No. 11 / November 2015

briefing paper

Observatoire social européen

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Ose PAPER SERIES

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TTIP: what it will mean for us and what is the alternative?

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ISSN 1994-2893

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Abstract

This Opinion paper describes why the negotiating parties want a Transatlantic Trade and Investment Partnership (TTIP), what the agreement will contain and what trade liberalisation may lead to. It argues that TTIP offers no improvements in economic or social conditions for European citizens. The Partnership, including the notorious Investor state dispute settlement, threatens a reduction in protection for employees and consumers and a substantial enhancement of the power of private business, potentially at the expense of public provision of services. If the Partnership is to be continued at all, then it should do so with the exclusion of the Investor-state dispute settlement (ISDS) and with changes to ensure against reduction in regulatory protections through attempts to achieve compatibility.

1. Introduction

The Transatlantic Trade and Investment Partnership has been under negotiation between the European Union (EU) and the USA since July 2013. The eleventh round of talks ended on 23 October 2015. We were promised a speedy conclusion, with ratification by the end of 2015. It is hard to judge how the negotiations are going due to a lack of openness, but negotiations for the arguably simpler Comprehensive Trade and Economic Agreement (CETA) with Canada started in 2009 and this agreement will come into effect in 2017, at the earliest.

TTIP has already provoked more public opposition and doubts than has been the case with any previous international trade agreement. Thanks to the strength of that opposition, we now have a little more openness in the negotiation process. We now know what the negotiations cover, in broad terms. We know something of the EU negotiating positions. However, we do not know the US positions, nor do we know to what extent the two sides are agreeing on the range of topics covered by the agreement.

The US side has insisted that all its position papers and all documents that emanate from them should remain secret. This therefore includes any consolidated documents on which the two sides have agreed. The EU side has respected this position while also maintaining secrecy on a number of its own negotiating positions. Restricted access to documents means that there is little scope for informed debate before a finalised version of the whole treaty is produced and comes to the European Parliament for approval. The legal requirements for the ratification process remain to be clarified. It may have to be approved, in whole or in parts, by Member States.

2. Why do the negotiating parties want the Partnership?

A. Negotiators on both sides of the Atlantic claim that the treaty will bring significant economic benefits. From the EU side in particular, there are promises that it will help lift economies out of depression. However, such promises have been backed up by exaggerating the results derived from expert studies, or by quoting studies based on highly questionable methodologies. This is now clear beyond any serious denial. The argument of substantial economic growth and job creation does not stand up.

B. A more plausible claim is that TTIP is intended to set standards in world trade negotiations. These have been conducted within the framework of the WTO (World Trade Organisation), but have reached deadlock. There has been a proliferation of bilateral and multilateral treaties since 1990 with close to 300 in operation by 2010. A major motivation for this has been the desire from trading blocs – especially the USA and EU – to include issues of business access not covered by WTO agreements, notably investment, regulation of services and protection of intellectual property. The EU and USA would like to use their trans-Atlantic agreement as a model for a new generation of trade agreements, and ultimately also for the WTO, leading to further liberalisation, opening up other countries to trade and business for their companies.

C. TTIP clearly does promise benefits for some businesses. Big companies have been actively pushing for the agreement and are the ones that are being consulted on the negotiations. An agreement would promise benefits for private business operating in sectors where government regulation is strong, ranging from dangerous chemicals, food and agriculture to finance and public services.

It should be noted that TTIP is not presented as a means to raise standards of protection for consumers or employees. Regulation mostly appears as a potential cost. It is easy to demonstrate that there are enormous social benefits from many regulations – including protection against toxic chemicals, carcinogens, dangerous car exhaust emissions, reckless banking practices and sources of global warming (Myant and O'Brien, 2015) - but the TTIP agenda is not about setting higher standards in these areas.

3. What will TTIP contain?

The outcome of negotiations will be a huge set of documents, with chapters covering a range of sectors and themes. The issues under negotiation are fairly clear, both from information already made public and from the Comprehensive Trade and Economic Agreement (CETA) agreed between the EU and Canada in August 2014 and currently awaiting ratification.

A relatively simple theme will be the removal of formal tariffs. These are already low (5.2% on average from the EU side and 3.5% on average from the US side), albeit with higher levels and restrictive quotas on some particular products. The EU will be giving up slightly more here, but will be looking for a relaxation of the US Buy American rules which prevent or restrict foreign competition in government procurements, notably for large infrastructure projects.

There are likely to be some exemptions from the agreement, such that governments can protect some specific sectors and activities. This is likely to be the case for audio-visual services, protecting national film industries. There may also be exemptions for some aspects of agriculture and food, such as genetically modified products. There are clear disagreements over regulating financial services and over chemicals where past philosophies of regulation appear incompatible. There is likely to be an exemption for public services, but the exact definition will be crucial.

The WTO's General Agreement on Trade in Services refers to services provided 'neither on a commercial basis nor in competition with other suppliers' ([1]). This leaves a vague boundary, for example regarding private schools and hospitals. Strengthening the wording to exclude specifically health care services has been resisted by UK pharmaceutical companies, which could be classified under health, hoping for easier access across the Atlantic.

An important point is that any exemptions will have to be agreed explicitly from the start. Once the treaty has been approved there will be little practical scope for making amendments so that if an area is not exempt from liberalisation at the start, it will not be possible to add it in later.

4. The so-called non-tariff barriers

Agreement on significant reductions of formal tariffs and quotas should not be too difficult, but that offers little, as those barriers to trade are already low. A bigger issue is that of the so-called non-tariff barriers including differences in regulations. This is a sensitive area as it affects areas of consumer and employee protection. The position papers setting out the far-reaching US demands on this – possibly asking for considerable reductions in regulation on the European side – are among the documents that will remain secret for up to 30 years (Hilary, 2015, p.26).

The nature of non-tariff barriers can be illustrated with examples of those identified by businesses for the motor vehicle industry. These included different personal tastes in cars, taxes on high-consumption vehicles and differences in crash tests. The first of these is hardly a barrier that can be reduced by negotiation. The second relates to environmental policies and its removal could be regarded as a cost rather than a benefit. The third is an additional cost, as tests will have to be done to satisfy two sets of rules. Choosing one set of rules could well make sense, ideally ensuring the most stringent reasonable standards, but this is unlikely to lead to significant cost savings when shared over the total production of a particular vehicle.

Reducing these barriers can be achieved by harmonisation (i.e. each side approves the same rules through its democratic procedures) or by mutual recognition (each side agrees to accept the other side's rules, even if they are different). Judging from the CETA negotiations and from various leaks, the emphasis will be on mutual recognition. In practical terms, that is the most feasible, but risks encouraging a race to the bottom. Given the choice, firms will locate where rules are the easiest to satisfy, undermining more stringent rules elsewhere.

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1. It should be added that the WTO plays no direct role in the negotiation of these preferential trade agreements. https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm

Moreover, mutual recognition is particularly problematic in areas where philosophies of regulation are very different. Such is the case for the EU's precautionary principle for dangerous substances, whereby the onus is on the producer to prove that a product is safe. In the USA there is no such obligation (Myant and O'Brien, 2015, and Ponce, 2015).

Achieving full compatibility of regulations will be difficult and time-consuming. It will not be completed before agreement is reached on TTIP. However, the agreement is likely to contain provisions for bodies to be set up on each side of the Atlantic to check on the justifiability both of existing regulations and of proposed regulations that have yet to be introduced. These bodies are likely to be open to comments from anyone, but the most enthusiastic input can be expected from business. This will allow a US business input on European regulations that already exist and on proposed regulations before they are approved in a parliament.

There might be very little change if there is strong opposition to weakening existing regulatory systems. On the other hand, a strong business input alongside an agenda for reducing regulations in general could lead to substantial changes and could lead to doubts, fears and delays on the part of governments, discouraging proposals for new regulations.

5. What will trade liberalisation lead to?

The effects of trade liberalisation can be summarised under five points. First, any increases in GDP and employment, even on the estimates used by the EU, will be negligible. The method used by the Centre for Economic Policy Research (CEPR), commissioned by the European Commission, used survey evidence, mostly from private companies, on the extent of existing barriers to trade (Francois et al. 2013). It required considerable guess work to estimate the increase in trade that would follow from removal of restrictive regulations, but the CEPR still found only a 0.5% increase in GDP after 10 years, with no increase in employment, and even that was based on an 'optimistic' scenario. This is within the margin of error for no increase whatsoever.

Second, attempts to claim more significant effects are based on seriously flawed methodologies. A notorious case is a study produced for the Bertelsmann Foundation which forecast 2,436,000 additional jobs across the EU and USA (Felbermayr et al., 2013). The European Commission noted some of their implausible figures and concluded that their estimates were 'unrealistically high' ([2]). Remarkably, the same group of authors have written critically of the method used in that study and also produced more substantial studies showing extremely small employment effects (Myant and O'Brien 2015).

2. http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf

Third, there could as likely be a fall as an increase in GDP and employment. This follows from another study (Capaldo, 2014) which took the CEPR estimates of changes in exports and imports between the two trading blocs. It then estimated the likely immediate impact, including the destruction of jobs in sectors unable to compete with their trans-Atlantic rivals. New job creation in successful activities would necessarily take longer to develop. Thus the first effect is net job destruction and rising unemployment pushing countries deeper into depression and making subsequent recovery more difficult.

Fourth, the direct economic impact is likely to be small. The economies of the EU and the USA are already closely integrated with the same multinational companies operating in both blocs. There are specific activities that may suffer from an ending of their protection - for example those European food products with Protected Designation of Origin - but possibilities for increased trade are limited.

Finally, the key issue is therefore likely to be the role of TTIP within a more general agenda for deregulation, relaxation of environmental and consumer safety standards and privatisation, particularly of what are currently public services. It will create a machinery for examining regulations and provide a further stimulus to a deregulatory agenda. The sectors most likely to be most affected are those for which public provision and regulation are most important, such as mineral extraction and health services.

6. Investor state dispute settlement (ISDS)

ISDS has rightly become the most controversial element in TTIP. It puts foreign investors in a specially privileged position. They alone can claim compensation from a state if its decisions are judged to have been commercially harmful to them. Under existing inter-state agreements, a company can demand compensation by the creation of an arbitration court made up of three legal experts chosen from an approved list held by a World Bank body. The discussions are secret and there is no right of appeal, but detailed justifications for decisions are frequently published.

According to the United Nations Conference on Trade and Development (UNCTAD), there were more than 3,000 such agreements between countries by 2013 and it knew of 514 arbitration cases ([3]).

3. http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf

6.1 ISDS in practice: potential risks

There is enough experience to see how ISDS works in practice. The following points emerge from that past experience:

- The experts operate with a narrow concept of legality, taking no account of *social* or other conditions, of sensible economic policies, or of governments' right to change policies. The only question for them is the possible harm to the *commercial* interests of a private company, judgement on which takes precedence over all other issues.
- Interpretations do not appear to be consistent and the common requirement to ensure 'fair and equitable' treatment of foreign investors is ambiguous and unclear, encouraging companies to start cases and encouraging governments to be cautious when facing multinational companies.
- Companies frequently claim compensation for changes in government policies. In 2007 the Belgian utility and energy group Electrabel brought a case against the Hungarian government for changes to energy regulation that were required when that country joined the EU ([4]). In 2011 the US tobacco firm Philip Morris, using its Hong Kong subsidiary, took action against the Australian government for anti-smoking measures ([5]). In 2012 the French utility Veolia took action against Egypt after the municipal authority in Alexandria, which had agreed to maintain a low wage level, followed Egyptian law in applying a newly-introduced minimum wage ([6]).
- Health care is not excluded from ISDS. A health care reform in Slovakia in 2004 allowed in private profit-making insurance companies. Subsequent reforms in 2007 and 2009 aimed to remove the profit motive from health provision. In 2014 the Dutch insurance company Achmea II won a tribunal case for compensation ([7]).
- The sums at stake can be enormous. The largest amount of compensation awarded was against Ecuador – for terminating a contract with Occidental Petroleum after the latter was judged to have broken Ecuadorian law - at the equivalent of 2% of its GDP (Hilary, 2015, p.46).

Thus ISDS gives a clear advantage to foreign over domestic companies and the implication of past judgements has been that the burden of proof rests with the government to demonstrate that it has not treated a foreign company unfairly.

4. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2853_En&caseId=C111
5. https://www.ag.gov.au/tobaccoplainpackaging
6. https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/12/15
7. http://opil.ouplaw.com/view/10.1093/law:iic/647-2014.case.1/IIC647%282014%29D.pdf

6.2 Will TTIP lead to a better ISDS?

Following a period of formal public consultation in 2014, during which the Commission received almost 150,000 replies to its on-line consultation on TTIP ([8]), the European Commission produced, in September 2015, a new draft proposal for internal consultation that might become the basis for a negotiating position ([9]). If implemented it would mark a definite improvement on past practice. However, it still needs to be agreed by the European side and would then await US comment. Even if incorporated into a final TTIP agreement, its effects would be limited as long as other existing agreements remain in place and, above all and for reasons explained below, should CETA be ratified in its current form.

Even if this proposal is not accepted, some improvement from past practice must be considered highly likely. A possible model will be the CETA agreement which broadly follows US practice. Thus, one can expect formal requirements for a degree of transparency, an insistence that the losing party pays the full cost of the tribunal – this is not the case in many existing agreements - and possibly some form of appeal mechanism, albeit not going back to national courts. This will actually be a slight improvement for eight EU members – countries of central and Eastern Europe – that already have ISDS agreements with the USA. However, the essence of the process will remain unchanged. A foreign investor can take action against a state, overriding decisions of that country's legal system and parliament.

The new EU proposal of 16 September 2015 makes it clear that the arbitrators will be professional judges, selected on a random basis for each case, and that there will be a right of appeal to another group of judges. There are stronger statements on what would be legitimate grounds for a government to change its policies, in the past a frequent basis for foreign investors to claim damages. In all, multinational companies might feel their position had become less strong and one could hope that fewer cases will be brought forward.

However, some key challenges remain:

- it is still left to judges' interpretation as to what constitutes legitimate regulation and policy changes and what can be interpreted as illegitimate action against a multinational company.
- the basis for deciding damages remains unclear and there is no upper limit.
- above all, national laws, governments and parliaments can still be overruled by an outside body.

8. http://europa.eu/rapid/press-release_IP-15-3201_en.htm
9. http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

The starting point for an alternative is very simple. All companies should have the right of recourse to courts in the country in which they are operating, as is currently the case, but no additional privileges. This is an achievable goal. ISDS was rejected by the Australian government for its trade agreement with the USA which came into force in 2005. That provided some protection but proved insufficient when, as mentioned above, Philip Morris used its Hong Kong subsidiary to take action against the Australian government.

This example also illustrates how difficult it will be to ameliorate the effects of ISDS without annulling the web of agreements that already exist between so many governments. Moreover, once CETA is ratified, irrespective of the final wording in TTIP, most US multinational companies would be able to use their Canadian subsidiaries to take action against a European government and European multinationals would similarly be able to take action in the USA. In fact, companies will even be able to use foreign subsidiaries to sue their own governments, giving them a privileged position at home as well as abroad.

Such action was taken in September 2013 by the Canadian company Lone Pine Resources using the ISDS clause in the North American Free Trade Agreement (NAFTA), linking the USA, Canada and Mexico and in force since 1994. It used its US subsidiary to claim damages from Canada after the Quebec government imposed a moratorium on fracking following fears over the environmental implications of that method of oil and gas extraction ([10]).

A full alternative would therefore require annulment of existing ISDS agreements as well as a halt to the signing of new ones. A number of countries – including Australia, South Africa, Ecuador, Bolivia, Venezuela and Indonesia - are refusing to sign agreements with ISDS clauses or cancelling existing agreements when they can (Eberhardt, 2014, pp.112-3).

7. What will ISDS lead to?

The effects of ISDS can be summarised under four points.

- US firms will try to use ISDS in EU member states to get a better deal than laws in that country allow. The evidence is clear from the experience of ISDS between the USA and Canada within NAFTA. US firms have taken action on changes to tax laws, access for health care companies in Canada's health system, energy and mining regulation and product safety. They have not usually been successful, but they can be (cf Poulsen et al, 2013).
- ISDS in TTIP can be expected to make parliaments more cautious over new regulatory measures and less likely to oppose deregulatory measures or to reverse deregulation and

10. http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf

privatisation measures that have already been adopted. They will be more scared of foreign business interests when the latter have the unique power to override parliaments' decisions. There is very clear evidence of 'regulatory chill', meaning that governments refrain from new regulatory measures when confronted by threats from multinational companies, after investment treaties are signed. This applies both in developing countries and in developed countries, notably Canada with its NAFTA involvement (Tienhaara, 2010).

- There will be no increase in investment across borders for much of the countries' economies. Multinational companies are already well established and a study for the UK government concluded that there is no evidence at all that they are discouraged from investing in that country by any feelings of legal uncertainty (Poulsen et al, 2013). ISDS is not relevant to the bulk of manufacturing industry and service activities.
- The biggest effects can be expected for public services - once profit-making interests are allowed in they will be impossible to remove - and activities with substantial environmental effects, such as mineral extraction. If ISDS leads to weakening of public control in these areas, then there could be increased trans-Atlantic investment, albeit not of a kind that need be judged beneficial.

None of this points to significant positive effects. There are more likely to be losses from relaxation of environmental rules, from privatisation of public services and from government caution over taking any decisions that could offend multinational companies.

8. Labour standards

There are differences in employment laws and practices within and between the two blocs and there is likely to be a specific chapter on labour rights. This presents an opportunity to set out high standards with means for their enforcement that could then become a model for further trade agreements. However, for reasons set out below, the final commitments may remain at such a general level that laws and practices remain unchanged.

TTIP's effects on labour standards will therefore be felt predominantly through the deregulation agenda fostered by ISDS and by the changes making regulatory systems compatible. This may lead to less stable and more precarious employment in some affected sectors. The effects on employment are otherwise likely to be small as the direct economic effects of TTIP are likely to be small.

There might be more structural change than predicted in the studies referred to above. Thus there could be some risk of major manufacturing enterprises moving production to where rules give employees the least protection. That might imply a move, for example by the automotive industry, towards the USA and to those states within the USA that make trade union recognition the most difficult, if not impossible. However, moving production across the Atlantic to import back into Europe would be difficult and costly for many products and would be made only marginally more attractive by TTIP. Moreover, there are plenty of low-wage parts of the EU where effective employee protection is weak. Production is therefore more likely to continue to move within the two trading blocs – towards central and Eastern Europe in the EU and towards the south in the USA – rather than across the Atlantic.

Some protection against diminution of labour standards could be provided by a labour chapter in TTIP. Both the EU and the USA have incorporated labour protection into past agreements. However, the EU typically includes a lot of words on labour standards in its trade agreements and sets up machinery for dialogue and consultation, but has never agreed on any means for enforcement. There is no evidence that its trade agreements have led to changes in labour standards in any partner country.

The USA has a more consistent record than the EU of including labour chapters in its trade agreements. It has also tended to strengthen those clauses over time. Thus the agreement with Peru, which came into force in February 2009, insisted on the 1998 ILO declaration on fundamental principles and rights at work. The USA is also the only country to have tried to apply any sort of sanctions, moving to set up an arbitration panel in 2014 to punish Guatemala for failing to enforce its own labour law. This followed complaints from Guatemalan trade union representatives of extreme intimidation, including murders which the authorities seemed unwilling to investigate.

However, US past practice suffers from three weaknesses.

The first is that the USA itself has been backward in ratifying ILO conventions. It has ratified 14 of the ILO's 189 conventions, including only two of its eight core labour standards (against forced labour and against the worst forms of child labour). It has not ratified conventions on freedom of association and collective bargaining, unlike all EU member states. A number of laws and practices in parts of the USA, restricting trade unions and rights to collective bargaining, would be unlikely to be judged compatible with ILO standards. It has presumably felt safe that economically and diplomatically weaker partners in past trade agreements will not take action against the USA for this likely non-compliance with provisions that it has signed up to.

The second weakness is that sanctions can be applied only where breaches of labour rights visibly affect trade. In other words, they are no protection to those outside partner countries' exporting sectors.

The third weakness is the reluctance to use sanctions when labour rights are not a high priority in US foreign policy. Thus it was April 2008 when trade unions in the USA first raised complaints about the situation in Guatemala with the US government. It was 2014 before the latter committed itself to proceed to set up an arbitration panel.

Achieving a strong labour chapter in TTIP would be a challenge. The ideal labour chapter would include full commitment to fundamental ILO conventions and their incorporation into national legal frameworks prior to TTIP coming into effect. There should then be sanctions should governments fail to implement their own laws and means for trade union and civil society representatives to press for action in cases where the agreement is breached, ideally by-passing the inertia and reluctance of government bodies. That would provide a basis for improving standards across all sectors and for all employees, with governments held liable for upholding internationally recognised standards. That could then be a model for trade agreements around the world.

9. Is there another way forward with TTIP?

The dominant thinking on globalisation has favoured increased liberalisation of trade and investment between countries. There are good reasons for supporting increased international contacts, but a philosophy based on liberalisation alone threatens a reduction in the effective power of governments, parliaments and courts in their own countries and worsening of conditions of employment and of environmental and consumer protection. The issue for constructive policy making is to find a means to develop international economic integration while respecting the sovereignty of democratic institutions and ensuring a further enhancement of social and employment conditions.

A TTIP based on liberalisation alone should not be acceptable for EU policymakers and stakeholders alike. It should not include ISDS, which gratuitously hands extra power to multinational companies. It should recognise and protect the rights of governments to develop public services free from the profit motive. It should foster the expanded role for such services and for employment protection, rather than allow them to be called into question. There should be unequivocal recognition of governments' right to regulate in the interests of sustainable development and economic and financial stability. That implies a controlled reduction in formal trade barriers, achievement of regulatory compatibility only where that implies no lowering of standards, and no special privileges for multinational companies.

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