

The Transatlantic Trade and Investment Partnership (TTIP): converging interests and diverging opinions

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Introduction

Since the early 2000s, the United States and the European Union, in order to highlight the key role that regulatory cooperation can play in building a strong transatlantic relationship, have stressed the need to promote better regulation, minimize regulatory divergence and facilitate transatlantic commerce. These tenets are now becoming reality through the TTIP (Trans-Atlantic Trade and Investment Partnership), designated by EU Commission President Juncker as one of the Commission's ten key priorities. According to the EC website, the 'TTIP could create jobs and growth at home, give global trade a shot in the arm, and boost our influence outside Europe too'¹.

The TTIP, a subject of major concerns in Europe, has already been written about at length on both sides of the Atlantic, and has provoked much controversy, which has unsettled the negotiators. Following eight rounds of negotiations, TTIP is facing fierce opposition from tens of thousands of US and European citizens, NGOs, trade unions and civil society organisations, all alarmed by the potential dangers of such a far-reaching trade agreement. They all fear that TTIP will result in a race to the bottom and in the erosion of their social, trade union and environmental rights. They fear that these rights will be sacrificed on the altar of free trade for the benefit of the multinationals.

1. <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

Following a brief reminder of the context (section 1), objectives and content of the TTIP (section 2) and a progress report on negotiations at the end of the eighth round (section 3), we shall return to certain issues which have been the focus of debate in 2014 (section 4): the lack of transparency surrounding the negotiations, the questioned potential benefits of the TTIP, its impact on labour standards, the controversial issue of the investor-state dispute settlement mechanism (ISDS), and regulatory cooperation already deemed to be anti-democratic².

1. Context of the launch of the TTIP negotiations

The idea of a large transatlantic market is not a new one. In 1998, leaders of certain major North American and European multinationals set up the '*Trans-Atlantic Business Dialogue*'³ (TABD), a powerful lobby group. Politicians responded positively by signing up for a transatlantic economic partnership with the intention to intensify economic relations between the two powers.

The terrorist attacks of 11 September 2001 and the invasion of Iraq in 2003 led to a cooling of transatlantic relations, but the ambitious aim of one great market resurfaced in 2005 in the form of the EU-US economic initiative.

In 2011, following the work of the 2007 Transatlantic Economic Council (TEC), US and European leaders formed the High-Level Working Group on Employment and Growth, the task of which was to identify policies and measures to implement in order to expand trade and investments. It recommends 'to launch negotiations on a comprehensive trade and investment agreement'. The final report from this group describes everything from the joint approach taken by the parties to the main parameters of these negotiations, and lists those areas in which the EU and the US have found common ground, describing how they intend to address the many areas, which will be included in the

2. This list is not at all exhaustive. Environmental issues, food safety, privacy, and the impact of public services are all points which are giving rise to animated discussions and arousing strong feelings.

3. <http://www.transatlanticbusiness.org/>.

agreement (HLWG 2013). The next step was the joint declaration made by Barack Obama, José Manuel Barroso and Herman Van Rompuy in February 2013⁴ relaunching the transatlantic partnership.

In Europe, large industrial groups, particularly in the automotive sector, were on the lookout for new markets and cheaper production sites. The economic and financial crises of 2008 resulted in a drop in wages in the United States, which thus became more competitive. In the US, also, multinationals encouraged the creation of a transatlantic free trade area. They reportedly made a deal with the Obama administration: they will pay more taxes, but will benefit in return from the opening up of a vast transatlantic market, something which is of great interest to new US cutting-edge companies such as Amazon, Google and Microsoft (Quatrepont 2014).

In 2013, the 28 national governments gave the European Commission the mandate to negotiate the TTIP. The negotiation stage is now fully under way and, by the end of 2014, seven negotiating rounds had taken place between EU and US negotiators. The process is expected to reach its conclusion by the end of 2015.

2. Objectives and content of TTIP

According to the negotiating mandate of the EU Council (made public rather late in the day on 9 October 2014), the agreement will only contain provisions relating to trade and trade-related issues between the United States and the EU. The agreement will be ambitious, comprehensive, well-balanced and fully consistent with World Trade Organisation (WTO) rules and obligations (Council 2013).

The aim of the TTIP is to develop trade and investment by tapping into the unused potential of a true transatlantic market, generating new economic potential for employment and growth thanks to increased market access and greater regulatory compatibility, paving the way for

global standards which could also be adopted by third countries. Its aims are:

- the abolition of most customs duties on bilateral trade on the entry into force of the agreement, followed shortly afterwards by a phasing out of all customs duties, except for the most sensitive;
- access to new markets by the dismantling of long-standing obstacles, while acknowledging the sensitive nature of certain sectors (services, agriculture, etc.). The EU intends to secure access to maritime transport and to US airline services, which is a controversial measure in the United States (EP 2014). Audiovisual services have been excluded;
- continued liberalisation of public procurement: the EU wishes to counter the US rules on national preference, such as the *Berry Amendment*⁵ and the *Buy American Act*⁶, and to obtain access to the US at inter-federal level, bearing in mind that federal commitments on public procurement contained in external trade agreements are optional for the federal states. The United States, on the other hand, is seeking to obtain 'fair, transparent and predictable' rules and non-discriminatory treatment in the EU and its Member States (United States Trade Representative, USTR 2013);
- the dismantling of regulatory non-tariff barriers to trade by attaining an ambitious level of regulatory coherence for goods and services through mutual recognition, harmonisation and enhanced cooperation between regulators. This is the hard core of the TTIP, which involves the most complicated issues to address. The regulatory differences between the EU and the United States reflect differences in preferences and values between their populations, as well as differing approaches to risk management;
- the protection of investments, as part of an investor-state dispute settlement (ISDS) mechanism, guaranteeing the transparency, independence of arbitrators and the predictability of the agreement, and offering investors a broad range of arbitration structures.

4. http://europa.eu/rapid/press-release_MEMO-13-94_fr.htm.

5. The *Berry Amendment* (1941) obliges the US Defense Department to use local suppliers for all of its public procurement needs. It was codified in 2002, and now applies mainly to textiles and foodstuffs.

6. A federal law (1933) requiring the US government to directly purchase only goods produced on US territory.

The final TTIP agreement will contain 24 chapters, divided into three sections: market access, regulatory cooperation and rules.

The section concerning market access focuses on achieving the EU's objective to gain easier access to the American market, in particular in trading goods, services (including financial services) and public procurement. The second section aims at cutting 'red tape and costs' and includes regulatory coherence, technical barriers to trade (TBT), food safety and animal and plant health, chemicals, cosmetics, engineering, medical devices, pesticides, information and communication technologies, pharmaceuticals, textiles, and vehicles. The last section on rules will lead to the adoption of new rules to make it easier and fairer to export, import and invest. It will contain rules on trade and sustainable development including labour rights, energy and raw materials, customs and trade facilitation, SMEs, investment protection and investor-state dispute settlement (ISDS), competition, intellectual property and geographical indications, and government-government dispute settlement⁷.

3. State of play: what progress after eight negotiating rounds?

The first three negotiating rounds took place in 2013, and gave negotiators a better understanding of their respective approaches to the areas covered by the agreement. The fourth round, therefore, was when the real negotiations began.

By the end of seven negotiating rounds, clear differences of view had emerged between the EU and the United States:

- on the abolition of customs duties: proposals for possible tariffs were exchanged in February 2014, but the Commission criticised the US offer as being less ambitious than its own, and publicly asked for a substantial improvement;

7. <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

- there are clear areas of disagreement on financial services: the EU wishes to include cooperation on financial regulation in TTIP as well as market access, but the United States fears that this would affect the restrictions contained in the *Dodd-Frank Act*⁸, and believe that the issue can be dealt within existing structures (the G20 and the Financial Stability Council). The European Commission therefore withdrew financial services from the negotiations during the sixth round, and informed Member States that it would address this issue once again if the US changed its views on greater regulatory coherence⁹;
- in relation to intellectual property rights, the European geographical indications (GI) are a potential obstacle, since many people in the US are unhappy with the idea of European GIs receiving protection under TTIP;
- agriculture has emerged as a key issue: the United States has condemned EU policies and measures relating to GMOs and certain chemical treatments. It wishes to see the lifting of EU health and phytosanitary barriers to US meat exports¹⁰, but Karel de Gucht, the European Commissioner for trade, has promised that the TTIP would not affect EU legislation on GMOs or hormones in beef, and has ruled out any form of mutual recognition of chemical products¹¹;
- on issues relating to the regulation of e-commerce and flows of cross-border data, European concerns in relation to US data protection legislation and practice were heightened following the revelations of spying activity carried out by the American National Security Agency (NSA) (EP 2014).

8. The *Dodd Frank Act* (2010) aims to enhance financial stability in the United States, to limit the moral hazard inherent to the 'too big to fail' character of certain financial institutions and to protect tax payers and users of financial products.

9. Euractiv (2014) Financial services off the table at next round of TTIP talks, 17 June 2014, <http://www.euractiv.com/sections/euro-finance/financial-services-table-next-round-ttip-talks-302808>.

10. Euractiv (2014) US wants 'science' to settle GMO debate in trade deal with EU, 18 June 2014, <http://www.euractiv.com/sections/trade-industry/us-wants-science-settle-gmo-debate-trade-deal-eu-302876>.

11. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1181&title=%C2%ABLe-TTIP-ne-modifiera-pas-la-r%C3%A9glementation-europ%C3%A9enne-applicable-aux-produits-chimiques-dangereux%C2%BB>.

The last round covered by this chapter (February 2015) clarified issues concerning market access, industrial tariffs, access to the agricultural market, trade in services and public procurement. A main focus of this round was the horizontal regulatory pillar: technical barriers to trade and issues relating to food safety and animal and plant health. While the latter issues are close to consolidation, there are still differences of view on TBTs. The EU has put forward its proposals on horizontal regulatory cooperation. Significant progress has been made on government-government dispute settlement, customs, trade facilitation and on problems concerning SMEs. Discussions on intellectual property rights are continuing, in order to further fine-tune the list of points to be covered by the agreement.

The next negotiating rounds are planned for April 2015 in Washington and July in Brussels. Two more rounds should follow by the end of the year. According to the December 2014 conclusions of the European Council, 'the EU and the US should make all efforts to conclude negotiations on an ambitious, comprehensive and mutually beneficial TTIP by the end of 2015'¹².

4. Some critical issues discussed in 2014

4.1 Lack of transparency of the negotiations

There has been on-going criticism from various NGOs, trade unions, civil society representatives and MEPs about the lack of transparency of the EU-US negotiations on TTIP. Opponents of the draft agreement point to the confidentiality of the negotiating mandate as a typical example of the lack of transparency and unwillingness of the Commission and Council to involve the public in this affair.

In a letter sent to his US counterpart in July 2013, the Chief EU negotiator, Ignacio Garcia Bercero, confirmed that the Commission would oppose public access to all documents relating to the negotiation or development of TTIP, and that the public would be denied access to these documents for a period of 30 years (European Commission

12. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/146411.pdf.

2013d). The EU Commissioner for Trade, Karel de Gucht, had also stated to the European Parliament that the Commission would apply an equivalent level of confidentiality to TTIP to that applied to previous trade agreements. He called upon all MEPs to defend the confidentiality of the negotiations¹³.

However, following the revelations made by Edward Snowden in June 2013 on espionage involving the National Security Agency (NSA), the European public and NGOs became concerned and began to demand greater transparency¹⁴. The European Commission tried to rectify matters by setting up an official website that presents the issues in an excessively simplistic fashion, using videos and so-called 'factsheets'.

In July 2014, the European Ombudsman, Emily O'Reilly, opened parallel inquiries in the EU Council and Commission to respond to the concerns expressed¹⁵. However, it was ultimately a judgment handed down by the Court of Justice of the European Union on 3 July 2014¹⁶ that would pave the way for the publication of documents relating to the TTIP negotiations. According to the European judges, texts relating to international issues should not systematically be kept confidential. The Council should provide specific reasons justifying any refusal to publish individual documents.

On 9 October 2014, the European Council of Ministers responsible for international trade authorised the European Commission to publish the negotiating mandate (Council 2014). This act was an important decision of principle, since it would be the first time such a publication had occurred since the European Union began negotiating trade agreements. In November, the Commission undertook the task of making public more European documents linked to the negotiations, while underlining that

13. Transcription of a debate on the EU negotiations on trade and investment with the United States, European Parliament Strasbourg, 22 May 2013.

14. FO Europe (2014) Civil society call for full transparency about the EU-US trade negotiations, 19 May 2014 (http://www.foeeurope.org/sites/default/files/foee_tt看-civil-society-transparency-call190514.pdf).

15. European Ombudsman (2014) Ombudsman asks the Council and Commission to publish more documents on TTIP, Press release, 31 July 2014 (<http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>).

16. CJEU, judgment of 3 July 2014, *Council of the European Union v In 't Veld*, C-350/12, not yet published.

'there should be no intention to publish' US or joint documents without the explicit authorisation of the United States'. The Commission also undertook the task of publishing the names of the individuals met by its political officers and senior officials (European Commission 2014d).

On 7 January 2015, the European Commission published several of its proposals for legal texts on competition, food safety, animal and plant health, customs issues, technical barriers to trade, small and medium-sized enterprises, and government-government dispute settlement. Other documents were to be published, except for those relating to market access and quotas and customs duties, which were deemed to be too sensitive¹⁷.

This apparent openness has not really met all expectations: none of the documents have been published together with their annexes, and the records of the negotiating rounds were found to be still too cursory. Nevertheless, at least they have been published, which is not the case on the other side of the Atlantic, where secrecy continues to reign.

4.2 Promised, but questionable, benefits

Relations between the EU and the US are considered to be the most significant relations globally in terms of trade and investment. In 2012, these two economies made up almost half of global GDP, and represented 30% of world trade (EP 2014). Nevertheless, there is said to still be unused potential in terms of economic growth.

Most of the quantitative arguments in favour of TTIP come from four econometric studies, which are often cited: from Ecorys (2009), CEPR¹⁸ (2013), CEPII¹⁹ (2013) and the Bertelsmann Stiftung (2013), the first two of which were directly commissioned by the European Commission. All of these foresee benefits in terms of trade and increased GDP for the EU and the United States. Only the Bertelsmann Stiftung study (2013)

speaks of possible consequences for employment. In the long term, it says, the TTIP could create around a million jobs in the US and 1.3 million in the EU.

Although it does not predict any impact on employment, the CEPR study has been particularly influential. The European Commission has used it as its main source of information on the economic effects of TTIP (European Commission 2013a and 2014a). This study presents a number of possible scenarios and indicates that a comprehensive and ambitious TTIP would result in an increase in total annual GDP of 0.5% for the EU (i.e. 119 billion EUR), and of 0.4% for the United States (95 billion EUR), once it was fully implemented in 2027. European households would see an average increase in their disposable annual income of 545 EUR thanks to the agreement, which would also result in an increase in the GDP of our trading partners of around 100 billion EUR (CEPR 2013). In its declarations on the TTIP, the Commission only refers to the most ambitious scenario (Myant and O'Brien 2015).

There is far from total agreement on these studies. Raza *et al.* (2014), in a critical assessment of the results and methodologies underlying these analyses, note that their very attractive results are based on unrealistic hypotheses, methods which are seen as inadequate (computable general equilibrium models, except for Bertelsmann), and the same data base to assess the repercussions of trade reforms. It is not surprising, therefore, that they come up with converging results, and this convergence should not be understood as an unbiased confirmation of their forecasts.

To obtain a more realistic scenario, Capaldo (2014) uses the United Nations Global Policy Model (GPM), a global econometric model focused on demand. He performs a simulation that takes account of the context of prolonged austerity and of the low growth rates in the European Union and the United States. His results are radically different from, and far less optimistic than, those produced by other evaluations. For Europe, he sees the TTIP resulting in:

- net losses in exports after 10 years, compared to the baseline 'without TTIP' scenario, of around 1.9% for France, 1.14% for Germany and 0.95% for the United Kingdom;
- a fall in GDP of -0.50% in Northern Europe, -0.48% in France and -0.29% in Germany;

17. Euractiv TTIP papers published as EU Ombudsman demands more transparency, 7 January 2015 (<http://www.euractiv.fr/sections/commerce-industrie/la-commission-publie-plusieurs-documents-de-negociation-du-ttip-311110>).

18. Center for Economic Policy Research.

19. Centre d'Études Prospectives et d'Informations Internationales.

- a drop in earned income of around 5,500 EUR per worker in France and 3,400 EUR in Germany;
- the loss of around 600,000 jobs in the European Union, including 223,000 in Northern European countries;
- a transfer from earned income to capital of around 7% in the United Kingdom, 8% in France and 4% in Germany;
- a reduction in government revenues and greater financial instability.

Although job creation is presented as an absolute priority for the European development model, there is absolutely no guarantee that TTIP will meet these expectations. Capaldo's study indicates that there is a likelihood, rather, of massive job losses in the EU (600,000) rather than the gains predicted by Bertelsmann.

In such a context, it is useful to refer to other trade agreements such as the North American Free Trade Agreement (NAFTA), which promised to create 170,000 new jobs in the United States²⁰. Twenty years down the line, its results have been disappointing. The US trade balance with Mexico deteriorated by around 98.8 billion dollars between 1994 and 2010, following mass company relocations from the US to Mexico. These relocations caused the loss of 682,000 jobs in the United States, of which 61% were in manufacturing. Two thirds of relocated workers lost more than 20% of their wages. As for Mexico, the real income of workers fell by almost 40% compared to before the agreement. Agriculture has been crippled by competition from US agribusinesses, and the increased competition has obliged the government to privatise some public companies and part of the social security system. In Canada, increased competition has led to a fall in public expenditure, taxes and social security (Scott 2011; Public Citizen 2014).

With reference to the job losses, which generally result from free trade agreements, the European Commission has confirmed that TTIP could provoke a sustainable and substantial disruption of the European labour market (European Commission 2013a). It acknowledges the 'legitimate' concerns as to the future of workers who would lose their jobs as a result of

20. The NAFTA (North American Free Trade Agreement), signed in 1992 by Mexico, Canada and the United States, and which entered into force in 1994, is a global agreement covering the same areas as TTIP. It was intended to provide economic growth and job creation by reducing tariff barriers.

TTIP, and advises EU Member States to have recourse to structural assistance funds such as the European Globalisation Adjustment Fund and the European Social Fund to help those who are expected to lose their jobs (Hilary 2015).

4.3 The impact on labour standards

Trade unions and civil society organisations are also extremely concerned as to the real implications of TTIP for workers on both sides of the Atlantic.

4.3.1 The potential risks of the TTIP

In theory, a free trade agreement between two developed economies with sound industrial relations systems should produce few concerns as to labour standards and social rights. In this case, however, major challenges clearly exist as to social and labour standards.

Two fundamentally different concepts of labour standards

The United States and the EU have fundamentally different conceptions of the employment relationship. The US model is based on the primacy of market forces (Block *et al.* 2004). Government regulation and, to some extent, the scope of collective labour conventions are therefore kept to a minimum. The European approach, on the other hand, is based on the principle that non-regulated markets create an imbalance in negotiating power between employers and workers. Governmental regulation and trade unions are necessary to provide a counter-balance and to defend employees in the labour market. These fundamental differences of approach may have very serious implications in the context of the TTIP negotiations.

Different conceptions of social security and labour law

Compa (2014) warns against the deregulation existing on the US labour market, which would destroy the European social safety net protecting the most vulnerable²¹. He underlines the crucial differences in the rules on dismissals. The US doctrine is one of do as you please, whereby any employer can fire staff, cut wages or do away with perks for whatever

21. The Agricultural Act of 2014, voted through by the Republicans in the House of Representatives, abolished the food aid which had been provided to millions of impoverished Americans.

reason, as long as this is not forbidden in law. There is no law in the US which requires the payment of redundancy pay dependent on seniority. There is no limit on the overtime a worker may be obliged to work by his or her employer. There is no law on mandatory leave or rest times. This lack of regulation could act as a magnet to attract European investors under a new trade agreement.

An imbalance in workers' trade union rights

All 28 members of the EU have ratified fundamental ILO (International Labour Organisation) Convention 87 on the Freedom of Association and the Protection of the Right to Organise, and Convention 98 on the Right to Organise and Collective Bargaining. By contrast, the United States is one of just 36 countries, which have not ratified either or both ILO Conventions 87 and 98²². This has been widely criticized in the past and has raised serious and justified concern among European citizens and civil society.

According to the U.S. Department of Labour, the United States will not ratify any ILO convention unless or until US law and practice, at both the federal and state levels, is in full conformity with its provisions²³. McIntyre and Bodah (2006) explain the three main arguments given by the US government for not ratifying fundamental ILO conventions: 'First, national labour policy is well established in the US, ensures a delicate balance between the interests of business and labour, and should not be upset to accommodate the interest of an international agency'. Second, the United States, being a member of ILO, has to uphold the spirit of ILO conventions 87 and 98. Third, ratification is impossible as the Conventions would affect state and other employees who are not covered by federal labour laws.

For many years now, there have been worries as to the gradual importation of the US 'union-buster' model to the EU (particularly in the UK) to undermine the traditional respect of union rights. The TTIP

22. So far the US has ratified only two of the eight conventions (Abolition of Forced Labour Convention, Worst Forms of Child Labour Convention). A third convention on discrimination has been submitted to the Senate for consent in 1998, but has not yet been considered.

23. United States Department of Labor, International Labor Standards and the ILO (<http://www.dol.gov/ilab/diplomacy/PC-ILO-page2.htm>).

is reigniting these concerns, and raising questions as to the EU's ability to defend the respect of union rights and collective bargaining, as enshrined in the treaties (Richards 2014). These fears are even greater since the economic crisis has already resulted in a clear erosion of union and social rights in several European countries (Schömann 2014).

A risk of social dumping?

These fundamental differences in the area of union rights raise the question of social dumping. The relatively weak employment standards currently applied in the 25 US states which have adopted anti-union legislation concerning the so-called 'Right to Work'²⁴ could have broader implications. Since labour costs in these states are lower, many US companies have already deliberately transferred their production sites to these states. European companies, however, could use the system to relocate their activities in the future, investing and building factories in the US states which apply this famous 'right to work', thus avoiding the need to respect European labour standards. Moreover, according to the investor protection provisions proposed in TTIP, any improvement in employment arrangements or conditions would entitle these EU or US companies to claim for compensation. The fear of being party to legal cases such as *Veolia v Egypt*²⁵ by virtue of TTIP could dissuade states from improving social benefits (Richards 2014).

4.3.2 EU and US Positions

In its initial position paper of 16 July 2013, the European Commission states that, in addition to recognition of sustainable development as a horizontal and environmental aspect that should inform the TTIP in all areas, an integrated chapter is envisaged on labour and environmental aspects as well as their inter-linkages (European Commission 2013c). There should be cross-references to labour rights in other chapters (investment chapter, services and public procurement).

24. A 'right-to-work' law is a statute in the United States that prohibits union security agreements, or agreements between labour unions and employers, that govern the extent to which an established union can require employees' membership, payment of union dues, or fees as a condition of employment, either before or after hiring.

25. Since 2012, under a bilateral investment agreement between France and Egypt, Veolia has been involved in a court case with Egypt, which it took to court for the alleged breaking of a waste disposal contract for the city of Alexandria. The city had refused to amend the contract as demanded by Veolia, which had to deal with increased costs, partly due to the establishment of a minimum wage (Kyriaki 2012).

Its issue paper sets out a promotional approach on labour provisions for the TTIP negotiations in order to prepare the negotiations on the text. It focuses on commitments to promote 'the mutual supportiveness between trade and labour policies and to ensure that increased trade does not come at the expenses of worker protection, but rather supports it'. It refers to the ILO Decent Work Agenda²⁶, the ILO core labour standards and other ILO labour standards protecting working conditions in additional areas (such as health and safety at work). To further evolve an effective commitment to labour provisions, the EU proposes to include thematic core labour standards for each of the four areas of fundamental rights and principles as defined in the ILO declaration of 1998, describing in more detail the commitments made by each partner, including concrete actions planned for implementation.

The proposal also promotes the uptake of Corporate Social Responsibility (CSR) on labour matters, in accordance with internationally recognized principles and guidelines, in order to foster the contribution of trade and investment to sustainable development.

To solve any conflict concerning the implementation of labour provisions, the EU has a dedicated dispute settlement mechanism which establishes a clear, mandatory and time-bound procedure for the resolution of any concerns, not providing for sanctioning but for dialogue and follow-up actions (European Commission 2014b).

In its position paper, the Office of the United States Trade Representative underlines the fact that the labour provisions of this agreement may become a model, given the shared commitment by both partners, which already maintain a high level of protection for their workers. The US stresses the need for commitment to internationally recognised labour rights in the agreement and the wish to establish procedures for consultations and cooperation to promote their respect (USTR 2013).

Previous bilateral agreements signed by the US do not refer to the ILO's Decent Work Agenda, nor to its eight fundamental conventions. Since it is unlikely that the US will ratify these fundamental conventions, the

26. It sets out 4 pillars: promoting employment, social protection, promoting social dialogue, fundamental principles and rights to work.

most we can hope for is that the TTIP will contain general non-binding provisions urging ratification of the fundamental conventions, combined with a process for follow-up and dialogue. There is a risk, then, that the TTIP will end up applying to workers enjoying differing levels of protection and rights within one single market, with all the dangers this could imply, particularly in terms of social dumping.

4.3.3 European and US trade unions form a common front

The European Trade Union Confederation (ETUC) is lobbying for the inclusion of a social clause and implementation mechanisms in the agreement in the hope of creating a 'gold standard' agreement, which will help to improve living and working conditions on both sides of the Atlantic, and to guard against any attempt to use the agreement to lower standards (ETUC 2013).

The American Federation of Labor and Congress of Industrial Organisations (AFL-CIO) agrees with the ETUC that the TTIP objectives should include full employment, decent work and better living conditions for all, and that in no case should it permit deregulation.

In the view of the US federation, an agreement with Europe is a real opportunity for the United States government to move beyond the approach based on the lowest common denominator in the field of labour rights, and, instead, to create trade standards which will benefit individuals. The labour rights provisions in TTIP must therefore be strong, and must go beyond those contained in the US-Peru free trade agreement of 2007²⁷. The latter represented a considerable step forward, but do not contain all the elements, which are essential to a binding chapter on 'Labour'. The AFL-CIO also warns against the risk that the negotiating process might be used to attack measures relating to worker and consumer protection and food safety, such as those in

27. They require parties to adopt and maintain labour laws that comply with ILO core standards and provide acceptable wages, hours and health and safety conditions, and to effectively enforce such laws. They further subject labour obligations to the same dispute settlement procedures as commercial obligations, with both fines and trade sanctions available as remedies.

REACH²⁸ for chemical products, or labelling requirements for genetically modified foodstuffs (AFL-CIO 2014).

In their *Declaration of Joint Principles* of 21 May 2014, the ETUC and AFL-CIO highlight the points which must be dealt with in TTIP, emphasising a key element: it must work. According to both organisations, labour rights should be built into the architecture of the TTIP, should apply at all levels of government of both parties, and should not be limited to the chapter on sustainable development. The parties should commit themselves to the ratification and effective enforcement of ILO fundamental labour standards (ETUC and AFL-CIO 2014).

The trade unions support the Commission concerning the inclusion of the ILO's 'Decent Work Agenda' in the chapter, but regret that it takes a promotional approach, although the basic problem is that the United States has not ratified the eight ILO fundamental conventions. ILO conventions 155 (occupational safety and health), 122 (employment policy), 81 and 129 (labour inspection) and 144 (tripartite consultation) should also be included (Jenkins 2014).

4.3.4 Lessons to be learned from the past: the impact of NAFTA on workers' rights

To better understand the potential consequences of the TTIP, it is worth looking at some aspects of its not-so-distant 'cousin' initiative, the North American Free Trade Agreement (NAFTA).

The North American Free Trade Agreement was signed together with the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC). NAALC was the first agreement signed by the US that focused on labour standards and was added on to an international trade agreement.

28. REACH is an EU regulation under which all chemical substances of which more than one tonne is produced or imported per year per manufacturer or importer, including those already in circulation, must be the subject of a risk analysis and must be tested by their manufacturer or importer over the next eleven years.

Its stated objective was to improve working conditions and living standards in the United States, Mexico, and Canada, taking into account the increase in trade between the three countries. It contained 11 core labour principles, and each Party committed itself to ensuring that its labour regulation would provide high labour standards and promote compliance (in a similar way, the TTIP aims at promoting high levels of protection of EU standards). However, the chosen approach was cooperation, supplemented by some oversight mechanisms designed to guarantee adequate enforcement of labour laws, with violations being potentially punishable by trade sanctions as a last resort. Unfortunately, these commitments have turned out to be rather general and vague and the principles have not been interpreted in a similar manner by the three parties.

Thirty-eight submissions have been made under NAALC by non-governmental groups or unions, referring to serious alleged violations (issues of freedom of association, health and safety, employment discrimination, minimum employment standards; the outcome of the resolution process has almost systematically been disappointing, often limited to an exchange of information or the organization of public fora or seminars²⁹).

NAALC has been relatively weak in its ability to improve working conditions and living standards, or promote compliance with national labour regulations. It does not have a formal mechanism to include workers or their representatives in the process beyond presenting the initial submission. Several of the submitted cases were not solved due to limitations in the agreement, governmental weakness and a lack of political will to truly resolve problems, as well as the refusal to involve workers in initiatives destined to improve workplace conditions (Delp *et al.* 2004).

29. See *ITAPSA and Apple growers cases*: Bureau of International Labor Affairs, US Dept of Labor, 1997. United States Department of Labor. Bureau of International Labor Affairs. Submissions under the North American Agreement on Labor Cooperation (NAALC). US NAO Case 9703 & Canada NAO Case 98-1: ITAPSA. <http://www.dol.gov/ilab/trade/agreements/naalc.htm>; Bureau of International Labor Affairs, US Dept of Labor, 1998a. United States Department of Labor. Bureau of International Labor Affairs. Submissions under the North American Agreement on Labor Cooperation (NAALC). Mexican NAO Case No. 9802: Apple growers. <http://www.dol.gov/ilab/trade/agreements/naalc.htm>

Serious doubts have been raised as to the access to labour courts in Mexico and the United States, as well as to their fairness. Settlements are often rather weak and unenforceable for workers. Ministerial agreements suggesting the provision of better information to victims cannot be considered as genuine solutions to the serious labour violations denounced in many of the cases (Human Rights Watch 2001).

This situation raises serious doubts as to the usefulness of such mechanisms and their ability to protect workers. Clearly, such an approach has to be avoided at all costs in the TTIP process.

4.4 Investor-state dispute settlement

No sooner had TTIP negotiations begun than it emerged in public discussions that the inclusion of an investor-state dispute settlement (ISDS) mechanism was a potential obstacle to ratification of the agreement.

This mechanism allows a foreign investor to lodge a direct complaint to a State, to be examined not in national courts, but rather in an international court of arbitration. The investor may bring an action if he considers that the State has infringed the rules of the investment treaty, which protect his rights. The purpose of the ISDS is to ensure a safe and predictable context for foreign investors, as well as a dispute settlement system, which is apolitical and facilitates both decisions and investments (Fabri and Garbasso 2015).

The large number of investment agreements signed in recent years³⁰ (UNCTAD 2014) and the steep increase in the number of disputes between investors and States have generated criticism as to restrictions on a State's sovereign power to legislate and to apply the law³¹.

30. The United Nations Conference on Trade and Development (UNCTAD) listed, in 2013, almost 3,200 bilateral investment treaties and investment chapters contained in free trade agreements.

31. *Veolia v Egypt* is one of the cases most frequently referred to, see note 23.

Civil society and NGO representatives condemn the ISDS as unlawful. If the arbitration court finds in favour of the investor, it can only demand financial compensation, and cannot, in principle, ask a State to withdraw or amend a law which is not compatible with the agreements signed. Nevertheless, given the risk that it might have to pay considerable financial compensation, a government may decide to withdraw a law, decision or regulation, or make it more flexible. Indirectly, then, foreign investors would be able to influence legislation. New Zealand, for example, suspended its decision to amend its legislation on cigarette packets, pending the outcome of the complaint lodged by Philip Morris against the Australian government concerning a similar legislative change (Skovgaard Poulsen *et al.* 2013).

Whilst there are risks of politicisation of the cases brought in certain developing countries, the risk is far lower in US and European democracies. Many States have already adopted national laws offering protection against direct and indirect expropriation³², including the United States, so why resort to international arbitration? Using these arguments, Australia convinced the United States not to include the ISDS in their 2004 trade agreement, since both countries have a sound and well-developed system for settling disputes between investors and States (Fabry and Garbasso 2015). In the same line of thought, the European Parliament voted unanimously in favour of an explicit clarification mentioning that future investment agreements would only include an ISDS mechanism in cases where this could be justified (EP 2013).

Recourse to the ISDS could result in reverse discrimination: US investors would have the privilege of being able to call upon an international arbitration court, whereas European investors would not and would have to go through national courts, and vice-versa (Krajewski 2014).

32. Direct expropriation occurs when an investment is nationalised or when it is directly expropriated by means of an official transfer of the legal title or through the physical seizure of that investment. Indirect expropriation occurs when a State intervenes in the use of the asset or the benefits provided by this asset without it being seized or the legal title to the property being affected.

Civil society and NGO representatives opposed to the ISDS denounce the lack of transparency of this arbitration process, which takes place behind closed doors. The documents tend to be kept confidential and the public is not allowed into the hearings, and in some cases is not even informed of certain disputes. The European Commission undertook actions to enhance the transparency of its ISDS model during the negotiations with Singapore and Canada by introducing a clause on total transparency. Questions have also arisen as to the independence and impartiality of the arbitration judges (Speak 2014).

From a trade union perspective, Krajewski (2014) lists the elements missing from the Commission's approach in relation to the protection of labour rights and social interests, e.g. investor obligations and the link between the protection of investments and the promotion of social and labour standards; adherence to corporate social responsibility principles or non-binding guidelines (ban on child and forced labour, etc) addressed to multinationals.

The European Commission, on the other hand, sees the need to set out a template for a European bilateral investment treaty and underlines that '(...) the system needs improvements' (European Commission 2013b). On 27 March 2014, it opened an on-line consultation on investor protection in TTIP. It published its report in January 2015, presenting an analysis of around 150,000 contributions received (European Commission 2015a): 97% of the responses were opposed to the inclusion of an ISDS mechanism in TTIP. The Commission maintains, nevertheless, that this consultation was not a referendum, and has identified four areas for further work: the right to regulate, the monitoring and operation of the ISDS tribunals, the relationship between domestic judicial systems and ISDS, and the review of ISDS decisions for legal correctness through an appellate mechanism (European Commission 2015b).

The consultation did not reassure public opinion; indeed, the Commission's attitude triggered a wave of indignation. In the view of the Corporate Europe Observatory (CEO) (2015b), 'in a blatant mockery of democracy, it is brushing off thousands who have spoken out against excessive rights for foreign investors in TTIP, pushing ahead with its pre-consultation agenda of 'reforming' an un-reformable system. But if

this is not what people in Europe want, who then is the Commission listening to? '.

The EU's final decision on the ISDS, which will have to be ratified by the Council of the EU and the Parliament, will only be taken with the approval of the Commission's First Vice-President. Although some national governments (particularly Germany) have spoken out against this clause, none of them has yet asked for the mandate to be amended to take out the ISDS.

On the other side of the Atlantic, more than forty organisations (trade unions, public health bodies, environmental and consumer groups) made an appeal to the Office of the US Trade Representative asking it to launch a similar public consultation (Speak 2014). The discussion took off following the publication in the 'Washington Post' of an opinion-piece by Senator Elizabeth Warren, a Democrat, calling for the removal of this mechanism from the future Trans-Pacific Partnership currently being negotiated by the United States³³. The Senator is well-known for her views on trade negotiations, and media coverage of her article forced the White House to publish a response on its blog. 'ISDS does not undermine U.S. sovereignty', claims Jeffrey Zients in this blog, 'The reality is that ISDS cannot require countries to change any law or regulation.' Obama's economic advisor develops a defensive line of argument similar to that of the European Commission, explaining that serious mishaps due to the system will be prevented by the demanding 'safeguards' negotiated by the United States³⁴.

33. Warren E. (2015) The Trans-Pacific Partnership clause everyone should oppose, The Washington Post, 25 February 2015 (http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html).

34. The White House Blog (2015), Investor-State Dispute Settlement (ISDS) Questions and Answers, 26 February 2015, <https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-ids-questions-and-answers>

4.5 Regulatory cooperation: an open door to lobby groups and a danger to democracy?

The highly controversial proposal for regulatory cooperation between the two continents is aimed at ensuring increasing compatibility of the existing rules in both Parties. It would mean that forthcoming legislation would be examined in the light of the constraints set up by the agreement. The TTIP would, in this way, be a 'living agreement', allowing for rules to be set even after it has been signed.

NGOs and social organisations fear that this regulatory cooperation could give pressure groups representing big business vast scope to influence the decision-making process, weakening the rights of citizens to have a say on the decisions taken.

The Commission's proposed text on this chapter, made public on 10 February 2015, was discussed with the US negotiators during the 8th negotiating round³⁵ and is strangely reminiscent of the points highlighted in a joint document from BusinessEurope and the US Chamber of Commerce, dating back to October 2012³⁶.

The main criticisms formulated by civil society against the Commission's proposal may be summarised as follows:

- early warning: as soon as a new regulation is in the pipeline, the parties will receive a notification. Even during the preparation stage of a regulation, the regulatory authorities must give stakeholders, i.e. business lobby groups potentially affected by the law or regulations, the chance to comment. In this way, companies would be able to exert strong pressure, at a very early stage in the legislative process, to block regulations protecting consumers;
- impact studies: any relevant new draft regulation will first have to be studied in terms of its impact on trade. A report on this will be drawn up to ensure that legislators do not adopt measures harmful

to the interests of major companies. This could have significant consequences on the capacity of the States and of the EU to adopt regulations in the general interest;

- exchanges on regulation: if one of the parties is unhappy about the effects of a planned legal act, or of regulations under revision, a dialogue must take place, and the party whose rules are under attack will have to cooperate and be ready to answer any questions on the matter;
- the Regulatory Cooperation Body (RCO), which would be in charge of supervising and developing regulatory cooperation, would be made up of a handful of senior officials from the European Commission's Secretariat-General, from the US and EU trade authorities, and from the US Office of Information and Regulatory Affairs (OIRA). Since there is already good cooperation between the lobby groups and regulatory agencies in the EU and the United States, this body could strengthen the influence of multinationals on public policies, whereas groups working for the general interest and with fewer financial resources would be put at a disadvantage. Although it does not have the power to adopt regulatory acts itself, the RCO is set to become an important institution (CEO *et al.* 2014; CEO 2015a);
- consultation and transparency, an open door to transatlantic lobbying: in the United States, the business world would be frustrated not to have the same access to EU decision-makers as its European counterparts. The Commission proposal therefore highlights the transparency of consultations, which could consolidate and increase the privileged access of companies to European decision-makers by including more US companies in the Commission expert groups (Bureau Européen des Unions de Consommateurs - BEUC 2015).

In February 2015, 150 civil society organisations issued a joint statement denouncing regulatory cooperation as the ultimate tool to prevent or weaken future general interest rules in favour of citizens, workers, consumers and the environment, and called upon the negotiators to withdraw this chapter from the TTIP negotiations³⁷.

35. http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf

36. US Chamber of Commerce and BusinessEurope (2012) Regulatory Cooperation in the EU-US Economic Agreement, <http://corporateeurope.org/sites/default/files/busineurope-uschamber-paper.pdf>

37. February 2015 – Statement by civil society organisations on regulatory cooperation in the TTIP http://corporateeurope.org/sites/default/files/be-statement_regulatory_cooperation_feb_2015_0.pdf

Conclusion

Clearly, the whole TTIP design and building process, from the very beginning, has been conceptually flawed, and the underlying principles questionable. Paradoxically, the process is moving forward and yet the level of uncertainty about what the TTIP will really be remains very high.

Looking at the costs, the TTIP will fundamentally impact social rights, the level of social protection in Europe and the life of all EU citizens. Already now, the Commission is pushing forward the need to simplify EU legislation, which is affecting the high level of protection in many areas. The so-called 'Better regulation' package, i.e. the process of 'simplifying', 'reducing administrative burden' and 'cutting red tape' is the tool the Commission is using to transform the law-making process and, in a way, organise a trade-off of social protection for trade.

The ambition of those who promote TTIP is to radically alter important aspects of our legal system, public services (including education and health), housing, energy, water and transport sectors, as well as working and living conditions. The whole idea of the TTIP should be abandoned. Negotiations should be stopped. Instead, the Commission should focus on the necessity to promote the EU's social and economic development.

Will the TTIP nevertheless be signed in 2015? It is far from certain. The TTIP is still unpopular in a number of European Member States, where civil society and the trade unions are actively opposing it, but the European Commission seems determined to reach an agreement.

Another obstacle to the conclusion of TTIP is the attitude of Washington. The Americans seem more interested in finalising the Trans-Pacific Partnership (TPP). In his state of the Union address, Barack Obama repeated his resolve to see both agreements concluded, and expressed his intention to ask Congress to grant him 'fast-track trade authority'. This provision facilitates US trade negotiations, since its partners can be sure that an agreement will be adopted by Congress quickly and without amendments. Congress nevertheless still retains the power, acting on a simple majority, to adopt (or otherwise) the negotiated agreement. Obama has pleaded its cause, recalling the need to

harmonise ground rules 'to protect American workers with strong new trade deals that aren't just free, but fair'³⁸. Although many in his camp are against this procedure, the situation has changed since the mid-mandate elections, lost by the Democrats. The Republican majority seem more inclined to go along with the TTIP negotiations.

In Europe, Syriza has already indicated its hostility to TTIP. The Tsipras government, when it came to power in January 2015, confirmed that it would exercise its right of veto to prevent signing of the agreement in Council.

There are also questions as to the nature of the TTIP. If the agreement is classified as a mixed agreement (including provisions other than specifically trade provisions), it will also have to be ratified by national parliaments. This, however, is very uncertain. Two weeks after the conclusion of the free trade agreement between the European Union and Singapore, the European Commission stirred up the situation by announcing its intention to request an opinion from the European Court of Justice (ECJ) on the issue of who is competent to sign and ratify such a trade agreement. In this way, the Commission is hoping to clarify which provisions of the free trade agreement concluded with Singapore fall within the exclusive or shared competence of the EU, and which fall within the exclusive competence of the Member States (European Commission 2014c).

The European judges may then decide that the provisions on the highly controversial arbitration clause (ISDS) should be ratified by national parliaments. In that case, such a decision would not just concern ratification of the agreement between the EU and Singapore, but also ratification of the TTIP.

38. The White House, Remarks by the President in State of the Union Address, January 20, 2015 (<http://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015>).

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