The Transatlantic Trade and Investment Partnership (TTIP) Negotiations between the EU and the USA

Caught between Myth and Reality?

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ACRONYMS

ARRA	American Recovery and Reinvestment Act
ASEAN	Association of Southeast Asian Nations
CAFTA	Central American Free Trade Agreement
CEOE	Confederation of Employers and Industries of Spain
CETA	Canada - EU Comprehensive Economic and Trade Agreement
CGE	Computable General Equilibrium
EU	European Union
EUKOR	EU-Korea Free Trade Agreement
EUTUC	EU Trade Union Confederation
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
IA	Impact Assessment
ICJ	International Court of Justice
ILO	International Labour Organization
ILS	International Labour Standards
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
LP	Labour Provision
MWDR	Wage to average value added per country
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
NHS	National Health Service
NTBs	Non-Tariff Barriers
PCA	Permanent Court of Arbitration
RCC	Regulatory Cooperation Council
SME	Small and Medium-Sized Enterprise
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
US	United States of America
UN	United Nations
WB	World Bank
WTO	World Trade Organization

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The Barcelona Centre for International Affairs (CIDOB) is a think tank that analyses the events taking place in the European Union (EU) and the world at large, particularly the changes and trends that can or do affect citizens and their well-being. The process of negotiating the Transatlantic Trade and Investment Partnership (TTIP) that began in 2013 has raised high expectations – as is to be expected of an agreement of these dimensions between the EU and United States. This agreement, which goes beyond the merely economic, seeks to open up a geostrategic space that could have significant repercussions for the world order in terms of trade and investment and the future political relations of both partners. Because of its potential implications for citizens' rights, consumer protection and levels of employment protection, it is also generating great controversy and popular movements that oppose the deal's completion.

With the publication of this monograph, which is the product of an international seminar held on May 27th 2015, CIDOB aims to play its part in the debate. The experts' contributions contained here explain the pros and cons of the agreement and should aid citizens, consumers, the interested public, businesspeople, unions and political decision-makers to take positions based on deeper knowledge of the agreement and the negotiations underway.

The authors give in-depth examination to all the controversial aspects of the agreement and those causing most concern in public opinion. From the lack of transparency and the European Council's mandating of negotiating responsibilities to the European Commission, to the disputed system of Investor-State Dispute Settlement, via the social, labour and environmental issues.

The basis of the EU has always been a system of economic integration built on market economics and it has established numerous free trade agreements with countries in the Mediterranean, Latin America and Asia, and with developing and industrial economies without provoking criticism or movements opposing the agreements and their negotiating processes. This time it is different, perhaps because the agreement is

with the United States and is clearly a negotiation between peers and it is feared that the EU will be a "norm taker" in relation to the US, or because the economic crisis has reduced levels of well-being and it is feared that protection from third parties will be reduced, or perhaps it is that those who oppose free trade and the market economy have found a cause and an occasion with which to gain popularity. What is certain is that the negotiations have not followed the same course as others previously conducted, such as the negotiation concluded with Canada a year ago on the Comprehensive Economic and Trade Agreement (CETA), a model of agreement and negotiation that is very similar to the TTIP's.

The importance of the agreement and its conclusion has forced a response from the European Commission that is both understandable and, to some degree, unprecedented. The new strategy for a more responsible trade and investment policy set out in the Communication given by the Commission to the Council and the European Parliament in October 2015 is a sign of the need for a new way of concluding trade negotiations (particularly those on the TTIP) by raising goodwill rather than producing disagreement. In its new strategy, the commission proposes greater transparency and the publication of the mandate from the council to the commission along with their negotiating directives, as well as requirements for promoting and respecting labour rights around the world. It also suggests transforming "the old investor-state dispute settlement into a public Investment Court System composed of a Tribunal of first instance and an Appeal Tribunal operating like traditional court. [And] in parallel, engage with partners to build consensus for a fully-fledged, permanent International Investment Court".

The TTIP negotiations are changing shape and depth in order to face up to the challenges and ensure conclusion and ratification. Faced with these difficulties, support must be provided in order to reach a good agreement that is widely accepted. The future of the EU depends upon it, as does the preservation of the values set out in its treaty.

As director of CIDOB, I would like to thank all the participants in the seminar, the authors of this monograph, Dr Sangeeta Khorana, for coordinating both, the U.S. Consulate General in Barcelona for supporting the seminar and the European Commission's Europe for Citizens programme for its contribution to this, among other activities, that bring greater knowledge of the European Union to the citizens.

INTRODUCTION

- WHY THE TTIP AND WHAT MATTERS ABOUT IT

  Sangeeta Khorana

INTRODUCTION: WHY THE TTIP AND WHAT MATTERS ABOUT IT

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The Transatlantic Trade and Investment Partnership (TTIP), under negotiation between the European Union (EU) and the United States (US), is a comprehensive though controversial trade agreement. It aims to expand trade and investment between the US and EU through tariff reduction (particularly on agricultural products) and to achieve outcomes in three broad areas: a) market access; b) regulatory issues and non-tariff barriers; and c) rules, principles, and new modes of cooperation to address shared global trade challenges and opportunities. The ambitious trade agreement is driven by the goals of aligning regulations and standards, improving protection for overseas investors, increasing access to services and government procurement markets by foreign providers, and generating a set of global economic governance standards beyond the realm of the World Trade Organization (WTO). The ongoing negotiations have attracted significant public interest. At first, they were greeted with widespread enthusiasm, but this has increasingly been replaced by scepticism about their scope and depth as well as about the possibility of reaching a timely conclusion to a far-reaching agreement.

The US and EU have held ten rounds of negotiations since TTIP negotiations commenced in July 2013. While both sides had initially aimed to conclude the negotiations in two years (by the end of 2015), the complexity of the scope and breadth of issues covered under the proposed agreement has impacted the progress of ongoing talks. A firm conclusion date for the agreement is nowhere in sight even after the most recent round of talks was held in Washington DC in July 2015. After the conclusion of the negotiating round in July, the negotiators candidly acknowledged the political imperative of concluding the trade initiative. Despite the open acknowledgment of the need to speed up negotiations, the US and EU remain deadlocked in many areas. Issues which remain unresolved at the end of the July round include: protection for foreign investors; investor-state dispute settlement (ISDS) procedure; harmonisation of product regulations and standards cooperation; participation of small and medium-sized enterprises (SMEs) in trade; provisions on intellectual property to protect business interests; and public procurement, among others. Areas of progress include market access in agriculture,

services, rules of origin, competition, state-owned enterprises, subsidies and SMEs. Significant and positive developments to report from the July round are, firstly, the exchange of services offers, with the EU tabling its services text proposal. Secondly, progress has been made on regulatory issues, such as regulatory cooperation/coherence, technical barriers to trade and sanitary and phytosanitary issues. Finally, progress has also been reported on the regulatory pillar, though more work remains to be done. Issues on which discussions are pending (after the July 2015 round) are: (a) sustainable development/labour and the environment; (b) investment protection and dispute resolution; (c) public procurement.

Until recently the negotiating mandate was a restricted document. Though public consultations on the TTIP have been ongoing there is a lack of clarity among businesses and consumers as to what the proposed trade agreement would mean for them. Ongoing negotiations have sparked objections not only from businesses but also SMEs and consumer and environmental groups on both sides of the Atlantic, which makes it pertinent to debate the areas of common concern. The concerns of various groups emanate from possible negative economic consequences of the TTIP and the ideas and ideology that drive the overall negotiations. Three things distinguish the TTIP from other trade agreements. First, the proposed agreement has the potential to be largest free trade agreement (FTA[1]) ever negotiated by the US and EU, in terms of combined economic size, population and investment. Second, the TTIP is a 'strategic' agreement in that the negotiators are aiming for the EU and the US to take the lead in setting 21st century global standards. In particular, the proposed agreement aims to assemble a mega-agreement which includes new and expanded commitments on regulatory coherence as well as '21st century' issues, which include state-owned enterprises (SOEs) and other subjects that have either not been discussed or only modestly discussed within the FTA setting. Third, the TTIP could have direct implications for the multilateral trading system. Although the US and EU are, to date, not negotiating the TTIP as an "open" or "living" agreement it is likely that other trading partners could join (unlike the Trans-Pacific Partnership), given that other trading partners outside the agreement have expressed an interest in using the TTIP to present common approaches for the development of globally-relevant rules and standards in future multilateral trade negotiations.[2]

Why TTIP?

The economic rationale for the agreement stems from current trade statistics – the EU and US economies account for nearly half of global gross domestic product (GDP)and almost a third of world trade (WTO, 2013). The US continues to be the EU's most important trade partner, accounting for almost 20% of extra-EU exports in goods and services and more than 15% of imports in 2012, even though bilateral EU-US trade as a share of world trade has lost some importance lately. In addition, the level of Foreign Direct Investment (FDI) between the EU and the US is high, with investments of more than $3.7 trillion in each other's economies (Cooper, 2013). Trade data shows that bilateral FDI stock stood at €2.4trillion in 2011 (European Commission, 2013) and annual FDI inflows from the US to the EU amounted to roughly €80 billion in the same year (Raza et al., 2014).

1. FTAs eliminate tariffs and quotas including non-tariff barriers on all trade, allowing goods and services to move freely across signatories' borders.
2. Officials and other stakeholders of certain countries (e.g. Canada, Mexico and Turkey) have expressed an interest in their countries participating in the TTIP negotiations.

Studies reporting on the economic impact of the TTIP agreement suggest gains and mutual economic benefits from trade liberalisation for both the US and EU – though the extent is small.[3] Estimates on the change from the TTIP within the 10 to 20-year time period find GDP and real wage increases, ranging from 0.3% to 1.3%. The European Commission (2013) estimates the potential economic stimulus from the TTIP at €120 billion to the EU economy, €90 billion to the US economy and €100 billion to the rest of the world. Other studies also comment on the opportunity to boost transatlantic economic growth and jobs by eliminating or reducing costly tariff and non-tariff barriers. A CEPR study (2013) finds that an "ambitious and comprehensive" trade and investment agreement could bring aggregate economic gains of €119bn per year to the EU (0.9% GDP) and €95bn (0.8% GDP) to the US. In terms of real GDP, this amounts to an additional increase of almost 0.5% and 0.4%by 2027 for the EU and US, respectively. The study by the Ifo (2013) also estimates growth and employment effects on both sides of the Atlantic. It reports an additional increase in real GDP of almost 5% for the EU and a higher gain for the US of 13.4% over the next 20 years (Ifo Institute, 2004). A study by the UK Department of Business, Innovation and Skills (2014) estimates annual gains for the UK at between £4 billion and £10 billion (0.14% to 0.35% of GDP) by 2027. However, the employment effects of the proposed partnership are rather modest. CGE modelling studies report that unemployment in the EU will either remain unchanged, or will be reduced by up to 0.42%, i.e. roughly 1.3 million jobs, again over a 10 to 20-year period. This amounts to an annual reduction of between 65,000 and 130,000 unemployed people. The projected gains when interpreted over the 20-year time horizon do not translate into staggering benefits. For the EU, a positive growth effect of only 0.5% is predicted, which translates into average growth of 0.04% per annum by 2027. What is more, adjustment costs are mostly neglected or downplayed in most models. These costs are the macroeconomic adjustment costs, which can come in the form of: (i) changes to the current account balance; (ii) losses to public revenues; and (iii) changes to the level of unemployment.

The methodology adopted by Ecorys, CEPR and CEPII for computing the effects of the TTIP has been widely critiqued. Raza et al., (2014) opine that even 25-50% "actionable" (i.e. reducible NTMs in Ecorys's estimates (as assumed by Ecorys and CEPR)) are too high to be realistically achievable. Second, all studies employ CGE modelling techniques with standard neoclassical models of production and trade. The key assumptions of the models include: (i) full employment of factors, including labour; (ii) price clearing markets; and (iii) a constant government deficit. These assumptions are unrealistic and do not address specific key macroeconomic variables of interest. Third, the estimates are for a 10to20-year time frame, which cannot account for any changes in the short and medium term. Finally, price elasticities are high and these drive the gains from trade for the EU and US such that higher assumed elasticity values lead to higher estimated gains in exports, output and income. Thus, existing studies have been criticised for their choice of assumptions and for the likely modelling bias in their estimates of gains from the TTIP, which makes the economic results questionable.

This explains why the underlying rationale for the partnership often alluded to by both the EU and US authorities goes beyond conventional economic gains. In essence, it is a combination of economic, strategic

3. See Ecorys (2009), CEPR (2013), CEPII (2013, Bertelsmann/Ifo (2013), ÖFSE report.

and geopolitical aims that are encapsulated in an agreement. In pure economic terms, the TTIP agreement is an attempt by the EU and US to create the world's largest and richest free trade and investment area, which should be understood in the context of the failure of the Doha Round and in general to herald regulatory convergence among WTO members. The geopolitical aspect is an important consideration for both the EU and US and the emphasis of the partnership is to broadly counter: (a) the relative decline of the EU and the US in world's affairs in recent years, and (b) the rise of new economic actors, particularly in Asia-Pacific, by establishing new ground rules on trade for the world economy.

What matters in the ongoing negotiations

This book contains eight interdisciplinary chapters that provide first-hand information and useful insights into the TTIP written by practitioners and academics, which explains why the book has been structured in two parts: (a) policy perspectives; and (b) academic analysis. The rationale for the interdisciplinary focus of this compilation is that there is a gamut of issues within trade negotiations which focus on economics, politics, law and international relations. Recent works suggest that an informative analysis draws on a variety of disciplines and straddles an interdisciplinary domain. But, often, trade negotiations and agreements are analysed in isolation within the main disciplines, and as a result the inter-linkages between them are seldom unpacked for a comprehensive understanding of the issues. The essays that follow unbundle complex issues and dispel myths to enable a holistic understanding of the TTIP agreement. In all likelihood some critics will claim that a compilation of essays on the TTIP is 'just another academic contribution', but we strongly believe readers should appreciate that to understand the agreement we need to look beyond the economic rationale and comprehend issues across disciplinary boundaries to understand the functioning of the new and evolving '21st century' world order as well as to visualise interconnections between various disciplines in this chapter and the remaining chapters of the book.

The TTIP is clearly *much more than just a trade agreement*, which warrants an interdisciplinary analysis through a practitioner's lens. These essays provide information on the main issues being negotiated under the TTIP, what it means for firms and consumers in EU member states and in Spain, and how the proposed partnership could possibly reconfigure the matrix of economic governance at global level. The book contains essays that form the backbone for reading the rest of the volume and provides a comprehensive and state-of-the-art analysis of topical issues in the ongoing TTIP negotiations. We are aware that the mega-regional TTIP agreement is a fashionable area for research, and given the interdisciplinary nature of this edited volume we envisage this book as an important contribution to the existing literature. The studies made thus far have not shed the light on the policy implications of the TTIP from a practical perspective that the chapters that follow achieve. We endeavour to offer a holistic understanding of the question of how the TTIP could potentially impact businesses, consumers and the policy space in the EU, and enable the reader to assemble the enormity of the *TTIP puzzle* from a practical perspective. Part I of this book launches an investigation into the TTIP from a practitioner's perspective. The remaining chapters highlight these issues, including, of course, the thorny issues that hamper the wrapping up of ongoing negotiations.

“Assessing the Potential Economic Impact of the TTIP” (Chapter 1, Lars Nilsson and Nuno Sousa) reviews the impact of the TTIP estimated by a CEPII study (2013) commissioned by the European Commission. This study, which is the basis for the EU’s position, discusses modelling issues in ongoing negotiations, ranging from tariff and non-tariff barrier (NTB) reductions to a moderate degree of regulatory harmonisation, using CGE modelling techniques. The essay confirms that if the TTIP were to be concluded and fully implemented, this could raise GDP in the EU and the US by about 0.5% and 0.4%, respectively, which would increase bilateral exports by 30%-35%.

“The TTIP as the engine of growth: Truths and Myths” (Álvaro Schweinfurth, Chapter 2) explores the impact of the TTIP on business competitiveness. The essay *explains why the TTIP talks matter for Spanish business and, in doing so, presents the viewpoint of the Confederation of Employers and Industries of Spain. The confederation* supports an ambitious trade agreement between the EU and the US, putting forward its view that an agreement focusing on tariffs is insufficient and that only a deep integration agreement can benefit Spanish businesses.

“TTIP or Europe” (Ricard Bellera, Chapter 3) attempts to demystify the myths around the mammoth trade partnership. The author discusses the global dimension of the proposed agreement and offers a practitioner’s insight into the effects of the TTIP on the Spanish and Catalonian economies. The essay opines that the TTIP is not likely to be a magic cure for the economic problems that the EU currently faces.

Part II has five chapters that provide a well-researched commentary on the topical and controversial issues in the TTIP. For instance, “Investment protection and Investor-State Dispute Settlement in the TTIP” (Christian Tietje, Chapter 4) provides an exhaustive commentary on ISDS, which is the most controversial of all the issues in the ongoing negotiations. In fact, this aspect of the TTIP has attracted fierce criticism on both sides of the Atlantic, so much so that the EU Trade Commissioner Cecilia Malmström has made ISDS a top priority in ongoing negotiations. The chapter includes a historical and systemic review of ISDS as well as relevant issues for the EU, which relate to: (i) the protection of the right to regulate; (ii) the establishment and functioning of arbitral tribunals; (iii) the relationship between domestic judicial systems and ISDS;(iv) the review of ISDS decisions through an appellate mechanism; and (v) commentary on why the inclusion of ISDS makes sense with regard to trade and investment relations with Canada and the US.

“The public procurement chapter of TTIP: The potential for further market access” (Richard Craven, Chapter 5) discusses a politically sensitive issue, public procurement, and its size, magnitude and the significance of public contracts markets in the EU and the US, highlighting the growing use of public procurement as a policy tool. The chapter provides an overview of the starting point for procurement liberalisation within the context of ongoing negotiations and lists the regulatory system for public procurement in both the EU and US. It points out how the complex procurement systems are underpinned by the different objectives and limited openness of the negotiating partners. The essay also elaborates on the negotiating positions of the EU and the US, comments on offensive and defensive interests, and concludes with why reaching an agreement on procurement might prove difficult. An important contribution made

by this essay is how the TTIP might aim to go a step beyond the WTO Government Procurement Agreement (GPA) in terms of scope, e.g. the potential for the inclusion of provisions on framework agreements and public-private partnerships, and coverage of the levels of government and entities subject to market access requirements.

"Security and Privacy Implications of e-Procurement in TTIP" (Gregory Voss, Chapter 6) touches one-procurement within the overall framework of the Digital Agenda for Europe. In line with earlier work by Khorana et al., (2014), the essay acknowledges security and privacy concerns associated with e-procurement. The essay highlights the WTO GPA 2012which recognises the importance of e-procurement, includes detailed provisions and calls for the use of "interoperable" software, "including authentication and encryption" (Art. IV. 3 (a)), and for ensuring mechanisms to establish "prevention of inappropriate access to systems" (Art. IV.3 (b)). But, sadly, none of these issues are mentioned in the procurement liberalisation issues currently under debate in the TTIP. A strength of this chapter is its contribution to the debate on sensitive issues relating to the protection of security, privacy and confidentiality in e-procurement and suggestions for establishing common rules on security, confidentiality and privacy, interoperability, approved platforms or requirements for e-procurement platforms, and a bold vision of a common e-procurement platform.

"EU's approach to social standards and the TTIP" (Lorand Bartels, Chapter 7) considers the extent to which the TTIP provisions on labour and environmental standards are likely to be similar to the EU-Cariforum Economic Partnership Agreement. The contribution considers the extent to which, legally, these two sets of provisions give the EU the means of implementing its obligations to ensure that its external activities respect human rights and pursue the objective of promoting sustainable development. It also considers the desirability of these differences in the EU's approach to human rights and democratic principles, on the one hand, and labour and environmental standards on the other.

"Economics of Labour Standards in Free Trade Agreements: prospects for the TTIP" (Inmaculada Martínez-Zarzoso, Chapter 8) identifies yet another controversial issue that merits inclusion in the TTIP. It highlights how labour markets are a topical issue within the trade agreement setting from an economics perspective. Based on a comparative analysis of bilateral and/ or regional FTAs recently signed by the US, the EU and third-party OECD countries with labour provisions, the chapter identifies whether changes in labour conditions (minimum wage, severance pay and strictness of labour regulations) can be attributed to inclusion of labour provisions in trade agreements. The essay employs econometric analysis and comments on trends in labour conditions in the participating countries.

Conclusion

The book explores issues that impact the progress of ongoing TTIP negotiations and analyses the mega-regional deal discourse from the practitioner and academic perspectives. It highlights the complexity of ongoing negotiations always keeping in view the interests of stakeholders, i.e. consumers, policymakers, civil society and businesses. The main strength of the essays in the book is their first-hand informative analysis

of what the proposed agreement will mean for different groups that are likely to be impacted by the TTIP agreement. The book is topical in that it comments on how the TTIP is an important and ground breaking agreement in an era of anaemic growth. It justifies the underlying rationale for the TTIP as an answer to the virtual halt of trade liberalisation following the Doha talks as a factor that propelled the EU and the US to negotiate the proposed mega-FTA. The essays also shed light on issues which, until now, have not been debated and include novel issues such as e-procurement. The compilation of essays thus marks the beginning of our journey in analysing the paradigms of evolving trade partnership negotiations between the EU and the US in the international domain.

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PART 1

- CHAPTER 1. ASSESSING THE POTENTIAL ECONOMIC IMPACT OF THE TTIP

  Lars Nilsson & Nuno Sousa

- CHAPTER 2. THE TTIP AS THE ENGINE OF GROWTH: TRUTHS AND MYTHS

  Álvaro Schweinfurth

- CHAPTER 3. THE TTIP OR EUROPE?

  Ricard Bellera

CHAPTER 1. ASSESSING THE POTENTIAL ECONOMIC IMPACT OF THE TTIP

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Background to the TTIP

In 2007, the EU lifted its self-imposed moratorium on bilateral free trade agreements and launched so-called competitiveness-driven deep and comprehensive FTA negotiations with ASEAN countries (negotiations are concluded with Singapore), India (negotiations are ongoing) and Korea (FTA in force since 2011).

Following the analysis presented in the European Commission's communication "Global Europe – Competing in the world",[1] these partners were identified as priorities for bilateral agreements on the basis of criteria such as economic potential, trade barriers (tariffs and NTBs) against the EU's export interests and engagement in FTA negotiations with EU competitors. At the time, the US and Japan were not among the priority partners mainly due to concerns about the potential impact on the multilateral trading system.

However, by early 2013, as the EU's new approach to bilateral FTAs started to deliver (notably with the entry into force of the EU-Korea FTA), and with slim prospects for advancing in multilateral trade talks, the EU and Japan decided to engage in negotiations for an FTA after conducting a joint exercise to determine the scope and the level of ambition of a future agreement. In parallel, EU and US leaders directed the Transatlantic Economic Council to establish a High Level Working Group on Jobs and Growth (HLWGJG), led by the EU Trade Commissioner and the US Trade Representative. It was tasked with identifying policies and measures to increase EU-US trade and investment to mutually support beneficial job creation, economic growth and international competitiveness.

The HLWGJG presented its final report in early 2013, recommending a comprehensive trade agreement between the EU and the US addressing a broad range of bilateral trade and investment barriers, including those related to regulatory issues. The European Council president, Herman Van Rompuy, and US president, Barack Obama, endorsed the recommendation which subsequently led to the opening

1. COM (2006) 567 final.

of negotiations on the Transatlantic Trade and Investment Partnership (TTIP) in July 2013.Before the European Commission could obtain a negotiating mandate from the council for the TTIP negotiations, an Impact Assessment (IA)[2] had to be prepared analysing the potential economic, social and environmental impact of the policy initiative.[3] The economic impact of the TTIP as presented in the commission's IA is based on work carried out for the commission by CEPR. The CEPR (2013) analysis was mainly grounded on a computable general equilibrium (CGE henceforth) model simulation following the standard methodological approach for *ex ante* analyses of trade agreements. But the lively policy debate prompted by the TTIP negotiations and the intense public scrutiny that the report has been subjected to has also fuelled a debate on how to go about measuring the impact of FTAs and the extent to which analyses like the one featured in CEPR (2013) (and other studies employing similar methodologies) capture the real world complexities that matter for understanding the impact of trade policy changes.

The rest of this paper is structured as follows: Section 2 reviews the so-called computable general equilibrium type of models that usually are employed to assess, *ex ante*, the impact of FTAs and lists some pros and cons of using them. Section 3 reviews the estimated impact of the TTIP as presented in CEPR (2013) in terms of main macroeconomic results and trade outcome. The last section concludes.

Overview of economic impact assessment of trade liberalisation

The basic motivation for opening up to trade is that it leads to increased specialisation and improved resource allocation, allowing firms to fully exploit economies of scale and to lower production costs. At the same time the increased presence of foreign competitors puts downward pressure on prices and offers greater product variety for consumers. In addition, over time, trade openness allows ideas and technologies to spread, spurring innovation and productivity growth. All these reinforcing channels amount to profound changes to how the economy works. However the many interlinkages at play make these effects difficult to quantify.

Most studies have relied on CGE models to assess *ex ante* the general economic impact of trade liberalisation. They are thus used to reply to the question "What would happen if…" by simulating the price, income and substitution effects associated with trade policy changes and comparing them against predictions about what would happen without such policy changes in place.

Features of CGE models

The longstanding principle of CGE models is (usually) the creation of a simulated version of the global economy to form the background against which policy changes are imposed and evaluated. However, over the past decades(s) they have undergone important changes to keep up with the economic theory on which they are grounded.

2. COM (2013) 136 final.
3. One should note that several analyses are made by the European Commission during the lifetime of an FTA. During the negotiations stage a Sustainability Impact Assessment is carried out in order to complement the IA with additional sectoral and qualitative analyses and stakeholder consultations. Once the negotiations are concluded and before signature, an economic assessment of the negotiated outcome is made. The main difference compared to previous economic analysis is that at this point in time the text of the agreement is available and the exact nature of tariff and non-tariff barrier liberalisation is known. Finally, after the agreement has been in place for a sufficient period of time an *ex post* analysis of its impact is also carried out.

Today, the more advanced CGE models used for trade policy analysis incorporate imperfect competition and product differentiation by variety and by quality. At the same time, the workhorse database – the Global Trade Policy Analysis Project Database – has seen its country coverage increase significantly,[4] and now includes data for a whole range of variables that are relevant for the analysis of the wider effects of trade policy changes (e.g. CO_2 emissions and so-called satellite data – foreign affiliate sales, Foreign Direct Investment (FDI), migration flows, etc.).

The main advantage of CGE models is that they quantify the effects of trade policy taking into account the main links between the domestic and international production of goods and services and the consumption and investment decisions of firms(across sectors) as well as of consumers and the government (in all countries). The models also account for the fact that different sectors compete for capital, labour and land.

This allows for an assessment of all the direct and indirect effects of changes to trade policy. As an example, let us assume that policymakers decide to raise import barriers on steel to relieve the competition pressure on the domestic industry. A CGE model would show how detrimental protecting this one sector from competition would be to downstream industries that use steel as inputs (due to higher steel prices). Furthermore, the inter-linkages in the CGE model would also pick up the impact on upstream industries, since the steel producers and downstream industries would make less use of business services like logistics. CGE models are therefore important for evaluating the economy-wide effects of specific policy decisions.

However, this advantage of the CGE methodology comes at a cost, notably the high level of aggregation required to be able to use comparable and consistent data across countries to run these models. The standard CGE models do not normally feature more than 57 sectors (if it is based on GTAP data). This contrasts with the fact that trade liberalisation takes place at tariff line level, which in the EU is normally at 8-digit level.[5] If products at this fine level of aggregation are considered sensitive, the assessment of trade policy changes would have to rely on complementary analyses based on other methodologies. These would notably involve the use of partial equilibrium models that can handle specific impacts at detailed product level. However, the linkages across and between sectors and countries would go unaccounted for.

Criticisms of the approach

CGE models have been criticised for simplifying reality and for omitting important issues. For example, when trade costs are reduced, the mechanics of the model ensure that the output of the more competitive sectors of an economy is expected to increase (relative to the baseline) while the opposite holds true for the less competitive sectors.[6] For this to happen labour has to move from contracting to expanding sectors, where wages increase.[7] This process is assumed to be relatively friction free. This assumption may be appropriate within sectors but it is less so between sectors. Moreover, the fiscal implica-

4. The latest version of the GTAP database (GTAP 9) covers 140 regions, whereas GTAP 5 from 2011 covered 66 regions.
5. The Harmonised System (HS) comprises about 5000 products at 6-digit level. In the EU, the Combined Nomenclature contains two subheadings of the HS and thus breaks it down to 8-digit level.
6. The baseline refers to the state of affairs that would apply to the world economy should the simulated trade liberalisation scenario never occur.
7. Due to labour market specificities in each country and across sectors within countries, such as varying reservation wages (for which data generally is missing), labour supply is usually not modelled.

tions that this adjustment entails in the presence of labour market frictions (retraining, temporary wage replacement payments, etc.) are not accounted for in the macroeconomic welfare analysis.

Another criticism often made of CGE models concerns how much the macroeconomic impact of trade policy changes depend on the size of the so-called elasticities (or in other words the extent to which demand and supply react to price changes). Higher elasticities lead to stronger substitution effects between imports and domestic products and to enhanced welfare gains. The elasticities for modelling trade liberalisation are estimated using robust econometric methodologies at product and sector level to reflect the level at which cuts in trade barriers actually take place. However, more work is needed to update these estimates, not least in light of all the new products that are put on the market every year.

Much of the criticism of GCE models implies that they may be exaggerating the welfare gains from trade liberalisation, but some arguments have been put forward suggesting that these may in fact be underestimated. Two arguments along this line carry particular importance. First, the CGE models that are used in trade liberalisation simulations do not account for increased productivity effects associated with greater incentives to innovate from enhanced competitive pressure. Second, the impact of the liberalisation of foreign investment (increasingly an important component of modern trade agreements) is unaccounted for in most models. This is an important drawback, as FDI is a significant part of modern economic integration and the presence of foreign capital is proven to be, in itself, a catalyst for knowledge and technology advancements in recipient countries, which eventually leads to productivity gains.

While many of these criticisms are valid and deserve further reflection, the few alternatives to CGE models that have been proposed have not yet proven to be sufficiently reliable for *ex ante* analyses of economy-wide effects of trade policy changes.[8]

Incidence of NTBs and extent to which trade liberalisation can reduce these

As important as discussions on the merits of modelling tools may be, one must remember that the output of any model will never be of higher quality than the data put into it. When it comes to trade policy analysis, the data on NTBs are particularly worth mentioning. The trade costs imposed by NTBs are an increasingly important question to address from a policy standpoint. As tariffs have come down worldwide NTBs are fast becoming the main friction to trade. However, quantifying the trade cost they impose (ideally in *ad-valorem* equivalents) continues to be a challenge for analysts due to their nature.

For example, if there is a restriction on imports of eggs in the form of additional sanitary controls, how much, in percentage terms, does it add to the price of the foreign good?[9] In services, the trade costs imposed by legislation in place are even harder to quantify, as the

8. One alternative to CGE-based analyses of the economic impact of trade agreements that is gaining some traction in policy circles is the use of simulations based on structurally (econometrically) estimated general equilibrium models. Arguably a main advantage of this methodology is that the key modelling parameters (used for the counterfactual analysis) are all consistently estimated (and not merely calibrated as in the traditional CGE models) using structural relationships as implied by the underlying theoretical model.
9. The discussion of the societal value of any particular measure that may be regarded as an NTB is outside the scope of this discussion, which is focused on how economic tools can be used to assess the impact of trade agreements. Clearly, a full assessment of the role of NTBs in trade policy must be done in light of the broader context that frames the existence of particular measures.

restriction could, for instance, be a cap on the number of foreign engineers allowed to deliver a service. These restrictions may be particularly difficult to analyse, but the trade costs they carry are tangible and can easily spill into goods trade (e.g. if foreign engineering services are needed to install imported technically-advanced goods such as solar panels or wind turbines).

Research in this field has managed to advance by adopting different techniques (notably through surveys, econometrics, and/or expert opinions) to estimate the associated trade costs. The simulations of the impact of the TTIP that can be found in the CEPR (2013) report rely on data on the trade costs of the NTBs that affect the bilateral EU-US trade flows as published in Ecorys (2009). The quantification of these costs was based on a direct quantity-based approach that involved applying a questionnaire (on the basis of an inventory of measures), from which an index of trade restrictiveness was constructed. This reflected exporting firms' perceived difficulties in terms of market access.[10]

An additional problem for *ex ante* analyses of FTAs is determining how much the negotiated outcome will actually reduce NTBs. Again this is particularly difficult to establish for services where it is common that trade partners agree to bind current levels of restrictions, i.e. the potential for increasing applied restrictions is eliminated. While this reduction in business uncertainty is valuable, after entry into force of the agreement operators still face the same barriers as before. How should the removal of this uncertainty be quantified in terms of reduced trade costs for this particular type of services trade?

Potential economic impact of the TTIP

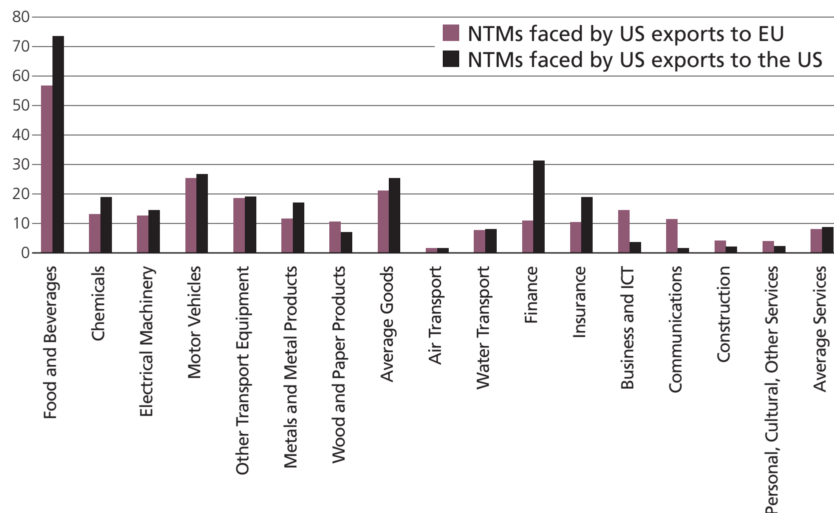
EU and US trade barriers

The economic impact of trade liberalisation between the EU and the US hinges on several things, notably the relative importance of various sectors in terms of GDP and trade flows and the extent to which the two markets are linked by global value chains and international production. The average tariff levels in the EU and US are broadly similar and relatively low, although in agricultural products the EU average level of tariff protection (about 13%) is significantly higher than the US average (just below 5%). In manufacturing there is one sector in which EU tariffs are generally higher than those in the US– passenger cars, where the tariffs imposed by the EU (10%) are four times higher than the US tariff (2.5%). But on the other hand, contrary to the EU, most trade-restrictive US tariff peaks are found in the manufacturing sector (e.g. textiles, clothing, footwear, ceramics, glass and leather products).[11]

The overall low level of tariffs in EU-US trade has shifted the focus to the role of NTBs. Figure 1 shows that EU and US bilateral NTBs are fairly high, reaching some 60%-70% in the food and beverages sector and some 25% in motor vehicles. EU exports of financial services to the US are also estimated to face high barriers.

10. These scores were employed as a proxy for the NTM indicator in a gravity equation. On that basis an *ad valorem* tariff equivalent per sector was obtained.
11. A tariff peak is usually defined as a tariff of 15% or higher.

Figure 1. Estimated levels of EU and US NTBs, by broad economic sector (%)



Fuente: Ecorys (2009).

Simulation of the impact

The CEPR (2013) study simulates various potential negotiation outcomes. Below, we report on what is labelled a comprehensive agreement with an "ambitious" outcome which fully eliminates tariffs and reduces NTBs by 25%.[12] Itis further assumed that NTBs linked to procurement are reduced by 50%.Moreover, the impact of partial alignment with global rules and recognition of respective partners' standards is also taken into account. For this it is assumed that reducing regulatory barriers bilaterally might improve access for third countries through what the report calls "direct spillovers". In addition, if third countries adopt/converge with EU-US standards, this will lead to lower costs in trade between them and to better access for the EU and US to these markets. This is called "indirect spillover".[13] Hence, the rest of the world may actually gain from EU-US regional integration efforts.

The results are compared to a baseline scenario which represents what the economy would look like in the absence of the TTIP. The comparison is made in 2027 when the agreement is assumed to be fully implemented and the necessary adjustments among and within sectors are assumed to have taken place.[14] The scenario simulated is summarised in Table 1.

Table 1. Summary of reported scenario simulation

Policy change	Ambitious scenario
Tariffs	100% reduction
NTBs (goods and services)	25% reduction
Procurement NTBs	50% reduction
Spillovers	20% (direct), 10% (indirect)

Source: CEPR (2013).

12. NTBs often come in the form of domestic rules and regulations which may impact on trade. Regulations serving a legitimate purpose neither can nor should be removed. But when the objective on both sides of the Atlantic is the same (e.g. safe cars), negotiators will aim for acceptance of each other's procedures to reach that objective. Such recognition has the potential to lower trade costs significantly.
13. Spillovers are modelled conservatively. Direct spillovers are modelled at 10%-20% of direct NTB reductions. Indirect spillovers are modelled as half of the direct spillover reductions.
14. The projection of the data to 2027 is based on the latest forecasts by the IMF, the World Bank and others in terms of economic and population growth, etc.

The CGE model employed in the simulations is described in detail in the CEPR (2013) report. It is based on the widely-used GTAP model (Hertel et al., 1997), with added features such as firm level competition and supply of varieties of goods and services to both final consumers and downstream firms under monopolistic competition. The simulations were run using a conservative approach regarding the choice of labour market closure assuming that the economy has a fixed supply of labour in the long run. Alternative labour market closures entail huge data requirements to accurately capture the realities of national labour markets (including wage dynamics, domestic labour regulations, demographic changes, occupational and qualifications requirements, labour mobility, etc.), which are complex to model. Such information is often not available and up-to-date, including projections on comparable cross-country bases for a global model.

Results in terms of GDP, trade, output and jobs

The results show that in 2027 the TTIP could increase EU and US GDP by about 0.5% and 0.4%, respectively, relative to a situation without the TTIP in place (see Table 2). This is not a one-off gain. The increase in GDP will gradually build up and increase every year until reaching the levels mentioned above in 2027. After that this economic gain, which reflects the ability of the economy to produce more with its available resources, will continue. The reduction of NTBs is the main driver behind this gain, accounting for as much as 80% of the total expected effects by 2027.

The GDP gains are intrinsically linked to greater trade activity following the liberalisation. The CEPR (2013) simulation suggests that EU exports to the US would increase by 28%, while US exports to the EU would go up by close to 37%. EU and US exports to the rest of the world would also increase by 0.9% and 2.7%, respectively.[15] EU and US imports from the third countries would at the same time increase by 1.5% and 0.3%, reflecting how part of the cost savings achieved by the reduction of NTBs will not be restricted to EU-US bilateral trade flows (spillover effects), but due to increased economic activity (higher GDP).

Table 2. Change in GDP across regions and EU and US bilateral exports, % from baseline (ambitious scenario)

	Total A=sum(B:F)	Tariffs (B)	NTBs goods (C)	NTBs services (D)	Direct spillovers (E)	Indirect spillovers (F)	Procurem. (G)
European Union	0.48	0.11	0.26	0.03	0.07	0.02	0.05
Bilateral exports to US	28.0	7.7	21.0	1.4	-1.7	-0.3	2.1
United States	0.39	0.04	0.23	0.06	0.06	0.00	0.03
Bilateral exports to EU	36.6	15.3	19.9	1.4	-0.1	0.0	1.6
Other	0.14	-0.01	-0.04	-0.01	0.05	0.15	0.00
OECD, high income	0.19	-0.03	-0.06	0.00	0.07	0.20	0.00
Low inc. countries	0.20	-0.02	0.01	0.00	0.00	0.21	0.01

Source: CEPR (2013)

The results reported in Table 3 show that sector output changes in the EU in general are small. Production in the primary sectors is almost unaffected, while there is a small increase across all services sectors. In manufacturing there is also a small increase in output with some excep-

15. The latter two figures are derived from CEPR (2013), Table 19 and Table 20.

tions. The most notable exception is in electrical machinery, where output is expected to decline by 7.3%, but from a low baseline share in value added. The reductions of NTBs in goods and in services are important drivers of changes at sector level. For example, for motor vehicles, tariff reductions alone are detrimental to the EU motor vehicle sector with falling output levels. In contrast, with NTB reductions the sector expands.

For the US, the changes in sector-specific output are also found to be small, with all services sectors changing less than 1% (not displayed). Finance and insurance sectors will contract, but by less than 0.5%. In manufacturing, processed foods, electrical machinery and motor vehicles are expected to contract, while in the other sectors output will marginally expand or remain by and large unaffected.

Table 3. Changes in EU output by sector (%)

	A+B+C+D+E+F	B	C	D	E	F	G	H
	Baseline shares in value added	total	tariffs	total NTMs goods	total NTMs services	direct spill-overs	indirect spill-overs	procurement
Agr forestry fisferies	0.040	0.06	0.03	-0.03	0.00	0.06	0.01	0.00
Other primary sectors	0.019	0.02	0.00	-0.03	0.00	0.05	0.00	0.00
Processed foods	0.030	0.57	0.08	0.56	0.01	-0.20	0.13	0.07
Chemicals	0.028	0.37	-0.07	1.08	-0.04	-0.77	0.17	0.24
Electrical machinery	0.004	-7.28	-0.13	-1.25	0.02	-5.74	-0.16	0.11
Motor vehicles	0.015	1.54	-0.93	4.04	-0.02	-1.81	0.26	0.61
Other transport equipment	0.007	-0.08	-0.23	0.10	-0.03	0.04	0.02	0.18
Other machinery	0.037	0.37	0.40	-1.03	-0.07	1.46	-0.39	0.05
Metal and metal products	0.021	-150	0.05	-0.55	0.05	-0.78	-0.18	-0.79
Wood and paper products	0.023	0.08	0.08	-0.06	0.00	-0.11	0.16	-0.02
Other manufactures	0.029	0.79	0.63	-0.11	-0.01	0.48	-0.19	0.02
Water transport	0.003	0.99	0.16	0.15	-0.01	0.27	0.41	0.05
Air transport	0.003	0.44	0.18	-0.05	0.03	0.17	0.11	0.02
Finance	0.032	0.42	0.07	0.10	0.25	-0.04	0.03	-0.05
Insurance	0.010	0.83	0.07	0.05	0.61	0.06	0.05	0.02
Business services	0.222	0.25	0.06	0.14	0.02	0.01	0.03	0.03
Communications	0.023	0.17	0.06	0.11	-0.05	0.00	0.04	0.02
Construction	0.083	0.53	0.14	0.30	0.03	0.01	0.04	0.05
Personal services	0.035	0.26	0.05	-0.03	-0.01	0.14	0.11	0.01
Other services	0.338	0.28	0.05	015	0.01	0.05	0.03	0.03

Source: CEPR (2013)

The report examines how the labour market could be affected (despite holding labour supply fixed) by analysing: (i) changes in the wages that employees are paid and (ii) the reallocation of jobs across the economy in response to the potential restructuring triggered by the agreement. It finds that the TTIP would have a positive impact both on more skilled and less skilled labour wages, with each increasing by close to 0.5% with a slightly higher impact in the EU.

The agreement is expected to generate a reallocation of jobs across different sectors of the economy, with expanding sectors pulling labour

from contracting sectors by offering them higher wages. However, the simulations suggest that these movements will be relatively limited. Less than 0.7% of those working in the EU are expected to move between sectors as a result of the agreement.

Complementary analyses for additional insights

Despite being the best tool for *ex ante* trade policy analysis, CGE models have inherent shortcomings, as discussed above. For this reason, one may also want to explore other types of analyses for complementary insights on the potential economic impact of the TTIP.

On the employment side, while robust CGE-based methodologies for a more sophisticated analysis of labour markets impacts are not yet available, it is possible to rely on the recent developments of inter-country input-output data for interesting insights and detailed quantification of the employment footprint of external trade. The European Commission's Joint Research Centre (DG JRC) and DG TRADE have recently published a comprehensive set of indicators that does just that.[16] They show that between 1995 and 2011 the number of jobs in the EU supported by exports to the rest of the world increased by 67% to reach 31.1 million. Moreover, data show that 15% of these jobs (around 4.7 million jobs) depend on the sales of goods and services to the US market. These results underscore the possibilities offered by the ongoing TTIP negotiations to effectively contribute to creating employment opportunities in the EU.

Another limitation of CGE analyses is that they are ill-suited to accounting for the heterogeneity of the business sector and in particular the specificities of SMEs, which account for 28% of the EU's direct exports to the US. However, a recent survey has allowed for a thorough identification of a number of difficulties that EU SMEs face when trying to export to the US market.[17] A number of cross-cutting issues came to light, such as the challenge of complying with technical rules and regulations and being legally excluded from many public procurement markets.

Other issues raised included problems in accessing the relevant information about the regulations that apply to their products. Manufacturing SMEs raised sector-specific rules such as in the case of food, beverages and agricultural products, pharmaceuticals, textiles, machinery and electrical equipment. In the services area, restrictions on the movement of people were the most highlighted issue. Such direct and structured exchanges with stakeholders (SMEs in this case) provide a wealth of valuable information to indicate areas which would be important for the perception of an ambitious, balanced and comprehensive TTIP agreement.

Conclusion

Assessing the impact of trade agreements is complex. Many of the traded goods are produced using domestic and/or imported intermediates, including services, which is something that has to be taken into account. CGE models try to take all these intricacies into consideration. However,

16. Arto et al., (2015).
17. See the report "Small and Medium Sized Enterprises and the Transatlantic Trade and Investment Partnership" available at: http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153348.pdf.

the estimated impact is often provided at fairly aggregate level and may need to be complemented by additional analyses, though several issues are still difficult to quantify, such as the impact on the labour market and the productivity effects of trade liberalisation.

Despite having drawbacks, most trade economists would agree that CGE techniques are the best methodologies presently available to evaluate the impact of future FTAs. This is also the approach adopted in the CEPR (2013) study which was briefly summarised above. The report attempts to address the core issues in the TTIP negotiations, including tariff and NTB reductions and a moderate degree of regulatory harmonisation.

The results signal that the agreement could raise EU and US GDP by about 0.5% and 0.4%, respectively, once fully implemented, and increase bilateral exports by some 30%-35%. It is important to note that the modelling results should be interpreted with care and caution and should preferably be seen as providing an orientation on the magnitude and direction of the effects compared to a situation of no agreement.

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CHAPTER 2. THE TTIP AS THE ENGINE OF GROWTH: TRUTHS AND MYTHS

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Overview

The TTIP negotiations between the EU and the US which began in July 2013 aim to integrate the two biggest economies in the world. This aim is in line with the thinking of the Confederation of Employers and Industries of Spain (CEOE) as the TTIP talks present a unique opportunity to foster growth and jobs. This essay presents the viewpoint of the CEOE by: (a) explaining why the TTIP talks matter to Spanish business; (b) presenting the position of the Confederation of Employers and Industries of Spain in this regard; (c) focusing on misunderstandings concerning the ongoing negotiations, which, from our perspective, require certain clarifications.

Spain and the US have a strong economic relationship, as substantiated by recent trade data. The US was the most significant destination for Spanish exports with more €10.6 billion over 2007-14, and Spain was the biggest trading partner outside the EU, reaching a bilateral trade volume of almost €21 billon. Though these figures seem modest in comparison to the overall value of goods exchanged in that same period between the EU and the US, which amounted to more than €524 billion, the trend between 2007 and 2014 has been very positive from the perspective of Spanish exports, with an increase of more than 30% from 2007-14. Exports of goods to the US represented 4.4% of total Spanish exports in 2014, with bulk of exports constituting intermediate products, which include chemicals (24.5%), engineering goods (21.6%), energy products (19.8%), food and beverages (11.3%) and cars (11.3%). As far as the composition of US imports goes, intermediate products like chemicals (34.9%), engineering goods (27.1%), food and beverages (13.5%) and energy products (9.4%), constituted 84.9% of total US exports to Spain. A comparison of Spanish exports in 2014 with 2011 shows that the highest increase was in cars (+78.6%) and engineering goods (+24.8%). The positive trend in bilateral trade continued in the first half of 2015 compared to the same period in the previous year, with an increase of more than 15% in exports and imports. Regarding services, in 2013 the US was (after the United Kingdom) the second largest destination for Spanish service exports and at €7.6 billion represented 7% of Spanish service exports. It was also the second largest provider of services to Spain after the UK.

The depth and scope of the economic linkage between the two partners (i.e. the EU and USA), cannot be fully appreciated without taking into account the foreign direct investment flows between them. The USA has investments of more than €45 billion in Spain and plays a significant role in key Spanish industrial sectors like the car, chemical and pharmaceutical industries which have enabled Spain to develop strong domestic industries, like the car-part industry, which is very well embedded in the value chain. Further, what makes the TTIP relationship worthy of pursuing is that investment relations increased from 1995 to 2015. Since then, more than 700 Spanish companies have set up bases in the U.S.A and the stock of Spanish direct investment has soared to over €43 billion, making the US the third largest destination for Spanish foreign investments, behind only the United Kingdom and Brazil. The main presences are in the infrastructure development, energy, banking and insurance sectors.

Bearing in mind all the aforementioned economic interests and aspects, the CEOE has traditionally supported a trade agreement as long as discussions for an agreement are ambitious in scope. The confederation was of the view that an agreement that only focused on tariffs was insufficient not only because of the fact that the average tariff on both sides of the Atlantic is 3.5%, but also because it would not take in other major aspects which are hampering trade and investment, like the NTBs and a series of restrictions on investment, services or public procurement. Therefore an ambitious agreement enabling deep and wide discussions for liberalisation complemented by more regulatory coherence and regulatory cooperation are critical for eliminating issues relating to divergences between the two trade areas.

But before passing to the last point of my exposition attempting to dispel some fears, I would like to present a deeper insight into certain critical points like regulatory cooperation, government procurement, services, energy and cross-border data transfers for business and SMEs. Regulatory cooperation and standard convergence with the goal of avoiding national conflicts on product and trade standards should be the core objective of the agreement. We recommend using international standards, such as the International Organization for Standardization, the International Electrotechnical Commission or the International Telecommunication Union. Testing and certification should be performed according to international IEC/ISO standards. Cooperation in other sectors should be enhanced by the establishment of a mechanism to allow counterpart regulatory agencies and standard bodies to formally recognise compatible, functionally equivalent approaches to approving products and services allowed for sale in their respective markets.

Taking into consideration the growing complexity of trade and the increasing importance of services and public procurement, two particular areas which make up a significant part of Spanish investments and services, the CEOE is highly interested that negotiations conclude with substantial results in these two particular chapters. The public procurement chapter should go beyond the Government Procurement Agreement (GPA) by extending coverage to government and public entities and by reducing thresholds. It should also eliminate certain obstacles European companies face in the US procurement market, especially when it comes to particular domestic provisions such as the Buy America Act and local content requirements. The ongoing negotiations are also an

important opportunity to ensure more transparent, open and predictable and procedural requirements. Being aware that "Buy America" provisions are stipulated at state level, negotiators should find ways for these provisions not to apply to European companies. This particular chapter is of particular importance for small and medium-sized European companies.

Concerning services, the general rule should be that full market access and national treatment should be granted for the provisions of all services in all modes of supply, with very limited exceptions. As many sectors as possible should be covered by the agreement, including financial services, banking, insurance, telecommunications and transport. Greater coordination of financial regulation is recommended as the benefit would accrue not only to the financial sector but to all sectors of the economy. More coordination of financial regulations would reduce cost to companies. We would like to stress that the purpose of including financial services is not to lower prudential standards or to change any legislation put in place by either side in the financial crisis, but to ensure that the reforms are implemented in a compatible way. The Financial Market Regulatory Dialogue and the EU-US Regulatory Dialogue Project could be strengthened and supported by the inclusion of financial services within the TTIP negotiations. The inclusion of these dialogues in the overall regulatory cooperation that will be put in place by the TTIP will constitute a major opportunity for the establishment of a financial services regulatory framework that would enhance regulatory consistency and promote appropriate recognition of the respective regimes. Further, EU and US negotiators should aim towards full market access and national treatment for the (re) insurance sector, going beyond the commitments of the General Agreement on Trade in Services. The TTIP should include ambitious and transparent standards, including a consultation process.

Due to the fact that the operations are increasingly integrated within the global supply chain and distribution channels are operated at a global level, it is more important than ever that similar approaches are taken with respect to the management of talent, skills and competences within business. In particular, the negotiators should seek to exempt EU and US nationals from labour market tests, volume quotas or remuneration tests for short term intra-corporate transferees; ensure that visas and work permits for EU and US nationals are issued for the maximum permitted duration; provide a fast track application procedure for EU and US nationals applying for visas and work permits for intra-corporate transferees and establish a "stand still" principle preventing the application of any new barriers or restrictions on US and EU nationals in the context of an intra-corporate transfer.

In addition, an ambitious chapter on energy should also be included in the agreement removing all export restrictions on energy and energy-related products and services in the form of export bans, export quotas, licenses, or export subsidies, tariffs and any discriminatory measure on crude fossil fuels, refined products, equipment and other goods that support exploration, production, manufacturing, transport and retail. With regards to energy, although the association is aware that the TTIP is not the solution to improving the European energy situation, the TTIP should aim to secure the lifting of existing gas export restrictions on all US LNG and relax US export restrictions on US crude oil reaching the European market, as this will be of benefit to the industry.

Data driven innovation is key for jobs and growth in Europe. Data flowing across borders is a key driver of international trade, the digital economy and European companies. Therefore, it is necessary that the TTIP include provisions that avoid the imposition of data localisation requirements, encourage mechanisms to reinforce trust and security, introduce 'adequacy requirements' that are implemented in order to impede undue restrictions on international data flows, provide adequate rules for data transfers within groups of companies, ensure the effective functioning of the 'safe harbour' mechanism, and avoid weakening trust in the digital environment.

Since negotiations started in 2013, the CEOE and the other national business federations – apart from BUSINESSEUROPE – are following the ongoing negotiations very closely and trying to clarify certain fears and criticisms exerted against the TTIP. I develop these arguments in the latter part of this essay.

Main issues: dispelling the fears

The criticism that there is a lack of democracy in the ongoing negotiations is far from reality if we take into consideration that the capacity of the European Commission is enshrined within the strict limits of the mandate agreed between the twenty-eight democratic governments in member states and that any final text agreed between the negotiators will have to be submitted to the final approval of the European Parliament. Furthermore, at the beginning of July 2015 the European Parliament adopted a non-binding resolution in regard to the trade agreement with the US with a set of recommendations for the European Commission. Among others, transparency is one of the main guiding principles of these negotiations. Most of all, since the new trade commissioner took office, the commission has been making serious efforts to explain and inform all the national parliaments and civil society stakeholders about the TTIP. Additionally, the negotiating texts of the EU are being published on the website of the European Commission and an advisory group has been created where the commission shares confidential information with civil society stakeholder (business, trade unions, consumers and NGOs). These decisions, unprecedented in the history of trade negotiations, constitute an important step forward because they consolidate greater public support, dispel myths and misperceptions about the TTIP agreement, allowing for a much more fact-based debate. However, we do recognise the need for the commission to keep sensitive information confidential, mainly with a view to defending the interests of EU businesses. The disclosure of the whole strategy pursued in the negotiations could potentially lead EU negotiators into a position of weakness and seriously undermine the ability of the commission to strike the best deal for the EU.

The TTIP will not put into question fundamental rights in the EU such as freedom of expression and information. It will also not hamper specific EU regulations relating to data security and protection. The transfer, storage and processing of data are essential for 21st century economic activity. To enhance the trust of users it should be guaranteed that cross border data flow provisions are in compliance with data protection standards and the rules in force in the country of residence of the data subjects.

As regards regulatory cooperation, its final purpose is neither to change existing legislation nor to lower existing standards. Its final aim consists of eliminating unnecessary bureaucratic overlaps which do not entail any legal change. Bearing in mind this last point, regulatory cooperation will only be possible in those specific areas where the standards guarantee the same level of protection but where the proceedings, practices and methodologies are different. Therefore, apart from so-called vertical regulatory cooperation aimed at achieving results in specific sectors such as the automotive, chemical, pharmaceutical, textile and engineering goods industries, it is necessary to set up a general framework where the commission and the US administration can exchange and engage in a structured dialogue on any new legal proposal, with the final purpose of avoiding any additional burdensome overlapping requirements. This aspect gains importance when it comes to setting regulations to avoid divergences in the new areas related to the development of new technologies and products.

Another point of controversy is that the agreement could imply the privatisation of essential public services, which is not the case. In this regard, it must be highlighted that the negotiators have not been empowered to do so. Furthermore, both the US and the EU are committed to the multilateral General Agreement on Trade in Services (GATS), which excludes services supplied in the exercise of governmental authority (social security schemes and any other public service, such as health or education) from its scope. Finally, the EU and the US have unambiguously stated that the TTIP would not predetermine the legal nature of services, a decision which lies within the remit of each government to decide.

As far as the sustainability chapter is concerned, the main objective of the TTIP is to boost trade and investment between the US and the EU. Having said that, the TTIP offers the opportunity to foster sustainability through trade. The TTIP can promote decent work on both sides of the Atlantic through the reference to the 1988 ILO Declaration. However, it is neither necessary nor appropriate to include in the sustainability chapter a commitment by parties to ratify ILO conventions. Using the TTIP in order to force the ratification of ILO conventions by the US and the EU member states (we should recall that the EU is not empowered to ratify ILO conventions) would be unrealistic. In the particular case of the USA, the political decision-making as well as the 1988 Tripartite Agreement, which stipulates that no ILO convention will be submitted to the US Senate if ratification would require any change in the US and state laws, would render the ratification process extremely difficult.

Another point worth stressing is that the TTIP is going to benefit SMEs more than the big multinationals, which have the capacity and resources to operate in different business environments. SMEs have so far resisted attempts to access the US market due to the additional costs from bureaucratic overlaps and differences in technical requirements. Tariffs are an element, but the differences in technical specifications, standards and conformity assessment procedures and licensing procedures represent a serious problem for SMEs in transatlantic trade. All products must comply with regulations, which makes the costs of complying with divergent rules and requirements high for SMEs. In many cases, it is simply not worth the effort for an SME to invest capital and human resources in market access.

The confederation is aware that the US and the EU have different jurisdictions and we consider it essential that the TTIP should include a comprehensive, well-oiled ISDS mechanism to ensure the neutrality and application of public international law. ISDS is a vital part of investor protection, as it provides a neutral, fact-based resolution mechanism in cases where an international agreement has been breached. Further, ISDS also reaffirms states' obligations under public international law, offering fair and equitable treatment. Though the legal systems in the EU and US are developed and sound, it is not guaranteed that investors will be able to receive adequate protection. For instance, the right to non-discrimination is not guaranteed in the US unless there is an international agreement to which foreign investors can refer.

The CEOE expects and hopes that the TTIP negotiations will result in an ambitious and balanced agreement that will deliver for both partners. An ambitious agreement can spur trade and investment, generate growth and jobs and ultimately establish a set of standards which can be the benchmark and set the 'gold standard' for the rest of the world.

CHAPTER 3. THE TTIP OR EUROPE?

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"Yet this is the crux of the argument against TTIP:
one must choose between Europe and TTIP"
(Defraigne, 2014, p.14).

Overview

The title of the conference organised by CIDOB last May 27th, 'TTIP negotiations: caught between myth and reality', is a very good reflection of one of the main elements that have marked the debate on the TTIP throughout the last two years. As the European Commission states in its publication 'The top 10 myths about TTIP', there has been a will to present the debate for or against the treaty as a disagreement between two points of view, in which one of them is technical, scientifically elaborated and based on real facts and the other is the result of prejudices as well as mythologisation and is therefore of a fictitious nature (European Commission, 2015).The claim of holding a "realist" or "true" position on an agreement that is in the course of being negotiated and whose real effects in the mid- and long-term remain unknown is speculative. When the difference between reality and myth is the amount of information and the latter is being provided in dribs and drabs by those who defend the TTIP, it seems obvious that the accusations of "mythologising" the debate, when made about those who lack this information, entails a certain degree of manipulation.

In one of his many speeches, the former European Commissioner for Trade, Karel de Gucht, expressed it clearly: "My role as the main political negotiator of TTIP is to listen, to persuade, and where necessary to provide information, so that the debate is based on facts, not fear or hyperbole" (De Gucht, 2014). If we take into account that the first meaning of "persuade" is "to induce, urge, or prevail upon successfully" and that its second meaning is "to cause to believe, convince" then we understand the extent to which for de Gucht the use of information is strategic and unidirectional.[1] The fact that the European Commission reserves for itself the role of "the one that persuades" to the European citizens, does not seem to correspond, however, to the understanding of the regular rule of law and ends up disregarding the fundaments of European democratic culture. If the intention is the destruction of the "mythical" substrate in which the debate over the TTIP is being developed, there would be no better way than providing free access to the information. However, this would just limit both the capacity "to per-

1. Collins English Dictionary. Available at:www.collinsdictionary.com

suade" and the selective use of information by those who, despite a willingness to complain about the tendency for "myth-making" on the side of those who scrutinise the TTIP, are perhaps willing to limit their argumentative capacity.

In fact, TTIP defenders themselves do not lack myths in the arguments they raise. Besides those who are of an "ideological" nature taking for granted the "efficiency of the markets" and thinking that "free trade is a win-win proposition" or that "growth creates jobs" although "the disparity between the economic and financial sectors makes it possible for growth to be experienced purely in financial terms without any visible benefit in the 'real economy' dimension…" (Skrzypek, 2014, p.10), there is a series of preconditions that, according to us, can be put into question. We will analyse them below. In our view, the negotiation of the TTIP is characterised by opacity, rashness ("one tank of gas") and distance with regard to the immediate interests of European citizens. The TTIP agreement by itself is unnecessary. It consolidates a dynamic that we consider contrary to the logic of the EU and makes use of a means that do not satisfy our democratic expectations, both in argument and treatment of information. It is regrettable that the top representatives of European citizens are treated as "criminals or spies" (Urtasun, 2015) when they attempt to exercise the right to information. It is deeply troubling that a European MP, once he/she has finally managed to access the information that transforms "myth to reality", states that "I left without any sense of reassurance either that the process of negotiating this trade deal is democratic, or that the negotiators are operating on behalf of citizens"(Scott Cato,2015).

The main issues around the TTIP

The negotiation process is "not transparent"

The "commercial" framework in which the negotiation is being developed allows a degree of opacity that does not correspond to the nature and scope of the decisions entailed by the TTIP, which happen to be, to a large extent, of a deregulatory kind. The extent to which this opacity is deliberate has become evident on at least two issues. On the one hand, in the refusal by the European Commission to publish the list of the interest groups and lobbies with which it has been and still is holding meetings. As can be seen in the list of contacts compiled throughout the preparations of the negotiating mandate, there is evidence of a special complicity with a specific kind of actors who represent interests that are essentially corporate (European Commission, 2013a). On the other hand, there is little will to provide the required transparency to the process, as became clear with the refusal to publish the negotiating mandate initiated in July 2013. This mandate, considered secret, was not declassified until October 2014 when the pressure exerted by civil society as well as the specific request of the European Ombudsman became decisive (European Commission, 2013b). These two, moreover, drew the attention to some curious aspects, such as when Mr. Reilly asks Mr. Barroso if "the Commission (could) explain whether it has a policy of sharing certain negotiating documents selectively with privileged stakeholders"(O'Reilly, 2014).

With regard to the texts that maybe consulted, no access to the consolidated texts is foreseen before the process ends, neither is it to the proposals made by the commission relating to key questions such as the opening up of the European market to issues as significant as services, public tenders or investment. As Joseph Stiglitz reminds us, this lack of transparency is worrying: "All over the world, trade ministries are captured by corporate and financial interests. And when negotiations are secret, there is no way that the democratic process can exert the checks and balances required to put limits on the negative effects of these agreements" (Stiglitz,2014). In this sense, the TTIP is an opaque treaty and has been so since its very beginning, as shown, for example, by the letter sent by the head of the European negotiation team, Ignacio García Bercero, to his US counterpart, Daniel Mullaney, in July 2013, in which he guaranteed the strictest confidence: "Finally, when persons or groups other than those specified above, seek access to documents described in paragraph (a) [negotiating texts, each side's proposals], the exception to public access set out in Article 4 of Regulation 1049/2001 apply as long as the protection is justified on the basis of the content of a document, up to 30 years" (Garcia Bercero,2013).

The TTIP is "not necessary"

The urgency that exists to close the TTIP is justified by the need to act as soon as possible in a geopolitical context in which the EU and the US are obliged to "protect themselves" from the "emergence" of countries that are threatening their worldwide hegemony and their deeply-rooted values. Nevertheless, this interpretation of the "West against the rest" presents as a "defensive" attitude what in reality is an "offensive" one, in order to take advantage of economic, military and political domination so as to impose new regulations on a global scale regardless of multilateral institutions. The position of the two "allies" on each side of the Atlantic Ocean, though, has been very different for decades and it still is, at least in commercial terms. In May 2015, the trade balance in the eurozone rendered a surplus of €18.8bn, whereas that of the USA suffered a deficit of $41.9bn.[2] EU exports are strong and the continent attracts enough foreign investment. There is therefore no need, in the European case, to attract private investment, and regarding public investment, the growing problem is fraud and tax evasion which represented, for the ensemble of the EU in 2012, a loss of income of approximately €1 trillion (Oxfam Intermon, 2015),which invariably ends up determining growth and employment.

As Defraigne says, "we have let hyper-financialisation flourish at the expense of the non-financial sector and we have let it generate instability through over indebtedness and speculation. Low inflation and high unemployment are the result of policy failures as much as they are of market failures" (Defraigne, 2014, p.2). The EU's main problem lies in the shortcomings of its institutional architecture and the lack of correspondence between a common monetary policy and economic and social policies in the hands of the member states. The investment that fails is not from outside, but the inward investment between European countries that are more and more distant, not only in terms of their economic indicators but also regarding their mutual trust. In this sense, the TTIP implies "[a] dangerous distraction for Europe" which does not respond

2. *Trading Economics*. Available at: http://www.tradingeconomics.com/country-list/balance-of-trade

to any economic or commercial need (Defraigne, 2015, pp.46-7). It actually responds to the interests and push of a number of multinational corporations that have taken advantage of the weaknesses of the European construction in the field of taxation. Now they wish to make good use of this opportunity and of the lack of leadership to force new advancements in the deregulatory agenda.

The TTIP is "not advantageous"

Some are trying to "persuade" us that the energy that the TTIP "injects into our economies is measured in the millions, billions and trillions – of jobs, trade and investment flows" (De Gucht, 2013).On the scientific front, however, the benefits rendered by the TTIP do not seem so evident. The four studies that the European Commission is using when it wants to establish its *ex ante* judgement have their predictions in common, which are not so ambitious. Even though they foresee an increase in transatlantic commercial flow, in the case of the EU this increase takes place to a large extent thanks to inner commercial flow (up to 30%) which results in modest growth of the gross domestic product (GDP)(Raza et al., 2014, p.IV), ranging only from 0.3% to 1.3% in ten years. With regard to incomes, the study is more optimistic (Berden et al., 2009), and foresees an increase of €12,300 in per capita terms in the period from now to 2027, even though it is convenient to remember that the increase in GDP does not automatically imply a balanced increase in income, whether in capital and labour income, or, in the latter case, at the different salary levels. In relation to employment, the Bertelsmann study states a job creation range of between 2 million and just 124,000 (Felbermayr and Heid et al., 2013a),[3] with the latter being the most plausible scenario in the most detailed version (in the Ifo study).

The divergence between the different studies shows us how, as opposed to the profits resulting from the reduction or removal of customs duties, the calculation of profits corresponding to deregulation is much more complex. Along with the difficulty of predicting which regulations can be eliminated in the course of a negotiation swings between the removal of 50% or 25% of existing regulations (Francois, 2013),there is the difficulty of establishing the impact of deregulation in the short- and mid-term, taking into account the costs that this entails in the social, labour and environmental areas. In turn, the difficulty of quantifying the effects of a deregulation in a macroeconomic framework which is global and dynamic must be added as well. The four studies use a methodology similar to the CGE one, which accepts that all liberalisation automatically entails a macroeconomic balance. This way, the idea is that the more competitive sectors absorb the resources of those that suffer more pressure, so avoiding the consequences caused by the readjustment in terms of domestic demand. The pattern that is applied at commercial level is a bilateral one and does not incorporate the diversity of global flows. Other analysis models, such as the United Nations' Global Policy Model, yield very different results.

For example, Tufts University states that, despite the increase in commercial volume, the TTIP would imply a net loss of incomes for

3. Compare: Felbermayr and Heid et al., (2013a) 'Part 1: Macroeconomic Effects', Graphic 11, with: Felbermayr and Flach et al., (2013b), Table III, 13.

European economies, with a decrease in economic activity, particularly in low added value sectors (Capaldo, 2014). This way, 600,000 jobs would be lost from now to 2025 and per capita wages would lose between €165 and €5,000. This loss of activity would result in a reduction in tax revenue and therefore in higher pressure on social security systems. On the one hand, the disappearance of customs duties would entail a loss of €20bn in 10 years, to which the cost resulting from increased unemployment would have to be added, both as regards the payment of benefits (between €5bn and €14bn) as well as the loss of incomes from tax (between €4bn and €10bn) (Raza et al., 2014). On top of that, incomes from other regulations would also be lost, as well as the possible compensations that the TTIP would entail in the framework of protection for investors.

In general terms, the UN model confirms the *ex post* results of other previous treaties such as the North American Free Trade Agreement (NAFTA). Despite the good *ex ante* predictions, this treaty, signed in 1994, led to the loss of a million US jobs and a significant fall in wages (Scott, 2006). In Mexico, the increase in productivity reduced the foreseen increase in manufacturing jobs, and at the same time destroyed a million jobs in the agricultural sector. The benefits of this kind of treaty are not so evident with regard to real growth and employment, and they do not even guarantee an increase in investment, at least if we take into account the historical balance of the bilateral investment treaties (BIT) or the investment dynamics in countries that have not subscribed to any BITs (such as Brazil). In any case, even though the clash of figures and models may look very thrilling, it is of a secondary nature, among other things because the volume of trade has no economic significance. As Dani Rodrik states, "one dollar of output that is exported is no more (or less) valuable to the home economy than one dollar of output that is consumed at home". The real issues lie elsewhere: "in the broader social/political consequences of regulatory harmonization and the appropriateness of an ISDS regime in the North Atlantic region. I have serious concerns in both areas" (Rodrik, 2015).

In the case of Europe, the possible impact of the TTIP may be very different depending on the kind of economic and business network affected. In the case of Catalonia and Spain the historical tendency to a deficit in trade balances is not a good precedent. The low degree of investment in research and development (R&D) (1.24% of Spanish GDP versus 2.94% in Germany or 3.32%in Finland), the lack of technological specialisation, the reduced productivity and the medium size of companies (4.7 workers on average, versus 11.7 in Germany) imply a model in which, traditionally, competitiveness is not generated through added value but from low wages and production costs. The austerity policies applied in the framework of European economic governance, with cuts to public investment, lack of credit in companies, brain drains and more precarious employment in the framework of the labour reform, have reinforced this tendency. Some countries, due to their high productivity and specialisation, can adapt their supply to the flows in global demand in a dynamic way and can, therefore, have some opportunities; in the case of Spain, the TTIP may reinforce the current tendency towards impoverishment of the productive model, deindustrialisation and tertiarisation of its economy.

The TTIP is "not without harm"

As is widely acknowledged, 80% of the profits from the TTIP will not come from removal of customs duties but from regulatory convergence. The European Commission has been repeating that this does not mean that the minimum standards in fundamental aspects, such as working rights or environment, will not be respected. But, beyond this promise, it has not described the mechanism by which in an environment of competition higher standards will be maintained. The US has signed 14 of 189 ILO conventions, of which only two form part of the eight fundamental ones. Among the latter, those corresponding to collective bargaining, trade union freedom, and discrimination are absent.

Given the trend towards lower wages in Europe it is likely that the TTIP will not change this tendency. In its studies on impact, the European Commission states that "still against this background, there are legitimate concerns that labour is not sufficiently mobile between sectors and across Member States in the EU. As a consequence, there could be prolonged and substantial adjustment costs…"(European Commission, 2013, p.53); with this in mind, it can be understood that with the TTIP not only may strong adjustments in employment be foreseen but also the quality of contracts may be considered an obstacle. In some studies, such as the Ecorys one, labour legislation is regarded as an element that directly affects competitiveness: "The most important measures affecting competition include: (v) labour legislation and in particular collective labour agreements…" (Berden, 2009, p.111). Despite the fact that this only relates to the postal sector, it can be extrapolated more widely. The possibility of establishing common standards (ILO) or introducing clauses for intangibility or regressive policies that may guarantee the non-alteration of labour status does not seem to be considered in the negotiation.

The economies of scale and regulatory convergence promoted by the TTIP could possibly have negative effects on the quantity and the quality of employment, but also on other aspects that affect us not only as workers, but also as consumers and citizens. In this context, for instance, several things, like the removal of the precautionary principle, the legislation on transgenic items, the hormonal or chemical treatment of meat, or labelling legislation may turn out to be relevant to our food chain. Beyond this, with regard to the environment, if environmental regulations — whether related to CO_2 levels or the protection of diversity — are identified as obstacles to company competitiveness and as "political" inhibitors of corporate profits, some elements of sustainability that are identified as hallmarks of the European project may be lost.

As a transversal element, the impact that the TTIP may have on public services must also be considered. In this case, no matter how the European Commission argues that the TTIP will carry a clause on the exclusion of services "provided in the exercise of the governmental authority", the US Government has already announced that it "will put into question the functioning of any designed monopoly" (Marantis, 2013). Considering the state a monopoly is one of the elements of most evident contrast between the US and EU: the US values companies' rights to profits at the same level as those of states to endow themselves with the policies they consider necessary. The loss of democratic legitimacy this entails is crudely shown by two mechanisms, the ISDS and the Regulatory Cooperation Council

(RCC), both of which indicate a dimension of the TTIP that may turn out to be particularly worrying and that has been criticised by, among others, the European Trade Union Confederation (ETUC) (ETUC, 2013).[4] In contrast to those who present the negotiation of the agreement as a process that ends in its signature and originates a new "commercial" dimension, we believe that the TTIP has started to change Europe since the very beginning of the negotiations, by accelerating and orientating regulatory convergence in the European framework. The signature of the treaty would not mean its finalisation and ratification, since instruments such as the ISDS and the RCC may make the TTIP a "living" treaty that will constantly interfere in the judiciary and legislative sovereignty of European Union states. Further, the privatisation of justice and the meddling of corporate interests in legislative dynamics imply a cession of political sovereignty that turns out to be absolutely unjustifiable.

The TTIP "does not" reinforce the European Union

The European Commission is entering a "mythical" domain when trying to put the TTIP on the same level as the European internal market. De Gucht asked, rhetorically: "After all, what is the Single Market, if not the world's most advanced, most revolutionary experiment in regulatory cooperation?" (De Gucht, 2013, p.3).We have been trying for years to spread information on the European project by highlighting our complex architecture, which includes a Parliament, a Council, a Commission, a Court of Justice, a Central Bank, an Economic and Social Committee, a Committee of the Regions, and a budget which is considerable albeit reduced. For us, this simplification by the European Commission turns out to be malicious and unfounded. The TTIP has is a significant issue for the European Union, given that its achievement may cause the EU to suffer a strong and permanent identity crisis immediately after the blow that the impact of fiscal consolidation policies has meant for its feasibility. Once the social model, which used to be the hallmark of Europe in the world's eyes, has been knocked about, and once its internal market has been diluted in the oceanic tide of the TTIP, what would then be the element that would endow the European project with a certain identity? As Jeronim Capaldo rightly points out, the proposed treaty "leads the European Commission, TTIP's main advocate in Europe, into a paradox: its proposed policy reform would favour economic disintegration in the EU" (Capaldo, 2014).

The urgency with which the European Commission intends to conclude the TTIP negotiations implies a headlong rush resulting from the failure of austerity policies and the need to divert attention from the evident failings of the institutional architecture of the European Union. Instead of making progress on the political union, some states, together with big pressure groups, prefer to enrol in an Atlantic adventure that may end up being too large for Europe. Several factors, such as the lack of consolidation, the existence of eight different currencies and the clear executive impotence within the framework of the crisis, place us as the junior partner in a project for which the US is well prepared. For the North American power, this transatlantic agreement could also have a strategic value: "This agreement will have as its main goal, beyond ensuring the American commercial power, the obstruction of the path to the mere possibility of an European economic space that could be globally competitive, the prevention of relations with the emerging powers that may

4. "It is imperative that the failings of the NAFTA are not replicated, let alone aggravated, by any future TTIP. This applies in particular to investor rights. We oppose the inclusion of an investor-state dispute settlement provision in the agreement", ETUC (2013).

not be under the regulatory control of America, and the weakening of the weight that national sovereignties may have in a global market..." (Naïr, 2014, p. 144).

Currently, Europe faces challenges and holds potentialities that are not necessarily to be settled in the Atlantic. "Today only domestic policies can spark growth in the Eurozone: first, the mutualisation and restructuring of debt through a transfer union with fiscal discipline would prove very effective; second, massive innovation investments [r] anging from research and development as well as education to trans-european networks would boost both long-term competitiveness and short-term job creation; third, fighting inequalities through national social policies would be eased by EU tax harmonisation" (Defraigne, 2014, p.8). At an economic level, the TTIP does not help Europe due to the diversion it causes with regard to the immediate challenges, as well as due to the fact that it places the continent in a disadvantageous position given the existent "institutional asymmetry". In this sense, regarding the "cultural", "political" and "social" identities, there are also strong differences with the USA. This way, for example, the proximity between company and government (lobbies...), the use of raw materials (fracking), the prioritisation or not of the fight against climate change (Kyoto), the culture of privacy (the Snowden case) or the centrality that the respect for "cultural" diversity occupies in Europe, suggest that some approaches that are not necessarily complementary or potentially "convergent" with those of the USA.

The TTIP's global dimension

The European position against the TTIP has sometimes been presented just as an anti-American position. This is not in line with reality, because the rejection of the agreement is not rooted in the alienation towards the culture and the citizens of the USA, but in the opposition (which is also transatlantic) to the fact that the TTIP results in a transfer of sovereignty from the state to big transnational corporations. "The question is whether we should allow rich corporations to use provisions hidden in the so-called trade agreements to dictate how we will live in the twenty-first century. I hope that citizens in the USA, Europe and the Pacific answer with a resounding NO" (Stiglitz, 2015). Also this strategy is complemented by a geopolitical vision that we cannot share, summarised by Hillary Clinton perfectly well when relating the TTIP to something similar to an "Economic NATO" (Brzezinski). The renewed polarisation of the world into economic blocs by means of the instrumentalisation of commercial policy does not seem to be an optimal solution. The attempts to limit the economic rise of the emerging countries with treaties such as the TTIP or the TPP (Trans-Pacific Partnership) will only result in a stronger consolidation of the geopolitical breach which is already taking place at a global level and, furthermore, is likely doomed to failure.

The TTIP "will neither deliver on growth nor will it make China yield. On the one hand, the main potential source of growth in Europe is domestic; on the other, China will simply organise its own regional coalition in response to the 'pincer' strategy imagined by Washington to contain China through the combination of TTIP and

TPP" (Defraigne, 2014, p.2).In this manner, the TTIP represents a step backward in the process of EU construction, but it also implies a polarisation that is wrongly responding to the problems deriving from the Doha Round as well as weakening the multilateral approach as a necessary framework in order to face the distressing global problems that lie ahead of us. Poverty, violence and climate change cannot be solved from the perspective of blocs, but require a global approach and multilateral government. These three problems deserve an extraordinary effort by all of us since the series of risks they imply have such widespread importance. If we want to face the threats that put the viability of the planet into question, we do not need to empower transnational corporations and defend the supposed interests of the 800 million people that the TTIP would embrace; we must rather satisfy the fundamental rights of the 7.2 billion people who share the global project called Earth.

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CHAPTER 4. INVESTMENT PROTECTION AND INVESTOR-STATE DISPUTE SETTLEMENT IN THE TTIP

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Overview

The negotiations over the TTIP have caused intensive political discussions and raised concerns from civil society. However, even though several regulatory issues that are envisaged to be part of the TTIP are subjects of the debate, one topic is dominating: ISDS. Indeed, the entire global ISDS system that has been in place for several decades is already in question because of the debate that started with the TTIP. Unfortunately, however, the heated discussion on the TTIP and ISDS is in large part not fact-oriented. The underlying rationale of ISDS and its basic structure are unknown to many participants in the discussion.

The aim of this short essay on ISDS in the TTIP is not to reject or promote ISDS in a political sense. Instead, this contribution tries to lay out some facts on ISDS in order to bring the entire discussion on investor-state dispute settlement back to solid and objective ground. In order to do so, this contribution will first make some brief historical and systemic remarks. Second, this paper will discuss the four topics identified by the European Commission as being most critical: the protection of the right to regulate; the establishment and functioning of arbitral tribunals; the relationship between domestic judicial systems and ISDS; and the establishment of an appeal mechanism and/or an international investment court. Finally, this contribution will make some brief comments on why ISDS also makes sense with regard to trade and investment relations with Canada and the United States.

Systemic and historical background of ISDS

In order to understand the system of international investment protection, it is important to clarify the legal relationship between the foreign investor and the host state of the respective investment. The foreign investor can have a direct legal relationship with the host state. A classical example in this regard is a concession granted by the host state to the foreign investor, for instance, a concession for the exploitation of a natural resource. Such a direct legal relationship between the foreign

investor and the host state is based either on a legal decision by the respective government or on a contractual basis between the investor and the government. It is common to refer to a "contract" in order to specify any such direct legal relationship between a foreign investor and a host state. The problem with this legal relationship is that in almost all cases it is governed by the domestic law of the host state. As any state is — as an expression of its sovereignty — free to change its domestic law at any time, the host state may at any given time modify its domestic law in a way that nullifies or impairs the legal rights granted to the investor. In a situation in which the investor is insufficiently protected by the respective domestic constitution, the investor cannot challenge the sovereign decision of the host state to change its domestic legal system. Public international law does not provide effective protection to the foreign investor. Moreover, even if the respective rules of public international law would be applicable, it is still within the sovereign discretion of the host state how to implement such public international law in the domestic legal system. Thus, there is no guarantee that the respective international law will actually be applicable to a foreign investor.

The only way to ensure effective legal protection of foreign investors is to have a public international law treaty in force between the home state of the investor and the respective host state of the investment. Such a treaty restricts the state sovereignty of the host state and thus, *per definitionem*, prevents unilateral changes to the domestic legal system of the host state to the detriment of the foreign investor. This is the basic idea of so-called bilateral investment treaties, as well as investment protection chapters in free trade agreements.

As already indicated, it is not only the substantive legal protection of the rights of the investor that is of interest here**.** It is most important to procedurally enforce the rights granted by public international law. A classical instrument in this regard is diplomatic protection by the home state of the investor. However, diplomatic protection is only available if there is a breach of public international law by the host state. As already indicated, the contractual rights of the investor are not usually protected by public international law and are thus not subject to any action of diplomatic protection by the home state. Moreover, there is no right of the investor to diplomatic protection. It is within the political discretion of the home state whether and how to grant diplomatic protection. Thus, diplomatic protection is more a political instrument than a legal right.

Domestic legal remedies within the host state of the investment are also no alternative for the foreign investor. In most states around the world, domestic judicial systems are weak or at least rather ineffective. Most unfortunately, corruption is also an issue in many domestic legal systems. Overall, long-standing experience demonstrates that seeking domestic legal remedies in the host state is time-consuming, costly and ineffective for a foreign investor.

Furthermore, it is important to realise that investors are usually judicial persons. Different to natural persons (individuals), judicial (legal) persons do not enjoy the protection of international human rights. As the Inter-American Commission on Human Rights stated in a report in1999: "The Commission […] considers that the Convention grants its protection to physical or natural persons. However, it excludes from its scope legal or

artificial persons, since they represent a legal fiction."[1] This statement is true for public international law in general. The only exception in this regard is the European Convention on Human Rights. Moreover, even if national constitutions grant human rights to judicial persons, this is usually restricted to domestic judicial persons. A good example in this regard is Article 19 (3) of the German Constitution, which reads as follows: "The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits".

Because of insufficient legal protection of foreign investors under public international law and most domestic legal systems, the worldwide system of investment protection treaties has been developed. Germany and Pakistan concluded the first investment treaty on November 25th 1959 based, among others, on the experience of the Anglo-Iranian Oil Company case before the International Court of Justice (ICJ) of 1952, which demonstrated the insufficient legal protection of contractual rights of investors under public international law. This treaty did not include ISDS; rather, it was restricted to state-to-state dispute settlement. ISDS provisions only emerged at the end of the 1960s. Comprehensive ISDS clauses became common in investment treaties by the end of the 1980s, followed by an increase in arbitral proceedings in the 1990s. After the year 2000, states started to modify their approach towards investment treaties by including sustainability and public interest provisions in treaty language. Since 2000, there has also been an increase in the conclusion of deep and comprehensive free trade agreements containing investment chapters.

Overall, today they are more than 3000 bilateral investment treaties or other international investment agreements (IIAs). In addition, about 600 publicly known international investment disputes have been settled or are still pending. The most frequent respondent state is still Argentina. This is due to the very specific circumstances surrounding the Argentinian financial crisis of 2002. Other frequent respondent states are Venezuela, the Czech Republic, Egypt, Canada, Mexico, Ecuador, India, Ukraine, Poland and the United States. As to home states of those investors bringing ISDS cases, most claimants come from the European Union, followed by investors from the United States.

Central issues in the TTIP debate

The TTIP's proposed investment protection standards and dispute settlement mechanism have raised concerns from governments, private industry and civil society. The intensive political debate on this has led the European Commission to initiate a public consultation on investment protection in the TTIP. The commission received more than 150,000 replies to its public consultation. However, a large majority of these replies were automatically generated by electronic means and thus not of much substantial value. Nevertheless, the commission identified four areas that are most important in the current discussion: (1) the protection of the right to regulate; (2) the establishment and functioning of arbitral tribunals; (3) the relationship between domestic judicial systems and ISDS; and, (4) the review of ISDS decisions through an appellate mechanism, and – as a further development in the discussion and closely related – the establishment of an international investment court.[2]

1. Bendeck-Cohdinsa v. Honduras, Report N° 106/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 311 (1999), para. 17.
2. The following parts of this essay are based on: Freya Baetens/Christian Tietje, "The Impact of ISDS in the Transatlantic Trade and Investment Partnership", a study prepared for Minister for Foreign Trade and Development. Cooperation, Ministry of Foreign Affairs, The Netherlands, June 2015, available at: http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html

The right to regulate

A major concern for civil society is whether investment protection might restrict the sovereign right of a state to regulate. However, there is no empirical evidence for the theory that investment protection and/ or arbitration has caused states to withdraw or refuse to enact regulations aimed at legitimate policy concerns. On the contrary, even though "regulatory chill" is by its very nature hard to prove, there are strong indications that investment protection and arbitration have no or only limited impact on the legislative autonomy of states. This is due to the following facts: First, the vast majority of ISDS claims challenge administrative decisions affecting single investors rather than legislative or regulatory acts per se. Second, it is difficult to make a case that ISDS is, or has ever been, the sole cause in preventing progressive regulation, especially given that regulations which impact on areas like the environment and natural resources usually involve continuous policy debates. Third, a close look at modern BITs and other International Investment Agreements (IIAs) as well as the study of the practice of arbitral tribunals clearly indicate that a "right to regulate" is well established as part of the substantive definitions, general exception clauses and preamble language in contemporary international investment protection law. This approach is clearly evidenced in CETA–the draft Comprehensive Economic and Trade Agreement between the EU and Canada. CETA strikes a good balance in promoting progressive policy changes while respecting investors' rights. Making states' rights to regulate more explicit in CETA (and the TTIP) with regard to certain legitimate public policy concerns provides clear guidance for arbitral tribunals, ensures that investors will not make investment decisions based on unfounded expectations, and prevents the abolishment of the entire system of investment protection.

These conclusions are strongly supported by an analysis of the dispute settlement practice under NAFTA and the Central American Free Trade Agreement (CAFTA). Claimants that succeed in ISDS in NAFTA have not directly challenged any government's authority or ability to regulate within a given policy space. Instead, the large majority of NAFTA and CAFTA cases involve individual contractual, tax, or export control issues. Indeed, investor claims that directly challenge government regulations, and thus the government's policy space, have never succeeded.

The establishment and functioning of arbitral tribunals

Concerns have been raised as to the impartiality of arbitral tribunals and arbitrators. Even though it is questionable whether there is really any problem in this regard in the current systems, again, CETA, as the blueprint for the TTIP, includes innovative elements. CETA provides, inter alia, for the adoption of a code of conduct of arbitrators addressing conflicts of interest and ethics as well as the establishment of a roster of arbitrators, who are pre-selected by the states (EU).

However, some caution is necessary. There is already long-standing experience in international dispute settlement with rosters of arbitrators. Taking the example of the list of arbitrators of the Permanent Court

of Arbitration (PCA) indicates that several persons on this list were not nominated because of any relevant expertise in dispute settlement, but for other, political reasons.

Despite any political debate on the TTIP, there is consensus that transparency in ISDS needs to be improved. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: April 1st 2014) and the Convention on Transparency in Treaty-based Investor-State Arbitration ("Transparency Convention"), adopted by the UN General Assembly on December 10th 2014 but not yet in force, provide clear guidelines in this regard.

The relationship between domestic judicial systems and ISDS

A further issue in the current debate on ISDS concerns the relationship between domestic judicial systems and international dispute settlement. Most prominent in this regard is the call for a requirement of the exhaustion of local remedies before initiating international arbitral proceedings. In the current ISDS system in force, it is not common to require the exhaustion of local remedies. On the contrary, the modern ISDS system was created precisely in order to overcome the requirement to exhaust local remedies as a prerequisite of the classical legal instrument of diplomatic protection.

If the rule of exhaustion of local remedies were to be included in the TTIP or any other ISDS system, international arbitration would function in effect as a second-level remedy–an "appeal" at an international level after domestic redress has been sought. This would have the potential to cause conflicts between the domestic and the international judicial systems. Moreover, introducing such a second-level remedy would result in significant delays and in additional costs for both the investor and the state.

A more favourable alternative would be to provide for a fork in the road provision. This would require the investor to choose between bringing their claim before the host state's courts or an international tribunal, with such a choice being irreversible. The advantage of this system is to avoid contradictory results and to confine the investor to one remedy by forestalling recourse to others. Moreover, this option does not entail extra costs and time, while, most importantly, it prevents foreign investors from having a wider range of *fora* available to pursue a claim than domestic investors.

An intermediate option could be, first, to require parties to seek redress in local courts, and, second, to allow for international proceedings only if no satisfactory remedy is granted after a defined period of time (e.g. 2 years).

Appeal mechanism and a possible International Investment Court

Most prominent in the current debate on ISDS and the TTIP is the call for an appeal mechanism and the establishment of some kind of public court system for investment disputes. The EU Parliament summarised this

discussion in its resolution of 8 July 2015 on the TTIP.[3] The relevant section of this resolution reads as follows (p. 15 et seq.):

> *"… to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives".*

It is obvious that the EU Parliament, like large parts of civil society, is of the opinion that the current ISDS system is characterised by "private" arbitration/dispute settlement and that this ought to be replaced by a "public" international court system. This assumption is not correct. ISDS based on an arbitration clause in a BIT or in a free trade agreement has its legal basis in public international law. Moreover, domestic parliaments have given their consent to any such arbitration by approving ratification of the respective treaty. ISDS is, of course, already a means of public dispute settlement.

Even though the establishment of a possible international investment court, including some kind of appeal mechanism, within the framework of CETA or the TTIP or even on a broader scale sounds appealing, some fundamental problems and challenges must be highlighted:

Regarding a possible appeal mechanism, the experience with the WTO Appellate Body is instructive. In this regard, the selection of members of the Appellate Body has proven to be complicated, namely with regard to limited remuneration/salary and sufficient qualification. Indeed, experience not only with the WTO Appellate Body, but also with any international court demonstrates that financing the system by states/the EU is always a problem. States are constantly unwilling to provide the sufficient financial resources needed for the effective functioning of the institution.

The risk exists that as soon as an appeal mechanism is available, the losing party might be pressured by its citizens (in the case of states) or its shareholders (in the case of companies) to appeal the decision, regardless of the chances of success. Again, the WTO experience shows that this was certainly the case, at least at the beginning of the Appellate Body's existence. In addition, when discussing a possible ISDS appeal mechanism in the TTIP, one should be aware that any appeal institution might become a de facto lawmaker as its decisions would have influential effects as precedents.

Moreover, international arbitration, including ISDS, is always subject to domestic court review and supervision. Domestic courts have certain competences to intervene in pending arbitral proceedings according to the *lex arbitri* principles. Furthermore, international arbitral awards are always subject to recognition and enforcement by domestic courts

3. European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228 (INI)).

in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The New York Convention stipulates the obligation to recognise and enforce international arbitral awards subject to the so-called *ordre public*. Art. V(2) of the convention reads as follows: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

The only exception in this regard is the procedure according to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). ICSID proceedings do not have the hybrid character of interplay between national and international law as do other arbitral proceedings, but are exclusively rooted in public international law. Thus, there is no domestic *lex arbitri* in ICSID proceedings. In addition, ICSID awards are as enforceable as domestic court judgements. Hence, the New York Convention of 1958 is not applicable. However, ICSID proceedings against the EU will not be possible as the EU is not entitled to become a party to the ICSID convention. Only states may ratify the convention.

The ECJ has made clear that arbitration as such is compatible with the legal order of the EU. However, domestic courts are obliged to ensure compliance with EU law if they are to deal with arbitration because of *lex arbitri*, or with regard to the recognition and enforcement of arbitral awards. Thus, in the case that an international arbitral award is in contradiction with basic principles of EU law (such as the fundamental freedoms or EU competition law), a domestic court of an EU member state must refuse the recognition and/or enforcement of such an award because of a violation of the European *ordre public* (Art. V(2)(b) New York Convention 1958).[4]

Establishing an international investment court would de facto require that the judgments of such a court (or appellate institution) be directly enforceable in domestic legal orders. It would certainly be possible to make respective court proceedings subject to domestic *lex arbitri* and/or the New York Convention of 1958. However, any such attempt would seriously undermine the authority of a respective international court. Thus, only a provision as provided for in the Unified Agreement for the Investment of Arab Capital in the Arab States of November 26th 1980 is realistic. This agreement, which has been ratified by most member states of the Arab League and which entered into force on September 7th 1981, provides for the establishment of a regional court for investment disputes. Art. 34 of the Agreement stipulates that *"(1) [j]udgements shall have binding force …, (2) [j]udgements shall be final and not subject to appeal …, (3) [a] judgement delivered by the Court shall be enforceable in the State Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgment delivered by their own competent courts."*

Overall, abolishing investment arbitration and establishing an international investment court is certainly possible. However, it might be that states (and the EU) would lose more than they would gain from such a step.

4. ECJ, Case C-126/97, Eco Swiss [1999].

Why ISDS with Canada and the USA?

A point that is constantly raised in the current debate on the TTIP and investment protection is that investment protection and, specifically, ISDS are only necessary (if at all) in relation to "weak" states. The USA (and Canada), however, are states under the rule of law. Two aspects should be considered with regard to this argument. First, there are long standing conflicts with the US on the functioning of their judicial system (keywords in this regard are, i.a.: jury system; discovery vs. data protection; "exorbitant" or "extraterritorial" jurisdiction; class action and punitive and triple damages). The German Federal Constitutional Court in a decision of 25 July 2003 (2 BvR 1198/03) even made clear that certain aspects of the US system of class action and punitive damages are contrary to fundamental principles of German constitutional law. It is thus certainly not evident that the US legal system is equivalent to the rule of law idea in the European sense.

Moreover, second, international arbitral practice clearly demonstrates that foreign investors may be treated in the US in a sense that raises concerns. In the case of Loewen vs. USA (NAFTA Award of June 26th 2003), the tribunal described the treatment of the Canadian investor in the US in the following words: "By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr. Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due." Similar issues are raised in the case of Mondev vs. USA (NAFTA, 2002).

Finally, the political dimension of including ISDS and investment protection in a trade agreement with the US is important. It is obvious that whatever is negotiated between the US and the EU will have significant impact on any future trade and investment negotiations around the world. The TTIP will be a blueprint for trade and investment lawmaking to come. There is thus a serious risk of globally abolishing investment protection for all. This will most certainly have a negative impact on the worldwide flow of foreign investment.

Conclusion

This short essay has highlighted some important aspects explaining the rationale of international investment protection and ISDS. The substantive and procedural law of international investment protection is an important part of the global rule of law. As with any public international law, international investment protection law restricts state sovereignty. This is the very idea of public international law. However, any such restriction is part of a balanced system of rights and exceptions. As the Tribunal in *Semire vs. Ukraine* stated:

"The object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest."[5]

5. Semire vs. Ukraine, ICSID Case NO. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 273.

This approach is common practice and increasingly reflected in explicit treaty language. However, this does not mean that there is no space and necessity for improvement of the system. Transparency and more precise treaty language are examples. The TTIP (and CETA) should be seen as a chance for a global model of such improvements.

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CHAPTER 5. THE PUBLIC PROCUREMENT CHAPTER OF THE TTIP: THE POTENTIAL FOR FURTHER MARKET ACCESS

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Overview

This chapter will consider the public procurement aspects of negotiations towards a TTIP between the EU and the US. The term "public procurement" refers broadly to the process followed by public bodies when contracting with private sector firms for the acquisition of goods, works and services (Arrowsmith and Anderson, 2011). Recent high profile examples of this include the California High-Speed Rail Authority's advertising and award of a $1.2 billion contract for the construction of a high-speed railway system in California in the United States– awarded, in 2014, to a US subsidiary of Spanish firm ACS (AFP, 2014)– and, in the UK, the advertising and award of a £500 million Department for Work and Pensions contract for services for the assessment of whether or not sick and elderly claimants qualify for "out of work" welfare payments –awarded, in 2014, to US firm Maximus (DWP, 2014).

The public procurement negotiations for the TTIP are controversial and politically sensitive, which make it an interesting area for further research.[1] This is due to, amongst other reasons: the size of the market for public contracts, around 15-20%of GDP (Ueno, 2013); anxieties over the privatisation of core public services (e.g. the UK's National Health Service (NHS)); and also recognition of public procurement as a policy tool, e.g. to pursue local, industrial, social or environmental policies (e.g. to foster the development of SMEs), something which does not always fit neatly alongside free trade objectives.

The chapter will begin in section two by providing an overview of the starting point for the negotiations. This section will provide an outline of the regulatory system for public procurement in both the EU and US, and will also consider the current trade relationship in public procurement, which is primarily based upon the WTO's Agreement on Government Procurement (GPA). The next sections, section three and four, will look at the TTIP negotiating positions of the two sides, i.e. what the EU and US will hope to gain from the negotiations, areas in which they may be protective, and also topics on which agreement may be difficult. It will be seen that, because of current EU and US commitments under the GPA, the EU stands to have the most to gain from further public procurement liberalisation. Indeed,

1. There is a growing amount of literature on the subject: see R. Craven, (2014); C. Yukins, (2015); C. Yukins and H-J Priess, (2014); K. Hansen-Kuhn, (2014); Woolcock and Heilman-Grier, (2015); European Parliament, (2015).

according to European Commission estimates, 10% of the EU's potential economic gains from the TTIP could come from greater access to US procurement markets (Department for Business Innovation and Skills, 2013, p.59). However, there are many hurdles to overcome (mainly related to gaining the acceptance of sub-federal levels of government in the US) for any meaningful success. The final section, section five, will offer some concluding remarks.

Background

Introduction

The High Level Working Group on Jobs and Growth, which, prior to the initiation of TTIP discussions, was asked in 2011 to identify activities for expanding EU-US trade and investment, highlighted public procurement in its final report in February 2013:

"[T]he goal of negotiations should be to enhance business opportunities through substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment"(HLWGJG, 2013).

The inclusion of market access rules on public procurement in the TTIP negotiations is not surprising: they are an increasingly common feature of bilateral trade agreements (Anderson et al, 2011). Of the 13 bilateral trade agreements concluded by the EU and third countries between 1970 and 2000, none had a separate chapter or article on public procurement, since 2000 13 of 24 (54%) such agreements have had a separate public procurement provision (Cernat and Kutlina-Dimitrova, 2015, p.6).

In relation to trade agreements concluded with third countries not party to the WTO's GPA (see section 2.4 below), one common approach is for the EU to seek to require GPA commitments, e.g. an agreement containing a reference to the GPA text (Anderson et al, 2011).With respect to the US and EU trading systems, however, both the US and EU have highly developed regulatory systems on public procurement (see sections 2.2 and 2.3 below), as was the case with respect to the US-Canada Agreement on Government Procurement (concluded on February 12th 2010) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (concluded on September26th 2014). In view of this, the EU, in particular because of dissatisfaction with US coverage commitments under the GPA (see section 4), especially given the role of infrastructure spending in the US recovery following the 2007/2008 financial crisis, has seized upon the opportunity presented by the TTIP. The EU has expressed ambitions to negotiate a "GPA plus" agreement with the US, i.e. an improved GPA, improved rules and improved coverage (European Commission, 2013).

The EU regulatory system

Corresponding with the internal market objectives of the EU, the EU's regulatory system on public procurement has developed so as to limit the extent to which procurement in member states may operate as barriers to trade

(e.g. through national bias in the award of contracts). Thus, where a contract is of sufficient cross-border interest, it must be procured in line with the general rules and principles of the EU treaties (e.g. articles 28-38 TFEU on the free movement of goods and article 56-62 TFEU on the free movement of services). For financially important contracts, i.e. those contracts meeting specified financial thresholds, more detailed coordinating directives are in place (these cover approximately €425 billion, or 3.4% of EU GDP (2011 figures), of public procurement in the EU) (European Commission, 2014, p.7). Following recent reforms the current set of "procedural directives" includes the Public Procurement Directive 2014/24/EU, the Utilities Directive 2014/25/EU, the Concessions Directive 2014/23/EU, and the Defence and Security Directive 2009/81/EC. Member states have until April 2016 to ensure these updated rules are transposed into domestic law.

As an illustration of approach, the Public Procurement Directive 2014/24/EU, the most prominent of the above directives, sets out a selection of competitive procedures based on principles of equal treatment, non-discrimination, transparency and proportionality for public bodies to choose between for a particular procurement (a "tool box approach"): the open procedure (article 27) and the restricted procedure (article 28) (the directive's standard procedures), competitive dialogue (article 30), innovation partnerships (article 31), and the competitive procedure with negotiation (article 29).[2] In relation to the conduct of these procedures, the directive provides rules on, amongst other things, the EU-wide advertising of public contract opportunities, time limits for receipt of expressions of interest and bids, the drawing up of technical specifications and contracts, and the criteria that may be used to qualify suppliers, shortlist suppliers and award the contract. There are also rules on more modern procurement initiatives like electronic procurement, framework agreements and dynamic purchasing systems. These detailed and complex prescriptive rules are backed by directives which require effective review of procurement decisions and remedies for breach of procurement law: the Remedies Directive for the Public Sector 89/665/EEC; and the Remedies Directive for the Utilities Sector 92/13/EEC.

The US regulatory system

The Federal Acquisition Regulation (FAR) is the main legal authority governing federal procurement in the US and its rules apply to most "executive branch agencies" (48 C.F.R. §2.101(b)) (i.e. executive departments, military departments, and independent establishments as defined in 5 U.S.C. §§ 101, 102, and 104(1), as well as to wholly government-owned corporations, as defined in 31 U.S.C. § 9101). The regulation in the US serves a wider range of objectives, none of which concern free trade. For example, as a guiding principle, the FAR explains that *"[t]he vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives".* This is in marked contrast to the internal market rationales associated with the EU system (section 2.2 above). However, like the EU, the US system is shrouded in complexity: there are a number of exemptions from the FAR and also a number of implementing and supplementing regulations/statutes.

Below federal level, each of the 50 US states has responsibility for its own procurement rules. These rules therefore vary from state to state,

2. In exceptional cases a non-competitive procedure may be used (article 32).

though many states have rules in place that correspond with the FAR (e.g. because of a common overarching WTO framework).

The WTO's Agreement on Government Procurement (GPA)

Despite the different core texts governing public procurement in the EU and US, the different rationales behind the regulation, and the wildly dissimilar terminology used by the two systems, many commonalities can be found in the rules and procedures of the FAR and EU procurement directives. A large part of this can be put down to the present trade relationship between the two jurisdictions. The main agreement regulating market access in public procurement between the EU and US is the WTO's GPA, but an exchange of letters also exists involving three US states (Illinois, North Dakota and West Virginia) and the EU.[3]

The GPA is a "plurilateral" agreement found in Annex 4(b) of the WTO Agreement. This means not all members of the WTO are parties to the GPA, just those that have chosen to sign up, currently 43 WTO members (including the 28 members of the EU). As a plurilateral agreement between predominantly developed nations, the GPA has not faced the same difficulties as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS), and a newly agreed GPA text that entered into force for both the EU and US on April 6th 2014.

The EU and US, particularly the EU, have, since the outset, been at the forefront of the development of the GPA rules; thus, in view of this, along with similar market access objectives, the GPA is based on general principles like those found in the EU system: non-discrimination, transparency and fairness (article IV). Again, similar to the EU, but more skeletal, the GPA rules put in place framework coordination for some key aspects of public procurement. These include basic rules on contract notices/adverts (article VII), technical specifications (article X), rules of origin and offsets (article IV), supplier qualification and shortlisting (article VIII and IX), supplier lists (article IX), contract award (XV), negotiations with bidders (article XII), electronic procurement (article XIV) and procedures for challenging procurement decisions (article XVIII).

The annexes to the GPA are particularly important for the purposes of the discussion here: these specify, for each signatory state, the extent of the agreement's coverage in relation to financial thresholds, central government entities, sub-central government entities, goods, services and construction.

3. Available at:http://www.ustr.gov/trade-topics/government-procurement/us-european-communities-1995-exchange-letters (accessed 03/12/13). Here there is agreement for enhanced EU access to procurement markets in North Dakota and West Virginia (not covered by GPA), and Illinois; Massachusetts Port Authority; and Boston, Chicago, Dallas, Detroit, Indianapolis, Nashville and San Antonio.

EU targets and concerns

New and improved rules

The European Commission's "GPA plus" aim is for the TTIP procurement chapter to build upon existing rules, setting "a higher standard that could inspire a future GPA revision", establishing "new disciplines" that go beyond those contained in the GPA (European Commission,

2014, p.1). This could potentially include, for example, harmonised terminology and important issues omitted from the GPA, such as green/ environmental procurement, procurement via Public-Private Partnerships (PPP), and framework agreements (termed "Indefinite Delivery/Indefinite Quantity Contracts", "Government-Wide Acquisition Contracts", and also "Multiple Award Schedule Contracts in the US). The two parties could also seek to add detail to existing GPA provisions, e.g. in relation to technical specifications, qualification, shortlisting and award, as well as domestic challenge procedures. However, the extent to which this is necessary (given the problems related to coverage of the GPA agreement (see below)) is questionable and arguably negotiations of new and improved rules would distract from (what should be) the primary objective (of the EU, at least): improved coverage of market access commitments (Craven, 2014). Arguably, the desire to improve upon the market access rules found in the GPA is a misinterpretation of the recommendations of the HLWGJG, the report of which mainly stressed expanded coverage based on national treatment: "*substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment*" (HLWGJG, 2013).

Expanded coverage

In addition to improved rules, a key priority for EU negotiators is (and should be, in accordance with the recommendations of the HLWGJG) to seek concessions from the US in terms of the coverage of the GPA market access rules to the public sector in the US. This is a real bone of contention for the EU. In contrast to the 15% GDP of public procurement the EU is prepared to open up under the GPA (i.e. essentially the size of the procurement market of contracts of "cross-border interest" caught by EU procurement directives), the US GPA commitments cover only 3.2% GDP (a total of €34 billion) of the US procurement market (European Commission, 2011). In view of this discrepancy, the EU recognises that approximately 10% of the EU's potential economic gains from successful TTIP negotiations could come from greater access to US procurement markets (Department for Business Innovation and Skills, 2013), and, according to statements from the UK government, "if [the EU] failed to do a deal on government procurement in the TTIP, that would diminish [TTIP's] significance quite considerably" (House of Lords, 2014, para. 128).

There are 89 entities listed in Annex 1 of the US GPA Appendix 1(which lists central government entities). The EU wants the TTIP to apply to all central government/public entities, including subordinated entities of central government; this means the inclusion of notable exceptions like the Federal Aviation Administration.

More significant than the coverage of the procurement of federal-level entities is procurement at US sub-federal level: currently, only 37 of 50 US states have formally accepted the GPA (Annex 2). This means 13 states– Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia and West Virginia – are all outside GPA rules. In addition, coverage of entities within some of the 37 states signed up to the GPA (e.g. local, regional and municipal levels) is, in comparison to the EU GPA offer-

ing, very limited. For example major cities are not covered, such as New York, Los Angeles, Houston, Philadelphia, Phoenix, San Diego, San Jose, Jacksonville, Austin, San Francisco, Columbus, Fort Worth, Charlotte, El Paso, Memphis, Seattle, Denver, Baltimore, Washington, Louisville, Milwaukee, Portland and Oklahoma City.

The greater inclusion of sub-federal procurement in the US, e.g. the upgrade of the 13 states outside the GPA to GPA standard access, is recognised as potentially a bridge too far for TTIP negotiations. This is mainly because of the lack of authority the US administration has to bind individual states to such agreements. It is noted that in the period since signing up to the GPA, which came into force in 1996, there has been a backlash amongst states: fewer and fewer are prepared to accept the procurement chapters of international trade liberalisation deals, e.g. it is more difficult to get the acceptance of some states because, rather than the decision simply resting with the state governor, state legislature approval is required (Woolcock and Heilman-Grier, 2015, p.20). Indeed, in recent trade agreements concluded by the US with Peru, Columbia and Panama only eight states signed up to the procurement chapter (Hansen-Kuhn, 2014, p.4).

Despite the above, because the immediate benefits of open public procurement markets are not obvious (e.g. without signing up to an agreement any sub-federal entity could still choose to enable a foreign company to bid on a case by case basis), some have contemplated ways of using the TTIP to introduce and condition states to such international liberalisation (Yukins and Priess, 2014).One way this might be done would be to ensure that the deployment of federal funds could not be used to subvert the GPA rules, i.e. when transferred to be spent by non-GPA state/public entities. This raises a particular EU concern: the proliferation of "Buy America/n" laws, policies and practices the US has seen in the wake of the 2007-2008 global financial crisis and recession (European Commission, 2015). Here, essentially, where US federal government funds a state or local project there will be domestic content requirements; for example, under the American Recovery and Reinvestment Act (ARRA) 2009, 100% of the iron, steel and manufactured goods used for construction projects funded by the $787 billion stimulus package need to be US-produced (these particular "Buy American" provisions expired in September 2011). According to the EU's 2015 Trade and Investment Barriers Report, "*significant progress in this area is an important pre-requisite for a successful conclusion of the TTIP negotiations. In particular, it will be crucial to secure better EU access to sub-federal procurement in the U.S*" (European Commission, 2015, p.8). "Buy American" provisions should be GPA-friendly, so, for example, where the GPA applies, iron and steel should be allowed to originate from non-US GPA signatories; however, because of the US's limited GPA coverage commitments, many state and local government projects are regarded as outside the GPA, thus resulting in many EU suppliers facing apparent exclusion from major procurement activity in the US. In the US-Canada Agreement on Government Procurement 2010, Canada was able to obtain certain exemptions from the ARRA 2009, but, because of broad political commitment to "Buy American" legislation in the US, Canada had to reciprocate by offering US firms greater market access, e.g. provinces and municipalities not covered by the GPA (Woolcock and Heilman-Grier, 2015, p.21).

In addition, in view of the above difficulties surrounding the inclusion of US states, some had hoped for the TTIP negotiators to learn from the successful CETA (EU-Canada) negotiations. For the CETA negotiations, Canadian provinces were included in the negotiations (House of Lords, 2014, para.136).According to CETA negotiators for the EU, it was made clear to Canada from the outset of negotiations that they regarded some areas of provincial competence as "indispensable" and would not be interested in a deal if these areas were not on the negotiating table. Thus, provincial governments were involved in negotiations from the outset and consultation mechanisms were also put in place, and, as a result, the EU claims to have achieved access to approximately 70-80% of the Canadian procurement market between the federal government, the provinces and the large municipalities.

The EU is also keen to extend US commitments in relation to all entities governed by public law, state-owned companies and similar operating in the field of utilities (Annex 3 GPA). The US also has derogations for specified goods (Annex 4), services (Annex 5) and construction services (Annex 6), which the EU will also want on the negotiation table. Furthermore, a long standing bone of contention is the extensive use of procurement in the US to support small or minority-owned businesses (see Small Business Act 1953). A GPA exemption (Annex 7) means that each year contracts amounting to $billions are set aside for such businesses.

The United Kingdom's National Health Service

In the UK, a prominent EU economy, campaign groups have mobilised to garner support against the TTIP due to anxieties over the way in which procurement liberalisation may impact on the UK National Health Service (a publicly-funded health care system in the UK),in particular, a campaign fearing irreversible privatisation of the NHS. On January 28th 2015, Commissioner Cecilia Malmström wrote to Lord Ian Livingston (a UK government minister for trade and investment (December 2013-May2015)) to allay such concerns:

> "*[M]ember states do not have to open public health services to competition from private providers, nor do they have to outsource services to private providers; member states are free to change their policies and bring back outsourced services back into the public sector whenever they choose to do so, in a manner respecting property rights (which in any event are protected under UK law); it makes no difference whether a member state already allows some services to be outsourced to private providers, or not*" (Department for Business, Innovation and Skills, 2015).

Malmström invites sceptics to look at the protections in the EU-Canada CETA deal as an example of the approach.

Despite the clear reassurances, the anti-TTIP campaign on this front is still strong; for example, there is a view that, regardless of legal protections, an Investor-State Dispute Settlement system may enable US firms to pressure/bully the UK government.

US targets and concerns

There is much less information regarding what the US might seek from TTIP procurement negotiations. It may, however, be assumed that the US attitude to procurement liberalisation is on the defensive, as it has much less to gain from the EU than vice versa. Nevertheless, although, legally speaking, the EU is in a strong negotiating position, the US, in its annual report on foreign trade barriers, regularly identifies numerous concerns regarding public procurement in practice in certain EU member states; for example, the 2015 report highlights issues relating to transparency, corruption and discrimination in Bulgaria, the Czech Republic, France, Greece, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovakia and Slovenia (Office of the US Trade Representative, 2015, pp.144-146).

In addition, an EU proposal for a new regulation, "a regulation of the European Parliament and of the Council establishing rules on the access of third country goods and services to the European Union's internal market in public procurement and procedures supporting negotiations on access of European Union goods and services to the public procurement markets of third countries" (European Commission, 2012a),[4] is also raised in the 2015 US report. This legislative initiative was set in motion in March 2012 and continues to be debated in the European Parliament and Council.

The proposed regulation, which followed EU-wide consultation indicating broad support for action (though, not necessarily legislative action) reflects dissatisfaction with many third countries (the USA, Japan, Canada, Korea and China, for example) in not committing to opening their procurement markets up in a manner corresponding to EU commitments (see above). Also, the regulation is a response to certain trading partners maintaining or introducing restrictive/protectionist measures, impacting on EU businesses (such as US "Buy America" provisions). In addition, due to the above, member states were responding in divergent ways, so a coordinated EU approach was deemed important.

The proposed regulation is GPA compliant: third-country goods and services benefitting from EU market access commitments (e.g. those under the GPA) must be treated equally to EU goods and services (article 4). However, for other third-country goods and services, article 5 of the regulations allows for restrictive measures, provided these are in line with the specific safeguards (see article 6). In addition, the commission would be empowered to launch an external investigation into restrictive procurement measures by third countries (article 8), and there is a mechanism for consultation with third countries (article 9). If no resolution is arrived at following consultation, articles 10 and 11 provide scope for retaliation in the form of (i) the disqualification of certain tenders; and/or (ii) a mandatory price penalty on the third-country goods/services.

The proposed regulation would clearly send a message to third countries; however, whether or not the prospect of this legislation provides sufficient leverage to gain greater GPA plus coverage offer from the US remains doubtful (see section 3 above). Arguably it serves mainly an internal political function, appeasing the anxieties of the EU business community. From an external perspective, the proposed regulation places the EU, which generally sees itself as a strong advocate against

4. See also European Commission (2012b).

protectionism, in an awkward position. Thus, the EU is quick to point out how different the measure is from "Buy American" policies (e.g. a system of price preferences for providers from the EU), and, indeed, the EU appears to have flatly rejected any such legislation, not wanting to give implicit approval to something "to which it is adamantly opposed" (European Commission, 2012b).

Concluding remarks

In this chapter the deficiencies in the market access relationship between the EU and US concerning the field of public procurement have been highlighted. These deficiencies are not the result of deficiencies in the GPA. Rather, these are the result of poor coverage of international public procurement rules in US public bodies, mainly sub-federal US bodies. The challenge posed by the resistance of sub-federal levels of government in the US to international procurement liberalisation needed to be recognised and acted upon early on, as was the case in relation to EU negotiations with Canada over CETA. There has been little sign of any such activity and, thus, the likelihood of the TTIP meaningfully enhancing the procurement relationship between the EU and US is in serious doubt, which is a major blow for the EU and the TTIP in general.

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CHAPTER 6. SECURITY AND PRIVACY IMPLICATIONS OF E-PROCUREMENT IN THE TTIP

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Overview

Five years ago, the European Commission commented that electronic procurement (e-procurement) "is no longer a pipe-dream – it is increasingly a working reality in many regions and Member States" (European Commission, 2010). However, out of an EU public sector market for purchases of goods, services and works estimated at €2.4 trillion, e-procurement only accounts for between 5% and 10% of procurement, in spite of the potential savings of between 5% and 20% reported by entities that have made the switch to e-procurement (European Commission, 2012a). The United States has a similarly large government procurement market, worth $1.7 trillion (GAO, 2015), and thus provides opportunities for the use of e-procurement and the extension of its potential benefits over a large base. Such huge markets should interest companies from the other side of the Atlantic. Yet the subject of security and privacy implications of e-procurement has not been raised by either the EU or the US in the resources that they have officially published (through the European Commission and the United States Trade Representative, respectively) to date regarding the TTIP negotiations.[1]

As discussed in this article, the development of e-procurement is treated as a priority nationally, regionally and internationally, and e-procurement is seen as a way forward to increase efficiency and facilitate access to public tenders and increase transparency by "holding public authorities more accountable" (OECD, 2015). It is perceived as a means to enhance "value for money" through increased competition, reduced costs, and other related benefits (UN, 2011). The US e-government legislation called for work to ensure "effective implementation of electronic procurement initiatives".[2] The European Commission has indicated the "strategic importance" of e-procurement, which ties in with the Digital Agenda for Europe and the e-Government Action Plan 2011-2015 (European Commission, 2012a). Furthermore, Europe has set out to develop e-procurement through recent revisions to its procurement directives, which it claims will increase the accessibility of businesses to procurement activity in the EU member states (European Commission, 2014). The recently revised EU procurement

1. *See* http://ec.europa.eu/trade/policy/in-focus/ttip/ (last visited on August 2, 2015) (to date, no full negotiating text has been officially published by the EU on public procurement), and https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-7 (last visited on August 2, 2015).
2. E-Government Act of 2002 (H. R. 2458) adding a new ch.36 (Management and Promotion of Electronic Government Services) to 44 U.S.C. of which §3602(12) on the Office of Electronic Government.

directives, currently in the process of transposition into member state national law, favour (and sometimes mandate) the use of "electronic means" in procurement in many instances (see, for example, Directive 2014/24/EU, which has a transposition deadline of April 18th 2016 (art. 90(1)). The importance of e-procurement was also highlighted in the preamble to the 2012 Revised Amendment to the World Trade Organization (WTO)'s 1994 Government Procurement Agreement (GPA 2012 Revision), which stresses the "importance of using, and encouraging the use of, electronic means for procurement" (WTO, GPA 2012 Revision, 2012). The current GPA 2012 Revision, however, provides only a very basic level of requirements regarding contracting using e-procurement, calling for the use of "generally available and interoperable" software "including those related to authentication and encryption" (WTO, GPA 2012 Revision, 2012, Art. IV. 3 (a)) and ensuring mechanisms establish the "prevention of inappropriate access" to systems (WTO, GPA 2012 Revision, 2012, Art. IV.3 (b)).

Recent EU trade agreements mirror procurement provisions in their government procurement chapters. This is the case with the Canada-EU trade agreement (CETA, 2014, Ch. X, Art. IV, 3. (a)-(b), p. 314, 1 August 2014 final version), and the EU agreements with members of the Andean Community, the EU agreement with Iraq, and the EU-Central American association agreement. Even earlier agreements, such as that between Chile and the EU, encourage the use of "electronic means of communication" and "electronic information systems". If the EU and the United States are committed to achieving an ambitious outcome on procurement within the TTIP setting, the development of "GPA plus" provisions on e-procurement are essential in order to ensure security, privacy and confidentiality of information, together with the other benefits such as transparency and increased access that are provided by electronic means for providing tender information, communicating and transacting. For example, the European Commission reported on CETA that *"Canada will also create a single electronic procurement website that combines information on all tenders and access to public procurement at all levels of government*" (European Commission, 2013), and an equivalent mechanism may initially be provided for the parties to the TTIP so as to encourage market access for EU and US firms in each other's markets.

The adoption of "GPA plus" elements under a TTIP framework could allow the EU and the US to "set a higher standard that could inspire a future GPA revision",[3] such as in the area of the security of e-procurement systems and platforms, all the while ensuring that security standards in this context, including requirements as to identity authentication, encryption, data storage and evidentiary elements regarding tenders (evidence of receipt and integrity of content) are set cooperatively, in a way that does not create artificial barriers to trade,[4] thereby ensuring the access of Spanish and other European companies (and US ones, alike) to new markets. Such security standards, developed in collaboration, if set ambitiously using the partners' combined expertise, could then become de facto "gold standards" internationally, because of the importance of the markets involved and the influence of these key players; they could serve as an inspiration for a future GPA revision and could influence other trade discussions in progress, such as TTP.[5] As stated by Woolcock and Grier (2015):

3. European Commission, EU-US Transatlantic Trade and Investment Partnership: Public Procurement, Initial EU position paper, para. 2.1, p. 1.

4. *See id.*, para. 3.1, p.2, on the importance of ensuring that technical standards do not create artificial barriers.

…the TTIP could contribute to the international procurement arena by setting a new standard for procurement agreements. If the terms of the TTIP go beyond current procurement agreements, in particular, the GPA, it would likely provide the basis for the inclusion of its liberalisation of procurement in other agreements…. If the TTIP includes procurement rules that go beyond the revised GPA, they could provide the basis for incorporation in a subsequent revision of the GPA. Also, such new rules would likely be incorporated in any new FTAs that the EU and the US negotiate.

In this regard, it should also be noted that data security – the subject of GPA plus elements – is a key element of data protection and privacy, creating trust among parties.

The importance of security for trust, privacy and confidentiality in e-procurement

The security of the electronic means of e-procurement can have an impact on the trust that parties who use the system have in it, as has been aptly demonstrated in the private sector. This trust or "confidence" of entities is at the heart of the integrity of the procurement system and of transactions and is a prerequisite for the adoption of electronic market tools. In the private sector, in the case of e-commerce, this has been cited by the European Commission in its Digital Agenda. However, this is also true for public e-procurement systems as well. While there are phases of procurement, such as notification, submission, evaluation and ordering that are complex and need different treatment from that of the private sector (requiring "an agreed set of protocols and standards for organising the exchange of complex documents and interaction between the public purchaser and supplier"), there are many aspects of e-procurement that maybe applicable to and used by the B2B market, such as invoicing and payment after award (European Commission, 2010). Thus, some of the same concerns, such as that for security of the platform and of transactions, arise in the two cases. These concerns about security have been echoed in studies from academia (Khorana, Ferguson-Boucher, and Kerr, 2015) and the private sector (PWC, 2013). Trust is crucial; there must be confidence in both "government and the enabling technologies" and two themes that consistently appear in the literature in this regard, both regarding private sector marketplaces and e-government, are privacy and security (Carter and Bélanger, 2005).

At the same time, cybersecurity has recently been a critical concern, as evidenced by the European Commission's Cyber Security Strategy and Proposal for a Directive,[6] and the White House's establishing of a Cyber Threat Intelligence Integration Center.[7] This was also brought home in 2011, when the EU's Emissions Trading System (ETS) or so-called "cap and trade" market on carbon credits was hacked. The ETS suffered because "protections against crime, from background checks on carbon traders to basic Internet security to unified governance, were minimal from the start" (Funk, 2015). Potential hacking can interfere with transactions and communications and misappropriate data. This is a cautionary tale for the use of electronic means, the security of which could arguably better be managed at a higher level than the local one. Thus, common standards for encryption, electronic signatures, management of network identities and authorisations could be better handled.

5. *See id.*, para. 2.1, p. 1, on the impact of "GPA plus" elements on a future GPA revision.
6. *See* https://ec.europa.eu/digital-agenda/en/news/eu-cybersecurity-plan-protect-open-internet-and-online-freedom-and-opportunity-cyber-security.
7. Press Release, The White House, Presidential Memorandum -- Establishment of the Cyber Threat Intelligence Integration Center, February 25 2015, available at https://www.whitehouse.gov/the-press-office/2015/02/25/presidential-memorandum-establishment-cyber-threat-intelligence-integrat.

In the e-procurement context the protection of security is synonymous with the protection of citizens' data privacy. The OECD (1993 amended 2013) states: "Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data". Similarly, such protection helps ensure the confidentiality of Spanish and other private companies' proprietary information, whether in the tendering process or in the carrying out of government contracts, such as concessions or the provision of services.

The importance given to data protection in processing has already been shown by its inclusion in the 2014 revised EU procurement directives. There, data protection law must be taken into consideration when designing technical specifications, especially through the use of privacy by design in establishing specifications for the processing of personal data (see e.g. Directive 2014/24/EU, recital (77)). Similarly, the US Privacy Act of 1974, through its incorporation in the Federal Acquisition Regulation, applies to government contracting where a contractor designs, develops or operates a system of records on individuals.[8] Such legislation, which is subject to "numerous exceptions" given wide interpretation, provides certain rights to data subjects, including, *inter alia*, a right to accuracy of data, allowing individual access for inspection, and certain information rights (Belanger and Hiller, 2006). Arguably, these are not as extensive as the rights provided by EU legislation, although a full comparative study is beyond the scope of this paper. Nonetheless, in the case of international standards, a high best level of data protection should be the one referred to in this design, regardless of differences otherwise existing between the legislation of the US and that of the EU in the matter. However, because of the differing levels of protection of personal data in the EU and the US, a common high level of protection may be a contested area in negotiations.

In addition to specific personal data or privacy legislation protections, the United States' Freedom of Information Act (FOIA) allows certain privacy exceptions to disclosure subject to FOIA requests for public records that include personal data or business trade secrets (Belanger and Hiller, 2006), although one would look to the Privacy Act for provisions regarding the sharing of documents between US government agencies. In the EU under the new procurement directives, access to certain documents and communications may need to be limited based on data protection principles (see e.g. Directive 2014/24/EU, art. 83(6) (on access to documents in enforcement actions) and art. 86(2) (on information exchange in administrative cooperation)).This is because access to such information may involve the processing of personal data subject to the requirements of EU data protection principles such as data minimisation, purpose limitation, relevance and security requirements, among others. As noted in the text of the procurement directives, EU data protection law applies (currently the 1995 Data Protection Directive (Directive 1995/46/EC), which will be repealed and replaced by the proposed General Data Protection Regulation once adopted), and the principle of data protection by design shall be taken into account when drawing up technical specifications relating to the processing of personal data (see e.g. Directive 2014/24/EU, recital 77).

Likewise, in the case that security is not ensured, the EU directives allow for reverting back to non-electronic means (see e.g. Directive 2014/24/EU, Art. 22(1)). Under the relevant provisions, if there is a breach of

8. *See* http://www.gsa.gov/portal/content/104249 (last visited on August 2, 2015).

security or if electronic means cannot ensure the necessary security for extremely sensitive information, electronic means do not need to be used for communication in the submission process. This underscores the necessity of the highest level of security, for confidentiality and proprietary data protection, even where personal data is not involved.

In order to obtain such security in public procurement in a way that encourages transparency, efficiency and enhanced market access, this paper argues that there must be a coherent legal framework establishing rules and technical standards, and harmonisation of such technical standards. It should be noted that, related to the issues of privacy and confidentiality, the location of data stored in connection with procurement may be an issue in negotiations.

TTIP negotiations should address the issue of the use of cloud storage in the e-procurement context, information to be given to tenderers regarding the localisation of their personal data and trade secrets in the cloud and any national security or law enforcement legislation that may allow access to such data and secrets and the potential use thereof. The location of the data in terms of that of the hardware used to store it in the cloud at any given moment is important in determining the legal environment applicable to it (European Commission, 2012b), and this will have a bearing on law enforcement access to such data, an issue brought to light in connection with the NSA PRISM disclosures, which have been the subject of discussion in the context of current EU data protection law reform (Voss, 2014). Thus, this too may be a contested area for negotiations, as data privacy and cross-border data flows are considered contentious market access issues (Akhtar and Jones, 2014).

The TTIP: An opportunity to initiate a cooperative procedure to establish common rules?

EU-US discussions in the area of public procurement could provide for a formalised continuing set of discussions and actions to further advance protection of security, privacy and confidentiality in e-procurement through stages. In such a way, the negotiation of the TTIP could translate into a stellar opportunity for the EU and the US, through GPA plus elements, to set e-procurement standards for tomorrow, potentially inspiring a GPA revision in the future and having an impact on TTP negotiations, or the negotiation of other trade agreements to be entered into by the EU or the US.

However, any such advances may need to be conducted only on the central level to start with, especially given the US government argument that, "principles of federalism bar the federal government from compelling the states to open their procurement markets under an international agreement, such as the GPA" (Yukins, 2014). Nonetheless, the local levels should be targeted at a future time, as a means to reach "enhanced mutual access to public procurement markets at all administrative levels (national, regional and local)", identified by the council of the EU in its mandate for negotiations as one of its negotiating goals (Council of the European Union, 2013) and a means to bring true benefits to SMEs. It has been noted that countries with a "well implemented" e-procurement system "have noticed higher participation of SMEs … due to

improved market access and a reduction in marketing costs" (UN, 2011). SMEs would have easier access to tender information available centrally online, and less paper bureaucracy with the various steps of the procurement process achievable online.

Furthermore, given the timeframe for TTIP negotiations, the most that one may likely expect to see in the eventually implemented agreement is the establishment of general undertakings and the initiation of actions for rule- and standard-making and to depend on a "living agreement" status for the further development of TTIP work on e-procurement following ratification.

There is some precedence for this as, following the GPA 2012 Revision a Bilateral Procurement Forum was established by the EU and the US to provide for ongoing dialogue (Woolcock and Grier, 2015). In addition, both parties adopted a "living agreement" procedure for government procurement in their recent free trade agreements (FTA) with the Republic of South Korea, for example, although not with specific tasks identified at the time of signature. In each case, a Government Procurement Working Group was established, which was able to deal with issues regarding government procurement subsequent to the entry into force of the FTA (see KORUS, 2010, art. 17.10 and KOREU, 2010, art. 15.3 (f), in accordance with art. 9.3). Moreover, CETA establishes a Committee on Government Procurement in order to further discussions with the goal of "affording Parties the opportunity to consult on any matters relating to the operation of this Chapter or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties" (CETA, 2014).Specifically, such a committee may promote activities that "may include information sessions in particular with a view to improving electronic access to publicly-available information on each Party's procurement regime, and initiatives to facilitate access for SMEs" (CETA, 2014, art. XIX (2) (d)), including those from Spain. However, what is being proposed in this paper goes further.

For example, on security matters, common rules on security and related common rules on interoperability and on confidentiality and privacy could be targeted. Moreover, such a task force could charge already existing agencies to represent the parties for some of their work. For example, in the area of security, the EU Agency for Network and Information Security (ENISA) could take this role for the European Union. Although ENISA is not a standards developing organisation itself, it "has been identifying and elaborating on the work performed by standardisation bodies (such as ISO, ETSI, ITU, CEN, CENELEC)" relevant to its work on network and information security standards development, sometimes through working collaboration, since 2009 (Purser, 2014). On the United States side, the National Institute of Standards and Technology, a standards and guideline-developing agency of the US Department of Commerce, could take the corresponding role.

More ambitiously, a choice of commonly approved platforms or common requirements for e-procurement platforms could be established. Having common systems would address the market fragmentation issue about which the European Commission has expressed concerns, "[market fragmentation] can emerge from the existence of a wide variety of systems, sometimes technically complex, [….] that can lead to increased costs for

economic operators/suppliers" (European Commission, 2012a). While the European Commission was speaking of intra-EU systems, when the transatlantic market is considered, this would be even truer, and some of the work of the EU on a regional basis may serve as a model for working internationally with the United States. Such developments arose cooperatively and not in competition and have the potential to impact the standards and policies of other nations in the area of e-procurement. This in turn would lead to greater transparency and access to markets through adoption of the e-procurement solution, through a cooperative process that would avoid a battle of standards and create efficiencies and protection for businesses (including SMEs) and citizens.

Establishing an e-procurement road map for the future

A first objective for negotiations, then, would be to recognise the benefits of e-procurement in the text of the TTIP and to obtain undertakings by the two partners to collaboratively develop security standards for e-procurement, dealing with the various issues identified in this paper. As part of such discussions, mutually acceptable e-procurement platforms could be identified or at least their relevant commonly required technical specifications could be established.

To begin with, the partners could each undertake to develop single window e-procurement portals, based on such security standards, which would centralise and make access to information easier. Single window e-procurement portals may be used by decentralised procurement systems, as they allow bidding to be conducted individually by contracting agencies and only require a system operating entity (UN, 2011). The EU and US should establish the TTIP as a "living agreement" and set up a working group tasked with developing the security standards mentioned above, and working toward additional centralisation, as discussed below.

Second, collaborative work between the US and EU could be initiated, with the working group tasked to aim at going further – initially determining the feasibility of the creation of a single international platform for public procurement to be used by the two partners. If determined to be feasible, the working group would be charged with working on its development. Such an achievement would fully ensure a single coherent framework, single technical infrastructure, efficiency and market access for economic actors from either side of the Atlantic. Such a platform should be scalable internationally, adopting the security standards already established. And why not host it in Spain?[9] Although this last goal may today seem unrealistic, there have been cases of international web-based systems set up in the past, albeit in areas outside of government procurement.[10]

Third, establishing security standards for one platform and monitoring the implementation of these would obviously take fewer resources than doing so for numerous platforms based on various standards. Data protection and privacy protection should be easier to achieve. Costs for maintaining a platform would be reduced for governments, as they could be shared out through membership fees to the central international platform, and the increase in potential suppliers would drive down prices through com-

9. Spain already has experience with various e-procurement platforms. *See e.g.*, https://contrataciondelestado.es/wps/portal/plataforma and https://contractaciopublica.gencat.cat/ecofin_pscp/AppJava/es_ES/search.pscp?reqCode=start.

10. These have been frequent in the B2B sector (in the automotive and aviation industries, as well as in finance), and certain researchers highlight the ability to compare e-procurement platforms to B2B web marketplaces (Assar and Boughzala, 2008).

petition. Having one set of terms and conditions and system requirements to comply with would help EU as well as Spanish businesses– especially SMEs– to trust that their confidential information and citizens' data would be secured and protected, which would please both constituencies.

Conclusion

In conclusion, the TTIP could include provisions requiring work on the achievement of e-procurement in order to provide benefits to governments and market access to companies from both sides of the Atlantic. These should include the development of common security standards, the protection of data and privacy, centralised portals and, eventually, if feasible, an international platform. Here, what we are proposing is first incremental, but eventually leads to major steps. At each level the goal is clear – to increase confidence and trust in the e-procurement solution through enhanced security and (relatively) greater protection of privacy and confidentiality of information. And to do this in a way based on common best standards allowing Spanish and other SMEs one set of requirements with which to comply. The result should be greater public contract opportunities, more procurement competition, lower risk and higher benefits to consumers.

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CHAPTER 7. THE EU'S APPROACH TO SOCIAL STANDARDS AND THE TTIP

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Introduction

Since the early 1990s, the EU's trade agreements have included a 'human rights clause' requiring the parties to respect human rights and democratic principles. More recently, beginning with the 2008 EU-Cariforum Economic Partnership Agreement,[1] they have also included 'sustainable development' chapters, which contain obligations to respect labour and environmental standards. These sets of provisions are a central means by which the EU achieves its 'ethical' foreign policy objectives (Khaliq, 2008).

Similar provisions are also likely to feature in, or otherwise apply to, the TTIP. This article considers the extent to which, legally, these two sets of provisions give the EU the means of implementing its obligations to ensure that its external activities respect human rights and pursue the objective of promoting sustainable development. It also considers the differences in the EU's approach to human rights and democratic principles on the one hand and labour and environmental standards on the other.

Human rights clauses in trade agreements

Since 1995 the EU has adopted a policy of ensuring that all cooperation and trade agreements are subject to human rights clauses (European Commission, 1995). Traditionally, it did this by inserting human rights clauses directly into these agreements. More recently, it has done this by cross-referencing (sometimes by implication)[2] human rights clauses in existing agreements between the parties.[3] Similarly, the EU has specific human rights clauses and other similar clauses in its autonomous instruments granting trade preferences (including the EU's Generalised Scheme of Preferences (GSP) programme)[4] as well as in financing agreements with developing countries.[5]

Whether the TTIP will be subject to a human rights clause is still an open question. The following proceeds on the basis that it will.

1. EU-Cariforum Economic Partnership Agreement [2008] OJ L289/I/3.
2. Article 15.14 of the EU-Korea Free Trade Agreement [2011] OJ L127/6 states that "[u]nless specified otherwise, previous agreements between the Member States of the European Union and/or the European Community and/or the European Union and Korea are not superseded or terminated by this Agreement".
3. This policy is understood to be set out in the confidential EU documents: 7008/09, 7008/09 COR 1 and 10491/1/09 REV 1 (RESTREINT UE). See EU Council Document 12450/11 rejecting an application for public access to these documents.
4. Reg 732/2008 [2008] OJ L211/1.
5. E.g. Annex I of the 2012 Model General Conditions to Financing Agreements and Article 23(1) of the European Development Fund, at http://ec.europa.eu/europeaid/work/procedures/financing/financing_agreement/index_en.htm.

Obligations

The 'essential elements' clause

The core of all human rights clauses is an 'essential elements' clause, which is in relatively standard wording. The following, from the 2012 EU-Central America agreement, is a good example:

> Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.[6]

The EU's early agreements contain little else and it is unfortunate, in some respects, that it is one of these agreements – the 1993 EU-India cooperation agreement – that is the best known, thanks to an ECJ case on its human rights clause in 1996.[7] In fact, the human rights clause in this agreement is quite unrepresentative of later human rights clauses, which have quite different forms and legal effects, and much of what the court said about this clause is of limited relevance to these clauses in general.[8]

One of these later changes, now a standard feature of human rights clauses, is the inclusion of an 'implementation' clause, which states that "[t]he Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement".[9] This clause derives from what is now Article 4(3) TEU, which has in the context of EU law been interpreted as imposing a variety of additional obligations on EU member states, including the obligation to take steps to ensure the effective application of EU law.[10]

Enforcement

The human rights clause is designed for the situation where a state violates human rights. In that event, a human rights clause authorises the other party to respond by means of unilateral "appropriate measures". In most cases, this may be done without even the need for prior consultations.

This is achieved in most of the post-1996 agreements in a somewhat unwieldy way. These agreements deem a violation of the essential elements of the agreement to be a "material breach" of the agreement, which is in turn deemed to be a "case of special urgency"[11] automatically entitling the other party to adopt "appropriate measures" under a so-called "non-execution" clause.[12] More efficiently, the 2012EU-Peru/Colombia agreement states that "any Party may immediately adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement".[13]

There are conditions on the adoption of "appropriate measures": they must be taken in accordance with international law; priority must

6. Article 1 of the EU-Central America Association Agreement [2012] L346/3.
7. Case C-268/94, *Portugal v Council* [1996] ECR I-6177.
8. To take an example, Article 60 of the Vienna Convention on the Law of Treaties, referred to by the Advocate-General and the parties to the case, is, by its own terms, only a default clause and therefore inapplicable to later versions of the human rights clause, which expressly regulate the consequences of violations of the norms in the essential elements clause. Of course, strictly speaking, Article 60 would not be relevant anyway, given that the EU is not a party to the Vienna Convention 1969, and the Vienna Convention 1986 is not in force. It is the customary international law rule reflected in this provision that would be relevant. Invariably, the academic commentary misses this point, e.g., recently, Khaliq (2008), pp.112-13.
9. E.g. Article 355(1) of the EU-Central America agreement.
10. For a useful summary, see Hillion and Wessel (2008).
11. The wording is unfortunate. The phrase 'special urgency' implies temporal urgency, not material gravity.
12. E.g. Article 355(2)-(5) of the EU-Central America agreement.
13. Article 8 of the EU-Colombia/Peru Agreement [2012] L354/3.

be given to the measures that least disrupt the functioning of the agreement;[14] it is usually agreed that suspension would be a measure of last resort;[15] and it is sometimes also said that the measures must be revoked as soon as the reasons for their adoption have disappeared.[16] As to the nature of such measures, these conditions clearly indicate that a wide range of measures is envisaged, including the suspension of the agreement in whole or in part. This corresponds to the purpose of these clauses, which listed a range of measures including trade sanctions.[17]

It is worth noting that non-execution clauses mentioning 'appropriate measures' also permit the suspension not only of the agreement containing the clause, but also other agreements between the parties (and presumably also obligations between the parties under customary international law). This means that, for example, free trade agreements which do not themselves contain an operative human rights clause, or do not cross-reference an existing human rights clause, are in any case subject to any otherwise binding human rights clause with a non-execution clause. Here, however, it is relevant to note that the 1993 EU-India cooperation agreement, predating the 1996 model, contains an essential elements clause but not a "non-execution" clause. Any EU-India FTA would therefore have to contain its own non-execution clause to ensure that the human rights clause can have full effect.

Dispute settlement

While the post-1996 human rights clauses are relatively similar in substance, they differ significantly in the extent to which they, or "appropriate measures", are subject to dispute settlement under the agreement. The Cotonou Agreement and all of the Euro-Mediterranean association agreements in force provide for dispute settlement in relation to the interpretation and application of their human rights clauses, including appropriate measures adopted under these clauses. By contrast, certain others, including, most recently, the EU-Central America agreement, only permit an affected party to "ask that an urgent meeting be called to bring the Parties together within 15 days for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties".[18]

The 2012 agreement concluded with Colombia and Peru presents something of a puzzle in this regard. The normal rule (expressed as a jurisdiction clause in Article 299(1) and as an exclusive jurisdiction clause in Article 8(2)) is that the dispute settlement system established in the agreement applies to all disputes relating to the interpretation and application of the agreement. But Article 8(3) provides for an urgent meeting in the same terms as that in the Central America agreements. The question is whether, without more, this should operate as a carve-out from dispute settlement. On balance, the answer is that it probably should not. The 'urgent meeting' by no means displaces or renders redundant the otherwise applicable consultation or dispute settlement proceedings in the event of appropriate measures. Indeed, a party that calls such a meeting might have an interest in having these measures subjected to formal dispute settlement. It would therefore appear that, in contrast to the situation in certain of the EU's free trade agreements, in these agreements disputes relating to the human rights clause are fully subject to dispute settlement proceedings.

14. This second condition is entirely counterintuitive insofar as an appropriate measure under a human rights clause is adopted specifically to disrupt the normal implementation of the agreement. The explanation is that the condition originates in safeguards clauses, where the measures chosen are defensive, not offensive. In this original context, it makes perfect sense to oblige parties imposing restrictive measures to adopt the measures that least affect the other party. See Bartels (2005), p.24.
15. But not in the EU-Colombia/Peru agreement.
16. Article 8(3) of the EU-Colombia/Peru agreement, ibid. This wording derives from Article 96(2)(a) of the Cotonou Agreement [2000] OJ L 317/3, amended in 2005 and 2010.
17. Annex 2 of European Commission (1995).
18. Article 355(5) of the EU-Central America Agreement.

Sustainable development chapters

Origins

The EU's practice of including sustainable development chapters in FTAs is relatively recent in origin. The principle of sustainable development is commonly attributed to the 1987 Brundtland Report,[19] and has been an important element of EU policy since the European Commission's 2001 Communication 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development'.[20] The emphasis in this Communication (adopted at the 2001 Göteborg European Council) was on the internal dimensions of the EU's strategy. The external dimensions were then elaborated in the commission's 2002 Communication "Towards a global partnership for sustainable development", issued prior to the 2002 UN World Summit on Sustainable Development held in Johannesburg.[21] The principle of sustainable development also featured prominently in the 2005 European Consensus on Development, which defined common principles for the development policies of the EU and the member states,[22] and stated that "the primary and overarching objective of EU development cooperation is the eradication of poverty in the context of sustainable development". More recently, since the 2009 Lisbon Treaty, the EU's external policies must pursue the objective of "foster[ing] sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty".[23]

The first of the EU's free trade agreements to make reference to the principle of sustainable development was the 1993 EU-Hungary Europe Agreement,[24] and it has appeared regularly as an objective, or in an incidental or interpretive context, in agreements since then. The principle was given an unusually broad definition in the 2000 Cotonou Agreement, which states that "[r]espect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development".[25] More conventionally, the EU-Central America agreement states that: "[t]he Parties reaffirm their commitment to achieving sustainable development, whose pillars – economic development, social development and environmental protection – are interdependent and mutually reinforcing".[26]

It is notable that the principle of sustainable development has never been treated as a concrete obligation in itself: none of the agreements admit the possibility of violating the "principle of sustainable development".[27] Rather, in the context of this principle and sometimes under its banner, the agreements contain provisions on cooperation as well as, relevantly, concrete obligations to respect and "strive" to improve multilateral and domestic labour and environmental standards.[28] Such chapters are now found in the 2008 EU-Cariforum agreement, the 2010 EU-Korea agreement, and the 2012 EU-Central America and EU-Colombia/Peru agreements, the EU-Canada Comprehensive Economic and Trade Agreement (initialled 2014, not yet signed), and others. The EU is now seemingly committed, as a matter of policy, to including these provisions in future free trade agreements. But questions remain as to what value this brings, and, for reasons to be explained, how these chapters relate to the EU's existing policy on human rights clauses.

19. For a full discussion, see Barral (2012), p.379, no. 9. She notes that "[a]lthough the term 'sustainable development' is fully articulated and disseminated by the Brundtland Report, the expression was borrowed from the 1980 World Conservation Strategy (a joint IUCN/ WWF/ UNEP document)".

20. COM (2001) 264, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0264&rid=2.

21. COM (2002) 82, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0082&rid=1.

22. Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy [2006] OJ C46/1.

23. Article 21(3), referring to Article 21(2)(d) of the Treaty on European Union.

24. The principle of 'sustainable development' first appeared in an international trade instrument in the EU-Hungary Agreement [1993] OJ L347/2.

25. Article 9 of the Cotonou Agreement.

26. Article 284(2) of the EU-Central America agreement.

27. This is quite common: see Barral (2012), p.385.

28. These are not new clauses: in fact, they originate in the NAFTA labour and environment side agreements, and have become common in North and South American trade agreements since then. For account of their evolution, see Bartels (2008), pp.342-366.

Obligations

As noted, the sustainable development chapters contain provisions on labour standards and environmental standards. In both cases, the obligations are of two types: a) minimum obligations to implement certain multilateral obligations, and b) a set of other additional obligations requiring the parties not to reduce their levels of protection, and encouraging them to raise their levels of protection, subject to a proviso that this is not done for protectionist purposes.

The sustainable development chapter in the EU-Central America agreement is typical. The parties affirm their commitments to the ILO core labour principles[29] and they also affirm their commitment to "effectively implement" the fundamental ILO Conventions referred to in the ILO Declaration of Fundamental Principles and Rights at Work of 1998,[30] as well as a set of multilateral environmental agreements.[31] There is a question over whether this 'affirmation' of an existing commitment amounts to a concrete obligation in its own right. Certainly, this is not the usual language of obligations, which uses auxiliaries such as 'shall', 'must' and 'will'. But it is also difficult to see what else such a statement might be taken to mean.

Beyond this basic provision concerning minimum standards, the parties undertake not to lower their levels of protection to encourage trade or investment, or to fail to effectively enforce their labour and environmental legislation in a manner affecting trade or investment between the parties;[32] and they undertake that they will "strive to ensure" that their laws and policies provide for and encourage appropriate but high levels of labour and environmental protection and that they will "strive to improve" these laws and policies.[33] The first of these obligations is an effective guarantee against retrogression, when this relates to trade or investment under the agreement.[34] The second is weaker, in the sense that it is only a best endeavours provision, but it is also broader in scope in that it applies to labour and environmental standards even when trade and investment is not affected. But, though weak, it is not meaningless: an overt weakening of existing legislative protections could hardly be said to be consistent with striving to improve these standards.[35]

The sustainable development chapters also contain clauses preventing abuse: for example, the EU-Central America agreement states that "labour standards should never be invoked or otherwise used for protectionist trade purposes and … the comparative advantage of any Party should not be questioned".[36] Interestingly, sometimes (as in this example) there is only such a clause in relation to labour standards; while in the Korea and Cariforum agreements there is an equivalent clause for environmental standards. It is likely, however, that any such standards would in any case need to be justified under the general exceptions to the agreement, which contain provisions preventing this type of abuse.

Unlike the other agreements so far concluded containing sustainable development chapters, the EU-Cariforum agreement regulates investment in goods, and in this part of the agreement includes additional sustainable development obligations. The parties are required to act in accordance with core labour standards, not to operate their investments in a manner that circumvents international labour or environmental obli-

29. Article 286(1) of the EU-Central America agreement. These core labour standards are: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

30. Article 286(2), ibid. These are: (a) Convention 138 concerning Minimum Age for Admission to Employment; (b) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; (c) Convention 105 concerning the Abolition of Forced Labour; (d) Convention 29 concerning Forced or Compulsory Labour; (e) Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; (f) Convention 111 concerning Discrimination in Respect of Employment and Occupation; (g) Convention 87 concerning Freedom of Association and Protection of the Right to Organise; and (h) Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

31. Article 287(2), ibid. These are (a) Montreal Protocol on Substances that Deplete the Ozone Layer; (b) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; (c) Stockholm Convention on Persistent Organic Pollutants; (d) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); (e) Convention on Biological Diversity; (f) Cartagena Protocol on Biosafety to the Convention on Biological Diversity; and (g) Kyoto Protocol to the United Nations Framework Convention on Climate Change. Article 287(3) and (4) provide that the Amendment to Article XXI of CITES must be ratified, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade must be ratified and implemented.

32. Article 291, ibid.

33. Article 285, ibid.

34. This term is currently the subject of litigation in See Guatemala (2015), paras 454-472.

35. Cf. the US letter (6.5.2013) requesting consultations with Bahrain for violations of 'strive to ensure' obligations: http://www.dol.gov/ilab/reports/pdf/20130506BahrainLetter.pdf.

36. Article 286(4), ibid.

gations, and to ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.[37] These provisions reiterate the obligations set out in the sustainable development chapter, and their existence is probably explained in terms of a complicated negotiating dynamic. However, the fact that these provisions are located outside the usual chapter raises interesting questions, discussed below, as to their implementation and enforcement.

How, then, do these provisions relate to the parties' existing obligations, including those under the human rights clause? In terms of the applicable standards (as opposed to implementation and remedies), their novelty concerns the provisions requiring the parties not to undermine their existing labour and environmental standards. It is quite conceivable that a measure may reduce the level of domestic protection in these areas without this amounting to a violation of the norms set out in the human rights clause, or indeed in any applicable multilateral environmental agreement. On the other hand, the provisions based on multilateral standards add nothing substantively new. As far as the ILO core labour standards are concerned, these are already binding on the parties by virtue of their membership of the ILO. In addition, as mentioned, all of these standards are human rights covered, as the European Commission has itself acknowledged, by the human rights clause. The situation with the multilateral environmental agreements is a little different: the obligation to implement these agreements amounts to no more than a reaffirmation of obligations already binding on the parties under those agreements. It seems, then, that the provisions are not as original as they seem. The question, addressed below, is whether such duplication comes at a cost.

Monitoring

The sustainable development obligations are specifically monitored by a variety of organs established under the agreements. Most important are the bilateral committees established specifically for sustainable development issues. These have mandates of varying breadth. The Trade and Development Committee established by the EU-Cariforum agreement has a broad mandate to discuss sustainable development issues and is not therefore limited to discussing issues only insofar as they concern the implementation of the sustainable development chapter.[38] More narrowly, the Trade and Sustainable Development Board in the EU-Central America agreement has a mandate to oversee the implementation of the sustainable development chapter, but may otherwise have limited jurisdiction.

These bilateral meetings and organs are accompanied by civil society mechanisms in various forms, ranging from unilateral advisory groups to bilateral meetings of civil society groups (in the case of the EU-Cariforum agreement these meetings take place within a civil society consultative committee specifically designed for this purpose). Interestingly, the mandate of these groups is described in terms of "trade-related aspects of sustainable development". Bearing in mind the wide definition of sustainable development, it is not inconceivable that these organs might legitimately discuss certain issues relating to these matters. Indeed, this could include matters falling under the human rights clause, if the

37. Articles 72 and 73 of the EU-Cariforum agreement.
38. Article 230(3)(a) of the EU-Cariforum agreement.

broad definition of 'sustainable development' adopted in the Cotonou Agreement is applied. There may ordinarily be no warrant for such a reading, but in the case of the Cariforum agreement this would be entirely proper, given that the parties are all parties to the Cotonou Agreement as well.

Bilateral implementation

As mentioned in the context of the human rights clause, it may be that the agreement itself stands in the way of sustainable development principles. For example, a party may have adopted high labour standards, consistent with its right to do so, which have a disproportionate effect on products from the other party. The question would be whether such standards would thereby violate the national treatment obligation in the agreement ensuring that those products must not be granted less favourable treatment than domestic products. It may be that the problem can be resolved by means of interpretation; on the other hand, it may be that there is a violation and the most appropriate solution is for the parties to agree bilaterally on a solution that permits such standards in the name of sustainable development. Again, the powers of the organs established under the agreement will determine whether such a course of action is possible, and as mentioned, this depends on the agreement.

Dispute settlement

None of the sustainable development chapters gives the parties the right of unilateral enforcement of the sustainable development obligations, nor (except in the EU-Cariforum agreement, on which see below) is it permissible to resort to the normal dispute settlement procedures established under the agreements. Rather, disputes on these matters are to be resolved in a self-contained system of dispute settlement involving consultations followed by referral to a panel of experts.

This panel has the power to examine whether there has been a failure to comply with the relevant obligations and to draw up a report and to make non-binding recommendations for the solution of the matter. The next steps differ according to the agreement at issue. In the EU-Korea agreement, the report goes to the parties, who "shall make their best efforts to accommodate advice or recommendations … on the implementation of [the sustainable development] chapter", and to the Domestic Advisory Group.[39] In the EU-Central America agreement, the report is published and the relevant party must respond with an appropriate action plan, the implementation of which is then monitored by the Trade and Sustainable Development Board.[40]

Once again, the EU-Cariforum agreement differs from this model. In this agreement, the normal dispute settlement procedures apply, but the suspension of concessions is ruled out.[41] On the other hand, this remedies carve-out only applies to violations of obligations set out in the sustainable development chapter. It does not apply to violations of the sustainable development obligations set out in the chapter on investment in goods. Perhaps by oversight, these obligations are fully subject not only to dispute settlement but also to the usual remedies available under the agreement.

39. Article 13.15(2) of the EU-Korea Free Trade Agreement [2011] L127/6.
40. Article 301of the EU-Central America agreement.
41. Article 213(2) of the EU-Cariforum agreement.

Implications for the TTIP

Along with the EU-Canada CETA, the TTIP represents the first time that the EU has negotiated provisions on social standards with another state that also has its own tradition of negotiating provisions of this type. The precedent of CETA also shows that the outcome might be some combination of both parties' traditional sets of provisions, at least where this does not conflict with a red line policy on either side. To predict the outcome of TTIP negotiations therefore requires some brief analysis of the US position on social provisions in free trade agreements. This is in fact simpler than it might otherwise have been, because, as noted, in large measure the EU's model provisions concerning labour and environmental standards are taken –in most cases verbatim –from earlier US practice. It suffices therefore to mention certain areas of divergence.

The first, and most significant, area of divergence is that the United States has no tradition of subjecting its agreements to broad human rights clauses, let alone clauses that are enforceable by means of sanctions. It is currently impossible to know what will emerge on this point from the negotiations, but given the EU's stated policy concerning human rights clauses it would be remarkable and significant if the EU gave this up in this instance.

The second area of divergence, somewhat ironically, perhaps concerns the enforceability of the sustainable development obligations. Here the positions are reversed. The US, now by legislative mandate, has a negotiating objective of ensuring that all labour and environmental obligations in its free trade agreements are enforceable by ordinary dispute settlement procedures.[42] In recent US agreements, labour obligations are subject to ordinary dispute settlement, with ordinary remedies (suspension of trade concessions equal to the benefits nullified or impaired, or a monetary assessment equal to 50% of this amount).[43] This may be directed to be spent, relevantly, on "assisting a disputing Party in carrying out its obligations under this Agreement".[44] By contrast, as noted, the EU's sustainable development obligations are not enforceable, except insofar as the parties agree to take into account the recommendations and advice of a panel of experts appointed to determine disputes under the relevant provisions. Which model prevails will be interesting to observe.

Beyond this, the differences are minor. For example, the US insists that it is only the core labour standards in the ILO Declaration that can be enforceable as minimum standards; the EU sometimes has a more generous approach to these standards. But, as noted, it is not entirely certain that the provisions concerning this larger set of standards are properly obligatory.

Conclusion

The EU has for many years developed a consistent policy of conditioning its FTAs in compliance with human rights norms. This is likely to prove a stumbling block in TTIP negotiations, because the US has no equivalent tradition and is unlikely to want to commit to such a possibility. On the other hand, the US has an evolved practice concerning labour and

42. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 USC 4201(b)(10)(H).

43. Article 22.13 (5) US-Korea FTA (2010); Article 21.16(6) US-Peru FTA (2007).

44. Article 22.13 (6) US-Korea FTA (2010); Article 21.16(7) US-Peru FTA (2007). It is unclear whether this possibility is excluded by the new US negotiating objectives set out in the Bipartisan Congressional Trade Priorities and Accountability Act.

environmental provisions, similar to the EU's, but which, unlike the EU's provisions, are subject to robust enforcement by means of sanctions and monetary penalties. There will probably be little disagreement on the basic labour and environmental standards to be included in the TTIP, but their enforcement is likely to be something of a controversial issue.

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CHAPTER 8. ECONOMICS OF LABOUR STANDARDS IN FREE TRADE AGREEMENTS: PROSPECTS FOR THE TTIP

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"TTIP: chance to enhance labour rights globally must not be missed"
"The TTIP should promote mutual supportiveness between trade and labour policy and include a strong role for civil society. The differences between the EU and U.S. approaches to labour provisions in trade agreements should not be an impediment but rather a unique opportunity for ambitious and innovative coverage of provisions on labour rights in the TTIP."
Press Release 14/11/2014 No 64. European Economic and Social Committee

Introduction

This paper explores the interactions between countries' participation in FTAs and labour market conditions in the participant countries from an economics perspective. We specifically focus on FTAs between developed and newly industrialised countries (OECD members). In this way, we aim to identify the most controversial economic issues that merit inclusion in the Transatlantic Trade and Investment Partnership (TTIP) negotiations ongoing between the EU and US concerning labour issues. The main approach consists of comparing the bilateral or regional FTAs that have recently been signed by the US and the EU with third-party OECD countries and that include labour provisions (LPs). They are: NAFTA in 1994, US-Chile in 2004, US-Australia in 2005 and US-Korea in 2011; EU-Mexico in 2000, EU-Chile in 2004, EU-Korea in 2012 and EU-Canada negotiations. The chapter then identifies the LPs that have most frequently been included in FTAs and the prospects for TTIP negotiations concerning LPs. The labour conditions in the signatory countries are then analysed across agreements and over time by using a comparative approach to identify whether changes in labour conditions (minimum wage, severance pay, and strictness of labour regulations) could be attributed to the LPs contained in the agreements. In this way, we will be able to infer whether FTAs including more comprehensive LPs contribute to maintaining or improving labour conditions in the participant countries. We specifically compare the EU and US FTAs with OECD countries and examine the convergence or divergence in a number of labour conditions in the participant countries.

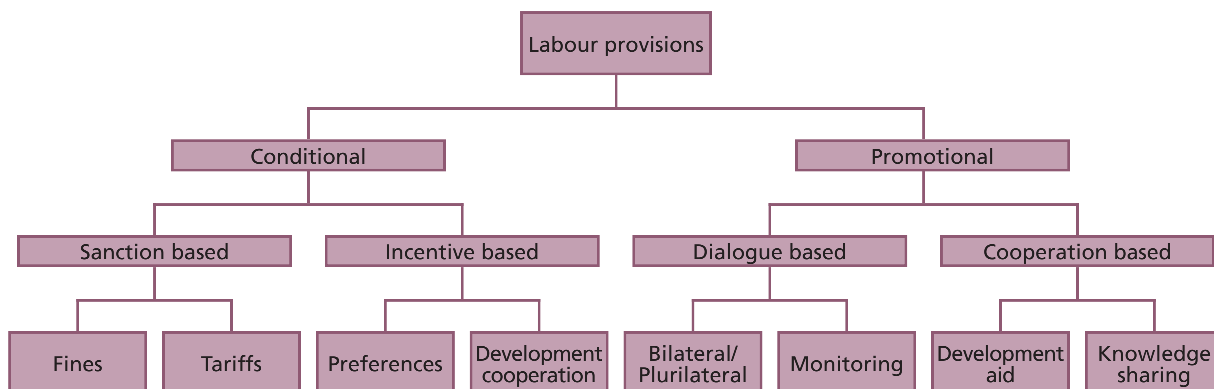
Section 2 describes the main approaches used in trade agreements to include LPs, compares the EU and US approaches and refers to the International Labour Organization (ILO) conventions and their importance. Section 3 compares the evolution of labour conditions in signatory countries. Finally, Section 4 presents prospects and policy conclusions for future agreements, in particular for the TTIP.

Main approaches to labour provisions in trade agreements

The failure to include labour standards in multilateral trade negotiations in the 1990s led main economic players in the world economy, namely the EU and the US, to consider the inclusion of LPs in FTAs (Grandi, 2009; Nkowawani, 2009; Peels and Fino, 2015). The first attempt was made by the US in 1994 though North American Free Trade Agreement (NAFTA) negotiations, which was accompanied by a side agreement, the North American Agreement on Labour Cooperation (NAALC). This side agreement addressed a number of labour issues, and in particular those relating to eleven labour standards, among them the four core ILO standards that were later defined in the 1998 ILO Declaration. Nevertheless, no explicit reference to the ILO was made in the text. After NAFTA, all trade agreements signed by the US have included LPs in their main text, albeit with some notable differences in the FTAs signed before and after 2006. On the one hand, the agreements signed before 2006 only refer to three out of the four core standards in the ILO 1998 Declaration, omitting the non-discrimination principle. Furthermore, they only explicitly refer to ILO convention 182, which addresses the prohibition of child labour. On the other hand, the agreements signed after 2006 also refer to the non-discrimination principal (Peels and Fino, 2015).

The first EU FTA that included LPs was signed in 2004 with South Africa and the main text of the agreement included an explicit reference to the ILO standards contained in the ILO's fundamental conventions (as with the Agreement with Chile in 2005). Since then, the majority of EU trade agreements refer to the ILO Declaration, and after 2009, they also refer to the 2006 UN Ministerial Declaration on Decent Work for All. Several EU agreements focused on cooperation and dialogue on labour issues such as working conditions, migrant communities or gender equality. Examples include agreements with Jordan, Morocco and Iraq.

Figure 1. Main approaches regarding labour provisions in trade agreements



Source: Ebert and Posthuma (2011).

The two main general approaches regarding the inclusion of LPs in trade agreements are summarised as in Figure 1.The US has principally adopted the conditional approach, whereas the EU has generally opted for the promotional approach. Within the conditional approach, some

FTAs included pre-ratification conditionality while others incorporate post-ratification sanctions comprising the imposition of tariffs or fines on countries that do not comply with the agreed labour regulations (NAFTA, US-Chile).There has, however, been only one such case– within the framework of CAFTA, where a complaint was raised against Guatemala in 2008. The case is still unresolved and to date no sanctions have been imposed. Hence, in the absence of a consistent application of sanctions, most authors argue that up to now, the main enforcement tool of LPs has been public censure. Other LPs are exclusively incentive-based and offer additional reductions in tariffs or additional aid that are conditional on compliance (EU Generalised System of Preferences+ (GSP+), US African Growth and Opportunity Act (AGOA)). Examples of the promotional approach can be found among the EU and US agreements, most of which are dialogue and cooperation based (EU-South Korea, EU-Chile, US-Australia, US-Cambodia Textile Agreement). According to the ILO (2015), of the 58 FTAs with LPs more than half (34) use only promotional elements. The effects of conditional versus promotional approaches have been discussed in the ILO (2015). The main conclusion is that pre-conditionality has gone some way to improving domestic labour laws prior to ratification (EU-Chile, EU-Australia). Conversely, the effects of the complaint mechanism have been limited to raising awareness rather than addressing the corresponding concern. The effects of the promotional approach have yet to be comprehensively evaluated and more field research is thus required.

Focusing more specifically on the content of the most recent FTAs in relation to labour issues, three key features characterise the LPs: (a) referral to International Labour Standards (ILS); (b) monitoring and cooperation issues; (c) dispute resolution (Ebert and Posthuma, 2011). As regards the ISL, the FTAs signed by the US and the EU in the late 2000s both refer to the 1998 ILO declaration. However, the wording and implications differ. Whereas the US agreements stress the effective implementation of national labour legislations, the EU agreements stress the effective implementation of the ILO conventions. With regard to monitoring and cooperation issues, both the US and the EU EIAs provide for a joint board to oversee the implementation of the labour chapter, as well as institutional mechanisms for recommendations from civil society and for cooperation activities. However, the mechanisms differ slightly from one agreement to the next. Finally, there are also differences in the dispute settlement mechanisms. On the one hand, the EU provides for a dedicated mechanism for labour issues consisting of government consultation and a panel of experts, which have to take ILO activities into consideration and seek ILO advice and assistance. On the other hand, in the US, the standard mechanism for dispute settlement applies if the Cooperative Labour Consultations fail. The ILO supervisory mechanism is also envisaged as an indirect source of dispute settlement.

Table 1 shows the agreements signed from 1994 onwards by the EU and the US with OECD member countries and highlights main differences concerning the three above-mentioned characteristics. It is worth mentioning that only one agreement, EU-Mexico, does not have a chapter dedicated to this issue and the text contains only indirect references to human rights. As regards the ILS referrals, all recent FTAs signed by the EU and the US include references to the 1998 ILO Declaration, however, the EU stresses the effective implementation of the ILO Conventions (EU-Rep. of Korea,

2011), whereas the US stresses the effective implementation of national labour legislations which should, nevertheless, be in compliance with the Principles of the ILO 1998 Declaration (US-South Korea, 2012).

Table 1. Free Trade Agreements with LPs signed by the EU and US with OECD countries, 1994-2014

Name and Date	Referral to ILS/National laws	Scope and content	Enforcement
NAFTA (US, Canada, Mexico) NAALC (1994)	**Ensure** that national laws provide for high labour standards.	**Strive for** a high level of national labour laws.	**Fines up** to US$20 million.
US-Chile (2004) Ch. 18	Requires enforcement of national laws, 1998 ILO Declaration.	Strive to ensure labour standards and minimum working conditions.	Fines up to US$ 15 million.
US-Australia (2005) Ch. 18	**Requires enforcement of** national laws and 1998 ILO Declaration.	**Not fail to effectively enforce** labour laws. Extensive labour cooperation mechanism.	**Different enforcement** of commercial and labour disputes.
US-South Korea (2012) Ch. 19	**Requires enforcement of** national laws, which must conform to ILO 1998 Declaration.	**Not fail to effectively enforce** labour laws.	**Identical enforcement** of commercial and labour disputes.
EU-Mexico (2000)	**No labour chapte**r only indirect references.		
EU-Chile (2005) Art 44 (social cooperation)	The parties **acknowledge the importance of social development**.	**Social development** must go hand-in-hand with economic development.	**Cooperation** shall contribute to facilitating women's access to all necessary resources to allow them to fully exercise their fundamental rights.
EU-South Korea (2011) Art 13 (Trade and Sustainable Development)	**Acknowledging the right** of each party to establish its own levels of labour protection.	The parties commit to initiating **cooperative** activities as set out in the Annex.	**Designated national offices**, which shall serve as a contact point with the other party for the purpose of implementing this chapter.
CETA (EU-Canada, negotiations concluded in September 2014)	**ILO** Declaration and conventions.	Each party shall **effectively enforce** its national labour laws.	**General Dispute Settlement** Procedure Art 33.

Source: CEPR (2013). ILS stands for international labour standards.

Another important aspect to be considered is the state of ratification of the different ILO conventions by the countries participating in FTAs with LPs. Table 2 shows the number of ILO conventions ratified by country and the year of ratification of the eight main conventions concerning core labour standards. Of particular note is the comparison between the US, which has only ratified 14 conventions, and France (part of the EU), which has ratified 125. Mexico and Chile have ratified 78 and 61 conventions, respectively. Concerning the eight core conventions, the US and South Korea have not yet ratified the conventions that deal with freedom of association issues, and the US has not ratified the two conventions tackling discrimination issues. Surprisingly, the non-ratification of these conventions does not prevent the US from claiming to comply with the corresponding labour rights nor from incorporating provisions in FTAs that "require the enforcement" of laws related to labour discrimination and freedom of association in their FTA partner territories (Meyer, 2015). The US is followed by South Korea and Canada in the ranking based on the number of ILO Conventions ratified.

Table 2. Number of ILO conventions ratified by country and year of ratification of main conventions

LO Conventions		Freedom of association		Forced labour		Discrimination		Child labour	
Convention N°:		C087	C098	C029	C105	C100	C111	C138	C182
Country	Number	Year of Ratification Fundamental Conventions							
Australia	58	1973	1973	1932	1960	1974	1973	-	2006
Canada	34	1972		2001	1972	1972	1964	-	2000
Chile	61	1999	1999	1933	1999	1971	1971	1999	2000
South Korea	29	-	-	-	-	1997	1998	1999	2001
Mexico	78	1950	-	1934	1959	1952	1961	-	2000
U.S.	14	-	-	-	1991	-	-	-	1999
EU (France)	(125)	All 8 conventions ratified by all EU states, over a number of years							

Source: Compiled by the author using ILO data. Only OECD countries with recent TAs with LPs included. France has been chosen to represent the EU.

Labour conditions in member states

An important issue is the impact of the agreements and whether they depend on differences in the LPs included and their quantitative and qualitative scope. Martínez-Zarzoso (2015) is the only author who has recently examined the effect of the inclusion of LPs in FTAs on labour conditions in the signatory countries. Her findings show that labour conditions in countries that are members of RTAs with labour provisions tend to converge, and that increasing bilateral trade also reduces divergences in domestic labour conditions in certain cases. In particular, the minimum to median wage and the average severance pay converge at 8% and 19% per year, respectively, indicating that some harmonisation exists within FTAs with LPs.

Kamata (2014) analysed a related aspect, specifically whether trading more intensively with partner countries in FTAs with LPs has a positive impact on labour earnings, and whether labour clauses reduce the trade-promoting effect of trade agreements. The main findings indicate that there is no clear answer to the first question due to a lack of statistically significant data of the trade-intensity variable, whereas concerning the second question, a slightly negative effect of the LPs on the growth of trade is found.

The main difficulty in finding an answer to these complex matters is to find adequate comparable data on labour market outcomes. The obvious source for these data should be the International Labour Organization (ILO), but indicators at country level are only available for the period 2009-2013, and in many cases the amount of missing data and lack of comparability across countries is a major drawback. Accordingly, two alternative sources of data are considered: World Bank data and OECD statistics.

The recently released World Bank *Doing Business* dataset measures the regulation of employment that affects the hiring and redundancy of workers and the rigidity of working hours.[1] The indicators encompass four broad areas, each with different subsections. The first, rigidity of employment, covers three sub-areas: hiring difficulties, rigidity of hours and redundancy issues. Some of the aspects covered, as well as the main differences in OECD countries are shown in Table

1. For three years the World Bank worked with a consultative group which included labour lawyers, employer and employee representatives and experts from international organizations (ILO and OECD), as well as from the civil society and the private sector. The dataset covers the period from 2007 to 2014. The data are based on a detailed questionnaire and are made comparable across economies by using a number of assumptions about the worker and the business. The worker is a full-time employee that works as a cashier in a supermarket or grocery store and is not a member of a labour union, unless this is mandatory in the sector/country. The business is a limited liability company (or the equivalent in the economy), which operates a supermarket or grocery store in the economy's largest (second largest for 11 economies) business city and has 60 employees.

3. Most of these variables do not change over time; therefore it is only possible to compare the differences for a cross-section of countries in a given year. In general, the US, Australia and Canada exhibit lower labour-protection levels, whereas EU countries, South Korea and occasionally Chile have stricter conditions in place concerning the three sub-areas.

Table 3. Labour protection in OECD countries

Hiring difficulties	Rigidity of hours	Redundancy issues
Fixed-term contracts prohibited for permanent tasks: No: Australia, Canada, Chile, Germany, Italy, UK, Korea and US Yes: France and Mexico	**Working week can extend to 50 hours or more (including overtime):** No: France and Australia (2006) Yes: Australia (2014), Canada, Chile, Germany, Italy, UK, Korea, US, France and Mexico	**The employer is required to notify a third party to make 1 worker redundant (group of 9 workers):** No: Australia and Canada, France, Italy (2006), UK, US (Australia, Canada, UK and US) Yes: Chile, Germany, Italy (2014), Korea and Mexico (Chile, Germany, France, Italy, Korea and Mexico)
The maximum cumulative duration of fixed-term contracts in months: No limit: Australia, Canada, Mexico UK and US Limit: Korea (24), Chile (12), Germany (24), Italy (44) and France (18)	**Average paid annual leave for workers with** tenure (days): US (0), Canada(10), Chile (15), Mexico (16), Korea (19), Italy (21), Germany (24), Australia (25),UK (28) and France (30)	**Priority rules apply for redundancies (reemployment):** Yes: France, Germany, Italy, and Mexico (Korea, Mexico, Italy and France)

Redundancy cost measures	
Notice period for redundancy dismissal after 20 years of continuous employment (months): Zero: US and Mexico 4: Australia and Korea 8-10: Canada, France, Italy and UK 15-26: Germany	**Severance pay for redundancy dismissal after 20 years of continuous employment (months):** Zero: US, Italy and Australia (2006) 10-25: UK, Canada, Australia (2014), France (2006:23), Germany (22) and Mexico (30) 26-86: Chile (43) and Korea(43)

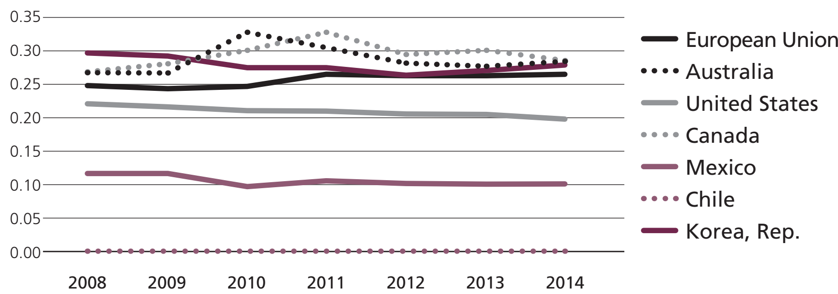
Source: World Bank Doing Business (2005). Changes in the regulation are indicated by the year in brackets.

As regards redundancy cost measures reported in the second part of Table 2, the average notice period required is reported in column 1 and the severance payments and penalties due when making a worker redundant expressed in weeks of salary is reported in column 2. Rigidity of employment and redundancy costs display similar disparities, with the US having no such measures in place and most EU countries exhibiting maximum values.

Of the available indicators, only the data on minimum wage in dollars (MWD) and the ratio of minimum wage to average value added per country (MWDR) change over time (available since 2008) and could be used to compare pre-FTA and post-FTA conditions. We only include the second as we consider it more comparable across countries, since it takes into account the standard of living, which is closely related to labour productivity proxied by the value added per worker.

Figure 2 shows that some convergence in this ratio is observed between the EU and most of its trading partners in recent FTAs, including LPs, namely with Australia, Canada and Korea, whereas no convergence is observed between the US and those three countries, plus Mexico and Chile.

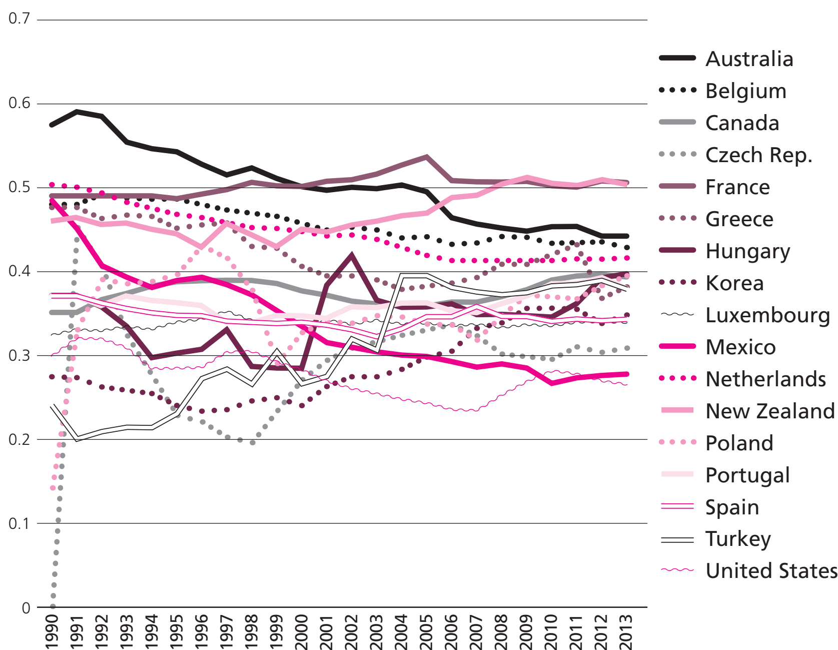
Figure 2. The ratio of minimum wage to the average value added per worker



Source: World Bank Doing Business.

Another source of comparable data is the OECD Employment and Labour Market Statistics (OECD, 2015).[2] The indicators available are minimum/mean wage ratios and indices for strictness of employment protection legislation, the latter constructed using information about individual and collective dismissal as well as strictness of employment protection legislation for regular and for temporary employment.

Figure 3. Ratio of minimum wage to mean wage



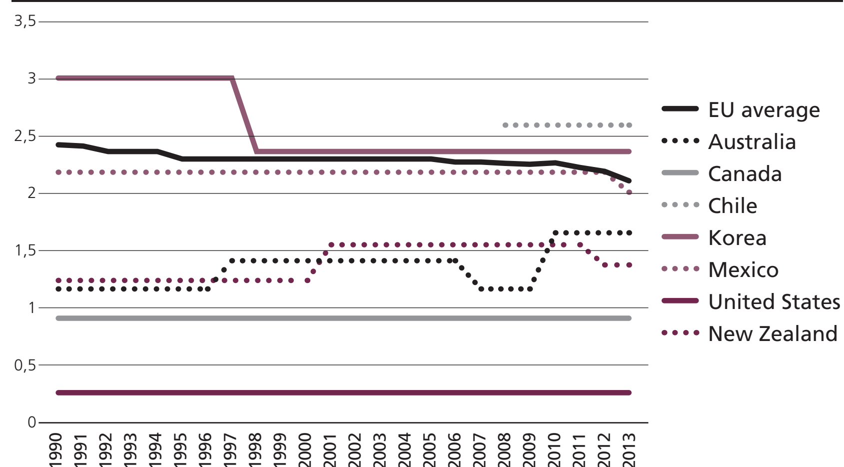
Source: Compiled by authors using OECD data.

Indicators are available from 1990 to 2013 and comparable over time and across countries. Figure 3 also shows some convergence between EU countries and others. However, this is not the case for the US and the trading partners with which it has RTAs with employment protection provisions on minimum/mean wage ratio – a similar measure to the one shown in Figure 2 but computed using national statistics averages instead of survey data as in Figure 2.

2. http://stats.oecd.org/BrandedView.aspx?oecd_bv_id=lfs-data-en&doi=data-00658-en.http://www.keepeek.com/Digital-Asset-Management/oecd/employment/oecd-employment-outlook-2013_empl_outlook-2013-en#page7.

Figure 4 shows strictness of employment protection legislation for regular employment for the OECD countries involved in FTAs with LPs. The index varies between 1 and 6 according to the strictness (level of labour protection) of the contract concerning notification procedures for dismissal, length of notice period, severance pay and length of trial period, compensation for unfair dismissal and maximum time to make a claim and possibility of reinstatement after unfair dismissal. Excluding the US, Canada and Chile, some convergence is observed towards average values, with the EU, Mexico and Korea showing lower strictness over time, the latter after 1998, while New Zealand and Australia show increasing index values over time. It is worth noting that the US and Canada exhibit the lowest figures and show no changes over time in the index.

Figure 4. Strictness of employment protection – Individual and collective dismissals in standard contracts



Source: OECD employment protection statistics, available at stats.oecd.org.
A summary of the graphical analysis in this section indicates some evidence of convergence only for the EU agreements.

Prospects for the TTIP: A mixed approach?

Given that a draft of the TTIP agreement has not been made available, probably the most convenient blueprint is the draft of the chapter included in the agreement between the EU and Canada (CETA). Article 2 of chapter 24 of the CETA provisional text (Trade and Labour) states the following:

> *"Recognizing the right of each Party to set its labour priorities and to adopt or modify its relevant laws and policies … each party shall strive to continue to improve those laws and policies with the goal of providing high levels of labour protection"*

Article 3 of the same chapter states that each party shall ensure compliance with the obligations as members of the ILO and commitments under the ILO Declaration and the four core labour standards.

Generally speaking, the effectiveness of the labour provisions has proven difficult to demonstrate conclusively. Evidence so far is limited to provisions

with *conditional elements.* Evidence of improvements in labour standards at national level has been highly case specific and dependent on the interplay between a variety of political, social and economic factors (ILO, 2015). Incentive-based elements seem to work better in the developing world and an integrated and multi-faceted approach seems most promising. According to Kraazt (2015), the TTIP can potentially establish a standard concerning the inclusion of extensive labour provisions in the main text of the agreement and provide for a comprehensive approach based on the recent convergence observed in existing agreements.

Conclusion

The inclusion of labour provisions in trade arrangements offers a number of opportunities to promote labour standards through the mechanisms of international economic governance. The main unresolved question is how the practical application of labour provisions in trade arrangements, as well as the use of the different *conditional or promotional* elements, can contribute to the improvement of employment and working conditions in the global economy. One pending undertaking, especially in the case of the US, is to ensure coherence between the application of labour provisions and the ILO's international labour standards concerning ratification issues.

The majority of labour provisions in trade agreements now refer to ILO instruments, mostly in the form of the ILO 1998 Declaration. An important challenge is to align the practical application of these labour provisions with the ILO's instruments, mechanisms and activities so as to ensure policy coherence on labour standards at international level.

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