judiciary. An opinion of the ECJ takes on average around 18 months.

The CETA agreement is clearly important in its own right, but also as the template for other similar trade and investment agreements currently under negotiation. CETA has therefore also been a test case for other similar trade agreements. Accordingly, it is becoming more difficult to argue against other similar agreements after CETA's ratification, as its promoters are framing CETA as the most progressive trade agreement.



CETA itself includes several issues of concern in general and for the provision of public services, including education, in particular. CETA includes, among other things, the controversial, but reformed ISDS (Investor-State Dispute Settlement) mechanism renamed as the investment court system, the standstill and “ratchet” clause that lock-in existing levels of liberalisation, new restrictions on regulatory measures, and new rules on government procurement. Services are a major component in CETA and this part of the agreement took 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 in 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 to intensify the pressures of privatisation and commercialisation of education.

EU-Japan Economic Partnership Agreement

The negotiations on the EU-Japan Economic Partnership agreement were initiated in 2013 and the negotiations were concluded on 8 December 2017. The legal review of the agreement, also called “legal scrubbing” is currently ongoing and according to EU Trade Commissioner Malmström, the Commission has taken “quite dramatic measures” to speed up the completion of this task in order to move ahead as quickly as possible. The Parties intend to officially sign the agreement before the summer and the Commissioner hopes that the agreement can enter into force by the end of 2018 or early 2019. The agreement does not include investment and as such is considered an EU-only agreement, as the ECJ ruling on the EU-Singapore agreement concluded that only non-direct foreign investment and ISDS are mixed competences. Accordingly, the EU-Japan Economic Partnership Agreement will only require the ratification of the European Council and the European Parliament. In other words, even if education is a national and in some countries a sub-national competence, the agreement will not require ratification at the national or sub-national level. The EU and Japan are negotiating on investment in a parallel track.



In terms of the chapter on sustainable development, the EU has for the first time concluded an agreement that includes a specific commitment to the Paris Agreement on climate change. According to the [Commission press release](#) announcing the conclusion of the negotiations, the agreement “fully safeguards public services”. However, when looking at the [actual text](#) of the agreement there is no exclusion of public services that would back up the Commission statement. Under the article 1 on scope of chapter 8 on *Trade in Services, Investment Liberalisation and Electronic Commerce* there is no exception for education and other public services, however there is an exception for audio-visual services and government procurement.

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EU-MERCOSUR Free Trade Agreement

The EU-MERCOSUR negotiations started back in 1995 and the negotiations were relaunched in 2016. The Parties hoped to conclude the negotiations in 2017, but the negotiations continue. The last round took place on 19-23 February in Asuncion, Paraguay. The Parties are making an effort to conclude the negotiations quickly before Brazil will be absorbed in election campaigns starting in the coming months. The talks are being held in secret and only a very limited amount of information is available, for example basic information such as the dates of the upcoming rounds. There is very limited transparency in terms of the offers and proposals being discussed. Market access offers were initially exchanged in May 2016 and in the [EU report of the 31th round of negotiation](#) it is mentioned that the revised MERCOSUR offer on services was discussed. One of the few proposals that the EU has published is the [proposal on intellectual property rights](#). Here the EU is aiming to extend and lock in the copyright provisions with an additional 20 years compared to the multilateral standards (life of the author plus 50 years).

Trade in Services Agreement (TiSA)



The negotiations on the Trade in Services Agreement (TiSA) were proposed by the US and Australia in early 2012 and began in 2013. TiSA negotiations arose in response to the ongoing impasse in WTO negotiations, including talks to expand the General Agreement on Trade in Services (GATS). 21 rounds of negotiations had taken place by November 2016. The negotiations are currently on hold, but could resume at a later stage. Nevertheless, many of the issues are being picked up in other bilateral, plurilateral and multilateral negotiations.

Transatlantic Trade and Investment Partnership (TTIP)

The negotiations of the Transatlantic Trade and Investment Partnership (TTIP) were initiated in July 2013 and 15 rounds of negotiations had taken place by October 2016. As in the case with TiSA, negotiations are currently on hold, but could resume at a later stage. There have been both positive and negative indications from the Trump Administration with regard to a possible continuation of the TTIP negotiations.

US Trade Representative Robert Lighthizer has emphasised the importance of the US' relationship with the EU, while comments from Trump on EU policies being "very, very unfair" have increased tensions between the Parties. Recently EU Member States and the European Commission have affirmed that the US's participation in the Paris Agreement on climate change is critical for continuing the TTIP negotiations. As France's Secretary of State to the Minister for Europe and Foreign Affairs Jean-Baptiste Lemoyne said earlier in February: "*One of our main demands is that any country who signs a trade agreement with EU should implement the Paris Agreement on the ground. No Paris Agreement, no trade agreement. The US knows what to expect.*"

Trans-Pacific Partnership (TPP) / Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP)

The Trans-Pacific Partnership (TPP) is a comprehensive trade and investment agreement. It was first 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 TTP text](#) was published.



The US withdrew from the agreement in January 2017. The following 12 countries are now involved: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. One year after the withdrawal of the US to the TPP the remaining 12 countries of the original TPP announced that they agreed to a revised TPP called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), with the official signing expected to take place in early March 2018.

According to the [Canadian government](#) two main modifications were made with respect to intellectual property and copyright and when it comes to the application of investor-state dispute settlement, however the final text has not been published.

Compared to the original TPP agreement the CPTPP suspends certain provisions in the area of intellectual property and copyright. Consequently, the CPTPP suspends TPP obligations relating to patents and pharmaceuticals, including on patent term adjustment, which required Parties to adjust the patent term to compensate for “unreasonable” patent office delays, as well as the TPP obligation on patent term restoration for marketing approval delays. On copyright the CPTPP suspends certain TPP obligations on copyright and related rights, including on terms of protection. Under this suspension, the Parties are able to continue to provide a copyright term of “life of the author plus 50 years”, in accordance with multilateral standards.

In the area of investment the Parties suspend the provisions related to Investment Agreements and Investment Authorizations. This implies that foreign investors cannot bring forward a case under investor-state dispute settlement when: 1) investment contract has been breached; or 2) when authorization to invest is amended or revoked by the government.

The European Court of Justice (ECJ) ruling on ISDS in intra-EU Bilateral Investment Treaties

[The European Court of Justice \(ECJ\) ruled on 6 March 2018 that the arbitration clause in an Investor-State Dispute Settlement \(ISDS\) agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law.](#) The case concerns the case brought by Achmea, a Dutch private insurance group, claiming it suffered financial damage when Slovakia partly reversed its liberalisation of its sickness assurance market, and prohibited in particular the distribution of profits generated by sickness insurance activities.

ECJ finds that *“by concluding the BIT, Slovakia and the Netherlands established a mechanism for settling disputes which is not capable of ensuring that those disputes will be decided by a court within the judicial system of the EU, only such a court being able to ensure the full effectiveness of EU law. In those circumstances, the Court concludes that the arbitration clause in the BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law.”*



Beyond the Achmea case and the bilateral investment treaty (BIT) between the Netherlands and Slovakia, the ruling is also applicable to the other 200 bilateral investment treaties between EU Member States currently in place.