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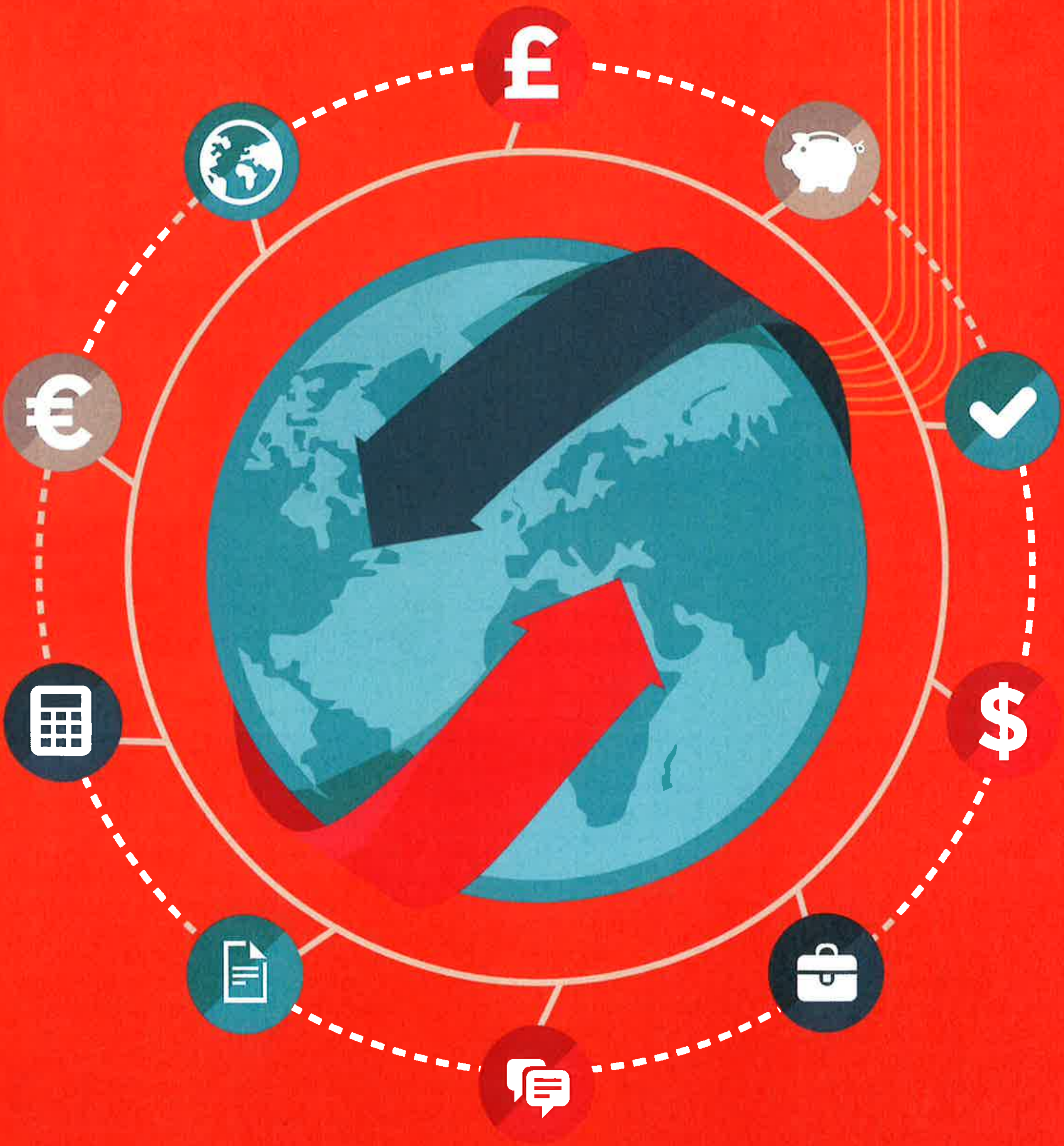

'trade gap'

As the fifth round of talks on the Transatlantic Trade and Investment Partnership ends, barrister Adam King explores the pros and cons of such an alliance for nations on both sides of the pond

In February 2013, President Obama and the President of the European Commission, José Manuel Barroso, announced talks for the establishment of a free-trade agreement between the USA and the EU. The proposed deal is known as the Transatlantic Trade and Investment Partnership (TTIP) and – should it become formalised – it would be the largest free-trade agreement in history. Currently, negotiations are ongoing and are not expected to conclude before the end of this year.

Whether TTIP is best characterised as a long-overdue and mutually beneficial alliance – providing a much-needed boost to our struggling economies – or as an anti-democratic coup by the global corporate elite leading, inevitably, to the destruction of the rule of law and the enslavement of the common man depends, to a large extent, on your political inclinations – but also on the detail.

For goods and services to move freely between the two continents, there needs to be a 'harmonisation' of regulatory regimes across relevant industries: it's no good agreeing, say, to allow American car manufacturers to invest in the European market, duty free, if we then prohibit the sale of their cars for failing to measure up to our more stringent emissions requirements. But when a politician or bureaucrat speaks of harmonisation, alarm bells should ring. We don't generally like having our wages 'harmonised', do we – so what does it mean for the regulatory landscape?

The EU Commission has recently reassured us that the intention is to 'achieve compatibility without lowering standards on either side'. A laudable aim, no doubt, but logically impossible – unless, in every single case, the looser regulations on one side of the Atlantic (whichever side that might be for the particular industry in question) are tightened to match the stricter rules on the other. Somehow that seems unlikely for a free-trade pact intended to make life easier for big business.

On 14 May 2014, the Commission published a collection of short documents setting out its position on regulation in the various sectors intended to be part of TTIP. The fine detail, it's fair to say, is still some way off – or is being kept secret.

By way of example, the three-page *EU Position on Textiles and Clothing* explains that: 'TTIP could reinforce existing cooperation on labelling requirements for textile/clothing and footwear products, convergence and/or harmonisation of approaches to guarantee product safety and consumer protection, and standards approximation… This could result in gains for industry and regulators, and in greater international harmonisation, and would be achieved without compromising the protection of public health.'

Few certainties for clothing manufacturers at this stage then. But whatever the fine detail turns out to be, labelling requirements for clothing is perhaps of less concern than food safety regulations (chlorine-bleached chicken and hormone-fed beef being the headline fears), data privacy (not the Americans' strong suit), and public health (asbestos is still permitted in the USA in roofing and pipeline wrapping).

But even if such worries are unfounded, and a tolerable 'harmonisation' process can be achieved – the member states of the EU have arguably managed it, after all – the mechanism by which disputes are to be resolved has come in for some heavy criticism.

Known as Investor State Dispute Settlement (ISDS), it has been described by George Monbiot, writing in *The Guardian*, as 'allowing a secretive panel of corporate lawyers to overrule the will of parliament and destroy our legal protections'. The San Francisco-based Democracy Centre, meanwhile, described it as 'a privatised justice system for global corporations'. Is it really as bad as all that?

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If, as part of a free trade agreement, Country A invites Country B to – for example – invest in building a nuclear power station in its territory, Country B will understandably want some reassurances from Country A that it is not going to ban nuclear power any time soon. If Country A gives such a promise, but then breaks it a few years later, surely Country B is entitled to compensation – and in an independent tribunal, rather than the domestic courts of Country A.

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At first glance, that might all seem fair enough, but the principle of the thing is problematic – as tobacco giant Philip Morris's multi-billion dollar suits against Australia, Uruguay and Norway illustrate. Those nations' anti-tobacco legislation offended against the relevant bilateral investment treaties – so Philip Morris claimed – and they were, therefore, faced with paying compensation for future lost profits, which, in the case of Uruguay, exceeded the value of the country's entire gross domestic product (GDP).

According to the Victorian constitutional theorist A V Dicey, parliament cannot bind its successors. Parliament today cannot pass a law preventing the parliament that will exist in a decade's time from banning advertising on cigarette packets and expect it to be upheld by that future parliament. If the electorate in a decade's time want to ban advertising on cigarette packets they can elect MPs who pledge to do so, and those MPs must then be free to do so. The effect of ISDS, critics say, is effectively to undermine parliamentary sovereignty.

If parliament ratifies a bilateral investment treaty, future parliaments can find themselves severely limited as to the laws they are able to pass – unless they are prepared to pay out economy-ruining levels of compensation to multi-national companies whose profits are affected.

ISDS tribunals established by other bilateral investment treaties around the world have been criticised for, among other things: the partisan composition of their panels – corporate lawyers whose firms count the claimant companies among their clients; the secrecy of the hearings; and the absence of a proper appeals process.

These particular problems are remediable, but the question arises of whether independent panels are needed at all.

First used in 1959 between Germany and Pakistan, they were originally for when one party to an investment treaty did not trust the courts of the other. The USA and the EU, it might be said, ought not to feel that way about their relationship.

Another area that is causing particular concern is Intellectual Property Rights (IPRs). After the European Parliament roundly rejected the Anti-Counterfeiting Trade Agreement (ACTA) in 2012, there is much speculation as to which parts of it might be dusted off and introduced into TTIP. There can be little doubt that a great deal of lobbying will be going on in Brussels to bring as much in as possible.

The EU Commission's most frequently asked question on the subject is: 'Will TTIP be ACTA through the backdoor?' It answers thus: 'No. ACTA... was intended to end the trade in counterfeited goods. It goes without saying that the position of the European Parliament – which voted against ACTA – will be fully respected.'

The tone of the Commission's one-line summary of the controversial treaty – as well as its use of the phrase 'it goes without saying' – will no doubt cause ACTA's opponents to smell, if not a rat, then certainly a very large mouse. It is perhaps unlikely, however, given the strength of feeling it engendered two years' ago, that the EU will bow to US pressure on enforcement.

What does this all mean for trading standards in the UK? Probably a great deal of change, but not for a good couple of years, and not of a kind that can accurately be predicted.

ABOUT THE AUTHOR:
Adam King is a barrister at QEB Hollis Whiteman. Contact him at www.qebholliswhiteman.co.uk